RENT DEPOSIT REQUIREMENTS:

A CIVIL COURT POLL TAX

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ABSTRACT

The implied warranty of habitability, read into nearly every lease for the residential use of real property in the United States, requires a property owner to maintain a rental home in a safe and habitable manner as a condition precedent to the receipt of the full contract rent. The enduring axiom of free and open access to the courts provides that the civil legal system is an accessible forum for the redress of and defense against claims. In many states, however, the warranty of habitability represents a limit to this access. In jurisdictions that maintain a rent deposit requirement, a tenant's ability to raise a breach of the warranty of habitability in defense to an eviction proceeding is predicated on the tenant's ability to deposit into the court all rent alleged to be owed to the landlord. Tenant-litigants, the majority of whom are poor people of color, are prohibited from raising a valid defense available at law if they cannot pay a fee they have not been proved to owe.

Rent deposit requirements render the implied warranty of habitability a right without a remedy. This subordination of tenants' rights is the legal system's intellectual inheritance from the legacy of property and labor theft from Black and Indigenous peoples to generate white wealth and perpetuate white ownership. Just as the poll tax limited the ability of Black people and poor white people to vote by predicating the ability to participate in the franchise on a required payment, rent deposit requirements make the ability of tenant-litigants to raise a valid defense to a proceeding contingent on payment of a substantial sum they have not been proved to owe. A tenant who has withheld rent in a good faith effort to compel the repair of significant habitability-impairing conditions in their home may nevertheless be evicted if they are unable to maintain their savings and make the required deposit to the court.

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This Article positions rent deposit requirements as an economic restraint on access to the civil court system and examines this barrier in relation to the poll tax. A review of the unique and historically dispossessive nature of housing courts informs the analysis of the creation and proliferation of rent deposit requirements. As courts of poverty, traditional notions and standards of justice often do not apply, and judicial efficiency and lessors' right to control and derive profit from their property are privileged over the health and safety of communities. It will also discuss the ways in which rent deposit requirements flatten reform efforts, like the burgeoning Right to Counsel movement, and undermine the legitimacy of eviction courts. Exploring solutions, this Article suggests procedural changes that would help mediate between the docket pressure faced by high volume courts and the access to justice concerns that rent deposit requirements raise.

INTRODUCTION

Ms. Green[1] was out of good options. For months, she asked her landlord to address the mold throughout her apartment. No matter how much she scrubbed, the mold and mildew grew back. She was a lifelong tenant of substandard apartments, and she knew that an infestation of this nature required professional remediation. The landlord continued to ignore her when her daughter developed a cough and difficulty breathing, and refused to take her calls even when she provided notice that she would need to move for health reasons. But breaking the lease was never a true consideration because she and her child did not have anywhere else to go. Finally, when August's rent came due, she did not write the

1. Ms. Green was a client of the Rutgers Law School Housing Advocacy Clinic during the 2022-23 academic year. While her name and other identifying details have been changed to protect her family's privacy, I rely on myself and my students' work on Ms. Green's eviction case, and our many interviews with her during and after our representation about her experience of the eviction legal system. In sharing parts of Ms. Green's story, I hope she achieves a small measure of the recognition and respect that the eviction legal system denied her.

check. She did not buy a money order. She kept the rent in her checking account and hoped her landlord would finally pay attention. The rent would be paid eventually, she thought, when the landlord held up their end of the bargain.

When Ms. Green lost her job a couple of months later, she could no longer save for anything. She had been withholding her rent through the fall, waiting for her landlord to fix the mold condition. When she was sued for eviction for failing to pay the rent, she learned that she would not be able to present the mold infestation as a defense; because she did not have the full amount of rent money that the landlord said she owed available to deposit with the court, the judge would not let her raise a defense based on the landlord's breach of the implied warranty of habitability. If she was not allowed to tell the judge about the mold, she would not be able to explain why she had withheld the rent. Without an opportunity to defend herself, Ms. Green and her daughter moved out of their home and on to a friend's couch. At least her daughter could breathe again.

Ms. Green's experience is illustrative of a broader housing precarity that is pervasive in under-resourced communities throughout the United States. Living with substandard housing conditions, and ignored by their landlords, renters often have only one means of redress: withholding rent and facing the specter of eviction for the opportunity to raise the breach of the implied warranty of habitability as a defense to the case.[2] Withholding and setting aside rent is not a simple decision to make for rent burdened[3] tenants with little safety net, but it is often the only option. Indeed, low-income renters are more likely to take action to address substandard conditions than middle income renters living in similar circumstances.[4]

In jurisdictions where a breach of the implied warranty of habitability is recognized as a defense to a nonpayment action, tenants are impliedly authorized to withhold rent based on the landlord's failure to comply with the warranty of

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2. David Super notes that there are three options available to tenants experiencing substandard living conditions: tenants may live with the conditions, putting up with various defects or engaging in self-funded repair work; secure new housing; or withhold rent in order to raise a warranty of habitability claim. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 408 (2011). Of these options, withholding rent represents the only avenue for actual redress that does not require a significant initial monetary outlay by the impacted tenant. Putatively available to tenants are various private rights of action for damages, which are complicated claims for unrepresented tenants to make out and will not typically provide the injunctive relief necessary to compel repairs. *Id.* at 403.

3. *See* WHITNEY AIRGOOD-OBRYCKI, ALEXANDER HERMANN & SOPHIA WEDEEN, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE RENT EATS FIRST: RENTAL HOUSING UNAFFORDABILITY IN THE US 1–3 (2021), https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_rent_eats_first_airgood-obrycki_hermann_wedeen_2021.pdf [https://perma.cc/2687-T4FG] (finding that in 2018, 47.5% of renters were "cost burdened," meaning they spend more than 30% of household income on rent, and nearly one-quarter of all renters were "severely cost burdened," meaning they spend more than 50% of household income on rent).

4. Super, *supra* note 2, at 409–10 (noting that "better-off tenants" often have greater mobility than poorer tenants, and with the ability to locate new, more favorable housing with less hardship, these tenants may prefer to move out of substandard housing without asserting a warranty of habitability claim).

habitability by allowing conditions dangerous to life, health, or safety to exist.[5] If the landlord tries to evict the withholding tenant, the tenant can raise the withholding as an affirmative defense to the nonpayment cause of action.[6] If the tenant lives in a jurisdiction that requires a rent deposit to proceed to trial on a warranty of habitability defense, they will not be able to raise this lawful defense if they are unable to deposit all the rent that the adverse party alleges is owed.[7] Tenants like Ms. Green who are unable to continue to set aside money each month—because of an urgent need, such as an emergency home repair or medical expense—are barred from raising a defense and will be evicted, even if they would have been able to show their entitlement to a rental abatement. The placement of an economic restraint on access to the court deprives the tenants—primarily poor and people of color—most often living with substandard conditions[8] and most likely to be sued for eviction[9] of the protections and promise of the implied warranty of habitability within the eviction legal system.

This Article argues that rent deposit requirements predicate full participation in the civil legal system on the ability to acquire, maintain, and deposit wealth, and function like a poll tax in conditioning access to a democratic institution on the ability to pay.[10] Rent deposit requirements disproportionately exclude poor people of color from access to the courts, raising due process and procedural justice concerns, and undermining the credo that all litigants can freely make their stand in a court of law.[11] Both rent deposit requirements and poll taxes place poor people in a position of inferiority and deprive them of access to what should be an open institution based on a required payment.

Rent deposit orders have been studied through their relation to the implied warranty of habitability[12] and the tenants' rights revolution,[13] and their impact, or

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5. See *infra* note 58 and accompanying text.

6. See *infra* note 59 and accompanying text.

7. Super, *supra* note 2, at 426.

8. The U.S. Department of Housing and Urban Development (HUD) estimated that in 2019, among all renter households with very low incomes, defined as incomes no more than 50% of Area Median Income, 374,000 households experienced severely inadequate or substandard housing. THYRIA ALVAREZ & BARRY L. STEFFEN, U.S. DEP'T OF HOUS. & URB. DEV., WORST CASE HOUSING NEEDS: 2021 REPORT TO CONGRESS 3, 5 (2021) [hereinafter HUD WORST CASE NEEDS], https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs-2021.pdf [https://perma.cc/WYY9-X74X].

9. Black renters are overrepresented by population size in the eviction legal system. In a study, Black renters made up 19.9% of the adult renter population but represented 37.9% of all defendants in eviction filings. Black and Latinx renters were most likely to be repeatedly subject to eviction cases at the same address, and Black women experienced eviction filings at nearly twice the rate of white women. Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653–56 (2020).

10. *See infra* Part II.B.

11. *See infra* Part III.B.

12. *See* Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 13–19 (2016).

13. *See* Super, *supra* note 2, at 426–34.

lack thereof, on the utilization of the implied warranty,[14] and as a feature of the eviction legal system landscape.[15] Building on the work of scholars who have positioned the rent deposit requirement as a limit on access to justice, this Article situates the rent deposit requirement within the broader plane of economic restraints on the exercise of rights, and the exclusion of poor people from democratic processes and institutions.

Part I will provide a history and overview of the warranty of habitability, rent deposit requirements, and the poll tax. Examining the ways in which rent deposit requirements fit within the broader structure of the housing court and eviction legal systems, I contend that eviction courts[16] are designed to privilege landlords' property rights in as efficient a manner as possible, and that these interests are privileged over all others, including the health and safety of communities. Rent deposit orders allow property owners to move swiftly towards eviction without participation from a tenant-litigant who may challenge their account and lead to a more comprehensive, and time-consuming, adjudication of the claim. Ultimately, rent deposit orders strip from tenants the progress that was made through the creation of the implied warranty of habitability, situating the landlord-tenant relationship within the same feudal framework that existed from the Middle Ages through to the 19th century emergence of the modern city.

Next, Part I will frame the poll tax as an exclusionary economic restraint. A review of the history of the poll tax demonstrates its use as a tool of explicit racial oppression, and a marker of prejudice against poor people. The poll tax briefly existed in post-Revolutionary America as a means of concentrating power in wealthy white men and was largely abandoned prior to the Civil War. Its reemergence in the Redemption-era and Jim Crow American South was part of a

14. *See* Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 163, 176 (2020).

15. *See* Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 381–82 (2022).

16. The forum for an eviction case varies by jurisdiction. An eviction case may be heard by specialized courts that handle all residential and commercial landlord-tenant matters or eviction matters, a low-level court of general jurisdiction, or a small claims court. *See LSC Eviction Laws Database: State/Territory Dataset*, LEGAL SERVS. CORP. (2021), https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database [https://perma.cc/9KU4-YBVJ] (showing the variety of courts that handle eviction cases). In this Article, I refer to the courts that hear eviction cases as eviction courts, rather than landlord-tenant or housing courts, as they are known in New York City, Boston, and other cities, because the primary function of these courts is dispossession. *See infra* Part II.A.

campaign of oppression and terror leveled primarily against Black[17] people following ratification of the Reconstruction Amendments.

Part II examines rent deposit requirements as a means by which the entrenched inequities of the eviction legal system are reinforced, and the ways in which these inequities parallel the purpose and result of the poll tax. While other monetary barriers to democratic institutions like the civil court system are not imbued with specific racial animus, they have had a similar effect of depriving groups of people from accessing and participating fully within a system that purports to be free and open. Economic restraints have also been used as a barrier to civil courts in a number of different contexts, including in divorce and bankruptcy proceedings, in proceedings to terminate parental rights, and in eviction courts. Rent deposit orders differ from economic restraints in the form of court fees because rent deposit orders do not support the administrative functioning of the court, but instead enrich a private party. While the Supreme Court has inconsistently identified wealth-based requirements as impermissible barriers to courts, the justices have at times, and in dissent, acknowledged that economic restraints render poor people unable to access the same level of justice as better-resourced people.

Part III observes that both rent deposit requirements and the poll tax effectively achieve their underlying goals, and in doing so, undermine the systems that they purport to protect from undeserving influence. Rent deposit requirements prohibit tenants from raising and developing a potentially complex defense, necessarily allowing eviction courts to achieve the overarching goals of dispositional efficiency and the supremacy of the interests of property owners. Rent deposit requirements have consequences that are separate from but related to these goals. Specifically, rent deposit requirements undermine Right to Counsel programs and more broadly undermine the legitimacy of eviction courts as forums of equal access and justice. State and local governments invest millions of dollars on Right to Counsel administration, but these investments are diminished if tenant-litigants are unable to raise a warranty of habitability defense at trial.

Finally, Part IV presents potential reforms. Removing the rent deposit requirement is necessary to truly open the court to all litigants and can be accomplished through legislation or court challenge using poverty as a suspect classification. It suggests court reforms that could help eviction courts manage a

17. Throughout this Article, I capitalize the word Black, and not white, when referring to groups in racial, ethnic, and cultural terms, as contemplated by the guidelines of the Chicago Manual of Style. This use is consistent with my understanding that the word Black may, for many people, reflect a shared identity and community, similar to the use of the words Latin/Latinx, Asian, and Indigenous and Native American, which are similarly capitalized and also refer to diverse groups that may identify as part of a shared cultural and ethnic community. The word white is not associated with the same shared meaning. It is my belief that capitalizing the word white in this context may amplify or reinforce tenets of white supremacy, which I intend to avoid doing. *See* UNIV. OF CHI. PRESS, CHICAGO MANUAL OF STYLE § 8.38 (17th ed. 2017); *see also* Mike Laws, *Why We Capitalize "Black" (and Not "White")*; COLUM. JOURNALISM REV. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/7NGN-A86S].

high volume of cases without rent deposit requirements, providing greater access and a more equitable process both prior to and at the trial stage. Courts can achieve trial docket management without rent deposit requirements while ensuring that all litigants are able to assert their claims by allowing more permissive discovery rules for tenant-litigants and by participating in active judging.

I.
BACKGROUND

To provide context to the discussion of housing conditions litigation that will be the focus of the remainder of this Article, Part I will begin by summarizing the history of the development of the implied warranty of habitability within the context of residential leasehold property. At its inception, the implied warranty of habitability was heralded as a transformational doctrine with the power to manifest more equitable outcomes within landlord-tenant legal practice.[18] Ultimately, rent deposit requirements were introduced as a countervailing substantive barrier to full use of the implied warranty, imposing a specific limit on its use within the eviction legal system. Part I also provides an overview of the American poll tax, positioning the poll tax as an economic restraint on the Fourteenth Amendment's grant of universal male suffrage in order to disenfranchise Black voters. Poll taxes, like contemporary rent deposit orders, place a financial barrier on a democratic institution to exclude an undesirable class of people from obtaining access.

A. The Implied Warranty of Habitability and Rent Deposit Requirements

Habitability is a cultural construct, subject to evolving ideas around standards of health and comfort.[19] Conditions that are accepted as imperiling life and safety in the modern developed world may have been seen as merely inconvenient or else an acceptable common practice by early common law courts.[20] The modern implied warranty of habitability was created by courts and legislatures and upholds a construction of habitable living conditions applicable to the dominant class—which is not, traditionally or currently, the class of people most impacted by substandard living conditions.[21] Indeed, the project of habitability standards

18. *See* Franzese, Gorin & Guzik, *supra* note 12, at 12.

19. Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 810 (2013).

20. *Id.* at 810–11. Early landlord-tenant law largely involved the leasing of agrarian land to tenant-farmers, who expected a simple shelter, if any, provided, and who were often more capable of performing repair work than their landlord. Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J. L. REFORM 8, 12 (1973). Today, certain residential housing features are considered of such basic habitability standards that they are referred to as "essential services," including running water and electrical service. *See, e.g.*, REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 302 (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2015). These services simply did not exist during the time of early landlord-tenant law.

21. *See supra* note 8.

for the housing the poor can be understood as an exercise of state power, rather than the product of benevolence or empathy.[22] Exploring the development of the implied warranty of habitability, rent deposit orders, and their impacts on the court system is useful only with the recognition that the concept of habitability is a historically fluid but essential component of humane and safe housing.

1. Before the Implied Warranty of Habitability

The creation and implementation of the implied warranty of habitability is embedded in a deep history of the tenant movement. The tenant class suffered deprivation for millennia; more recently, tenants held a position of unequal power within a system that remained designed around feudal traditions of ownership and use, and remained subject to the duty to pay rent while landlords were largely held unaccountable to the tenant for any obligation beyond free possession.[23]

At early common law, and through the 19th and early 20th centuries, landlord-tenant relationships were viewed as a pure instrument of property law.[24] Thirteenth century English norms saw the shifting of the rights associated with a tenancy from those "based on the relationship between the landlord and the tenant and [those] based on the relationship between the tenant and the land."[25] Medieval courts opted to apply property law doctrine, rather than contract law doctrine, to landlord-tenant matters because they did not find a contractual relationship within landlord-tenant transfers: contract law did not recognize the leasehold estate's transfer of title during a set term and the landlord's retention of a reversionary interest.[26]

A lease governed the conveyance of land, granting possession of the property from landlord to tenant, for the tenant's use free from landlord influence, under the principle of *caveat lessee*, or "renter beware."[27] *Caveat lessee* provided that,

22. Peter Marcuse, *Housing Policy and the Myth of the Benevolent State*, *in* CRITICAL PERSPECTIVES ON HOUSING 248, 252 (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds., 1986).

23. Super, *supra* note 2, at 400 ("[W]hile the courts rigorously enforced tenants' obligations to pay rent with expedited procedures, landlords were under virtually no pressure to perform their obligations to their tenants."); *see also* Javins v. First Nat'l Realty Corp., 428 F.2d 1070, 1082 (D.C. Cir. 1970) ("[T]he legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards.").

24. *See* Memorandum from Alice Noble-Allgire to Members of the URLTA Drafting Committee 1 (Feb. 12, 2012), https://www.nhlp.org/wp-content/uploads/Research-Memo-re-50-State-Survey-of-the-Warranty-of-Habitability.pdf [https://perma.cc/Q57H-XXBW] [hereinafter 50 State Survey].

25. Campbell, *supra* note 19, at 795 n.7.

26. *Id*. at 795–96.

27. 50 State Survey, *supra* note 24, at 1; *see also* Jana Ault Phillips & Carol J. Miller, *The Implied Warranty of Habitability: Is Rent Escrow the Solution of the Obstacle to Tenant Enforcement?*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 1 (2018).

absent a specific lease term or special circumstance,[28] a tenant received complete responsibility for the premises for the duration of the tenancy. Any covenants or responsibilities between the landlord and tenant were seen as independent terms without a related obligation.[29] Because the granting of possession was the landlord's sole obligation, only a physical deprivation of possession through an actual eviction or other permanent vacatur severed the tenant's obligation to pay rent.[30] Even if the landlord expressly warranted condition of the premises in the lease agreement, a breach had no impact on the ongoing rental obligation.[31]

2. Development of the Implied Warranty

A reciprocal obligation first found purchase through judicial recognition of a tenant's quiet right to enjoyment of the premises.[32] At common law, the quiet right to enjoyment conferred an implied obligation on the landlord to not disturb the peace of the tenant and had historically been relied upon to prohibit a landlord's improper physical eviction of a tenant.[33] Courts extended the quiet right of enjoyment to find claims of constructive eviction when conditions on the premises so frustrated a tenant's enjoyment that the tenant was deprived of use even in the absence of physical abandonment or removal.[34] In *Dyett v. Pendleton*, a tenant argued that he was constructively evicted from his dwelling in a rooming house due to the landlord's renting of other portions of the rooming house to noisy tenants.[35] The court held that even if a tenant is not physically prevented from occupying the premises, where "such a disturbance, such an injury to its beneficial enjoyment, such a diminution of the consideration upon which the contract is founded," the tenant should be relieved of the obligation to pay rent.[36] In the early Twentieth century, this reasoning was extended to partial evictions, where a tenant is unable to use a portion of the leased premises as a result of an act by the landlord, finding in *Giraud v. Milovich*[37] that a tenant was relieved of the obligation to pay

28. Exceptions include that the landlord retained responsibility: for maintaining common areas under the landlord's control; under a short-term lease for the rental of furnished premises; for ensuring the premises were fit for their intended purposes if the parties had entered into a lease for a building under construction; and for failure to disclose latent defects of which the landlord knows or should have known and which the tenant could not be expected to notice by inspection. 50 State Survey, *supra* note 24, at 1 n.1 (citation omitted).

29. Michael A. Brower, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 854 (2011); *see Campbell*, *supra* note 19, at 796 ("While the principle of dependent obligations developed in contract law, the concept was foreign to the law of property.").

30. Brower, *supra* note 29, at 854.

31. Campbell, *supra* note 19, at 797.

32. *Id.* at 796–97.

33. *Id.* at 798–99.

34. *Id.*

35. Dyett v. Pendleton, 8 Cow. 727, 735–36 (N.Y. 1826).

36. *Id.* at 731.

37. Giraud v. Milovich, 85 P.2d 182 (Cal. Dist. Ct. App. 1938).

rent for the entire premises because a landlord "should not be permitted to apportion his wrong."[38]

The rapid growth of cities in the early 20th century left a limited number of available rental housing units, often with poor living conditions.[39] Due to housing shortages, tenants lacked bargaining power and had no choice but to accept substandard conditions with few prospects for redress or repair.[40] In response, state and local legislatures enacted housing codes to set minimum standards for safety and health,[41] which became the basis for courts to integrate broader contract law principles into landlord-tenant law,[42] and to modify the common law *caveat lessee* rule to find an implied warranty of habitability.[43] A lease could now be seen as a contract between a landlord and a tenant, and a landlord could be held accountable for performance of its obligations.[44] The implied warranty of habitability provided tenants with an avenue for advocacy; a mutually-reciprocal obligation between habitable conditions and the payment of rent gave tenants an opportunity to enforce housing standards and, importantly, occupy safe and healthy homes.

3. The Modern Implied Warranty of Habitability

Much of modern landlord-tenant law is of local creation, and subject to local legal culture.[45] This body of law shifts dramatically over municipal and state boundaries and is vulnerable to shifts in power and political machinations.[46] The locality-specific depth and breadth of the implied warranty of habitability is no

38. Campbell, *supra* note 19, at 798 (citing *Giraud*, 85 P.2d 182).

39. Ault Phillips & Miller, *supra* note 27, at 5.

40. *Id.*

41. Marcuse, *supra* note 22, at 249 ("[S]ubstantial government action in the field of housing began in the United States in 1867 with New York's pioneering Tenant House Act . . . [which] prescribed minimum standards for fire safety, ventilation, sanitation, and weather-tightness for roofs for accommodations rented to two or more families.").

42. Super, *supra* note 2, at 400.

43. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1082 (D.C. Cir. 1970) (breaking with prior common law, which held a tenant responsible for property maintenance, to find an implied warranty of habitability).

44. Super, *supra* note 2, at 401 ("The courts had long provided landlords with a service essential to their businesses: eviction procedures, operating far more expeditiously than other civil actions . . . . The courts would now demand that, in exchange for this extraordinary help in requiring tenants to perform their legal obligations, landlords comply with the laws of health and safety.").

45. Lauren Sudeall & Daniel Pasciutti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 73 VAND. L. REV. 1365, 1370 (2021).

46. *See, e.g.*, Roshan Abraham, *Before it Was Struck Down, Albany's Good Cause Eviction Law Worked*, NEXT CITY (Mar. 30, 2023), https://nextcity.org/urbanist-news/before-it-was-struck-down-albanys-good-cause-eviction-law-worked [https://perma.cc/49T4-YAKQ] (describing the positive impact of a "good cause eviction" law enacted in Albany, NY, which required a landlord to establish a permitted cause of action in order to evict a tenant, prior to its overturning by a state court, and the confusion and uncertainty experienced by local tenants during the appeals process).

exception. Though 49 states,[47] and the District of Columbia,[48] recognize the implied warranty of habitability as part of virtually all residential leases, its structure and remedies for its breach vary by state.[49]

The Uniform Residential Landlord And Tenant Act ("URLTA"), promulgated in 1972 and revised in 2015, represents an attempt to establish a uniform statutory landlord-tenant law.[50] URLTA incorporates the warranty of habitability and imposes affirmative obligations on landlords, including the requirement to make repairs and maintain the premises in a habitable manner.[51] URLTA provides the basis for the statutes authorizing the implied warranty of habitability in 19 states, while the implied warranty of habitability is codified in 27 other states through statutes that are not modeled on URLTA.[52] Four other states and the District of Columbia maintain common law recognition of the implied warranty of habitability.[53]

There is significant overlap in the acts or omissions that both URLTA and non-URLTA states have identified as a breach of the warranty of habitability. In many states, failure to comply with local building or housing codes is a breach of the implied warranty of habitability.[54] In URLTA states, the landlord's failure to provide an essential service, like heat, hot water, or electricity, is a material breach of the implied warranty; non-URLTA states also statutorily define acts or omissions, such as the failure to exterminate pests, that constitute a breach.[55] Indeed many non-URLTA statutes nevertheless track the model language, requiring the landlord to maintain the premises in a manner fit for habitation and in compliance with local housing codes, while others have enacted more specific requirements that go beyond URLTA, requiring, for example, the waterproofing of the roof and exterior walls of the structure.[56]

Greater variation is found in the remedies available to a tenant confronted with a breach of the implied warranty. URLTA provides five remedies available under contract law, and many non-URLTA statutes offer remedies that track

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47. *See* Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URBAN LAW ANN. 3, 6–8 (1979). Arkansas is the only state in the United States that does not recognize the implied warranty of habitability. *See* ARK. CODE ANN. § 18-17-601 (2023) (requiring tenants to comply with housing codes and maintain the dwelling in a safe and habitable manner but imposing no reciprocal obligations on landlords).

48. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–73, 1081 (D.C. Cir. 1970).

49. 50 State Survey, *supra* note 24, at 13–14.

50. UNIF. RESIDENTIAL LANDLORD & TENANT ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 1972); REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT (NAT'L CONF. OF COMM'RS ON UNIF. STATE L. 2015); Ault Phillips & Miller, *supra* note 27, at 9.

51. *See generally* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 2.104; REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 302.

52. Ault Phillips & Miller, *supra* note 27, at 9.

53. *Id*.

54. *Id*. at 12.

55. *Id*. at 10–11.

56. 50 State Survey, *supra* note 24, at 7–8.

URLTA; though both URLTA and non-URLTA regimes vary in specific provisions, many offer remedies that fall within the scope of those offered by the URLTA, including: "termination for a material breach, rent abatement or damages for tenants who remain in possession, repair and deduct for minor defects, and specific performance/injunctive relief."[57]

4. Rent Deposit Requirements

URLTA authorizes the use of a landlord's noncompliance with the implied warranty of habitability as a defense to an eviction action for possession or nonpayment of rent.[58] While this provision does not expressly permit a tenant to withhold rent based on a breach of the implied warranty of habitability, that the breach is a recognized defense to a nonpayment of rent action impliedly provides the remedy.[59] However, while seeming to permit the withholding of rent, URLTA authorizes a landlord to seek a rent deposit order, directing a tenant in possession of the premises during the pendency of the action to pay all or part of the "unpaid rent and all additional rent as it accrues into an escrow account" with the court or another entity as a condition of having their defenses heard.[60]

Rent deposit requirements are found in both URLTA and non-URLTA statutes alike, and procedures vary by jurisdiction.[61] These provisions authorize a court to order a tenant who uses a breach of the implied warranty as a defense in an eviction action based on nonpayment of rent to prove that the alleged rental arrears amount is available—that the monthly rent has been withheld and saved by the tenant—and would have been paid to the landlord but for the landlord's breach.[62] If the tenant does not make the requisite deposit, the tenant is barred from raising the defense at trial.[63] Thirteen states are characterized as having a

57. *Id*. at 14.

58. REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 408(a).

59. 50 State Survey, *supra* note 24, at 13–14.

60. REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 408(b).

61. *See, e.g.*, VA. CODE ANN. § 55.1-1244(B)(2) (2023) (requiring a tenant to deposit with the court "all rent due under the rental agreement" on an ongoing basis, unless modified by subsequent order of the court) (URLTA statute); MONT. CODE ANN. § 70-24-421 (2023) (permitting the court to order a tenant to deposit all or part of the rent allegedly accrued and ongoing rent as it accrues, as well as determine the amount due to each party) (URLTA statute); S.C. CODE ANN. § 27-40-790 (2023) (requiring a tenant to pay a landlord all rent alleged due, and continue to pay to the landlord ongoing rent as it comes due) (URLTA statute); N.H. REV. STAT. ANN. § 540:13-d (2023) (requiring a tenant raising a breach of the warranty of habitability as a defense in a nonpayment of rent proceeding to "pay into the court any rent withheld or becoming due thereafter as it becomes due.") (non-URLTA statute).

62. Super, *supra* note 2, at 441 (noting that rent deposit requirements implicitly rely on moral judgments surrounding the "good faith" of a deliberating withholding tenant, and in contrast, the lack of worthiness of a tenant who lacks funds to assert a warranty of habitability defense).

63. *Id.* at 426. Some states take a broader approach to rent deposit requirements, requiring deposit of the alleged arrears amount in full to assert any defense at all. In Florida, a tenant is deemed to have waived all defenses, and a landlord is entitled to immediate possession, if the deposit is not

"protectionist" approach to landlord-tenant law, meaning that the laws of the state generally offer rights or protections to tenants.[64] Even protectionists states, such as New Hampshire[65] and New Jersey,[66] maintain a rent deposit requirement[67] that tenant-litigants must satisfy before being granted an opportunity to raise a warranty of habitability defense.[68]

Rent deposit requirements are putatively available to prevent against the bad faith use of the implied warranty of habitability; the deposit is intended to shield landlords from an unfounded habitability defense by a tenant who simply does not want to, or is unable to, pay rent.[69] A mandatory deposit is intended as a check to ensure that the alleged arrears accrued solely and as the direct result of habitability issues, and not based on bad faith or economic hardship.[70] Courts offer other justifications for rent deposit orders, including that deposit requirements protect

made. FLA. STAT. § 83.232(5) (2023). Other states, such as Texas, require a rent deposit to stay the execution of a warrant of eviction while the tenant's appeal is pending. In Texas, to appeal a judgment in a nonpayment case, a tenant must pay both an appeal bond and an initial deposit, both usually set at one month's rent. *See* TEX. PROP. CODE ANN. § 24.00511–21 (West 2023). Even where a tenant adequately certifies an inability to pay the appeal bond, the tenant must still make the initial deposit to stay an eviction. In the absence of the initial deposit, the appeal may go forward, but the tenant will not be protected from the trial court's dispossession order and can be evicted from the premises. TEX. PROP. CODE ANN. § 24.0054(a)–(a-2) (West 2023). The eviction effectively moots the appeal.

64. *See* Megan E. Hatch, *Statutory Protections for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUS. POL'Y DEBATE 98, 110 (2017). Hatch's 13 "protectionist" states are California, Connecticut, Maine, Massachusetts, Maryland, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Rhode Island, and Vermont. *Id*. Hatch notes that laws governing landlord-tenant relations are generally protective to renters; the absence of laws typically benefits or protects landlords. Protectionist states thus tend to have a higher number of landlord-tenant laws *Id*. at 105.

65. N.H. REV. STAT. ANN. § 540:13-d (2023).

66. Marini v. Ireland, 265 A.2d 526, 535 (N.J. 1970) (providing that a tenant may be required to deposit any unpaid rent with the court if a trial involving a warranty of habitability defense is delayed).

67. The laws that require a tenant to deposit any withheld rental arrears into a court escrow account in order to assert a breach of the warranty of habitability as a defense to a nonpayment of rent eviction case are referred to as rent deposit orders or requirements, rent escrow orders or requirements, rent bonds, and landlord protective orders. In this Article, I refer to these laws using the terms rent deposit order and rent deposit requirement interchangeably.

68. Some states require a rent deposit to an escrow account held by the court when a tenant files an affirmative case alleging a breach of the implied warranty of habitability. *See, e.g.*, MD. CODE ANN., REAL PROP. § 8-211(k)(2) (LexisNexis 2023); MINN. STAT. § 504B.385 (2022); N.J. STAT. ANN. § 2A:42-92 (West 2023). While affirmative rent escrow requirements are similarly prohibitive and have a pronounced chilling effect on the assertion of the implied warranty of habitability, this Article centers the exclusion of tenant-litigants from a court proceeding that they have been forcibly brought into, rather than a proceeding that was commenced by the tenant affirmatively.

69. Ault Phillips & Miller, *supra* note 27, at 21; Franzese, Gorin & Guzik, *supra* note 12, at 13; Super, *supra* note 2, at 429.

70. Super, *supra* note 2, at 425; 280 Broad, LLC v. Adams, No. HDSP-137382, 2006 WL 2790909, at *3, *7 (Conn. Super. Ct. Sept. 26, 2006) (denying rent abatement to tenant who was without heat and electricity in his apartment due to a furnace explosion where the nonpayment of rent was not "solely motivated" by the conditions, but also economic hardship).

the due process rights of landlords,[71] protect against the degradation of landlord interests during a more protracted proceeding,[72] and provide monetary assurance to landlords.[73]

While some jurisdictions require rent deposits in all cases where the implied warranty of habitability is invoked as a defense, or allow a judge to order a deposit *sua sponte*, others require landlords to move for such relief and show need.[74] A rent deposit order is a form of equitable relief,[75] and equity principles should require a landlord to show that the landlord has complied with health and safety laws, as well as the standard showing for equitable relief, including likelihood of irreparable harm, the inadequacy of other remedies available, and a likelihood of success on the merits.[76] In reality, there is "little evidence" that courts require landlords to make a true equitable claim for relief.[77] The burden is more likely to shift to the tenant, who may be granted an opportunity to defend against the deposit requirement, but courts have found that they be granted something less than an evidentiary hearing.[78]

Once a rent deposit order is entered, the tenant is typically required to deposit the alleged arrears, and the ongoing rent as it becomes due, in an escrow account held by the court.[79] Some jurisdictions require that certain payments be made to the landlord directly,[80] or that the court issue payments from its escrow account

71. *See, e.g.*, Martins Ferry Jaycee Hous., Inc. v. Pawlaczyk, 448 N.E.2d 512, 514 (Ohio Ct. App. 1982) (affirming the denial of tenants' ability to assert the condition of the premises as a defense when tenants failed to comply with rent deposit order, finding that landlords' rights must also be protected); Rush v. S. Prop. Mgmt. Inc., 173 S.E.2d 744, 746 (Ga. Ct. App. 1970) (disbursement of funds ordered to be held in escrow was proper as withholding the funds deprives the landlord of property without due process).

72. Bell v. Tsintolas Realty Co., 430 F.2d 474, 481 (D.C. Cir. 1970) (finding that rent deposit orders may be permissible to protect against a landlord's loss during protracted litigation).

73. *Id.* at 479 n.10; Green v. Superior Court, 517 P.2d 1168, 1182 (Cal. 1974) (suggesting that rent deposit requirements may protect a landlord from abuse of the warranty of habitability defense).

74. Super, *supra* note 2, at 430.

75. *See Bell*, 430 F.2d at 479, 484 (instructing courts to balance the equities and issue deposit orders only where a landlord demonstrates a need for financial protection).

76. Super, *supra* note 2, at 430.

77. *Id.*

78. *See* Dameron v. Capitol House Assocs. Ltd., 431 A.2d 580, 583 (D.C. 1981) (finding tenants are entitled to a limited hearing regarding rent deposit order).

79. *See, e.g.*, FLA. STAT. § 83.60(2) (2023); HAW. REV. STAT. § 521-78 (2023); Unif. Residential Landlord & Tenant Act § 4.105(a); Revised Unif. Residential Landlord & Tenant Act § 408(b); *Bell*, 430 F.2d at 479.

80. *See, e.g.*, NEV. REV. STAT. § 118A.490(1) (2023); City of Mount Vernon v. Brooks, 469 N.Y.S.2d 517, 518–19 (City Ct. 1983) (denying tenants' motion to deposit funds into court escrow and instead ordering payment of funds directly to the landlord, reasoning that payment will allow the landlord to repair any conditions at issue, and is "only a benefit" to the tenants); Juliano v. Strong, 448 A.2d 1379, 1380, 1382 (Pa. Super. Ct. 1982) (directing payment of funds held in escrow with the county health department to the landlord).

to the landlord during the pendency of the proceeding.[81] For instance, in *Dameron v. Capitol House Associates, Ltd.*, the court entered a rent deposit order requiring the rent-striking tenants to deposit the full rent amount alleged, despite their contention that a recent rent increase was unlawful due to substandard conditions.[82] Without holding an evidentiary hearing, the court determined that the conditions at issue were insufficient to abrogate the need for a deposit, and provided a "pass through" to allow the landlord access to some of the deposited funds during the pendency of the case.[83] In other jurisdictions, if the tenant defaults on the deposit requirement, the tenant may be stripped of the ability to raise a defense related to the implied warranty of habitability,[84] denied a jury trial,[85] or be subjected to a judgment of possession,[86] a court order that authorizes a legal eviction.[87] In this way, rent deposit requirements offer property owners

81. *See, e.g.*, Cunningham v. Phoenix Mgmt., Inc., 540 A.2d 1099, 1100 (D.C. 1988) (affirming the trial court's entry of rent deposit order and disbursement to the landlord); King v. Moorehead, 495 S.W.2d 65, 79 (Mo. Ct. App. 1973) (holding that the court has discretion to make a distribution to the landlord during the pendency of the case, and the landlord may make a showing of "reasonable value" of the premises). *But see* McNeal v. Habib, 346 A.2d 508, 513–14 (D.C. 1975) (requiring an evidentiary hearing prior to the release of rent deposit funds where the tenant surrendered possession); MICH. CT. R. 4.201(I)(2)(b) (requiring court to "consider the defendant's defenses" in determining whether to order disbursement of deposited funds and allowing the court to issue disbursement for required repairs or "as justice requires"); Fritz v. Warthen*,* 213 N.W.2d 339, 343 (Minn. 1973) (allowing court to order disbursement of deposited rent funds to allow landlord to make repairs); UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.105(a) (allowing the court to "determine the amount due to each party" but not specifying that this determination must be after a full trial on the merits); *Bell,* 430 F.2d at 485; Leejon Realty Co. v. Davis, 416 N.Y.S.2d 948, 949 (Sup. Ct. 1977) (denying distribution of deposited funds to a landlord when repairs had not been made).

82. *Dameron*, 431 A.2d at 584–85.

83. *Id*.

84. *See, e.g.*, FLA. STAT. § 83.60(2) (2023) (tenant's failure to pay the rent deposit results in the waiver of the tenant's defenses and entitles the landlord to an immediate judgment of possession); Swartwood v. Rouleau, No. C8-98-1691, 1999 WL 293898, at *2 (Minn. Ct. App. May 11, 1999) (affirming refusal to hear tenant's abatement defense when tenant failed to make rent deposit ordered); Conway v. Nissley, No. 68536, 1995 WL 723298, at *3 (Ohio Ct. App. 1995) (affirming dismissal of counterclaims where tenant failed to make rent deposit ordered); Smith v. Wright, 416 N.E.2d 655, 661 (Ohio Ct. App. 1979) (affirming exclusion of evidence of unfit conditions of the premises where the tenant failed to deposit rent with the court).

85. *See, e.g.*, MICH. CT. R. 4.201(I)(2)(a)(iii) (2009) (tenant's failure to comply with a rent deposit order results in the waiver of the right to a jury trial on the issue of possession); Harris v. Hous. Auth. of Balt. City, 549 A.2d 770, 771 (Md. Ct. Spec. App. 1988) (affirming waiver of jury trial when tenant missed rent deposit order payments but finding that tenant was entitled to a hearing on the merits of the claim.).

86. *See, e.g.*, FLA. STAT. § 83.60(2) (2023); GA. CODE ANN. § 44-7-75(c) (2023); HAW. REV. STAT. § 521-78(b) (2023); Mahdi v. Poretsky Mgmt., Inc., 433 A.2d 1085, 1086 (D.C. 1981) (affirming judgment for landlord where tenant failed to comply with rent deposit order).

87. In New York City Housing Court, for example, a judgment of possession may be entered pursuant to a settlement agreement between the parties, following a trial on the merits of the case, or upon a tenant's default in appearance or stipulated obligation. *Judgments in Nonpayment Cases*, N.Y. STATE UNIFIED CT. SYS. (Jan. 31, 2020), https://www.nycourts.gov/courts/nyc/housing/nonpaymentjudg.shtml [https://perma.cc/FF37-SQCZ]. A judgment of possession

and courts a shortcut through litigation, where a tenant's ability to participate in an eviction case that may result in imminent homelessness rests on the tenant's "good faith"[88] ability to acquire, save, and deposit wealth with the court.

B. The Poll Tax

The ratification of the 24th Amendment in 1964 prohibited the use of a poll tax in federal elections.[89] The following year, the United States Supreme Court, relying on the 24th Amendment, struck down the federal poll tax at issue in *Harman v. Forssenius*.[90] In 1966, in *Harper v. Virginia State Board of Elections,* the Supreme Court held that a poll tax is an unconstitutional violation of the Equal Protection Clause of the 14th Amendment,[91] ending the ability to predicate participation in a state or federal election on the ability to pay a tax. However, as Ryan Partelow writes, "the view that the poll tax is antithetical to American democracy . . . was far from self-evident and resulted from a transformative change in the American constitutional fabric" in the period leading to the Court's *Harper* decision.[92] Part I.B of this Article briefly reviews the history of the poll tax and its position as a wealth-based restriction on a democratic institution in order to examine rent deposit requirements as a similarly wealth-based precondition on full access to a civil eviction court.

1. The Origins of the Poll Tax

A poll tax, or a "head tax", is a flat-rate tax imposed on all taxpaying adults, regardless of income.[93] Poll taxes existed in several different historical contexts, including throughout the ancient and early modern worlds.[94] In the United States, they are best understood as a fee paid by an individual in order to vote, and more

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authorizes the issuance of a warrant of eviction. *Id.* Upon the warrant's issuance, a city marshal or sheriff hired by the landlord may execute the warrant of eviction by evicting the tenant. *Id.*

88. Super, *supra* note 2, at 429.

89. Section one of the 24th Amendment states:

> The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax. U.S. Const. amend. XXIV, § 1.

90. Harman v. Forssenius, 380 U.S. 528, 544 (1965).

91. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

92. Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 426 (2020).

93. David Schultz & Sarah Clark, *Wealth v. Democracy: The Unfulfilled Promise of the Twenty-Fourth Amendment*, 29 QUINNIPIAC L. REV. 375, 378–79 (2011); Partelow, *supra* note 92, at 427.

94. Shultz & Clark, *supra* note 93, at 378–80 (noting that poll taxes existed throughout the ancient world, in Persia, Palestine, and in the Roman Empire and Republic, as well as medieval England and France).

specifically, a tool used by states in the Redemption-era and Jim Crow American South to disenfranchise Black people.[95]

Poll taxes were initially connected to the ability to vote in the United States as an instrument to expand the franchise by degree.[96] Following the medieval European tradition, where access to the vote was related to political rights associated with property ownership,[97] many states in post-Revolutionary America imposed property-ownership requirements on the right to vote in order to limit voting to only those people who were deemed to demonstrate a sufficient investment in the community.[98] Property ownership conferred not only wealth and social status, but the ability to participate in the political process. In an effort towards democratic reform, states introduced the poll tax as a remedial measure: instead of limiting the power to vote to white, property-owning men, the franchise was expanded to include white men who could afford to pay a poll tax.[99]

Atiba Ellis refers to these economic restraints, or legal financial obligations ("LFOs"), as a "pay-to-play system" in which a prospective voter must be able to show a tangible economic interest in society before being granted entry into the electoral process.[100] A wealth-based social hierarchy was pervasive in early American political thought; John Jay, an author of the Federalist Papers and the first Chief Justice of the United States Supreme Court, is said to have stated "the people who own this country ought to govern it."[101] Property ownership and wealth were thought to represent worthiness—even closeness to the divine—and thus, those in possession of it were more deserving of power.[102]

Incremental expansion of the vote continued through the dawn of the 19th century, with many states, including Vermont, New Hampshire, Maryland, and Alabama, adopting universal white male suffrage.[103] Abandonment of property qualifications and the poll tax may be seen as a shift away from the wealth-based political rights of Europe, where socioeconomic qualifications for voting continued to exist, and a move towards a more democratic society.[104] More pragmatically, wealth-based qualifications were increasingly unable to maintain the social order desired by the hegemonic class as they excluded many white male

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95. *Id.* at 378 (citing C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 84 (3d rev. ed. 1974)).

96. Partelow, *supra* note 92, at 427.

97. Schultz & Clark, *supra* note 93, at 379.

98. *Id.*

99. *See id.* at 382.

100. Atiba R. Ellis, *The Cost of the Vote*, 86 DENV. U. L. REV. 1023, 1036 (2009).

101. John Kretzschmar, *Understanding Organized Labor*, UNIV. OF NEB. OMAHA, WILLIAM BRENNAN INST. FOR LAB. STUD. (Jan. 2009), https://www.unomaha.edu/college-of-public-affairs-and-community-service/william-brennan-institute-for-labor-studies/engagement/comment-2009-pt-1-organized-labor.php [https://perma.cc/65JY-7YZB].

102. Schultz & Clark, *supra* note 93, at 383.

103. *Id.* at 385.

104. *Id.* at 386 ("The poll tax, then, had a dual legacy . . . . Its adoption was a democratic reform, and its rejection the same.").

voters who would vote in favor of the dominant class.[105] Indeed, by the time of Andrew Jackson's 1829 presidential inauguration, nearly all states had abandoned property- and wealth-based qualifications for voting, providing universal suffrage for white men, though all other Americans remained excluded from the franchise.[106]

2. The Re-emergence of the American Poll Tax

The collapse of Reconstruction-era federal oversight over voting practices, and the backlash to the ratification of the 15th Amendment in 1870,[107] caused a striking resurgence of the poll tax in the American South.[108] As part of a broader project to maintain white dominance through state-sanctioned violence and oppression during the Redemption and continuing through the Jim Crow era, southern state governments suppressed the Black[109] vote through the "Mississippi Plan," establishing suffrage requirements, including literacy tests, grandfather clauses, and poll taxes.[110] While it is impossible to determine the specific impact of the poll tax on voter suppression, "there is a consensus among scholars that the poll tax certainly kept at least some otherwise eligible voters from casting their ballots."[111] Though the intent of the poll tax requirement was to disenfranchise Black voters, the state constitutional provisions that enacted these requirements

105. Ellis, *supra* note 100, at 1038–39 ("In some Southern states, the median yearly income did not equal the property qualification.").

106. Partelow, *supra* note 92, at 427; Schultz & Clark, *supra* note 93, at 385.

107. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

108. Partelow, *supra* note 92, at 427–28. Partelow notes that the post-Reconstruction surge in poll tax adoption was "particularly ironic as some states, such as Alabama, first entered the Union in the antebellum period without any tax or property qualifications whatsoever" at a time when economic restraints were common throughout the country. *Id*. at 427 n.18.

109. Efforts to disenfranchise Black voters almost certainly led to a diverse disenfranchisement of people of color, including voters of Asian and Indigenous descent. Unfortunately, these potential voters were also prevented from voting by other explicitly racist policies that denied them citizenship, such as the Naturalization Act of 1870, which extended naturalization to "aliens of African nativity and to persons of African descent" but excluded all other people of color. Naturalization Act of 1870, Pub. L. No. 41-254.

110. Ellis, *supra* note 100, at 1041 ("By the turn of the twentieth century, the ex-Confederate states from Mississippi to Virginia revised their constitutions to include economic and educational requirements specifically designed to prevent African Americans from possessing the right to vote.").

111. Partelow, *supra* note 92, at 428 (first citing V.O. KEY JR., SOUTHERN POLITICS 599 (1949); then citing John Lackey, *The Poll Tax: Its Impact on Racial Suffrage,* 54 KY. L.J. 423, 427 (1965)); Ellis, *supra* note 98, at 1042–43 (noting that in Alabama, the eligible Black voting population fell to less than two percent; by 1910 in Virginia, just seven years after the implementation of the poll tax, the rate of Black registration fell to 15%, while nearly 80% of eligible white voters were registered to vote).

were written as racially-neutral economic status requirements, and were upheld by courts.[112]

Because of its racially-neutral positioning, the poll tax also disenfranchised some poor white voters, whose interests were not represented in the vision of the new South propagated by the wealthy white landowners (many of whom were former Confederate leaders) who comprised the Democratic elite.[113] The poll tax was effective at discriminating against poor people, and Black people specifically, because it was expensive, ranging from $1.00 to $2.00 annually, which was a significant amount of money to many working people.[114] The poll tax also presented challenges to voters beyond the financial obligation. Because the poll tax was optional, it was difficult to prove that it had been paid, and it accumulated, meaning that a potential voter had to have paid the tax in full for a period of years prior to the period during which they were attempting to vote, in advance of the election.[115] For poor people, these obstacles were nearly insurmountable.

3. The Abolition of the Poll Tax

Following decades of activism, during which federal courts upheld poll taxes,[116] in 1964, the 24th Amendment, which abolished poll taxes in all federal elections, was ratified.[117] The passage of the 24th Amendment and the Voting Rights Act that same year, and the Civil Rights Act in 1965, demonstrated the progress made by the Civil Rights movement to develop—in law makers, the courts, and the American public—a recognition that voting is a fundamental right and to condition the right to vote on payment of a tax is an unconstitutional restriction.[118]

The application of a poll tax in state elections remained lawful until 1966, when the Supreme Court issued its decision in *Harper v. Virginia State Board of Elections*, striking down Virginia's poll tax in state elections as a violation of the

112. Ellis, *supra* note 100, at 1041–43. For instance, the Supreme Court upheld the Mississippi Plan, and the poll tax, in *Williams v. Mississippi*, 170 U.S. 213, 225 (1898). In *Williams*, a Black man appealed his conviction based on the makeup of the jury. Mississippi required all jurors to pay poll taxes before being registered to vote or serving on a jury, creating an exclusively white jury pool. The Court rejected the claim that the statute resulting in all white juries was unconstitutional because it did not discriminate on the basis of race and did not violate the Equal Protection Clause of the Fourteenth Amendment. *Id.*

113. Partelow, *supra* note 92, at 429–30.

114. Ellis, *supra* note 100, at 1041 (first citing FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 32–33 tbl.1 (1958); then citing ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, 356–57 tbl.A.10 (2000)).

115. *Id.* at 1042.

116. *See* Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (holding that a state may condition suffrage without implicating the Fourteenth Amendment); Butler v. Thompson, 97 F. Supp. 17, 18–19 (E.D. Va. 1951), *aff'd*, 341 U.S. 937 (1951) (rejecting facial and as-applied challenges to poll tax as prerequisite to voting and disregarding disproportionate effect on Black residents).

117. Ellis, *supra* note 100, at 1047.

118. *Id.*

Fourteenth Amendment's Equal Protection and Due Process Clauses.[119] The Court found that the poll tax had no rational relation to the ability to vote, with Justice Douglas writing for the majority, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[120] The Court acknowledged that rights are not stagnant and recognition can shift over time.[121] Acknowledging the right to vote as a fundamental right, the Court applied a strict scrutiny analysis and found the poll tax an unconstitutional violation of the Equal Protection and Due Process Clauses,[122] holding that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[123] With *Harper*, the Court bridged divergent federal and state voting requirements, recognizing that full access to the right to vote cannot be achieved while economic barriers to its exercise exist.[124]

An examination of rent deposit orders and the poll tax reveals a parallel in their design. Both rent deposit orders and poll taxes were constructed to exclude a class of people deemed undesirable or unworthy of participation from access to an institution. The existence of these two devices evinces a fidelity to an existing political and social order that is maintained to the detriment of, and based on the elimination of, the participation of primarily poor people of color.

II.
RENT DEPOSIT REQUIREMENTS REINFORCE THE INEQUITIES OF THE EVICTION LEGAL SYSTEM

Rent deposit requirements appeal to eviction courts because they allow courts to efficiently manage dockets and swiftly dispose of cases, while upholding the interests of property owners, with little regard for the tenants who lose before the

119. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 665–66 (1966).

120. *Id*. at 668 (citation omitted).

121. *Id*. at 669–70.

122. *Id*. at 670. While Harper and the 24th Amendment rendered poll taxes unconstitutional, economic restraints on voting remain to this day in the form of LFOs stemming from court debt, preventing people with felony conviction history from voting. *See* Lisa Foster, *The Modern Poll Tax: Too Many States Condition the Right to Vote on the Payment of Court Debt*, HUM. RTS., OCT. 2022, AT 20, 20, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economics-of-voting/the-modern-poll-tax/. Facially wealth-neutral policies, such as photo identification requirements, also continue to exclude low-income people from the vote. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 239 (2008) (Breyer, J., dissenting) (noting that the cost associated with obtaining a photo identification for the purpose of voting could exceed the poll tax invalidated in *Harper*).

123. *Harper*, 383 U.S. at 665.

124. *See* Ellis, *supra* note 100, at 1050.

fight even begins.[125] Summary eviction proceedings[126] in specialized eviction courts were originally conceived to provide an alternative to self-help eviction.[127] Summary process was prioritized to encourage landlords to engage in contracted litigation instead of extra-judicial lockouts: strict limits on the timing of the proceeding and the issues available for consideration were intended to demonstrate that the "summary eviction proceeding is a convenient, safe, and relatively speedy alternative to self-help" eviction.[128] Stated differently, if property owners could no longer simply lockout tenants, at least the legal process for evicting them was not unduly burdensome. Indeed, prior to the widespread recognition of the warranty of habitability, there were no defenses available to tenants facing eviction; the court's inquiry rested only on whether (or not) the rent was paid.[129]

Rent deposit orders allow eviction courts a short-cut to maintaining efficient case disposition and the supremacy of the property interests of property owners to the detriment of all other interests, but they do so at the expense of the perception of the legal system's legitimacy as a democratic institution.[130]

Rent deposit requirements and poll taxes result in illusory rights. Due process rights mean little to a defendant unable to raise a defense, just as the 14th Amendment represented an empty promise of access to the franchise for Black voters constrained by insurmountable poll taxes. Understanding the overriding goals of the eviction legal system supports the contention that rent deposit requirements exist to reify and privilege efficiency and the interests of property owners over the health and safety of communities, and the eviction court's own legitimacy.

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125. *See* Super, *supra* note 2, at 433–36 (noting that many tenants are not aware of rent deposit requirements, are not prepared to deposit funds within the mandated period of time for compliance, are provided minimal time before a judge, and rarely are able to exercise their right to a jury trial, significantly constraining their ability to present a defense and meaningfully litigate a case).

126. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000) ("A summary proceeding for eviction exists in every state. Despite its different labels—summary process, summary dispossession, or forcible entry and detainer—a basic feature of the proceeding is its limited nature. Generally only a single issue is presented: Who is entitled to possession? The question is usually answered within six to ten days after the action is commenced.").

127. Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, *in* A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES 32, 32 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022) ("Courts justified the creation of housing summary eviction proceedings . . . on the ground that they would dissuade landlords from forcibly expelling tenants and tenants from forcibly resisting those expulsions."); s*ee also* Spector, *supra* note 126, at 155–56.

128. Spector, *supra* note 126, at 158–59.

129. Super, *supra* note 2, at 413.

130. *See id*. at 448–49 (applying rent deposit requirements to the procedural due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and finding that, should the factors apply to private civil litigation, rent deposit requirements would be found to deprive tenants of due process).

As Professor Ellis writes, "[T]he history of the American franchise has been one of a tension between those who wish to protect the vote from being freely accessed and those who wish to have the vote defined more liberally to include a broader cross section of the American public."[131] The same could be said for eviction courts, where an inherent tension exists between the push by tenants and their advocates for a more equitable and open adjudication of claims and the pull of landlords and their lobbyists to maintain a system that overwhelmingly favors their interests and diminishes tenant participation, despite the risk to the court's legitimacy.[132]

David Super suggests that courts seem to have little or no recognition of the impact that rent deposit orders have on the low-income tenants that represent the population of litigants subject to the most burdensome penalties for failure to comply with such orders, writing that they impose these requirements "often virtually without explanation, in a paragraph or a footnote, generally as dictum."[133] Individual judges may recognize the inequity in placing economic restraints on the use of a lawful defense by a litigant in a defensive posture.[134] But to engage in a practice of acknowledgment and repair would seem to contravene the deeply held interests at the heart of the eviction legal system.

A. Rent Deposit Orders Preserve Eviction Court's Efficiency to the Detriment of Tenants

With 3.6 million eviction filings made each year,[135] eviction courts are some of the highest volume civil courts in the country.[136] As courts of poverty, eviction

131. Ellis, *supra* note 100, at 1028.

132. *See* Super, *supra* note 2, at 416 ("As such, the courts are vulnerable to competitive pressures. If the new tenants' rights made evictions too burdensome, landlords might abandon the courts and seek to evict their tenants themselves.").

133. *Id.* at 428 (citing Hinson v. Delis, 102 Cal. Rptr. 661, 666 (Ct. App. 1972); King v. Moorehead, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973); Teller v. McCoy, 253 S.E.2d 114 (W. Va. 1978)); *id.* at 432 ("both the burden of [rent deposit] payments and the risk of suffering the penalties for noncompliance are considerably greater for the poorest tenants and for those with the most serious repair problems" for whom "making escrow payments may sometimes be impossible and may often require foregoing other necessities.").

134. *See, e.g.*, Bell v. Tsintolas Realty Co., 430 F.2d 474, 480 (D.C. Cir. 1970) ("We have good reason for concern when a meritorious defense cannot be litigated because a monetary barrier has been erected; not only does the individual defendant lose, but the purposes of the adversary system as a whole are frustrated.").

135. Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Porton & Matthew Desmond, *Estimating Eviction Prevalence Across the United States*, PROC. NAT'L ACAD. SCIS., May 24, 2022, at 1, 3.

136. In 2021, 46 states and territories reported 12,361,739 state civil court cases initiated. *CSP STAT Civil*, CT. STATS. PROJECT (Oct. 9, 2023), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-civil; *see* Kathryn Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. 1030, 1143 ("The civil courts churn through 20 million cases per year, most of which are evictions, debt collections, and family law matters of all types including divorce, custody, child support, parental rights, and domestic violence.").

courts[137] are often deeply under-resourced in comparison to other courts,[138] and are under pressure to dispose of cases with great speed.[139] Eviction cases are seen as simple disputes, requiring less process and minimal consideration.[140] Court staff and decisionmakers see eviction cases as requiring little subject-matter expertise, knowledge or training.[141] Subject to summary process, eviction cases proceed on an accelerated timeline with fewer procedural safeguards than other civil cases.[142]

Courts are unconcerned with this limited attention, and often dispose of cases within minutes, disregarding even the least burdensome procedural requirements, including elements of a property owner's prima facie case.[143] The specific procedural quirks of the eviction legal system, including the brief time frame allowed for answering a complaint and preparing a defense and the prioritization of settlements,[144] are all fueled by and work in concert with rent deposit requirements to allow courts to focus on efficiency and docket clearance, at the expense of just outcomes for all claims presented.

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137. *See supra* note 16.

138. Kathryn A. Sabbeth, *Market Based Law Development*, LPE PROJECT (July 21, 2021), https://lpeproject.org/blog/market-based-law-development/ [https://perma.cc/WA7H-NWH3] ("As an illustration, in one year, the number of civil cases in Housing Court in New York City was higher than in all federal district courts combined, nationwide, and yet the Housing Court budget was less than one percent of the federal courts' [budget].").

139. *Id*.

140. *See* Lindsey v. Normet, 405 U.S. 56, 64–69 (1972) (holding that Oregon's summary eviction process did not violate the Due Process Clause even where the statute allowed a trial to be scheduled only six days after service of the complaint); *see also* Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 302 (2018) (critiquing the simplification of poverty-related litigation); Sabbeth, *supra* note 138 (arguing that treating poverty-related litigation and legal issues as simple, and underfunding poor people's courts, reflects political priorities).

141. Sudeall & Pasciutti, *supra* note 45, at 1388 (reporting that in interviews, judges and clerks of Georgia's eviction courts revealed that "in their view, the issues presented by [eviction cases] do not require much expertise or training on the part of the decisionmaker—in part because the main issue to be resolved is just whether the tenant has paid rent").

142. Eloise Lawrence describes the similarities between litigation commenced under the Fugitive Slave Act and contemporary eviction law, which are both subject to summary process. Eloise Lawrence, *When We Fight, We Win: Eviction Defense as Subversive Lawyering*, 90 FORDHAM L. REV. 2125, 2132 (2022) (citing Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1898 (2019)). As in historic Fugitive Slave Act cases, most tenants sued for eviction are not guaranteed counsel, the prima facie burden of the moving party is a low threshold, and litigants' rights are frequently waived or denied. *Id.* at 2132 n.45 (citing Farbman, *supra*, at 1894). Notably, the Fugitive Slave Act "was intended to create a summary process where owners could reclaim their 'property' with federal assistance, requiring only minimal proof." *Id.* at 2132 n.46 (citing Farbman, *supra*, at 1907).

143. Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding the Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 925 (2015) (summarizing literature showing that the "average time consumed by each case [is] often two minutes or less" and stating, "judges often shortcut the law: they do not hold landlords to statutory burdens of proof").

144. *See infra* note 157 and accompanying text.

Rent deposit orders allow courts to meet efficiency goals by leaving tenants little opportunity to truly litigate a case—if tenants lack a meaningful opportunity to compose a defense, they have no choice but to settle. Rent deposit orders work in concert with, and reinforce, the characteristics of the summary proceedings to allow courts to dispose of cases on their dockets quickly, avoiding extended motion practice and trial. If most tenants cannot present a defense,[145] very few cases will go to trial; if trial is not an option, then tenants have no choice but to engage in settlement discussions without any bargaining power, or face eviction, with its well-known and devastating consequences.[146]

1. Limits on Time to Answer a Complaint and Prepare a Defense

An eviction case moves on an accelerated timeline from commencement.[147] After receiving the initial pleading, tenants are granted only days to answer or appear in court.[148] In contrast, litigants in other civil litigation are typically granted nearly one month to file an answer.[149] A legal system that deems 48 hours a sufficient grant of time for a (likely unrepresented) litigant to conceive of and prepare a compelling defense such that they and their family might remain housed undermines its own legitimacy.[150] Nevertheless, in *Lindsey v. Normet*, the United States Supreme Court upheld an Oregon statute providing for only six days to answer and prepare for trial, reasoning that defenses to eviction cases are simple and do not require more time.[151] The Court also upheld Oregon's restrictions on the defenses that tenants may raise, excluding, among other substantive defenses,

145. Some states' statutes prohibit tenants from raising a substantive defense, such as the Oregon statute at issue in Lindsey v. Normet, 405 U.S. 56, 65 (1972). *See infra* note 152 and accompanying text. While these statutes have a devastating impact on justice, this Article focuses on courts where tenants nominally retain the right to present a defense but may be barred from presenting a defense for consideration as a result of rent deposit orders.

146. The social consequences of eviction extend far beyond the loss of one's home and are well documented. *See, e.g.*, Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 298–99 (2015) (describing immediate harms of eviction); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 70–73 (2016); Chester Hartman, *The Case for a Right to Housing*, *in* A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 177, 180 (Rachel G. Bratt, Chester Hartman & Ann Meyerson eds., 2006).

147. Arguably, the accelerated timeline extends further back to the time of filing, where property owners often face few administrative barriers and significantly lower court filing fees than other forms of civil litigation. *See* Sabbeth, *supra* note 15, at 377; *see also* Henry Gomory, Douglas S. Massey, James R. Hendrickson & Matthew Desmond, *The Racially Disparate Influence of Filing Fees on Eviction Rates*, 33 HOUS. POL'Y DEBATE 1463, 1477–79 (2023) (low court filing fees encourage landlords to liberally file eviction cases, and are associated with a higher volume of eviction case filings against Black tenants in particular).

148. *See LSC Eviction Laws Database*, *supra* note 16 (showing that in much of the country, tenants have between 2 and 14 days to respond to an eviction complaint).

149. *See, e.g.*, FED. R. CIV. P. 12 (21 days); N.Y. CIV. PRAC. L. & R. § 3012(c) (30 days); N.J. CT. R. 4:6-1 (35 days).

150. *See infra* Part III.B.

151. Lindsey v. Normet, 405 U.S. 56, 65 (1972) ("[T]he simplicity of the issues in the typical action will not usually require extended trial preparation and litigation.").

consideration of the landlord's breach of the warranty of habitability.[152] The Court notes that it is permissible for Oregon to restrict the use of the warranty of habitability as a defense to nonpayment by "treating the undertakings of the tenant and those of the landlord as independent rather than dependent covenants"[153] and restrict the eviction court's inquiry to the sole question of whether the rent has been paid.[154]

Accelerated timelines necessarily deprive tenant-litigants of the opportunity to craft and present a meaningful defense to the proceeding by limiting the level of inquiry and preparation that it is possible to engage in prior to the date the answer must be submitted. This shortened timeframe further degrades the public's perception of the court as a space to obtain justice. When tenants are not afforded an opportunity to meaningfully respond to the allegations against them, eviction courts become a one-sided debt collection or wealth extraction apparatus, with its functionality primarily concerned with granting property owners a fast and simple method of depriving their tenants of possession of both money and shelter.[155]

2. Prioritization of Settlements

In eviction courts, litigants are under tremendous pressure to settle and are regularly deprived of the rights standard to traditional civil litigation.[156] Judges prioritize docket clearance and encourage settlements over litigation, making minimal inquiry into the mutual assent and understanding of the parties.[157] This prioritization of settlements for the sake of efficiency results in a shadow legal

152. *Id*. at 65–66.

153. *Id.* at 68.

154. *Id.* at 65–68.

155. *See* Sabbeth, *supra* note 15, at 379; Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1247–48 (2022) (describing how courts systematize and legitimize the extraction and transfer of capital from people of color to majority-white corporations and the state); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs,* 135 HARV. L. REV. 1704, 1743 (2022) (describing lower civil courts "as a site for private companies to petition the state for permission to re-distribute others' assets to themselves—permission that appears to be granted without much, if any, scrutiny"); *see also* Brian Highsmith, *The Structural Violence of Municipal Hoarding*, AM. PROSPECT (July 6, 2020), https://prospect.org/civil-rights/the-structural-violence-of-municipal-hoarding/ [https://perma.cc/J7WM-ASDV] (describing the ways in which laws and systems shield accumulated wealth from redistribution, perpetuating harm primary against Black communities); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 569 (1992) (describing eviction court proceedings as "scene[s] . . . of debt collection").

156. *See infra* Part III.B.

157. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 112–13 (1997) [hereinafter Engler, *Out of Sight*]; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2061 (1999) [hereinafter Engler, *And Justice for All*] (critiquing that a judge's minimal inquiry "fails to elicit the information needed to ensure that the agreements are fair and reasonable, or that the unrepresented litigant's decisions are the product of informed consent, as opposed to misinformation, misunderstanding, and coercion.").

system,[158] where tenants are pushed to accept settlement terms in order to remain housed.[159] Settlements allow the court to swiftly dispose of cases while litigants forgo the already minimal procedural safeguards afforded to them. Instead, tenants are taken out of the formal process and subjected to an alternative system with parameters set by the opposing party's counsel.[160] While the vast majority of civil litigation ends in a settlement,[161] within the context of a legal system that is so notorious for its imbalance in legal representation that the appearance of counsel has become a truism—the vast majority of landlords are represented by attorneys in eviction court while most tenants defend their cases *pro se*[162]—a process

158. This alternate or "shadow" legal system is a consequence of what Nicole Summers has named "civil probation," the ability of a landlord to swiftly evict a tenant outside of the statutorily defined legal process based on the inequitable and often ill-bargained-for terms of a settlement agreement. Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847, 888 (2023). "[C]ivil probation establishes an entirely distinct set of procedural rules for eviction," outside of the purview of the formal legal system. *Id.* at 891.

159. Russell Engler vividly relates the experience of settlement negotiation within New York City's eviction courts, noting that tenants, most of whom are poor and unrepresented, are pressured to settle their cases quickly, misled about the law, and at times, physically intimidated, by landlords' attorneys who purport to have the tenant's interest in mind. Engler, *Out of Sight*, *supra* note 157, at 108–11. Tenants are expected to sign settlement agreements without court oversight in the hallways of the courthouse, a setting described by a former judge as "an absolute horror show," lacking adequate seating, ventilation, and hygienic practices, filled with a cacophony of crying children and desperate adults. *Id*. at 106.

160. Summers, *supra* note 158, at 854.

161. Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care*, 6 J. EMPIRICAL LEGAL STUD. 111, 146 (2009) (stating that "the quest for a single settlement rate . . . may be futile" but "if a single settlement rate is to be invoked, it should be that about two-thirds of civil cases settle"); *see also Evictions*, N.Y.C. COUNCIL, https://council.nyc.gov/data/evictions/ [https://perma.cc/2MWM-B7EW] (last visited Jan. 20, 2024) (noting that in 2017, 230,071 eviction cases were filed against tenants in New York City Housing Court and that 20,804, or 9%, resulted in execution of a warrant of eviction by a City Marshal).

162. *See, e.g.,* NAT'L COAL. FOR A CIV. RIGHT TO COUNS., EVICTION REPRESENTATION STATISTICS FOR LANDLORDS AND TENANTS ABSENT SPECIAL INTERVENTION 2 (2023), http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf [https://perma.cc/VJY7-PPNE] (finding that on average, absent a right to counsel in eviction proceedings for the jurisdictions listed, 83% of landlords were represented by attorneys and 4% of tenants were represented by attorneys); AM. BAR ASS'N & HARV. NEGOT. & MEDIATION Clinical Program, DESIGNING FOR HOUSING STABILITY: BEST PRACTICES FOR COURT-BASED AND COURT-ADJACENT EVICTION PREVENTION AND/OR DIVERSION PROGRAMS 2 (2021) https://hnmcp.law.harvard.edu/wp-content/uploads/2021/06/Deasigning-for-Housing-Stability.pdf [https://perma.cc/B6Y6-ASN8]; 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) (citing representation rates in multiple jurisdictions); Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL'Y 87, 88 (2010) (noting that, historically, in New York City Housing Courts, 90% of landlords were represented by counsel while only 5–10% of tenants were represented by counsel); GARY BLASI, UCLA LUSKIN INST. ON INEQ. AND DEMOCRACY, UD DAY: IMPENDING EVICTIONS AND HOMELESSNESS IN LOS ANGELES 11 (2020), https://escholarship.org/uc/item/2gz6c8cv [https://perma.cc/PX82-BHWB] (citing NPC RESEARCH, EVALUATION OF THE SARGENT SHRIVER CIVIL COUNSEL ACT (AB590) HOUSING PILOT PROJECTS 53 (2017)) (noting that in Los Angeles, "only a small proportion of tenants in eviction cases are represented by lawyers, compared to 95% of landlords").

governed by settlement agreements is neither equitable nor normatively sensible. Settlements nevertheless remain encouraged, if not mandated, because it would require an exponentially larger investment in resources to provide a forum for meaningful consideration of all relevant claims.

B. Rent Deposit Orders Are an Economic Restraint on Court Participation

Eviction proceedings operate exactly as intended: cases are disposed of quickly, typically without deep inquiry, by placing the profit and the property rights of the landlord over the people rendered homeless.[163] The typical framing of the civil legal system is that it oversees disputes voluntarily litigated by private parties.[164] Yet marginalized individuals, entering the eviction legal system in a defensive posture, do so not of their own volition, but because they have no other choice.[165] The rights of tenant-litigants are subordinated to the rights of property owners at every opportunity.[166] This subordination is the legal system's intellectual inheritance from the legacy of property and labor theft from Black and Indigenous peoples to generate white wealth and perpetuate white ownership.[167] Within the context of the American empire, it is not surprising that the eviction legal system serves to diminish the property interests of tenants, exhibiting deeply anti-tenant biases through the diluting and withholding of tenants' rights.[168]

The eviction legal system was nominally created to protect tenants;[169] as a compromise to property owners, it is a legal process that moves quickly to undermine tenants' interests and swiftly retrieve wealth, possession, or both at once, from tenants who are left with neither.[170] Rent deposit orders aid courts and landlords in this goal by depriving tenants of the ability to assert their rights, guaranteeing an outcome advantageous to the landlord from the outset of the proceeding. Despite the existence of a warranty of habitability defense in many jurisdictions, the right is basically useless because it cannot be asserted.

Just as wealth has no bearing on a person's ability to vote, it should have an equally insignificant impact on a person's ability to present a defense to a legal claim made against them. In contrast to voting, however, access to the civil court to present a defense is not a fundamental right. In *Harper*, the Court's analysis of the poll tax turns on the right to vote and not the law's application to poor

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163. Lawrence, *supra* note 142, at 2128–29; *see also* John Whitlow, Opinion, *Lawyer Calls Court an Eviction Machine*, ALBUQUERQUE J. (July 9, 2019, 12:02 AM) (on file with author).

164. Brito, Sabbeth, Steinberg & Sudeall, *supra* note 155, at 1246.

165. *Id*.

166. *See supra* Part II.A.

167. Sabbeth, *supra* note 15, at 369–70.

168. *Id.* at 370*;* Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 U. PA. L. REV. 267, 272–73 (2023).

169. *See* Sinnar, *supra* note 127.

170. Sinnar, *supra* note 127, at 33 ("every state maintains summary eviction procedures designed to oust tenants expeditiously when they fall behind on rent. . . . The speed of this process makes it virtually impossible for tenants to mount a viable defense.").

people.[171] Still, the *Harper* Court indicates that a wealth-based test is an inappropriate basis upon which to deny a civil opportunity,[172] and this reasoning is instructive when contemplating the positioning of economic restraints on other democratic institutions, including the civil court system.

When considering denials of access to justice based on economic restraints in the form of court fees, the Supreme Court has specifically carved out distinctions to justify only narrow protections for the poor. In these cases, the Court considers the burden payment requirements place on the ability of litigants to access a court system that provides the sole forum for a dispute, and whether a mandatory fee represents a barrier to a judicial monopoly.[173] A review of the Court's handling of economic restraints applied to court access offers insight into the shape of this analysis when applied to rent deposit requirements. In *Boddie v. Connecticut*, the Court held that the state could not deny access to courts for people unable to pay the court costs associated with divorce proceedings[174] based on the state's sole oversight over divorce and finding that divorce implicates a "fundamental human relationship."[175] In his concurrence, Justice Douglas indicates that this case represents an "invidious discrimination based on poverty."[176] Adoption of his analysis could have introduced poverty as a suspect classification under the Equal Protection Clause, providing the opportunity to challenge statutes on the basis of discrimination based on indigency.[177] Justice Douglas explicitly contemplates this more expansive understanding of rights, and posits "[I]s housing less important to the mucilage holding society together than marriage?"[178] In his partial concurrence, Justice Brennan argues that *Griffin v. Illinois* should control, and that the Equal Protection Clause is violated by the exclusion of indigent litigants from court.[179] Citing to *Harper*, Justice Brennan implicitly compared exclusion from courts to exclusion from the polls.[180]

In other cases involving wealth-based barriers to court access and participation, the Court's holdings have been decidedly mixed. In *United States v. Kras*, the petitioner challenged the filing fees associated with filing for bankruptcy as unconstitutional as applied to indigent people.[181] The Court, distinguishing the case from *Boddie*, found that marriage and divorce have a constitutional

171. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

172. *Id.* at 668–70.

173. Super, *supra* note 2, at 447.

174. Boddie v. Connecticut, 401 U.S. 371, 373–74 (1971).

175. *Id.* at 383.

176. *Id.* at 386 (Douglas, J., concurring).

177. *Id.* at 385.

178. *Id*.

179. *Id.* at 388–89 (Brennan, J., concurring in part) (citing Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that a state may not deny a free transcript to an indigent, where the transcript is necessary for a direct appeal from his conviction)).

180. *Id.*

181. United States v. Kras, 409 U.S. 434, 435 (1973).

dimension that bankruptcy lacks.[182] Further, the Court rejected the idea that government control over the bankruptcy process is equivalent to the control over marriage that was dispositive in *Boddie*.[183] But as four justices noted in a dissent, "The bankrupt [person] is bankrupt precisely for the reason that the State stands ready to exact all of his debts through garnishment, attachment, and the panoply of other creditor remedies."[184] In contrast, in *M.L.B. v. S.L.J.*, the Court held that inability to appeal termination of parental rights due to inability to pay record preparation fees violated the Equal Protection and Due Process Clauses.[185]

Eviction cases raise similar issues related to economic restraints on access to the courts. As with the divorce proceedings at issue in *Boddie*, housing is fundamentally tied to state action. Government actors determine where housing can be built and the ordinances that dictate building standards and habitability codes.[186] The infrastructure for supplying homes with electricity, water, and other essential services are built, maintained, and regulated by the government. It also:

> provides the means to enforce contracts and define the legal relationships that make possible the buying, selling, producing, and leasing of housing. It enforces the legal sanctity of the home from intrusion and violation. It constructs and protects the property rights that make landlordism and tenancy possible. It influences the extent to which capital is used for housing or diverted from it.[187]

Government has a hand in regulating every aspect of the creation and maintenance of housing, the determination of rights of possession, and the enforcement of those rights. Nevertheless, the Court has generally declined to consider the economic restraints that undercut the ability of low-income people to access and participate in eviction court, such as rent deposit requirements, as deserving of greater scrutiny. Justice Douglas's dissent to the denial of certiorari in *Williams v. Shaffer* outlines the "disparity between the access of the affluent to the judicial machinery and that of the poor in violation of the Equal Protection Clause."[188] In *Williams*, the tenant-litigant challenged Georgia's summary eviction statute, which conditioned a tenant's ability to obtain a trial in an eviction case upon payment of a rent deposit covering all rent that the tenant could be liable for on the date of trial.[189] Justice Douglas compellingly writes that "[t]he effect of the security statute is to grant an affluent tenant a hearing and to deny an indigent

182. *Id.* at 444–45.

183. *Id.* at 445.

184. *Id.* at 455 (Stewart, J., dissenting).

185. M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996).

186. DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 141–42 (2016).

187. *Id*.

188. Williams v. Shaffer, 385 U.S. 1037, 1037 (1967) (Douglas, J., dissenting from denial of certiorari).

189. *Id.* at 1038.

tenant a hearing. The ability to obtain a hearing is thus made to turn upon the tenant's wealth."[190]

Justice Douglas raises the basic distinction between treatment of people with wealth and those without, positioning economic restraints on court participation as an access to justice concern. Rent deposit requirements sit apart from more traditional economic restraints related to court access, such as the court fees at issue in *Boddie*, *Kras*, and *M.L.B.*, because the rent deposit exists for the benefit of a private party. The rent deposit is paid into a court escrow account for the purpose of insuring a landlord's claim, collateralizing the claim to guarantee a payment should the landlord prevail.[191] The requirement also serves the landlord-litigant by regularly preventing the adverse party from presenting a conflicting claim. Predicating the ability to obtain a hearing on the ability pay a deposit necessarily limits the ability of poor people to access a hearing and present a defense. A defendant is therefore barred from raising a defense because they cannot prove that they can satisfy a judgement that has not yet been entered against them. The state action, in this instance, is the creation of the forum for the dispute. In practice, for many tenants living in substandard housing, the withholding of rent is the only mechanism truly available to vindicate their rights.[192] If a tenant is sued for nonpayment of rent, the eviction court may be the only forum available for the tenant's claim to be heard and repairs compelled.[193] Prohibiting the tenant-litigant from raising a defense is a wholesale deprivation of the ability to make the claim in a meaningful manner.

The Court has not adopted the reasoning of Justice Douglas's *Williams* dissent and has not acknowledged wealth as a suspect classification, nor has it adopted a generalized right of access to the court to raise a defense.[194] The undercurrent supporting that access relies on a reading of the Equal Protection Clause as forbidding discrimination based on poverty and on an understanding of the crucial role of the government in many dimensions of American life, including within the structures that constitute and regulate the housing landscape at the state, local, and federal levels.

Rent deposit requirements have been found to implicate due process protections in at least one instance. In *Lucky Ned Pepper's, Ltd. v. Columbia Park and Recreation Association*, a Maryland court heard a challenge to a state law that

190. *Id*. at 1039.

191. *See supra* notes 72–73.

192. Super, *supra* note 2, at 403–05 (noting that, once the implied warranty of habitability is incorporated into leases, tenants may sue their landlords affirmatively for damages due to landlord breach, but that equitable relief is often not available, and affirmative suits require legal and economic resources that many tenants typically lack).

193. *Id*. at 405.

194. Williams v. Shaffer, 385 U.S. 1037, 1037 (1967) (Douglas, J., dissenting from denial of certiorari). *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973) (declining to recognize wealth as a suspect classification where parents of low-income school children sought finding that state's reliance on local property tax revenue for supplement funding for school system violated the Equal Protection Clause).

required the deposit of all alleged rental arrears into an escrow account as a condition of obtaining a jury trial.[195] Finding that the rent deposit requirement was an unconstitutional infringement on the right to a civil jury trial, the court held that the law presupposed that the rent claimed due was actually owed—fact finding which encroaches upon a jury's function.[196] The court further found that requiring a party to pre-pay a possible judgment in order to access a jury trial placed a premium on the exercise of the right, and that providing a secure fund for the landlord was not a reasonable regulation of the right to a jury trial.[197]

The court's reasoning is instructive: it is unreasonable for a court to provide a secure funding source for a potential judgment, and to do so places landlords in a position outside of the parameters that exist for all other litigants.[198] That Ms. Green, the tenant discussed earlier, must put up collateral to merely appear in court and participate in a case that has been filed against her requires her to overcome an artificial barrier that is not expected of civil litigants in any other defensive posture, and privileges her landlord's claim in a way that does not exist for other plaintiffs. For Ms. Green, the amount in controversy, and thus the amount that she must pay in order to present a defense, is a mere distraction. The required deposit amount represents a sum that the landlord has not, at this stage in the litigation, proved to be owed—it is not a judgment amount, but a fact in dispute. The amount alleged could be comprised of a rent amount that would be abated following a trial as a result of the conditions, and that the tenant would ultimately not be responsible for paying.[199] An unscrupulous landlord may harness a rent deposit order to effectuate an eviction by claiming an amount owed in excess of the rent or by allowing conditions to degrade to force a tenant to use funds to pay for repairs.[200] Rent deposit requirements bar tenant-litigants from raising these possible defenses if they cannot prove to the court's satisfaction that the landlord will be able to straightforwardly collect a money judgment should one be entered.

Rent deposit requirements and poll taxes base participation in a free and open aspect of democratic society on the ability to build, maintain, and deposit wealth, and are predicated on the notion that the acquisition of wealth entitles a person to greater political and social rights. Just as voters capable of paying the poll tax were historically viewed as those "owning" the country and thus deserving of the ability

195. *See* Lucky Ned Pepper's, Ltd. v. Columbia Park & Recreation Ass'n, 494 A.2d 947, 948 (Md. Ct. Spec. App. 1985).

196. *Id*. at 951.

197. *Id*. at 951–52.

198. *Id*. at 952.

199. Super, *supra* note 2, at 433 ("[I]f the landlord has failed to maintain the premises, the implied warranty of habitability vitiates some or all of the tenant's rental obligation," and the tenant should not be faulted for the inability to deposit these funds).

200. A pre-trial hearing is rarely held to assess the credibility of the landlord's claims to rent owed. *See supra* Part I.A.4; *see also* Lipshutz v. Shantha, 240 S.E.2d 738 (Ga. Ct. App. 1977) (declining to reduce rent deposit by amount that tenants spent on repairs); Super, *supra* note 2, at 433 (following the issuance of a rent deposit order, "malicious landlords can force tenants to divert their rent money by cutting off essential utilities or creating some other intolerable condition.").

to participate in its running,[201] rent deposit requirements draw a line between tenants acting in "good faith" through their ability to indefinitely save the rent money they are withholding, and those who are not.[202] Poll taxes discriminated based on wealth for the purpose of excluding Black voters from the franchise; rent deposit requirements discriminate based on wealth for the purpose of efficiency, and in order to maintain the supremacy of property ownership.[203] Both render rights that should be available to all litigants and voters illusory. The *Lucky Ned* court and Justice Douglas, in his *Williams* dissent, envision a profound shift in the way eviction courts—and American society—conceive of access to justice for poor people. This shift could result in a more nuanced understanding of the ways in which democratic institutions have failed to provide access and resources to poor people within the civil legal system and within the current electoral regime, which is not yet free of economic restraint.[204]

III.
CONSEQUENCES OF RENT DEPOSIT REQUIREMENTS

Eviction courts, as courts of poverty, are not often the subject of rigorous study.[205] While state and local courts administer nearly all lawsuits filed within the civil legal system, their processes and procedurals are rarely studied.[206] Eviction courts are often influenced by local legal culture, and the laws and policies governing the proceedings may not accurately reflect practice in the courts.[207] Tenants, usually appearing without counsel, may be treated with hostility and granted mere minutes to be heard on their claims.[208]

Several scholars have studied the use of the warranty of habitability in housing courts, with a focus on procedure and outcomes, and have concluded that the warranty of habitability is underenforced. Studies of eviction courts in Detroit and Chicago in the 1970s, and in Baltimore during the 1990s, found that tenants raising the warranty of habitability in defense to a nonpayment proceeding were

201. *See supra* Part I.B.1.

202. *See* Dameron v. Capitol House Assocs. Ltd., 431 A.2d 580, 584 (D.C. 1981) (stating that payment of a rent deposit order is a "manifestation of the good faith of the tenant's asserted defense").

203. Stanger v. Ridgway, 404 A.2d 56, 58 (N.J. Dist. Ct. 1979) (finding that the purpose of a rent deposit is to prevent against delays that undermine an eviction proceeding's purpose of "speedy recovery of premises or resolution of disputes" and to "protect the landlord if he prevails").

204. *See supra* note 122 (noting that economic restraints on voting persist to the present day in the form of court debt, preventing people with felony conviction history from voting, and photo identification requirements, which construct barriers for people unable to afford to obtain the particular form of acceptable identification.)

205. Sudeall & Pasciutti, *supra* note 45, at 1370; Sabbeth, *supra* note 140, at 302.

206. Sudeall & Pascuitti, *supra* note 45, at 1371.

207. *Id*. at 1372–73.

208. Sabbeth, *supra* note 138.

awarded rent abatements at a vanishingly small rate.[209] More recently, a 2014 study of the nonpayment of rent cases in Essex County, New Jersey, found that the warranty of habitability was raised in only 0.2% of cases, or 80 out of 40,000 cases, filed, concluding that the implied warranty of habitability is underutilized by tenant-litigants.[210] A more recent study of the warranty of habitability operationalization gap in New York City's housing courts found that even in New York City, where tenants may have greater access to counsel and few substantive barriers to overcome,[211] rent abatements in settlement agreements were rare.[212]

Rent deposit requirements alone do not explain the underutilization of the warranty of habitability in eviction courts because the warranty remains underenforced even in jurisdictions that do not require such deposits.[213] However, the inability to raise the warranty of habitability will necessarily limit its use in courts. The condition the courts impose on the warranty of habitability defense has a substantial chilling effect on the primarily poor people who navigate eviction courts in the defense posture. As a result, they are more likely to live in substandard conditions.[214] In addition to the actual impact on litigants and their households, rent deposit orders also have the effect of undermining reform efforts, such as right to counsel in eviction court initiatives, and further erode the perception of the legitimacy of eviction courts.

209. *See* Mosier & Soble, *supra* note 20, at 33 (examining Detroit eviction cases and finding that at most, rent abatements were awarded in two percent of all nonpayment of rent cases, a figure which includes cases where there was a finding of a reduced amount than the rent amount claimed for reasons beyond the warranty of habitability, such as instances where a mathematical error contributed to an inflated arrears calculation); Julian R. Birnbaum, Nancy B. Collins & Anthony J. Fusco Jr., *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URBAN L. ANN. 93, 109–11 (1979) (studying Chicago eviction cases and finding that zero tenant-litigants in the sample cases studied received rent abatements, though 41% of these tenants raised a warranty of habitability defense); Bezdek, *supra* note 155, at 554 (studying a sample of nonpayment of rent eviction cases in Baltimore and finding that rent abatements were ordered in 1.75% of the sample cases).

210. Franzese, Gorin & Guzik, *supra* note 12, at 5 ("[O]f the more than forty-thousand residential eviction proceedings brought in 2014 in Essex County, [New Jersey,] only eighty asserted breach of the implied warranty of habitability as a defense. That figure is startling, revealing that the defense was raised in only *0.2% of residential eviction actions* . . . ." (footnote omitted)).

211. Summers, *supra* note 14, at 211.

212. *Id*. at 190–93 (finding in a sample dataset of cases where tenants asserted warranty of habitability claims that were assessed as "meritorious" using a scale of factors, only between 2.35 and 9% of tenants received an abatement.)

213. *See, e.g.*, *id.* at 190, 211.

214. Super, *supra* note 2, at 426.

A. Rent Deposit Orders Undermine Right to Counsel Programs

The eviction Right to Counsel ("RTC") movement[215] has made tremendous gains since 2017, when New York City became the first jurisdiction in the nation to guarantee an attorney to low-income tenants sued in eviction proceedings, [216] beginning in certain zip codes.[217] By mid-2023, 22 jurisdictions have established programs offering some form of RTC for tenants in eviction proceedings.[218] Proponents of RTC argue that RTC programming offers jurisdictions considerable savings over time.[219] While a substantial outlay is necessary to hire attorneys and provide for other overhead expenses,[220] the movement offers great cost savings in avoiding the considerable social spending associated with an increased population

215. Existing scholarship illuminates the history and origins of the RTC movement. *See generally* Andrew Scherer, Gideon*'s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988); RIGHT TO COUNS. N.Y.C. COAL., HISTORY OF THE RIGHT TO COUNSEL NYC COALITION, https://d3n8a8pro7vhmx.cloudfront.net/righttocounselnyc/pages/10/attachments/original/1517948094/history_of_RTC.pdf?1517948094 [https://perma.cc/GY5K-SSFK] (last visited Jan. 21, 2024).

216. New York City's RTC law, implementing the Universal Access to Counsel ("UAC") program, was passed in August 2017, and provides access to free legal services to income-eligible tenants facing eviction proceedings in housing court and in New York City Public Housing Authority ("NYCHA") termination of tenancy proceedings. *See* N.Y.C. ADMIN. CODE § 26-1302 (2023); N.Y.C. DEP'T OF SOC. SERVS., OFF. OF CIV. JUST., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FIVE OF IMPLEMENTATION IN NEW YORK CITY 2 (2022) [hereinafter NYC UA REPORT WINTER 2022], https://www.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2022.pdf [https://perma.cc/6MQU-8NZ7].

217. The UAC program was phased in throughout New York City, with residents of three zip codes per borough eligible for the program in the first year of implementation. Abigail Savitch-Lew, *City Tackles Roll-Out of Universal Access to Counsel in Housing Court*, CITYLIMITS (Jan. 17, 2018), https://citylimits.org/2018/01/17/city-tackles-roll-out-of-right-to-counsel-in-housing-court/ [https://perma.cc/L5P9-FMA9].

218. *Minnesota, Westchester County, NY, Jersey City, NJ, and St. Louis, MO, Are Latest Jurisdictions with Right to Counsel for Tenants Facing Eviction*, PUB. JUST. CTR. (July 11, 2023), https://www.publicjustice.org/en/news/minnesota-westchester-county-ny-and-jersey-city-nj-are-latest-jurisdictions-with-right-to-counsel-for-tenants-facing-eviction/ [https://perma.cc/LS7Y-78J7].

219. *See* Raymond Brescia, *Sheltering Counsel: Towards a Right to a Lawyer*, 25 TOURO L. REV. 187, 236 (2009); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel,* 3 CARDOZO PUB. L., POL'Y, & ETHICS J. 699, 711 (2006).

220. *See* NAT'L COAL. FOR A CIV. RIGHT TO COUNS., THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: ENACTED LEGISLATION 10–25 (Nov. 2023), http://civilrighttocounsel.org/uploaded_files/283/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf [https://perma.cc/X3XS-CUDG] (providing budgets for various RTC programs, including Newark, NJ ($750,000); Seattle ($750,000); San Francisco ($17 million); Minneapolis ($1.25 million)); Joshua Rosario, *Jersey City Announces Right-to-Counsel Program for Tenants; Would be Funded by Fee on Developers*, JERSEY J. (Apr. 4, 2023), https://www.nj.com/hudson/2023/04/jersey-city-announces-right-to-counsel-program-for-tenants-would-be-funded-by-fee-on-developers.html [https://perma.cc/F792-JHJP] (noting that the Jersey City RTC program has an annual budget of $4 million, to be funded through a fee on residential development projects).

of individuals and families without permanent housing.[221] This claim is largely borne out.[222] However, any cost savings must be tempered against the substantial barriers to tenants' vindication of rights, even with counsel. Rent deposit requirements in RTC jurisdictions will continue to prevent tenants from raising warranty of habitability defenses even with free access to skilled, competent counsel.

Studies have consistently found that tenant-litigants represented by counsel are far more likely to achieve a favorable monetary outcome in general,[223] and are more likely than unrepresented tenant-litigants to prevail on warranty of habitability claims specifically.[224] While there are other factors contributing to the

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221. *See, e.g.,* STOUT, THE ECONOMIC IMPACT OF AN EVICTION RIGHT TO COUNSEL IN BALTIMORE CITY 8 (2020), https://abell.org/wp-content/uploads/2022/02/Baltimore20RTC20Report_FINAL_5_8_2020.pdf [https://perma.cc/TCK7-52CQ] (estimating that for every dollar spent on RTC in Baltimore City, the cost savings or value to Baltimore City and Maryland would be at least $6.24, with at least $3.06 recognized by Baltimore City alone); STOUT, THE ECONOMIC RETURN ON INVESTMENT OF PROVIDING COUNSEL IN PHILADELPHIA EVICTION CASES FOR LOW-INCOME TENANTS 6 (2018), https://legalaidresearchnlada.files.wordpress.com/2020/01/philadelphia-evictions-report.pdf [https://perma.cc/KB76-NKS9] ("With an annual investment of approximately $3.5 million, the City of Philadelphia . . . could provide legal assistance to all tenants unable to afford representation, avoiding $45.2 million in costs to the City annually.").

222. *See, e.g.*, STOUT, CONNECTICUT EVICTION RIGHT TO COUNSEL ANNUAL INDEPENDENT EVALUATION: JANUARY 31 TO NOVEMBER 30, 2022, at 67 (2022), https://www.stout.com/-/media/pdf/evictions/stout-2022-independent-evaluation-ct-rtc_final_2022-12-30.pdf [https://perma.cc/6DSD-TXMX] (estimating "that Connecticut realized economic benefits of between $5.8 million and $6.3 million" in the first nine months of 2022); STOUT, EVICTION FREE MILWAUKEE ANNUAL INDEPENDENT EVALUATION: SEPTEMBER 1, 2021 TO DECEMBER 31, 2022, at 77 (2023), https://county.milwaukee.gov/files/county/board-of-supervisors/District-4/District-4-Map/Stouts2022IndependentEvaluationofEFM_FINAL_2023.03.061.pdf [https://perma.cc/8S87-DKQH] (estimating a return on investment of up to $3.10); STOUT, CLEVELAND EVICTION RIGHT TO COUNSEL ANNUAL INDEPENDENT EVALUATION: JANUARY 1, 2022 TO DECEMBER 31, 2022, at 74 (2023), https://freeevictionhelpresults.org/wp-content/uploads/2023/01/UPDATED-Stouts-2022-Independent-Evaluation-FINAL_2023.01.31.pdf [https://perma.cc/2XJA-5A9U] (estimating a return on investment of between $2.62 and $3.11); *see also* LAW SOC'Y OF SCOTLAND, SOCIAL RETURN ON INVESTMENT IN LEGAL AID: TECHNICAL REPORT 3 (2017), https://www.lawscot.org.uk/media/01hhjrlr/social-return-on-investment-in-legal-aid-technical-report.pdf [https://perma.cc/UP26-9NFV] (estimating a return of £11 for every £1 of legal assistance in housing cases, with 80% of that benefit accruing to the tenant and 20% to public services).

223. *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) (finding that, in a Massachusetts study, tenant-litigants represented by counsel achieved significantly more favorable monetary outcomes); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. POVERTY L. & POL'Y 453, 494 (2011) (finding that tenants represented by counsel were more likely to raise cognizable claims and more likely to receive payment from their landlords at the conclusion of the case, but not specifying whether such claims and payments were based on successful defense of breach of the implied warranty of habitability or some other claim).

224. *See* Summers, *supra* note 14, at 209 (finding that represented tenants who are entitled to rent abatements are at least nine times more likely to actually obtain rent abatements as compared with unrepresented tenants who are entitled to rent abatements); Carroll Seron, Martin Frankel, Gregg Van Ryzin & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in*

lack of success tenants historically have found when asserting habitability claims,[225] access to counsel increases the odds that a claim will be litigated successfully. However, attorneys cannot pay rent deposits for their clients;[226] implementation of greater access to counsel programs do little if tenants are prevented by economic restraints from asserting the cognizable claims that attorneys may litigate effectively. An economic barrier is particularly egregious given that counsel is typically assigned only to tenants at a certain level of household income,[227] who are statistically more likely to live in substandard conditions[228] and are less likely to be able to comply with rent deposit requirements.[229]

Rent deposits minimize the benefits of counsel in settlement negotiations, where tenants are prevented from anything approaching equal leverage. Landlords can offer any settlement they want when a tenant is barred from a trial to determine the merits of the parties' claims. Landlords and their attorneys can exploit this lack of leverage, refusing to engage in good faith settlement negotiations or barreling towards trial, knowing even a represented tenant-litigant is hamstrung, unable to raise a lawful, otherwise available defense to the nonpayment of rent allegation.

B. Rent Deposit Requirements Undermine Perceptions of Legitimacy

Eviction courts are designed to efficiently dispose of cases while prioritizing property rights over the need for shelter, privileging the accumulation of wealth by a largely white property-owning class over the human needs and rights of poor people of color who are disproportionately placed in a defensive posture in eviction proceedings.[230] Using Shaun Ossei-Owusu's framework, Kathryn Sabbeth compellingly argues that eviction courts can be considered kangaroo

New York City's Housing Court: Results of a Randomized Experiment, 35 L. & SOC'Y REV. 419, 426 (2001) (finding that 19% of represented tenants obtained rent abatements as compared with 3% of unrepresented tenants); *see also* Mosier & Soble, *supra* note 20, at 45; Birnbaum, Collins & Fusco, *supra* note 209, at 115.

225. *See* Super, *supra* note 2, at 109–10. *See generally* Summers, *supra* note 14.

226. Juliet M. Brodie & Larisa G. Bowman, *Lawyers Aren't Rent*, 75 STAN. L. REV. ONLINE 132, 141–42 (suggesting that, in an "increasingly financialized rental market," a reduction in eviction rates is likely to flow from increased investment of government and charitable funds towards rental assistance, in addition to an influx of tenant lawyers to assist tenants in obtaining rental assistance).

227. In New York City, tenants with household income at or below 200% of the Federal Poverty Guidelines (FPG) are eligible to receive access to legal representation in eviction proceedings. *See* NYC UA REPORT WINTER 2022, *supra* note 216, at 2. In 2024, 200% of FPG for a family of four in the 48 contiguous United States is a household income of $62,400.00 per year. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., 2024 POVERTY GUIDELINES: 48 CONTIGUOUS STATES (Jan. 2024), https://aspe.hhs.gov/sites/default/files/documents/7240229f28375f54435c5b83a3764cd1/detailed-guidelines-2024.pdf.

228. *See* HUD WORST CASE NEEDS, *supra* note 8, at 3.

229. Super, *supra* note 2, at 433.

230. *See* Engler, *Out of Sight*, *supra* note 157, at 82, 107; Engler, *And Justice for All*, *supra* note 157, at 2068.

courts, "that it is hard to reach a conclusion any different."[231] Professor Ossei-Owusu identifies kangaroo courts as courts that are "inferior, informal, and inequitable";[232] Professor Sabbeth places eviction courts squarely within this framework, outlining the eviction legal system's failure to attain the perception of legitimacy through its procedure and outcomes.[233] The existence of rent deposit requirements supports the eviction court's placement within the framework.[234]

First, eviction courts tend to be inferior in structure and quality as compared to traditional civil courts, "as a result of lower notice requirements, restrictions on consideration of defenses," including rent deposit requirements, and the "distortions created by the systemic mismatching of represented individuals against attorneys," resulting in outcomes that are not an accurate representation of the applicable law to the facts at issue.[235] Next, the informal nature of many eviction courts cuts against the eviction legal system's credibility. While tenants are often held to formal rules and standards of practice, and are reprimanded or punished for technical failures, landlords may not be held responsible for complying with evidentiary rules or for the burden of proving elements of their prima facie case.[236] Local legal culture dictates many eviction court protocols, both formal and informal, and judges hold a great deal of discretion over their individual interpretations of statutes.[237]

The rent deposit requirements and other restrictions on defenses and counterclaims also suggest a "jurisprudential embrace of informality,"[238] resulting less in a process resembling legal inquiry and more a commercial transaction, swiftly disposed of to best effectuate docket clearance.[239] Finally, eviction courts tend to be fundamentally inequitable, as the looser procedural protections lead to

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231. *See* Sabbeth, *supra* note 15, at 396 (citing Shaun Ossei-Owusu, *Kangaroo Courts*, 34 HARV. L. REV. F. 200 (2021)).

232. Ossei-Owusu, *supra* note 231, at 202.

233. Sabbeth, *supra* note 15, at 396–99.

234. *Id*. at 396–97 (noting that limits on the consideration of defenses, among other factors, contribute to the eviction legal system's inability to accurately apply the governing law to the facts of the case, of which rent deposit requirements are one such substantive limitation).

235. *Id.*

236. *Id.* at 397.

237. Kristian Hernandez & Cristian ArguetaSoto, *Local Judges Decide Fate of Many Renters Facing Eviction*, FORT WORTH REP. (Aug. 13, 2021, 6:00 AM), https://fortworthreport.org/2021/08/13/local-judges-decide-fate-of-many-renters-facing-eviction/ [https://perma.cc/ED95-MBJ4] (describing local variation in applicability of federal eviction moratorium).

238. Ossei-Owusu, *supra* note 231, at 209.

239. Sudeall & Pascuitti, *supra* note 45, at 1368 ("Given the efficiency with which eviction cases are often handled, some have described eviction court not as a 'court' at all, but instead merely a 'process' or assembly line."); Emily Jane Goodman, *Housing Court: The New York Tenant Experience*, 17 URB. L. ANN. 57, 57 (1979) (quoting a former judge, "it is a court which seeks to arrange a settlement between tenant and owner as soon as possible. . . . The court seeks informality and rehabilitation. It aims to promote conciliation and compromise rather than confrontation, and verily, removal of violations whether of record or no is the name of the game, not imposing penalties.").

a strong likelihood of unfair legal outcomes. Civil courts have long produced and upheld outcomes that are steeped in race- and class-based biases.[240] Rent deposit requirements are illustrative of the eviction legal system's routine perpetuation of housing insecurity and negative outcomes for poor people and primarily those of color.[241]

Rent deposit requirements fit squarely within the kangaroo court paradigm.[242] By placing an economic barrier on the presentation of a defense, rent deposit requirements indicate to litigants that eviction courts are not a forum for all claims to be heard.[243] The requirements help maintain the culture of subordination in eviction courts, and reify the eviction court's social order, by allowing courts to disregard a tenant's lawful claim, avoiding a lengthy trial and, potentially, a less favorable outcome for the landlord.

Just as the poll tax functioned as a cumulative fee lacking rigorous oversight to ensure accounting accuracy,[244] rent deposit requirements are a minimally-examined bar based on the unilateral assertion of one party against another.[245] With the application of a rent deposit order, a fact in dispute becomes a judgment

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240. *See* Brito, Sabbeth, Steinberg & Sudeall, *supra* note 155, at 1257 ("The state's use of the civil legal system as a tool to legitimize and enforce racial exploitation is a phenomenon as old as this nation. Civil courts repeatedly legitimized slavery, an openly violent institution that ensured a racialized subordinate workforce."); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1723–24 (1993) (discussing early American civil courts that "established whiteness as a prerequisite to the exercise of enforceable property rights.").

241. *See supra* note 9; *see also* Ethan Duran, *Milwaukee County Among Top Five Counties Across Nation for Using Federal Relief Dollars*, WISC. L.J. (June 23, 2023), https://wislawjournal.com/2023/06/23/milwaukee-county-among-top-five-counties-across-nation-for-using-federal-relief-dollars/ [https://perma.cc/W8XS-A8R9], (noting that the 10 Milwaukee, Wisconsin neighborhoods with the highest eviction rates have majority African American populations and 40% of the population lives below the poverty line).

242. Professor Ossei-Owusu notes the significance of identifying a legal forum as a kangaroo court—that this phrase is fraught and destabilizing, and that kangaroo courts "[h]istorically . . . served as preludes to racial violence." Ossei-Owusu, *supra* note 231, at 201. I reference his work, and the analysis conducted by Professor Sabbeth, not to de-legitimize eviction courts, but to argue that the eviction legal system de-legitimizes itself through the rent deposit requirement, creating a unilateral process through a wealth-based exclusion to achieve inherently inequitable outcomes. To the extent that this argument finds purchase, eviction courts have already become undemocratic institutions.

243. In communities overrepresented in the eviction legal system, it is commonly understood that outcomes are predetermined. *See* Judith Fox, *The High Cost of Eviction: Struggling to Contain a Growing Problem*, 41 MITCHELL HAMLINE L. J. PUB. POL'Y & PRAC. 167, 191 (2020) ("Whenever I ask a tenant why he or she failed to appear at their eviction hearing, I get one of two answers: (1) I did not know about it, or (2) it would not matter because everyone gets evicted.").

244. *See supra* note 115 and accompanying text.

245. *See* Dameron v. Capitol House Assocs. Ltd., 431 A.2d 580, 584–85 (D.C. 1981) (requiring rent striking tenants to deposit the full amount of rent alleged to be owed, despite the tenants' contention that the rent amount was unlawful, following a limited, non-evidentiary hearing). *See* Franzese, *supra* note 12, at 15–18 (suggesting that over time, courts have moved away from judicial discretion and fact-specific analyses while setting rent deposit amounts, and instead, tend to order tenants to deposit the full rent amount alleged to be owed without inquiry.).

not because a fact finder adopts a party's theory of the case, but because one party was unable to pay enough money to present their case. Just as the poll tax stripped primarily Black voters of the right to vote, rent deposit orders create a right without a remedy. Rent deposit requirements result in illusory rights and deeply inequitable outcomes, and they contribute to the perception of illegitimacy that pervades eviction courts.

IV.
POTENTIAL REFORMS

Effective reforms are those that will alter the structures that generate inequality and inequity in access and participation, rather than creating new features that only expand the eviction legal system. Reforms that assist tenant-litigants with meeting and satisfying rent deposit requirements by, for example, providing funding for the deposit, uphold an exclusionary, inequitable, and inherently undemocratic process.[246] Instead, our focus must orient around reforms with the interlocking goal of allowing all litigants free and fair access to assert and defend against claims.

Part IV briefly considers potential reforms. Removing rent deposit requirements completely is the only way to move towards a system that provides fair and full access to participation to all litigants, regardless of wealth or procedural posture. Courts can adopt further reforms that will allow tenants greater ability to defend against evictions while sparing the court the time and expense of seeing every case through to trial.

A. Remove Rent Deposit Requirements

Removing and prohibiting rent deposit requirements from state statutes and court rules will provide more meaningful and equitable court access for tenant-litigants. By allowing tenant-litigants to freely assert a defense, courts would offer a forum truly open to diverse claims and would be better equipped to dispose of cases in a manner that is respectful of the rights and humanity of all parties. The call for a free and open court envisions a process that gives poor people an opportunity to be heard within a space that is used primarily as a debt collection agency, providing an opportunity to defend against claims and obtain redress for violations of law that have resulted in harm.

Funding rent deposits or allowing policies that require current rent deposits instead of arrears deposits fail to address the underlying tension—that access to the court remains, like a poll tax, predicated on an ability to pay. While funding

246. Rent deposit order funds may be proposed as a workaround to the substantive barrier presented by rent deposit requirements: a fund would provide a tenant with the financial means to deposit the required money with the court, allowing the tenant to litigate their warranty of habitability defense. While such a fund would allow individual tenants to pursue an otherwise unavailable claim, it is not a reform designed to dismantle a substantive barrier, but instead allows an alternative funding source to reinforce its use.

poll taxes or limiting them to a single fee per election may have seemed a productive means with which to expand access to the vote, it would have been impossible to implement with meaningful impact and without reinforcing the existence of that economic restraint. Rent deposit orders similarly require a more expansive solution than simply funding them.

Other reforms, such as active judging, could adjust the culture of eviction courts, while allowing courts some control over dockets and procedural positioning, and would be a step toward more equitable processes and outcomes.[247] If tenants are still constrained by rent deposit requirements, other reforms have little impact. Removing these requirements will allow for greater tenant participation in the eviction legal system, and it would more broadly break down the structures that oppress residents of rental housing, providing for a court system that is more open to the tenant experience.

Removing rent deposit requirements can be achieved through legislation or through direct legal challenge. The most straightforward means of addressing and repairing the harm caused by rent deposit requirements is legislative: states should enact legislation that bans the use of rent deposit requirements as a barrier to the assertion of a warranty of habitability claim.[248]

Tenants and their advocates may consider using the theory outlined in Justice Douglas's dissent in *Williams v. Shaffer* to argue that rent deposit requirements represent an economic restraint on access to the court to raise a defense that primarily deprives poor people and people of color from accessing the court.[249] Building on the reasoning provided by the court in *Lucky Ned*, tenants may assert that the pre-payment of a possible judgment amount pre-supposes a finding of fact, impermissibly depriving tenants of access to the court based on an alleged debt that has not been proved owed.[250]

While studies cast some doubt on the effectiveness of the warranty of habitability in use,[251] much of this data reflects the overall deficiency in eviction court processes: namely, the prioritization of efficiency and property rights above health and safety.[252] That judges rarely take the time to review the record of

247. *See* Ault Phillips & Miller, *supra* note 27, at 37 (offering suggestions for judicial engagement to ensure greater access to justice, including authorizing and encouraging judges to actively assess the existence of a defense and to "lead a tenant through the essential elements of a habitability-based defense"; providing trainings for judges on habitability claims and engagement with *pro se* litigants; and the development of a judicial culture that maintains accountability for landlords.) *See also infra* note 264 (discussing the elements of active judging).

248. A comprehensive ban on rent deposit requirements would disallow their use in the context of eviction proceedings as well as affirmative litigation filed by tenants in pursuit of a warranty of habitability claim. *See supra* note 68.

249. *See* Williams v. Shaffer, 385 U.S. 1037, 1039 (1967) (Douglas, J., dissenting from denial of certiorari).

250. *See* Lucky Ned Pepper's, Ltd. v. Columbia Park & Recreation Ass'n, 494 A.2d 947, 951 (Md. Ct. Spec. App. 1985).

251. *See* Summers, *supra* note 14, at 203–04.

252. *See supra* Part II.A.

substandard conditions and code enforcement violations that exist within a dwelling during allocution of a settlement agreement may indicate that judges feel they lack the time to do so and that a more thorough inquiry ought to be conducted during a full evidentiary hearing on the issues.[253] In these courts, tenants lose their cases before they even begin.

B. Open the Court to Tenant Participation

Rent deposit requirements are justified through the continued dominance of the dual interests of eviction court: the preservation of lessors' property rights and efficient docket clearance.[254] Ridding the eviction legal system of rent deposit requirements will not on its own dismantle these interests; the work of disentangling the civil courts from restraints of racial capitalism requires broad solutions, among them the abolition of wealth-based conditions.[255] While working towards the greater goal of a more equitable legal system, it is possible to address the court's interest in judicial efficiency and docket clearance while providing substantially greater access to tenant-litigants.

First, eviction courts can adopt permissive discovery rules for litigants in a defensive posture. In an effort to "streamline" litigation, some states, including Texas, Pennsylvania, and Michigan, prohibit discovery in eviction cases.[256] Some of these bans represent an attempt to shield under-resourced, unrepresented litigants from the cost and complexity of the discovery process.[257] Some states permit discovery in eviction courts in very limited instances. In New York, for instance, discovery is not prohibited in eviction proceedings, but is not typically available.[258] Disclosure cannot be conducted as a matter of right but is available to a party upon a showing of "ample need" to establish a specific defense or counterclaim.[259]

There is a "sweet spot" for discovery reform, with disclosure requirements imposed only on sophisticated, better-resourced plaintiffs who are more likely to

253. *See* Engler, *And Justice for All*, *supra* note 157, at 2019–20 (noting that judges in "poor people's courts" regularly approve settlements with minimal judicial oversight, and regularly "encourage and pressure" litigants, many of whom are unrepresented, to settle their cases).

254. *See supra* Part II.A.

255. *See, e.g.*, Marika Dias, *Paradox and Possibility: Movement Lawyering During the COVID-19 Housing Crisis*, 24 CUNY L. REV. 173, 206 (2021).

256. Diego Zambrano, *Missing Discovery in Lawyerless Courts,* 122 COLUM. L. REV. 1423, 1426 (2022).

257. *Id.* at 1427 (citing Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 797 n.309 (2015)).

258. N.Y. REAL PROP. ACTS. LAW § 745 (McKinney 2024), practice cmts.

259. N.Y. Univ. v. Farkas, 468 N.Y.S.2d 808, 811–12 (Civ. Ct. 1983) (balancing the need for disclosure in cases involving a complex claim with the purpose of an expedited, summary proceeding, and finding that ample need for disclosure exists where "the requested disclosure is carefully tailored and is likely to clarify the disputed facts," prejudice can be limited, and "the court, in its supervisory role can structure discovery so that *pro se* tenants, in particular, will be protected and not adversely affected by a landlord's discovery requests").

have access to relevant information in cases that are more complex or where serious wrongs are alleged.[260] Allowing more permissive discovery would allow the parties a greater opportunity to develop more meaningful defenses and claims, especially related to more nuanced areas of housing law, such as the implied warranty of habitability, encouraging settlement and allowing the parities to avoid trial through dispositive motion practice. In this way, discovery would allow courts to remove cases from their calendar, freeing up space for trials of only the most contentious cases involving disputes of fact. Similar to the rent deposit requirements, discovery reform will provide a path to freeing a court's docket from the constraints of multiple trials per day, allowing parties to meaningfully address outstanding issues while allowing judges a measure of control and focus over their dockets in the high-volume eviction court setting.

In addition to liberalizing discovery rules, eviction courts can permit judges to play a more active role in developing an unrepresented tenant-litigant's case to ensure that all claims are granted meaningful time before the court. Access to justice advocates suggest inquisitorial procedures[261] through active judging and narrative form testimony for pro se tenants.[262] Active judging would allow judges to develop the tenant's "narrative so that its legal adequacy can be articulated and evaluated"[263] by helping the unrepresented tenant-litigant to identify and outline relevant facts, claims, and defenses; advising the unrepresented tenant-litigant about court procedures and providing modifications to allow a non-attorney to understand and participate in the proceeding; providing information about evidentiary rules and helping the unrepresented tenant-litigant to identify and introduce relevant evidence.[264] That these opportunities are regularly granted to

260. Zambrano, *supra* note 256, at 1458–61.

261. *See, e.g.*, Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1060 (2017) (defining inquisitorial procedures as a system where "the judge controls investigation and fact finding, and the parties' role in producing evidence and enforcing relief is minimized").

262. Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L., POL'Y, & ETHICS J. 659, 682–85 (2006) (identifying factors that contribute to imbalances of power between represented and unrepresented litigants and offering opportunities for mitigation, which include allowing a *pro se* litigant to define legal and factual terms related to their claim and facilitating the unrepresented party's presentation of their case by assisting with structuring and developing narrative form testimony, identifying relevant time periods, emphasizing facts related to the legal theory at issue, and responding to the represented party's claims).

263. *Id.* at 684.

264. Sudeall & Pasciutti, *supra* note 45, at 1414 (citing Engler, *And Justice for All*, *supra* note 157, at 2028–29); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 655 (2017) (noting that the "three dimensions of active judging" are "(1) adjusting procedures; (2) explaining law and process; and (3) eliciting information").

both unrepresented and represented landlords alike demonstrate a low barrier to structurally incorporating these practices into eviction court procedures.[265]

CONCLUSION

For the poor tenants most likely to encounter them, rent deposit requirements represent a significant barrier to assertion and presentation of a defense related to a breach of the warranty of habitability. In predicating the ability to raise a defense available at law on the ability to acquire, save, and deposit a substantial sum, the amount of which is based entirely on the allegation of the adverse party, rent deposit orders act as an economic restraint on a tenant's ability to participate in a court case filed against them. When courts adopt a fact in dispute—the alleged rental arrears—as the ultimate outcome of a case without a hearing or evidence, it results in the eviction of tenants on the basis of a debt that they have not been proved to owe. Tenants are effectively cast out of the court system if they are unable to provide insurance for a landlord's ultimate claim.

In placing an economic restraint on a democratic institution, rent deposit requirements are functionally similar to poll taxes. Poll taxes and rent deposit requirements discriminate on the basis of wealth in order to achieve a related goal: for the poll tax, that goal was the explicit exclusion of Black people from the vote, and for rent deposit requirements, it is the need to maintain efficiency and the supremacy of the rights of property owners. Both rent deposit orders and poll taxes render rights associated with access to that institution illusory and undermine the legitimacy of the institutions they purport to uphold. While poll taxes allowed states to efficiently exclude voters deemed unworthy or undesirable within the political community, rent deposit requirements allow the eviction legal system to exclude tenant-litigants' claims from consideration, providing for unilateral presentation of the facts that necessarily favor property owners.

Courts that continue to prevent litigants from raising claims based on their inability to pay a deposit undermine the validity of their outcomes. This "pay-to-play" system is ill-suited to democratic society and should be abolished. Instead, courts should adopt procedures, such as liberalized discovery rules and active judging protocols, that will allow them to manage high volume dockets while granting due consideration to all viable claims. Ultimately, jurisdictions that fail to remove rent deposit requirements, and thus fail to sufficiently disentangle the ability to the ability to raise a lawful defense from the ability to acquire, save, and deposit wealth, run the risk of comparison to historic actors who shirked a duty to address invidiously discriminatory policies like the poll tax.

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265. *See supra* Part III.A; Super, *supra* note 2, at 436 (identifying the support that unrepresented landlords receive from judges, court staff, and outside legal resources in order to make their case, and concluding that this support may result in greater success for landlords without representation).