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Digitizing The Warranty of Habitability

Edward W. De Barbieri* & Jordan Fruchter**

The warranty of habitability was touted fifty years ago as a gamechanger in rebalancing power between tenants and landlords. Under the warranty, a residential tenant's duty to pay rent is conditioned on a landlord's obligation to make repairs. Scholars who have studied the warranty of habitability have focused on its defensive use, primarily when a tenant is already in eviction proceedings. Consensus has emerged that the warranty as a defensive shield has failed to deliver meaningful benefits to tenants living in poor housing conditions.

This Article explores whether an affirmative use of the warranty, coupled with a new technology and community organizing approach, can improve tenant outcomes. Specifically, the authors designed, built, and implemented a novel tool available for tenants to bring pro se actions for money damages in small claims courts for breaches of the warranty of habitability. The Warranty of Habitability Abatement of Rent Mathematical Calculator ("H.A.R.M. Calculator") is an efficiency application that allows law students and attorney volunteers to assist tenants in preparing small claims court pleadings. Tenants then file their complaints and, when successful, obtain judgments for money damages against their current or former landlords.

This Article contributes to the poverty law, housing law, and legal technology literatures by focusing on the warranty of habitability in a new way. An affirmative, tenant-centered remedy has the possibility of shifting power dynamics between tenants and landlords. Through initial data collected, the authors have developed working hypotheses that the tool will test through future research.

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* Associate Professor of Law, Director, Community Economic Development Clinic, Albany Law School. Thanks to Ray Brescia, Danshera Cords, Davida Finger, Lee Anne Fennell, Serge Martinez, Pat Reyhan, Ezra Rosser, Kathryn Sabbeth, Nicole Summers, Geeta Tewari, and participants at a works-in-progress session at the 2021 Law & Society Conference, the AALS Section on Poverty Law March 2022 Works-in-Progress Conference, and the Albany Law School Summer Writing Workshop for comments on earlier drafts. Thank you to Zana Beck for excellent research assistance. Thank you to Tom Hemstock in the Schaffer Law Library for aid tracking down difficult to locate sources. Thank you to Jasper Burroughs, Samuel Kishiyama, Miranda Tafoya, and the editors of the *UC Irvine Law Review* for their superb feedback and thoughtful editing.

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INTRODUCTION

In March 2019, Tiana and David Logan paid $2,150 to rent a three-bedroom apartment with their three children in Albany, New York.[1] Soon after moving in, members of the family developed respiratory issues.[2] Water stains, black spots, and a home-test kit pointed to the presence of mold in the apartment.[3] In April 2019, the following month, the city issued the building's landlord a violation for excessive moisture in the apartment.[4]

When the Logan family promptly vacated the apartment because living there was causing adverse health issues, they sought reimbursement of their rent.[5] The landlord refused and threatened a lawsuit because the family was leaving early.[6] Only through the kindness and generous gift of a stranger did the Logans recover the $2,150 they paid in rent.[7]

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1. Chris Churchill, *Churchill: Family's Apartment Turned into a Nightmare*, TIMES UNION (Apr. 15, 2019, 10:29 AM), https://www.timesunion.com/7dayarchive/article/Churchill-13763204.php [https://perma.cc/9VE4-JJ76] (describing a family's experience renting an apartment, becoming ill from apparent mold and excessive moisture, and being unable to recover their rent upon vacating the unit).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. The supposed cause of action for the lawsuit would presumably be for the Logans' breach of the lease by vacating the unit prior to the lease expiration. *Id.*

7. Chris Churchill, *Churchill: A Kindness that Family's Landlord Wouldn't Muster*, TIMES UNION (Apr. 20, 2019, 5:14 PM), https://www.timesunion.com/7dayarchive/article/Churchill-A-kindness-that-family-s-landlord-13780900.php#taboola-4 [https://perma.cc/QGP9-K5NR] (describing a stranger's kindness in writing a check to a family who vacated apartment following illness from excessive moisture).

A few months earlier, in January 2019, Shatika Morris, a single-mother, and her ten-year-old daughter lived in a different apartment owned by the same landlord as the Logan family's apartment.[8] Having lived through a damaged roof that let water drip onto furniture and clothing, and a persistent lack of hot water, Morris decided to move out.[9] When Morris failed to pay her final month's rent on time, her landlord sued her twice for a total of $2,993.[10] With the support of a local tenants' rights group, Morris countersued her landlord, alleging $5,000 in damages.[11] Morris eventually won a judgment against her landlord from the local court in the amount of $2,219.[12] Morris sued for $3,000 in abatement of rent based on a claim that her landlord breached the warranty of habitability doctrine.[13] While Morris was still required to enforce the judgment against her landlord, securing a money award under the warranty of habitability doctrine was one way to fight back following her landlord's intransigence in making repairs.

It is an understatement to say that there is a significant power imbalance between low-income residential tenants and landlords.[14] Low-income tenants, many

8. *Id.*

9. *Id.*

10. *Id.*

11. Recently in New York State, for example, the statutory cap for money damages in New York City Civil Court was increased to $10,000 from $5,000; the cap remains $5,000 for city courts outside New York City, and $3,000 for town and village courts. S. S6417, 2019–2020, Reg. Sess. (N.Y. 2019); S. S69, 2021–2022, Reg. Sess. (N.Y. 2021).

12. A short time ago, the New York State Legislature passed a bill to expand small claims court jurisdiction over absentee landlords who live outside the city or county where the small claims court is located. S. S69, 2021–2022, Reg. Sess. (N.Y. 2021).

13. A first-year law student is taught that a breach of the warranty of habitability can be cured with a simple three-step process. Step one is to place the landlord on notice. Step two is to wait a reasonable period of time for the landlord to cure the repairs issue. Step three is to withhold rent until the issue is fixed. *See* OPEN SOURCE PROPERTY CASEBOOK, at 73, https://www.dropbox.com/s/ycai5ilngh9u54z/OSP_Landlord%20Tenant_Clowney_2020_08_20.pdf?dl=0 [https://perma.cc/6YJG-H7FT]. As is often the case, the remedy found in the law student's casebook is much more challenging to implement in the real world. Oftentimes, given the threat of eviction, withholding rent simply is not an option for tenants facing uninhabitable living conditions.

14. *See, e.g.*, PHILIP ME GARBODEN & EVA ROSEN, THE THREAT OF EVICTION: HOW LANDLORDS SHAPE A CONTINGENT TENURE (2019), https://www.law.nyu.edu/sites/default/files/Garboden_Rosen_ThreatofEviction_2019.pdf [https://perma.cc/9EDZ-BS52] (finding that landlords use a power imbalance, supported by the *threat* of eviction to keep poor tenants from exercising their legal rights with respect to code enforcement). In an extreme and tragic instance, a landlord frustrated at not being able to evict residential tenants during the pandemic is alleged to have violently kidnapped two sleeping tenants and dropped them in a graveyard half an hour drive from the apartment unit they were living in. Brendan J. Lyons, *Police: Albany Landlord Tied Up, 'Evicted' Sleeping Tenants, Dumping Them in Cemetery*, TIMES UNION (Feb. 26, 2021, 8:53 AM), https://www.timesunion.com/news/article/Albany-landlord-tied-up-evicted-sleeping-15972981.php [https://perma.cc/S6D7-DK37]. The authors have presented this paper to a number of legal academic audiences, and in a number of unscientific Zoom chats participants identified "power disparities," "money or lack thereof," "mutual trust & respect," "threat of eviction, rent unaffordability," "power imbalances," and "different goals-consumption versus property value" as reasons for the underlying tension between residential tenants and landlords.

of whom face unstable housing[15] and chronic eviction[16] are frequently unrepresented in eviction proceedings.[17] Landlords frequently lack a financial incentive to repair housing units rented to low-income families and individuals.[18]

The experiences residential tenants such as the Logans and Morrises face with respect to needed repairs are common across the country.[19] Matthew Desmond's 2016 Pulitzer Prize winning book, *Evicted: Poverty and Profit in the American City*, studied and brought to public consciousness in tragic detail instances of chronic eviction and their sociological consequences.[20] At the same time, legal scholars have increasingly uncovered the impacts of eviction during the pandemic[21] and the rise of geographic inequality more broadly.[22]

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15. Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638 (2019); Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316, 316 (2021).

16. By chronic eviction, we are referring to situations where tenants are evicted repeatedly over the course of their lives. This is related to, but slightly different than, the notion that Eva Rosen and Philip Garboden discuss as "serial evictions." *See id.*

17. In one major city, court administrators reported in 2014 that ninety-nine percent of tenants were unrepresented by counsel. PERMANENT COMM'N ON ACCESS TO JUST., REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 24 (2015), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/2015_Access_to_Justice-Report-V5.pdf [https://perma.cc/DNA4-72R6] (citing The Chief Judge's Hearing on Civil Legal Services (2014)).

18. *See, e.g.*, Eva Rosen, *Rigging the Rules of the Game: How Landlords Geographically Sort Low-Income Renters*, 13 CITY & CMTY. 310, 329 (2014) (discussing evidence that landlords sort for low-income tenants with limited ability to move and use code enforcement mechanisms to make repairs and charge tenants for the work done).

19. *See, e.g.*, Zack Briggs, *'Frustrating Situation' | Tenants of Northwest Side Apartment Complex Living with No Hot Water for Past Month*, KENS5 (Oct. 4, 2022, 6:34 PM), https://www.kens5.com/article/news/local/no-hot-water-san-antonio-apartments/273-92de4ae2-86d2-44aa-aee5-5bcff042f82d [https://perma.cc/GB3E-W653].

20. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016). The legal academy response to Desmond's work has been significant. YALE LAW JOURNAL FORUM, for instance, published three book reviews of EVICTED in an April 2017 volume. *See* Lisa T. Alexander, Evicted*: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J.F. 431 (2017); Laurie Ball Cooper, *Legal Responses to the Crisis of Forced Moves Illustrated in* Evicted, 126 YALE L.J.F. 448 (2017); Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability,* 126 YALE L.J.F. 458 (2017).

21. *See, e.g.*, Emily A. Benfer, David Vlahov, Marissa Y. Long, Evan Walker-Wells, J.L. Pottenger, Jr., Gregg Gonsalves & Danya E. Keene, *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1, 2 (2021) (finding that eviction and housing displacement led to increased spread of COVID-19 disproportionately affecting low-income groups and communities of color); Michelle D. Layser, Edward W. De Barbieri, Andrew J. Greenlee, Tracy A. Kaye & Blaine G. Saito, *Mitigating Housing Instability During a Pandemic*, 99 OR. L. REV. 445 (2021) [hereinafter *Mitigating Housing Instability*] (arguing that policymakers should place focus on housing instability in short term relief efforts addressing the harms of the pandemic).

22. *See, e.g.*, Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1765 (2021) (discussing the rise of superstar cities like New York, San Francisco, Boston, and Atlanta, which lack affordable housing, and the health, education, and economic disparities of cities and rural areas left behind); Michelle D. Layser, *Subsidizing*

Chronically evicted tenants disproportionately come from and reside in communities of color.[23] Further, chronically evicted tenants and those experiencing housing instability are more likely to have suffered severe health outcomes during the pandemic.[24] Even though evictions were a scourge before the pandemic, housing insecurity added to the ongoing public health crisis.[25]

Recent scholarly attention has focused on the defensive use of the warranty of habitability during eviction proceedings.[26] Such studies have classified the warranty as a failed poverty alleviation approach.[27] Poverty, and the diminished social standing of poor tenants, is a major barrier to enforcing tenants' rights at law.[28] Unsurprisingly, empirical evidence points to race as the "strongest demographic predictor of evictions."[29] Despite studies regarding the warranty as a defense, no study of the warranty of habitability explores its use as an *affirmative* tool for tenants to use prior to eviction.

This Article places laser-like focus on the rights of residential tenants like the Logans and Morrises who seek repairs and damages under the warranty of

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Gentrification: A Spatial Analysis of Place-Based Tax Incentives, 12 U.C. IRVINE L. REV. 163, 167 (2021) (presenting analysis of federal tax data suggesting that government subsidies flowed disproportionately to areas exhibiting signs of gentrification, concentrating government incentives and reducing opportunity broadly).

23. Zoe Greenberg & Tim Logan, *A 'Tsunami of Evictions' Threatens to Strike Boston*, BOSTON GLOBE (June 28, 2020, 12:01 AM), https://www.bostonglobe.com/2020/06/28/metro/tsunami-evictions-threatens-strike-boston [https://perma.cc/VXV2-24N5] (reporting that the coming wave of evictions is likely to impact Black communities most, compounding the impacts of the COVID-19 pandemic on Black residents).

24. Don Bambino Geno Tai, Aditya Shah, Chyke A. Doubeni, Irene G. Sia & Mark L. Wieland, *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, CLINICAL INFECTIOUS DISEASES, June 2020 (finding disproportionate impact of COVID-19 on African American, Latinx, and Native American communities, and noting the connection between housing instability and adverse impacts on public health). Adverse health outcomes are associated with eviction more broadly. *See* Gracie Himmelstein & Matthew Desmond, *Association of Eviction with Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, 175 JAMA PEDIATRICS 494, 494 (2021) (finding that eviction actions during pregnancy lead to poor birth outcomes).

25. *See Mitigating Housing Instability*, *supra* note 21 (arguing that policymakers should place focus on housing instability in short term relief efforts addressing the harms of the pandemic).

26. *See, e.g.*, David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 394–95 (2011) (arguing that the tenants' rights revolution failed to meaningfully impact poverty because of several fundamental defects).

27. *Id.*

28. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. ON POVERTY L. & POL'Y 97, 101 (2019) (identifying poverty as the source for lack of enforcement of tenants' rights and proposing legal solutions to address enforcement of deficient housing conditions).

29. Davida Finger, *The Eviction Geography of New Orleans: An Empirical Study to Further Housing Justice*, 22 U.D.C. L. REV. 23 (2019) (finding that race plays a significant role in evictions of tenants in New Orleans, highlighting participatory research as a key method for telling tenant stories, and concluding the need for tenant stories to guide law and policy reform); *see also* Nicole Summers, *Civil Probation*, 75 STAN. L. REV. (forthcoming 2023) (manuscript at 11 & n.36), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4117813_code2704910.pdf?abstractid=3897493&mirid=1&type=2 [https://perma.cc/AJ4A-7JKU].

habitability in an affirmative manner. Focus on the affirmative use of the warranty of habitability is timely for three reasons. First, as eviction moratoriums expire,[30] landlords will increasingly turn to the courts for relief from tenants who are behind in paying their rent.[31] Tenants are wise to consider legal rights that can act as a sword before receiving an inevitable notice to quit or notice to terminate, necessitating the illusory shield against eventual eviction.

Second, many tenants have been living through particularly challenging housing conditions that have gone unrepaired by landlords during and before the pandemic.[32] Asserting meritorious claims under the warranty of habitability offers tenants the opportunity to either compel landlord repairs for a tenant still in possession of a residential unit or, if the tenant has vacated the unit, the tenant may assert a meritorious claim for repairs, which can help the tenant recover rent already paid. In either case, for the worst actor landlords who fail to provide safe and sanitary housing, a movement among tenants to assert warranty of habitability claims creates an incentive for owners to make repairs.[33] Increasing the cost of being

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30. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2320 (2021) (mem.) (denying an application to vacate a District Court's stay of its order related to the federal eviction moratorium); *Id.* at 2321 (Kavanaugh, J., concurring) (noting that congressional authorization is needed to extend the moratorium past July 31, 2021). The Center for Disease Control and Prevention Director Dr. Rochelle Walensky extended the eviction moratorium through July 31, 2021. Press Release, Ctrs. For Disease Control & Prevention, CDC Director Extends the Eviction Moratorium for 30 Days (June 24, 2021), https://www.cdc.gov/media/releases/2021/s0624-eviction-moratorium.html [https://perma.cc/S3JW-SPCD]. When the CDC reinstated the moratorium after it expired in July 2021, the Supreme Court struck down the moratorium. Ala. Ass'n of Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2490 (2021) (per curiam). The Mercatus Center at George Mason University has proposed stemming the tide of evictions by encouraging renegotiation, limiting the pace of evictions, and creating incentives for landlord forbearance. SALIM FURTH, MERCATUS CTR., GEORGE MASON UNIV., WHEN THE MORATORIUM EXPIRES: THREE QUICK STEPS TO REDUCE EVICTION (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664186 [https://perma.cc/NR4N-YAGX].

31. States such as Idaho and Missouri, which lacked statewide eviction bans, saw a spike in eviction cases to 2019 levels after initial pandemic-related court closures in March 2020. Benjamin Larsen & McAllister Hall, *Despite Federal Moratorium, U.S. Eviction Rates Returning to Pre-Pandemic Levels*, PHYS.ORG: THE CONVERSATION (May 24, 2021), https://phys.org/news/2021-05-federal-moratorium-eviction-pre-pandemic.html [https://perma.cc/FX9V-A6UP].

32. In one particularly gritty instance captured by a Washington Post reporter, a New York tenant was living in an apartment with no heat in a building condemned by the city, following the landlord's failure to make any repairs when the tenant stopped paying rent after a pandemic-related job loss during the pandemic. Eli Saslow, *The Battle for 1042 Cutler Street*, WASH. POST (May 1, 2021), https://www.washingtonpost.com/nation/2021/05/01/landlord-tenant-eviction-moratorium-pandemic/ [https://perma.cc/8LB9-TGET] (highlighting hardships facing both landlords and low-income tenants during the pandemic).

33. Whether legal services interventions to improve tenant living conditions raises landlord costs is a subject of scholarly debate. For example, John Bolton, Stephen Holtzer, and Robert Daines, authored two studies that argued that legal services attorneys—through eviction defense work—may be enriching their clients at the expense of other poor tenants since such defense increases landlord costs (which must be passed on to other tenants). *See* Note, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973); Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served*, 13 YALE L. & POL'Y REV. 385, 386 (1995) (first citing

a landlord who fails to repair housing units across a portfolio of buildings may lead some to change their business practices and improve conditions for their tenants.

Third, within state and local jurisdictions there is often a lack of judicial consistency with respect to damages calculations related to the warranty of habitability.[34] This is not surprising as most damages are calculated based on fact-specific inquires and findings.[35] However, as a matter of consistent application, similar claims ought to have similar rent abatements awarded to tenants. Offering judges and court staff a simpler body of decisions from which to cite and make orders has the potential to improve judicial efficiency.[36]

Adjacent to the scholarly discussion about the warranty of habitability are two related scholarly conversations. In one vein, scholars discuss how the law is designed to favor landlords over tenants.[37] In another, scholars continue to explore the question of whether *pro se* litigants with civil disputes are able to access justice fairly.[38] Related to this second question is whether low-income individuals ought to have a right to counsel in civil matters.[39]

Recently, Professor Nicole Summers has built on these strands of scholarly inquiry by summarizing research about the warranty of habitability and classing it into two categories.[40] One set of studies explores the frequency with which tenants assert warranty of habitability claims without concern for which tenants have

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Note, *supra*; and then citing Robert Daines, *Landlord-Tenant Litigation and the Impact of Free Legal Services* (1991), *in* JEROME N. FRANK LEGAL SERVS. ORG., LANDLORD-TENANT CLINICAL PROJECT CLASS MATERIALS (1995) (unpublished manuscript) (on file with Jerome N. Frank Legal Services Organization, Yale Law School)). Steven Gunn refutes this line of studies, concluding instead that eviction representation by legal services attorneys typically result in tenants paying all or substantially all their rent, proving that landlords are not harmed through such representation. *See* Gunn, *supra*.

34. In the case law research for this project, the authors found percentage abatements ranging from 100% to 5% for infestations, 50% to 5% for hot waters issues, and 50% to 8.75% for floor or ceiling damage. *See infra* Appendices 1, 2. Given the range of severity of housing conditions it is not necessarily surprising to see a range in percentage abatements. However, it is still difficult for judges and court staff to quickly view a "market" rent abatement for conditions across an entire state. One goal of this project is to provide such a resource based on the authors' research and the work of our research team.

35. *See infra* Appendices 1, 2.

36. The authors' research in New York State, *infra* Appendices 1, 2, is one attempt to summarize what is an otherwise inconsistent set of case law with respect to rent abatement awards.

37. *See* Rosen, *supra* note 18; Sabbeth, *supra* note 28; Finger, *supra* note 29.

38. *See, e.g.*, Deborah L. Rhode & Ralph C. Cavanagh, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976) (studying and discussing the difficulty pro se parties face nationally in seeking products to assist with divorce filings).

39. For an all-encompassing argument on a civil litigation right to counsel, see John Pollock & Michael S. Greco, Response, *It's Not Triage if the Patient Bleeds Out*, 161 U. PA. L. REV. PENNUMBRA 40 (2012) (presenting the case for a Gideon-style right to counsel for eviction cases).

40. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 151–52, 214 (2020) (presenting evidence of an operationalization gap in the warranty of habitability, supporting claims of increased access to counsel as a way to lead to a rise in asserting the warranty of habitability, but noting that most tenants represented by counsel who asserted meritorious claims still did not benefit from the law).

meritorious claims.[41] A second set of studies analyzed a small group of non-representative case studies of tenants with meritorious claims.[42] Summers' own research points to an operationalization gap, specifically a gap between tenants with meritorious claims and those who benefit from making such a claim.[43] Further, the data Summers and her team analyzed of twelve hundred eviction cases filed in New York City revealed that a lack of access to counsel and onerous requirements for asserting a claim were not the primary barriers to tenants winning relief.[44]

As it stands now, the warranty of habitability appears to be a legal nullity.[45] Most tenants, even when represented by counsel in eviction proceedings, are unable to benefit from the warranty's protection. Most landlords who own and rent out substandard apartments to low-income tenants fail to make repairs even when ordered to do so by the courts.[46] Accountability is weak, and judicial oversight is almost impossible given the existing heft of eviction dockets.

Against the backdrop of this problem, we explore a potential solution and seek to test its efficacy. In particular, this Article seeks to introduce and explore a key question: if landlord noncompliance is costlier than compliance, does the warranty of habitability create an incentive for landlords to make repairs? Given what Summers calls the warranty of habitability's operationalization gap, the authors seek to discover whether a tool that regularizes the calculation of damages and presents judges with a consistent damages calculation can impact the ability of tenants to benefit from the warranty.[47]

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41. *Id.* at 151 (first citing Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenants Reform*, 69 RUTGERS L. REV. 1, 22–23 (2016); then citing Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV., 533, 547–48 nn.52–54 (1992); then citing Anthony J. Fusco, Jr., Nancy B. Collins & Julian R. Birnbaum, *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 URB. L. ANN. 93, 109–11 (1979); and then citing Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8, 42 (1973)).

42. *Id.* at 152 (first citing Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57, 67–69 (2015)); and then citing Franzese, Gorin & Guzik, *supra* note 41, at 23 n.97.

43. *Id.* at 149.

44. *Id.* at 152–53 (concluding that while tenant representation did matter, most represented tenants asserting meritorious claims still did not receive a benefit, and the cases studied were in New York, a state lacking in onerous legal requirements for asserting the claim). In addition, Summers' findings refute the theory that providing code enforcement records to judges will narrow the operationalization gap since judges who have access to such records rarely use them. *Id.* at 153.

45. The authors make this statement cognizant that it in part contrasts observations made almost forty years ago about the increase in tenants' rights and the resulting decrease in landlords' rights. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1984) ("Tenants' rights have increased dramatically; landlords' rights have decreased dramatically.").

46. *See, e.g.*, DESMOND, *supra* note 20 (featuring landlord narratives).

47. It has been suggested that judges are technologically illiterate. *See* David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817 (1977). A goal of this project is to

A novel web-based calculator, which the authors are calling the Warranty of Habitability Abatement of Rent Mathematical Calculator ("H.A.R.M. Calculator"),[48] is an efficiency application that allows law students and attorney volunteers to assist tenants in preparing small claims court pleadings.[49] Tenants then take the pleadings created with a volunteer, file them in small claims court, and, if successful, obtain judgments for money damages against their current or former landlords.[50] Tenants may then seek to enforce those judgments. Enforcement of the judgment may occur in a number of ways—for example, through a rent abatement for a tenant in possession of the housing unit or an offset against rent owed for a tenant who has already vacated the unit.

In presenting a potential legal technology solution to the operationalization gap presented by the warranty of habitability, this Article adds to the academic literature in a number of ways.[51] First, it offers additional empirical evidence that the substantive law and legal processes in housing evictions favor landlords. Second, it introduces a potential solution to the problem of this power imbalance. Such contributions are relevant to poverty law, housing law, and legal technology literatures.

Finally, it is possible to further make the warranty of habitability a part of eviction proceedings by including two mandatory steps. First, as Professor Serge Martinez has argued, courts could require landlords to plead the absence of repairs issues when seeking to evict.[52] And second, judges in eviction matters could make mandatory findings that an absence of adverse repairs issues exists before permitting the eviction to proceed.[53] The H.A.R.M. Calculator could aid tenants in

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use technology to better present a damages calculation to a judge in a way that she can easily understand and render a ruling without the need to engage with complex technological issues.

48. Author Jordan Fruchter coined the term for this tool and presented it at the 7th Annual Stanley M. Grossman Innovators Invitation at Brooklyn Law School, where he was awarded second place. Lauren Mineau, *Clinic Student's Prize-Winning Tech Tool Puts the Power in Tenants' Hands*, ALB. L. SCH. (May 7, 2020), https://www.albanylaw.edu/the-justice-center/news/clinic-students-prize-winning-tech-tool-puts-the-power-tenants-hands [https://perma.cc/9FDQ-PN6Y].

49. Currently the tool is located on our servers and is being used by Albany Law School clinical and pro bono students in conjunction with United Tenants of Albany staff and court-based advocates. *See* https://tenants.albanylaw.edu.

50. More research and repetitions in the usage of the tool are needed. However, in the small number of instances where tenants have used documents generated from the tool, judges have positively responded to the specificity of damages calculations. Further, demonstrations to judges and tenant side attorneys have proved encouraging and have been well received. The authors are discussing implementing the tool in a number of cities in New York State, as well as in Oregon and elsewhere.

51. In addition, the lessons learned from the creation of this tool may have applications in other housing and poverty law contexts. Such uses and applications are beyond the scope of this current project.

52. Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 272 (2020) (proposing that landlords must plead an absence of conditions that would abate rent owed for nonpayment eviction matters).

53. *Id.* at 275 ("[J]udges should be required to make a finding on conditions in every lawsuit—for possession or damages—based on nonpayment of rent.").

offering jurisdiction-specific case law to support a specific claim for damages, as well as providing an argument to present to the court for a possible judicial finding.

Following this Introduction, the Article proceeds as follows. Part One provides a history of the warranty of habitability from early common law to its eventual codification. It places the warranty of habitability within other poverty law movements and raises challenges to enforcing the warranty of habitability. In addition, it discusses the availability of traditional remedies to low-income tenants and notes the inadequacies of those remedies. Finally, Part One identifies inconsistent application across courts, even those within the same state, as a barrier to asserting the warranty of habitability.

Part Two proposes an alternative remedy—seeking relief through money judgement in small claims court—and a tool—the Warranty of Habitability Abatement of Rent Mathematical Calculator ("H.A.R.M. Calculator")—that can help implement this alternative remedy. In addition to assisting with the implementation of the warranty of habitability, Part Two discusses ways that using the H.A.R.M. Calculator can lead to greater judicial consistency.

Part Three articulates goals for the H.A.R.M. Calculator project moving forward. Specifically, it highlights metrics for study, expected data outputs, and opportunities for collaboration and further research. The H.A.R.M. Calculator's focus on *affirmative* cases and not the defensive use of the warranty during eviction proceedings ensures that it will not simply clog already backed-up eviction dockets.

The H.A.R.M. Calculator project focuses on an applied research methodology. That is, it takes theory, puts it into practice, and then studies the outcomes. The authors hope that by contributing to the scholarly conversation about low-income tenancy, asserting the rights of low-income tenants, and the conversation about eviction generally, they are, in some small part, contributing to the solution of lessening the societal impacts of eviction on individuals and families least able to absorb eviction's tremendous burdens.

I. CHALLENGES ASSERTING THE WARRANTY OF HABITABILITY

For residential tenants, especially low-income individuals and families, asserting their rights in court is difficult, if not impossible. The barriers include high cost and difficulty in securing counsel.[54] Without an attorney, tenants often are not able to research and gain the knowledge necessary to avail themselves of the justice system.[55]

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54. *See* PERMANENT COMM'N ON ACCESS TO JUST., *supra* note 17 (finding that 99% of tenants in eviction matters were unrepresented by counsel).

55. A comprehensive study of the Cleveland housing court, for instance, found that while dedicated urban housing courts could improve judicial responses to housing issues, housing courts are "not likely to be the linchpin or urban housing reform." W. Dennis Keating, *Judicial Approaches to Urban Housing Problems: A Study of the Cleveland Housing Court*, 19 URB. LAW. 345, 364–65 (1987) (finding that "substandard buildings, unaffordable units, discrimination, and displacement do not

Legal services organizations, and right to counsel coalitions supported by cost-benefit calculations,[56] are working towards a civil right to counsel for tenants facing eviction.[57] In addition, tenant organizing and legal information groups often provide knowledge and information necessary for tenants to (1) know the law and (2) apply their particular facts to the law.[58] Yet, when confronting the power imbalance that tilts towards landlords, asserting one's rights as a tenant—even with the support of a legal services attorney or housing rights group—can be daunting. This should not be surprising; some point to fee-shifting statutes as an example of how the housing dispute resolution system fails to benefit tenants.[59]

This Part narrows focus specifically on challenges tenants face in asserting the warranty of habitability to compel landlord repairs of residential housing units. It traces the history in legal approaches to tenancy, from contract law to, in many jurisdictions, a codification of the warranty of habitability. It traces connections made in the literature around the origin of the warranty of habitability which was hailed as a "revolution."[60] Next, it discusses the limitations tenants face in asserting the warranty of habitability. Finally, it proposes suggestions for consistently, efficiently, and effectively assisting tenants in asserting the warranty of habitability within the court system.

A. Movement from Caveat Lessee to Codification of the Warranty of Habitability & the Rise of Tenants' Rights

Historically, courts were reluctant to intervene in the relationship between tenants and landlords.[61] Courts and legislatures treated the relationship between

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readily lend themselves to judicial resolution" (citing Chester W. Hartman, Robert P. Kessler & Richard T. Legates, *Municipal Housing Code Enforcement and Low-Income Tenants*, J. Am. Inst. Planners 90 (1974))). Whether it is necessary to keep the justice system inaccessible, relying on the legal profession to serve as gatekeepers, is a related question, though one that is not adequately addressed here since it is beyond the scope of this Article.

56. STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A (2016), https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf [https://perma.cc/87XQ-TSGT].

57. *See* HEIDI SCHULTHEIS & CAITLIN ROONEY, CTR. FOR AM. PROGRESS, A RIGHT TO COUNSEL IS A RIGHT TO A FIGHTING CHANCE: THE IMPORTANCE OF LEGAL REPRESENTATION IN EVICTION PROCEEDINGS (2019), https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance/ [https://perma.cc/YV2N -E3M6].

58. Kansas Housing Resources Coalition, for instance, has resources and information available to renters, landowners, homeowners, and others, including rental assistance and anti-eviction resources. *Kansas Emergency Rental Assistance (KERA)*, KAN. HOUS. CORP., https://kshousingcorp.org/emergency-rental-assistance/ [https://perma.cc/W3QF-2ZVA] (last visited Jan. 19, 2023).

59. *See* Sabbeth, *supra* note 28, at 127.

60. *See generally* Rabin, *supra* note 45, at 521 (discussing reasons the term "revolutionary" is apt to characterize doctrinal changes in landlord-tenant law, largely due to changes from 1968 to 1973 which all favored the tenant over the landlord).

61. John S. Grimes, *Caveat Lessee*, 2 VAL. U. L. REV. 189, 190–98 (1968).

tenants and landlords as a private business transaction.[62] As a result, courts and legislatures viewed the two parties as having equal bargaining power.[63] Thus, lawmakers and judges approached residential tenancies as a matter best governed by contract law.

Most leases in the formation of English common law occurred in the agricultural context.[64] Thus, even despite their limited political power, a "dissatisfied lessee could always default."[65] Under early common law, the principle of *caveat emptor* applied to all contracts for the leasing of real property in many states. As such, a tenant's obligation to pay rent was independent of the condition of any structures on the property.[66] Thus, in cases where there was no fraud, false representation, or deceit, and in absence of express warranty or covenant to repair, there was no implied covenant that the leased premises were suitable or fit for occupation or that they were in a safe condition for use.[67] The legal duty imposed upon the lessor was satisfied when the legal right of possession was delivered to the lessee.[68]

In the 1970s, courts began to shift away from the harsh rule of *caveat emptor* and towards recognizing an implied warranty of habitability.[69] Statutorily enacted

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

63. *See* Grimes, *supra* note 61, at 193.

64. *See id.* at 193–94.

65. *See id.* at 193.

66. In New York, for instance, this had long been the case. O'Brien v. Capwell, 59 Barb. 497, 504 (N.Y. Gen. Term 1870); *see also* Tonetti v. Penati, 367 N.Y.S.2d 804, 806 (App. Div. 1975) ("It has long been the law in this State, following common-law principles, that there is no implied warranty of habitability in a rental of property.").

67. *O'Brien*, 59 Barb. at 504. In such instances, tenants were more suitable stewards and custodians of land since owners were not present, while tenants were on the land and better able to maintain it. *Id.*

68. Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1291 (N.Y. 1979).

69. The landmark case was *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1072–73, 1081 (D.C. Cir. 1970) (holding that the warranty of habitability is implied into all residential units and gives rise to usual remedies for breach of contract), *cert denied*, 400 U.S. 925 (1970) (mem.). This was also the case at the state level: in New York, for instance, a few years after *Javins*, the *Tonetti* case set out the standard for which courts and the legislature adopted the warranty of habitability. *See Tonetti*, 367 N.Y.S.2d at 808 ("[A] warranty of habitability and fitness for the purpose intended (unless specifically excluded) should be implied from the very nature of a rental for residential purposes"). The warranty of habitability was eventually codified in 1975 with the enactment of N.Y. Real Property Law Section 235-b. According to its Senate sponsor, N.Y. State Senator H. Douglas Barclay, the purpose of the law was to "confirm the direction that the courts have been taking toward dealing with the question on the basis of contract law." Park. W. Mgmt. Corp. v. Mitchell, 404 N.Y.S.2d 115, 117 (App. Div. 1978). The statute provides in part:

> In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. Any agreement by a lessee or tenant

warranty of habitability guarantees were adopted explicitly to place "the tenant in parity legally with the landlord."[70] Such statutes accomplish this parity by providing tenants a cause of action or an affirmative defense or counterclaim.[71] As a result of the enactment of these statutes, the tenant's obligation to pay rent is "dependent upon the landlord's satisfactory maintenance of the premises in habitable condition."[72]

Following the civil-rights-era organizing and grassroots fights of the 1960s, the 1970s saw a significant expansion of tenants' rights.[73] This included a number of rights for tenants of private landlords.[74] David Super, in his 2011 work *The Rise and Fall of the Implied Warranty of Habitability*, places the warranty of habitability soundly within the tenants' rights revolution.[75]

B. Limitations on Asserting Warranty of Habitability

Despite the expansion of the warranty of habitability, the ability of tenants to assert their rights at law has seen only modest improvements.[76] For example, in order to assert the right, a breach must occur.[77] A breach of the warranty of habitability has occurred when, in the eyes of a reasonable person, the defects in the premises deprive the tenant of the essential functions which a residence is expected to provide.[78] While the warranty of habitability does not require the landlord to ensure "the premises are in perfect or even aesthetically pleasing condition,"[79] the

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> of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

N.Y. REAL PROP. LAW § 235-b(1)–(2) (McKinney 2023).

70. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1293 (quoting Senator Barclay's remarks in support of legislative proposal).

71. 1975 LEGIS. ANN., at 315 (memorandum of Sen. H. Douglas Barclay).

72. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1294; *see also* Ellis v. Collegetown Plaza, LLC., 753 N.Y.S.2d 228, 230 (App. Div. 2003) ("A tenant's obligation to pay rent ceases if, due to the landlord's breach of the warranty of habitability, the tenant abandons the property." (first citing Tonetti v. Penati, 367 N.Y.S.2d 804, 808 (App. Div. 1975); and then citing Pantalis v. Archer, 384 N.Y.S.2d 678, 680 (Dist. Ct. 1976))).

73. *See* Rabin, *supra* note 45.

74. *Id.* at 535.

75. *See* Super, *supra* note 26, at 392–93.

76. Professor Serge Martinez discusses his cynical perspective in teaching the warranty to clinical students (as opposed to his exuberance when he teaches the doctrine in his property classes) because of the "vast chasm between what the law requires and what tenants actually experience." *See* Martinez, *supra* note 52, at 240.

77. Allan David Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37, 37 (1978) ("The primary holding of [*Javins* and related cases] has been that a material breach of the landlord's responsibility to keep the leased premises in habitable repair diminishes the tenant's obligation to pay rent.").

78. Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) ("If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warranty of habitability has occurred.").

79. *Id.*

landlord must ensure "there are no conditions that materially affect the health and safety of tenants."[80]

The courts have noted that it is not possible to document every instance where the warranty of habitability could be breached as each case must turn on its particular facts.[81] One factor courts often look to is whether the issue constitutes a violation of the local housing or building code because a "[s]ubstantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition."[82] However, the existence of a code violation does not *automatically* constitute a breach of the warranty of habitability as some code violations may be de minimis or have no impact upon habitability.[83] Examples where a breach of the warranty of habitability has been deemed to occur include properties with the following conditions: (1) no heat or hot water,[84] (2) water leakage and the resulting damage,[85] (3) infestation of bed bugs,[86] (4) mold,[87]

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80. *Id.* In one state, the scope of the statute includes conditions caused by both latent and patent defects existing at the inception of and throughout the tenancy. Tracy Bateman, Christine M.G. Davis, Laura Hunter Dietz, John A. Gebauer, Stephanie A. Giggetts, John Glenn, Noah J. Gordon, Glenn A. Guarino, Glenda K. Harnad, Tammy E. Hinshaw, Anne E. Melley, Jeanne Philbin, Caralyn M. Ross, Mark T. Roohk, Jeffrey J. Shampo, Eileen Wierzbicki, Lisa A. Zakolski & Stephanie Zeller, 74 N.Y. JUR. 2D LANDLORD AND TENANT § 191 (2022).

81. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1294.

82. *Id.*

83. *Id.*

84. *See generally Park W. Mgmt. Corp.*, 391 N.E.2d 1288; 1420 Concourse Corp. v. Cruz, 521 N.Y.S.2d 429 (App. Div. 1987). In another instance, a trial court found that over a three-month period with seventeen instances of no heat and thirteen instances of lack of hot water, an appropriate rent abatement was twenty percent for lack of hot water and thirty percent for lack of heat. *See* Mary Marsh Zulack, *If You Prompt Them, They Will Rule: The Warranty of Habitability Meets New Court Information Systems*, 40 J. MARSHALL L. REV. 425, 427–28 (2007) (citing Parker 72nd Assocs. v. Isaacs, 436 N.Y.S.2d 542 (Civ. Ct. 1980)). Zulack points out that the court in *Parker* was essentially acting as a regulatory agency since the result was the same as how an agency would have acted. *Id.* at 428.

85. *See generally* Minjak Co. v. Randolph, 558 N.Y.S.2d 554 (App. Div. 1988); Ocean Rock Assocs. v. Cruz, 411 N.Y.S.2d 663 (App. Div. 1978), *aff'd*, 51 N.Y.2d 1001 (1980).

86. *See generally* Joseph v. Apartment Mgmt. Assocs., L.L.C., 927 N.Y.S.2d 816 (App. Term Feb. 25, 2011) (unreported table decision).

87. *See generally* Pallotta v. Perry, No. 2001-962, 2002 WL 1798804, at *1 (App. Term May 17, 2002); 157 E. 57th St. L.L.C. v. Birrenbach, 801 N.Y.S.2d 779 (App. Term June 23, 2005) (unreported table decision). One scholar notes that photographs submitted as evidence in court will not capture the smell of mold in an apartment, but can be an excellent record for many types of conditions. *See* Zulack, *supra* note 84, at 452.

(5) broken tile or tread which present a hazardous condition,[88] (6) lead-based paint in the apartment,[89] and (7) offensive fumes and odors.[90]

This would suggest a significant problem to be addressed by additional procedural or substantive change. Specifically, Super's empirical analysis of courts after the 1970s reveals that, following adoption of the warranty, (1) eviction cases did not increase, (2) judicial resources applied were modest, and (3) most cases never reached adjudication in open court.[91] The reasons underlying these results are perhaps not surprising. Expanding the warranty of habitability did not on its own reduce the cost it takes a tenant to assert their right, reduce the time necessary to pursue a claim,[92] or increase tenant financial incentives to pursue an action against their landlord.[93]

1. Traditional Remedies for Breach

When a breach of the warranty of habitability has occurred, the tenant has several remedies available at their disposal including rent abatement,[94] repair and deduct,[95] and injunctive relief.[96]

a. Rent Abatement

Rent abatement is the most frequently applied remedy for breaches of the warranty of habitability.[97] In New York, the appropriate reduction in the amount of rent for the breach is the difference between the fair market value of the premises if it had been as warranted.[98] This amount is measured by the agreed upon rent in the lease and the rental value of the premises during the period of the breach.[99]

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88. *See generally* Ernest & Maryanna Jeremias Fam. P'ship v. Matas, 971 N.Y.S.2d 70 (Civ. Ct. Jan. 25, 2013) (per curiam) (unreported table decision); Pleasant E. Assocs. v. Cabrera, 480 N.Y.S.2d 693 (Civ. Ct. 1984).

89. *See generally* German v. Fed. Home Loan Mortg. Corp., 885 F. Supp. 537 (S.D.N.Y.), *clarified on reargument*, 896 F. Supp. 1385 (S.D.N.Y. 1995).

90. *See generally* Tonetti v. Penati, 367 N.Y.S.2d 804, 805 (App. Div. 1975); Kekllas v. Saddy, 389 N.Y.S.2d 756, 757–58 (Dist. Ct. 1976).

91. *See* Super, *supra* note 26, at 434.

92. Asserting a breach of the warranty of habitability is governed by the statute of limitations for breach of contract. In New York, there is a six-year statute of limitations for contract breach. N.Y.C.P.L.R. 213 (McKinney 2023); Sprague v. Luna Park Co-op., 442 N.Y.S.2d 105, 106 (App. Term 1981); Yokley v. Henry-Clark Assocs., 655 N.Y.S.2d 714, 716 (App. Term 1996).

93. *See infra* Section I.B.3.

94. Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (N.Y. 1979).

95. *Kekllas*, 389 N.Y.S.2d at 759.

96. Bartley v. Walentas, 434 N.Y.S.2d 379, 383 (App. Div. 1980).

97. German v. Fed. Home Loan Mortg. Corp., 885 F. Supp. 537, 568 (S.D.N.Y.), *clarified on reargument*, 896 F. Supp. 1385 (S.D.N.Y. 1995).

98. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1295; Witherbee Ct. Assocs. v. Greene, 777 N.Y.S.2d 200, 203 (App. Div. 2004); Nostrand Gardens Co-op. v. Howard, 634 N.Y.S.2d 505, 506 (App. Div. 1995).

99. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1295.

Before the tenant begins withholding rent, the generally recognized process requires that the tenant first provides notice of the condition to the landlord and allows the landlord a reasonable period of time to address the condition.[100] Upon failure of the landlord to cure the condition, the tenant may withhold rent until the landlord fixes the issue or, if the landlord initiates a summary nonpayment proceeding, the tenant may plead a breach by the landlord of his duty to maintain the premises in a habitable condition as an affirmative defense.[101]

b. Repair and Deduct

As an alternative remedy to rent abatement, the tenant may undertake the repairs and deduct the cost from the rent.[102] However, the process for a tenant completing repairs on her own is not simple.[103] Specifically, in order for a tenant to recover damages in a repair and deduct scenario, the tenant must (1) notify the landlord of the needed repair, (2) the condition must be substantial in that the condition affects habitability of the premises, and (3) the landlord must either refuse or fail to repair the condition after a reasonable opportunity to repair has been given by the tenant.[104] If all three conditions are satisfied, then the tenant may deduct the cost of repairs from the rent, provided the cost of the repairs is reasonable and not excessive.[105]

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100. Solow v. Wellner, 595 N.Y.S.2d 619, 621 (App. Term 1992), *aff'd as modified*, 613 N.Y.S.2d 163 (App. Div. 1994); Moskowitz v. Jorden, 812 N.Y.S.2d 48, 50 (App. Div. 2006) ("While a landlord may not require prior written notice of a defective condition before a tenant may invoke the warranty this does not mean that notice is not required."); Alharb v. Sayegh, 604 N.Y.S.2d 243, 244 (App. Div. 1993) (lack of notice is a cognizable defense to a claim of breach of warranty of habitability). *But see* Chapman v. Silber, 760 N.E.2d 329, 336 (N.Y. 2001) ("[A] landlord who actually knows of the existence of many conditions indicating a lead paint hazard to young children may . . . be charged constructively with notice of the hazard."); Spatz v. Axelrod Mgmt. Co., 630 N.Y.S.2d 461, 465 (City Ct. 1995) (landlord did not need notice of defect to be liable for breach of the warranty of habitability).

101. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1295; Pezzolanella v. Galloway, 503 N.Y.S.2d 990, 993 (City Ct. 1986).

102. Jangla Realty Co. v. Gravagna, 447 N.Y.S.2d 338, 341 (Civ. Ct. 1981).

103. There are a number of reasons why such a process does not work for many tenants. For one, a tenant may lack the skills and knowledge to make the repair on their own. Some repairs may require expensive tools. Other repairs, such as heating or plumbing or electrical work, may need to be completed by a licensed professional. In addition, certain repairs may require access to systems in the basement or other inaccessible parts of a building that a tenant is unable to reach. Also, a tenant may lack time to complete the repair.

104. Williams v. Wright, NYLJ, June 20, 1985 at 13 (N.Y. App. Term 1985) ("[W]here the condition is such that there is a breach . . . and the landlord refuses to make the repairs in a reasonable period of time, the tenant may make the repairs and deduct their reasonable cost from the rent."); Kekllas v. Saddy, 389 N.Y.S.2d 756, 759 (Dist. Ct. 1976) (recognizing "repair and deduct" as a viable remedy but disallowing the deduction where no notice of problem was given to the landlord).

105. *Jangla Realty Co.*, 447 N.Y.S.2d at 341.

c. Injunctive Relief

Finally, injunctive relief may be an appropriate remedy where the landlord's breach of habitability is continuous and drastic.[106] In such cases—lead paint, for instance—injunctions have been issued ordering the landlord to rectify the condition affecting the habitability of the premises.[107] But courts are reluctant to provide injunctive relief. Awarding damages is the preferred remedy because injunctive relief "might very well inject the court into the day-to-day operations and management of [the premises] and any other building in which one or more tenants are dissatisfied with the services supplied by the landlord."[108]

2. Deficiencies with the Traditional Remedies

As noted above, the most popular remedy for the breach of the warranty of habitability is rent abatement. After providing notice, the tenant may withhold rent until the breach has been cured, at which time the rent is due.[109] While this approach may appear on paper like a simple process to obtain relief, it is riddled with practical pitfalls. This Section will discuss in detail the deficiencies with this traditional remedy.

a. The Lease Has Expired

The inadequacy of withholding rent as a one-size-fits-all solution is immediately apparent when one considers the scenario where the tenant has moved out of the apartment.[110] The ability to withhold rent is simply not an option where the lease has expired and the tenant no longer occupies the premise. A tenant who has moved out of the apartment or will be moving out of the apartment within a short period of time needs an alternative remedy for relief.

b. Uncertainty of Whether There Is a Breach

Second, a tenant faces uncertainty as to whether the particular conditions constitute a breach of the warranty of habitability. As noted above, there is no

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106. Bartley v. Walentas, 434 N.Y.S.2d 379, 383 (App. Div. 1980).

107. *See, e.g.*, Laura Goldberg Mgmt. v. Rivera, NYLJ, July 28, 1994 at 23, col. 1 (N.Y. Civ. Ct. 1994) (ordering correction of lead paint conditions in tenant's apartment in response to established breach of the warranty of habitability); Amsterdam v. Goldstick, 490 N.Y.S.2d 106, 109 (Civ. Ct. 1985), *aff'd*, 521 N.Y.S.2d 203 (App. Term 1987) (where court directed landlord to remove municipal violations including failure to include name and New York address on rent bills).

108. *Bartley*, 434 N.Y.S.2d at 383.

109. *See supra* Section I.B.1.a.

110. The reader will recall the facts of the Logan family, discussed at the beginning of this Article, who vacated their apartment unit soon after taking possession and were unable to recover rent already paid to their landlord. In the *Tonetti* case mentioned above, New York's Appellate Division found for a tenant who argued for return of his security deposit even though he vacated his apartment months before the lease expired due to the smell of dog urine. Tonetti v. Penati, 367 N.Y.S.2d 804, 806–08 (App. Div. 1975).

bright-line test to determine when a beach has occurred. Rather, a breach determination is a fact-specific inquiry.

One study in Essex County, New Jersey, found that out of some forty thousand eviction proceedings in 2014, only eighty cases even asserted breach of warranty of habitability in defensive papers.[111] The authors of that study note that there is a far-greater statistical likelihood that apartments in the area studied have significant housing code violations.[112] That study does not discuss uncertainty about whether a breach has occurred as a reason for such a lack of claims brought under the warranty—however, uncertainty could be another possible reason to research in the future.

The measuring stick is whether "in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide."[113] A tenant cannot be certain their particular conditions would constitute breaches because "[e]ach case must . . . turn on its own peculiar facts."[114] Because reasonable minds can disagree, a tenant faces the uncertainty that his or her particular circumstances do not constitute a breach.

In considering the uncertainties of whether there is a breach, the stakes are particularly high for the tenant because, upon withholding rent, the landlord will almost certainly initiate a non-payment summary proceeding to evict the tenant.[115] Such a lawsuit is nevertheless retaliatory since a landlord is not able to evict based on a tenant's exercise of their rights to withhold rent. As part of the proceeding, the tenant may always counterclaim or plead as a defense breach by the landlord of her duty to maintain the apartment in a habitable condition.[116] Nonetheless the tenant faces the risk that the finder of fact ("the eyes of the reasonable person") determines there was in fact no breach, in which case the tenant would be liable for the entire unpaid rent.

Ideally the tenant would set aside the withheld rent for that contingency; however, many tenants will likely not have the financial capability to save the requisite funds. Scholars point out that low-income households are less likely to withhold rent on their own when a dispute arises concerning repairs in a given apartment.[117] Professor Franzese and her co-authors note that courts impose a rent deposit requirement in a number of states to deter tenant misuse of the warranty, or to avoid the obligation to pay rent.[118]

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111. *See* Franzese, Gorin & Guzik, *supra* note 41, at 5.
112. *Id.*
113. Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (N.Y. 1979).
114. *Id.* at 1291.
115. *See* N.Y. REAL PROP. LAW § 235-b (McKinney 2023).
116. *Park W. Mgmt. Corp.*, 391 N.E.2d at 1295.
117. *See* Super, *supra*, note 26, at 397–98 (discussing how high-income and low-income households face significant differences in approach when confronted with the repair of a rental apartment unit).
118. *See* Franzese, Gorin & Guzik, *supra* note 41, at 13.

Studies estimate that nearly eighty percent of U.S. workers are living paycheck to paycheck.[119] Facing a stack of bills due today, the vast majority of Americans simply do not have the luxury to set aside funds for tomorrow.[120] With the inability to pay the back rent, the tenant faces the very real prospect of eviction and homelessness within a very short period of time. By one count, eleven states require rent to be deposited while a tenant asserts a breach of the warranty.[121] Professor Summers' research indicates that in some jurisdictions, such as New York, the warranty of habitability still fails to benefit tenants with meritorious claims.[122] The compounding nature of a rent deposit requirement on a tenant asserting the warranty defensively or affirmatively is important to consider.

In New York, prior to the passage of the Housing Stability and Tenant Protection Act of 2019, the risk of eviction was particularly troublesome for tenants who were afforded only seventy-two hours to vacate the premises.[123] Under the new law, the tenant is given fourteen days' notice.[124] While the extended period of time provides a measure of relief, it does not eliminate the risk of eviction.[125] This risk may simply to be too high for tenants to assert their rights and thus they forego withholding rent.

c. Uncertainty of the Amount of the Damages

Even if the apartment conditions do in fact constitute a breach, the tenant faces an additional hurdle. While the tenant may be entitled to damages, the tenant cannot be certain as to the *amount* of damages and therefore the amount of rent to be abated. As noted above, the damages for breach of the warranty of habitability

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119. Zack Friedman, *78% of Workers Live Paycheck to Paycheck*, FORBES (Jan. 11, 2019, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2019/01/11/live-paycheck-to-paycheck-government-shutdown/#56ef18e4f10b [https://perma.cc/PYF6-FK7Q].

120. *See id.*

121. *See* Franzese, Gorin & Guzik, *supra* note 41, at 13–14 (citing ALA. CODE § 35-9A-405(a) (2022); ARIZ. REV. STAT. ANN. § 33-1365(A) (2022); CONN. GEN. STAT. ANN. § 47a-14h(h) (West 2022); FLA. STAT. ANN. § 83.60(2) (West 2022); GA. CODE ANN. § 44-7-75(a) (West 2022); HAW. REV. STAT. ANN. § 521-78(a) (West 2022); KY. REV. STAT. ANN. § 383.645(1) (West 2022); MONT. CODE ANN. § 70-24-421(1) (West 2011); NEV. REV. STAT. ANN. § 118A.490(1) (West 2021); N.H. REV. STAT. ANN. § 540:13-d(II) (2022); OHIO REV. CODE ANN. § 5321.07(B)(1) (West 2022).

122. *See* Summers, *supra* note 40, at 214 ("The findings caution against an over focus on the onerous substantive doctrines that exist in some jurisdictions.").

123. N.Y. REAL PROP. ACTS. LAW § 749(2)–(3) (McKinney 2023). Tenants still have the right to contest the eviction in court after the expiration of the seventy-two-hour notice. At the same time, Matthew Desmond's research indicates that most tenants tend to move out upon receiving a notice to quit or notice to terminate even though tenants have the right to remain and challenge the action in court. Matthew Desmond, *Forced Out*, NEW YORKER (Jan. 31, 2016), https://www.newyorker.com/magazine/2016/02/08/forced-out [https://perma.cc/3VNG-QNZG] ("Some landlords pay tenants a couple hundred dollars to leave by the end of the week. Some take off the front door. Nearly half of the forced moves of renting families in Milwaukee are 'informal evictions,' which, like many rentals, involve no paperwork, and take place in the shadow of the law.").

124. N.Y. REAL PROP. ACTS. LAW § 749(2)(a) (McKinney 2023).

125. *See* Leung, Hepburn & Desmond, *supra* note 15, at 325-26.

are calculated by taking the difference between the fair market value of the apartment if it had been as warranted, as measured by the agreed upon rent in the lease, and the rental value of the apartment during the period of the breach.[126] In calculating the tenant's damages, "the finder of fact must weigh the severity of the violation and the duration of the conditions giving rise to the breach, as well as the effectiveness of steps taken by the landlord to abate those conditions."[127] Courts have noted that this damages calculation is problematic in that it is susceptible to an imprecise determination.[128]

Courts often do not provide an explanation when determining the appropriate percentage abatement, but rather, at times, appear to simply pick a percentage. For example, one court noted:

As to the lack of hot water for one apartment, the court finds that an abatement of 20% for each month in which such problem existed is proper. Such an abatement is less than the 50% granted for no water in H & R Bernstein v. Barrett 101 Misc 2d 611, 421 N.Y.S.2d 511 (Civ. Ct., Bronx Co., Nolan, J.) and less than the 50% frequently allowed when neither hot water nor heat is provided.[129]

Because of this somewhat arbitrary methodology of picking a number within an established range, the percentage of rent abated can vary widely from case to case for the same issue. Examples for various cases decided in New York include: (1) 35%[130] versus 50%[131] versus 100%[132] for no heat or hot water, (2) 5%[133] versus 12%[134] versus 45%[135] for an infestation of vermin and/or insects, (3) 15%[136] versus 25%[137] versus 50%[138] for interior leaks, (4) 25%[139] versus 50%[140] for mold

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126. Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1295 (N.Y. 1979).

127. TRACY BATEMAN, CHRISTINE M.G. DAVIS, LAURA HUNTER DIETZ, JOHN A. GEBAUER, STEPHANIE A. GIGGETTS, JOHN GLENN, NOAH J. GORDON, GLENN AL. GUARINO, GLENDA H. HARNAD, TAMMY E. HINSHAW, ANNE E. MELLEY, JEANNE PHILBIN, CARALYN M. ROSS, MARK T. TOOHK, JEFFREY J. SHAMPO, EILEEN WIERZBICKI, LISA A. ZAKOLSKI & STEPHANIE ZELLER, 74 N.Y. JURIS. 2d LANDLORD AND TENANT § 204, (2019).

128. Park W. Mgmt. Corp. v. Mitchell, 404 N.Y.S.2d 115, 119 (App. Div. 1978).

129. Century Apartments, Inc. v. Yalkowsky, 435 N.Y.S.2d 627, 630 (Civ. Ct. 1980).

130. DANIEL FINKELSTEIN & LUCAS A. FERRARA, FED. N.Y. PRAC. SERIES, LANDLORD AND TENANT PRACTICE IN NEW YORK § 9:47 n.1 (2021).

131. Parker 72nd Assocs. v. Isaacs, 436 N.Y.S.2d 542, 544 (Civ. Ct. 1980).

132. Ocean Rock Assocs. v. Cruz, 411 N.Y.S.2d 663, 664 (App. Div. 1978), *aff'd*, 417 N.E.2d 93 (N.Y. 1980).

133. Whitehall Hotel v. Gaynor, 470 N.Y.S.2d 286, 294 (Civ. Ct. 1983).

134. Bender v. Green, 874 N.Y.S.2d 786, 794 (Civ. Ct. 2009).

135. Ludlow Props., LLC v. Young, 780 N.Y.S.2d 853, 857 (Civ. Ct. 2004).

136. FINKELSTEIN & FERRARA, *supra* note 130, § 9:53 n. 1.

137. *Id.*

138. *Id.*

139. Pallotta v. Perry, No. 40328, 2002 WL 1798804 at *1 (N.Y. App. Term May 17, 2002).

140. Yorkroad Assocs. v. Corrigan, NYLJ, Jan 5, 2016 at 37, col 9, 2016 NYLJ LEXIS 4973 at *22 (N.Y. Civ. Ct. 2016).

and (5) 17%[141] versus 100%[142] for obnoxious orders. This lack of uniformity makes it particularly difficult for a tenant to properly estimate their abatement, and thus determine the appropriate amount of rent to withhold. As a result, a tenant who "wins" his or her case could still "lose" if the amount of rent abated is less than the amount of rent withheld by the tenant.

d. Housing Choice Voucher Recipients

Tenants who participate in the housing choice voucher program may be particularly reluctant to withhold rent. The housing voucher program, commonly referred to as Section 8, is a federal program which assists low-income families with affording "decent, safe, and sanitary housing."[143] A participating family is provided a housing subsidy that is paid to the landlord directly by the public housing authority.[144] The participating family is responsible for the difference between the actual rent charged by the landlord and the amount subsidized by the program.[145]

The steady flow of income from the federal government to the landlord during a claim under the warranty of habitability creates a perverse disincentive for a landlord to act.[146] Of course tenants are able to request inspections of subsidized units.[147] For a landlord, an inspection and the need to make repairs may simply increase the cost of doing business.[148] For a tenant, a failed inspection may lead to a loss of a home and the return to an unfriendly and inelastic housing market where most voucher-eligible apartments are similarly decrepit.[149]

Individuals are placed on a waiting list where it can take years (up to ten years in some instances) before they begin to receive a benefit due to the high demand for the program.[150] Put another way, given the lengthy waiting period and the vital

141. FINKELSTEIN & FERRARA, *supra* note 130, § 9:62 n.2.

142. Mayourian v. Tanaka, 727 N.Y.S.2d 865, 867 (App. Term 2001).

143. *Housing Choice Voucher Program (Section 8)*, BENEFITS.GOV, https://www.benefits.gov/benefit/710 [https://web.archive.org/web/20210715125015/https://www.benefits.gov/benefit/710] (last visited July 15, 2021).

144. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/RMS3-XQ2T] (last visited Jan. 20, 2023).

145. *Id.*

146. *See* Franzese, Gorin & Guzik, *supra* note 41, at 18 & n.72 (highlighting a case where a landlord continued to receive 83% of the rent in government subsidies while an action for necessary repairs was pending, and it was not until the subsidies ceased that the landlord acted).

147. *See generally* Philip M.E. Garboden, Eva Rosen, Stefanie DeLuca & Kathryn Edin, *Taking Stock: What Drives Landlord Participation in the Housing Choice Voucher Program*, 28 HOUS. POL'Y DEBATE 979 (2018) (finding that landlords view inspections related to the Housing Choice Voucher program as cumbersome given Baltimore's aging housing stock).

148. *Id.* at 982, 992, 997.

149. *Id.* at 996 ("This problem was particularly acute on initial inspections, when a failure results in housing insecurity for a tenant . . . .").

150. Aaron Schrank, *It's a Long Wait for Section 8 Housing in U.S. Cities*, MARKETPLACE, (Jan. 3, 2018), https://www.marketplace.org/2018/01/03/its-long-wait-section-8-housing-us-cities/ [https://perma.cc/V8ZG-3LJG].

financial assistance the subsidy provides, a Section 8 recipient would be well served to comply with the program's eligibility requirements. Such requirements include that the family must fulfil its obligations under the lease and the family must "not commit any serious or repeated violations of the lease."[151] A tenant may be reluctant to withhold rent under the view that it could be construed as not fulfilling his or her obligation under the lease. This reluctance is reinforced after the fact, especially if no breach of the warranty of habitability is found.

e. Tenant Blacklist

A tenant who withholds rent and as a result is named in a "housing court holdover and nonpayment proceeding" may end up on a "tenant blacklist."[152] The New York State Office of Court Administration historically provided housing court data to tenant screening companies which in turn compiled the data into commercially available lists.[153] Prior to the Housing Stability and Tenant Protection Act of 2019, landlords traditionally used these lists to identify and screen tenants who have been involved in eviction cases in housing court.[154] Particularly problematic is the fact that a tenant can end up on this list regardless of why the case was initiated and regardless of the outcome of the case.[155] Furthermore, the lists are often misleading. "For example, if a tenant is awarded a 90% rent abatement . . . [due to the breach of the warranty of habitability] the report will report the disposition of the case as a 'judgment' against the tenant for the remaining 10% of the rent."[156] "The consequences for tenants of being placed on the tenant screening 'blacklist' can be quite dire as, regardless of the underlying causes for or merits of the eviction proceeding, many landlords are unwilling to rent to a tenant who appears on the list."[157]

With the passage of the Housing Stability and Tenant Protection Act of 2019, landlords are prohibited from refusing to rent to a potential tenant based on the individual's involvement in a past or pending landlord-tenant action or real property summary proceeding.[158] There is a rebuttable presumption that a landlord is in violation of the statute "[I]f it is established the landlord requested information from a tenant screening bureau relating to a potential tenant or otherwise inspected

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151. 24 C.F.R. §§ 882.413, 982.551(e) (2022).

152. GERALD LEBOVITS & JENNIFER A. ROZEN, N.Y. STATE BAR ASS'N, LEGALEASE: THE USE OF TENANT SCREENING REPORTS AND TENANT BLACKLISTING 3 (2018), https://nysba.org/NYSBA/Publications/LegalEASE%20Pamphlet%20Series/PUB_LegalEase_Tenant%20Screening%20and%20Blacklisting.pdf [https://perma.cc/ZFK5-AC78].

153. *Id.*

154. Practice Law Real Estate, Practice Note, *Residential Lease Agreements: Key Lease Considerations (N.Y.)*, THOMSON REUTERS WESTLAW PRECISION (2022).

155. LEBOVITS & ROZEN, *supra* note 152.

156. *Id.*

157. ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD TENANT LAW IN NEW YORK § 2:39 (2021).

158. N.Y. REAL PROP. LAW § 227-f(1) (McKinney 2022).

court records relating to a potential tenant and the landlord subsequently refuses to rent or offer a lease to the potential tenant."[159] The New York Attorney General may bring an action or special proceeding for a minimum civil penalty of five hundred dollars and maximum of one thousand dollars for each violation to enforce this provision.[160]

While the New York statute is certainly a positive development for tenants, one must query its effectiveness from a "real-world" perspective. There are unresolved practical issues, such as a tenant's ability to establish that a landlord requested a report from a tenant screening bureau. Furthermore, given the arguably nominal dollar amount of the penalty, one wonders how effective the penalty is as a deterrent. Landlords may continue their practice of tenant blacklisting and risk the *potential* penalty, which must be enforced by the attorney general. If the penalty is assessed, landlords may simply accept it as a "cost of doing business" with no real change to the practice of blacklisting certain tenants.

3. Tenant Financial Incentives vs. Landlord Financial Incentives

Finally, tenants often lack incentives to pursue actions against their landlords. Landlords are in business to earn revenue from rental apartments.[161] Tenants, on the other hand, need apartments to be able to find gainful employment.[162] A tenant may solve her problem with her landlord in a few ways—filing a lawsuit on one end of the spectrum, moving out on the other. Often moving out can be simpler, quicker, and less costly.

a. Cost

The costs associated with participation in a court case to assert one's rights as a tenant against their landlord are significant. First, the tenant needs to know that such a right exists. Identifying the necessary information, including possible case law, to support a tenant's case is costly—it requires speaking to an attorney, or advocate. Since legal counsel in civil matters is not a right,[163] locating such

159. *Id.*

160. N.Y. REAL PROP. LAW § 227-f(2) (McKinney 2022).

161. *See, e.g.*, GRANT CARDONE, HOW TO CREATE WEALTH INVESTING IN REAL ESTATE (2018, Kindle Edition) (discussing in detail ways that individuals can acquire rental apartments as a means to amass wealth).

162. Much is wrapped up in the notion of home: where one raises a family, sends children to school, or cares for loved ones. *See generally* Garboden et al., *supra* note 147 (focusing on the context of landlords providing homes for tenants through rental housing).

163. In Mississippi, for instance, as of August 2021, there are simply not enough legal-aid attorneys available for all the tenants who face eviction as the federal coronavirus eviction moratorium expires. Will Parker, *Eviction Ban's Expiration Leaves Renters in South Appearing Most Vulnerable*, WALL ST. J. (Aug. 1, 2021, 8:31 PM), https://www.wsj.com/articles/eviction-bans-expiration-leaves-renters-in-south-appearing-most-vulnerable-11627810842 [https://perma.cc/BV9X-B7NX] ("There's one legal-services attorney for every 20,000 eligible clients." (statement of John Jopling, Managing Att'y, Miss. Ctr. for Just.)).

information can require tenants to pay out of their own pockets. But the alternative is not filing an action at all.

Second, costs are incurred by attending court hearings and not working or seeking income generating activities during court proceedings. Finally, there are additional out-of-pocket costs associated with filing a case—filing fees, transportation costs, possibly childcare, meals away from home, and even lost wages.[164] Such fees can generate revenue for courts. Despite the incentive to increase filings to generate revenue, often civil courts are understaffed, making dispute resolution that much more difficult. Professor Serge Martinez's proposal to require that landlords prove an absence of repairs issues is one approach to ensuring needed repairs are made in a timely manner.[165]

b. Time

Dispute resolution processes can be lengthy. Even with summary proceedings that are the hallmark of eviction matters, court calendars can burgeon and delay a result. Time delays add to the cost of seeking justice in court and leave tenants less inclined to pursue a judicial remedy.

In addition, tenants generally lack knowledge or education about their rights as tenants. Even in the few jurisdictions with a right to counsel in eviction proceedings, most of the actions a tenant might take to enforce the warranty of habitability—withholding rent and determining how much rent to withhold—happen before a court action has commenced. As a result, tenants need knowledge and information before they are served with an eviction notice.

C. Towards a Consistent Application of the Warranty of Habitability by Courts

Another aspect of the warranty of habitability is consistent application by courts, or, more specifically, lack of consistent application. This occurs for a number of reasons. As discussed above, it is costly and time-consuming for tenants to bring repairs cases. As a result, adjudication of claims is often inconsistent and incredibly fact specific. This leads to differing outcomes. Although it may be appealing, scrapping the current system entirely and starting from scratch is likely to be unsuccessful. The same challenges are likely to plague any judicial response that does not account for the current dispute adjudication practice.

A second component of inconsistent application of the warranty of habitability is variation among judges and courts on percentage rent abatement that should be awarded for particular repairs. Lack of heat in February in Buffalo might

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164. In Kansas, for instance, the filing fee for damages up to $500.00 is $47.50, and $67.50 for damages above $500.00 and up to $4,000.00. *See generally Small Claims Information*, DOUGLAS CNTY. KAN., https://www.douglascountyks.org/depts/clerk-district-court/small-claims-information [https://perma.cc/E683-56ZM] (last visited Jan. 20, 2023).

165. *See* Martinez, *supra* note 52, at 272, 274.

be a 100 percent abatement. But in Atlanta, it may be less. Rather, in Atlanta, lack of heat as well as lack of air conditioning may factor into a court's decision to grant relief.[166]

In one case, in 1984, the Georgia Court of Appeals held that a tenant could recover damages for a lack of heat and air conditioning.[167] In *Peek v. Duffy*, the tenant, Mary Duffy, argued during an eviction proceeding that her landlord owed her for her diminished value in her rental unit because it lacked heat during the winter months and air conditioning.[168] In that case, the court granted a total of $3,364 in general and punitive damages.[169]

1. Reducing Tenant Cost and Time

Creating legal mechanisms for reducing tenant cost and time in asserting their rights ought to lead to more consistent application of the law across tenant communities and across jurisdictions. Access to a free attorney can assist tenants in advocating for their rights at law. Right to counsel organizing campaigns are one mechanism advocates have argued will increase tenant use of the justice system.[170]

In particular, a 2016 study of impact of legal representation on the outcomes of litigants in civil matters shows a clear correlation between the presence of counsel and a successful outcome for tenants.[171] This meta-analysis of seventeen studies on the effectiveness of counsel in housing matters revealed only one study that found full legal representation had no effect.[172] The authors of the study point to one piece of research showing tenants with counsel were nineteen times more likely to achieve success in a housing matter than their unrepresented peers.[173]

166. In Georgia, a landlord is not required to keep an air conditioning unit in working order unless the landlord provided the unit upon the tenant moving in. STATE OF GA., GEORGIA LANDLORD TENANT HANDBOOK: A LANDLORD-TENANT GUIDE TO THE STATE'S RENTAL LAWS 10 (2021), https://www.dca.ga.gov/sites/default/files/2-15-21_handbook_final_draft.pdf [https://perma.cc/5NLT-QTRW].

167. Peek v. Duffy, 324 S.E.2d 795, 795–96 (Ga. Ct. App. 1984) (denying a landlord's appeal following a trial court's determination that the landlord failed to appear at trial and resulting order granting the tenant's motion to dismiss).

168. *Id.*

169. *Id.* at 796.

170. The meta-analysis—the research on the research—supports this assertion. *See* Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 903–04 (2016) (exploring the literature on the right to counsel in civil matters and concluding the lawyers do affect the outcomes of housing matters in a manner beneficial to tenants).

171. *Id.*

172. *Id.* at 904.

173. *Id.* (citing David L. Eldridge, *The Construction of a Courtroom: The Judicial System and Autopoiesis*, 38 J. APPLIED BEHAV. SCI. 298, 309 (2002)).

The support of peer tenants is also frequently a key component of availing of the justice system.[174] Peer tenants working collectively through a tenant organizer, perhaps in conjunction with a civil legal service attorney, can quickly and effectively assert tenant rights on a building-wide or neighborhood-wide basis.

Finally, the use of pro se forms in court, as well as new technology, permit tenants to assert their rights in new ways. At the same time, the unauthorized practice of law often comes up in these contexts. This Subpart examines the role of pro se forms, technology, and unauthorized practice of law in asserting tenant rights under the warranty of habitability.

a. Right to Counsel Campaigns

At present in the United States, there is no constitutional right to housing.[175] However, the cost to individuals and families of the deprivation of one's dwelling has gained focus and attention in recent years.[176] As a result, coalitions have called for a civil right to counsel in particular circumstances, including eviction and foreclosure.[177] A number of scholars, including this Article's co-author, have called for expanding the right to counsel as part of a pandemic response.[178]

Bolstering these policy arguments is hard mathematical and financial analysis. In the most rigorous cost-benefit analysis performed to date, a financial firm estimated that a right to counsel program in New York City would reduce evictions by seventy-seven percent and save $320 million per year.[179] Another study by the Boston Bar Association estimated that for every dollar contributed to the right to counsel the state would yield $2.69 in savings.[180]

b. Tenant Organizing Groups

The existence of tenant organizing groups can further the ability of tenants to assert their rights under the warranty of habitability. There are a number of models of community lawyering to support tenant-organizing work. Lawyers as a resource ally, a model advanced by the Community Development Project, now TakeRoot

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174. Any tenant who has experienced a building-wide bedbug infestation, repeated lack of hot water, and regular water leaks through their bathroom ceiling will no doubt draw strength from the shared experience (and frustration) of their neighbors, particularly in searching for court-sponsored remedies.

175. Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

176. *See, e.g.*, Parker, *supra* note 163.

177. For a clearly articulated argument supporting a right to counsel, see generally Pollock & Greco, *supra* note 39.

178. *See, e.g.*, Layser et al., *supra* note 21.

179. STOUT RISIUS ROSS, INC., *supra* note 56, at 3–5.

180. BOS. BAR ASS'N, INVESTING IN JUSTICE: A ROADMAP TO COST-EFFECTIVE FUNDING OF CIVIL LEGAL AID IN MASSACHUSETTS at 4 (2014), http://bostonbar.org/app/uploads/2022/06/statewide-task-force-to-expand-civil-legal-aid-in-ma-investing-in-justice.pdf [https://perma.cc/988R-3A4L].

Justice, in New York City, is one such example in the area of housing and related civil practice areas.[181] More broadly, Dean Luz E. Herrera and Professor Louise Trubek explored the contours of progressive lawyering in a recent study of leading-edge organizations, including those that advance housing justice missions.[182] Such legal services and organizing interventions can yield successful outcomes for low-income tenants and other vulnerable communities with matters requiring civil disputes.

c. Pro Se Forms, the Use of Technology, and the Unauthorized Practice of Law

Another area ripe for expansion for residential tenant use of the warranty of habitability is pro se forms. Often, as is the case here, technology can assist in the completion of pro se, or pro se assisted,[183] forms. Ensuring such interventions do not run afoul of various state-level prohibitions on the unauthorized practice of law is another dimension that such tools, including this one, need to consider.

All fifty states have some sort of prohibition on the unauthorized practice of law.[184] However, not all states enforce these rules through statute.[185] With respect to pro se forms, often court systems themselves provide such forms. The Center for Arkansas Legal Services and Legal Aid of Arkansas, for example, have a pro se answer and objection to unlawful detainer eviction posted to their websites.[186] The form has language related to the Centers for Disease Control and Prevention Eviction Moratorium.[187] It also has a number of defenses or affirmative defenses

181. E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y.C. L. REV. 213, 214 (2009).

182. *See* Luz Herrera & Louise G. Trubek, *The Emerging Legal Architecture for Social Justice*, 44 N.Y.U. REV. L. & SOC. CHANGE 355 (2020).

183. Pro se assisted forms and processes involve methods such as ghostwriting, brief legal advice, or brief legal information.

184. The American Bar Association began tracking unauthorized practice of law and presenting summaries publicly as early as 1994. The source of the definition for the practice of law varies between statute, case law, rule, and custom and practice. AM. BAR ASS'N 2018 SURVEY OF UNAUTHORIZED PRACTICE OF LAW ENFORCEMENT (2019), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2018_upl_survey.xlsx [https://perma.cc/K4QU-PMKC]; *see also* Derek A. Denckla, Response, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581 (1999); *see also* Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 UTAH L. REV. 87.

185. In Colorado, for instance, the foundation for the prohibition of the unauthorized practice of law is case law. *See, e.g.*, People v. Shell, 148 P.3d 162, 167 (Colo. 2006) (en banc.); Denver Bar Ass'n v. Pub. Utils. Comm'n, 391 P.2d 467, 470 (Colo. 1964) (en banc.). With respect to housing matters and the unauthorized practice of law, see generally Victoria V. Kremski, *The Unauthorized Practice of Law and Landlord-Tenant Cases*, The, 78 MICH. BAR J. 964 (1999).

186. *See Landlord/Tenant: Answer and Objection to Unlawful Detainer Eviction*, https://a.arlawhelp.org/landlord-tenant/unlawful-detainer-evictions [https://perma.cc/SVK2-84BM] (last visited Jan. 20, 2023).

187. *Answer and Objection PDF Packet*, ARK. L. HELP (Feb. 17, 2022, 2:00 PM), https://a.arlawhelp.org/ld.php?content_id=62232695 [https://perma.cc/F7SH-G9FN].

which might be pleaded in a future filing.[188] Such tools stop at offering legal advice, but can be useful at increasing access to courts.[189]

With respect to small claims courts, overall, such courts are effective at resolving civil disputes. One study of small claims courts in Iowa, for instance, concluded that the courts were, to a great extent, fulfilling their purposes of "impartially and intelligently" resolving disputes in a "speedy, simple, and inexpensive manner."[190] Yet, such processes still add cost and time to tenants asserting rights.

As is often the case, technology may reduce time and cost and expand access. A number of housing technology products are geared towards tenant access. JustFix, for instance, provides a variety of products to help tenants.[191] Tenants can use a mobile device to send a certified letter to their landlord concerning a repair.[192] During the pandemic, JustFix created a product to provide notice to a landlord about COVID-related factors to avoid eviction.[193]

With respect to unauthorized practice of law, Professor Deborah L. Rhode, among others, provided empirical data decades ago about the use of pro se forms in areas of law such as divorce.[194] Generally, pro se forms do not run afoul of unauthorized practice of law restrictions. Further, Rhode and others argue that to the extent tools such as pro se forms increase access to justice, they ought to be increased.[195] The private bar—the primary constituent group lobbying for an expanded unauthorized practice of law statute and enforcement—should view the increased access to courts as a positive factor.[196]

Washington State and other states, including Utah, have noteworthy exceptions to the unauthorized practice of law with the recent introduction of licensed paralegals.[197] Some states, such as Virginia, have declined to adopt similar licensing regimes, rather focusing on programs to serve clients of modest means and adopting unbundled legal services methods.[198]

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188. *Id.*

189. Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1026 (2004) ("Civil courts should also redesign their own processes to reduce costs and increase accessibility.").

190. Suzanne E. Elwell with Christopher D. Carlson, Contemporary Studies Project, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 524 (1990) (discussing the effectiveness of small claims courts while noting difficulties in the post-judgment process).

191. *Technology for Housing Justice*, JUSTFIX, https://www.justfix.nyc/en/ [https://perma.cc/5QL6-DSDH] (last visited Jan. 20, 2023).

192. *Id.*

193. *Id.*

194. *See* Rhode & Cavanagh, *supra* note 38, at 104.

195. *Id.*

196. *Id.*

197. Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 MISS. L.J. SUPRA 75, 77 (2013).

198. Lori W. Nelson, *LLLT—Limited License Legal Technician: What It Is, What It Isn't, and the Grey Area in Between*, 50 FAM. L.Q. 447 (2016).

In New York, the leading case on the publication of forms and unauthorized practice of law is *Dacey*.[199] In that case, a nonlawyer published a book titled *How to Avoid Probate!* The book discusses the challenges presented by probate and steps that individuals can take to avoid probate.[200] New York's highest court held there was no unauthorized practice of law because the book was sold to the public and there was no relationship of trust between the author and the purchasers.[201]

2. Increasing Judicial Consistency

A final element in the consistent application of the warranty of habitability is increased judicial consistency. For example, judges must conduct their own research and investigation to determine the adequacy of a remedy for a breach. Treating similar housing repair issues will lead to judicial consistency.[202] Local differences notwithstanding, a well-informed bench ought to be aware, say, of what sixty percent of judges award for a rodent infestation.[203]

II. THE H.A.R.M. CALCULATOR

This Part describes a project to address the problem posed in the last Part. Namely, how to make it costlier for landlords to *not* fix repairs in tenant apartments. It introduces the Warranty of Habitability Abatement of Rent Mathematical Calculator ("H.A.R.M. Calculator") and provides a summary of the reasons for its creation. Next, the benefits of the implementation of the H.A.R.M. Calculator to tenants are presented. As it is implemented, we anticipate the H.A.R.M. Calculator will provide valuable data about eviction and substandard housing conditions facing low-income tenants in the areas it is used.

Finally, we present challenges in implementing the H.A.R.M. Calculator. Specifically, we identify limitations confronting the ability of tenants to assert the warranty of habitability as a sword in seeking repairs to substandard housing. In addition, we identify systemic imbalances that the H.A.R.M. Calculator faces in its use. Ultimately, we articulate how we expect the H.A.R.M. Calculator to be most useful to individuals and families.

Given all of the deficiencies with withholding rent, this Article proposes an alternative remedy for the breach of the warranty of habitability. Specifically, the proposed remedy is for tenants to bring an affirmative claim in small claims court for breach of the warranty of habitability. This is significant for a number of

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199. N.Y. Cnty. Laws.' Ass'n v. Dacey, 234 N.E.2d 459, 459 (N.Y. 1967).

200. *Id.*

201. *Id.*

202. Anne X. Alpern, *The Judicial Process in Housing Code Enforcement*, 3 URB. LAW. 574, 575 (1971) ("It was recognized that having a dozen judges handle various aspects of violations could only result in fragmented enforcement without any consistent policy.").

203. Consistent approaches to dispute resolution can protect scarce court resources through efficient research and rendering of rulings.

reasons. The conversation about tenants' rights in eviction matters often focuses on the potential use of the warranty of habitability as a *defense* in eviction proceedings. The novelty of the H.A.R.M. Calculator rests in part in its function as an *affirmative* tool.[204] Most tenants currently lack representation and affirmative tools to win damages or repairs. This tool offers that benefit in a pro se delivery mechanism that tenants may affirmatively use to seek positive improvement to their housing conditions.

The following Sections will discuss the nature of the claim, the benefits of bringing the action in small claims courts, and the inability of the proposed remedy to act as a panacea for all tenants facing uninhabitable living conditions.

A. Nature of the Claim

As discussed above, most codifications of the warranty of habitability are designed to include a cause of action.[205] The proposed remedy would have tenants seek damages in an amount equal to the difference between (1) the agreed upon rent in the lease (i.e., the fair market value of the premises if it had been as warranted) and (2) the rental value of the premises during the period of the breach (the date landlord was placed on notice concerning the particular issue causing the breach up to the current date or, if applicable, the date the landlord fixed the issue). As the calculation suggests, the tenant would be essentially suing for back rent paid during the period of the breach.

B. Venue Selection: Why Small Claims Court

The tenant must decide as an initial matter which court is the proper venue to file her or his claim. While the tenant could file the claim in civil court, this Article proposes filing in small claims court for several reasons.[206] First, over the past few decades, a number of small claims courts have adopted recommendations—such as more convenient evening hours and increased amount-in-controversy thresholds—which make pro se litigation more convenient.[207] Second, despite many large businesses using small claims courts as collection agencies, small claims courts

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204. Deborah H. Bell, *The Mississippi Landlord-Tenant Act of 1991*, 61 MISS. L.J. 527, 528 n.5 (1992) (noting that most low-income tenants only use the warranty of habitability defensively and few tenants have counsel to bring affirmative cases against landlords for violations of the warranty).

205. For instance, in New York, the intended purpose of NEW YORK REAL PROPERTY LAW section 227-f (McKinney 2019) is to not only provide tenants an affirmative defense but to also provide tenants a cause of action. 1975 LEGIS. ANN., at 315 (memorandum of Sen. H. Douglas Barclay).

206. There are, of course, reasons to file in other venues. Most likely this decision will be a state-by-state investigation based on the facts and processes in each state. In Massachusetts, for instance, litigants have no discovery rights in small claims courts, which may be a downside to tenants initiating warranty of habitability claims as tenants may lack records regarding notice.

207. Thomas L. Eovaldi & Peter R. Meyers, *Pro Se Small Claims Court in Chicago: Justice for the "Little Guy"?*, 72 NW. U. L. REV. 947, 992–95 (1978) (presenting findings from a study of a pro se small claims court experiment in Chicago and proposing improvements to the judgment collection process; evening and weekend hours; incentives to reduce continuances; added care in assignment of judges; and increasing the claim amount from $300 to $1,000).

still comprise the primary public mechanism for millions of litigants with small controversies to settle disputes.[208] Finally, with the rise of private arbitration, small claims courts are still the most open and accessible public dispute resolution options for small dollar claims.[209]

Nevertheless, there may be instances where small claims court is not an appropriate venue. With respect to damage amounts, money damages in small claims court are capped.[210] As a result, high damage claims may best be pursued elsewhere.

C. Representation: The Pro Se Litigant

If a tenant decides to initiate an action against his or her landlord, then the practical reality is that the tenant will likely do so without the assistance of legal counsel.[211] The rental housing market is dominated by low-income tenants.[212] It stands to reason that tenants facing uninhabitable living conditions are primarily low-income tenants who are living paycheck to paycheck.[213] A tenant who is struggling to make ends meet from week-to-week would be unable to retain legal counsel unless the attorney was willing to represent the tenant on a contingency basis. A tenant could explore turning to pro bono legal service programs for help. However, given that "[l]egal assistance from legal services programs is a scarce resource,"[214] it is unlikely a tenant would successfully procure such services. For these reasons, it is assumed that a tenant who pursues an affirmative claim would do so on a pro se basis.

D. Small Claims Court and the Pro Se Litigant

A pro se litigant who files his or her claim in civil court would be forced to navigate the complex maze that is proper court procedure. When considering the formal steps and procedures required in a civil case (e.g., filing the complaint, discovery, responding to motions, etc.), a pro se litigant could easily get lost within

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208. Leslie G. Kosmin, *The Small Claims Dilemma*, 13 HOUS. L. REV. 934, 981–82 (1976) (arguing for small claims court reforms in a manner that increases judicial resolution of disputes, however imperfect).

209. Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie L. Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOL. Q. 7, 7 (2017) (showing that some alternative dispute resolution mechanisms such as mediation and arbitration are being used with success in small claims courts).

210. *See infra* Section II.E.4. for a discussion of small claims court caps.

211. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999) ("Unrepresented litigants are flooding the courts.").

212. Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1353 (2007).

213. Nearly 80% of U.S. workers are living paycheck to paycheck. One may reasonably conclude that a tenant facing uninhabitable living conditions would more likely than not be living paycheck to paycheck. *See* Nelson, *supra* note 198.

214. Helen B. Kim, Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1648 (1987).

this maze. On the other hand, small claims court is an attractive option for the pro se litigant because its mission is to provide "a simple, informal and inexpensive procedure"[215] to decide small claims. Accordingly, the "rules are more informal, and the process is a lot easier."[216]

1. Cost

As discussed above, a tenant facing a breach of the warranty of habitability will likely be unable to sustain substantial costs to pursue a claim. Fortunately, filing a claim in small claims court is a relatively inexpensive proposition. In New York State, the filing fee for a city court can be as low as $15 for claims in the amount of $1,000 or less and $20 for claims in the amount of more than $1,000.[217] The filing fee for New York town or village court is $10 for claims in the amount of $1,000 or less and $15 for claims in the amount of more than $1,000.[218] This is significantly less than civil courts in New York where it would cost $210.[219]

Also, litigants are likely eligible for fee waivers. Fee waivers are available for low-income, poor litigants.[220] However, trial court judges have discretion about who receives a fee waiver.[221]

2. Commencing the Action

One of the co-authors visited our local small claims court, the Office of the Albany City Clerk in February 2019, to inquire how to file and commence an action in small claims court and confirmed it is a simple process. The plaintiff starts the process by completing a small claims application, which only requires the basic contact information for both the plaintiff and the defendant, the amount of the claim, and a brief description of the nature of the claim.[222] The plaintiff files the application with the applicable court clerk and pays the above-referenced filing fee.[223] The plaintiff is not responsible for service of process as the court clerk is

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215. N.Y. UNIFORM CITY CT. ACT § 1802 (McKinney 2019); N.Y. UNIFORM JUST. CT. ACT § 1802 (McKinney 2019).

216. *Small Claims*, NYCOURTS.GOV (July 15, 2021), https://www.nycourts.gov/courthelp/SmallClaims/index.shtml [https://perma.cc/T2PM-RSMX].

217. N.Y. UNIFORM CITY CT. ACT § 1803(a) (McKinney 2019).

218. N.Y. UNIFORM JUST. CT. ACT § 1803(a) (McKinney 2019).

219. N.Y. C.P.L.R. § 8018(a)(1)(i), (3) (McKinney 2022).

220. Lee Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. U. L. REV. 21, 33 (1967) ("About half the states and the federal government have enacted some form of waiver of filing fees or waiver of security deposit for poor litigants.").

221. Erin K. Burke, Note, *Utah's Open Courts: Will Hikes in Civil Filing Fees Restrict Access to Justice?*, 2010 UTAH L. REV. 201, 209 (discussing recent increases in civil court fees, and the difficulty facing the poor in paying them or seeking fee waivers).

222. LAWRENCE K. MARKS, N.Y. STATE UNIFIED CT. SYS., A GUIDE TO SMALL CLAIMS & COMMERCIAL SMALL CLAIMS IN THE NEW YORK STATE CITY, TOWN & VILLAGE COURTS (2022), https://www.nycourts.gov/courthelp/pdfs/SmallClaimsHandbook.pdf [https://perma.cc/CY57-65YJ].

223. *Id.*

required to send notice to the defendant via ordinary first-class mail and certified mail with return-receipt requested.[224]

3. Informal and Simplified Procedure

The fundamental tenet of small claims court is that courts conduct hearings "in such a manner as to do substantial justice between the parties according to the rules of substantive law."[225] The mandate to render substantial justice means only that "judges and arbitrators must lower the procedural and evidentiary hurdles that inhibit speedy, uncomplicated, inexpensive justice for the vast numbers of self-represented individuals, for whom the small and commercial claims courts are designed."[226] The procedural rules in New York civil courts of practice, procedure, and pleading do not apply.[227] As a result of this mandate, one commentator notes that "[s]ometimes substantial justice is found by turning the judicial face slightly away from the technical rule of substantive law."[228]

4. Rules of Evidence

The rules of evidence are substantially relaxed in small claims court in that all evidence is admissible, "except [that subject to] statutory provisions relating to privileged communications and personal transactions or communications with a decedent or mentally ill person."[229] As a result, hearsay in testamentary and documentary form is admissible.[230] However, a judgment cannot be reached on hearsay alone; some non-hearsay evidence must be introduced for a judgment to be awarded.[231]

E. H.A.R.M Calculator: Details and How it Works

In order to aid the pro se litigant to bring a claim of the breach of the warranty of habitability, the co-author, Jordan Fruchter, created a computer program referred to as the Warranty of Habitability Abatement of Rent Mathematical Calculator ("H.A.R.M. Calculator") as part of a team assignment in the Community Economic

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224. N.Y. UNIFORM CITY CT. ACT § 1803(a) (McKinney 2019).

225. N.Y. UNIFORM CITY CT. ACT § 1804 (McKinney 2019).

226. Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, N.Y. ST. BAR J., Dec. 1998, at 6, 9.

227. N.Y. UNIFORM CITY CT. ACT § 1804 (McKinney 2019).

228. David D. Siegel, MCKINNEY PRACTICE COMMENTARY, Civ. Ct. Act § 1803 (1989); *see also* David D. Siegel, NEW YORK PRACTICE § 581, at 917 (2d ed. 1991). ("What is apparently meant [in sections 1804, 1804-A] is that substantive law can be flexed a bit as long as it is not broken off entirely.").

229. N.Y. UNIFORM CITY CT. ACT § 1804 (McKinney 2019).

230. Forte v. Westchester Hills Golf Club, Inc., 426 N.Y.S.2d 390, 391–92 (City Ct. 1980); Bazzini v. Garrant, 455 N.Y.S.2d 77, 79 (Dist. Ct. 1982) (admitting notarized letter).

231. Arnold Herstand & Co. v. Gallery: Gertrude Stein, Inc., 626 N.Y.S.2d 74, 78 (App. Div. 1995).

Development Clinic at Albany Law School.[232] The authors spent years developing the H.A.R.M. Calculator as a web-based application.[233] The following Sections will discuss the intended purpose of the H.A.R.M. Calculator, the intended target audience, the general layout of the calculator, the required inputs, the calculation of the percentage abatement, and the output.

1. Intended Purpose

The purpose of the H.A.R.M. Calculator is to provide a tenant (1) a method to reasonably estimate damages for his or her particular issue based on existing New York case law; (2) the paperwork necessary to initiate a claim in small claims court; and (3) a summary of the claim to help organize the tenant's thoughts while at trial. It should be stressed the calculator alone cannot win the case for a tenant. Whether the tenant is successful at trial is a matter of how well they "tell their story" in the form of their testimony and evidence presented. The calculator is designed to aid the tenant in the story telling process.

2. Intended User

Although the H.A.R.M. Calculator is intended to aid tenants to pursue a claim against their landlord, the tenant, somewhat counterintuitively, is *not* the intended user of the application. Instead, the intended user is an attorney at a pro bono legal service provider (e.g., a legal aid or legal services organization) or law students under the supervision of an attorney (e.g., a student participating in a law school clinic). While the calculator is intended to help simplify the legal process for the tenant, filing a claim for the breach of the warranty of habitability would likely be too complicated for tenants to pursue on their own without some sort of intervening legal guidance. As such, at least initially, the calculator will not be made available for a tenant's direct use. Instead, it is envisioned that the tenant would meet with an attorney or law student to review his or her particular fact pattern and, if appropriate, the attorney or law student would use the small claims calculator to generate a small claims application and trial document for the tenant to bring a claim. Inserting an attorney or law student into the process will help properly educate the tenant on the nature of the claim, the procedure to place the landlord on notice, and how to properly prepare for trial.

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232. *See* Mineau, *supra* note 48.

233. Additional groups of law students assisted with researching case law, testing, working with tenants, and working with tenants' rights organizations to make this endeavor possible.

3. Calculator Layout

The H.A.R.M. Calculator consists of three sections: the "Input" screen, the "Application" output, and the "Trial Document" output.[234] Upon inputting some basic information concerning the tenant, the landlord, and the particular issue, the calculator will automatically calculate an estimate of the tenant's damages, complete the small claims application to be filed,[235] and create the trial document for the tenant's reference.

4. Input

Section one of the input screen collects basic contact information for both the tenant and the landlord and the amount of monthly rent. The tenant should be able to obtain the landlord's contact information from the lease agreement. The information in section one will automatically carryover to the small claims application to be filed with the city clerk.

Section two of the input screen collects information concerning the apartment issue(s) that the tenant is experiencing. The tenant starts by selecting the general problem with the apartment from a drop-down box and then selects the specific issue within that category.[236] Selecting the specific issue will automatically generate the percentage discount for the breach of the warranty of habitability.[237] The tenant then inputs the date the landlord was notified of the issue, whether the landlord fixed the issue, and, if applicable, the date the landlord fixed the issue. The program will automatically calculate the amount of rent paid from the period of notification to the current date or, if applicable, the date the landlord fixed the issue. The program will then calculate the discounted rent for that time period based on the applicable breach of the warranty of habitability percentage. The difference between the rent paid and the discounted rent represents the amount of damages for that particular issue. The amount of damages for all issues is aggregated and carried to the small claims application and the trial document. If the total damages exceed $5,000, the damages are capped at the statutory cap of $5,000, which is the limit in

234. Consider how other automated document generation tools, such as those used to automatically file income tax forms, operate.

235. The intent is to modify the calculator in the near future such that it will be capable of generating a small claims application for multiple jurisdictions. Initially, we created the tool to be used in Albany, New York.

236. See *infra* Appendix 1 for the list of categories and subcategories.

237. See *infra* Section II.E.5 for how the percentage is determined.

the jurisdiction the project originated in.[238] More study needs to be completed about the differences in statutory caps on damages in small claims court.[239]

5. Percentage Discount of Rent

The percentage discount due to the breach of the warranty of habitability is estimated by using the percentage abatement granted in previous cases with the same or similar issue.[240] Given the scarcity of published decisions concerning the breach of warranty in a particular jurisdiction (e.g., Albany civil court), the calculator utilizes case law across the entire state. While the case law from outside of the jurisdiction will not be binding, the court should at least find the case law and, by extension, the percentage abatement, persuasive. A lack of hot water has no jurisdictional bounds and therefore should yield a substantially similar percentage abatement regardless of whether the apartment is located in one city or another.

In some instances, there was no case law available for the specific issue. The calculator uses a reasonable estimated percentage discount for these particular issues.[241] One court has stated that "one well respected treatise [Rasch's 2 N.Y. Landlord & Tenant Incl. Summary Proc., § 18:8 at 40–41(4th ed.)] suggests that '[a]s a general rule, the courts have granted rent abatements of 10% to 20% for minor breaches of warranty, or general deterioration of building services, 30% for moderately serious breaches, and 50%–60% for most serious breaches.'"[242] Accordingly, depending on the severity of the particular issue, the calculator estimates the discount ranging from 10% to 60% where there is no case law for the specific issue.

6. Output

Upon properly completing the input section, the small claims calculator produces two documents for the tenant. The first document is a completed small

238. The calculator is currently intended for use in Albany city court. The intent is to modify the calculator such that it will be capable of generating the small claims application for multiple jurisdictions including town and village courts, in which case the damages calculation will be capped at $3,000.

239. With respect to substance, authors have proposed expanding small claims to fourth amendment matters and patent claims, among other types of disputes. Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 571, 571 (2013); Robert P. Greenspoon, *Is the United States Finally Ready for a Patent Small Claims Court*?, 10 MINN. J.L. SCI. & TECH. 549, 549 (2009).

240. See *infra* Appendix 2 for the percentage discount for each specific issue. For example, the calculator uses a forty-five percent discount for a bedbug infestation which was the percentage abatement granted in *Ludlow Properties, L.L.C. v. Young*. *See* 780 N.Y.S.2d 853, 857 (Civ. Ct. 2004) (awarding a forty-five percent abatement for bedbug infestation).

241. See *infra* Appendix 2 for the estimated percentage discount for each specific issue.

242. Hamblin v. Bachman, 885 N.Y.S.2d 711, 714 (City Ct. 2009) (unreported table decision).

claims application for the court in the relevant jurisdiction.[243] All that is required of the tenant to initiate the suit is to sign the application where indicated, file the application with the city clerk, and pay the applicable fee.

The second document produced is the trial document. The document is not intended to be admissible as evidence in the proceeding, but rather to serve as a script of sorts for the tenant's use. The document is structured to organize the tenant's thoughts and aid them as they proceed step-by-step through the trial. The first section explains the nature of the claim (breach of the warranty of habitability), provides the statutory authority (in the case of New York, it is New York Real Property Law § 235-b), and the specific issue(s) causing the breach (e.g., no heat). The next section provides an explanation of how the damages are calculated for a New York claim which is then followed by a specific break-down of the damages calculation for each issue. The calculation includes critical information such as the date the landlord was placed on notice, the length of the breach, the rent paid during the breach, the percentage discount, and the supporting case law.

7. A Final Word

The traditional remedy for the breach of the warranty of habitability seems simple on paper. The tenant withholds rent until the issue is fixed. However, it cannot be viewed as universal solution. In some cases, it is impractical for the tenant to withhold rent. In other cases, it is impossible for the tenant to withhold rent. Tenants need multiple options so that they can find a solution that is tailored to their particular circumstances. The small claims court solution is one more option that tenants can utilize to remedy their uninhabitable living conditions.

F. Challenges of H.A.R.M. Calculator

1. Limitations and Considerations

While filing a claim in small claims court may be an attractive option, it is not a one-size-fits-all solution that will be appropriate for every tenant. The remedy has several limitations that a tenant should carefully consider.

2. Payment of Rent Required

In order to utilize the proposed solution, the tenant must have actually paid rent to the landlord. The nature of the claim is a recovery of back rent; thus, it would be unavailable as a remedy if the tenant has been withholding rent or the tenant is just behind on the rent.

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243. The intent is to modify the calculator such that it will be capable of generating the small claims application for multiple jurisdictions. *See supra* note 235.

3. No Equity Jurisdiction

Small claims courts do not have equity jurisdiction.[244] As a result, a tenant cannot utilize small claims court to compel the landlord to cure the conditions giving rise to the breach of the warranty of habitability. The tenant is limited to suing for monetary damages. In many cases fixing the issue may be more important than recovering damages. The satisfaction of recovering damages for lack of heat may be of little consolation to the tenant if it is the middle of winter and ten degrees outside. If fixing the issue is the tenant's primary goal, the tenant should seek an alternative remedy.

4. Limited Personal Jurisdiction

In order for the tenant to bring the claim in small claims court, the court must have personal jurisdiction over the landlord. The scope of personal jurisdiction for small claims court can be limited depending on the jurisdiction. In New York, until recently, for city courts, the landlord must have either resided, maintained an office for the transaction of business, or had regular employment within the *county* where the small claims court is located.[245] For town or village courts in New York, until recently, the defendant must have either resided, maintained an office for the transaction of business, or had regular employment within the *municipality* where the small claims court is located.[246] This limited personal jurisdiction significantly narrowed a tenant's ability to bring a claim against his or her landlord because merely owning a rental property located within the locality was *not* sufficient for the small claims court to assert personal jurisdiction.[247] In the past, the landlord must have lived, worked, or maintained an office in the locality. As of 2022, the New York legislature has adopted legislation that expands the scope of personal jurisdiction of small claims courts by providing personal jurisdiction over a landlord if the rental property is located within the county.[248]

In many instances the rental property will be owned by a limited liability company ("LLC"), rather than the landlord directly. Because an LLC, unlike an individual, cannot reside or have regular employment in a locality, personal jurisdiction could, in the past, be obtained over the LLC only if it had an office for the transaction of business in the applicable locality.[249] Fortunately, there is a simple method to confirm the location of at least one of the LLC's offices. New York law

244. N.Y. UNIFORM CITY CT. ACT §§ 207, 1801 (McKinney 2021); N.Y. UNIFORM JUST. CT. ACT § 1801 (McKinney 2021).

245. N.Y. UNIFORM CITY CT. ACT § 1801 (McKinney 2021).

246. *Id.*

247. *See, e.g.*, Solomon v. Correll, 597 N.Y.S.2d 268, 268–69 (City Ct. 1993); Wessell v. Porter, 438 N.Y.S.2d 57, 58–59 (City Ct. 1981).

248. N.Y. UNIFORM CITY CT. ACT § 1801 (McKinney 2022); N.Y. UNIFORM JUST. CT. ACT § 1801 (McKinney 2022).

249. N.Y. UNIFORM CITY CT. ACT § 1801 (McKinney 2021); N.Y. UNIFORM JUST. CT. ACT § 1801 (McKinney 2021).

requires that the LLC articles of organization designate in which county the LLC's office is located.[250] The designated county can be obtained by visiting the New York Department of State business entity database online and performing a search of the LLC in question.[251] Altogether, it should be simpler for small claims courts to assert jurisdiction over landlords and LLC owners with the recent law reforms granting personal jurisdiction over defendants with real property located in a jurisdiction.

5. Statutory Cap on Damages

In deciding to bring an action in small claims court, the tenant should consider the jurisdictional limit on damages. The maximum amount a plaintiff can sue for in small claims court is capped at $5,000 in city court[252] and $3,000 for town and village courts.[253] At the time of this writing, the New York legislature had recently increased the statutory cap in New York City to $10,000[254] and had proposed increasing the maximum amount to as high as $15,000.[255]

While the increased jurisdictional limit would increase the viability of utilizing small claims court, it remains to be seen whether the average tenant would reach the current jurisdictional limit. Absent a significantly long period of time where there is a breach, a tenant's damages will likely not reach the cap.

Consider the following example. Assume a tenant (T) rents an apartment in Alabany, New York paying $968, which represents the median gross rent for the area.[256] After moving into the apartment, T faces an infestation of bedbugs. Assume the infestation is severe enough that it would constitute a breach of the warranty of habitability which would entitle T to a rent reduction of 45%.[257] T promptly notifies his landlord (L) who refuses to remedy the condition. After waiting for six months, during which time T continued to pay rent, T decides to sue L in small claims court

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250. N.Y. LTD. LIAB. CO. LAW § 203(e)(2) (Consol. 2022).

251. To complete this search, visit Dep't of State, Div. of Corps., *Corporation and Business Entity Database*, N.Y. STATE, https://www.dos.ny.gov/corps/bus_entity_search.html [https://perma.cc/A5XT-CYGY] (last visited Jan. 20, 2023).

252. N.Y. UNIFORM CITY CT. ACT § 1801 (McKinney 2022).

253. N.Y. UNIFORM JUST. CT. ACT § 1801 (McKinney 2022).

254. S.B. 6417, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) (increasing the monetary jurisdiction of the New York city civil court to $10,000); Assemb. B. 4360, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) (raising the civil jurisdictional limits to $10,000 for small claims).

255. *See* Assemb. B. 7421, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) (increasing the monetary jurisdiction of the justice courts from $3,000 to $15,000); S.B. 5951, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) (increasing the monetary jurisdiction of the justice courts from $3,000 to $5,000).

256. *Albany New York Residential Rent and Rental Statistics*, DEP'T OF NOS., https://www.deptofnumbers.com/rent/new-york/albany/ [https://perma.cc/6P5C-7KNQ] (last visited on Jan. 20, 2023); *see also id.* at n.1 ("Gross rent is defined as contract rent plus the estimated average monthly cost of utilities (electricity, gas, water, and sewer) and fuel (oil, coal, kerosene, wood, etc.). Because some rentals include utilities and others don't, gross rent is a way of normalizing the variability.").

257. *See* Ludlow Props., L.L.C. v. Young, 780 N.Y.S.2d 853, 857 (Civ. Ct. 2004) (holding a tenant was entitled to a 45% abatement of rent due to a bed bug infestation).

in City Court for L's breach of the warranty of habitability. Based on these facts, T's damages would be $2,614, which is calculated by multiplying the monthly rent ($968) times the percentage abatement (45%) times the period of the breach (six months). T is well under the jurisdictional limit of $5,000 outside of New York City.

6. Calculation of Damages

Finally, a claim for damages due to the breach of the warranty of habitability must be set forth with some degree of specificity rather than merely a demand for 100% abatement for the period of the breach.[258] It's unlikely a pro se litigant with no familiarity of the case law on the particular matter will be able to calculate a reasonable approximation of their damages. However, see discussion *infra* at Part III as to how the H.A.R.M. calculator can eliminate the guess work for the tenant and aid in the overall process of filing their claim.

7. Ethical Considerations

Picking up the discussion from Part I.C.1.c. above, the *Dacey* court makes three points relevant to the H.A.R.M. Calculator. First, the use of a legal form does not constitute the unlawful practice of law.[259] The output of the H.A.R.M. Calculator are prefilled forms. The forms can be used by tenants in initiating an action in small claims court based on preloaded case law that also produces a supporting damages calculation to support the claims asserted in the form complaint.

Second, the *Dacey* court held that the book, *How to Avoid Probate!*, offered general advice to common problems without specifically identifying or offering advice.[260] The H.A.R.M. Calculator is similar. It offers a general solution to a common problem: how to compel a landlord to make repairs. If a tenant completes the H.A.R.M. Calculator on their own, they are not receiving personal advice. Rather, they are accessing information to benefit themselves and their cohabitants.

Third, the *Dacey* court held that the drafting of legal documents that create legal rights is not always the practice of law.[261] Further, to find unlawful practice, there must also be engagement with a professional to create an improper or illegal

258. Bartley v. Walentas, 434 N.Y.S.2d 379, 383 (App. Div. 1980).

259. *See* N.Y. Cnty. Laws.' Ass'n v. Dacey, 283 N.Y.S.2d 984, 997 (App. Div.) (Stevens, J., dissenting) ("Courts and lawyers continuously use and cite texts for this very purpose. So also with forms."), *rev'd*, 234 N.E.2d 694 (N.Y. 1967).

260. *See id.* at 998 ("At most the book assumes to offer general advice on common problems, and does not purport to give personal advice on a specific problem peculiar to a designated or readily identified person.").

261. *See id.* at 999 ("Concededly the practice of law 'manifestly includes the drafting of many documents which create legal rights. It does not follow, however, that the drafting of all such documents is always the practice of law.'" (citing Or. State Bar v. Sec. Escrows, 377 P.2d 334, 337 (Or. 1962) (en banc.))).

professional relationship.[262] Here, the H.A.R.M. Calculator allows someone in need to access the court system when they would not otherwise be able to do so.

In the instance that a tenant is assisted in the completion of the H.A.R.M. Calculator, it may be relevant who is assisting. If the person assisting is a volunteer attorney, such a situation is permissible to the extent the work is completed as part of a limited scope engagement. Similarly, if a law student is assisting under an attorney's supervision, the limited scope analysis applies.

A law student acting without a supervising attorney would not be covered by the same supervision and law license. In such a situation, the law student should make clear that they are assisting the tenant in the completion of a form without giving legal advice. Similarly, in the instance that a worker at a nonprofit tenants' rights group assists in the preparation of the form, that individual should make clear that they are assisting in the preparation of the form and not offering legal advice.

The concept of ghostwriting may be relevant to the extent that a judge or factfinder questions the tenant about the origin of the form. Courts have wildly divergent views on the ethics of ghostwriting as a means to enhance access to justice.[263] States vary from not requiring the identity of a ghostwriter be revealed, to requiring the fact that a ghostwriter has assisted but not revealing the identity, to only revealing the identity if the assistance is "substantial" or "excessive," to requiring the identity of a ghostwriter.[264] As a matter of transparency, and because of New York practice rules, we include a statement that the form was prepared with the assistance of the "Community Economic Development Clinic in The Justice Center at Albany Law School" so that judges and other court personnel know to contact us if they have questions or concerns about tenants using the forms in court.[265]

III. PROJECT GOALS AND MEASURES FOR SUCCESS GOING FORWARD

At present, the current version of the H.A.R.M. Calculator is in use and collecting data in our home city. We are expanding to additional cities and states. This Part explores (1) metrics for study, (2) expected data outputs, and (3) opportunities for further research.

A. Metrics for Study

A key metric for study will stem from the ability of tenants to use the H.A.R.M. Calculator to assert their rights. Such metrics include amount of funds requested in court and the amount of funds ordered by courts. Funds demanded, and

262. *See id.* (citing People v. Alfani, 125 N.E. 671 (N.Y. 1919)).

263. Jona Goldschmidt, *Ghosting: The Courts' Views on Ghostwriting Ethics Are Wildly Divergent. It's Time to Find Uniformity and Enhance Access to Justice*, 102 JUDICATURE, Fall/Winter 2018, at 36, 46.

264. *Id.*

265. H.A.R.M. Calculator tool, *supra* note 49.

judgements ordered, will offer metrics to study a useful aspect of eviction that is often overlooked: what funds are left on the table by tenants for failing to assert the warranty of habitability.

Additional metrics will be added as scholars continue to study eviction and its consequences. The authors, one of whom teaches a course in Housing Law & Policy, will continue to read the literature and engage in exploration of new metrics to add. Further, through the publication of this Article, the authors hope additional metrics may be proposed by scholars, practitioners, students, and other readers.

B. Expected Data Outputs

As mentioned above, data about funds demanded and funds awarded will be key outputs of the H.A.R.M. Calculator. However, additional data will be collected too. These include geographic location of apartment units that are substandard, or in need of repair.

As efforts to use visual mapping and other graphical methods to present eviction data expand, data collected through this project may complement other data collection studies. The authors expect that data collected with respect to property addresses of apartment units may lead to a narrative around chronic eviction. The H.A.R.M. Calculator may add to this narrative if tenants make use of the tool in a regular manner.

CONCLUSION

Based on the metrics articulated and data collected, the research team will be able to identify key additional findings worthy of future study. For example, we will be able to identify, based on location of the apartments in need of repair, racial and income information of residents using overlapping census data. As a result, a follow-up study about race, class, and income information may be explored.

Recently, in some jurisdictions, city councils are adopting "good cause" eviction ordinances.[266] Such ordinances do not *eliminate* eviction. Rather, they create the presumption that residential tenant leases are renewed. Further, they enumerate specific causes for which landlords may evict tenants. Non-payment of rent, as well as holding over beyond a lease term, are often included.

Landlords are challenging these laws on a variety of grounds. Such claims include Takings Clause violations and other constitutional, legal, and equitable claims. As good cause ordinances are enacted, refined, and operationalized, there is

266. *Just Cause Eviction Policies*, LOCAL HOUS. SOLS., https://localhousingsolutions.org/housing-policy-library/just-cause-eviction-policies/ [https://perma.cc/C27N-AZ8D] (last visited on Jan. 20, 2023).

an opportunity to study the outcomes of such laws alongside H.A.R.M. Calculator use. This is an area the authors seek to explore further in future study.[267]

Finally, the authors invite collaborators and partners to contact us about using the H.A.R.M. Calculator in their jurisdictions.

267. For a recent example of litigation related to Good Cause ordinances, see Order, Pusatere v. City of Albany, No. 1-22-140574 (N.Y. Sup. Ct. June 30, 2022), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1469&context=housing_court_all [https://perma.cc/46PU-3QEP]. The Community Economic Development Clinic at Albany Law School submitted an amicus brief on behalf of United Tenants of Albany and a tenants association for an affordable housing complex in an appeal of *Pusatere* before an intermediate appellate court in New York State.

Appendix 1: Apartment Issues

General Issue Dropdown Box

- Appliance Issue
- Electrical Issue
- Excessive Noise Issue
- Heat Issue
- Infestation Issue
- Interior Wall/Floor/Ceiling Issue
- Leak Issue
- Plumbing/Water Issue
- Rubbish/Garbage Issue
- Windows/Doors/Stairs Issue

Specific Issue Dropdown Box

Appliance Issue
Refrigerator not functioning
Oven or stove not functioning
Oven or stove insufficiently functioning

Electrical Issue
Light fixtures not functioning
Electricity insufficient to run basic appliances
No electricity in certain rooms
Outlets not functioning

Excessive Noise Issue
Excessive noise from neighboring building

Heat Issue
No heat
Insufficient heat

Infestation Issue
Bedbugs
Mice/Rats
Roaches
Other

Interior Wall/Floor/Ceiling Issue
Damaged floors
Holes in floors
Damaged walls
Holes in walls
Ceilings damaged
Ceiling falling down in room(s)

Leak Issue
Interior ceiling leaks
Leak resulting in flood
Leak resulting in mold
Leak resulting in sitting moisture

Plumbing/Water Issue
Intermittent lack of hot water
No hot water
No water
Pipes freezing
Sinks backed up
Toilets backed up
Water discolored
Water has foul odor

Rubbish/Garbage Issue
Accumulation of garbage

Windows/Doors/Stairs Issue
Windows not locking properly
Windows not opening/closing
Windows broken
Windows not weather-tight
Exterior door not closing properly
Exterior door broken
Door not weather-tight
Broken exterior door lock
Stair railing missing/broken
Stairs broken/unsafe

Appendix 2: Percentage Discount for Breach of the Warranty of Habitability

Specific Issue	Discount	Support
Appliance Issue		
Refrigerator not functioning	20%	Estimate
Oven or stove not functioning	10%	Whitehall Hotel v. Gaynor, 470 N.Y.S.2d 286 (Civ. Ct. 1983)
Oven or stove insufficiently functioning	10%	Whitehall Hotel v. Gaynor, 470 N.Y.S.2d 286 (Civ. Ct. 1983)
Electrical Issue		
Light fixtures not functioning	10%	Estimate
Electricity insufficient to run basic appliances	30%	Estimate
No electricity in certain rooms	30%	Estimate
Outlets not functioning	20%	Estimate
Excessive Noise Issue		
Excessive noise from neighboring building	50%	Nostrand Gardens Co-Op v. Howard, 634 N.Y.S.2d 505 (1995)
Heat Issue		
No heat	38%	Five Corner Rentals, LLC v. Valentino, Index No. LT 191-16 (Civ. Ct. 2016)
Insufficient heat	20%	Estimate
Infestation Issue		
Bedbugs	45%	Ludlow Properties, LLC v. Young, 780 N.Y.S.2d 853 (Civ. Ct. 2004)
Mice/Rats	30%	Estimate
Roaches	40%	501 New York LLC v. Anekwe, 836 N.Y.S.2d 485 (App. Term 2006)
Other	30%	Estimate

Interior Wall/Floor/Ceiling Issue		
Damaged floors	9%	Pleasant E. Assocs. v. Cabrera, 480 N.Y.S.2d 693 (Civ. Ct. 1984)
Holes in floors	20%	Estimate
Damaged walls	15%	Estimate
Holes in walls	15%	Estimate
Ceilings damaged	15%	Estimate
Ceiling falling down in room(s)	50%	Whitehall Hotel v. Gaynor, 470 N.Y.S.2d 286 (Civ. Ct. 1983)

Leak Issue		
Interior ceiling leaks	10%	Century Apartments, Inc. v. Yalkowsky, 435 N.Y.S.2d 627 (Civ. Ct. 1980)
Leak resulting in flood	55%	Estimate
Leak resulting in mold	20%	Estimate
Leak resulting in sitting moisture	20%	Estimate

Plumbing/Water Issue		
No hot water	38%	Five Corner Rentals, LLC v. Valentino, Index No. LT 191-16 (Civ. Ct. 2016)
Intermittent lack of hot water	5%	Whitehall Hotel v. Gaynor, 470 N.Y.S.2d 286 (Civ. Ct. 1983)
No water	50%	H & R Bernstein v. Barrett, 421 N.Y.S.2d 511 (Civ. Ct. 1979)
Sinks backed up	15%	Estimate
Toilets backed up	10%	Clarkson Mobile Home Park, Inc. v. Ecklund, 532 N.Y.S.2d 615 (Co. Ct. 1987)
Pipes freezing	55%	Estimate
Water discolored	30%	Estimate
Water has foul odor	50%	Newkirk v. Scala, 935 N.Y.S.2d 176 (2011)

Rubbish/Garbage Issue		
Accumulation of garbage	10%	Park W. Mgmt. Corp. v. Mitchell, 47 N.Y.2d 316 (1979)

Windows/Doors/Stairs Issue		
Windows not locking properly	10%	Estimate
Windows not opening/closing	10%	Estimate
Windows broken	9%	Pleasant E. Assocs. v. Cabrera, 480 N.Y.S.2d 693 (Civ. Ct. 1984)
Windows not weather-tight	10%	Estimate
Exterior door not closing properly	30%	Estimate
Exterior door broken	30%	Estimate
Door not weather-tight	10%	Estimate
Broken exterior door lock	30%	Estimate
Stair railing missing/broken	25%	Estimate
Stairs broken/unsafe	25%	Estimate