# THE IMPLIED WARRANTY OF HABITABILITY: IS RENT ESCROW THE SOLUTION OR THE OBSTACLE TO TENANT'S ENFORCEMENT?

*Jana Ault Phillips*[1]
*Carol J. Miller*[2]

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ABSTRACT

The implied warranty of habitability's social justice goal of

[1] Instructor, Missouri State University; J.D. (1990) Washington University (St. Louis); M.B.A. (2018) Missouri State University.

[2] Distinguished Professor, Missouri State University; J.D. (1978), M.B.A. (1984) University of Missouri-Columbia. She is the past national president of the Academy of Legal Studies in Business.

providing a minimum standard of habitability for residential tenants has resulted in multiple approaches to enforcement at the state and local level. This article explores the evolution of the competing interests of landlords and tenants. It also questions whether procedural requirements, especially a rent escrow requirement, create an unfair barrier to a tenant's enforcement of the implied warranty of habitability. Finally, the article offers recommendations to improve the efficacy of the implied warranty through a strategy of legislative and judicial reform.

## I. INTRODUCTION

In today's society, everyone agrees that a tenant has a reasonable expectation of a minimum standard of habitability when she rents a dwelling from a landlord.[3] Similarly, everyone agrees that a landlord is entitled to receive rent when the landlord provides a tenant with a home pursuant to a contract between the landlord and the tenant. What should happen, however, when both of these expectations fail? Whose right is more important? Whose right is protected by the United States Constitution? Should one right be contingent upon the other? Is it possible to implement a process that is fair to both parties and that addresses the need for social justice?

The implied warranty of habitability is one of many legal developments in the last fifty years that continues to evolve as society seeks to ensure that a tenant receives habitable premises when a landlord controls the condition of her home. What began as a sword for tenants to enforce the most basic right to habitable premises, is most often used as a shield when a tenant fails to fulfill her most basic duty to pay rent. At times, this right and this duty are intertwined, such as when a tenant sees rent withholding as the only way to enforce her right to receive habitable premises. In other situations, a tenant uses an alleged breach of the implied warranty of habitability as an excuse for an unrelated failure to pay rent.

This article addresses the question of whether a rent escrow requirement is an unfair barrier to a tenant's enforcement of the implied

[3] "The United States has accepted basic commitments to the principle that all people have the right to adequate housing." G.A. Res. 217 A(III), art. 25(1), Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Economic, Social and Cultural Rights art. 11(1), Jan. 3, 1976, 993 U.N.T.S. 3 (signed, [but not ratified], by the U.S. on Oct. 5, 1977); Brief for ACLU of Mo. Found. et al. as Amici Curiae, Kohner Props., Inc., v. Johnson, 535 S.W.3d 351 (2016), SC95944, 2018 Mo. LEXIS 243 (Mo. July 3, 2018) (en banc) [hereinafter ACLU Brief] at 39. Ensuring access for all to adequate, safe and affordable housing is a target of the 2030 Agenda for Sustainable Development adopted at the United Nations Sustainable Development Summit in 2015. G.A. Res. 70/1, ¶ 11.1 (Sept 25, 2015).

warranty of habitability or a necessary procedure to protect the rights and enforce the duties of landlords and tenants. In addressing this question, this article explores the competing interests of landlords and tenants as they both pursue their rights arising from common law, statutes, contracts, and the Constitution. Part II discusses the evolution of landlord/tenant law and the implied warranty of habitability. Part III reviews the interaction between the common law and the statutes that create the implied warranty. Part IV analyzes the arguments protecting the landlord's rights by requiring the tenant to pay rent in escrow during an implied warranty of habitability dispute to protect the landlord and the tenant. In Part V, Tenant's remedies and issues that create barriers to a tenant's implied warranty case, including access to justice, contract theories, and an ineffective judicial system are discussed. Part VI presents recommendations to improve the efficacy of the implied warranty of habitability through legislative and judicial reform.

## II. EVOLUTION OF LANDLORD/TENANT LAW AND THE IMPLIED WARRANTY OF HABITABILITY

### *A. Common Law*

When a tenant in England in the 1500s leased land, the tenant had no expectation that the landlord would warrant that any structures on the property were in any particular condition.[4] This was a lease of dirt, an opportunity to raise crops and animals to survive. The structures on the land, if any, were secondary to the purpose of the lease. The transaction was based on principles of property law in which the "landlord relinquished the right to possession and use of the land" and the "tenant gained land and the right to be free from landlord interference."[5]

As with most laws in the early years of the United States, landlord/tenant law mirrored the English approach and treated a lease as a conveyance of property. Throughout the 1800s, common law courts in the United States viewed leases as conveyances of land that included the principle of caveat lessee - renter beware.[6] During this time, courts also

4 Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 795-96 (2013).

5 *Id*. at 796.

6 Michael A. Brower, Comment, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 852, 854 (2011); Memorandum from Alice Noble-Allgire, Reporter, to the Members of the URLTA Drafting Comm., *50 State Survey of the Warranty of Habitability* 1 (Feb. 12, 2012), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta_memo_warrantyofhabitability_021212.pdf.

considered covenants between the landlord and tenant mutually independent.[7] Other than an actual eviction, landlord's breach of the lease did not excuse tenant's obligation to pay rent.[8] Even when leases became more about structures and less about land, tenants were required to vacate the property before they stopped paying rent.[9] The right to withhold rent was contingent not only on the condition of the property, but also on the tenant's complete evacuation of the premises.[10] This was true even when the residence was uninhabitable.

The "first judicially-created crack" in the caveat lessee doctrine was based on the implied warranty of quiet enjoyment, a property-based view of the landlord/tenant arrangement.[11] This was a common law implied duty for the landlord to not disturb the tenant's quiet enjoyment of the property.[12] In the case of a partial eviction, the courts held that if the landlord breached the covenant of quiet enjoyment, the tenant was excused from paying rent on the entire premises because the landlord should not be permitted to apportion his wrong.[13]

In 1886, August Witte rented a building in Kansas City, Missouri, to use as a residence and for his shoemaking business. The property included a small backyard with an outhouse. With the landlord's permission, Witte also built a woodshed near the outhouse. The landlord subsequently built a building in the backyard that destroyed the outhouse and the woodshed. Mr. Witte refused to pay rent and the landlord sued for unlawful detainer. In Witte v. Quinn,[14] the appellate court reversed the trial court's judgment for the landlord and found that the trial court should have allowed the tenant to present evidence that might show the landlord's actions were an actual or constructive eviction of the tenant from a portion of the rented property.[15] The court held that when a landlord wrongfully enters into any part of the property and expels the tenant from it, there is a total suspension of the whole rent until the tenant is restored to the whole possession.[16] This is true even when the tenant continues to occupy a portion of the property.[17] This rule means the landlord is not permitted to apportion his own wrong; otherwise landlords would be free to evict their own tenants (whose possession they are required to protect) when an eviction serves the landlord's financial

7 Brower, *supra* note 6, at 854.
8 *Id*.
9 *Id*. at 855–856.
10 *Id*.
11 Campbell, *supra* note 4, at 797–798.
12 *Id*.
13 *Id*. at 798 (citing Giraud v. Milovich, 85 P.2d 182 (Cal. Dist. Ct. App. 1938).
14 Witte v. Quinn, 38 Mo. App. 681 (Mo. Ct. App. 1890).
15 *Id*. at 691.
16 *Id*. at 690.
17 *Id*.

purposes.[18]

In the late 1800s and early 1900s, the urban population boomed and a severe rental housing shortage increased the rental of properties with unsafe and unsanitary conditions.[19] Legislatures responded to slum conditions (beginning with New York City in 1901) by enacting housing and building codes that set out minimum health and safety standards for construction and occupancy.[20] Unfortunately, criminal sanctions in the codes were not enough of an incentive for landlords to maintain their property in a habitable condition.[21]

[B]uilding code procedures presumed there were other options available to tenants. For example, under the New York City Tenement Housing Act of 1901, the remedy was for the agency in charge of administering the statute to issue a "vacate" order on those premises that were found to violate the building code requirements. The building was to remain vacant until sufficient repairs were made. As housing became more and more scarce, …[tenants faced a difficult situation when forced to vacate and unable to find other housing]. …government officials were hesitant to enforce building code violations that had the effect of putting tenants out onto the street.[22]

In light of this situation, desperate tenants would accept property in any condition and landlords had no incentive to make repairs.[23]

The implied warranty of habitability sought to remedy the failures of "inefficient and unworkable" code enforcement that had failed "to halt or reverse urban blight."[24] In 1969, the Hawaii Supreme Court opened the door to expanding tenants' rights with its decision in Lemle v. Breeden[25] by holding that a warranty of habitability was implied in all residential leases. It held that contract law should govern the lease, and the landlord's breach of the warranty freed the tenant from the obligation

18 *Id*. at 691.

19 Noble-Allgire, *supra* note 6, at 1.

20 *Id*.; Campbell, *supra* note 4, at 800.

21 Campbell, *supra* note 4, at 800.

22 *Id*. at 801. Some modern housing codes give tenants the right to participate in code enforcement proceedings. Tenants become part of the code enforcement system and impose a penalty by depriving the landlord of rent until the landlord brings property up to code. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 401 (2011) (citing MICH. COMP. LAWS ANN. §125.530(3)–(5) (West 2006); OHIO REV. CODE ANN. § 5321.07B(1) (LexisNexis 2004)). Receiverships for ill-maintained rental housing is also an option. *Id*. at 393 (citing MICH. COMP. LAWS ANN. § 125.535 (West 2006)).

23 Campbell, *supra* note 4, at 803.

24 Super, *supra* note 22, at 402. Local codes are not the source of the implied warranty of habitability but simply serve as evidence of the standard by which the community measures the warranty. Detling v. Edelbrock, 671 S.W.2d 265, 271 (Mo. 1984).

25 Lemle v. Breeden, 462 P.2d 420 (Haw. 1969) (citing *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 272 (N.J. 1969) in which the Supreme Court of New Jersey held a few months earlier that a commercial lease included an implied warranty against latent defects.).

to pay rent, regardless of whether the tenant had vacated the premises.[26]

Rats that invaded the tenants' bedrooms on the first night of their occupancy were the source of Henry Lemle's complaint in Lemle v. Breeden.[27] Mr. Lemle notified the landlord the next day, but the landlord's attempts to alleviate the rat problem were only partially successful. Three days after moving in, the Lemle family moved out. Mr. Lemle sued to recover his deposit and rent payment, alleging constructive eviction and breach of an implied warranty of habitability and fitness for use.[28] The court held the facts demonstrated the uninhabitability and unfitness of the premises for residential purposes.[29] The court went on to say that "[t]he doctrine of constructive eviction … no longer serves its purpose when the more flexible concept of implied warranty of habitability is legally available."[30]

As part of their defense to their landlord's eviction action for nonpayment of rent, the tenants in Javins v. First National Realty Corp. offered to prove that in their apartment building there were approximately 1,500 violations of the Housing Regulations of the District of Columbia.[31] The court was required to determine whether housing code violations arising during the term of a lease have any effect on a tenant's obligation to pay rent. The United States Court of Appeals for the District of Columbia Circuit determined that a warranty of habitability, measured by standards set out in the Housing Regulations, is implied by operation of law into residential leases covered by those regulations and that breach of the warranty gives rise to the usual remedies for breach of contract.[32] The court also held that tenant's obligation to pay rent is dependent upon performance of landlord's obligations, including maintaining the property in a habitable condition.[33]

### *B. Breach of Contract*

Lemle v. Breeden and Javins v. First National Realty Corp. cases marked the beginning of the modern approach to landlord/tenant disputes, treating a residential lease like a bilateral contract, not just a conveyance of property. A material breach of a bilateral contract excuses performance by the nonbreaching party. Arguably, requiring tenant to

26 Brower, *supra* note 6, at 857. Super, *supra* note 22, at 394.
27 *Lemle,* 462 P.2d 420.
28 *Id*. at 426-427.
29 *Id*. at 433.
30 *Id*. at 434.
31 Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1073 (D.C. Cir. 1970).
32 *Id*. at 1072-1073.
33 *Id*. at 1082.

continue to pay rent is inconsistent with true mutuality of obligations.[34] Some would argue this is like requiring the buyer to pay the purchase price to a breaching seller to correct the latter's noncompliance and is hardly standard in contract law.[35] David A. Super, Professor of Law at Georgetown University, in "The Rise and Fall of the Implied Warranty of Habitability," describes the situation in contract terms by recognizing that tenant's advance rent payment obligates the landlord to:

… perform her or his covenants during the upcoming month to earn the prepaid rent. If the premises fall into disrepair during the ensuing month, the landlord has not earned the rent already paid and is in breach. The standard rule in contract is that a non-breaching party need not continue to perform once the other has committed a material breach…..[36]

Tenant advocates often rely on this theory to support allowing tenants to retain possession without paying rent until the landlord restores the property to the required standards.

The relationship between buyers and sellers of goods, however, is fundamentally different from that of landlord and tenant, especially with regard to the ongoing relationship between landlords and tenants that does not exist in the sale of goods.[37] "While using the contractual sale of goods analogy allowed courts to make the landlord/tenant relationship consistent with societal expectations, the actual analogy was a strained one."[38] The implied warranty of habitability creates a regulatory scheme reflecting an ever-changing compromise among the interests involved, as well as diverse views about the relationship of law to economic and social reality, under the guise of contract doctrines that should focus instead on what the parties actually agreed.[39]

Professor Glendon also points out these differences:

The common law implied warranty of habitability covers both patent and latent defects throughout the lease; whereas the Uniform Commercial Code ("UCC") obligates the buyer to inspect for patent defects and the seller does not have an ongoing obligation to keep the goods sold in repair;

Courts often hold the implied warranty of habitability cannot be waived; whereas the UCC allows "as is" sales; and

The implied warranty of habitability allows tenants to remain in possession of the premises and stop paying rent; whereas the UCC makes buyers of defective goods choose between rejecting the goods or keeping

34 Super, *supra* note 22, at 442.
35 *Id*. at 429.
36 *Id*. at 441.
37 Campbell, *supra* note 4, at 830.
38 *Id*. at 829-830 (citing Mary Ann Glendon, *The Transformation of American Landlord Tenant Law*, 23 B.C. L. REV. 503, 547 (1982)).
39 Campbell, *supra* note 4, at 831.

them [having paid full price] and suing for damages.[40]

The conflicting views about the role of contract law in implied warranty of habitability cases is evident in the kaleidoscope of approaches individual states have pursued in adopting a common law or statutory form of the warranty.

## III. COMMON LAW, URLTA AND STATUTORY INTERACTIONS

Most residential landlord/tenant relationships today are no longer subject to the common law doctrine of caveat lessee.[41] Every state, except Arkansas,[42] recognizes the implied warranty of habitability in some form.[43] Attempts in Arkansas to enact pro-tenant legislation have failed repeatedly.[44] What has been referred to as the "tenant's rights

[40] *Id*. at 830 (citing Mary Ann Glendon, *The Transformation of American Landlord Tenant Law*, 23 B.C. L. Rev. 503, 547 (1982)).

[41] Brower, *supra* note 6, at 862.

[42] Arkansas, which does not recognize an implied warranty of habitability, has extremely pro-landlord common law and civil and criminal statutes for landlord/tenant disputes. On the civil side, Arkansas enacted the Uniform Residential Landlord Tenant Act (URLTA) in 2007, but only the half favorable to landlords; all pro-tenant provisions were removed. Lynn Foster, *The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1, 45 (2013); ARK. CODE ANN. §§ 18-17-101 – 18-17-913 (2017). Section 18-17-601 requires a tenant to comply with obligations of applicable housing codes and keep the property safe and reasonably clean, but imposes no obligations on landlords. Noble-Allgire, *supra* note 6, at 2 n.3. Arkansas courts follow the common law rule that absent a lease provision that requires otherwise, a landlord is not liable for any repairs. Foster at 36. On the criminal side, §18-16-101 makes it a misdemeanor when a tenant has failed to pay rent and then fails to vacate within ten days of notice from the landlord. Between 2001 and 2017, the statute required a tenant who enters a not-guilty plea and remains in possession to deposit rent with the court prior to adjudication. Any tenant who plead guilty, or *nolo contender*, or who was found guilty, that had not paid rent into the court registry was guilty of a Class B misdemeanor. In 2015, an Arkansas circuit court judge declared in *Arkansas v. Artoria Smith*, that the 2001 amendment to the failure to vacate statute was unconstitutional on due process and equal protection grounds, and as a form of unusual punishment in violation of the 8th Amendment. State v. Smith, No. CR 2014-2707, 2015 WL 991180 (Ark. Cir. Ct. Jan. 20, 2015). *See also* Lynn Foster, Arkansas v. Artoria Smith, THE ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE (Jan. 6, 2016), http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=8472 (last visited Feb.16, 2018, at 3:00 p.m.).

[43] Noble-Allgire, *supra* note 6, at 2. *See* Appendix *infra* for list of states with statutory or common law implied warranty of habitability.

[44] In 2011, the Arkansas General Assembly enacted a statute creating the Non-Legislative Commission on the Study of Landlord/Tenant Laws. The Commission's 2012 report concluded Arkansas law was significantly out of balance with that of other states and made more than a dozen recommendations for improvements. Foster, *The Hands of the State, supra* note 42, at 3. Several House and Senate bills were proposed in the ensuing years that attempted to implement some of the Commission's recommendations, but none were passed. In 2017, these included S.B. 600, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) regarding civil eviction, and H.B. 1166, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) and H.B. 2135, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) regarding an implied warranty of habitability. The only successful legislation was S.B. 25, 91st Gen. Assemb., Reg. Sess. (Ark. 2017), which became 2017 Ark. Acts 159 that amends ARK. CODE ANN. §18-16-101 to return it to the pre-2001 version upheld as constitutional in the *Munson v. Gilliam*, 543 F.2d

revolution" has proceeded simultaneously in every other state through case law and legislation.[45] Courts were the first to acknowledge the warranty of habitability in some states.[46] Legislators were first in others, either modeling the Uniform Residential Landlord Tenant Act ("URLTA") or amending existing statutes.[47]

The URLTA, established in 1972, represented the first major attempt to create uniform landlord/tenant legislation that fundamentally differed from the common law,[48] including a departure from the sale of goods contract model. Recognizing the warranty of habitability doctrine, the URLTA enumerated a number of obligations to be implied upon all residential landlords,[49] including the requirement to make repairs and to do whatever is necessary to keep the premises in a fit and habitable condition.[50] Nineteen states have adopted the implied warranty of habitability through statutes based on the URLTA;[51] twenty-seven states have implied warranty statutes not based on the URLTA;[52] and the District of Columbia and the remaining states – Illinois[53], Massachusetts, Missouri and Pennsylvania – recognize the implied warranty of habitability as a matter of common law.[54]

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48 (8th Cir. 1976) and *Duhon v. Arkansas*, 774 S.W.2d 830 (1989) decisions, and to eliminate the amendments held unconstitutional in *Smith*. 2017 Ark. Acts 159 § 1(b).

45 Super, *supra* note 22, at 398-99.

46 *Id*. at 398-399. Courts often acted first because state legislative branches were typically unwilling to pass explicit legislation on this issue – either because of the conservative nature of the legislature or the strong influence of the landlord lobby and commensurate lack of influence by tenants. Campbell, *supra* note 4, at 805-06. *See* Appendix *infra* for a list of states with statutory or common law implied warranty of habitability.

47 Super, *supra* note 22, at 398-399. Some courts were reluctant to adopt the implied warranty of habitability and felt it was a matter of policy best left to legislatures. Campbell, *supra* note 4, at 806 (citing Blackwell v. Del Bosco, 558 P.2d 563, 565 (Colo. 1976)). *See also*, Campbell, *supra* note 4, at 827 (citing Roche v. Lincoln Property, 175 F. App'x. 597, 603 (4th Cir. 2006) and Jesse v. Lindsley, 233 P.3d 1 (Idaho 2008)). *See* Appendix *infra* for a list of states with statutory or common law implied warranty of habitability.

48 Brower, *supra* note 6, at 859.

49 *Id*.

50 UNIF. LAW COMM'N, UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 2.104(a)(2) ("URLTA") (1974).

51 *See* Appendix *infra* for list of states with statutory or common law implied warranty of habitability.

52 *See* Appendix *infra* for list of states with statutory or common law implied warranty of habitability (includes the common law state of Pennsylvania, which also has a statute that only applies to larger cities).

53 The Illinois Supreme Court recognized the implied warranty of habitability in 1972 in *Jack Spring, Inc. v. Little,* 280 N.E.2d 208 (Ill. 1972). Further clarification occurred in 1985 in *Glasoe v Trinkle*, 479 N.E.2d 915 (Ill. 1985), which applied the implied warranty of habitability, with or without a building code, by holding habitability is to be measured by community standards, similar to the standard stated in the Missouri case of *Detling v. Edelbrock,* 671 S.W.2d 265, 271 (Mo. 1984).

54 Some of these states have statutes with limited remedies, such as repair and deduct, but they do not appear to have superseded the implied warranty under common law. Noble-Allgire, *supra* note 6, at 2. Arkansas does not recognize an implied warranty of habitability. The required elements

Source of State Law Regarding Landlord's Duty to Maintain Premises[55]

| URLTA Model | Non-URLTA Statute | Common Law |
|---|---|---|
| Alabama | California | District of Columbia |
| Alaska | Colorado | Illinois |
| Arizona | Delaware | Massachusetts |
| Connecticut | Florida | Missouri |
| Hawaii | Georgia | Pennsylvania |
| Iowa | Idaho | |
| Kansas + CL | Indiana | |
| Kentucky | Louisiana | |
| Montana | Maine | |
| Nebraska | Maryland | |
| New Mexico | Michigan | |
| North Carolina | Minnesota | |
| North Dakota | Mississippi | |
| Ohio | Nevada | |
| Oklahoma | New Hampshire | |
| Rhode Island | New Jersey | |
| South Carolina | New York | |
| Tennessee | Oregon | |
| Virginia | Pennsylvania | |
| | South Dakota | |
| | Texas | |
| | Utah | |
| | Vermont + CL | |
| | Washington + CL | |
| | West Virginia | |
| | Wisconsin | |
| | Wyoming | |

Section 2.104 of the URLTA provides in part:

(a) A landlord shall

(1) comply with the requirements of applicable building and housing

in a breach of implied warranty of habitability case in most common law states are:
A lease for residential property;
Subsequent development of dangerous or unsanitary conditions on the premises materially affecting the life, health and safety of the tenant;
Tenant's reasonable notice of defects to the landlord; and
Landlord's subsequent failure to restore the property to habitability. *Detling,* 671 S.W.2d at 270.

55 *See* Appendix *infra*.

codes materially affecting health and safety;

(2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(3) keep all common areas of the premises in a clean and safe condition;

(4) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;

(5) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(6) supply running water and reasonable amounts of hot water at all times and reasonable heat [between [October 1] and [May 1]] except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility connection.

The Comment to this section states:

Standards of habitability dealt with in this section are a matter of public police power rather than the contract of the parties or special landlord-tenant legislation. This section establishes minimum duties of landlords consistent with public standards. Generally duties of repair and maintenance of the dwelling unit and the premises are imposed upon the landlord by this section. Major repairs, even access, to essential systems outside the dwelling unit are beyond the capacity of the tenant. Conversely, duties of cleanliness and proper use within the dwelling unit are appropriately fixed upon the tenant (see Sections 3.101 and 3.102). Except as specifically provided, these obligations may not be waived (Section 1.403).

Most states following the URLTA consider a material breach of the implied warranty of habitability to occur when the landlord fails to provide essential services such as heat, hot and cold running water, sewage or septic, and electricity. Other states include by statute the landlord's failure to provide weather tight roof and walls, extermination of rodents or vermin, door locks, or garbage receptacles.[56] Determining whether a defect breaches the implied warranty of habitability in most common law states depends upon an analysis of case by case factors, including the nature of the defect, the effect on the life, health or safety of the tenant, the length of time it has persisted, and the age of the

56 *See* COLO. REV. STAT. § 38-12-505 (2016), MD. CODE ANN., REAL PROP. § 8-211 (LexisNexis 2017) and NEV. REV. STAT. § 118A.290 (2017).

structure.[57] Failure to comply with building codes affecting health and safety is also a common test for a material breach in all states recognizing an implied warranty of habitability.[58]

It is important to understand how implied warranty of habitability statutes interact with the common law, and whether a state recognizes one or both. The source of the warranty determines the landlord's responsibilities and the legal remedies available to the tenant.[59] Landlords typically take a position that a statutory implied warranty supersedes any common law rights and, therefore, tenants are bound by the statutory notice requirements[60] and limited to the remedies provided in the statute.[61] This increases the procedural hurdles a tenant must satisfy to have a valid statutory claim and very well could be the next front in what is referred to as the landlord's implied warranty of habitability "counter-revolution".[62] It would follow, then, that allowing common law and statutory rights to co-exist results in better outcomes for tenants, as long as tenants are aware of their rights and the procedures required to enforce them.

Kansas, Vermont and the state of Washington are examples of jurisdictions that recognize both statutory and common law implied warranty of habitability rights. In Washington, the implied warranty of habitability statute went into effect in July of 1973 and the Washington Supreme Court recognized the implied warranty of habitability as common law in a case in October of 1973.[63] In Landis & Landis Construction v. Nation, the Washington Court of Appeals held the statute did not supersede the common law remedy and the statute provides the

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57 King v. Moorehead, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973); *Glasoe*, 479 N.E.2d at 14.

58 In California, substantial breach means the failure of the landlord to comply with applicable building and housing code standards that materially affect health and safety. CAL. CIV. PROC. § 1174.2(c) (Deering 2017).

59 MARCIA STEWART ET. AL., EVERY LANDLORD'S LEGAL GUIDE 181 (13th ed. 2016). Recognizing a distinct common law and statutory claim means that failure to satisfy the statutory requirements may result in denial of statutory damages not available under common law. Campbell, *supra* note 4, at 823 (citing Myrah v. Campbell, 163 P.3d 679, 683 (Utah Ct. App. 2007)).

60 Notice requirements range from "a reasonable time" in COLO. REV. STAT. § 38-12-503(2)(c) (2016), IND. CODE § 32-31-8-6(b)(2) (2017), OHIO REV. CODE ANN. §5321.07(B) (LexisNexis 2017), S.D. CODIFIED LAWS § 43-32-9 (2017), and VT. STAT. ANN. tit. 9, § 4458(a) (2017); to three days in IDAHO CODE § 6-320(d) (2017), seven days in FLA. STAT. ANN. § 83.60(1)(b) (LexisNexis 2017), fourteen days in the URLTA § 4.101(a), fifteen days in DEL. CODE ANN. tit. 25, § 5306(a) (2017), and thirty-five days in CAL. CIV. § 1942.4(a)(3) (Deering 2017).

61 Campbell, *supra* note 4, at 821. Landlords support this position by pointing out that continuing to recognize common law implied warranty of habitability in states adopting the URLTA contradicts the primary purpose of providing uniformity among the states and will result in different standards across the country. Allowing common law claims independent of statutory requirements also fails to recognize that landlord/tenant acts are often a compromise between various factions and contain set procedures, such as a finding by a public body of a defect, before a tenant asserts a claim. *Id*. at 828.

62 *Id*. at 828. *Myrah,* 163 P.3d at 683.

63 Campbell, *supra* note 4, at 822.

tenant an option to pursue statutory rights in addition to the pursuit of remedies otherwise provided to the tenant by law.[64]

In Kansas, the Supreme Court recognized the common law implied warranty of habitability prior to the legislature's adoption of an implied warranty of habitability statute.[65] The court of appeals in Claus v. Deware Enterprises held the statute did not abrogate the holding in a case recognizing the implied warranty of habitability, but rather the statute included or is augmented by the landlord's common law duty to provide habitable premises.[66]

The Supreme Court in Vermont went one step further to distinguish when either source applied based on whether the habitability defect was patent or latent. In Willard v. Parsons Hill,[67] the court held the common law warranty continues to exist independent of a statutory claim when the tenant's claims fall outside the statute. The court held the statute only applies to patent defects (known to tenant and unknown to landlord); therefore a tenant's claim based on latent defects (unknown to tenant but known to landlord) was based on common law and not on the statute.[68] The landlord in Willard was aware for fourteen years that tenants' drinking water was unsafe, but failed to remedy it or notify the tenants.[69] After becoming aware of the problem, one group of tenants provided notice of the unsafe water to the landlord, but a second group did not give notice.[70] Both groups sued the landlord for breach of the implied warranty. If the statutory claim for breach was the only claim available, both groups' lawsuits would fail either for failure to give any notice or for failure to give proper notice, as required by the statute.[71]

Missouri started with a statutory duty regarding habitability; then it added a common law right, and now, due to an amendment to the statute, it only has a common law source for individual tenants. Modern landlord/tenant law in Missouri began with the 1969 Enforcement of

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64 Campbell, *supra* note 4, at 821 (citing Landis & Landis Construction v. Nation, 286 P.3d 979, 981 (Wash. Ct. App. 2012), holding tenant had a choice of three remedies when landlord failed to maintain the premises: proceed under the lease, proceed under the statute, or proceed under common law).

65 Campbell, *supra* note 4, at 822.

66 *Id*. (citing Claus v. Deware Enterprises, 136 P.3d 964 (Kan. Ct. App. 2006), holding tenant's claim was not separated into "breach of implied warranty of habitability" and "breach of [the statute]", instead the claim was simply for breach of contract. The statute, augmented by common law, determines landlord's obligations and whether breach has occurred.)

67 Willard v. Parsons Hill, 882 A.2d 1213 (Vt. 2005).

68 Campbell, *supra* note 4, at 826. The dissent in *Willard* argued the Vermont statute was a response to and codification of the common law implied warranty of habitability and should be read to abrogate the common law and set out tenant's sole remedy for breach of the implied warranty of habitability, and that failure to strictly follow the statutory notice requirements was fatal to tenant's claim. *Id*. at 825.

69 *Id*. at 824.

70 *Id*.

71 The group giving notice did not give landlord the statutorily required opportunity to cure. *Id*.

Minimum Housing Code Standards Act ("MHCSA").[72] The purpose was the coercive repair, by the landlord or from his property, of conditions harmful to the life, health, and safety of tenants resulting from violations of the housing code.[73] The original version gave occupants of one-third or more of the dwelling units in a building the right to pursue a civil nuisance action that included the appointment of a receiver to perform an abatement of the code violations. Originally, the court could order rents paid directly from tenants to the court for the receiver's use. This was later amended to allow payments directly from tenants to the receiver.[74]

Interpreting the MHCSA in 1973, the Court of Appeals for the Kansas City District in King v. Moorehead recognized the legislative intent to incorporate minimum standards for occupancy in every residential lease based on the applicable minimum housing code. The court held that "[i]t is consistent with these legislative policies that in every residential lease there be an implied warranty by the landlord that the dwelling is habitable" at the beginning and remains so during the entire term.[75] In addition, tenant's obligation to pay rent is dependent upon landlord's performance of the obligation to provide habitable premises.[76]

The Missouri Supreme Court recognized a common law implied warranty of habitability in its 1984 decision in Detling v. Edelbrock.[77] Recognizing that the MHCSA is not tenant's exclusive remedy, the court believed the legislature intended the MHCSA to be in addition to remedies available at common law, including the implied warranty of habitability.[78] The MHCSA, however, was amended in 1998, removing occupants of one-third or more of the dwelling units in a building as potential plaintiffs in these actions.[79] Only the county, municipality, local housing corporation or neighborhood association has the right to pursue a remedy under MHCSA.[80] Individual tenants in Missouri must now rely on a common law action or pursue a limited remedy under Missouri's repair and deduct statute discussed below.[81]

72 MO. REV. STAT. §§ 441.500 to 441.640 (West 2018).
73 King, 495 S.W.2d at 73.
74 MO. REV. STAT. § 441.570 (West 2018).
75 King, 495 S.W.2d at 74.
76 *Id*. at 75.
77 Detling v. Edelbrock, 671 S.W.2d 265, 271 (1984).
78 *Id*. at 272.
79 H.B. 977, 1998 MO. LAWS.
80 MO. REV. STAT. § 441.520.1 (West 2018).
81 MO. REV. STAT. § 441.234 gives a tenant the limited ability to pursue self-help in repairing a code violation and deducting the cost from rent. House Bill 848, introduced on February 6, 2017, attempted to amend MO. REV. STAT. § 441.234 by adding a requirement for a tenant asserting an affirmative defense of a breach of an implied warranty of habitability to pay rent to the court during litigation, and to set forth the four elements of an implied warranty of habitability claim. H.B. 848, 2017 MO. LAWS. The bill did not make it out of the House Committee in 2017, but was pre-filed

## IV. PROTECTING THE LANDLORD'S RIGHTS AND USE OF RENT ESCROW

Procedural requirements in implied warranty of habitability cases are in place to protect landlords and tenants. Landlords argue that tenants alleging a breach of the implied warranty of habitability should move out (consistent with constructive eviction) or continue to pay rent if they remain in possession while the matter is litigated. It seems reasonable that tenants are less likely to frivolously assert the implied warranty of habitability claim when they are required by statute[82] or the court[83] to deposit rent with the court during the pendency of the action. This protects the landlord from frivolous lawsuits and provides due process prior to judicial deprivation of landlord's property.

The tenant's ability to withhold rent during an implied warranty of habitability dispute, and the accompanying escrow requirement, if any, has a major impact on landlords. Landlords in the United States are forced to pursue hundreds of thousands of rent and possession actions each year. Most of these involve tenants who, for numerous reasons, stop paying rent in violation of their lease. Many tenants also refuse to vacate the property. Tenants faced with an eviction lawsuit may assert an unjustified implied warranty of habitability defense or counterclaim as a means of delaying their eviction. It can take several weeks, and sometimes months, for the landlord to reclaim possession and begin the process of replacing the previous tenant.[84] The landlord's property is not producing income during this time but the landlord is still faced with paying expenses such as a mortgage, insurance, taxes and maintenance. This impacts the landlord's ability to provide housing to other tenants that are paying rent on time.

One of the few U.S. Supreme Court cases to address the implied warranty of habitability, Lindsey v. Normet, provides arguments in landlord's favor regarding protection of their rights during landlord/tenant litigation. In Lindsey, landlord sued for possession pursuant to Oregon's Forcible Entry and Wrongful Detainer statute ("FED"). The tenant withheld rent claiming breach of the implied warranty of habitability. Tenant pursued due process and equal protection challenges of the FED procedures regarding an expedited hearing, limits on issues tenant was allowed to raise as a defense, and the requirement of a double bond on appeal by tenant. The court held the

on December 1, 2017, as House Bill 1401. H.B. 1401, 2018 MO. LAWS 22.

82 URLTA § 4.105.

83 MICH. CT. RULE 4.201(H)(2) (2018).

84 *See* Paula A. Franzese, et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord Tenant Reform*, 69 RUTGERS L. REV. 1, 9 n.27 (2016).

expedited hearing procedure and the limits on the issues the tenant was allowed to raise were constitutional, but held the double bond requirement violated tenant's equal protection because it required a more expensive payment by tenants bringing an appeal than it did of other appellants, without any basis for the distinction.

The court, however, held tenant was not denied due process by requiring tenant to continue rent payments while litigating landlord's alleged wrongdoing.[85] Furthermore, there is no constitutional barrier to Oregon's insistence that tenant provide for accruing rent pending judicial settlement of tenant's disputes with landlord.[86] The constitution expressly protects against confiscation of private property or the income from it.[87] A state is presumed to have acted within its constitutional power despite the fact that, in practice, its laws result in some inequality.[88] The court noted that even a poor tenant should be able to pay their standard rent during trial and appeal.[89]

A landlord's interest or expectation in receiving monies due under a rental agreement is a "property interest" within the meaning of the Fourteenth Amendment.[90] The government can allow a tenant to withhold rent without violating the Fourteenth Amendment, as long as specific procedural requirements are met. The U.S. Supreme Court in Mathews v. Eldridge established three factors [Mathews test] for courts to consider in a due process case:

The private interest that will be affected by the official action;

The risk of 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.[91]

Applying these factors to Ohio's statutory scheme permitting tenants to pay rent into escrow with the court when a tenant alleges that the landlord failed to properly maintain a rental unit, the Sixth Circuit Court of Appeals held in Chernin v. Welchans that due process was not violated.[92] Pursuant to the Ohio Landlord-Tenant Act, a tenant may deposit his rent with the clerk of the court when these five procedural

85 Lindsey v. Normet, 405 U.S. 56, 68 (1972).

86 *Id*. at 67. The Court refers to an exchange during oral argument where the court suggested and tenant agreed that not paying rent while in possession might be a taking of landlord's property without due process. *Id*. at 67 n.13.

87 *Id*. at 74.

88 *Id*. at 71.

89 *Id*. at 79.

90 Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

91 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

92 Chernin v. Welchans, 844 F.2d 322 (6th Cir. 1988).

requirements are met:

Landlord has failed to comply with the rental agreement or statutory requirements to properly maintain the premises;

Tenant provides landlord written notice of the circumstances that constitute landlord's noncompliance;

Tenant gives landlord reasonable time to make repairs or respond to the notice of alleged noncompliance (usually thirty days but this depends on the severity of the condition and the time required to remedy the condition);

Tenant's evaluation of landlord's response and a reassessment of whether there is still adequate grounds to deposit the rent with the clerk; and

Tenant is current in his rent payments.[93]

Bertrand Chernin, as landlord, brought suit challenging the constitutionality of this statute as a violation of due process for failure to provide notice and a hearing before depriving Chernin of a property interest. Applying the Mathews test, the court held that the statute did not violate the landlord's due process rights. With regard to the private interest affected by the official action, the court concluded the landlord's interest in the rent payments was not substantial enough in length of time or resulting hardship to warrant a pre-deprivation hearing, especially when balanced against the tenant's right to live in fit and habitable conditions.[94]

The second prong of the Mathews test, risk of erroneous deprivation and the probable value of additional procedural safeguards, was also satisfied with the numerous procedures and requirements of the statute that minimize the likelihood of a wrongful deprivation.[95] This includes the tenant's obligation to give landlord thirty days prior notice of any rent deposit and the clerk's notice to landlord as soon as it receives rent from the tenant.[96] Tenant must also be current on rent payments and may be liable for depositing rent with the court without justification pursuant to the statute.[97]

The final Mathews test concerns the government's interest in retaining the challenged procedure. The court found that the rent escrow process advances the state's interest in ensuring adequate housing conditions exist in Ohio and protecting the health and welfare of the tenants.[98] It also resolves disputes between private citizens with as little

93 *Id*. at 324 (*citing* OHIO REV. CODE ANN. § 5321.07 (Baldwin 1980)).

94 *Chernin,* 844 F.2d at 326-27.

95 *Id*. at 327.

96 *Id*.

97 *Id*.

98 *Id*. at 329.

government intervention as possible.[99] The landlord's proposal to require tenants to file suit against the landlord involves the government at a much earlier stage and increases expenses for all involved.[100] As a result of passing all of the Mathews tests, the Ohio statute complies with all constitutional due process requirements.[101]

For those that argue requiring the tenant to continue to pay rent removes any incentive for the landlord to make the repairs, landlords counter that this incentive is redundant, especially when the rent is held in escrow and the landlord does not have access to it until the property is repaired. Housing codes, retaliatory eviction statutes, and the possibility of tort liability also provide incentives for the landlord to maintain their property. Tenant complaints to local officials can result in an order to correct the problem, fines, lawsuits by the city or county, and, if the tenant's health is at risk, required vacation of the building.[102] If the property is vacated, the landlord may pay for comparable temporary housing nearby,[103] moving expenses and utility connection charges.[104]

Almost every state has a retaliatory eviction law that penalizes the landlord for evicting a tenant in retaliation for asserting a particular right.[105] Under the URLTA, "if the landlord engages in retaliatory conduct, the tenant is entitled to recover possession or terminate the lease, and in either case, recover the greater of three month's rent or treble damages, and attorney fees."[106] Laws of Iowa and Kentucky (both URLTA-based states) "presume retaliation if the landlord's action occurred within one year of the tenant's exercise of a legal right such as a complaint about defective conditions," and the landlord must prove retaliation has not occurred.[107]

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99 *Id*.

100 *Id*. at 329-30.

101 *Id*. at 330. Note that the district court originally severed the portion of the statute allowing a court to stay a hearing beyond sixty days after the landlord's request for a hearing. *Id*. (*citing* Chernin, 641 F. Supp 1349, 1358 (N.D. Ohio 1986)).

102 MARCIA STEWART ET. AL., EVERY LANDLORD'S LEGAL GUIDE 204-05 (12th ed. 2014).

103 *But see* George Wash. Univ. v. Weintraub, 458 A.2d 43, 50 (D.C. 1983) holding compensation in the form of both an abatement of rent and reimbursement for hotel expenses is double recovery.

104 STEWART, *supra* note 102.

105 *Id*. at 204." Forty-two states forbid retaliatory eviction of a tenant who has complained to landlord or a government agency; twenty-nine states forbid retaliatory eviction of a tenant who is involved with a tenant's organization; twenty-six states forbid retaliatory eviction of a tenant who is enforcing a legal right or remedy; and only eight states have no law respecting retaliatory eviction." NON-LEGISLATIVE COMMISSION ON THE STUDY OF LANDLORD-TENANT LAWS, REPORT TO GOVERNOR MIKE BEEBE, PRESIDENT PRO TEMPORE OF THE SENATE, AND SPEAKER OF THE HOUSE at 18 (2012) [hereinafter ARK. LT STUDY].

106 However, tenant must be up to date with rent payments to raise a claim. ARK. LT STUDY, *supra* note 105, at 18.

107 Delaware is 90 days; Arizona and D.C. are six months; and California is 180 days. STEWART, *supra* note 59, at 361. *See also* the appendix in STEWART, *supra* note 59, for a list of state retaliation laws.

Landlords may also be liable for tenant's injuries if the landlord is negligent, careless, reckless or violates a statute.[108] Several states view a breach of the duty created by the implied warranty of habitability as the basis for tort liability, even without an express provision for liability in the URLTA.[109] The Alaska Supreme Court held that "landlords are liable for injuries caused by failure to exercise reasonable care to discover or remedy dangerous conditions."[110] Massachusetts allows tenants to recover for emotional distress and personal property damage caused by a landlord's failure to maintain the property as required by statute, and specifically allows tenants and guests to recover in tort for injuries caused by breach of the implied warranty of habitability.[111]

## V. TENANT'S REMEDIES AND BARRIERS TO TENANT'S ENFORCEMENT

### *A. Remedies*

#### 1. Damages

In statutory or common law states, the landlord's breach of the implied warranty of habitability gives rise to various remedies for the tenant. Pursuant to the URLTA, if a landlord fails to comply with the habitability requirement, the tenant may provide landlord written notice of the breach and must give the landlord fourteen days to remedy the breach.[112] If the landlord fails to perform, the tenant may terminate the lease within thirty days of the original notice.[113] The tenant may recover actual damages and, if the "landlord's noncompliance is willful," "reasonable attorney fees."[114] The tenant may also raise the landlord's noncompliance with the statute as a defense to an action for rent and possession and the court may order the tenant to pay rent to the court.[115] If the tenant's defense is "without merit and is not raised in good faith,

108 Stewart, *supra* note 59, at 233

109 Foster, *supra* note 42, at 42.

110 ARK. LT STUDY, *supra* note 105, at 27.

111 "Florida, Montana, New Hampshire, Ohio and Wisconsin, among others, all recognize some standard of care by landlord, whether connected to the implied warranty of habitability or not, with respect to premises occupied by tenants." *But see*, Alabama, which adds a provision to the URLTA that states "the act creates no duties in tort"; Virginia, which ruled its version of URLTA created "liability in contract but not in tort"; and Pennsylvania, which held "breach of the implied warranty of habitability does not give rise to tort liability." ARK. LT STUDY, *supra* note 105, at 27.

112 URLTA § 4.101(a) (1974).

113 *Id*.

114 *See id*. § 4.101(b).

115 URLTA § 4.105 (1974).

the landlord may recover reasonable attorney fees."[116]

A majority of the jurisdictions give tenants the right to recover damages after terminating the lease.[117] Damages may include diminished value of the property between the notice of the condition and the termination date, "tenant's lost benefit of the bargain for the remaining term of the unexpired lease," and "expenses involved in acquiring different housing."[118] Twenty-one states allow a tenant to recover punitive damages in "cases of fraud, intent, maliciousness, or willful and wanton conduct."[119] Several states allow for a tenant's recovery of attorney fees when the lease has an attorney fee clause or the landlord's conduct is willful or unreasonable.[120]

2. Repair and Deduct

Illinois, Texas, Washington and Missouri are not URLTA states, but they do allow tenants to repair and deduct the repair costs. The common law state of Illinois allows a tenant to repair anything required under the lease, law, administrative rule or local ordinance or regulation, at the lesser of $500 or one-half monthly rent.[121] The limit in Texas, a non-URLTA statutory state, is one-month's rent or $500, whichever is greater, as often as necessary so long as the total per month does not exceed this limit.[122] Two-month's rent per repair per twelve month period is the limit in Washington, a non-URLTA state.[123] Another common law state, Missouri's repair and deduct statute is limited to repairs of local housing or building code violations. It is only available to a tenant living on the premises at least six months and who is current on all lease obligations, for repairs under $300 or one-half the periodic rent, whichever is greater,

116 *Id*.

117 Noble-Allgire, *supra* note 6, at 15. "A breach of the implied warranty of habitability is a contract claim, with the underlying premise that the landlord has materially beached an implied term of the lease;" therefore, "tenant should be excused from performing (paying rent) or should be entitled to damages." Campbell, *supra* note 4, at 834. "Courts applying common law generally have treated a material breach of the implied warranty of habitability as a constructive eviction, allowing tenant to terminate the lease without further liability for rent." Noble-Allgire, *supra* note 6, at 14 (citing Kold v. DeVille, 326 S.W.3d 896 (Mo. Ct. App. 2010) and Mease v. Fox, 200 N.W.2d 791, 797 (Iowa 1972)).

118 Noble-Allgire, *supra* note 6, at 15, 27-28. *See also* URLTA § 4.104 (1974).

119 Noble-Allgire, *supra* note 6, at 30.

120 *Id*. at 31-32. Landlord may recover attorney fees in some states if tenant's claim for rent withholding was without merit. *Id*. at 31.

121 765 ILL. COMP. STAT. ANN. 742/5 (LexisNexis 2017). Bakirdan v. Ferguson, No. 3-11-0004, 2012 Ill. App. LEXIS 993 at *6-7 (Ill. App. 3d April 30, 2012) discusses the Act's procedural requirements.

122 TEX. PROP. CODE ANN. § 92.0561(b) (West 2017).

123 WASH. REV. CODE § 59.18.100(2) (2017).

but not more than one month's rent in a twelve-month period.[124]

Many statutory and common law states have "repair and deduct" statutes that give the tenant the right to self-help in making repairs and deducting the cost from their rent. Some repair and deduct statutes are limited to minor defects while others, and the URLTA, allow repair and deduct for essential services.[125] Alaska, and most states adopting the URLTA, limits repairs to running water, hot water, heat, sanitary facilities, or other essential services with no dollar limit, only the actual and reasonable cost of the repair.[126]

### 3. Withholding Rent and Payment to Escrow

Many states recognize a remedy that includes a tenant's right to retain possession of the premises and withhold rent pending resolution of an implied warranty of habitability dispute, with or without a repair and deduct statute. In such states, a court may order, or a statute may require, that the tenant pay the withheld rent into an escrow with the court.[127] The rent escrow requirement mitigates the possibility of bad-faith tenants using the breach of warranty defense merely as an excuse to avoid paying rent.[128] Courts in some states are allowed to use the withheld rent to perform the repairs required to return the property to a habitable condition.[129]

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124 MO. REV. STAT. § 441.234. *See also* H.B. 848, 2017 MO. LAWS *supra* note 81.

125 MO. REV. STAT. § 441.234. at 26. *See also* URLTA §§ 4.103 and 4.104. New Jersey, New York and Pennsylvania allow repair and deduct under common law. Noble-Allgire, *supra* note 6, at 26. The URLTA does not define essential services but §4.104 lists "heat, running water, hot water, electric, gas, or other essential service" when referring to the conditions authorizing tenant's right to repair and deduct. The Uniform Law Commissioners approved a Revised Uniform Residential Landlord Tenant Act ("RURLTA") in 2015, but it has not been enacted in any state. RURLTA § 102(10) defines essential service as heat, hot and cold running water, sewage or septic disposal and electricity. The term includes gas or air conditioning if required to be supplied to a tenant by the lease or law other than this act which, if not supplied to the tenant, would create a serious threat to the health, safety, or property of the tenant.

126 ALASKA STAT. § 34.03.180 (2017). *See also* URLTA § 4.104 (1974).

127 Noble-Allgire, *supra* note 6, at 13, 16, 17. *See also* URLTA § 4.105 (1974). Kentucky, New Mexico, Oklahoma and Tennessee enacted the URLTA but omitted the rent escrow requirement. *See* Appendix *infra* for a list of states with a rent escrow statute.

128 Franzese, *supra* note 84, at 13. Super, *supra* note 22, at 429 (citing Dameron v. Capitol House Assocs. Ltd., 431 A.2d 580, 584 (D.C. 1981)).

129 Noble-Allgire, *supra* note 6, at 17. Super, *supra* note 22, at 429 (citing Scroggins v. Solchaga, 552 N.W.2d 248, 252 (Minn. Ct. App. 1996); King, 495 S.W.2d at 79; City of Mount Vernon v. Brooks, 469 N.Y.S.2d 517, 519 (City Ct. 1983). Maryland provides that a court "[m]ay, after an appropriate hearing, order that some or all money in the escrow account be paid to the landlord or the landlord's agent, the tenant or the tenant's agent, or any other appropriate person or agency for the purpose of making the necessary repairs of the dangerous conditions or defects[.]" MD. CODE ANN., REAL PROP. § 8-211(n)(2) (LexisNexis 2017). Pursuant to the RURLTA, a court may order escrowed rent released to the landlord to be used only to repair the property, or released to the tenant in compensation for repairs tenant made in compliance with the act or for actual

The rent withholding rights and escrow procedures vary depending on the source of the implied warranty of habitability. Section 4.105 of the URLTA implies a right for tenant to withhold rent when the tenant is using the landlord's breach of the habitability requirement as a counterclaim in an action for possession or rent. This section provides that the court "may order the tenant to pay into court all or part of the rent accrued and thereafter accruing."[130] The comment to this section provides that, "… upon filing of the counterclaim the court will enter the order deemed appropriate by him concerning the payment of rent in order to protect the interests of the parties." The right to withhold rent would also be implied in the URLTA states adopting this section.

Alabama, a URLTA state, adopted Section 4.105.[131] It also has, however, Section 35-9A-164, which provides that a "tenant may not withhold payment of rent to the landlord, while in possession, to enforce any of the tenant's rights" under the Alabama URLTA.[132] New Mexico also modifies the URLTA to specify that tenant may abate one-third of her rent when landlord fails to maintain the premises, but may only abate all of the rent if tenant vacates the premises.[133]

Oklahoma is a URLTA state that did not adopt Section 4.105. The only situations where a tenant is allowed to withhold rent is if the tenant is deducting for repairs or the tenant's procurement of essential services pursuant to the statute.[134] Otherwise, if the landlord's breach renders the dwelling uninhabitable, the tenant must vacate or continue to pay rent.[135] In contrast, Wisconsin (not a URLTA state) has a statute that allows the tenant to remain in possession after a landlord's breach and provides that "… rent abates to the extent the tenant is deprived of the full normal use of the premises."[136] It does not allow rent to be withheld in full.

The common law jurisdictions of Massachusetts, Pennsylvania, Missouri and the District of Columbia have varying approaches to the rent withholding rights and escrow procedures. Massachusetts is a common law implied warranty of habitability state that also has a specific rent withholding statute. The Supreme Judicial Court of Massachusetts held in 1973[137] that residential leases include an implied warranty of

damages. RURLTA § 408(d). *See* Appendix *infra* for a list of states with a rent escrow statute.

130 URLTA § 4.105(a).

131 ALA. CODE § 35-9A-405 (2017).

132 The Comment to this section states it was substituted in place of the Uniform Act section entitled "Separation of Rents and Obligations to Maintain Property Forbidden." ALA. CODE § 35-9A-164 (2017).

133 N.M. STAT. ANN. § 47-8-27.2 (2017).

134 OKLA. STAT. tit. 41, § 121(B-C) (2017). The statute does not define "essential services" but follows the URLTA language by referring to "heat, hot water, running water, electric, gas or other essential service."

135 OKLA. STAT. tit. 41, § 121(D) (2017).

136 WIS. STAT. § 704.07(4) (2017).

137 Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843-845 (Mass. 1973).

habitability and tenant has three remedy options. The first option is to sue landlord, rescind the lease and pay the reasonable value, if any, of tenant's use of the property while in possession. The second option is to follow statutory procedures to retain possession and withhold rent. A Massachusetts court has the discretion to require tenant to pay fair market value rent to the court clerk under 239 Section 8A. Massachusetts allows the funds to be "expended for the repair of the premises by such persons as the court after a hearing may direct,"[138] and remaining funds after landlord resolves the breach are paid to the landlord. Tenant must be current on rent payments prior to landlord's knowledge of the condition that violates the implied warranty of habitability. Tenant's third option is to pursue a common law claim for damages while still following the statutory procedures for withholding rent.[139]

Pennsylvania has a common law implied warranty of habitability, and it has a rent withholding statute that only applies in larger cities.[140] The Pennsylvania Supreme Court upheld the constitutionality of this statute in DePaul v. Kauffman on due process grounds and as a proper exercise of police power.[141] The court reasoned property rights are not absolute and persons hold their property subject to valid police regulation made for the health and comfort of the people. A legitimate objective of the regulation of property for the general welfare is an adequate supply of safe and decent housing.[142] The Pennsylvania Supreme Court analyzed the rent withholding statute again in Pugh v. Holmes and held the statute did not preclude the development of landlord/tenant common law, including the implied warranty of habitability.[143] The trial judge has discretion to require tenant to deposit all or some of the unpaid rent into escrow.[144] The court should consider "the seriousness and duration of the alleged defects and the likelihood tenant will successfully demonstrate the breach of the implied warranty of habitability."[145] If landlord materially breached the implied warranty of habitability, then tenant's obligation to pay rent is abated in full; and, if landlord partially breaches the warranty, rent is abated in part and tenant pays the part not abated.[146]

138 MASS. GEN. LAWS ch. 239 § 8A (2017).

139 Tenant may also voluntarily pay funds to the court after landlord commences an action against tenant. Boston Hous. Auth., 293 N.E.2d at 844.

140 35 PA. CONS. STAT. § 1700-1 (2017).

141 DePaul v. Kauffman, 272 A.2d 500, 504 (Pa. 1971).

142 *Id*.

143 Pugh v. Holmes, 405 A.2d 897, 905 (Pa. 1979). *See also Ford v. Philadelphia Hous. Auth*., 848 A.2d 1038, 1056 (Pa. Commw. Ct. 2004), which held the implied warranty of habitability only applies to private residential leases and not to public housing situations.

144 *Pugh*, 405 A.2d at 907.

145 *Id*. at 908.

146 *Id*. at 907. In Illinois, the supreme court held the tenant is liable for the fair rental value of the defective premises during the landlord's breach and is entitled to an abatement of rent in excess of that amount. Glasoe v. Trinkle, 479 N.E.2d 915, 922 (Ill. 1985).

The percentage reduction in use method is the correct manner of determining the amount by which the obligation to pay rent is abated.[147]

Missouri recognized the common law implied warranty of habitability in 1973, but only recently addressed the tenant's obligation to continue to pay rent, either to the landlord or in escrow. In Kohner Properties, Inc. v. Johnson,[148] the tenant withheld rent when the landlord failed to repair a leaking bathroom ceiling that resulted in mold. The landlord filed a rent and possession action against the tenant. The tenant asserted breach of the implied warranty of habitability as an affirmative defense.[149] Landlord argued the tenant's defense was barred because the tenant failed to pay her rent to the court in custodia legis. The trial court found tenant was barred from asserting the implied warranty of habitability defense because she did not pay her rent to the court as required by King v. Moorehead. The Court of Appeals held King's requirement that tenant deposit rent with the court pending litigation is nonbinding dicta,[150] and, therefore,

A tenant's submission of the entire contracted-for rent to the court in custodia legis is not an automatic prerequisite to a tenant raising the landlord's breach of the warranty as a defense or counterclaim in a rent and possession suit against her. ….. the trial court may order a tenant in possession to submit all, part, or none of her withheld rent to the court in custodia legis pending litigation. …..the trial court shall have the discretion to enter a suitable protective order upon either party's request and after notice and an opportunity to be heard by the opposing party.[151]

The Missouri Supreme Court affirmed the trial court's decision, holding circuit courts may exercise discretion on a case-by-case basis to determine whether an in custodia legis procedure is appropriate in a particular case.[152]

The District of Columbia has a housing code[153] that creates privately enforceable duties, but does not address the types of private remedies available.[154] The United States Court of Appeals for the District of

147 Pugh, 405 A.2d at 295.

148 Kohner Prop., Inc. v. Johnson, No. ED103133, 2016 Mo. App. LEXIS 896, 535 S.W.3d 351 (Mo. Ct. App. 2016).

149 Another recent Missouri case, Brainchild Holdings, LLC v. Cameron, 534 S.W.3d 243 (Mo. 2017) made its way to the Missouri Supreme Court when the tenant, raising the affirmative defense of the landlord's violation of the implied warranty of habitability in a rent and possession suit, requested a jury trial and the trial court denied her request. The Court of Appeals ruled in favor of the tenant and transferred the case to the supreme court. The Missouri Supreme Court held that either party in a rent and possession action, upon request, is entitled to a trial by jury. *Id*. at 248.

150 Kohner, No. ED103133, 2016 Mo. App. LEXIS 896, at *16-17.

151 Kohner, No. ED103133, 2016 Mo. App. LEXIS 896 at *27-28.

152 Kohner Prop., Inc. v. Johnson, SC95944, 2018 Mo. LEXIS 243, at *12 (Mo. July 3, 2018) (en banc) (citing URLTA § 4.105(a)).

153 D.C. Mun. Regs. tit. 14 (2017).

154 Javins v. First Nat'l Realty, 428 F.2d 1071, 1080-1081 (D.C. Cir. 1970). *See also* D.C. Mun.

Columbia Circuit held in Javins v. First Nat'l Realty that a violation of the code is a breach of the implied warranty of habitability and tenant meets his burden of proof with proof of a housing code violation.[155] The trial court must then determine what portion, if any, of rent is suspended by landlord's breach.[156] The court may require tenant to make future rent payments into a court registry as they become due. Escrowed money is rent for the time between when the landlord filed suit and the case came to trial, and is apportioned between the landlord and tenant after trial on the basis of finding the rent actually due for the period at issue in the suit.[157]

Bell v. Tsintolas in the District of Columbia provides a detailed discussion of when a court should require tenant to pay rent in escrow (referred to by the court as a landlord protective order "LPO").[158] LPO's are not favored by the court and are to be required only in limited circumstances, only on landlord's motion and only after notice and a hearing on the matter.[159] At such a hearing, the trial judge has the discretion to require an LPO on a case-by-case basis.[160] The court in Bell v. Tsintolas indicated a judge should require an LPO only when the landlord demonstrates an obvious need[161] for protection, such as when tenant asks for a jury trial or asserts the implied warranty of habitability defense.[162] When the case ends, if the landlord has no code violations, all escrowed rent is paid to the landlord for rent due during litigation.[163] If tenant proves there was no rent due because of the implied warranty of

Regs. tit. 14, § 301 (2017) creating an implied warranty of habitability.

155 Javins, 428 F.2d at 1072-73. *See also* Winchester v. Staten, 361 A.2d 187, 191 (D.C. 1976) discussing the landlord's option to pursue only possession or both possession and rent in landlord/tenant court. Tenant is not allowed to assert counterclaims in possession-only suits. Bell v. Tsintolas Realty Co., 430 F.2d 474, 477-478 (D.C. Cir. 1970).

156 If there is no abatement due to the breach, then landlord gets possession. If no rent is due because of the breach, then landlord does not get possession. If only partial rent is due and tenant has not paid it, then landlord wins if tenant refuses to pay. Javins, 428 F.2d at 1082-83.

157 *Id*. at 1083. The court does not require tenant to be current on rent payments before using the implied warranty of habitability defense.

158 Bell, 430 F.2d at 479.

159 *Id*.

160 *Id*. at 483. *But see* Mahdi v. Poretsky Mgmt, Inc., 433 A.2d 1085, 1088 (D.C. 1981) holding rent may be abated but no tenant may remain in possession unless he pays the abated rent.

161 Factors determining "need" include: amount of rent due; number of months landlord did not receive rent; reasonableness of the rent rate; landlord's monthly obligations for the property; is tenant *in forma pauperis*; does landlord face a substantial threat of foreclosure. Then the court should compare "need" with the merits of an implied warranty of habitability defense including: are violations de minimus or substantial; did landlord have notice; landlord's response to the notice; and the date of the last repair relating to the alleged defect. *Bell*, 430 F.2d at 484.

162 *Id*. at 483-84.

163 *Id*. at 485. *See also Habib v. Thurston*, 517 A.2d 1, 18 (D.C. 1985) and *Pleites v. Serafin*, 627 A.2d 509, 511 (D.C. 1993) holding due process requires a post-trial evidentiary hearing on disbursement of funds from escrow under the LPO. Either party is entitled to a jury trial to determine the right to LPO funds covering the period while the landlord's action for possession is pending. *Habib*, 517 A.2d at 24.

habitability, then escrowed rent is returned to tenant absent landlord's proof that the breach was not ongoing during litigation.[164] If tenant proves partial abatement is warranted, then the escrowed rent is divided accordingly.[165]

### *B. Barriers to Tenant Enforcement*

#### 1. Social Justice for Low Income Tenants

While the implied warranty of habitability offers various remedies to address the initial social injustice tenants face when landlords fail to provide habitable premises, many jurisdictions adopting it fail to acknowledge and address the reality of the barriers involved in a tenant's ability to pursue these remedies under the warranty. These barriers include a low-income tenant's limited access to alternative housing and adequate representation, the judiciary's attempt to make remedies in landlord/tenant disputes fit the precedent of a breach of contract case, and the court systems' antiquated and biased approach to landlord/tenant cases. Tenants need faster remedies. They cannot afford to pay rent in escrow and a second rent for a habitable apartment. If they continue to live in a mold- or bedbug-infested apartment while waiting for a remedy, their health will deteriorate and the social injustice continues.

There are numerous definitions of social justice.[166] It requires "inspiring, working with, and organizing others to accomplish together a work of justice.…[I]ts object, as well as its form, primarily involves the good of others."[167] Robert E. Rodes, Jr., the Paul J. Schierl/Fort Howard Corporation Professor of Legal Ethics Emeritus at the University of Notre Dame, describes it as "that branch of the virtue of justice that moves us to use our best efforts to bring about a more just ordering of society."[168] Professor Rodes suggests, "I do not owe the man on the grate a place to live, but I do owe him whatever I can do to provide a social order in which housing is available to him."[169] The United Nations also recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the

164 *Bell,* 430 F.2d at 485.

165 *Id*.

166 *See, e.g*., Julie D. Lawton, *Article: Teaching Social Justice in Law Schools: Whose Morality Is It?*, 50 IND. L. REV. 813, 818 (2017); Robert E. Rodes, Jr., *Articles: Social Justice and Liberation*, 71 NOTRE DAME L. REV. 619, 620 (1996).

167 Michael Novak, *Defining Social Justice*, 108 FIRST THINGS: A MONTHLY JOURNAL OF RELIGION & PUBLIC LIFE 11, 13 (Dec. 2000).

168 Rodes, *supra* note 166, at 620.

169 *Id*.

continuous improvement of living conditions."[170]

There is no doubt that far too many residential tenants are forced to live in deplorable conditions and that the current judicial system often fails to protect its most vulnerable citizens.[171] Case after case serve as examples of a landlord's failure to provide even the basic necessities of life. The plight of Esperanza Menendez-Jackson, as described in "The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord Tenant Reform," is typical. "Ms. Menendez-Jackson is a single mother who lived with her three children in a government subsidized apartment building in Newark, New Jersey."[172] Her apartment was infested with bed bugs, was often without hot water, heat, and a working oven, and the only bathroom suffered from a serious mold problem. Visitors had to leave all personal belongings in the hallway and then change clothes immediately upon exiting the apartment, a ritual that was a fact of daily life for Ms. Jackson and her children.[173] "[O]n the coldest nights when the indoor temperature dipped into the teens, [the family] sought shelter with relatives and friends. Over time, that possibility narrowed as a result of the stigma and fear associated with the premises' bed bug infestation."[174] Ms. Jackson notified her landlord on numerous occasions, but his attempts at remediation over the course of a year were haphazard and ineffective.[175]

Ms. Jackson notified government authorities, secured counsel through a legal aid agency, and withheld her rent in response to the landlord's breach of the implied warranty of habitability. The landlord moved to evict for nonpayment of rent. The court allowed Ms. Jackson to deposit into escrow with the court fifty percent of the rent she would otherwise owe.[176] "The tenant's monthly rent payment was one hundred-fifty dollars," and the government paid the remaining sixteen hundred-fifty dollars.[177] The government's payments continued "notwithstanding the substantially defective condition of the premises. … It took a full ten months for the matter to be resolved, during which time the landlord

170 International Covenant on Economic, Social and Cultural Rights art. 11(1), *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (signed by the U.S. on Oct. 5, 1977). Ensuring access for all to adequate, safe and affordable housing is a target of the 2030 Agenda for Sustainable Development adopted at the United Nations Sustainable Development Summit in 2015. G.A. Res. 70/1, Goal 11.1 (Sept. 25, 2015).

171 "As of 2007, the U.S. Department of Housing and Urban Development estimated that 430,000 unassisted very low-income renters (out of a total population of about 300 million) lived in severely substandard housing." Franzese, *supra* note 84, at 5 n.11 (citing U.S. Dep't of Hous. & Urban Dev., HUD Strategic Plan FY 2010-2015, at 18 (2010)).

172 Franzese, *supra* note 84, at 25.

173 *Id*.

174 *Id.,* at 25-26.

175 *Id.,* at 26.

176 *Id*.

177 *Id*.

continued to receive the full state subsidies." [178]

Advocates for landlords and tenants offer various solutions to this all too frequent scenario. Landlords contend tenants should move out, as required by the constructive eviction remedy. Tenants argue the lease is a contract and landlord's breach entitles the tenant to pursue contract remedies, including withholding rent while retaining possession. While both remedies are available in various formats in most states, neither is practical or effective in achieving the implied warranty of habitability's goal. The problem is not so much which remedy is best, but more about the process used to obtain the remedy.

The deficiencies in the process are exacerbated by the fact that habitability issues arise most often with low-income households, giving rise to social justice concerns that are not addressed by most states' implied warranty of habitability procedures. Most tenants lack the legal or economic resources to sue affirmatively for breach of the implied warranty of habitability; therefore, "the best chance for repairs to be adjudicated is in connection with an affirmative defense or counterclaim to the landlord's action for possession for nonpayment of rent."[179] The probability that a tenant will assert his or her rights "depends on the tenant knowing about the warranty,[180] knowing how to raise it, and deciding that doing so is in his or her interest."[181] Although some jurisdictions are taking steps to improve tenants' education and representation,[182] far too many court systems remain a dead-end for tenants. The Washington University Civil Rights & Community Justice Clinic and the Metropolitan Saint Louis Equal Housing & Opportunity Council joint study of 6,369 landlord/tenant cases from 2012, found only two cases

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178 *Id*., at 26-27.

179 Super, *supra* note 22, at 405.

180 More likely than not, tenants who learn of the breach of warranty defense do so through word-of-mouth, a friend, on-line resources or the housing court help desk. Franzese, *supra* note 84, at 30.

181 Super, *supra* note 22, at 406. UCLA law school studied a "random sample of eviction case files with habitability claims . . . Out of 151 tenants who asserted facts constituting breaches of the implied warranty of habitability, the total number who prevailed at trial without a lawyer was zero." Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 868-69 (2004). In a Baltimore study, "85 percent of disputants reported having threats to health and safety but barely a quarter of them were able to elaborate about those conditions before a judge." PUBLIC JUSTICE CENTER, HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT, 52 (2015) [hereinafter BALTIMORE RENT CT.].

182 The Metropolitan Council on Housing in New York City provides "free tenants' rights clinics, a tenants' rights hotline and various guides on evictions, repairs, rent stabilization, and rent control." Franzese, *supra* note 84, at 32 n.115 (citing *About Us: What is the Metropolitan Council on Housing?*, METRO. COUNCIL ON HOUS., http://metcouncilonhousing.org/about_us (last visited Oct. 26, 2016). The New Jersey Truth-in-Renting Act requires landlords to distribute information regarding legal rights and responsibilities of landlord and tenant. Failure to comply subjects a landlord to a penalty of up to $100 for each offense. Franzese, *supra* note 84, at 32–33 n.115 (citing N.J. STAT. ANN. SEC. 46:8-43–47 (West 2016)).

(0.03%) "resulted in a judgement in favor of the tenant," but 4,934 cases (77.5%) were decided in landlord's favor.[183]

The landlords' argument in favor of constructive eviction ignores the purpose of the implied warranty of habitability and the realities many low-income tenants face when trying to find suitable replacement housing. Low-income tenants do not have any leverage over landlords and are faced with limited housing options. "For an apartment with $700 per month rent, the total initial costs could be in the range of $2,800."[184] Finding an accessible unit for someone with physical disabilities, such as accommodating a large wheelchair, can take up to six months.[185] A tenant in a subsidized housing program is frequently denied subsidized housing in the future when they are a party to an eviction proceeding even though it was precipitated by the landlord's breach.[186] Evicted families generally relocate to worse neighborhoods and lower quality housing than families who move under less demanding circumstances.[187] As a result, tenants the implied warranty of habitability was designed to protect are actually harmed by attempting to enforce their rights using the warranty.

Low-income tenants also face a dilemma when forced to choose among spending limited resources on a lawyer, funding their own repair of defects to make the property habitable, relocating to temporary housing, or paying full monthly rent. As discussed in Part V.A.3, in those jurisdictions that allow tenants to retain possession during habitability litigation, cases and statutes are mixed on whether to include a procedural requirement that tenant continue to pay rent in escrow or to the landlord.[188] Tenant advocates argue that for low-income tenants, those most likely to live in slum housing, that requiring tenants to continue to pay rent may effectively keep the implied warranty of habitability out of court, frustrating the instrumental, redistributive and humanitarian goals

183 Karen Tokarz and Zachary Schmook, *Law School Clinic and Community Legal Services Providers Collaborate to Advance the Remedy of Implied Warranty of Habitability in Missouri*, 53 WASH. U. J. L. & POL'Y 169, 176 (2017).

184 "This does not include moving expenses, nor does it begin to address utilities." MO. HOUS. DEV. COMM'N, MHDC HOUSING NEEDS ASSESSMENT REPORT at 6 (2015) [hereinafter MO. HOUSING REPORT].

185 *Id*.

186 ACLU Brief, *supra* note 3, at 56 (citing HOUS. AUTH. OF KANSAS CITY, MO., ADMISSIONS AND CONTINUED OCCUPANCY POLICY ch. 3 at 11, http://www.hakc.org/affordable_housing/liph_acop.aspx).

187 ACLU Brief, *supra* note 3 at 54. "[R]enters who experienced a forced move wound up in neighborhoods with a poverty rate 5.4 percentage points higher and a crime rate nearly 1.8 percentage points higher than those of renters who moved by choice." Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1763 (2015).

188 *See* Appendix *infra* for a list of rent escrow statutes.

of the warranty.[189] The Public Justice Center and the Right to Housing Alliance in Baltimore, Maryland, conducted a study of rent court experiences and outcomes from July 2014 through July 2015 (the "Baltimore study").[190] The Baltimore study found that:

> [B]y far the greatest impediment to renter's meritorious cases was the court's requirement that they deposit any alleged rent arrears in order to proceed. The law states that the amount of rent paid into escrow should be reduced to reflect the lower value of the housing in its defective condition. However, judges abated the amount of rent to be paid into escrow in only three of fifty-nine cases. [This happened] even though the law puts the burden on the landlord to show cause why abatement should not be granted. [C]ourts also often gave the landlord more time for repairs than the law allowed and awarded tenant less compensation for the conditions than the law provides. Thus, as currently interpreted in most cases, the rent escrow law simply provides no incentive for landlords to remedy dangerous defects before a renter files in court. [191]

### 2. Court Barriers for Tenants

"Those generally assumed to lack full 'access to justice' are those unable to pay market rates for representation by lawyers."[192] Reduced funding for legal aid has resulted in record numbers of tenants who cannot hire a lawyer.[193] These pro se tenants are lost in the avalanche of landlord/tenant cases handled by our overburdened and ill-prepared court system. Tenants also need access to sufficient information, advocacy and problem-solving resources such that the outcome of the dispute is dependent on current law and facts, rather than on differential access to advocacy resources or on factors not recognized by the substantive law (like the race, class or gender of disputants).[194]

The Baltimore study "shows that court systems prioritize

189 Super, *supra* note 22, at 426.

190 BALTIMORE RENT CT., *supra* note 181.

191 *Id*. at 41-44.

192 Blasi, *supra* note 181, at 865.

193 Campbell, *supra* note 4, at 819. Legal Services Corporation's funding decreased by nearly 11% ($45 million) from 2010 to 2015. In New York City, 99% of tenants are unrepresented in eviction proceedings. In New York State, 91% of tenants are unrepresented in eviction proceedings. LEGAL SERVS. CORP., FY 2016 BUDGET REQUEST, http://www.lsc.gov/media-center/publications/fy-2016-budget-request (last accessed Aug. 20, 2017 at 11:45 a.m.)(citing TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, STATE OF NEW YORK UNIFIED COURT SYSTEM, Nov. 2014).

194 Blasi, *supra* note 181, at 878. Blasi suggests paying for access to justice by taxing legal services and giving the money to legal aid agencies. If the fees paid to the largest 100 law firms were taxed at 8.75%, it would generate approximately $3.3 billion, almost ten times the current budget of the federal Legal Services Corporation. *Id*. at 880.

efficiencies that privilege the landlord's bottom line and ignores two predominating realities of poor renters and their housing:" first, that renters lack access to timely legal advice and have insufficient knowledge to navigate the process; and, second, that "renters are poor, have few rental options … and look to the court to enforce housing standards."[195] In addition, "institutionalized customs of courts steer renters away from defending themselves, instead pushing them into agreements that have no effect on the considerable problems renters face at home – namely, overspending on insecure, unsafe, unhealthy housing."[196] This impacts the most vulnerable members of our society, namely low-income[197] and minorities.[198]

Trying disputes about housing conditions also requires different skills than many courts previously employed in breach of contract cases.[199] Courts apply the implied warranty of habitability based on certain cultural understandings of what is meant by "habitable" and what constitutes a habitable residence.[200] Judges view the question of habitability through their own "cultural lens," which shapes how they interpret the landlord's obligations.[201] There are various standards for

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195 BALTIMORE RENT CT., *supra* note 181, at iv-v.

196 *Id*.

197 A family with one full-time worker earning minimum wage cannot afford the local fair-market rent for a two bedroom apartment anywhere in the United States. Substitute Brief of Appellant at 45, Kohner Prop., Inc. v. Johnson, SC95944, 2018 Mo. LEXIS 243 (Mo. July 3, 2018) (en banc) [hereinafter Johnson S. Ct. Brief] (citing U.S. DEP'T OF HOUS. & URBAN DEV., AFFORDABLE HOUSING, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/ (last visited Feb. 28, 2018) [hereinafter HUD AFFORDABLE HOUSING]). The gap between the number of extremely low income renters (earning up to 30% of the area median income) and the supply of units they can afford nearly doubled from 2003 to 2013. Johnson S. Ct. Brief at 40, (citing JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2015, http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-full.pdf). A 2013 study in St. Louis County, Missouri, found there were only 20.8 available units for every 100 extremely low income renter households. Johnson S. Ct. Brief at 40, (citing THE URBAN INST., HOUSING AFFORDABILITY GAP FOR EXTREMELY LOW-INCOME RENTERS, http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000260-The-Housing-Affordability-Gap-for-Extremely-Low-Income-Renters-2013.pdf (last visited October 21, 2016)).

198 More than 50% of tenants who spend more than fifty percent of their income on rent are Black, Hispanic or members of other racial minority groups. Johnson S. Ct. Brief at 29, (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, RACIAL DISCRIMINATION IN HOUSING AND HOMELESSNESS IN THE UNITED STATES, https://www.nlchp.org/documents/CERD_Housing_Report_2014 (last visited Oct. 23, 2016)). An estimated twelve million renter and homeowner households now pay more than fifty percent of their annual incomes for housing. Johnson S. Ct. Brief at 45, (citing HUD AFFORDABLE HOUSING). While not legally a protected class under the Fair Housing Act, low income households experience many instances of housing practices that would be considered discriminatory. MO. HOUSING REPORT, *supra* note 184, at 109.

199 Super, *supra* note 22, at 413.

200 Campbell, *supra* note 4, at 810. *See* Campbell, *supra* note 4, for a comprehensive study of the definition of habitability in courts over time.

201 Campbell, *supra* note 4, at 810.

determining the materiality of a landlord's breach. In the Missouri case of King v. Moorehead, the court focused on the nature of the deficiency or defect; the effect on tenant's life, health or safety; the length of time the defect persisted; the age of the structure; and the effect on the dwelling unit or common area.[202] Most courts agree, however, that material breaches result in significant disruption of tenant's use of their property, often putting tenant and tenant's family in danger of physical harm. This is exactly the situation the implied warranty of habitability was designed to prevent.

Courts have dealt with the split between the purpose of the implied warranty of habitability and the legal contract doctrines by adopting an extremely deferential standard of review of landlord/tenant disputes, [203]contrary to the underlying purpose of the rule. This situation has given rise to a very one-sided resolution of implied warranty of habitability cases. Landlord/tenant courts remain disproportionately vulnerable to influence from landlords and their lawyers, who typically are repeat players.[204] Landlords routinely evade their burden of proof and "utilize the court's summary process without having first complied with fundamental housing regulations."[205] On familiar terms with the judges and staff, landlords expect, and receive, special treatment. "Judges offer landlords unwarranted leeway in prosecuting their cases, inconsistently asking for basic evidence such as a lease and accounting statements."[206]

Hearing implied warranty of habitability cases demands greater resources than had been required to grant possession routinely to landlords when tenant had few defenses.[207] A few states, including Michigan, Illinois, Massachusetts and New York, have a separate landlord/tenant court in larger cities, similar to a small claims court, specifically set up to handle evictions.[208] Detroit landlord/tenant judges annually disposed of more than 10,000 cases each in the 1970s, and in 1985, each New York City Housing Court judge handled 8,688 evictions.[209] In 2013, the Baltimore City "rent court" ranked second (to

202 *King,* 495 S.W.2d at 76.

203 Campbell, *supra* note 4, at 836.

204 Super, *supra* note 22, at 414-416.

205 BALTIMORE RENT CT., *supra* note 181, at 51. In a study of the Baltimore landlord/tenant court, "half of the landlords submitted invalid registration and licensing credentials to the court to get their lawsuit docketed. [F]our out of five landlords provided the court information about their mandatory lead risk reduction compliance that was incorrect, outdated or otherwise unsupported by data from the state regulatory agency." *Id*. at v.

206 *Id*. at 51. *See also* Tokarz, *supra* note 183, at 177-178, in which the Washington University study revealed that 188 cases were filed by corporations without a listed attorney of record. Even though Missouri law requires a licensed attorney to represent a corporate landlord in an eviction suit, only 44 of these 188 cases were dismissed.

207 Super, *supra* note 22, at 413.

208 STEWART, *supra* note 59, at 371.

209 Super, *supra* note 22, at 434 (citing Recognizing a Right to Counsel for Indigent Tenants in

Detroit) in the percentage of renters facing eviction, hearing 150,000 rent cases annually.[210] Judicial resources applied to eviction cases are quite modest in most locales, however, resulting in nine-minute trials in Detroit[211] and two minutes allotted for each contested case in Chicago.[212]

## VI. RECOMMENDATIONS

The goal of the implied warranty of habitability is to provide a means for residential tenants to enforce a minimum standard of habitability in their homes, irrespective of the terms of their agreement with their landlord. As this article illustrates, the current process for a tenant to enforce this right, whether or not it allows the tenant to withhold rent during the dispute, is ineffective.

### *A. Strategic Approach*

A compassionate, imaginative and coordinated effort will produce opportunities and incentives for enforcement of the implied warranty of habitability.[213] As Leilani Farha, Special Rapporteur[214] on Adequate Housing for the United Nations, stated, a "human rights based housing strategy" is needed.[215] A strategy, unlike a policy, "… coordinates a wide range of laws, programs, policies and decisions and engages with multiple departments and various levels of government."[216]

An effective housing strategy that addresses the habitability of residential rental properties is needed today just as much as when the implied warranty of habitability began in 1969. According to sociologist,

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Eviction Proceedings in New York, 24 COLUM. J.L. & SOC. PROBS. 527, 537 n.86 (1991)).

210 BALTIMORE RENT CT., *supra* note 181, at iv.

211 Super, *supra* note 22, at 434 (citing Jonathan I. Rose & Martin A. Scott, "Street Talk" Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants, 52 J. URB. L. 967, 979 (1975)).

212 Super, *supra* note 22, at 434 (citing Anthony Fusco, Jr. et al., Chicago's Eviction Court: A Tenants' Court of No Resort, 17 URB.L.ANN. 93, 105 (1979)).

213 On August 11, 2017, Mayor de Blasio signed legislation to provide low-income New Yorkers with access to counsel for wrongful evictions. Intro. 214-B will serve 400,000 tenants and cost $155 million annually when fully implemented in five years. This is a significant increase from the $6 million available for this program in 2013. http://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for#/0 (last accessed Oct. 2, 2017 at 10:02 a.m.).

214 Special Rapporteurs are independent experts appointed by the United Nations Human Rights Council to monitor specific rights. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx (last visited Apr. 16, 2018).

215 Statement by Leilani Farha, Special Rapporteur, to the 37th session of the U.N. Human Rights Council, Geneva (Feb. 28, 2018), http://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.

216 *Id*.

and Princeton University professor, Matthew Desmond, who won a Pulitzer Prize for his book, "Evicted: Poverty and Profit in the American City," the United States is in the middle of another housing crisis.[217] There were approximately 2.3 million evictions filed in 2016, which is similar to the number of foreclosure starts in 2009.[218] In Desmond's opinion, this is due in part to a failure of imagination and compassion.[219] No one wins when eviction is considered the only solution when a tenant does not pay her rent.

Everyone benefits from a more effective landlord/tenant strategy and process. In 1996, the New York City Bar Association reported that the prevention of eviction through civil legal aid saved the city more than $27 million in homeless shelter costs.[220] A Massachusetts Legal Aid Corporation study in 2009 showed the state similarly saved $8.4 million.[221] In 2014, "the San Francisco Right to Civil Counsel Pilot Program estimated that full and limited scope representation for 609 tenants who avoided judicial eviction potentially saved over $1 million in shelter costs."[222] There are many ways to effectively achieve these benefits and protect the interests of landlords and tenants.[223]

Whether statute, common law or both provide the source of the warranty, a landlord's incentive to repair because of the implied warranty of habitability depends heavily upon the actions of the tenant, the court,[224] and the government. Our legislative and judicial branches must take the lead to overhaul the implied warranty of habitability process with the goal of addressing the barriers to tenant's enforcement while continuing to protect and incentivize landlords. Any strategy should, therefore, include four basic elements achieved through legislative and court reform:

Adopting clear standards for a landlord's duty to maintain habitable premises;

Providing practical and effective notification to make tenants aware

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217 Terry Gross, *First-Ever Evictions Database Shows: 'We're In the Middle Of A Housing Crisis,'* NATIONAL PUBLIC RADIO (Apr. 12, 2018), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis.

218 Terry Gross, *First-Ever Evictions Database Shows: 'We're In the Middle Of A Housing Crisis,'* NATIONAL PUBLIC RADIO (Apr. 12, 2018), https://www.npr.org/templates/transcript/transcript.php?storyId=601783346.

219 *Id*.

220 BALTIMORE RENT CT., *supra* note 181, at 49-50.

221 *Id*.

222 *Id*.

223 *See, e.g.*, the plan outlined in a recent study from Seton Hall University School of Law examining nonpayment of rent proceedings initiated by landlords in Essex County, New Jersey. The researchers found that of the more than 40,000 eviction proceedings in 2014, only 80 tenants (0.2%) asserted breach of the implied warranty of habitability as a defense. Franzese, *supra* note 84, at 5.

224 Super, *supra* note 22, at 406.

of their implied warranty of habitability rights and duties;

Adopting clear procedures for a tenant to enforce the implied warranty of habitability; and

Initiating court reform with prompt availability of remedies.

### *B. Legislative Implementation*

Detailed implied warranty of habitability legislation helps landlords, tenants and courts. State legislatures should enact detailed laws with clear standards and procedures that apply throughout the state, especially in those areas without a local housing code.[225] Fortunately, states without detailed habitability statutes can use the Revised Uniform Residential Landlord Tenant Act ("RURLTA") as a template.[226] Adopting clear standards for a landlord's duty to maintain habitable premises will begin with RURLTA Section 302, which provides that a landlord has a non-waivable duty to maintain the premises in a habitable condition, and includes a detailed list of what makes the premises "habitable," such as compliance with building codes, access to essential services, and a list of twelve other specific conditions.[227]

Next, tenants must be aware of their rights and obligations regarding the implied warranty of habitability.[228] As discussed in Part III, these rights and obligations are confusing, especially when statutes and common law both apply. Landlords are in the best position to disseminate the information and the implied warranty of habitability statutes should require they do so through posters in common areas of the premises, as part of the lease agreement, and as part of a notice regarding delinquent rent or an eviction.[229] Landlords receiving subsidized rent payments should also disseminate information about HUD standards and notification procedures.[230]

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225 This detail is necessary because many cities and counties do not have building, housing or health codes applicable to rental housing. RURLTA § 302 cmt. at 28.

226 The Uniform Law Commissioners approved a Revised Uniform Residential Landlord Tenant Act ("RURLTA") in 2015, but it has not been enacted in any state.

227 RURLTA § 302(a)(2)-(a)(13) describes conditions and facilities such as: weather protection; plumbing; access to water; heat; electrical; pest control; common area maintenance; trash removal; repair of floors, ceilings and windows; appliances; locks; and safety equipment.

228 *See* Tokarz, *supra* note 183, at 178.

229 Courts lack the facilities and the inclination to conduct community legal education so general consumer protection laws [similar to Dodd Frank] may require landlords to give tenants some information about their rights when seeking to collect rent. Super, *supra* note 22, at 406 (citing Mary B. Spector, *Tenant's Rights, Procedural Wrongs*, 46 WAYNE L. REV. 135, 207-208 (2000)). The New Jersey Truth in Renting Act requires landlords to distribute information regarding legal rights and responsibilities of landlord and tenant. Failure to comply subjects a landlord to a penalty of up to $100 for each offense. Franzese, *supra* note 84, at 32, 33 n.115 (citing N.J. REV. STAT. § 46:8-43 (2017)).

230 HUD has a procedure for notification, inspection and rent withholding for the Housing

Tenants then need a clear, simple, constitutionally compliant process to enforce the implied warranty of habitability. As discussed in Part IV, a landlord has a due process right to the rent payments that must be protected. Requiring notice of the breach of the implied warranty of habitability, and the escrow of withheld rent when a tenant retains possession, satisfies this constitutional requirement. RURLTA Section 401 requires that a tenant give the landlord notice and an opportunity to remedy an alleged non-compliance. Section 402(a)(2)(A) provides the option for tenant to retain possession while withholding rent, and Section 408 allows a tenant to use the landlord's noncompliance as a defense to an action for nonpayment of rent.

While Section 408(b) gives landlord or tenant the right to request a court order for escrow of rent, it is in everyone's best interest that this escrow is mandatory. [231] The rent escrow forces a tenant to remain current with her rent payments, protects the landlord's property rights, and provides an incentive for the landlord to expeditiously make repairs. A court may order escrowed rent released to the landlord to be used only to repair the property, or released to the tenant for actual damages or in compensation for repairs tenant made in compliance with the act.[232]

Circumstances may also arise that require landlords to pay money into escrow. If a tenant is forced to vacate uninhabitable property for health or safety reasons, landlord will deposit additional funds to pay a tenant's rent in an alternate dwelling until the landlord's property is returned to a habitable condition. When a landlord is a repeat violator of the implied warranty of habitability, the statute should require landlords to pay money into escrow as a penalty. It is also essential that courts escrow funds landlord would otherwise receive directly from the government that subsidize the tenant's rent. [233] Due to the absence of

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Choice Voucher Program. 24 C.F.R. § 982.401 (2017).

231 A rent escrow requirement is equitable in nature so landlords theoretically should establish the usual prerequisites for obtaining equity, including irreparable harm, inadequacy of remedies at law, likely success on the merits and clean hands. Equity principles would require landlords to prove that they have complied with health and safety laws to receive the "extraordinary" protection of an LPO, but there is little evidence this happens in practice. Super, *supra* note 22, at 430 (citing *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970)). Some jurisdictions require landlords to take the initiative by filing a motion and showing a clear need for protection or something similar. Super, *supra* note 22, at 430 (citing *Bell* at 483-84; CONN. GEN. STAT. § 47a-26b (2006); MICH. CT. R. 4.201(H)(2)).

232 RURLTA §408(d).

233 The incentive of a rent escrow is sharply reduced when the majority of rent comes from government subsidies and is not withheld when there is a breach of the implied warranty of habitability. This may be a significant contributor to the low rate of relief granted to low-income tenants. Super, *supra* note 22, at 432. *See also* Super, *supra* note 22, at 427 (citing *Cooks v. Fowler*, 459 F.2d 1269, 1272, 1274 (D.C. Cir. 1971) holding an LPO is unsustainable when it requires the tenant to deposit as security more than the landlord could legitimately claim on that account.) Notifying the government should be required along with the tenant's notice to the landlord. HUD has a procedure for notification, inspection and rent withholding for the Housing Choice Voucher

coordinated databases, in many cities landlords continue to receive large government rent checks even though there is a dispute about the premises' habitability.[234] With these procedures, funds from landlord, tenant and the government are available to achieve the social justice outcome anticipated by the implied warranty of habitability.

### *C. Court Adaptation*

As indicated throughout this article, courts are an integral part of a process that requires court reform and begins with consistency on the bench.[235] As discussed in Part V, courts are not prepared for the scope and magnitude of habitability cases, especially with so many pro se tenants. Until more resources are available to reduce the number of pro se tenants, courts must do a better job of protecting a tenant's rights.

Ensuring access to justice is the most frequently missing component in housing strategies,[236] and it includes demystifying court procedures.[237] With statutory authority, judges should ask tenants affirmatively whether serious defects exist in the property and lead the tenants through the essential elements of a habitability-based defense.[238] The judiciary should conduct regular training for judges on habitability-based claims and engagement of self-represented litigants.[239] Judges must be willing to rule against landlords that had almost invariably prevailed in their courts under previous policies,[240] and judges must hold landlords accountable for not only maintaining habitable properties, but also complying with the requirement to notify tenants of their rights and remedies.

Larger metropolitan areas with numerous landlord/tenant cases will realize economies of scale and increased efficiency using separate housing courts with judges (or commissioners) and staff that get involved in determining landlord's compliance with the implied warranty of habitability and the suggested notification requirements. Judges need access to data, including independent verification of the condition of the properties.[241] Requiring an independent property inspection will help

Program. 24 C.F.R. § 982.401 (2017).

234 Franzese, *supra* note 84, at 18.

235 BALTIMORE RENT CT., *supra* note 181, at 51.

236 Farha, *supra* note 215.

237 Blasi, *supra* note 181, at 865.

238 BALTIMORE RENT CT., *supra* note 181, at 52.

239 *Id*.

240 Super, *supra* note 22, at 413.

241 New York City has computer terminals at the bench of each housing court judge with access to a database of dwelling inspection reports, which can be accepted into evidence. The courts also have a dedicated housing court inspection squad the judges use to inspect the units in question. Franzese, *supra* note 84, at 27 n.106.

courts make an informed decision about allocating fault and enforcing an equitable remedy. The inspection findings should be entered in a database accessible to judges and rent-subsidizing agencies.[242] Smaller jurisdictions without resources for specialized courts and independent inspectors need to be especially diligent in requiring, and then taking the time to review, evidence of the property's condition from landlords and tenants.[243]

Trial courts are given a great deal of discretion to determine what breaches the obligation to provide habitable premises and how much proof must be brought forward to establish damages.[244] Where so many parties – particularly tenants – proceed pro se, an equity based ad hoc analysis of these claims is the best way to achieve the larger policy goal of eliminating substandard rentals and protecting the investment of legitimate landlords from tenants who are merely seeking to avoid paying rent.[245] Judges who hear evidence and observe the landlord and tenant have the best chance to observe their credibility and reliability.[246]

Courts and judges can also be part of a more compassionate housing strategy. In Cleveland's Community Court, the judge in an eviction case asks the tenant why she is behind on her rent, not simply if she is behind.[247] Full-time social workers in the court immediately work with the judge and the tenant to develop a compromise that helps the landlord receive payment.[248] Of course, inspectors, databases and social workers require funding. Potential sources of funds include state or federal grants, fines from landlords that are repeat offenders, and increased filing fees for landlords.

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242 *Id*. at 22. New York City has computer terminals at the bench of each housing court judge with access to a database of dwelling inspection reports, which can be accepted into evidence. The courts also have a dedicated housing court inspection squad the judges use to inspect the units in question. *Id*. at 27 n.106.

243 RURLTA Comment to §402 indicates a courts determination of the diminution in value due to a breach of the implied warranty of habitability need not include expert testimony. A court may consider the nature and duration of the defect, the proportion of the property that is affected, the value of services to which the tenant was deprived, the degree of discomfort imposed by the defect, and the effectiveness of the landlord's remediation efforts.

244 Campbell, *supra* note 4, at 836.

245 *Id*. at 834.

246 *Id*. at 832. Findings of the trial court will not be disturbed unless they are so wholly insupportable as to result in a denial of justice. *Id*. at 831 (citing Cohn v. Hinges, SC-2950-10, 2011, WL 6820293 at *4 (N.J. Super Ct. 2011), and Rova Farms Resort v. Investors Ind., 65 N.J. 474, 483-84 (1974)). The trial court has broad discretion to determine whether a particular condition is a material breach of the implied warranty of habitability. Campbell, *supra* note 4, at 831 (citing Pocasset Mobile Home Park, LLC v. Carvalho, 2011 WL 1744114, at *2 (Mass. App. Div. 2011)). *See* Campbell, *supra* note 4, at 832-833 for a discussion of courts finding tenant lacks credibility in a claim for breach of implied warranty of habitability.

247 *First-Ever Evictions Database Shows: 'We're In the Middle Of A Housing Crisis,'* NPR, supra note 217.

248 *Id*.

## VII. Conclusion

The implied warranty of habitability is a crucial component of landlord/tenant law. Its goal of ensuring a habitable home for all tenants is an integral part of achieving social justice in the rental housing market. After fifty years in existence in forty-nine states, however, there are still too many tenants that are unable to benefit from the implied warranty of habitability because of its procedural deficiencies. Rent payment procedures are at the epicenter of these shortcomings.

Too many landlords are allowed to breach their duty to provide habitable premises, and rent is the only effective sword and shield available to all tenants. It is the one item a tenant has that a landlord wants, and it is the most important source of cash flow that enables a landlord to supply the shelter that a tenant needs. Withholding and protecting rent payments provides the incentive and the means for landlords to fulfill their implied warranty of habitability duty. This is why protecting rent with a rent escrow procedure is crucial to the efficacy of the implied warranty of habitability.

The studies discussed in this article are an indication that society is increasingly aware of the problem, but the courts, legislators and the legal community need to act now to address the situation by implementing the changes suggested here. When the courts get involved in managing the escrowed funds and monitoring the completion of required repairs, tenants benefit. When landlords, legislators and the legal community get involved in making the implied warranty of habitability process fair to landlords and tenants, social justice is achieved. The goal of the implied warranty of habitability is attainable when rent escrow procedures are in place in all jurisdictions to allow the implied warranty of habitability to function effectively as a sword and a shield for tenants in their quest for a safe, habitable home.

## APPENDIX

State Law Regarding Landlord's Duty to Maintain Premises

| State | Statute | Similar to URLTA 2.104(a) | Common Law | Rent Escrow |
|---|---|---|---|---|
| Alabama | 35-9A-204 | Yes | | 35-9A-405(a) |
| Alaska | 34.03.100 | Yes | | 34.03.190(a)(3) |
| Arizona | 33-1324 | Yes | | 33-1365(A) |
| Arkansas | none | n/a | None | |
| California | 1941.1 | No | | |
| Colorado | 38-12- | No | | 38-12- |

| | 503 | | | 507(1)(c) |
|---|---|---|---|---|
| Connecticut | 47a-7 | Yes | | 47a-14h |
| Delaware | 5305† | No | | |
| District of Columbia | none | | Javins 1970 | |
| Florida | 83.51 | No | | 83.60(2) |
| Georgia | 44-7-13 | No | | |
| Hawaii | 521-42 | Yes | Leml e 1969 | 521-78 |
| Idaho | 6-320 | No | | |
| Illinois | none | | Jack Springs 1972 | |
| Indiana | 32-31-8-5 | No | | |
| Iowa | 562A.15 | Yes | | 562A.24 |
| Kansas | 58-2553 | Yes* | Claus 2006 | 58-2561 |
| Kentucky | 383.595 | Yes | | |
| Louisiana | 2682 | No | | |
| Maine | 6026 | No | | |
| Maryland | 8-211 | No | | 8-211(k)(2) |
| Massachusetts | none | | Hemingw-ay 1973 | 239-8A |
| Michigan | 554.139 | No | | 125.530 |
| Minnesota | 504B.161 | No | | 504B.385 |
| Mississippi | 89-8-23 | No | | |
| Missouri | none | | King 1973 | |
| Montana | 70-24-303 | Yes | | 70-24-421 |
| Nebraska | 76-1419 | Yes | | 76-1428 |
| Nevada | 118A.290 | No | | 118A.355.5 118A.490 |
| New Hampshire | 48-A:14 | No | | 540:13-d |
| New Jersey | 2A:42-88 | No | Reste Realty 1969 | 2A:42-85 2A:42-92 |
| New Mexico | 47-8-20 | Yes* | | |
| New | 235-b | No | | |

| | | | | |
|---|---|---|---|---|
| York | | | | |
| North Carolina | 42-42 | Yes | | |
| North Dakota | 47-16-13.1 | Yes | | |
| Oklahoma | 41-118 | Yes | | |
| Pennsylvania | 1700-1ˆ | No | Pugh 1979 | 1700-1 |
| Rhode Island | 34-18-22 | Yes | | 34-18-32 |
| South Carolina | 27-40-440 | Yes | | |
| South Dakota | 43-32-8 | No | | 43-32-9 |
| Tennessee | 66-28-304 | Yes | | |
| Texas | 92.052 | No | | |
| Utah | 57-22-4 | No | | |
| Vermont | 4457 | No | Willard 2005 | |
| Virginia | 55-225.3 | Yes | | 55-225.12B-2 |
| Washington | 59.18.060 | No | Landis 2012 | |
| West Virginia | 37-6-30 | No | | Teller v McCoy 1978 |
| Wisconsin | 704.07 | No | | |
| Wyoming | 1-21-1203 | No | | |

†Del. Code Ann. tit.25, §5305 (2018)
*Excludes 2.104(a)(2)
ˆFirst and second class cities only