

The Limits of Good Law: A Study of Housing Court Outcomes

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ABSTRACT

The enactment of the warranty of habitability in the early 1970s was hailed as a revolution in tenants' rights. Reversing centuries of legal precedent, the doctrine established that a tenant's obligation to pay rent is contingent upon the landlord's obligation to maintain the premises in good repair. Today, nearly fifty years later, scholars and advocates frequently observe that the law has not lived up to the potential originally envisioned. Yet these observations have been based on weak empirical evidence. This Article presents the results of the first rigorous empirical study on the effectiveness of the warranty of habitability. Based on statistical analysis of over 1,200 eviction case files and unit-level data matching of these files to Housing Code enforcement records, the study finds that the overwhelming majority of tenants with meritorious warranty of habitability claims do not benefit from the law at all.

The Article makes two significant contributions to the literature on the warranty of habitability. First, it establishes definitively that an operationalization gap exists in the law. While prior studies have observed that the warranty appears to be less effective than originally envisioned, all suffered from methodological limitations. These studies were either based on small, non-representative samples, or measured the use of the warranty against the entire population of tenants facing nonpayment of rent eviction. No study has been able to rigorously assess the use of the warranty of habitability in cases where it should be used: those in which the tenant has a meritorious claim. This study does so.

Second, the Article upends the leading theories for why the warranty of habitability is ineffective. These theories posit that tenants are unable to benefit from the warranty of habitability because they lack access to legal representation and/or because strict requirements exist for assertion of the claim. The findings of this study show that neither theory withstands empirical scrutiny. Specifically, the data reveal that although legal representation significantly affects a tenant's likelihood of benefiting from the warranty of habitability, still most represented tenants with meritorious claims do not benefit from the law at all. The findings also demonstrate that the strict procedural requirements cannot explain the law's ineffectiveness – even where the requirements are absent, the law is rarely used.

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INTRODUCTION

Ms. J’s apartment in the South Bronx had become truly unlivable. The bathroom ceiling had collapsed, the walls were covered in mold, and the entire place was infested with mice.¹ There were leaks in the bedroom and bathroom that had become so severe that, on multiple occasions, water flooded not only Ms. J’s apartment, but also the hallways of the building and neighboring units.² Ms. J had called the City to report the problems and inspectors had cited the landlord for violations of the Housing Code, but still no repairs had been made.³ Eventually, Ms. J stopped paying rent, as was her legal right to do. Since the early 1970s, the warranty of habitability has established that a tenant’s obligation to pay rent is contingent upon the landlord’s obligation to maintain the premises in good repair.⁴ The law states that where a landlord fails to maintain the property, the tenant is entitled to a rent abatement – a reduction in the amount of rent owed.⁵ Rather than fix the conditions in Ms. J’s apartment, however, the landlord filed an eviction action against her for nonpayment of rent.⁶ The law contemplates this response, and allows the warranty of habitability to be

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¹ *Beaumont Mgmt. Grp. LLC v. V.J.*, LT-021382-16/BX (N.Y. Civ. Ct. 2016).

² *Id.*

³ *Id.*

⁴ *See Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1072-73 (D.C. Cir. 1970). The warranty of habitability is often referred to as the “implied warranty of habitability” because it is implied in every residential rental agreement. *Id.* In New York, the doctrine is typically referred to as the “warranty of habitability” because it was enacted by statute. *See* N.Y. REAL PROP. LAW § 235(b). I use the term “warranty of habitability” or simply “warranty” to reflect this local usage and for simplicity of language.

⁵ *Id.*

⁶ *Beaumont Mgmt. Grp.*, LT-021382-16/BX.

asserted as a defense and counterclaim to the eviction complaint.⁷

The two sides came into Housing Court in July 2016, and the judge ordered the landlord to correct the defective conditions.⁸ The order required the landlord to make the repairs on two specific dates in August.⁹ Yet Ms. J waited at home all day both days, and no one ever showed.¹⁰ The parties went back into court in early September, and the court again ordered the landlord to make the repairs – this time, a few weeks later.¹¹ The landlord again did not comply.¹² This series of events repeated itself six more times throughout the fall and winter of 2016, and even into spring and summer 2017.¹³ Each time, the court ordered the landlord to make the exact same repairs, and each time, the landlord ignored the order.¹⁴ Eventually, the case settled.¹⁵ The landlord still had not made any of the repairs, but Ms. J agreed to repay the full amount of the back rent.¹⁶ The letter of the law had proven meaningless. Despite spending over a year in court, Ms. J was unable to effectively invoke her right to a rent abatement, nor was she able to use the law to secure performance of the repairs. And Ms. J had an attorney.¹⁷

The warranty of habitability was hailed as a “revolution” in landlord-tenant law;¹⁸ it was expected to provide a “powerful new remed[y] with which the urban poor could compel landlords to maintain their buildings adequately.”¹⁹ Yet nearly fifty years after the warranty’s enactment, to what extent is Ms. J’s experience typical, and to what extent is it an outlier? This Article presents the results of the first large-scale empirical study rigorously assessing the extent to which there is a warranty of habitability operationalization gap – a gap between the number of tenants

⁷ See *Park West Mgmt. Corp. v. Mitchell*, 47 N.Y.2d 316, 329 (N.Y. 1979).

⁸ *Beaumont Mgmt. Grp.*, LT-021382-16/BX.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 554 (1983-84).

¹⁹ David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 394 (2011). See Paula A. Franzese, Abbott Gorin, & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, RUTGERS U. L. REV. 1, 12 (2016) (“social justice reformers and tenants’ advocates heralded the advent of the implied warranty of habitability with great hopefulness”).

with meritorious claims²⁰ and the number of tenants who receive some benefit from the claim. Determining that there is a large gap, the study explores the reasons underlying it through further empirical analysis. The results upend the leading theories on why the warranty of habitability is under-enforced.

The study was conducted in the largest rental market in the country, New York City,²¹ in the context of nonpayment of rent eviction cases.²² Data was collected and analyzed to determine: (1) the overall rate of rent abatements in cases in which the tenant has a meritorious warranty of habitability claim; (2) whether and to what extent tenants with meritorious warranty claims receive other benefits from the claim, such as longer periods of time to repay rental arrears or avoidance of possessory judgments; (3) whether and to what extent the warranty functions as a tool within eviction proceedings to secure repairs; and (4) whether and to what extent legal representation affects a tenant's ability to benefit from the warranty where he or she has a meritorious claim.

The study was conducted using two unique datasets of nonpayment of rent eviction cases from 2016. The first dataset is a statistically significant sample of all nonpayment of rent eviction cases in which the tenant appeared. The second dataset is a statistically significant sample of nonpayment of rent eviction cases in which the tenant appeared and there were open "hazardous" or "immediately hazardous" Housing Code violations at the unit at the time the case was filed.²³ This dataset was

²⁰ Cases with meritorious claims were identified based on evidence of conditions of disrepair in the unit. For a detailed description of the methodology, *see infra* Section III.D.

²¹ According to the 2010 U.S. Census, New York City had 2,146,892 renter households. *See* U.S. Census – New York City Profile of General Population and Housing Characteristics: 2010 (2010). Los Angeles, the next largest city in the United States, has only 814,305 renter households. *See* U.S. Census – Los Angeles City Profile of General Population and Housing Characteristics: 2010 (2010). New York City was also selected as the site for this study for a number of other reasons. *See* Part III, *infra*.

²² Although the warranty of habitability may be asserted by tenants affirmatively, it is generally understood that the potential of the claim lies in its use as a defense and counterclaim in nonpayment of rent eviction cases. Affirmative cases tend to involve complicated and lengthy procedural requirements, and access to counsel is limited, as legal services providers prioritize representation of tenants who are at risk of eviction. In eviction cases, by contrast, tenants are already in court and can simply assert the claim as a defense or counterclaim in the case. *See* Franzese et al., *supra* note 19, at 2. *See also* Jessica K. Steinberg, *Informal, Inquisitive, and Accurate: An Empirical Look at a Problem Solving Court*, 42 LAW & SOC. INQUIRY 1058, 1064-65 (2017) (describing the problems involved in pursuing habitability claims both affirmatively and defensively).

²³ The Housing Code system in New York City has three classifications of violations: "Class A" for non-hazardous violations, such as a bathroom door that needs refitting or painting that needs to be done; "Class B" for hazardous violations, such as a defective carbon monoxide detector; and "Class C" for immediately hazardous violations, such as the

constructed based on a unique unit-level matching of eviction case data with Housing Code violation data. In total, over 1,200 nonpayment of rent eviction case files were collected, reviewed, and coded.²⁴

The study found that very few tenants with meritorious warranty of habitability claims actually benefited from the law. Overall, less than 2 percent of tenants who had meritorious claims received rent abatements. Perhaps even more astonishing, only 7 percent of tenants whose landlords have been cited by the City for hazardous or immediately hazardous Housing Code violations – a subset of those who had meritorious claims – received abatements. The findings also rule out the possibility that tenants with meritorious claims are reaping other types of benefits from their claims. Tenants with meritorious claims are no more likely to avoid possessory judgments or to receive longer periods of time to repay arrears as compared with tenants without meritorious warranty claims. The study also found that although tenants are more likely to benefit from the warranty of habitability when they have legal representation, the lack of access to counsel does not sufficiently account for the operationalization gap. The significant majority – 75 percent – of tenants who were represented by counsel and had meritorious warranty of habitability claims still did not receive a rent abatement. Finally, the findings showed that while eviction proceedings are indeed functioning as a forum to order landlords to perform needed repairs, the forum lacks accountability. Specifically, in 72 percent of cases in which the landlord agreed to make repairs in a court-ordered settlement agreement, the tenant reported that those repairs were still outstanding in a subsequent court appearance.

These findings make two broad sets of contributions to the scholarly literature on the warranty of habitability. First, the findings provide rigorous evidence of the existence of an operationalization gap in the warranty of habitability. While much research has pointed to problems with the warranty's implementation, prior empirical studies have consistently taken one of two forms. One set of studies has examined the overall frequency with which tenants assert warranty of habitability claims in court or receive rent abatements, without distinguishing between tenants who do and do not have meritorious claims.²⁵ A second set of studies has taken the

lack of heat or hot water. See N.Y.C. ADMIN. CODE §§ 27-2001 et seq. Class A violations must be repaired within 90 days, Class B within 30 days, and Class C within 24 hours. *Id.*

²⁴ A more detailed description of the study's methodology is provided in Part III, *infra*.

²⁵ See e.g., Franzese et al., *supra* note 19; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 1 (1992); Julian R. Birnbaum, Nancy B. Collins, & Anthony J. Fusco, *Chicago's Eviction Court: A Court of No Resort*, 17 URB. L. ANN. 93 (1979); Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Little Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J. L. REFORM 8, 12 (1973).

form of non-representative observational or case studies that have looked at outcomes among a small group of tenants with meritorious claims.²⁶ This study is the first thus far to rigorously examine on a large, representative scale the extent to which tenants benefit from the warranty of habitability when they have meritorious claims. It is also the first study to assess the possibility that tenants use the warranty of habitability to obtain beneficial outcomes in their cases other than rent abatements. That is, prior studies have not examined whether tenants use their entitlement to a rent abatement as leverage to achieve other desired case outcomes. This study does so.

Second, the findings of this study debunk the conventional wisdom on the reasons for the ineffectiveness of the warranty of habitability. Since the warranty's initial enactment nearly fifty years ago, scholars have tried to explain why tenants have not appeared to benefit from the law to the extent originally envisioned. The existing scholarship reflects a general consensus around two explanations: (1) tenants lack access to counsel; and (2) onerous legal requirements exist for assertion of a claim.²⁷ Recent theories have also hypothesized that tenant fears of retaliation discourage them from asserting the claim, and that judges lack ready access to Housing Code violation records, which would aid them in enforcing the law.²⁸ The findings of this study upend all of these existing theories.

First, the study finds that legal representation only accounts for a small fraction of the overall operationalization gap. While many previous studies have analyzed whether tenants who have access to counsel are more likely to receive rent abatements or raise warranty of habitability claims in court, none has measured the impact of legal representation specifically where the tenant had a meritorious claim.²⁹ This is the first study thus far to do so, and the finding shows that while representation matters, still the vast majority of represented tenants who have meritorious claims do not benefit from the warranty. Second, the study found the existence of a large operationalization gap *even though* New York lacks any of the onerous

²⁶ See Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57 (2015); Franzese et al., *supra* note 19, at 5 (discussing finding that among sample of eighty cases studied in which the warranty of habitability was raised, it successfully led to repairs in more than half).

²⁷ See *infra*, Section III.C.

²⁸ See *id.*

²⁹ See D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 931 (2013); Jessica K. Steinberg, *In Pursuit of Justice – Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 494 (2011); Carroll Seron, Martin Frankel, Gregg Van Ryzin and Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC. REV. 419, 428 (2001).

legal requirements for assertion of a claim. Thus, while these requirements may impose meaningful barriers where they exist, the findings of this study demonstrate that they do not sufficiently explain the warranty's lack of implementation. The study's findings also provide little support for the theory that retaliation fears drive tenant underuse of the claim. The data showed that tenants asserted their rights under the warranty at substantially higher rates than they benefited from it. And finally, the findings refute the theory that providing judges easy access to Housing Code violation records, without more, will serve as a meaningful solution to the warranty's operationalization failures. Code enforcement records are readily available to Housing Court judges in New York City, yet the data show that judges rarely take advantage of the opportunity to access them.

The Article proceeds as follows. Part I delves into the history of the warranty of habitability and explains the policy goals that drove its widespread enactment in the 1970s. Part II reviews the existing theoretical and empirical scholarship on the law's usage. Part III describes the objectives, data, and methodology of the study conducted. Part IV presents and analyzes the results. Part V describes the significance of these findings for our understanding of the warranty's implementation and the reasons for its ineffectiveness. The conclusions points to directions for future research.

I. EVOLUTION OF THE WARRANTY OF HABITABILITY

The implied warranty of habitability has a nearly fifty-year history. First enacted in 1970, the doctrine was adopted with the expectation that it would bring transformative change to the landlord-tenant relationship. Advocates and scholars believed that the law would level the playing field in eviction cases, compensate for ineffectual code enforcement systems, and serve as a strong deterrent mechanism against landlord property neglect. These expectations were widely shared by advocates, legislators, and jurists across the country. Following the warranty's initial adoption in the District of Columbia, forty-nine states embraced it in an extraordinarily short period of time. This Part describes the social, political, and legal concerns that motivated the creation of the warranty of habitability, and then traces its judicial and legislative adoption.

A. Motivations for the Warranty of Habitability

Prior to the enactment of the implied warranty of habitability, the doctrine of *caveat emptor* – buyer beware – applied to residential rental

agreements.³⁰ Landlords had limited obligations to maintain their units, and thus tenants were largely left to their own devices when conditions fell into disrepair. This doctrine was rooted in nineteenth century law that conceived of the lease as merely a possessory interest in land.³¹ A landlord fulfilled his or her obligations under the lease simply by conveying the land.³² The tenant then had complete control over the land and was responsible for maintaining any structures on it, while also assuming unconditional liability for the rent.³³ The lease contained no implied promises regarding the state of the premises being conveyed.³⁴ This scheme developed in an agrarian context in which the typical lease had a lengthy term and the tenant farmer was as well positioned to make the repairs as the landlord.³⁵

As demographic shifts occurred in the twentieth century, it became increasingly clear that *caveat emptor* was ill suited to the realities of modern landlord-tenant relationships.³⁶ By the 1960s and 1970s, overcrowded slums with dilapidated housing had come to characterize

³⁰ For a more detailed discussion of caveat lessee and early landlord-tenant law, see Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 *FORDHAM L. REV.* 225 (1969).

³¹ See Franzese et al., *supra* note 19, at 10.

³² See Richard Chused, *Saunders (a.k.a. Javins) v. First Nat'l Realty Corp.*, 11 *GEO. J. ON POVERTY L. & POL'Y* 191, 196 (2004).

³³ *Id.* The early common law rules even held tenants liable for rent after the premises had been destroyed by fire or other natural disasters. See *id.* at 197 n. 17. Many state legislatures changed these rules by statute in the nineteenth century. *Id.*

³⁴ *Id.* at 198 (“[t]he basic lease – the exchange of possession for rent – was both substantively and procedurally independent from other contractual terms”). When leases contained other covenants, those covenants were construed to be independent of each other, and thus a landlord’s violation of one covenant did not relieve a tenant of his or her obligations under another covenant. See *id.*

³⁵ See Mosier & Soble, *supra* note 25, at 12. Mosier and Soble also observe that in an agrarian context the dwellings conveyed were simple, and thus repairs were relatively inexpensive. *Id.*

³⁶ See *Javins*, 428 F.2d at 1074 (noting that, “in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well-known package of goods and services – a package which includes not merely walls and ceilings, but also adequate heat, light, and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance”). Courts also recognized that landlord-tenant law had failed to keep pace with developments in contract law, where judicial interpretation has “sought to protect the legitimate expectations of the buyer and have steadily widened the buyer’s responsibility for the quality of goods and services through implied warranties of fitness and merchantability.” *Id.* at 1075.

urban centers.³⁷ Poor tenants faced egregious and unsafe living conditions, and extremely few had the resources necessary to make the repairs.³⁸ The nature of contemporary landlord-tenant relationships also created different expectations.³⁹ A tenant renting an apartment usually held a short-term lease and expected to receive more than the land itself. The tenant instead sought to rent a dwelling equipped with utilities and functioning amenities.⁴⁰ There was a growing movement among legal advocates and scholars to modernize residential landlord-tenant law to conform to these expectations and needs.⁴¹

Housing codes had been enacted in many jurisdictions by this time, allowing for landlords to be held civilly and criminally liable for substandard conditions in their properties.⁴² However, there was strong

³⁷ See *id.* at 1078-79 (noting that “low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property”). Discriminatory federal housing policies severely restricted the housing options available to minority populations while at the same time facilitating white flight out of cities. The result was that minority tenants were forced into a limited supply of urban tenements, and cities’ became drained of their tax bases as property values plummeted.

³⁸ Quinn Phillips, *supra* note 30, at 225 (observing that tenants lived in “the most wretched living conditions, littered and unlit hallways, stairways with steps and banisters missing, walls and ceilings with holes, exposed wiring, broken windows, leaking pipes, stoves and refrigerators that do not work or work only now and then. And always the cockroaches, the rats, and the dread of the winter cold and uncertain heat.”). Substandard conditions can cause serious physical and emotional harm. See Super at 452 (“Chipping and peeling paint at home is the dominant cause of childhood lead poisoning, which can profoundly and permanently stunt children’s intellectual and emotional development. Asthma is the leading cause of urban school absences, and roach rodent, and mold infestation are leading causes of asthma”).

³⁹ See Mosier & Soble, *supra* note 25, at 12.

⁴⁰ *Id.*

⁴¹ See *Trends in Landlord-Tenant Law Including Model Code*, 6 REAL PRO. PROBATE & TRUST J. 550 (1971); Quinn & Phillips, *supra* note 30. Additionally, the warranty of habitability intended to harmonize the decline of caveat emptor in contract law with housing law. See Super, *supra* note 19, at 394.

⁴² Several courts noted that the establishment of housing codes reflected the legislative reversal of the doctrine of caveat lessee. See *e.g.*, *Pines v. Persson*, 14 Wis. 2d 590 (1961) (“The legislature has made a policy judgment that it is socially (and politically) desirable to impose [duties of repair] on a property owner which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.”); *Green v. California* (“These comprehensive housing codes affirm that, under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean, and habitable housing”). The development of the doctrine of constructive eviction further contributed to the erosion of caveat lessee. See Mosier & Soble, *supra* note 25, at 12. Under this doctrine, the tenant is entitled to terminate the lease by vacating the property if the premises are in such disrepair that they

consensus that enforcement was lacking. The costs associated with prosecuting landlords were high, and as commentators noted at the time, only “extreme violation[s] [] ha[d] any chance of being remedied in the major city setting, where large numbers of old buildings [we]re deteriorating rapidly.”⁴³ Code enforcement agencies were underfunded and overwhelmed, and most lacked sufficient adjudicatory resources to pursue aggressive litigation.⁴⁴ The agencies were also reluctant to seek criminal sanctions.⁴⁵ Civil liability, meanwhile, was proving an ineffective deterrent mechanism because fines were too low.⁴⁶ It was often cheaper for a landlord to pay a court-ordered fine than to make repairs.⁴⁷ Thus, as a mechanism for holding landlords accountable for making repairs, code enforcement was broadly considered “inefficient and unworkable.”⁴⁸ It became widely understood that the modern realities of rental housing demanded a stronger legal tool.⁴⁹

are unfit for human use. *Id.* Upon vacating the premises, the tenant’s rental obligation ends. *Id.* However, commentators at the time noted that while commercial lessees were in a position to take advantage of this development, the law was largely meaningless for residential tenants, for whom no better housing options were available if they opted to terminate their current lease. *Id.*

⁴³ *Id.* at 240.

⁴⁴ See Super, *supra* note 19, at 414.

⁴⁵ *Id.* (noting that, “[s]ending landlords to prison is not very popular” and also that the moral effect of criminal liability remains small: “What about the opprobrium of a conviction? That carries about the same sting as a traffic ticket”).

⁴⁶ See Quinn & Phillips, *supra* note 30, at 241.

⁴⁷ *Id.*

⁴⁸ See Super, *supra* note 19, at 402.

⁴⁹ See *Javins*, 428 F.2d at 1079-80 (noting that “the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum”). It was also widely understood that other available mechanisms for holding landlords accountable for property maintenance were insufficient. See Quinn and Phillips, *supra* note 30, at 242. The doctrine of constructive eviction allowed tenants to break their leases where landlords so badly neglected the premises that they became unlivable. *Id.* However, tenants could only exercise this defense if they actually abandoned the building, essentially defeating the whole purpose of raising it. *Id.* Some jurisdictions also had rent-withholding laws, which allowed tenants to deposit their rent into escrow in court rather than pay the landlord when they experienced, but commentators noted that tenants lacked bargaining power to invoke this law once their lease neared expiration. *Id.* Moreover, the typical “urban ghetto tenant,” who lived in buildings in the worst condition, had tenancy rights only as a “tenant by sufferance.” *Id.* at 243. This meant that the tenants most in need of the protection of the law lacked sufficient leverage to use rent-withholding on its own effectively. *Id.* In New York, Section 755 of the New York Real Property Actions & Proceedings Law (RPAPL) also allowed a tenant to withhold rent for lack of services, but this section only applied (and continues to apply today) when a government agency has already noted a “serious recorded violation.” *Id.* at 245. The statute, therefore, does not help tenants with a collection of smaller issues in an apartment. In addition, other

Public outrage was also growing at the law's toleration of slum conditions, particularly in urban centers.⁵⁰ The civil and welfare rights movements had swept the nation, generating a broad set of demands to expand the rights of poor and marginalized groups. As housing conditions were deteriorating and the size of urban slums was expanding, this context helped fuel a broad tenants' rights movement.⁵¹ Organized tenants held rent strikes, waged sit-ins, and engaged in other forms of protest to demand improved housing quality and affordability, while also standing behind litigation and lobbying efforts oriented towards the same goals.⁵²

The grassroots activism and legal reform efforts for better housing conditions coalesced around the goal of establishing an implied warranty of habitability in residential leases.⁵³ The warranty would make the tenant's covenant to pay rent mutual with the landlord's covenant to make repairs.⁵⁴ Thus, where landlords did not keep premises in good repair, tenants would be relieved of all or a part of their rental obligations.⁵⁵ Tenants would be "deputized to act as private attorneys general," empowered to impose automatic financial consequences on their landlords whenever they failed to

procedural difficulties apply: a tenant can only invoke Section 755 after suffering from the issue for six months. Furthermore, a landlord can prevail at court in a Section 755 action simply by repairing the major violation and allowing the smaller issues to continue—thus exposing the tenant to a defeat in court and "\$100 in court costs plus the rent[.]" *Id.* at 247. Upon critiquing these available mechanisms, Quinn and Phillips proposed a simple idea "that the rent should vary with the service." *Id.* at 253.

⁵⁰ See Quinn & Phillips, *supra* note 30, at 243 ("the law in this area is a scandal. More often than not unjust in its preference for the cause of the landlord, it can only be described as outrageous when applied to the poor urban tenant in the multi-family dwelling... Surely the law in a civilized urban society cannot tolerate such conditions. But it does! Let that be said frankly and without hedging."). See also Super, *supra* note 19, at 402 (noting that "[d]eteriorating housing conditions have serious negative effects on surrounding communities: they depress property values and hence property tax revenues, contribute to the spread of insect and rodent infestation, give cities a negative image with visitors, and are correlated with crime").

⁵¹ See Tenants and the Urban Housing Crisis (S. Burghardt ed. 1972); T. Flaum & E. Salzman, The Tenants' Right Movement (Urban Research Corp. Report, Sept. 1, 1969).

⁵² See Mosier & Soble, *supra* note 25, at 13-14. Comment, *Tenants Unions: Collective Bargaining and the Low-Income Tenant*, 77 YALE L.J. 1368 (1968). Advocates also sought to prohibit discrimination, impose rent control, limit evictions, and expand subsidies to support affordable housing development. *Id.*

⁵³ See Super, *supra* note 19, at 391.

⁵⁴ *Id.* This reciprocity was a sharp departure from longstanding common law rules that lease terms were substantively and procedurally independent from one another. See Chused, *supra* note 32, at 198. Under this regime, the landlord's failure to comply with one obligation could not be used to defend a claim that the tenant breached a different obligation (such as the payment of rent). *Id.*

⁵⁵ See Super, *supra* note 19, at 401.

address known disrepair.⁵⁶ Advocates believed that this scheme of financial liability would serve as a much-needed accountability and deterrence mechanism.⁵⁷ Whereas landlords realistically perceived the threat of financial penalties for code violations or damages imposed by affirmative litigation to be minor, it was expected that landlords would take the threat of losing all rent revenues – imposed without the need for bureaucratic intervention or a drawn-out court proceeding – much more seriously.⁵⁸

B. Establishment of the Warranty of Habitability

In 1970, the U.S. Court of Appeals for the District of Columbia became the first court to recognize the warranty of habitability.⁵⁹ In *Javins v. First National Realty Corp.*, the Court held that “a warranty of habitability... is implied by operation of law into leases of urban dwelling units... and that breach of this warranty gives rise to the usual remedies for breach of contract.”⁶⁰ The issue came before the Court in the context of an eviction action for nonpayment of rent.⁶¹ The tenants had failed to pay rent, and when the landlord brought an eviction case seeking possession on that basis, they asserted as a defense that they were relieved of their rental obligations because the landlord had failed to make needed repairs.⁶²

⁵⁶ See Franzese et al., *supra* note 19, at 13.

⁵⁷ See *Super*, *supra* note 19, at 403. *Super* further notes that advocacy to establish the implied warranty of habitability was also grounded in “a desire to redistribute power, wealth, and income into the hands of low-income people.”

⁵⁸ See *id.* (noting further that this threat “would be much more likely to motivate landlords to make concessions to their tenants in the form of needed repairs”).

⁵⁹ *Javins*, 428 F.2d at 1071.

⁶⁰ *Id.* The Court reasoned that the outdated principle that a lease conveying only a possessory interest in land “may have been reasonable in a rural, agrarian society,” but was no longer sensible “in the case of the modern apartment dweller.” *Id.* at 1074.

⁶¹ The *Javins* litigation arose out of a rent strike waged by poor tenants living in deplorable conditions in a low-income, minority neighborhood of Washington, D.C. See *Chused*, *supra* note 32, at 206-10. The tenants had no heat for six weeks in winter and were facing a host of other conditions issues that the landlord was refusing to address. *Id.* After a series of protests and sit-ins at government offices, none of which compelled the landlord to make repairs, twenty-nine tenants collectively organized and sent a letter to the landlord declaring that they were withholding rent until the conditions were repaired. *Id.* The landlord began suing tenants for possession and won, which caused other tenants to surrender their withheld rent. *Id.* Six tenants, however, continued to strike, and their eviction cases eventually became those that were taken up on appeal in *Javins*. For a detailed descriptions of the events that led to the *Javins* litigation, see *Chused*, *supra*.

⁶² *Javins*, 428 F.2d at 1073. Specifically, the tenants “alleged numerous violations of the Housing Regulations as an equitable defense or [a] claim by way of recoupment or set-off in an amount equal to the rent claim, as provided in the rules of the Court of General Sessions.” *Id.* (internal quotations omitted). The tenants claimed “that there are approximately 1,500 violations of the Housing Regulations of the District of Columbia in

Previously, the only nonprocedural defenses to nonpayment of rent eviction were payment of the rent claimed and constructive eviction.⁶³ The Court in *Javins*, however, both recognized the implied warranty of habitability as a legal doctrine and held that it could be invoked as a substantive defense in a nonpayment of rent eviction. The Court declared that “a tenant’s obligation to pay rent is dependent upon the landlord’s performance of his obligations, including his warranty to maintain the premises in habitable condition.”⁶⁴ It explained that in adjudicating whether the landlord had a right to possession of the apartment for nonpayment of rent, the lower court must first determine whether the tenants were relieved of all or a part of their rental obligations as a result of the landlord’s failure to repair.⁶⁵ The reduction in the amount of rent owed, known as a rent abatement, is typically described as a percentage of the total rent owed and is based on the severity of the substandard conditions and the length of time for which they persisted. The Court further held that if the defective conditions extinguished the tenants’ rental liability, the tenants were entitled to retain possession of the apartment.⁶⁶

A wave of similar judicial opinions followed. By the late 1970s, courts in California, Hawaii, Massachusetts, New Hampshire, New Jersey, Washington, and Wisconsin, among others, had recognized the implied warranty of habitability.⁶⁷ Legislatures also acted swiftly.⁶⁸ By the time New York passed its warranty of habitability statute in 1975, the warranty of habitability had already been recognized by legislatures in Rhode Island (1970), Arizona (1974), and Delaware (1974).⁶⁹ The doctrine was eventually adopted in some form in every state except Arkansas. The

the building [] where defendant resides[,] some affecting the premises of this Defendant directly, others indirectly, and all tending to establish a course of conduct of violation of the Housing Regulations to the damage of Defendants.” *Id.*

⁶³ See Mosier & Soble, *supra* note 25, at 10.

⁶⁴ *Id.*

⁶⁵ In *Javins*, the Court held specifically that the lower court must determine “(1) whether the alleged violations existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant’s obligation to pay rent was suspended by the landlord’s breach.” 428 F.2d at 1082-83.

⁶⁶ *Id.*

⁶⁷ See Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3, 6-8 (1979); California’s *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Hawaii’s *Lund v. MacArthur*, 51 Haw. 473, 462 P.2d 482 (1969) and *Lemle v. Breeden*, 51 Haw. 426, 462 P.2d 470 (1974)

⁶⁸ Super observes that the simultaneous progression of the implied warranty of habitability through courts and legislatures was unusual as compared to other law reform initiatives. See Super, *supra* note 19, at 398.

⁶⁹ See Cunningham, *supra* note 67, at 6-8.

specific contours of the laws varied, but in its most progressive iterations, including in New York, the warranty of habitability relieved tenants of all or a part of their rental obligations so long as (1) the landlord had notice of the defective conditions, either constructively,⁷⁰ orally, or in writing from the tenant or from a public agency (with no requirement that a housing code violation be issued), (2) the defective conditions affected the habitability of the premises, and (3) the landlord had failed to make repairs.⁷¹ Most jurisdictions also adopted accompanying laws protecting tenants from retaliatory eviction when they invoked their right to withhold rent as permitted by the warranty.⁷²

While courts and legislatures cited numerous reasons for adoption of the warranty of habitability,⁷³ they overwhelmingly emphasized that the law would act as tool for improving the rental housing stock occupied by low- and moderate-income families.⁷⁴ The *Javins* court noted that the “inequality in bargaining power” between landlords and tenants left tenants

⁷⁰ Notice is deemed to be constructive when the landlord knew or should have known about the conditions based on interactions with the property. For example, landlords are often held to have constructive notice of a condition when the condition existed at the time they purchased the property or because the condition exists in plain view and the landlord has entered the premises. See *Nachajski v. Siwec*, 31 Misc. 3d 150(A), 934 N.Y.S.2d 35 (App. Term. 2011).

⁷¹ In jurisdictions with more progressive forms of the law, tenants also are not required to deposit withheld rent into court nor to demonstrate “good faith” withholding – any tenant who has experienced conditions of disrepair during the course of their tenancy can assert breach of the implied warranty of habitability either affirmatively in a suit against their landlord or defensively in an eviction action for nonpayment of rent. The warranty of habitability is also deemed non-waivable. In at least one jurisdiction, tenants may also assert the claim as a defense to no fault evictions. See MASS. GEN. LAWS CH. 239, §8A. In many jurisdictions, courts and legislatures adopted corollary laws prohibiting landlords from evicting tenants in retaliation for invoking their rights under the warranty of habitability. See *Super, supra* note 19, at 393.

⁷² *Retaliatory Eviction of Tenant for Reporting Landlord’s Violation of Law*, 23 A.L.R. 5th 140 § 2[a] (1994); *Mosier & Soble, supra* note 25, at 13. The warranty of habitability is also generally considered non-waivable, such that any effort to contract around it in the lease is void as against public policy. See *Franzese, supra* note 19, at 3; *Katheryn M. Dutenhaver, Non-Waiver of the Implied Warranty of Habitability in Residential Leases*, 10 LOYOLA U. CHI. L.J. 41, 60 (1978).

⁷³ These reasons included a desire to harmonize landlord-tenant law with broader principles of contract and consumer protection law; recognition that the doctrine of *caveat lessee* was ill-fitted with the realities of modern urban living; and a questioning of the common law assumption that the land was the most important feature of a leasehold. See *Javins*, 428 F.2d at 1077-78.

⁷⁴ See *Super, supra* note 19, at 402 (noting that courts and legislatures “saw the implied warranty and its enforceability in actions for nonpayment of rent as a means of compelling landlords to maintain their buildings up to minimum standards of disrepair”).

with “little leverage to enforce demands for better housing.”⁷⁵ Among other barriers, tenants were prevented from successfully negotiating for improved conditions because “racial and class discrimination and standardized form leases le[ft] tenants in a take it or leave it situation.”⁷⁶ Severe shortages in affordable rental housing further exacerbated the inequalities in bargaining power, which, as the California Supreme Court observed, meant that, “even when defects are apparent, the low income tenant has no realistic alternative but to accept such housing.”⁷⁷ Mirroring the views of activists and commentators, courts also emphasized that the resource constraints faced by housing code enforcement agencies made a private remedy and right of action for tenants facing substandard housing conditions all the more necessary.⁷⁸ These concerns were echoed repeatedly throughout the country by courts and legislatures as they ushered in one of the most revolutionary changes to landlord-tenant law in modern history.⁷⁹

C. *Developments in Warranty of Habitability Laws*

In recent years, many jurisdictions have narrowed the circumstances in which the warranty of habitability can be invoked. They have done so by adopting three types of limiting rules. First, “good faith” laws require tenants to demonstrate genuine withholding of rent for bad conditions.⁸⁰ Under these laws, tenants cannot assert the warranty as a defense unless they can show that their motive for not paying rent was the landlord’s failure to repair.⁸¹ By removing the financial consequences the warranty imposes whenever the landlord’s failure to repair coincides with other

⁷⁵ *Javins*, 428 F.2d at 1079.

⁷⁶ *Id.*

⁷⁷ *Green*, 10 Cal. 3d at 625. See also Karen Tokarz & Zachary Schmook, *Law School Clinic and Community Legal Services Providers Collaborate to Advance the Remedy of the Implied Warranty of Habitability*, 53 WASH. U. J.L. & POL’Y 169, 187 (2016) (observing that the implied warranty of habitability “developed, in part, as a response to a chronic and prolonged housing shortage, particularly for low-income households”).

⁷⁸ See *Boston Hous. Auth. v. Hemingway*, 363 Mass. 184, 193 (1972).

⁷⁹ Although many advocates hoped that the implied warranty of habitability would be held constitutionally required, the United States Supreme Court rejected this argument. See *Lindsey v. Normet*, 405 U.S. 56 (1972). The Court held that federal constitutional principles of due process and equal protection do not require that a tenant be allowed to raise conditions issues as a defense to a nonpayment of rent eviction. *Id.* at 68.

⁸⁰ See *Super*, *supra* note 19, at 425 n. 172. *Super* finds that most states have “good faith” requirements. See *id.*

⁸¹ Some commentators defend these laws on the grounds that tenants should not be allowed to raise the warranty of habitability as a “legal afterthought.” See e.g., Samuel J. Brakel, *URLTA in Operation: The Oregon Experience*, 1980 AM. B. FOUND. RES. J. 565, 578.

events that cause the tenant to fall behind in rent, the laws effectively excuse landlords' noncompliance with obligations. The laws also practically diminish the availability of the warranty by increasing the burden of proof; some tenants who genuinely intended to withhold rent for defective conditions may simply have insufficient evidence to make out a "good faith" showing.

Second, many legislatures and courts have imposed landlords' protective orders, also known as "rent escrow" laws, requiring tenants to deposit unpaid rent with the court as a condition of asserting the warranty of habitability.⁸² Some versions of rent escrow laws require tenants to deposit their rent at the time of the withholding, whereas others impose the requirement upon the tenant's assertion of the warranty defense in the eviction case.⁸³ Most commentators consider rent escrow requirements to be severely restrictive of the warranty's meaningful availability.⁸⁴ Many tenants are unaware of the requirements and fail to comply with them during the appropriate time period. Thus by the time they appear in court,

⁸² See Franzese et al., *supra* note 19, at 13-14. Some jurisdictions have mandatory rent escrow requirements, in which all tenants who wish to withhold rent must deposit their rent with the court. *Id.* Other jurisdictions hold hearings in which judges make individualized determinations of whether rent escrow will be required based on the circumstances of the case. *Id.* Proponents of LPOs have justified them as necessary to prevent tenants from using the implied warranty of habitability in bad faith to shirk valid rental obligations. *Id.* Many scholars, however, criticize LPOs as creating artificial barriers to access the warranty. See e.g. *id.* at 18 (noting that rent escrow requirements "put[] aggrieved tenants into the untenable position of having to decide whether to relocate [a task that is both disruptive and costly], or remain on site, submit to judicial proceedings, and be forced to deposit into escrow the full rent due no matter the premises' defective condition, a task that is both onerous and counter-productive to the goal of improving stocks of rental housing"); see Cotton, *supra* note 26, at 71-73.

⁸³ There are also some jurisdictions in which rent escrow orders are available only upon motion by the landlord and at the discretion of the judge. See ALASKA STAT. § 34.03.190(A)(3); ARIZONA REV. STAT. § 33-1365(A); *Hinson v. Delis*, 102 Cal. Rptr. 661, 666 (Cal. Ct. App. 1972); *Javins*, 428 F.2d at 1083 n. 67; *Rotheimer v. Arana*, 892 N.E.2d 1183, 1194-95 (Ill. App. Ct. 2008); IOWA CODE § 562A.24(1); KAN. STAT. § 58-2561(A); KY. REV. STAT. § 383.645(1); MASS. GEN. LAWS CH. 239, § 8A; MONT. CODE § 70-24-421(1); NEB. REV. STAT. § 76-1428(1); OR. REV. STAT. § 90.370(1)(b); *Pugh v. Holmes*, 405 A.2D 897, 907 (Pa. 1979); 34 R.I. GEN. LAWS. § 34-18-32; *P.H. Inv. v. Oliver*, 818 P.2d 1018, 1021 (Utah 1991); *Teller v. McCoy*, 253 S.E.2d 114, 129-30 (W. Va. 1978).

⁸⁴ At least one appellate court, the Maryland Court of Special Appeals, has found that rent escrow requirements that apply to rental arrears (as opposed to applying only to ongoing rent that comes due after a case has been commenced) violate due process. See *Lucky Ned Pepper's Ltd. v. Columbia Park & Recreation Ass'n*, 64 Md. App. 222, 230 (1985). In *Lucky*, the Court considered a state law that required the deposit of all arrears allegedly due as a condition of obtaining a jury trial. *Id.* The Court held that the law erroneously presupposed that the rent withheld was in fact owed, and therefore improperly interfered with the tenant's right to a jury trial. *Id.*

they have already effectively waived their right to assert the warranty of habitability as a defense. Additionally, many tenants are unable to comply with the requirements because they are using withheld rent to cope with the disrepair.⁸⁵ Tenants spend money to make repairs on their own, to pay for temporary fixes such as space heaters when the heat is out or hot plates when the stove is not working, and to replace damaged possessions.⁸⁶ Commentators have pointed out that the result of rent escrow laws is often that it is tenants who need the protections of the warranty of habitability the most who will be least likely to benefit from it.⁸⁷

Third, some jurisdictions have imposed onerous notice requirements for assertion of a warranty claim.⁸⁸ In their most burdensome iterations, these rules require that notice to the landlord of defective conditions be established through an official housing code violation report.⁸⁹ Thus, if a tenant calls the landlord about the condition of disrepair, talks to the landlord in person, or even sends a letter describing the problem and the landlord fails to make repairs, the landlord cannot be held liable. This requirement engrafts the same problems faced by code enforcement systems onto the warranty of habitability. Where code enforcement agencies are ineffectual and under-resourced, a warranty of habitability scheme tied to this system will face the exact same limitations. Commentators have also remarked that such requirements are misaligned with how tenants communicate with their landlords in practice.⁹⁰

III. EXISTING RESEARCH ON THE WARRANTY'S EFFECTIVENESS AND THEORIES FOR TENANT UNDERUSE

Since the warranty of habitability was enacted nearly fifty years ago, scholars have tried to understand whether the law has lived up to the potential advocates and proponents originally envisioned, and if it has not, why not.⁹¹ Multiple studies show that tenants rarely assert the warranty as a

⁸⁵ See Super *supra* note 19, at 433 (noting that tenants may be forced to spend their rent money to mitigate the damages caused by the landlord's failure to repair); Franzese et al., *supra* note 19, at 23, 37 (noting that tenants use withheld rent "to make the essential repairs themselves in the view of landlord intransigence").

⁸⁶ An unabated bedbug infestation, for example, will require tenants to buy new bedding and furniture.

⁸⁷ See Super, *supra* note 19, at 426.

⁸⁸ See *id.*; Myrah v. Campbell, 163 P.3d 679, 683 (Utah Ct. App. 2007).

⁸⁹ See e.g., Dugan v. Milledge, 494 A.2d 1203, 1206 (Conn. 1985).

⁹⁰ See Super, *supra* note 19, at 426.

⁹¹ Whether or not the warranty of habitability actually aids low-income tenants has also long been the subject of academic debate. See Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Warner Z. Hirsch, *Regression Analysis*

defense in nonpayment of rent eviction cases. Other studies show that very few tenants receive rent abatements. These studies, however, have serious limitations. The large-scale studies do not isolate cases of tenants with meritorious claims, and thus leave unknown the extent to which the outcomes constitute an operationalization gap. The only study thus far that has measured outcomes among cases with meritorious claims was conducted using a small sample size that does not purport to be representative. No study has yet determined the size of the gap between the number of tenants with meritorious warranty claims and the number who benefit from the law.

Leading scholarship on the warranty of habitability has consistently attributed the apparent ineffectiveness of the law to two factors: the lack of access to counsel and onerous substantive doctrines that restrict the claim's use. Yet these theories have not been subject to rigorous empirical scrutiny. The existing studies show that tenants who are represented by counsel are more likely to receive rent abatements, but these studies have not controlled for whether tenants who are represented are more likely to have meritorious claims. The scholarship on the substantive doctrines, meanwhile, has been largely theoretical in nature.

This Part provides an overview of the scholarship on the warranty of habitability, describing a) the existing empirical studies on the law's overall usage and effectiveness, b) the research findings regarding the impact of legal counsel, and c) current explanations for the law's apparent ineffectiveness.

A. Use and Effectiveness of the Warranty of Habitability

Marilyn Mosier and Richard Soble pioneered the empirical

on the Effects of Habitability Laws upon Rent: An Empirical Observation on the Ackerman-Komesar Debate, 63 CALIF. L. REV. 5 (1975); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: Milking and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987); Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Rabin, *supra* note 18. The “mainstream” view believes that the increased costs imposed by code requirements and the warranty of habitability are passed from landlords to tenants, thereby hurting tenants (low-income tenants especially) in the long run. See Kennedy, *supra* at 485; Rabin, *supra* note 18, at 558-59. However, the overall impact of habitability regulations on housing costs varies wildly from study to study. See David Lisotkin et al, *Regulatory Barriers Affecting Affordable Housing*, 8 CITYSCAPE 1 2005, at 21 (finding that studies on the subject have claimed that building code regulations increase housing costs anywhere between one and two hundred percent). Furthermore, some scholars—notably Bruce Ackerman discussing his hypothetical town of “Slumville”—have argued that code enforcement and the warranty of habitability will help tenants without increasing their rents. See Ackerman, *supra*; Kennedy, *supra*.

scholarship on the warranty of habitability in the early 1970s with a study of the Detroit landlord-tenant court in the years immediately following Michigan's enactment of the law.⁹² Through case file review and in-court observations, Mosier and Soble found that rent abatements were awarded in an extremely small percentage of the total number of nonpayment of rent eviction cases.⁹³ Specifically, they found that at most, rent abatements were awarded in two percent of all nonpayment of rent cases.⁹⁴ Shortly after Mosier and Soble's research was published, a team of Illinois-based researchers conducted a similar study of Chicago's eviction court and found that zero tenants in the sample of cases they studied received rent abatements, even though 41 percent of tenants had raised the warranty of habitability as a defense.⁹⁵

Two more recent studies produced findings similar to those in Mosier and Soble's research. The first study was an observation-based study conducted by Barbara Bezdek of a sample of nonpayment of rent eviction cases in Baltimore in the early 1990s.⁹⁶ Bezdek found that rent abatements were ordered in only 1.75 percent of all cases she observed.⁹⁷ The second study reviewed court records of all nonpayment of rent eviction cases in Essex County, New Jersey in 2016.⁹⁸ The authors, Paula Franzese, Abbott Gorin, and David Guzik, calculated the overall frequency with which tenants formally raised the warranty as a defense.⁹⁹ They found that the warranty was asserted in the tenant's answer in only .2 percent of all

⁹² See Mosier & Soble, *supra* note 25, at 33.

⁹³ See *id.*

⁹⁴ See *id.* The study found that the full rent claim was excused in .7 percent of contested nonpayment cases and .1 percent of all nonpayment cases, and was partially excused in 11.9 percent of contested nonpayment cases and 2 percent of all nonpayment cases. However, these figures include cases in which the landlord received less than the full amount of rent claimed for reasons other than a rent abatement in satisfaction of the tenant's implied warranty of habitability claim, including where the rent claimed had been miscalculated and where the tenant had made all or partial payment. See *id.* at 33-34.

⁹⁵ Birnbaum et al., *supra* note 25, at 109. One additional study conducted during the same time period produced similar findings. See Ben H. Logan, III & John J. Sabl, *Note, The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729, 744 (1976) ("During the period examined, the implied warranty of habitability was pled as an affirmative defense in 56 cases, constituting 4 percent of all unlawful detainer actions and representing 27 percent of all contested unlawful detainer actions filed in that court for the 5-month period in question.").

⁹⁶ It is unclear whether this sample is a statistically significant representative sample. See Bezdek, *supra* note 25, at 547 n. 52. The study also involved court record review and exit interviews with litigants. *Id.* at 553.

⁹⁷ See *id.* at 554. Rent was ordered into escrow in 4.3% of all cases.

⁹⁸ See Franzese et al., *supra* note 19, at 5.

⁹⁹ *Id.*

cases (80 out of over 40,000).¹⁰⁰ Based on these findings, Franzese and her colleagues concluded that the warranty was significantly underutilized.¹⁰¹

These four studies measured the frequency with which the warranty of habitability was asserted or won (in the form of a rent abatement) within the total population of nonpayment of rent cases. None measured this frequency against the population of cases with meritorious warranty claims. Thus, the studies' conclusions that the warranty is ineffective rest on the assumption that more tenants could have asserted or won the claim than actually did so. It is unknown whether that assumption was valid. Moreover, even if it was valid, the findings tell us little about the size of the gap between the number of tenants with meritorious claims and the number who benefited from the law.

The only study thus far that has sought to determine a tenant's likelihood of benefiting from the warranty of habitability when he or she has a meritorious claim is Michele Cotton's "multi-case study" of 59 rent escrow actions in Baltimore.¹⁰² In these actions tenants petition the court to have their rent deposited into the court's escrow account rather than paid to the landlord based on violations of the warranty of habitability.¹⁰³ Cotton found that that less than half – 42 percent – of tenants who had established entitlement to a rent abatement actually received one.¹⁰⁴ However, Cotton's study was based on a small sample of cases that did not claim to be statistically representative of the population as a whole;¹⁰⁵ thus, the conclusions that may be drawn from the findings are limited.

These studies leave two significant gaps in our knowledge about the use and effectiveness of the warranty of habitability. First, no large-scale study has yet compared the number of cases in which tenants benefit from

¹⁰⁰ *Id.*

¹⁰¹ *Id.* This conclusion is based on the "far-greater statistical likelihood that significant housing code violations exist on leased premises in Essex County." *See id.* The authors do not state specifically what the statistical likelihood is that substandard conditions exist in the premises. *See id.* They cite only to HUD data on the prevalence of substandard housing conditions nationwide. *See id.* at n. 11. One year later, in 2017, Karen Tokarz and Zachary Schmook published the results of a study that looked broadly at outcomes in eviction cases in St. Louis, Missouri. *See Tokarz & Schmook, supra* note 77. While the study did not look specifically at the frequency with which the warranty of habitability was raised, it found that only .03 percent of cases resulted in judgments for the tenant whereas 77 percent of cases resulted in judgments for the landlord (with the remainder of cases resulting in dismissal). *Id.* Based on these findings, the authors concluded that the warranty of habitability is rarely used. *Id.*

¹⁰² *See Cotton, supra* note 26, at 72.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 71. Specifically, tenants received abatements in 42 percent of cases in which they had established the elements required for this relief. *Id.* at 72.

¹⁰⁵ *Id.* at 62-64.

the warranty against the number of cases in which tenants have meritorious claims.¹⁰⁶ Thus, we do not know the extent to which the low usage rates reflect the law's ineffectiveness, or simply reflect low rates at which tenants have meritorious claims. No one has yet determined the size of the operationalization gap. Second, the existing studies leave open the possibility that tenants may benefit from the warranty of habitability through outcomes other than rent abatements.¹⁰⁷ Tenants who settle their cases may elect to leverage their right to a rent abatement to negotiate a longer repayment period or avoid a possessory judgment in favor of the landlord. No studies have accounted for this possibility. Without research that fills these gaps, we cannot properly reach a conclusion about the extent to which tenants benefit from the warranty of habitability.

B. Impact of Legal Representation

Very limited research exists on the impact of legal representation on the use of the implied warranty of habitability. Mosier and Soble's study of the Detroit landlord-tenant court found that tenants who were represented by counsel were more likely than unrepresented tenants to raise the warranty as a defense.¹⁰⁸ They also found that represented tenants achieved overall better outcomes in their cases as compared to unrepresented tenants.¹⁰⁹ However, this study did not identify the extent to which the represented tenants were more likely to have warranty of habitability claims. It is possible, in other words, that lawyers chose tenants for representation because they had meritorious claims, and thus that the higher usage of the claim and stronger outcomes simply reflect this selection bias.

The only other research that exists on the effect of counsel has been embedded within two studies on the overall impact of access to counsel in eviction cases.¹¹⁰ The first study, a 1992 study on the impact of counsel in

¹⁰⁶ See Steinberg, *supra* note 22, at 1071 (noting that, "[e]ven when a study demonstrates that one class of litigants – tenants, for example – routinely achieves unfavorable outcomes, it can be difficult to ascertain whether the poor outcomes are the result of unmeritorious claims, or are due to more structural factors, such as lack of legal representation or structural unfairness with the adjudicatory process.").

¹⁰⁷ The only exception is Franzese et al.'s research on the use of the warranty of habitability as a tool to compel landlords to make needed repairs. See Franzese et al., *supra* note 19, at 2, 24-25.

¹⁰⁸ Mosier & Soble, *supra* note 25, at 45.

¹⁰⁹ *Id.* at 35. Birnbaum et al.'s study also found that tenants who were represented by counsel achieved significantly better outcomes than unrepresented tenants. See Birnbaum et al., *supra* note 25, at 115.

¹¹⁰ In addition, Jessica Steinberg's study of the impact of unbundled legal aid found that tenants who were provided with unbundled legal services were significantly more likely to raise cognizable defenses as compared with unassisted tenants. See Jessica

eviction cases in New York City, found that rent abatements were awarded in 18.8 percent of cases in which the tenant was represented by counsel, compared with only 3.3 percent of cases in which the tenant was unrepresented.¹¹¹ Tenants were randomly assigned to the treatment (offer of representation) and control (no offer of representation) groups to eliminate selection bias.¹¹² However, there was no specific control for whether the tenants in each group had meritorious warranty of habitability claims at the same rate.

The second study, a more recent assessment of the impact of access to counsel in eviction cases in Massachusetts, found that monetary outcomes were significantly more favorable to the tenant where the tenant was represented.¹¹³ These monetary outcomes reflected rent abatements resulting from the warranty of habitability, but also could reflect monetary damages awarded based on other claims¹¹⁴ or reductions in the rent owed due to miscalculations or partial payment.¹¹⁵ Like in the 1992 study, it was also unknown whether the treated (offer of representation) and control (no offer of legal representation) groups had meritorious warranty of habitability claims at the same rate. No research has rigorously assessed the impact of counsel on the use of the warranty of habitability while controlling for whether the tenant had a meritorious claim.

Steinberg, *In Pursuit of Justice – Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 494 (2011). The study did not isolate breach of warranty claims specifically. *See id.* Steinberg also found that full representation had a significant impact on the likelihood of the tenant receiving payments from the landlord at the conclusion of the case, while unbundled legal assistance had no positive effect on the tenant’s likelihood of receiving a payment from the landlord. *See id.* at 486. The study did not determine whether the payment reflected a rent abatement based on the landlord’s violation of warranty of habitability, or alternatively based on some other monetary claim. *Id.*

¹¹¹ Carroll Seron, Martin Frankel, Gregg Van Ryzin and Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC. REV. 419, 428 (2001).

¹¹² All cases included in the study population had been determined as cases in which the tenant was likely to benefit from legal support. *See id.* This assessment was based on the presence of defenses and claims (beyond only the warranty of habitability), as well as non-legal characteristics of the tenant and case. *Id.*

¹¹³ Greiner et al., *supra* note 29, at 931.

¹¹⁴ Under Massachusetts law, there are numerous counterclaims available to tenants in nonpayment of rent eviction cases which carry monetary damages. *See e.g.*, MASS. GEN. LAWS CH. 93A, §§ 2, 9; MASS. GEN. LAWS CH. 186, § 14; MASS. GEN. LAWS CH. 186, §§ 2, 18.

¹¹⁵ *See* Greiner et al., *supra* note 29, at 931.

C. Explanations for the Law's Ineffectiveness

There is a general consensus among scholars who have studied the warranty of habitability that the law's ineffectiveness is attributable to two main factors. First, scholars claim that the ineffectiveness is a function of tenants' lack of access to counsel.¹¹⁶ Nearly all tenants in eviction proceedings are unrepresented; in some jurisdictions, as many as 94 percent of tenants appear in court without counsel.¹¹⁷ Pointing to the research described in Section III.B *supra*, commentators argue that the overall lack of access to counsel is responsible for the claim's underuse.¹¹⁸ They posit that unrepresented tenants do not have the knowledge, wherewithal, or resources required to effectively navigate the legal process in order to benefit from the warranty of habitability.¹¹⁹

¹¹⁶ See e.g., Mosier & Soble, *supra* note 25, at 62 (“[A]nother reason for the insignificant effect of the legislation on Detroit tenants is that while the legislation augments a tenant’s possible defenses, it does not provide for representation of those tenants in court”); Birnbaum et al., *supra* note 25, at 115-16 (emphasizing the importance of representation in determining tenant outcomes); Franzese et al., *supra* note XX at 22 (proposing increased access to counsel as a solution to improve the effectiveness of the warranty of habitability); Cotton, *supra* note 26, at 84 (citing lack of access to counsel as a barrier to effective assertion of the warranty of habitability).

¹¹⁷ See e.g., BOSTON BAR ASS’N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES 3 (2012); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 n.44 (2010); Maya Dukmasova, *New Data Reveals Impact of Being Lawyerless in Chicago Eviction Court*, CHI. READER, (Sept. 14, 2017) <https://www.chicagoreader.com/Bleader/archives/2017/09/14/new-data-reveals-impact-of-being-lawyerless-in-chicago-eviction-court>; Charles Allen et al., *Low-Income Tenants in D.C. May Soon Get Legal Help*, Wash. Post. (May 18, 2017) https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/05/18/low-income-tenants-in-d-c-may-soon-get-legal-help/?noredirect=on&utm_term=.8764ca043f6c. In New York City, where a right to counsel law recently was enacted, the percentage of tenants represented has risen from 1% before 2014 to 30% in in the final quarter 2018. CITY OF NEW YORK, UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR ONE OF IMPLEMENTATION IN NEW YORK CITY, at 4, <https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA-2018-Report.pdf>.

¹¹⁸ See Franzese et al., *supra* note 19, at 13; Cotton, *supra* note 26, at 84 (noting that “the lack of counsel means that the parties are particularly dependent on the court to ensure that the rule of law is applied”), 86-87 (arguing that advocates hoping to improve utilization of the implied warranty of habitability should not focus their efforts on access to counsel because the data suggest that all efforts thus far have faltered, and moreover the provision of additional lawyers would impose considerable resource demands on the courts). *But see* Bezdek, *supra* note 25, at 538 n. 16 (arguing against solutions involving access to counsel because it is “paternalistic and lets us off the hook for our parts in the charade of legal entitlement and rights vindication”).

¹¹⁹ See *id.*; see also Super, *supra* note 19, at 406-07; Cotton, *supra* note 26, at 66

Second, commentators argue that restrictive substantive doctrines, namely rent escrow, good faith withholding, and onerous notice requirements, limit the claim's usage.¹²⁰ These doctrines are not universal, but are becoming increasingly common across jurisdictions.¹²¹ David Super, a leading scholar on the warranty of habitability, attributes the "fall" of the warranty of habitability primarily to the spread of these rules.¹²² Writing in the *California Law Review* in 2011, Super finds that "these procedural obstacles have rendered the implied warranty of habitability almost irrelevant in practice."¹²³ He argues that the requirements are costly for tenants to comply with, are vulnerable to landlord abuse, and encourage tenants to move rather than pursue their claims.¹²⁴ While he acknowledges that data on their impacts is lacking, he contends that these substantive limitations are "likely a significant contributor to the low rate of relief granted [for violations of the warranty of habitability] to low-income tenants."¹²⁵ Franzese has likewise blamed these rules for the ineffectiveness of the warranty, describing them as a "practical bar to aggrieved tenants' very assertion of the implied warranty of habitability."¹²⁶

Scholars have also put forward other explanations for the law's apparent ineffectiveness. Some commentators have hypothesized that perceived or actual threats of retaliation disincentivize tenants from raising and/or pursuing warranty of habitability claims.¹²⁷ Super argues that tenants factor fears of retaliation into the "costs" of litigation; thus, to the extent tenants anticipate landlord retaliation, they will be unlikely to assert

(arguing that the legalese on pleadings acts as a barrier to unrepresented tenants asserting the warranty).

¹²⁰ See Super, *supra* note 19, at 407 (drawing attention to the "little-appreciated substantive doctrines" that emerged after the law's original enactment and arguing that they have operated as major barriers to the warranty's effectiveness); Franzese et al., *supra* note 19, at 20-22 (arguing that New Jersey's rent escrow requirement as one of the primary reasons for their findings regarding the low frequency with which the warranty is raised.). The rent escrow requirement in New Jersey on paper gives trial courts the discretion to order rent be paid into escrow during the pendency of the eviction case. Franzese et al. found that in practice, however, judges treat escrow hearing with little individualized attention, and as a matter of course order rent be deposited with the court, regardless of the conditions of the premises. *Id.* at 19-20, 37. The authors acknowledge that they do not know whether their findings regarding the presence of the rent escrow requirement and the low usage rates are correlative or causative. *Id.* at 20; Tokarz & Schmook, *supra* note 77.

¹²¹ See Super, *supra* note 19, at 425-429.

¹²² *Id.* at 423-26.

¹²³ *Id.* at 423.

¹²⁴ *Id.*

¹²⁵ *Id.* at 432.

¹²⁶ See Franzese et al., *supra* note 19, at 37.

¹²⁷ See Super, *supra* note 19, at 408.

their rights under the law.¹²⁸ In a separate vein, Franzese argues that the lack of centralized and accessible housing code record databases prevents judges from effectively enforcing the warranty.¹²⁹ Franzese posited that the availability of code enforcement data through such a database would both inform the court's analysis of the law and "would be a tool for the government to reduce or withhold any rent subsidies until the premises are restored to a habitable condition."¹³⁰ She explicitly pointed to New York City's centralized code violation database as a model for other jurisdictions to follow.¹³¹

III. STUDY BACKGROUND AND DESIGN

This study sought to use rigorous methodological analysis to assess

¹²⁸ Since the warranty's initial enactment, scholars have emphasized that entrenched power differentials between landlords and tenants, along with court cultures that privilege landlords and stigmatize tenant litigants, act as significant barriers to the law's effectiveness. *See* Bedzek, *supra* note 25, at 571-72, 568 (observing that in Baltimore, "the formal allocation of responsibilities between landlord and tenant is effectively overwritten by the 'tenant as deadbeat' subtext which is reiterated by the court on behalf of the class of landlord litigants" and arguing that "in a jurisdiction with a functioning warranty of habitability, the subtext in tenant-claiming cases would be: it is the landlord who has done wrong by failing to fulfill societally recognized obligations"); Cotton, *supra* note 26, at 85 (proposing that, "[i]t may also be the case that any uncertainty about the law that results in an environment of limited appellate guidance will be resolved against the less powerful party in the litigation, which in this situation is the tenant"); Super, *supra* note 19, at 451 ("either abandoning or destabilizing courthouse culture could have resulted in much broader application of the warranty"); Mosier & Soble, *supra* note 25, at 63 ("The disparities in help given to landlords and tenants and the treatment of late landlords and tenants are an indication of the perhaps inevitable bias of the court toward the landlord. Most of the judges and court personnel have a middle-class background, and they have become familiar with many landlords and attorneys appearing regularly in the court. The court had years of experience as a vehicle for rent collection and eviction where no defenses could be raised."). Scholars have also highlighted the constraints judges face in enforcing the laws. Judges have large numbers of cases on their dockets and lack access to important fact-finding tools and resources. *See* Cotton, *supra* note 26, at 85.

¹²⁹ *See* Franzese et al., *supra* note 19, at 23.

¹³⁰ *Id.*

¹³¹ *Id.* at 36, 28 n. 106 (noting that New York City has a Housing Code violation database that is publicly available online and that the Housing Court provides a computer on each judge bench). An even more robust technology solution was urged by Mary Marsh Zulack nearly a decade prior. *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, 449 (2007). Specifically, Zulack proposed a computerized system that would prompt judges through repair-related repair information gathering, retrieval, and adjudication steps. *Id.* at 425. Zulack predicted that such a system would "lead[] efficiently to outcomes that link the application of the warranty of habitability doctrine to real-world improvements in rental premises." *Id.*

the extent to which tenants who have meritorious warranty of habitability claims received benefits from the claim.¹³² It also sought to rigorously evaluate the existing theories regarding the apparent ineffectiveness of the law, including the extent to which legal representation affects tenants' likelihood of receiving the law's benefits. New York City was chosen as the site for this study because, in addition to being the nation's largest rental market, it is located in a jurisdiction that lacks the substantive doctrines often blamed for the law's failures. This legal backdrop is ideal because it allows for disentanglement of the various contributors to the claim's underuse. This Part describes the study's objectives, context, data, and methodology.

A. Objectives

The overarching objectives of this study were two-fold. First, the study aimed to properly assess the effectiveness of the warranty of habitability through rigorous methods and statistical analysis. While prior large-scales studies measured the overall frequency with which tenants asserted the warranty of habitability as a claim or received rent abatements in nonpayment of rent eviction cases, this study measured what I call the "operationalization gap" – the difference between the number of cases in which the tenant has a meritorious warranty of habitability claim and the number of cases in which the tenant receives some benefit from that claim.¹³³ It did so by identifying the cases in which the tenant appears to have a meritorious claim based on evidence of defective conditions in the unit.¹³⁴ Moreover, while prior studies have focused nearly exclusively on

¹³² New York City is also the nation's largest rental market and one notorious for substandard housing conditions. See *supra* note 21; Grace Ashford, *Leaks, Mold, and Rats: Why New York City Goes Easy on Its Worst Landlords*, N.Y. TIMES, A1 (Dec. 26, 2018).

¹³³ The objective here is not to determine whether the outcome was "just," but whether tenants who appeared to have meritorious claims received the benefits the law affords for those claims. See generally Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 178 (2003) (noting that "whether the litigant received a just or appropriate outcome" is "one of the most difficult questions for which to formulate accurate and reliable measures for empirical analysis").

¹³⁴ The data in this study showed that proper assertion of the warranty of habitability as a claim in the tenant's answer was largely insignificant as a factor predicting whether the claim was used successfully. Approximately half of the tenants who received rent abatements never actually asserted the claim. This finding is consistent with what one would expect given liberal pleading amendment rules. These rules have the effect of making actual amendments unnecessary in proceedings that usually resolve in relatively expeditious out-of-court settlements, such as eviction proceedings, where it is understood that the party could receive the amendment if leave was sought, and thus to avoid

tenants' use of the warranty of habitability to achieve rent abatements, this study also considered the possible use of the law to achieve other beneficial case outcomes and/or to secure repairs.

Second, the study set out to rigorously evaluate the existing theories regarding the warranty of habitability's ineffectiveness. As described previously, scholarship has consistently attributed the doctrine's apparent failures to two factors: lack of access to counsel and restrictive substantive doctrines. The scholarship, however, has been largely theoretical in nature; no studies have yet subjected these factors to rigorous empirical scrutiny.¹³⁵ This is the first study to do so. To understand the impact of access to counsel, I compared outcomes of cases with meritorious claims where tenants were and were not represented. To understand the significance of the restrictive substantive doctrines, I assessed the extent to which tenants benefited from the warranty of habitability in a jurisdiction (New York City) in which these doctrines are absent. While this assessment does not allow for a precise determination of the impact of the doctrines, it indicates the extent to which we can properly attribute the warranty of habitability's ineffectiveness to them. In other words, the existing literature would predict that where the restrictive doctrines do not exist, the warranty of habitability would be widely used. I assess whether this prediction is accurate. I also used the available data to glean insight into the extent to which retaliation fears play a role in the doctrine's effectiveness, as well as the extent to which an accessible Housing Code records database aids in judicial enforcement of the law.

These objectives translated into four specific research questions that drove the analysis of the quantitative data:

- (1) How often do tenants with meritorious warranty of habitability claims receive rent abatements?
- (2) To what extent do tenants with meritorious warranty of habitability claims receive other benefits as a result of the claim, such as a longer time period to pay rental arrears or the avoidance of a possessory judgment?
- (3) To what extent is the warranty of habitability serving as an effective tool to hold landlords accountable for making necessary repairs?

unnecessary litigation the parties treat the pleadings as if they were amended without actually going through the judicial procedures to do so.

¹³⁵ See Franzese et al., *supra* note 19, at 20-22 (citing to New Jersey's rent escrow requirement as one of the primary reasons for their findings regarding the infrequency with which the warranty is raised); Super, *supra* note 19, at 432 (concluding that rent escrow laws are "likely a significant contributor to the low rate of relief granted [for breach of the warranty of habitability] to low-income tenants") & at 441 (arguing that "good faith" requirements may make tenants incapable of pursuing warranty of habitability claims).

- (4) To the extent it exists, is the warranty of habitability's operationalization gap primarily a function of the lack of legal representation?

B. Study Context

New York City was an optimal site for this study for multiple reasons. For one, New York's warranty of habitability laws lack the restrictive rules that previous scholarship has blamed for the law's ineffectiveness. Specifically, tenants are not required to deposit their unpaid rent into escrow, nor are they required to demonstrate that the reason for the nonpayment was withholding of rent for defective conditions.¹³⁶ Notice requirements are also liberal: tenants are never required to provide notice in writing, let alone through the Code enforcement agency.¹³⁷ New York City also has a centralized and publicly accessible Housing Code record database that judges can easily reference, which Franzese predicts would aid in the law's enforcement. Analysis of the effectiveness of the warranty in this context provides crucial insight into whether the barriers traditionally cited-to are in fact the primary culprits for the law's apparent ineffectiveness, or whether there are other, perhaps less well understood, factors contributing to the outcomes commentators have observed. Additionally, the data available in New York City allow for an assessment of the impact of counsel while controlling for the strength of the tenant's warranty of habitability claim. This assessment more accurately indicates the impact of legal representation on the use of the claim than any of the studies conducted previously.

A brief overview of New York's warranty of habitability laws and eviction procedures is necessary to contextualize the study design and results. New York enacted the warranty of habitability through legislation in 1975.¹³⁸ The statute, New York Real Property Law § 235(b), provides

¹³⁶ See N.Y. REAL. PROP. LAW § 235(b).

¹³⁷ *Nachajski v. Siwiec*, 31 Misc. 3d 150(A), 934 N.Y.S.2d 35 (App. Term. 2011).

¹³⁸ See N.Y. REAL PROP LAW § 235(b). This legislation followed a New York Appellate Division case, *Tonetti v. Penati*, 48 A.D.2d 25 (1975), which laid the initial groundwork for a warranty of habitability in New York. In *Tonetti*, a tenant argued that he should be entitled to the return of his security deposit—even though he left an apartment many months before the expiration of his lease—due to the overpowering stench of dog urine. The Appellate Division agreed. The *Tonetti* court held, “It is evident that the rationale behind the common-law rule, which likened a lease to the sale of a chattel and therefore applied the ancient doctrine of *Caveat emptor*, has no rational basis in a modern, urban society.” *Tonetti v. Penati*, 48 A.D.2d 25, 367 N.Y.S.2d 804, 807 (1975). Senate Bill 3331B, which passed and later became codified as New York's Real Property Law § 235(b), represented a direct response to the case. See *Morbeth Realty Corp. v. Velez*, 73 Misc.2d 996, 343 N.Y.S.2d 406 (Civ. Ct. 1974)

that all residential leases, whether written or oral, contain an implied covenant that the premises be fit for human habitation, and that the tenants “shall not be subjected to any conditions which would be dangerous, hazardous, or detrimental to their life, health, or safety.”¹³⁹ As in most jurisdictions, it further provides that any attempt to waive these obligations is void as contrary to public policy and that no expert testimony is needed to establish damages.¹⁴⁰ A landlord must have had actual or constructive notice of the conditions in order for a tenant to recover for breach of the warranty. Written notice can never be required, however, regardless of what is provided in the lease.¹⁴¹ As stated previously, New York has no rent escrow or “good faith” requirements for the assertion of the warranty of habitability.¹⁴² While the warranty can be asserted affirmatively, most tenants assert the claim as a defense and/or counterclaim once a nonpayment of rent case is commenced against them.¹⁴³

In recent years, approximately 200,000 nonpayment of rent eviction

¹³⁹ N.Y. REAL PROP LAW § 235(b)(1). This provision has been interpreted to impose repair obligations on landlords where “conditions exist that violate housing codes and other laws designed to protect life, health, or safety in housing.” See *KEV Realty Co., Inc. v. Kelly*, 5/31/96 N.Y.L.J. 26, col. 4 (Civ. Ct. N.Y. Co.). See REAL PROP LAW § 235(b)(1).

¹⁴⁰ See N.Y. REAL PROP LAW § 235(b)(2), (3)(a). Section 235(b)(3)(b) provides that if the failure to repair is caused due to a labor strike, and the landlord has made a good-faith effort to cure the conditions, then the tenant cannot recover damages. Section 235(b)(3)(c) is designed to avoid double recovery for tenants in already-protected housing. Specifically, this section limits the recovery of tenants in housing subject to rent stabilization, rent control, the “emergency tenant protection act of nineteen seventy-four [1974],” or “the city rent and rehabilitation law.” N.Y. REAL PROP LAW § 235(b)(3)(3). The section states that if a tenant living in one of these types of housing receives a rent reduction from the New York State Division of Housing and Community Renewal (DHCR), then the amount a tenant recovers due to a landlord’s breach of the warranty of habitability must be reduced by the amount of this rent reduction. *Id.*

¹⁴¹ *Nachajski v. Siwec*, 31 Misc. 3d 150(A), 934 N.Y.S.2d 35 (App. Term. 2011).

¹⁴² *Ocean Rock Associates v. Cruz*, 66 A.D.2d 878, 411 N.Y.S.2d 663 (2d Dep’t 1978). The tenant must allow the landlord to enter the premises to make repairs; a tenant’s refusal to allow access provides a defense for landlords to damages for breach of the warranty of habitability. *Fifty-Seven Associates, L.P. v. Feinman*, 30 Misc. 3d 141(A), 924 N.Y.S.2d 309 (App. Term 2011). However, a landlord cannot merely assert a “good faith” defense by attempting (and failing) to cure: because the warranty of habitability reflects a contractual obligation, courts interpret the breach strictly. *Joseph v. Varna Trust*, 2/13/2003 N.Y.L.J. 19, col. 5 (Civ. Ct. N.Y. Co.).

¹⁴³ Tenants in New York City generally do not bring affirmative warranty of habitability claims where they face conditions of disrepair; they instead bring Housing Part (HP) actions. See Dennis E. Milton, *Comment: The New York City Housing Part: New Remedy for an Old Dilemma*, 3 *FORD. URB. L. J.* 267 (1975). A designated section of the Housing Court adjudicates HP actions. Any time a landlord violated or appears to have violated New York City’s Housing Maintenance Code or the New York City Civil Court Act, a tenant can initiate an HP action.

cases have been filed annually in New York City Housing Court.¹⁴⁴ Consistent with the eviction case resolution processes nationwide, the overwhelming majority of such cases are resolved through settlement agreements.¹⁴⁵ Nearly all settlements take the form of repayment agreements in which the tenant agrees to pay the rental arrears owed within a stated period of time.¹⁴⁶ There are three key outcomes negotiated in a repayment agreement. First, the parties negotiate the amount of money that is considered owed and must be repaid. Any rate abatement granted to the tenant will be deducted from the rent money owed.¹⁴⁷ Where a rent abatement is granted, the agreement will reference the abatement explicitly.¹⁴⁸ Second, the parties negotiate the length of time for repayment. If the tenant repays the amount owed by the deadline, the tenancy will be reinstated. Third, the parties negotiate whether the agreement will include a judgment for the landlord.¹⁴⁹ What occurs if the tenant misses a payment

¹⁴⁴ See NYC OFFICE OF CIVIL JUSTICE 2017 ANNUAL REPORT AND STRATEGIC PLAN, NYC HUM. RESOURCES ADMIN. 19 (2017), available at https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2017.pdf. In 2016, the year this study was conducted, there were 202,300 nonpayment cases filed. *Id.* The number of nonpayment cases filed has steadily decreased since 2013. *Id.* Eviction cases brought for reasons other than nonpayment of rent, such as termination of the tenancy or violation of the lease, are considered “holdovers.” *Id.* In 2016, there were 31,584 holdover cases filed. *Id.* A total of 22,089 eviction cases resulted in actual eviction that year, but the percentage breakdown between holdovers and nonpayment cases is unknown. *See id.*

¹⁴⁵ In this study, less than one percent of nonpayment of rent evictions went to trial. For a discussion of the widespread practice across jurisdiction of resolving eviction cases through “hallway negotiations,” *see* Engler, *supra* note 118.

¹⁴⁶ The data in this study showed that 22 percent of all nonpayment cases in which the tenant appeared were resolved through a settlement agreement in which the landlord agreed to discontinue the case (presumably because all the arrears had been paid or otherwise accounted for). 1 percent of cases resulted in settlement agreements in which the tenant agreed to move out, one-half percent resulted in dismissal (presumably because of a procedural or other type of defect), and 8 percent resulted in a default judgment. Cases that resulted in a discontinuance, move out agreement, or default judgment were excluded from the analysis unless otherwise indicated.

¹⁴⁷ Rent abatements may also be awarded at an abatement hearing held by a judge prior to the full trial. Because very few cases go to trial, few abatement hearings are held. All abatements awarded after a hearing were included in the data coding, analysis, and results. The amount of arrears claimed by the landlord may also be reduced for other reasons such as improper rental overcharges, the attribution of arrears to a public housing authority responsible for making Section 8 payments, or for other monetary claims asserted by the tenant.

¹⁴⁸ The rent abatement and its purpose are always expressly stated because landlords want to ensure that tenants cannot seek to recover on the warranty of habitability claims again in a subsequent court proceeding.

¹⁴⁹ It is generally understood that these latter two outcomes – amount of time to pay and whether a judgment issues – operate in an inverse relationship in negotiations. Thus,

under the agreement depends on whether the agreement contained a judgment for the landlord. If the agreement includes a judgment, the landlord is authorized to evict the tenant immediately upon the tenant's breach of the agreement terms. If the agreement does not include a judgment, the landlord must file a motion seeking the court's permission to go forward with the eviction.¹⁵⁰

Oftentimes, cases will include multiple settlement agreements. Where the tenant fails to pay the arrears by the deadline in the first agreement, either the tenant or the landlord can bring the case back to court. The tenant most likely would do so to seek an extension of time to pay. The tenant can also do so where the landlord has failed to comply with orders to make repairs. The landlord would bring the case back to court to seek authority for an eviction where a judgment was not awarded in the initial settlement agreement and the tenant failed to pay by the required deadline.

¹⁵¹ Although parties have the option to have a hearing before the judge in all of these scenarios, the result will most frequently be a subsequent repayment agreement with a new deadline.¹⁵²

the landlord will agree to a stipulation without a judgment and a shorter period of time to pay the arrears, or a stipulation with a judgment and a longer period of time to pay.

¹⁵⁰ Where an agreement does not include a judgment and the tenant breaches the terms, alternatively, the landlord is required to file a motion requesting a judgment and issuance of the warrant of eviction, and that motion must be allowed before an eviction can be carried out.

¹⁵¹ Where a tenant fails to pay by the payment deadline and the stipulation includes a judgment, the tenant will file a post-judgment "Order to Show Cause" seeking a stay in the execution of the eviction. Orders to Show Cause are liberally granted, and thus landlords tend to agree to a settlement allowing for a new deadline for the payment of the arrears. Where the original settlement stipulation does not include a judgment, the landlord will file a motion for issuance of the judgment and the execution upon the tenant's failure to pay by the payment deadline. Such a motion will also typically resolve in a subsequent settlement stipulation, this time including a judgment, with a new payment deadline. These subsequent settlement stipulations are allocated in the same manner as initial settlement stipulations, and thus will include provisions requiring the performance of repairs with the same regularity.

¹⁵² There are two general standards for the granting of orders to show cause in New York City Housing Court. First, if the order to show cause will grant merely a stay of execution for an eviction, there is wide judicial discretion in determining whether or not to grant the order—the court will grant the order if that is determined to be "just." See N.Y. C.P.L.R. 2201; see also *Joseph v. Cheeseboro*, 248 N.Y.S.2d 969, 971 (N.Y. Civ. Ct. 1964) (stating that the standard for granting such orders is "the court's own sense of discretion, prudence, and justice") *rev'd on other grounds*, 251 N.Y.S.2d 975. However, if the order to show cause will lead to vacatur of the judgment for eviction, a different standard prevails. In such cases (which generally result from a default judgment against the tenant), the party bringing the order to show cause must show that the default was "excusable default." See N.Y. C.P.L.R. 5015(a)(1). A showing of excusable default has two components that the tenant must show: "a reasonable explanation for defaulting and a

The eviction case procedures provide numerous opportunities for tenants to assert that repairs are needed in their units and for judges to order those repairs. The pro se answer form, used by virtually all tenants who submit an answer, provides as one of the standardized response options that repairs and/or services are or were needed in the unit.¹⁵³ Judges also ask tenants whether repairs are needed as part of the judges' review of the settlement agreement.¹⁵⁴ Wherever the tenant states that repairs are needed, the judge will require that the agreement include a provision obligating their performance. The agreement will enumerate the specific defective conditions and will provide "access dates" on which the repairs will be made. This process is repeated for each settlement agreement in the case.

Judges also have tools to verify the presence of defective conditions in the tenant's unit. The Housing Code enforcement database, maintained by the New York City Department of Housing, Preservation, and Development ("HPD" or "the Code enforcement agency"), is publicly accessible online and is searchable by unit. This database includes a multi-year history of the complaints made, inspections performed, and violations issued for each unit. All judicial benches are equipped with desktop computers and wireless Internet, allowing judges to easily access the available data. Judges also have the authority to order the Code enforcement agency to perform Housing Code inspections.¹⁵⁵

meritorious defense to the proceeding." *East 168th Street Associates v. Castillo*, 79 N.Y.S.3d 485, 489 (N.Y. Civ. Ct. 2018).

¹⁵³ The pro se Answer form is a check-box form that tenants complete orally at the Housing Court clerk's window. The form asks tenants whether "[t]here are or were conditions in the apartment and/or building and/or house which the Petitioner did not repair and/or services the Petitioner did not provide." This plain language wording is distinct from the legalese often used in pro se pleading forms in other jurisdictions. *See Cotton, supra* note 26, at 66 (noting that the pro se pleading form asks tenants to "state whether they want relief based on the 'warranty of habitability' and the 'covenant of quiet enjoyment,' terms which have no meaning to these tenants or even most lay people"). The pro se Answer form used in New York City Housing Court does not provide space for tenants to specify which repairs are needed. Thus, as described *infra*, cases are never identified as having a meritorious warranty of habitability claim based solely on the assertion of needed repairs in the Answer.

¹⁵⁴ An allocation is a judge's review of the stipulation with an unrepresented party to ensure that the party enters into the stipulation freely and voluntarily and understands the terms to which he or she is agreeing. Because questions about repairs are part of judges' standardized allocations, many landlord attorneys will ask tenants if repairs are needed and will include repair obligations in the stipulation voluntarily.

¹⁵⁵ *See* Judicial Request/Order for Housing Inspection, Civil Court of the City of New York, Form Civ. L-T-60 (Aug. 2004).

C. Data

Two distinct datasets were constructed for this study. The first dataset was a statistically significant random sample of all nonpayment of rent eviction cases filed in 2016¹⁵⁶ in which the tenant appeared.¹⁵⁷ The dataset was built using the New York Office of Court Administration's comprehensive database of all eviction case filings.¹⁵⁸ This Office of Court Administration database identified the index number, case type (nonpayment of rent or "holdover"¹⁵⁹), and whether the tenant appeared or defaulted for each case filed.¹⁶⁰ Approximately 97,000 cases satisfied the inclusion criteria.¹⁶¹ From these 97,000 cases, 746 index numbers were randomly selected using a data randomization generation tool. The selection was stratified in order to account for borough-level differences in the data.¹⁶² 746 cases is a statistically significant representative sample of the total study population at a 90% confidence interval, with a margin of error of 3% and a response distribution of 50%.¹⁶³ The files for all 746

¹⁵⁶ 2016 was the most recent year for which complete case data was available during the time period this study was conducted (May through October 2018). Many cases filed in 2017, particularly those filed in the latter half of the year, were still ongoing in 2018.

¹⁵⁷ A tenant appears by filing an answer at the Housing Court clerk's office. Cases in which the tenant defaulted were excluded because a default judgment generally precludes the tenant from asserting claims and defenses. Even where a tenant is successful in removing a default judgment at a later stage in the case, the tenant typically negotiates at a weakened bargaining position and thus does not have the same leverage to invoke the warranty of habitability. See Frazese et al, *supra* note 19, at 22 ("[t]he entry of a default judgment against a tenant who does not (or cannot) appear in court limits that tenant's range of options and all but closes the window of opportunity for consideration of viable defenses and alternatives to dispossession"). Inclusion of cases with default judgments in the study would have muddied the data, causing the findings to reflect both the structural barriers to usage *and* the lack of availability of the claim due to the default. Since the goal of the study was to assess the structural barriers to usage, defaulted cases were excluded.

¹⁵⁸ The NYU Furman Center was provided this database by the Office of Court Administration pursuant to a data use agreement that restricts usage to certain research purposes.

¹⁵⁹ See *supra* note 145.

¹⁶⁰ This dataset also included other information; however, the only data used for this study were the index number, case type, and appearance of the tenant. This data was used only to determine the size of the total study population and to identify a random representative sample of cases.

¹⁶¹ A total of 202,300 nonpayment of rent eviction petitions were filed in 2016. Thus, the tenant defaulted in over half of all the nonpayment proceedings.

¹⁶² A stratified sample is one that is proportional to certain differentiating criteria. Thus here, the number of cases from each borough in the sample was proportional to the number of cases from that borough in the total dataset. The sample was a .5% stratified sample.

¹⁶³ The margin of error states the amount of random sampling error in a study's results. The confidence interval is a type of interval estimate that might contain the true value of an

cases were retrieved from the Housing Court, scanned, and coded according to criteria and guidelines described below. The unit-level addresses for these cases were also matched with the HPD Housing Code enforcement database. This matching allowed each case to be linked to the unit's Housing Code complaint and violation history.

The second dataset was a statistically significant random sample of all nonpayment of rent eviction cases filed in 2016 in which the tenant appeared *and* in which one or more Housing Code violations were open at the unit at the time the case was filed.¹⁶⁴ This dataset was constructed by matching the Office of Court Administration database with the HPD Housing Code violation database at the unit level.¹⁶⁵ The matching identified 1,553 cases. From these 1,553 cases, 507 case index numbers were randomly selected using a data randomization generation tool. The selection was stratified in order to account for any borough-level differences in the data. 507 cases is a statistically significant representative sample of the total study population at a 90% confidence interval, with a margin of error of 3% and a response distribution of 50%. The files for all 507 cases were retrieved from the New York City Housing Court, scanned, and coded according to the same criteria and guidelines described below.

D. Methodology

The case files in both datasets were coded across seventeen different criteria. A detailed description of the coding guidelines is provided in Appendix A. The criteria included whether the tenant was represented,¹⁶⁶ whether the Answer asserted needed repairs; the outcomes of the first settlement agreement, including whether a possessory judgment entered, whether a rent abatement was awarded, and the length of time provided to

unknown population parameter. The associated confidence level quantifies the level of confidence that the parameter lies in the interval. The response distribution is the probability distribution of the response (target) variable. 50% is the most conservative choice for the response distribution, yielding the largest sample size.

¹⁶⁴ "Hazardous" Housing Code violations are classified as "B" level violations and "immediately hazardous" violations are classified as "C" level violations.

¹⁶⁵ The Office of Court Administration dataset included the unit-level address for each case filed. For each Housing Code violation, the Department of Housing, Preservation, and Development (DHPD) dataset included the unit-level address, the dates the violation was open and closed, and the violation classification level (A, B, or C). The DHPD data did not include information for violations at properties owned by the New York City Housing Authority (NYCHA), i.e., public housing, and thus the matched dataset used for this study was not inclusive of nor can it be taken to reflect outcomes involving NYCHA units.

¹⁶⁶ Representation status was coded based on whether the tenant was represented when he or she entered into the first settlement agreement in the case.

the tenant to repay the arrears;¹⁶⁷ whether the first and any subsequent settlement agreements required the landlord to perform “substantial repairs”; whether the judge ordered a Housing Code inspection; and whether the judge had accessed the Housing Code enforcement records of the unit.¹⁶⁸ “Substantial repairs” were defined as repairs of a condition sufficiently serious to constitute a violation of the warranty of habitability.¹⁶⁹

The first dataset – which I will refer to as the “all nonpayment cases” dataset – constituted a representative sample of all nonpayment of rent eviction cases in which the tenant had the ability to pursue claims and defenses.¹⁷⁰ Within this dataset, cases were divided into control or

¹⁶⁷ These outcomes were only recorded for the first settlement agreement because this agreement reflects what is generally the only substantive negotiation in the case. A subsequent agreement (other than a discontinuance) will only occur if a tenant has defaulted on the first agreement, and thus a tenant in that posture is in a weakened negotiating position. A tenant in that posture will also typically have waived defenses and claims in the first agreement, particularly if judgment has entered.

¹⁶⁸ The pro se Answer form provides an option for tenants to assert that repairs are needed in their apartments. The form does not prompt tenants to specify which repairs are needed. Settlement agreements, by contrast, nearly always specify the repairs to be performed where they require repairs.

¹⁶⁹ Repairs of all conditions issues that qualify as rent impairing pursuant to Multiple Dwelling Law, § 302-a were included as “substantial repairs.” All conditions that have been found to constitute a violation of the warranty of habitability were also included. These include, *inter alia*: lack of heat and/or hot water, *see* Parker 72nd Associates v. Isaacs, 109 Misc. 2d 57, 436 N.Y.S.2d 542 (N.Y. City Civ. Ct. 1980); flooding, *see* Spatz v. Axelrod Management Co., Inc., 165 Misc. 2d 759, 763, 630 N.Y.S.2d 461, 464 (City Ct. 1995); fumes and smoke, *see* Goldman v. O’Brien, 8/14/2000 N.Y.L.J. 28, col. 3 (App. Term 1st Dep’t); leaking gas, *see* Goodman v. Ramirez, 100 Misc. 2d 881, 420 N.Y.S.2d 185 (N.Y. City Civ. Ct. 1979); lead paint, *see* Chase v. Pistole, 190 Misc. 2d 477, 739 N.Y.S. 250 (County Ct. 2002); bedbugs, *see* Jefferson House Associates, LLC v. Boyle, 6 Misc. 3d 1029(A), 800 N.Y.S.2d 348 (J. Ct. 2005); mold, *see* 360 W. 51st St., LLC v. Cornell, 9/6/2005 N.Y.L.J. 18, col. 1 (Civ. Ct. N.Y.), *aff’d*, 360 West 51st Street Realty, LLC v. Cornell, 14 Misc. 3d 90, 831 N.Y.S.2d 634 (App. Term 2007); broken appliances (e.g., refrigerator or stove), *see* Rosewohl Enterprises, LLC v. Schiffer, 12 Misc. 3d 141(A), 824 N.Y.S.2d 766 (App. Term 2006); cockroaches, *see* 501 New York LLC v. Anekwe, 14 Misc. 3d 129(A), 836 N.Y.S.2d 485 (App. Term 2006); secondhand smoke, *see* Poyck v. Bryant, 13 Misc. 3d 699, 820 N.Y.S.2d 774 (N.Y. City Civ. Ct. 2006); mice and/or rats, *see* Northwood Village, Inc. v. Curet, 5/6/98 N.Y.L.J. 34, col. 4 (Dist. Ct. Suffolk Co.); noise and/or dust, *see* Mantica R. Corp. NV v. Malone, 106 Misc. 2d 953, 436 N.Y.S.2d 797 (N.Y. City Civ. Ct. 1981); failure to install kitchen facilities, *see* Joseph v. Varna Trust, 2/13/2003 N.Y.L.J. 19, col. 5 (Civ. Ct. N.Y. Co.); broken locks, *see* Jangla Realty Co. v. Gravagna, 112 Misc. 2d 642, 447 N.Y.S.2d 338 (N.Y. City Civ. Ct. 1981).

¹⁷⁰ The tenant had the ability to pursue claims and defenses in these cases because the tenant filed an answer. A tenant who does not file an answer defaults and, in most instances, will receive a default judgment. Although it is possible to defend a case after receiving a default judgment, a tenant in this posture will not have the same opportunity to

treatment groups based on whether the tenant appeared to have a meritorious warranty of habitability claim.¹⁷¹ Cases were assigned to the control group where all available information indicated that the tenant had not experienced serious conditions of disrepair sufficient to establish a warranty of habitability claim.¹⁷² Specifically, cases were assigned to the control group where the tenant did not assert repairs in the Answer, there were no substantial repairs included in the settlement agreement, and there were no open “hazardous” (Class B) or “immediately hazardous” (Class C) code violations at the unit at the time the case was filed.¹⁷³ Thirty-four percent of all nonpayment of rent cases met these conditions. I refer to this group as the “no meritorious claim” group.

Cases were assigned to the treatment group based on the presence of factors indicating that the tenant had experienced serious conditions of disrepair, and thus likely could have established a warranty of habitability claim. These factors included (1) the assertion that repairs were needed in the tenant’s Answer; (2) the inclusion of substantial repairs in the initial settlement agreement; and (3) the inclusion of substantial repairs in multiple settlement agreements. Some evidence of conditions of disrepair was present in the majority of nonpayment of rent cases. In half (50%) of all nonpayment of rent cases, tenants asserted that repairs were needed in their Answer to the complaint.¹⁷⁴ Slightly over half, 51 percent, of cases

pursue claims and defenses as a tenant who appears. *See supra* note 158.

¹⁷¹ Some cases did not fall into either classification because it was ambiguous whether the tenant had a meritorious warranty of habitability claim. These cases were excluded from the analysis.

¹⁷² The available information, however, did not provide insight into whether the tenant had suffered conditions of disrepair sufficient to constitute a violation of the warranty of habitability at an earlier time in his or her tenancy. Thus, there may have been some cases included in the control group that were cases in which the tenant had the ability to pursue a warranty of habitability claim.

¹⁷³ All three conditions were required to be met for a case to be assigned to the control group. Cases in which needed repairs were asserted in the Answer but in which substantial repairs were not included in the settlement agreement were not included in either group because it was ambiguous whether the tenant had a meritorious warranty of habitability claim. These cases were excluded from the analysis.

¹⁷⁴ It is unknown to what extent the tenants’ assertions may have been untruthful -- tenants could have, for example, invoked the claim without basis because they believed it would bolster their defense. To assess for this possibility, I compared the frequency with which tenants asserted needed repairs in their Answer with the frequency with which tenants claimed a service defect, which was offered as another check-box option on the standardized form. A service defect is in some ways a stronger defense to an eviction case than a warranty of habitability claim – where a tenant has not been properly served, the court has no jurisdiction and the case must be dismissed. Yet only 10 percent of tenants claimed this defense. This finding suggests that tenants were not simply checking every box that could be beneficial to their case, and thus supports the truthfulness of tenants’

included substantial repairs in the initial settlement agreement. There was not perfect overlap between cases in which repairs were asserted in the Answer and imposed in the settlement agreement – only 36 percent of cases met both conditions. There are two potential explanations for this finding. First, the Answer does not specify which repairs are needed, and thus in a certain percentage of cases the repairs claimed were likely non-substantial. Second, new repair needs may have arisen between the filing of the Answer and the settlement agreement, and thus some settlement agreements may have included substantial repairs that were not needed at the time of the Answer.¹⁷⁵ Overall, 10 percent of cases had repairs asserted in the Answer *and* substantial repairs included in *multiple* settlement agreements.¹⁷⁶

Table 1: Descriptive statistics of all nonpayment of rent eviction cases

Evidence of conditions of disrepair	Percentage of nonpayment of rent eviction cases
Need for Repairs Asserted in Answer	50%
Substantial repairs in settlement agreement*	51%
Repairs asserted in Answer <i>and</i> substantial repairs in settlement agreement	36%
Repairs in Answer <i>and</i> substantial repairs in <i>multiple</i> settlement agreements*	10%
(No evidence of conditions of disrepair)**	(34%)

* One of two permutations of “meritorious claim” treatment group

** “Not meritorious claim” control group

assertions of needed repairs. Moreover, research in other jurisdictions has found that tenants’ allegations of conditions of disrepair are generally valid. In a longitudinal study of seventy-three landlord-tenant cases in a housing court in Washington, D.C., Jessica Steinberg found that, “when tenants’ claims of housing code violations were investigated, ninety-seven percent of tenant cases resulted in at least one substantiated allegation.” *See* Steinberg, *supra* note 22. The primary purpose of this housing court, known as the Housing Conditions Court, is to address substandard housing. *Id.*

¹⁷⁵ The average length of time between the Answer and the settlement agreement was 21 days.

¹⁷⁶ This figure is likely relatively low in part because many cases do not involve multiple settlement agreements.

The treatment group – which I will refer to as the “meritorious claim” group – was configured and tested using two different permutations: (1) cases in which the settlement agreement required the landlord to make substantial repairs, and (2) cases in which *multiple* settlement agreements required the landlord to make substantial repairs *and* the tenant asserted that repairs were needed in his or her Answer.¹⁷⁷ The criteria used in the first permutation were more inclusive but less confident indicators of a meritorious warranty of habitability claim, whereas the criteria used in the second permutation were less inclusive but more confident indicators.¹⁷⁸ In the second permutation, cases were only included if two or more settlement agreements required repairs of the same conditions and the access dates in the first agreement had passed by the date of the second agreement.¹⁷⁹

The second dataset – which I will refer to as the “violation dataset” – constitutes a representative sample of cases in which there was an even stronger indication that the tenant had a meritorious warranty of habitability claim. Conditions of disrepair that constitute “hazardous” (Class B) and “immediately hazardous” (Class C) violations nearly always affect habitability,¹⁸⁰ and the status of the violation as “open” indicates both that

¹⁷⁷ Cases were only included in the “meritorious claim” group where the conditions requiring repairs, as stated in the settlement stipulation, were sufficient to constitute a warranty of habitability violation. Thus, where a settlement stipulation required a landlord to repair only a minor condition that did not affect habitability, the case was not included in the “likely meritorious warranty claim” group.

¹⁷⁸ The first permutation includes all cases in which it was likely that the tenant had a meritorious warranty of habitability claim. Virtually all cases result in a settlement stipulation, and the inclusion of repairs in the stipulation likely indicates that the tenant had a meritorious claim. However, there is a possibility that the tenant was lying by saying repairs were needed, or that perhaps the tenant had not notified that repairs were needed prior to the settlement discussion. Thus, this permutation could be overly inclusive by encompassing cases in which the tenant did not have a meritorious claim. The second permutation includes cases in which there was a near certainty that the tenant had a meritorious claim. If the tenant stated that repairs were need in his or her Answer and the landlord agreed to make repairs in not one but two or more settlement stipulations, we know that the landlord had notice of the conditions and failed to make repairs. Moreover, the tenant’s persistence in asserting the conditions and the need for repairs suggests a low probability of falsification. However, this permutation is likely to exclude cases in which the tenant has a meritorious claim. Many cases resolve with only one settlement stipulation, and it is possible that some tenants are not asked or do not know to mention that repairs are needed when they file their Answer.

¹⁷⁹ The goal of using these criteria was to identify cases in which the landlord appeared to have shirked his or her obligations to repair in the first agreement. Where the landlord had shirked such obligations, there is a strong likelihood that the tenant had a meritorious warranty of habitability claim because the landlord was on notice and failed to make the necessary repairs. It is unknown in these cases, however, if the failure to repair was the result of the tenant’s refusal to provide access.

¹⁸⁰ Conditions that qualify as Class C violations include, *inter alia*, rodents, inadequate

the landlord had notice of the condition of disrepair and that the landlord likely had not yet completed repairs.¹⁸¹ This dataset thus comprised a third treatment group. At times, subsets of the violation dataset were also used to test results among groups of cases with even stronger evidence of a meritorious warranty of habitability claim. Thus, outcomes were analyzed for subgroups of violation cases where the tenant had also asserted that repairs were needed in the Answer, substantial repairs were included in the settlement agreement, and/or substantial repairs were included in multiple settlement agreements.

The purpose of the violation dataset was primarily supplemental, as the cases included likely comprise only a small fraction of all nonpayment of rent cases in which the tenant had a meritorious warranty of habitability claim. Many tenants do not report defective conditions to the City, or do so only once their landlord has repeatedly failed to make repairs.¹⁸² Thus, the

supply of heat or hot water, and defective rodents. Conditions that qualify as Class B violations include, *inter alia*, inoperable smoke detectors, mold, and vermin issues. 95 percent of the cases included in the violation dataset had at least one open Class C violation.

¹⁸¹ In order for a violation to be closed (often referred to as “certified”), there must be a determination that the violation has been corrected. Prior to the deadline for correcting the violation (24 hours for a Class C violation, 30 days for a Class B violation, and 90 days for a Class A violation), a landlord may self-certify the violation as corrected by mail or through an online system. Once the deadline for correction of the violation has passed, a landlord must submit a dismissal request to the Code enforcement agency (the Department of Housing and Community Development, or “HPD”). Upon the filing of a dismissal request, an inspection will be conducted and the housing inspector will deem the violation corrected where so warranted. Certain violations require the submission of documentation along with the request for dismissal. Where a violation has been open for longer than twelve months and no new violations have been issued during that time period, the landlord can apply for a voluntary reissuance of the violation and may then self-certify the violation as corrected by the newly-established deadline for correction. *See Violation Removal – Overdue Violations*, New York City Department of Housing, Preservation, and Development, available at <https://www1.nyc.gov/assets/hpd/downloads/pdf/overdue-violations.pdf>. It is possible that in some cases included in this dataset, the violation had been corrected but the landlord had not yet undertaken the appropriate procedures to close the violation. It is also possible that there were some cases with uncorrected Class B and Class C violations at the time of case filing that were not included in the dataset because the landlord had falsely certified the violations as corrected. *See generally* Grace Ashford, *Bad Landlords Dodge Full Bite of a Watchdog*, N.Y. TIMES, A1 (Dec. 25, 2018) (reporting instances of false correction certifications by landlords).

¹⁸² *See generally* NEW SETTLEMENT APARTMENTS’ COMMUNITY ACTION FOR SAFE APARTMENTS (CASA) AND THE COMMUNITY DEVELOPMENT PROJECT (CDP) OF THE URBAN JUSTICE CENTER, TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT (2013), available at https://cdp.urbanjustice.org/sites/default/files/CDP.WEB.doc_Report_CASA-TippingScales-full_201303.pdf. Oral or written notice to the landlord is sufficient to satisfy the notice requirement of a warranty of habitability claim. *See supra* note 138.

“all nonpayment cases” dataset provides a more comprehensive representation of the use of the warranty of habitability across all nonpayment of rent eviction cases. The “violation dataset” is included to respond to potential concerns that the methodology used to identify cases with meritorious warranty of habitability claims in the first dataset are overly inclusive, and thus that the findings are diluted. Each case included in the violation dataset had on average 3.7 Class C violations, .5 Class B violations, and 1.3 Class A violations open at the time of case filing, totaling 5.6 open violations per case.¹⁸³ 95 percent of cases in the dataset had one or more open Class C violation.

Welch two sample t-tests and Pearson’s chi-squared tests were performed to compare case outcomes among the treatment and control groups. As described in more detail below, outcomes compared included rent abatements, the rate of possessory judgments, the length of the repayment period, and orders to perform repairs.

IV. RESULTS AND DISCUSSION

This Section provides the results of the statistical analysis and discusses the answers they provide to the four specific research questions. The analysis revealed that many more tenants had meritorious warranty of habitability claims than received any benefit from the claim. A small percentage of tenants with meritorious claims received rent abatements; no tenants, however, received other benefits, such as longer repayment periods or avoidance of a possessory judgment, as a result of having a meritorious claim. And while settlement agreements very frequently imposed repair obligations, it appears that those obligations most often went unfulfilled and unenforced. The lack of legal representation accounted somewhat for the findings, but was insufficient to fully explain them.

Subsections (A) and (B) provide the results of the statistical analysis for the three types of case outcomes studied: rent abatements, possessory judgments, and length of time for payment of the arrears. Subsection (C) provides the same for the data related to the enforcement of repair obligations, and subsection (D) provides the results of the analyses regarding legal representation.

¹⁸³ Repairs were asserted in the Answer in 71 percent of violation cases, and substantial repairs were included in the settlement agreement in 68 percent of violation cases. In 19 percent of violation cases, substantial repairs were included in multiple settlement agreements, and in 16 percent of violation cases, substantial repairs were included in multiple settlement agreements and repairs were asserted in the Answer.

A. Question 1: To what extent do tenants who have meritorious warranty of habitability claims receive rent abatements?

The data analysis revealed that tenants who had meritorious warranty of habitability claims rarely received rent abatements. Rent abatements were granted in only 1.75 percent of all nonpayment of rent eviction cases, even though 36-51 percent of the tenants in the study had meritorious claims. Put differently, a tenant with a meritorious warranty of habitability claim had between a 1.8 and 2.4 percent chance of receiving a rent abatement generally, and a 9 percent chance if there were open code violations in the unit. Even using the most conservative set of indicators to identify cases with meritorious warranty claims – cases in which there were open code violations, the tenant asserted repairs in the Answer, and substantial repairs were included in multiple settlement agreements – only 15 percent received rent abatements. In sum, the overwhelming majority of tenants who were entitled to rent abatements did not receive them. A detailed description of the statistical findings is provided below.

1. All nonpayment of rent cases

Rent abatements were awarded in 1.75 percent of all nonpayment of rent cases (13 out of 745). The percentage rose only slightly when calculated within cases with evidence of conditions of disrepair. Tenants were awarded rent abatements in 3.5 percent of cases with repairs asserted in the Answer. Of cases in which substantial repairs were included in the first settlement agreement, 2.35 percent were awarded rent abatements, and of cases in which substantial repairs were included in the settlement agreement and repairs were asserted in the Answer, 3.29 percent were awarded abatements. Abatements were granted in 2.76 percent of cases in which repairs were asserted in the Answer and substantial repairs were included in multiple settlement agreements. No abatements were awarded in the control group. The average abatement amount was \$1,955. These results are presented in Table 2 below.

Table 2: Rent Abatements in All Nonpayment of Rent Cases

Case Classification	Abatement Rate
All cases	1.77%
Repairs in answer	3.5%
Substantial repairs in settlement agreement*	2.35%
Repairs in answer <i>and</i> substantial repairs in settlement agreement	3.29%
Repairs in answer <i>and</i> substantial repairs multiple settlement agreements*	2.76%
No conditions of disrepair**	0%

* One of two permutations of “meritorious warranty claim” group

** “Not meritorious warranty claim” control group

2. Violation cases

Rent abatements were awarded in 9 percent of all violation cases, even though the tenants in all such cases had meritorious claims. The rate of rent abatements did not increase substantially even where additional evidence existed of conditions of disrepair. Tenants were awarded rent abatements in 10 percent of cases in which the tenant has asserted that repairs were needed in his or her Answer. Of cases in which substantial repairs were included in the first settlement agreement, 13 percent were awarded rent abatements, and of cases in which substantial repairs were included in multiple settlement agreements, the same share – 13 percent – were granted abatements. Abatements were awarded in 15 percent of cases in which repairs were asserted in the Answer and substantial repairs were included in multiple settlement agreements. The average abatement amount in the violation dataset was \$2,275. These results are presented in Table 3 below.

Table 3: Rent Abatements in Violation Cases

Case Classification	Abatement Rate
All violation cases	9%
Repairs in Answer	10%
Substantial repairs in settlement agreement	13%
Repairs in Answer <i>and</i> substantial repairs in settlement agreement	13%
Repairs in Answer <i>and</i> multiple settlement agreements	15%

3. Discussion

The data revealed that tenants received rent abatements at very low rates even where there were multiple indicators that they had meritorious warranty of habitability claims. The findings showed a large operationalization gap as measured by the award of a rent abatement: only between 2.5 and 9 percent of tenants who had a meritorious warranty of habitability claim actually benefited from that claim. At minimum, these findings show that the warranty of habitability is not operating in practice as it is designed on paper: to condition rental obligations on repairs. Instead, most tenants – approximately ninety-eight out of one hundred – are being held to their full rental obligations regardless of defective conditions. The result is that landlords are rarely facing financial consequences for neglecting their properties.

The data also showed that tenants were most likely to receive rent abatements when there were open code violations in the unit. Tenants were substantially less likely (approximately one-half to one-quarter as likely) to receive abatements when there was other evidence of conditions of disrepair but no code violations. This finding is striking. Although code violations provide proof of the existence of conditions of disrepair, a primary motivation for enacting the warranty of habitability was to provide an alternative to code enforcement for holding landlords accountable for conditions of disrepair. Courts, advocates, and legislators believed that by giving tenants the power to act as “private attorneys general” to enforce habitability standards, the warranty would function as an important work-around to often inefficient and poorly resourced housing code enforcement systems.¹⁸⁴ But to the extent the warranty of habitability provides

¹⁸⁴ See Franzese, *supra* note 19, at 13; *supra* notes 42-49 and accompanying text.

meaningful relief only where the Code enforcement system has been activated, as is indicated by this data, the law is not serving this purpose.

B. Question 2: To what extent do tenants with meritorious warranty of habitability claims receive other benefits from the claim, such as a longer time period to repay rental arrears or the avoidance of a possessory judgment?

The data also ruled out the possibility that tenants with meritorious warranty of habitability claims receive benefits from the claim other than rent abatements. As described above, the other key outcomes negotiated in a nonpayment of rent eviction case are (1) whether a possessory judgment is awarded to the landlord, and (2) the length of the repayment period afforded to the tenant. The analyses of both datasets showed that there was no statistically significant difference in either of these case outcomes between cases with and without meritorious warranty of habitability claims. Tenants with meritorious warranty claims were statistically just as likely to receive a possessory judgment as tenants without warranty claims.¹⁸⁵ In cases in which possessory judgments were awarded, there was no statistically significant difference in the length of the repayment period. Similarly, in cases in which no possessory judgment was awarded, there was no statistically significant difference in the length of repayment period.¹⁸⁶ Thus, tenants did not appear to be “trading” the opportunity for a rent abatement for other types of desirable outcomes in their cases. A detailed description of the statistical findings is provided below.

1. All nonpayment of rent cases

The results are presented in Tables 4 and 5 below. Among “no warranty claim” cases, 74 percent had possessory judgments and the average length of time for repayment of arrears was 37.6 days. Where a case had a possessory judgment, the average length of time for repayment was 42 days, whereas when the case did not have a possessory judgment, the average repayment period was 24 days. As described in Section III.C *supra*, two different permutations were used as the “meritorious warranty

¹⁸⁵ Tenants were slightly less likely to receive possessory judgments in cases in which there were open code violations, but this finding was not statistically significant.

¹⁸⁶ The length of repayment period is compared separately for cases with and without possessory judgments because these two outcomes are typically negotiated in an inverse relationship with each other – tenants who wish to avoid a judgment can typically do so in exchange for a shorter repayment period, whereas tenants who prefer a longer repayment period can typically achieve this by agreement to a possessory judgment.

claim” treatment group within the “all nonpayment of rent cases” dataset: (1) cases with substantial repairs in the settlement agreement (Permutation 1), and (2) cases with substantial repairs in *multiple* settlement agreements *and* repairs asserted in the Answer (Permutation 2). Among Permutation 1 cases, 73 percent had possessory judgments and the average length of time for the repayment of the arrears was 39.3 days. Where a case had a possessory judgment, the average length of time for repayment was 44 days, whereas when a case did not have a possessory judgment, the average repayment period was 26 days. Among Permutation 2 cases, 75 percent had possessory judgments and the average length of time for repayment of arrears was 40 days. Where a case had a possessory judgment, the average length of time for repayment was 44 days, whereas when a case did not have a possessory judgment, the average repayment period was 29 days.¹⁸⁷

Welch two sample t-tests and Pearson’s chi-squared tests were performed to test for statistical significance in the difference in outcomes between the “no warranty claim” cases and each of the two permutations of “meritorious warranty claim” cases. There was no statistically significant difference in outcomes between the “no warranty claim” control group and either of the two permutations of the treatment group. The full statistical results are reported in Tables 4 and 5 below.

2. *Violation cases*

These results are also presented in Tables 4 and 5 below. 67 percent of violation cases had possessory judgments. The average length of time

¹⁸⁷ In a significant share of cases (22 percent), the settlement agreement was an agreement to discontinue the case (a “discontinuance”) rather than a repayment agreement. A discontinuance generally results where the tenant has paid the entirety of the rent owed. The likelihood of a tenant receiving a discontinuance did not appear to be affected by the presence of a warranty of habitability claim. In fact, the likelihood of receiving a discontinuance was lower among tenants who appeared more likely to have meritorious warranty of habitability claims as compared with tenants who did not. The discontinuance rate among tenants with repairs asserted in their answer was 20 percent, compared with 25 percent among tenants without repairs asserted in the answer. The discontinuance rate in all violation cases was 19 percent. Among tenants with substantial repairs asserted in their settlement agreement, the discontinuance rate was 13 percent as compared with 35 percent among tenants with no repairs included in their settlement agreement. The latter disparity – and the low discontinuance rate when repairs were included in the settlement in particular – may exist because judges do not consistently perform allocutions of the settlement agreement where the agreement is a discontinuance. Thus, many tenants who needed substantial repairs may not have had the opportunity to include those repairs in their settlement. Nevertheless, the comparison among cases with and without repairs asserted in the answer and violation cases indicates that tenants with likely warranty of habitability claims did not appear to be using their claims to achieve discontinuances.

for repayment of arrears among all violation cases was 36.4 days. The average repayment period was 42 days for cases with possessory judgments, and 26 days for cases without possessory judgments. Pearson's chi-squared and Welch two sample t-tests were performed to test for statistical significance in the difference in outcomes between the violation cases and the "no warranty claim" cases (in the "all nonpayment cases" dataset). The results showed no statistical significance in the average length of repayment period or in the rate of possessory judgments. The average length of the repayment period also did not differ at a level of statistical significance when the issuance of a possessory judgment was held constant. Specifically, the repayment period was the same in violation cases with possessory judgments and "no warranty claim" cases with possessory judgments. There was also no statistically significant difference between violation cases without possessory judgments and "no warranty claim" cases without possessory judgments. The full statistical results are reported in Tables 4 and 5 below.

Table 4: Possessory Judgment Rate in All Nonpayment of Rent and Violation Cases

Case classification	Percentage of cases with possessory judgment for landlord	P-value¹⁸⁸ based on difference with control group
Substantial repairs in settlement agreement*	73%	.78
Repairs in answer <i>and</i> multiple settlement agreements*	75%	.91
Violation cases	64%	.09
No conditions of disrepair**	74%	--

¹⁸⁸ The p-value, or probability value of asymptotic significance, indicates the level of statistical significant of the outcome. P-values less than .05 indicate statistical significance, whereas p-values greater than .05 indicate that the outcome is not statistically significant.

Table 5: Average Length of Repayment Period in All Nonpayment of Rent and Violation Cases

Case classification		Repayment period		P-value based on difference with control group [95% Confidence Interval]	
Substantial repairs in settlement agreement*	With possessory judgment	39.3 days	44 days	.18 [-4.5, .9]	.16 [-4.3, .7]
	Without possessory judgment		26 days		.29 [-6.8, 2.0]
Repairs in answer and multiple settlement agreements*	With possessory judgment	40 days	44 days	.17 [-5.5, 1.0]	.34 [-3.9, 1.3]
	Without possessory judgment		29 days		.17 [-11.3, 2.1]
Violation cases	With possessory judgment	36.4 days	42 days	.37 [-1.3, 3.6]	.80 [-1.8, 2.3]
	Without possessory judgment		26 days		.41 [-5.7, 2.4]
No conditions of disrepair**	With possessory judgment	37.6 days	42 days	-----	-----
	Without possessory judgment		24 days		-----

* One of two permutations of the “meritorious warranty claim” treatment group among all nonpayment of rent cases

** “Not meritorious warranty claim” control group

3. Discussion

This research is the first to address the possibility that tenants with meritorious warranty of habitability claims are benefiting from the claim by achieving favorable case outcomes other than rent abatements. It effectively rules out this possibility. While tenants with open code violations at their units were slightly more likely to avoid possessory judgments as compared with tenants without warranty claims, this difference was small and not statistically significant. Moreover, such tenants still “paid” for this avoidance of the judgment with a shorter repayment period, equal to that awarded to tenants without warranty claims

who also avoided a possessory judgment.¹⁸⁹ The achieved benefit was therefore minimal.

These findings, together with the rent abatement findings, indicate that the vast majority of tenants with meritorious warranty of habitability claims did not receive any material benefit from the claim. The small percentage of tenants who received rent abatements indeed comprised the *only* tenants with likely meritorious warranty claims who benefited from the law at all. In other words, between 3 and 9 percent of all tenants who should have been able to invoke the law were able to successfully do so. The warranty of habitability did not provide any benefit at all to approximately 91 to 97 percent of tenants who appeared to satisfy the elements of the claim.

C. Question 3: Does the warranty of habitability serve as an effective tool to hold landlords accountable for making needed repairs?

It is possible that although most tenants are unable to successfully invoke the warranty to achieve rent abatements or other beneficial outcomes in their eviction cases, they are effectively using the law as a tool to compel landlords to perform needed repairs. The settlement agreements in slightly over half of all nonpayment of rent cases included an order obligating the landlord to make substantial repairs, which would seem to indicate that the law is being used in this way.¹⁹⁰ However, the fact that the settlement agreement included such an obligation does not necessarily mean that the landlord complied with it and made the repairs. The data does not allow for conclusions to be drawn regarding the extent to which repairs were ever completed once they were ordered in settlement agreements. Where cases involve multiple settlement agreements, however, the frequency with which identical repairs are included in two or more agreements provides one indication of the extent to which repair orders are followed. Specifically, the fact that the same repairs are ordered in multiple settlement agreements and the agreed upon “access dates” for the repairs in the earlier settlement agreement has passed strongly suggests that the landlord did not comply with the initial repair order.¹⁹¹ Conversely, where a case involves multiple

¹⁸⁹ It is also possible that the difference in the rate of possessory judgments is attributable to differences in preferences between tenants with code violations and those with no conditions of disrepair. To the extent tenants with code violations are genuinely withholding rent and have saved the money, they may be more likely to prefer an outcome comprised of shorter repayment period and no possessory judgment rather than one comprised of a longer repayment period and the award of a possessory judgment.

¹⁹⁰ Settlement agreements in cases that were converted to holdovers were excluded from this analysis.

¹⁹¹ It is possible that tenants are lying and saying that repairs are still needed after the

settlement agreements and an earlier settlement agreement included an order to perform repairs but later agreements do not include the same order, it suggests that the repairs have been performed as ordered. Thus, the frequency of each outcome was calculated to determine the extent to which landlords comply with repair orders included in settlement agreements. The findings indicate that repair orders were not complied with in nearly three-quarters of all cases where the data allow for this analysis.

Two other case activities serve as additional indicators of the extent to which the warranty of habitability is effectively used to improve housing quality within eviction cases: the frequency with which judges order Housing Code inspections, and the frequency with which judges access Housing Code enforcement records.¹⁹² As described in Section III.D *supra*, judges presiding over nonpayment of rent eviction cases have broad authority to order that the Housing Code enforcement agency perform an inspection of the unit.¹⁹³ They also have the ability to access Code enforcement records, which include the history of complaints, inspections, and code violations issued within the prior year. The data show that judges rarely took advantage of either opportunity to address repair issues in the tenant's unit.

The full results of the analyses are reported and described below.

1. *All nonpayment of rent cases*

In nonpayment of rent cases in which substantial repair obligations were included in the original settlement agreement and the parties entered into a subsequent settlement agreement after the access dates in the original settlement agreement had passed, the subsequent agreement included the same repair obligations 72 percent of the time.¹⁹⁴ Judges invoked their authority to order a Housing Code inspection in only 1.2 percent of all nonpayment of rent cases. Perhaps even more striking, such an inspection

repairs have already been completed. However, there does not appear to be an incentive for tenants to make such a misrepresentation. Tenants are not excused from their repayment obligations, nor do they receive any other direct benefit as a result of the landlord's failure to comply with the repair order.

¹⁹² Cf. Steinberg, *supra* note 22, at 1083-84 (highlighting the “central role of housing inspectors in prompting landlords to repair housing code violations,” in part through their roles as fact-finders, in the context of the Housing Conditions Court in Washington, D.C.).

¹⁹³ Although the form judges use to solicit a Housing Code inspection of a unit is termed an “Order/Request for Housing Code Inspection,” in practice an inspection is always scheduled once a judge completes the form. Thus, I describe this authority as the authority to “order” a Code inspection, although technically speaking the authority is to “order or request” a Code inspection.

¹⁹⁴ It is not possible to tell from the data the extent to which repairs are not performed because the tenant does not provide access on the agreed upon dates.

was ordered in only .4 percent of cases in which substantial repairs were included in the settlement agreement where there were no open Housing Code violations at the time of case filing or complaints made to the Code enforcement agency within six months prior to the filing.

2. *Violation cases*

In violation cases in which substantial repair obligations were included in the original settlement agreement and the parties entered into a subsequent settlement agreement after the access dates in the original agreement had passed, the subsequent agreement included the same repair obligations 80 percent of the time.¹⁹⁵ Judges invoked their authority to order a Housing Code inspection in only 1.8 percent of all violation cases. At the same time, there is little evidence that judges were aware of open Housing Code violations in the unit. A printout of the online record of the Code enforcement history of the unit was included in the case file in only 5.7 percent of cases, even though there were open Code violations in every case included in this dataset.¹⁹⁶

While judges may have accessed the Code enforcement database and not printed out a paper copy of the record for the file, circumstances suggest that such behavior would be unlikely. For one, it is typically court attorneys (attorneys who assist the judge in the courtroom) who access online records, and a printout of the record would be the most likely method of presenting the record to the judge. Second, it makes logical sense that judges (through their court attorneys) would print out and preserve the record once they have accessed it. Complete eviction case file records exist only in hard paper copy, rather than in any electronic database, and thus in the context of this system, the practical action for judges to take upon accessing an online record related to a case would be to add it to the paper file. Moreover, cases tend to involve multiple court appearances, and thus judges who accessed this record would likely want to remind themselves of the record in a later court appearance. Thus, the finding that a paper copy of the Code enforcement record was in the file in only 5.7 percent of cases likely reflects the frequency with which the judge indeed accessed the record.¹⁹⁷

¹⁹⁵ *Id.*

¹⁹⁶ Records of Housing Code violations are accessible through a centralized public online database.

¹⁹⁷ This outcome was not measured in the all nonpayment of rent cases dataset because very few of those cases had open code violations in the unit, and thus it would have been difficult to interpret the meaning of the rate there.

3. Discussion

These findings strongly suggest that the warranty of habitability is not effectively serving as a tool to compel the performance of needed repairs. In the overwhelming majority of cases in which repairs were ordered in settlement agreements, it appears that landlords did not in fact follow through on their obligations. To be sure, it is unknown to what extent landlords later complied with their obligations even though they did not comply on the scheduled access dates. However, the fact that between 70 and 80 percent of repairs appeared to have not been performed on the scheduled access dates strongly suggests that landlord's repair obligations are not being effectively enforced in the course of nonpayment of rent eviction cases.

The findings also indicate that judges rarely utilized the tools available to them to hold landlords accountable for needed repairs. Judges invoked their authority to catalyze Housing Code inspections in only a tiny share of cases, despite tenants' frequent reporting of serious conditions of disrepair. Had they done so, they would have triggered an overlapping enforcement system that should have then provided an additional layer of landlord accountability. Thus, even if the Housing Court judges were not able to unilaterally enforce habitability laws, they would have activated a system that perhaps could do so more effectively. However, judges did not follow this path. Judges also rarely took advantage of the opportunity to learn the Housing Code enforcement history at the unit. Thus, for example, in the violation dataset, the finding that judges only accessed the Code enforcement history 5.7 percent of the time indicates that their failure to order a Housing Code inspection was not simply a response to their awareness that the Code enforcement agency was already involved with the unit.

D. Question 4: To the extent it exists, is the warranty of habitability operationalization gap simply a result of the lack of legal representation?

The data showed that legal representation substantially affected tenants' ability to benefit from the warranty of habitability.¹⁹⁸ Represented

¹⁹⁸ These findings should be interpreted with some caution, as this study did not involve the randomized assignment of representation. The cases compared have equally strong evidence of warranty of habitability claims; however, it is possible that there are other factors that led counsel to accept some cases and not others. For example, counsel may have selected cases based on the presence of other claims and defenses, or because of the willingness of the tenant to participate in the case. However, to the extent these factors

tenants with meritorious warranty of habitability claims were at least nine times more likely than unrepresented tenants with meritorious claims to receive a rent abatement.¹⁹⁹ Except where there were open code violations in the unit, unrepresented tenants virtually never received abatements when they had meritorious claims. Approximately one in four represented tenants, meanwhile, received abatements when they had meritorious claims, whether identified based on either of the two permutations or the presence of open code violations. These findings strongly suggest that the lack of legal representation is an important contributor to the operationalization gap that has been detected.

However, the findings also show that the lack of legal representation does not fully account for the operationalization gap. Although rent abatements were much more frequent where tenants had legal counsel, rent abatements were not the norm in meritorious claim cases *even among cases in which the tenant was represented*. Most represented tenants – approximately three-quarters – with meritorious warranty of habitability claims did not receive rent abatements, even when they had open code violations in their units. These findings suggest that factors beyond the lack of access to counsel are also responsible for the operationalization gap.

As a preliminary matter, Pearson’s chi-squared tests were performed to test for selection bias in representation – that is, whether lawyers were choosing cases for representation based on the strength of the warranty of habitability claim.²⁰⁰ In the “all nonpayment cases” dataset, the tenant was unrepresented by counsel in 91 percent of all nonpayment cases, and represented by counsel in 9 percent of cases. First, I looked at whether represented cases were more likely to include substantial repairs in the settlement agreement. The results showed that there was no statistically significant difference among the rate at which repairs were included in settlement agreements between represented and unrepresented cases. Specifically, substantial repairs were included in the settlement agreement in 51 percent of unrepresented cases and 53 percent in represented cases. Next, I looked at whether represented cases were more likely to assert needed repairs asserted and to include substantial repairs in multiple settlement agreements. The results showed that the incidence was exactly

affected the selection of cases for representation, the results are likely biased *upwards* so as to overestimate the impact of legal representation.

¹⁹⁹ The length of repayment periods and the rate of possessory judgments were not compared because the sample size among represented tenants was too small to obtain results with statistical significance.

²⁰⁰ It is unknown to what extent the “substantial repairs” needed in the represented versus unrepresented cases were equivalent. Thus, it is possible that counsel were selecting for cases with more serious needed repairs, or for cases where more evidence existed documenting the severity of the repairs and notice to the landlord.

the same – 11 percent – where the tenants were represented and unrepresented. Pearson’s chi-squared tests again showed that there was no statistically significant difference between these rates. Thus, these results indicate that it is unlikely that lawyers were selecting cases for representation based on the presence of a meritorious warranty of habitability claim; overall, tenants had meritorious warranty claims at the same rate whether they were or were not represented. The full results are reported in Table 6 below.

Table 6: Presence of Conditions of Disrepair in Represented Versus Unrepresented Cases

Evidence of conditions of disrepair	Incidence in represented cases	Incidence in unrepresented cases	P-value
Substantial repairs in settlement agreement	49%	46%	.61
Substantial repairs in multiple settlement agreements and repairs in Answer	11%	11%	.84
(No conditions of disrepair)	(31%)	(23%)	---

A similar analysis was performed to test for selection bias in the violation dataset. In this dataset, the tenant was unrepresented by counsel in 79 percent of cases and represented by counsel in 21 percent of cases. To test for selection bias in representation, Welch two sample t-tests compared the number of open violations in unrepresented versus represented cases. Cases in which the tenant was represented had an average of 1.5 Class A, .6 Class B, and 4.3 Class C violations open at the time of case filing. Cases in which the tenant was unrepresented had an average of 1.3 Class A, .4 Class B, and 3.6 Class C violations open at the time of case filing. The differences between these two groups, compared separately for each code violation class level, also were not statistically significant. These findings strongly suggests that counsel did not select cases for representation based on the number or severity of open code violations in the unit at the time of case filing. The full statistical results are reported in Table 7 below.

Table 7: Open code violations in represented versus unrepresented cases

	Number of open violations in represented cases	Number of open violations in unrepresented cases	P-value
Class A	1.5	1.3	.43
Class B	.6	.4	.51
Class C	4.3	3.6	.07

1. All nonpayment cases

Next, Pearson's chi-squared tests were performed to test for differences in the rate of rent abatements among represented and unrepresented tenants with meritorious warranty claims. The results revealed that for tenants with the same evidence of conditions of disrepair, there were substantial and statistically significant differences in abatement outcomes based on representation status. Where substantial repairs were included in the first settlement agreement, the abatement rate was 27 percent when the tenant was represented compared with 0 percent when the tenant was unrepresented. Where substantial repairs were included in multiple settlement agreements and repairs were asserted in the Answer, the abatement rate was 30 percent when the tenant was represented compared with 0 percent when the tenant was unrepresented.²⁰¹ The full statistical results are reported in Table 8 below.

2. Violation cases

Pearson's chi-squared tests were also performed to test for differences in the rate of rent abatements among represented and unrepresented tenants with meritorious warranty claims, where merit is indicated by open code violations. The results showed that where there were open Class B or Class C violations at the unit at the time of case filing, the abatement rate was 26 percent where the tenant was represented compared with 3 percent where the tenant was unrepresented, and that this difference was statistically significant. Thus, legal representation had a demonstrated positive effect on the ability of tenants to successfully invoke

²⁰¹ Where repairs were asserted in the Answer, the abatement rate was 22 percent where the tenant was represented compared with 1 percent where the tenant was unrepresented.

the warranty of habitability. This finding is consistent with the finding in the “all nonpayment cases” dataset, which likewise showed that representation affected tenants’ likelihood of benefiting from the warranty. The full statistical results are reported in Table 8 below.

Table 8: Abatement Rates in Represented Versus Unrepresented Cases

Evidence of conditions of disrepairs	Abatement rate in represented cases	Abatement rate in unrepresented cases	P-value
Substantial repairs in settlement agreement*	27%	0%	.003
Substantial repairs in multiple settlement agreements and repairs in Answer*	30%	0%	.003
Violation cases	27%	3%	.003
(No conditions of disrepair)**	(0%)	(0%)	

* One of two permutations of “meritorious warranty claim” treatment group among all nonpayment of rent cases

** “Not meritorious warranty claim” control group

3. Discussion

The findings show that legal representation substantially affects a tenant’s likelihood of receiving a rent abatement when he or she has a meritorious warranty of habitability claim. Strikingly, they demonstrate that the warranty of habitability is all but inaccessible to tenants without counsel who appear to satisfy the elements of the claim but who do not have open code violations at their units. Tenants are simply unable to reap the benefit of the claim prescribed by the law on paper – a rent abatement – when they are unrepresented. Represented tenants with the same evidence of conditions of disrepair have a one-in-four or one-in-three chance of receiving a rent abatement. The warranty is slightly more useful to

unrepresented tenants where there are open code violations in the unit, with 3 percent receiving rent abatements. However, the impact of representation is still extremely significant. Represented tenants are *nine times as likely* to receive a rent abatement as compared to unrepresented tenants who have the same number and class levels of open code violations at their units. Representation, in short, dramatically affects the ability of tenants to benefit from the warranty of habitability.

At the same time, these findings indicate that representation does not fully account for the operationalization gap in the warranty of habitability. At most, between one-quarter and one-third of represented tenants with meritorious warranty of habitability claims receive rent abatements. Put differently, over two-thirds of tenants with meritorious warranty claims do not benefit from the claim despite having legal representation.

V. IMPLICATIONS OF THE FINDINGS FOR OUR UNDERSTANDING OF THE WARRANTY OF HABITABILITY AND ACCESS TO JUSTICE

The findings of this study reshape our understanding of the effectiveness of the warranty of habitability. The findings provide the most conclusive evidence to date that there is a large operationalization gap in the law. All prior large-scale empirical studies on the warranty have measured the rate at which the claim was asserted or won within the overall population of nonpayment of rent eviction cases, without distinguishing between cases of tenants with and without meritorious claims. This prior research sounded the alarm that the law was likely ineffective, but left open the possibility that the low usage rate simply reflected a low rate of tenants with meritorious claims. This study addressed these methodological shortcomings by specifically measuring the size of the gap between tenants who have meritorious warranty claims and those who benefit from the law. It also took into account the possibility that tenants with meritorious claims were forgoing rent abatements – the relief explicitly provided under the law – in favor of other benefits in their cases. The results together showed that more than 90 percent of tenants with meritorious claims did not benefit from the warranty at all. The results further revealed that tenants were unable to use the law as a tool to secure needed repairs. While judges often ordered landlords to perform repairs, the data shows that landlords evaded compliance with the orders nearly three-quarters of the time. These findings show conclusively that the warranty of habitability suffers from a major operationalization gap.

The results of this study are especially significant because they upend the traditional wisdom about the driving forces behind the warranty's ineffectiveness. Almost all of the existing scholarship on the warranty of

habitability to date has attributed its failures to the barriers imposed by restrictive substantive doctrines and the lack of access to counsel. The findings here show that those explanations are inadequate. First, the study found that tenants a low rate of effectiveness even where the law is unencumbered by restrictive substantive doctrines. New York warranty of habitability laws lack onerous notice, good faith withholding, or rent escrow requirements – indeed, tenants face few formal hurdles to assertion of the claim. Existing scholarship would suggest that this backdrop would translate into widespread use of the claim.²⁰² Yet the study found the opposite: very few tenants with meritorious claims actually benefited from the law.

It certainly may be the case that even fewer tenants benefit from the warranty of habitability where restrictive doctrines exist. However, the findings of this study demonstrate that these doctrines cannot, without more, explain the low usage rates of the law. This result has serious implications for policy. Proposals for legal reforms to the warranty of habitability, particularly those put forth by scholars and advocates in recent years, have focused primarily on the rollback of these restrictive doctrines.²⁰³ The findings suggest that those reforms are unlikely to result in widespread effectiveness of the law.²⁰⁴

The study's findings also disrupt our understandings and assumptions about the role of access to counsel in the effectiveness of the warranty of habitability. While the data showed unambiguously that representation mattered, it also revealed that the lack of access to counsel did not account for the majority of the warranty of habitability's operationalization gap. This finding has important implications for future research and policy. In 2017, shortly after the period for which the data in this study was collected, New York City became the first jurisdiction in the United States to enact legislation establishing universal access to counsel for low-income tenants in eviction proceedings.²⁰⁵ The legislation is being phased in over a five-year period such that all income-eligible tenants will be offered free legal counsel by 2022.²⁰⁶ Other jurisdictions quickly followed suit: in 2018, a San Francisco ballot initiative established the right to counsel for all tenants in eviction cases, and Newark, New Jersey passed an ordinance guaranteeing representation to tenants under 200% of the

²⁰² See Franzese et al., *supra* note 19; Super, *supra* note 19; Tokarz & Schmooz, *supra* note 77.

²⁰³ *See id.*

²⁰⁴ *See id.*

²⁰⁵ See VICKI BEEN, DEBORAH RAND, NICOLE SUMMERS, & JESSICA YAGER, NYU FURMAN CTR., IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS, 2 (2018) ("FURMAN CTR. REPORT").

²⁰⁶ *Id.*

federal poverty line.²⁰⁷ A number of motivations underlay these initiatives, among them that the provision of counsel would lead to stronger outcomes for tenants and greater enforcement of existing protections.²⁰⁸

While only a comprehensive and rigorous evaluation of the implementation of the laws will show their effects, the findings in this study suggest that they will likely enhance usage of the warranty of habitability for tenants with meritorious claims. In this regard, the study's findings lend support to scholars' contentions that the lack of access to counsel acts as a barrier to the effectiveness of the warranty of habitability.²⁰⁹ They also bolster existing views that expanded access to counsel will improve outcomes for tenants.²¹⁰ However, the results also indicate that the provision of legal representation likely will not, on its own, be enough to expand the benefits of the warranty of habitability to all – or even *most* – tenants with meritorious claims. The study showed that among tenants with meritorious claims had legal representation, 75 percent did not benefit from the claim. Thus, while universal access to counsel is likely to improve the effectiveness of the warranty, it is unlikely to serve as a cure-all.

The study's findings also undermine the hypothesis that the fear of retaliation discourages tenants from asserting their rights under the warranty of habitability.²¹¹ While it is difficult to measure the precise extent to

²⁰⁷ See Laura Waxmann, *Tenant Advocacy Groups Set to Receive Funding Under 'Right to Counsel' Program*, S.F. EXAMINER, Nov. 28, 2018, <http://www.sfexaminer.com/tenant-advocacy-groups-set-receive-funding-right-counsel-program/>; Jared Brey, *Tenants' Right to Counsel on the Move, Next Stop Newark*, NEXT CITY, Jan. 10, 2019, <https://nextcity.org/daily/entry/tenants-right-to-counsel-on-the-move-next-stop-newark>. Other jurisdictions have also introduced or piloted legislation to create similar policies, including Boston, Philadelphia, Los Angeles, and Washington, D.C. See FURMAN CTR. REPORT, *supra* note 205, at 2; CITY OF BOSTON, *Mayor Walsh Announces 2019 Housing Security, Economic Mobility Legislative Agenda*, <https://www.boston.gov/news/mayor-walsh-announces-2019-housing-security-economic-mobility-legislative-agenda> (last visited Feb. 18, 2019).

²⁰⁸ See FURMAN CTR. REPORT, *supra* note 205, at 3-6.

²⁰⁹ See Franzese et al., *supra* note 19, at 13; Cotton, *supra* note 26, at 84 (noting that “the lack of counsel means that the parties are particularly dependent on the court to ensure that the rule of law is applied”), 86-87 (arguing that advocates hoping to improve utilization of the implied warranty of habitability should not focus their efforts on access to counsel because the data suggest that all efforts thus far have faltered, and moreover the provision of additional lawyers would impose considerable resource demands on the courts). *But see* Bezdek, *supra* note 25, at 538 n. 16 (arguing against solutions involving access to counsel because it is “paternalistic and lets us off the hook for our parts in the charade of legal entitlement and rights vindication”).

²¹⁰ *Id.*

²¹¹ See e.g., Super, *supra* note 19, at 393. Most jurisdictions, including New York, prohibit landlords from retaliating against tenants for asserting their rights under the warranty of habitability or for invoking other legal claims. See Super, *supra* note 19, at 393; N.Y. REAL PROP. LAW § 223-b.

which retaliation fears drive tenant behavior, the data do not support that general thesis.²¹² The data shows that tenants overwhelmingly do not benefit from the warranty even when they have already asserted their rights by the time they appear before a judge or negotiate a settlement agreement. As described in Section III.D *supra*, in fifty percent of all nonpayment of rent cases, the tenant asserted in their Answer that the landlord had failed to perform needed repairs. Yet despite their willingness to raise conditions issues, only 3.5 percent of these tenants received a rent abatement. Perhaps even more striking, in 21 percent of all nonpayment of rent cases with meritorious claims,²¹³ the tenant had already made a complaint about the unit conditions to the Code enforcement agency by the time the case was filed.²¹⁴ The tenant successfully obtained a rent abatement in less than 3 percent of such cases. It is unlikely that retaliation fears would affect the two behaviors – complaining to a Code enforcement agency and seeking a rent abatement – differently. A landlord can easily trace the Code enforcement complaint to the tenant, and the complaint potentially exposes a landlord to harsh penalties, including fines and other sanctions, if violations are issued. Indeed, the financial consequences for landlords can be substantially greater from a complaint to a Code enforcement agency than from a tenant’s successful warranty of habitability claim in court.²¹⁵ Thus, it appears unlikely that tenants’ fears of retaliation substantially explain the study’s results.

Similarly, the findings cast doubt on the argument that the warranty’s ineffectiveness is attributable in part to the inaccessibility of Housing Code records. Franzese and her colleagues have argued that in many jurisdictions, judges are without the tools to effectively enforce the warranty of habitability because there is no centralized and publicly available code violation database.²¹⁶ Franzese has hypothesized that the availability of those records to judges through a centralized database would promote enforcement of the warranty.²¹⁷ The findings here, unfortunately,

²¹² This is not to say that tenants do not fear retaliation from their landlords or that retaliation does not exist in landlord-tenant relationships. The point is simply that retaliation fears do not appear to drive tenants’ willingness to assert their warranty of habitability rights within nonpayment of rent eviction cases.

²¹³ This statistic is based on the “all nonpayment of rent cases” dataset.

²¹⁴ These cases were identified by matching the address with the unit-level data from Department of Housing, Preservation, and Development (the “Code enforcement agency”).

²¹⁵ Among cases in which a rent abatement was awarded in the “all nonpayment of rent cases” dataset, the average amount of the abatement was \$1,995. Among cases with abatements in the violation dataset, the average amount was \$2,275. By contrast, some Housing Code violations carry fines as high as \$1,000 per day that the violation remains uncorrected. See N.Y.C ADMIN. CODE § 27-2115(k)(1)(i).

²¹⁶ See Franzese et al., *supra* note 19, at 23.

²¹⁷ *Id.*

strongly indicate that the mere existence of such a system is not, without more, a cure all for improving the usage of the warranty. Judges in New York City have precisely the tools Franzese identified -- indeed, Franzese points to New York City's integrated system as a model for other jurisdictions to follow -- but the data show that judges rarely took advantage of them. Moreover, few tenants benefited from the warranty of habitability despite the existence of this integrated system.²¹⁸

These conclusions signal that current understandings of the barriers to use of the warranty of habitability are incomplete. None of the existing theories for the law's ineffectiveness withstands empirical scrutiny. While the data show that some of the identified barriers, such as lack of access to counsel, certainly contribute to the claim's underuse, they also show that these barriers cannot account for the scope of the underuse.

CONCLUSION

Nearly fifty years ago, the United States Court of Appeals for the District of Columbia declared that the warranty of habitability was implied in all residential leases. Proponents hailed the development as a revolution in tenants' rights. Myron Moskowitz, writing in the *California Law Review* shortly after the first jurisdictions adopted the implied warranty of habitability, predicted that by giving tenants the power to enforce laws prohibiting substandard housing, the courts' rulings would spur improvements to the quality of housing, particularly that enjoyed by low-income tenants in urban settings.²¹⁹ The law would do so "not merely by adding to the number of enforcers," but by allowing enforcement to be driven by those most affected.²²⁰ This Article presents the results of the first rigorous empirical study assessing the effectiveness of warranty of habitability. The study demonstrates that tenants overwhelmingly do not benefit from the warranty when they are likely to have meritorious claims. Specifically, the study found that a mere 3 to 9 percent of tenants with meritorious warranty of habitability claims receive rent abatements. The findings also ruled out the possibility that tenants are receiving other types of benefits from the claim, such as a longer repayment period or avoidance

²¹⁸ These findings suggest that a more tightly structured system for integrating eviction case adjudication with code enforcement records, like that proposed by Mary Zulack, may be needed to ensure that judges in fact take advantage of the code enforcement records. See Zulack, *supra* note 132, at 107.

²¹⁹ See Myron Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1442, 1504 (1974). Moskowitz further hailed the new law as providing greater bargaining leverage to tenants in settlement negotiations with their landlords in eviction cases. *Id.*

²²⁰ *Id.*

of a possessory judgment. And further, the findings indicate that the warranty of habitability does not serve as an effective tool within eviction cases to compel landlords to perform repairs – although the court often orders landlords to complete repairs, the data strongly suggest that landlords rarely comply with these orders.

This study was also the first to rigorously evaluate whether and to what extent legal representation affects a tenant’s likelihood of benefiting from the warranty of habitability. It found that representation mattered significantly – tenants with meritorious warranty of habitability claims had between a 0 and 3 percent chance of obtaining an abatement when they were unrepresented, compared with an approximately 25 percent chance when they had representation. This finding strongly supports providing increased access to counsel as one way to improve usage of the claim. Yet the findings should also sober expectations that access to counsel provides a cure all for the warranty of habitability operationalization gap. Approximately seventy-five percent of tenants who had meritorious claims and were represented by counsel still did not benefit from the law.

The findings of the study also caution against an over-focus on the onerous substantive doctrines that exist in some jurisdictions. While those doctrines may very well impose additional barriers to the implementation of the warranty where they exist, the results here show that their existence does not fully – or even primarily – account for the operationalization gap. Even where the warranty of habitability is unencumbered by these doctrines, it is still not widely enforced.

These conclusions debunk decades of scholarship on why the warranty of habitability is ineffective. They signal strongly that more quantitative and qualitative research is needed to identify other procedural and/or substantive legal barriers to the claim’s usage. Further research should also explore whether the law’s ineffectiveness is attributable to non-doctrinal factors such as court culture or imbalances of power.

APPENDIX A: CASE FILE CODING GUIDELINES

Background information about the case

Criteria	Coding Guideline
Rent-regulation status of the unit	This information was coded based on the landlord’s assertion of the rent-regulation status in the petition. ²²¹ Units were classified in one of three categories: rent-regulated status,

²²¹ An eviction complaint is referred to as a “petition” under New York law. Landlords are required to state the rent-regulation status of the unit in the petition. *See* N.Y. REAL PROP. ACTIONS & PROC. LAW § 741.

	market status, and non-profit or government-owned.
Legal representation	Tenants were coded as either represented or unrepresented based on whether they had representation at the time they entered into the first settlement agreement.

Answer

Criteria	Coding Guideline
Date of Answer	The date the tenant completed the Answer was marked.
Whether repairs are asserted in the Answer	Cases were coded either “yes” or “no.” The pro se Answer form includes a check-box option which states, “There are or were conditions in the apartment and/or building and/or house which the Petitioner did not repair and/or services the Petitioner did not provide.” “Yes” was marked when the box was checked, and “No” was marked when the box was blank, unless the tenant later received leave of court to amend the Answer and in the Amended Answer included a similar claim asserting conditions of disrepair (including an express claim for breach of the warranty of habitability).
Whether a service defect is asserted	The pro se Answer form includes two check-box options related to service defects: 1) “I did not receive the Notice of Petition and Petition”; and (2) “I received the Notice of Petition and Petition, but service was not correct as required by law.” “Yes” was marked when either of the boxes was checked, and “No” was marked when both boxes were blank, unless the tenant later received leave of court to amend the Answer and in the Amended Answer asserted a service defect.

Case outcomes

Criteria	Coding Guideline
Date of first settlement agreement	The date of the first settlement agreement resulting in a case disposition was marked.
Whether the settlement agreement	This was coded as “yes” or “no” based on whether the first settlement agreement granted a

includes a judgment for the landlord	judgment for possession to the landlord. Where the case was discontinued, this outcome was coded as "DISCON." Cases that went to trial were marked "TRIAL."
Number of days for payment of the arrears	The number of days between the date the settlement agreement was entered and the date the arrears were due. Where the settlement agreement set a schedule for incremental repayments over a period of time longer than sixty days, the outcome was coded as "pay agreement." Where the settlement agreement set a schedule for incremental repayments over a period of time shorter than sixty days, the length of time was calculated based on the final date on which repayment would be due. Where the case was discontinued, this outcome was coded as "DISCON." All coding was based on the first settlement agreement. Cases that went to trial were marked "TRIAL."
Amount of arrears owed	The amount owed was as stated on the settlement agreement as the amount of arrears due and owing. Where a rent abatement was awarded, the abatement amount was not reflected. Ongoing use and occupancy also was not included. "DISCON" was coded for discontinued cases. All coding was based on the first settlement agreement.
Whether the settlement agreement requires the landlord to make substantial repairs	This was coded as "yes"/ "no." "Yes" was coded where the settlement agreement included repairs of conditions that qualify as rent impairing pursuant to Multiple Dwelling Law, § 302-a. "Yes" was also coded where the agreement included repairs of conditions that have been found to constitute a violation of the warranty of habitability, which includes, <i>inter alia</i> : lack of heat and/or hot water, flooding, fumes and/or smoke, leaking gas, lead paint, bedbugs, mold, broken appliances (e.g., refrigerator or stove), cockroaches, secondhand smoke, mice and/or rats, noise and/or dust, failure to install kitchen facilities, and broken locks.

Whether there are multiple settlement agreements	This was coded as “yes” or “no” only if the first settlement agreement included substantial repairs. “NA” was marked if the first settlement agreement did not include substantial repairs or was a discontinuance.
Same repairs in multiple settlement agreement	Marked as “yes” if there are multiple settlement agreements and a subsequent settlement agreement requires the landlord to make the same repairs as required by the first settlement agreement and the access dates in the first settlement agreement have passed. Marked as “no” if there are substantial repairs in the first settlement agreement and the same repairs are not included in a subsequent settlement agreement but the access dates have passed. Marked as “NA” if the access dates have not passed or if there were not substantial repairs included in the first settlement agreement.
Abatement	This was coded as “yes” or “no” based on whether an abatement was awarded.
Abatement amount	The dollar amount of the abatement awarded

Housing Code enforcement

Criteria	Coding Guideline
HPD record in file	This was coded as “yes” or “no” based on whether there was a printed out record of the Code enforcement history of the unit in the case file.
Housing Code inspection order/request	This was coded as “yes” or “no” based on whether the judge submitted a standardized form titled “Judicial Request/Order for Housing Code Inspection.”