HOW BAD IS BAD ENOUGH? GATEKEEPING A TENANT'S RIGHT TO 100% HABITABLE HOUSING

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ABSTRACT

Tenants seeking to defend against eviction and to correct substandard conditions in their homes are hamstrung. Even in jurisdictions with

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"progressive housing policies," there are steep doctrinal hurdles placed in front of tenants who try to establish a breach of the warranty of habitability and to defend against eviction. Such obstacles are baked directly into the judicial system and the standards that the judiciary applies in practice. While there are many systemic barriers to tenants vindicating themselves of the right to a fully habitable home, the most perniciously overlooked offender is a "substantiality" standard which trial court judges use to gatekeep whether code violations and other defects actually entitle a tenant to relief. For the great majority of tenants —the majority of whom are low income, of color, and without representation, an attempt to prove a substantial breach of the warranty of habitability is a high-risk bet. While large and institutional landlords bear the risk of some financial loss if tenants prove a breach of warranty at trial, tenants bear the risk of displacement and homelessness. Even tenants with representation face deep uncertainty as to whether a judge will decide (or else will instruct a jury in a manner to allow a jury to find) that the clear defects in a tenant's home are "substantial enough" to warrant relief. This, in turn, creates undue pressure to settle an eviction case on landlord-friendly terms and to not vindicate a tenant's rights fully. Under a standard of substantiality, the judiciary itself reifies the power imbalance between landlords and tenants by pressuring the parties to settle and by ultimately deciding that conditions in tenants' homes are not "bad enough." This Article draws on the Author's experience as a practitioner in housing court to examine the substantiality standard, to explain how this standard provides a clear example of how landlord-tenant law nationwide works to stifle a tenant's right not to be evicted from less than fully habitable housing and ends by advocating for a reimagined standard which fully protects tenants and their rights.

[A] tenant may not excuse her obligation with mere reasonable efforts to pay rent. Nor may [a] landlord avoid his duty with mere reasonable efforts to provide a habitable dwelling. The contract between the parties, seen through the law's clarifying lens, requires such symmetry.

Former Chief Justice of the Massachusetts Supreme Judicial Court,
Paul Liacos[1]

1. Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 985 (Mass. 1979). This is a quote from former Chief Justice Paul Liacos, who penned the opinion of the Massachusetts Supreme Judicial Court in *Berman & Sons*. Puzzlingly, this is the same case that the Supreme Judicial Court cites in *Goreham v. Martins*, 147 N.E.3d 478 (Mass. 2020), four decades later to stand for the proposition that housing defects must be "substantial" for a tenant to recover under the warranty of habitability. It is precisely the judiciary's stark shift away from the historical doctrine underpinning the warranty of habitability, including the

I. INTRODUCTION

Consider a real-world scenario from Massachusetts:[2] A tenant, known monosyllabically for the purposes of this Article as "T," rents a home for 12 years at a monthly rental rate of $920. Over the years, T has paid a whopping $132,480 to her landlord. According to T, her individual unit and her building have experienced a number of problems: bad dryer-vent odors, leaky windows, faulty bathtub drainage, a torn linoleum floor, an ant infestation, a noisy refrigerator, cracks in her walls, and a leaky toilet. T made her landlord aware of these issues over the past several years. Yet, per T, the landlord never remedied any of these issues when notified.

During the most recent four months of the tenancy, T fell behind on rent, leaving $3,680 unpaid. T's landlord then sends her a notice to quit for non-payment of rent. After receiving notice of the eviction, T calls the local health authorities. A local health inspector visits T's home and verifies most of the problems that T had complained of over the years. The inspector finds that the conditions in T's home materially impair the health, safety, or well-being of anyone in the home. The health inspector then sends the landlord an order to correct the conditions. In spite of years of notice, the landlord proceeds to fix all the issues within a few weeks of receiving the order to correct. The landlord then proceeds with its eviction case. T counterclaims and defends by arguing a breach of the warranty of habitability for the years during which the substandard conditions existed, entitling her to a rent rebate and a defense to the landlord's eviction case.

Let us step back for a moment and consider the situation theoretically. The warranty of habitability promises a proportionate money-back guarantee if a tenant rents a home and a landlord does not fix known defects in the home.[3] In theory, the legal principle requiring a tenant's *full and complete* tender of rent should equate to an equivalent obligation on a

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effect of such on community displacement and public health, which this Article explores. This doctrinal shift serves as a case study into the nationwide standards governing tenants' claims to breaches of the warranty of habitability – specifically in jurisdictions with "progressive housing policies."

2. The scenario that follows is a rough approximation of the facts from the 2005 Massachusetts Appeals Court case, *Jablonski v. Casey*, 835 N.E.2d 615 (Mass. App. Ct. 2005).

3. *See infra* Part III (discussing the warranty in depth); *see, e.g.*, Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 845 (Mass. 1974) ("[T]he tenant may raise the landlord's breach of his warranty of habitability as a partial or complete defence to the landlord's claim for rent owed for the period when the dwelling was in uninhabitable condition and the landlord or his agent had written or oral notice of the defects. The tenant's claim or counterclaim for damages based on this breach would be the difference between the value of the dwelling as warranted (the rent agreed on may be evidence of this value) and the value of the dwelling as it exists in its defective condition.").

landlord to provide a home in a condition of *full and complete* habitability.[4] The law obligates tenants to pay 100% of their rent—if a tenant receives a 95% habitable home, the tenant should receive a 5% rebate.[5]

With this theory in mind, let us turn back to T's situation. For years, T paid her full rent, but the landlord did not provide her with a fully habitable home. In fact, T made her landlord aware of several substandard conditions, but the landlord failed to fix them. The landlord only remedied these conditions after the health authorities ordered it. So what percentage of a habitable home did T receive during the years before the landlord repaired the conditions? Perhaps T received a 95% habitable home? Perhaps 85%? 99%? Certainly, the home was not 100% habitable. Let us assume modestly that, with all conditions taken together, T received a 95% habitable home. Looking at the last six years of T's tenancy, the total contract value of renting the home was $66,240. Reducing that value by 5% over six years gives T a rebate of $3,312. T's landlord claims $3,680 in unpaid rent, but, with her rent rebate applied, T only owes $368. So, if T pays off the difference, T should defeat the eviction case.[6] This is how the case must turn out in the real world, right?

No—instead, the judiciary in the real world would deny T the opportunity to receive a rent rebate for the verified defects that she experienced in her home.[7] The court would then evict T from her home.[8] Rather than awarding T a basic rent rebate and the chance to defend against eviction, the law in a "progressive" jurisdiction like Massachusetts encourages trial courts to gatekeep T's recovery and to decide that the conditions in T's home were not "substantial" enough to warrant relief.[9]

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4. *Hemingway*, 293 N.E.2d at 846.

5. The method for calculating damages under warranty of habitability is the difference between the value of the property as warranted—i.e., often the contract price for the unit––and the value of the same property in its defective condition. *See, e.g.*, *id.* at 843–45 (laying out this theory of damages).

6. For example, under the Massachusetts rent withholding statute, the amount due to tenants by virtue of their counterclaims is subtracted from the amount due to the landlord, and tenants have an opportunity to pay off the difference to keep possession of their home. *See* MASS. GEN. LAWS ch. 239, § 8A (1965). For further discussion of the Massachusetts rent withholding law and similar laws in other jurisdictions with "progressive housing policies," *see infra* Parts III, IV.A.

7. *See Jablonski*, 835 N.E.2d at 618–19 (deciding that, despite evidence that the landlord had notice of a number of code violations which it only fixed after receiving a violation notice from the local health department, there was no violation of the warranty of habitability because the defects were not substantial).

8. *Id.* at 621.

9. The Massachusetts Appeals Court in *Jablonski* affirmed the judgment of the trial court denying the tenant's right to recover under a theory of breach of the warranty of habitability. *See id.* at 618 ("We have required a material and substantial breach of the

Somehow, in the mind of the judiciary, substantiality of the defects is the threshold consideration in spite of T *fully* paying tens of thousands of dollars in rent for several years and not receiving a *fully* habitable home in return.[10]

What is going on here? Why was T denied recovery? Even in jurisdictions with "progressive housing policies" like Massachusetts,[11] there are steep doctrinal hurdles placed in front of tenants who try to establish a breach of the warranty of habitability and to defend against eviction.[12] Such obstacles are baked directly into the judicial system and the standards that the judiciary applies in practice.[13] While there are many systemic barriers to tenants vindicating themselves of the right to a fully

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warranty, representing a significant defect in the property itself, in order to excuse the tenant's obligation to pay rent. For example, [a] dwelling afflicted with a substantial [housing] Code violation is not habitable. The existence of a material or substantial breach is a question of fact and must be determined in the circumstances and facts of each case.") *Id.* (citations omitted).

10. Approximately 15 years after *Jablonski*, the Massachusetts Supreme Judicial Court took the opportunity to affirm this standard. *See* Goreham v. Martins, 147 N.E.3d 478, 488–89 (Mass. 2020) ("[V]iewing the facts of this case in the light most favorable to the tenant, as a matter of law there was no breach of the warranty. Habitability is measured by minimum community standards, which are generally, though not exclusively, reflected in the sanitary and building codes. . . . Although violations of the codes may provide compelling evidence that a dwelling is not habitable, they do not establish per se breaches of the warranty of habitability. . . . The emphasis is on whether the premises are fit for human habitation, not merely on whether the landlord committed a code violation.") (citations omitted). Ultimately, "*the warranty of habitability applies only to substantial violations or significant defects.*" *Id.* at 489 (emphasis added).

11. This Article focuses specifically on the law of jurisdictions with "progressive housing policies"—all of which recognize some right to defend against eviction based on a violation of the warranty of habitability. *See generally infra* Part III. This Article defines jurisdictions with "progressive housing policies" as jurisdictions ranking highly on the "COVID-19 Housing Policy Scorecard" published by the Eviction Lab at Princeton University. *See generally COVID-19 Housing Policy Scorecard*, EVICTION LAB (June 30, 2021), https://evictionlab.org/covid-policy-scorecard [https://perma.cc/8KGU-42LD]. While an imperfect measure of "progressiveness" in the housing policy sphere, this scorecard provides a glimpse into those jurisdictions which, during the COVID-19 pandemic, undertook the broadest possible protections for tenants. For the purposes of this Article, the jurisdictions with a scorecard score of greater than three out of five are defined as those jurisdictions with "progressive housing policies." There are fifteen jurisdictions which satisfy this criterion: Washington, D.C., Nevada, Massachusetts, Delaware, Minnesota, Connecticut, Washington, New Hampshire, Colorado, Michigan, New York, Hawaii, Pennsylvania, Illinois, and Wisconsin.

12. *See infra* Part IV.A (discussing the "substantiality" standard in place for proving breached of warranty of habitability in Massachusetts and other jurisdictions with "progressive housing policies").

13. *See infra* Part IV.B (discussing the real world impact of the "substantiality" standard for courts finding breaches of the warranty of habitability).

habitable home,[14] the most perniciously overlooked offender is a "substantiality" standard which trial court judges use to gatekeep whether code violations and other defects actually entitle a tenant to relief.[15] For the great majority of tenants—the majority of whom are low income, people of color, and without representation, an attempt to prove a substantial breach of the warranty of habitability is a high-risk bet.[16] While large and institutional landlords bear the risk of some financial loss if tenants prove a breach of warranty at trial, tenants bear the risk of displacement and homelessness if they lose. Even tenants with representation face uncertainty as to whether a judge will decide (or else will instruct a jury in a manner to allow a jury to find) that the documented and known code violations in a home are "substantial enough" to warrant relief.[17] This, in turn, creates undue pressure to settle an eviction case on

14. *See, e.g.*, *infra* note 32 and accompanying text (discussing the push for right to counsel in eviction cases); *infra* note 96 and accompanying text (discussing the movement against "no cause" evictions). Legal scholarship has focused on a variety of areas for proposed reform, thus demonstrating the contemporary urgency to critically reexamine all areas of landlord-tenant law. *See generally* Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1 (2022); Matthew P. Main, *An Unqualified Prohibition of Self-Help Eviction: Providing A Right to Court Process for All Residential Occupants*, 43 CARDOZO L. REV. 2205 (2022); Maya Brennan, *A Framework for Effective and Strategic Eviction Prevention*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 37 (2020); Katelyn Polk, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW. J.L. & SOC. POL'Y 338 (2020); Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. POVERTY L. & POL'Y 1, 3 (2015); Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV 101 (2010).

15. Legal scholars have addressed—from various angles—the barriers that tenants face in exercising their right to a habitable home and to defend against eviction based on a breach of the warranty of habitability. *See generally* Nicole Summers, *The Limits of Good Law*, 87 U. CHI. L. REV. 145 (2020); Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239 (2020); Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. POVERTY L. & POL'Y 97 (2019); Paula A. Franzese, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U.L. REV. 1 (2016); Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793 (2013); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 391–98 (2011); Barbara L. Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992). The history of the discussion of the warranty of habitability among legal scholars is discussed further *passim*.

16. *See infra* notes 22–29 and accompanying text (discussing the disproportionate impact of substandard housing conditions and evictions on the health of communities of color).

17. While there is a right to a trial by jury in eviction cases in Massachusetts and in other jurisdictions, the vast majority of tenants do not assert this right in a timely manner

landlord-friendly terms and to *not* vindicate a tenant's rights fully.[18] Under a standard of substantiality, the judiciary itself reifies the power imbalance between landlords and tenants by pressuring the parties to settle and by ultimately deciding that conditions in tenants' homes are not "bad enough." Something needs to change.

This Article draws directly on the Author's experience as a practitioner in housing court to argue for the elimination of the substantiality standard. The law must mandate rent rebates and the opportunity to defend against eviction every time tenants present a court with credible evidence of non-trivial defects and non-isolated code violations in their home.[19] This could be realized with a reimagined standard under which a trial judge must only determine that defects in a home were known and beyond *de minimis* before awarding recovery. This standard would disrupt the broad discretion which trial judges currently use to pressure parties to settle and to gatekeep that which constitutes "bad enough" housing.[20] Tenants and their advocates deserve to know what to demand of landlords and to understand the clear risks (or rewards) associated with pressing for certain settlement terms or bringing a case to trial. Interpreting this standard in tandem with the housing code in those jurisdictions with a robust code makes transparent and predictable for all the specific conditions that justify a rent reduction and a defense to eviction. This standard brings certainty and security to tenants who already

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and thus proceed to a trial in front of a judge. *See, e.g.*, Adjartey v. Cent. Div. of Hous. Ct. Dep't, 120 N.E.3d 297, 322 (Mass. 2019) ("If a party wishes to have the matter heard by a jury, he or she must file a demand for a jury trial no later than the due date for the defendant's answer (the Monday following the entry date). . . . This deadline, however, is not clearly stated on the summons and complaint form or on the summary process answer form. An unrepresented tenant may therefore unknowingly miss the deadline to timely notify the court of his or her decision to exercise the constitutional right to trial by jury."). *See generally* Marilyn M. Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Minuscule Results: A Study of Detroit's Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8, 25 (1973) (finding that one tenant in thousands asserted the right to a jury in Michigan eviction cases in the 1970s). Even for those tenants proceeding to jury trials, the standard that a court uses when providing jury instructions may have a profound impact on the results of a trial, particularly where jurors (much like the judiciary) may not fully understand the law and thus gravitate toward an analysis of whether housing conditions really were "bad enough," unless instructed otherwise. *See generally* Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701 (2000) (discussing the manner in which jury instructions may generally bewilder layperson jurors).

18. *See infra* note 36 and accompanying text (discussing the unequal patterns demonstrated in settlement outcomes for tenants in housing court).

19. *See infra* Part V. (discussing in-depth the proposed solution to the issue of the substantiality standard).

20. *See id.*

risk retaliation for requesting repairs and who often defend against their eviction without reliable access to counsel. This standard also facilitates the ability of tenants to fight back collectively against their displacement and for improved housing conditions in their community. Ultimately, such a standard exalts the right to a safe, secure, and healthy home for all—in particular for the low-income communities of color who experience disproportionate harm under the current regime and who are on the front lines of enforcing public health in their housing.

Courts scrutinizing whether conditions are really "bad enough" must stop. Any home with beyond *de minimis* defects is not a fully habitable home. This is the issue explored herein.

II. PURPOSES

Fully habitable housing is a universal human right.[21] Housing conditions play an essential role in individual and community health.[22] Fully habitable housing is particularly important to families with young children because ensuring safe living conditions is an essential part of creating a safe environment for children to grow.[23]

However, despite the importance of eradicating uninhabitable housing, substandard housing conditions continue to plague the United States rental housing market.[24] Tenants struggle with enforcing their right

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21. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Art. 11(1) (Dec. 16, 1966).

22. *See generally* B. Cameron Webb & Dayna Bowen Matthew, *Housing: A Case for the Medicalization of Poverty*, 46 J.L. MED. & ETHICS 588 (2018); Megan Sandel & Matthew Desmond, *Investing in Housing for Health Improves Both Mission and Margin*, 318 J. AM. MED. ASS'N 2291 (2017); Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15 (2015); Julie Graves Krishnaswami and Nicholas Freudenberg, *A Selected Bibliography to Accompany a Conversation on Health and Law*, 12 N.Y. CITY L. REV. 55 (2008); Steven A. Schroeder, W*e Can Do Better - Improving the Health of the American People*, 357 NEW ENG. J. MED. 1221 (2007); James Krieger & Donna Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758 (2002); Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733, 733 (2002); *Leveraging the Health-Housing Nexus*, HUD OFF. OF POL'Y DEV. & RSCH (2016), https://www.huduser.gov/portal/periodicals/em/winter16/highlight1.html [https://perma.cc/K9XL-R86R].

23. *See, e.g.*, Rebekah Levine Coley, et al., *Relations Between Housing Characteristics and the Well-Being of Low-Income Children and Adolescents*, 49 DEVELOPMENTAL PSYCH. 1775, 1785 (2013) (discussing the empirical data showing the relationship between housing characteristics and health outcomes for low-income youth).

24. Statistics from the United States Census Bureau—which may be under-representative—demonstrate that over one in twenty American households experience inadequate housing. *See 2021 National Housing Quality – All Occupied Units*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/ahs/data/interactive/

to fully habitable housing, given that the risk of eviction (and the associated health impacts of displacement) pervade every interaction with the owners and managers of rental housing.[25] Even in a state with "progressive housing policies" like Massachusetts, housing conditions remain at the forefront of public and individual health concerns for renters.[26] The substandard condition of the housing stock is yet another area where inequality is rampant, thus further deepening health disparities, particularly for those who live in lower-income communities of color.[27] The fact that evictions also disproportionately impact these same communities further compounds the negative health outcomes associated with substandard conditions.[28] This ultimately stifles the ability of tenants to achieve long-term solutions to the issue of substandard housing conditions in their communities.[29] Fully habitable housing and preventing eviction from substandard housing when tenants assert their right to have it is therefore a crucial issue of racial and economic justice.

The warranty of habitability serves as the primary mechanism for tenants to enforce their right to live in fully habitable housing—functioning as both a defense against eviction and a tool for holding

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ahstablecreator.html?s_areas=00000&s_year=2021&s_tablename=TABLE5&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1 [https://perma.cc/898N-LFDP]. Due to patterns of residential segregation, those experiencing inadequate housing are disproportionately in racially and socially marginalized groups. *See* Abraham Gutman et al., *Health, Housing, and the Law*, 11 NE. U.L. REV. 251, 275 (2019) (discussing how residential segregation leads to unequal health outcomes for those groups who are socially, and thus residentially, marginalized).

25. *See* Hugo Vásquez-Vera et al., *The Threat Of Home Eviction and Its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199 (2017) (discussing the effects of eviction on unequal health outcomes for low-income and minority tenants); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. POVERTY L. & POL'Y 59 (2016) (discussing the same).

26. The Massachusetts Attorney General's Office has seen an unprecedented increase in the numbers of complaints about inadequate housing conditions in Massachusetts. *See* Abby Patkin, *AG: Housing complaints are through the roof in Massachusetts*, BOSTON.COM (Mar. 23, 2023), https://www.boston.com/real-estate/renting/2023/03/20/massachusetts-housing-complaints-renters-increase/ [https://perma.cc/ZY2Z-MLPR]. For further empirical evidence demonstrating the extent of poor housing conditions which currently exist in Massachusetts, *see, e.g.*, Evan Lemire et al., *Unequal Housing Conditions and Code Enforcement Contribute to Asthma Disparities in Boston, Massachusetts*, 41(4) HEALTH AFFS. 563 (2022).

27. *See* David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH 115 (2011).

28. *See* Peter Hepburn, Renee Louis, & Matthew Desmond, *Racial and Gender Disparities among Evicted Americans*, 27 SOCIO. SCI. 649 (2020); Shreya Rao et al., *Association of US County-Level Eviction Rates and All-Cause Mortality*, 38 J. GEN. INTERNAL MED. 1207 (2023).

29. *Id.*

landlords accountable for substandard conditions.[30] The failings and unreliability of enforcement by local boards of health are unfortunately par for the course.[31] Further, the impracticality of expecting tenants—the vast majority of whom are lower-income and unsophisticated in legal process—to pay lawyers or proceed *pro se* to bring successful lawsuits vindicating their right to code-compliant housing is also well-documented.[32]

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30. For a detailed discussion of the warranty of habitability across jurisdictions, *see infra* Part III.

31. *See, e.g.*, Lemire, *supra* note 26 (explaining the effects of inadequate code enforcement in Massachusetts); Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 838–39 (Mass. 1974) ("In 1960, the Massachusetts Department of Public Health . . . adopted art. II of the State Sanitary Code which established minimum standards of fitness for human habitation for all housing in the Commonwealth. However, this initial legislative and administrative response to the growing housing crisis had little effect because the public agencies, which were totally responsible for the enforcement of the State Sanitary and housing codes, lacked the resources necessary to police the entire housing sector."). *See generally* Michael Weinberg, *Strategic Housing Code Enforcement: A Multidisciplinary Approach to Improving Habitability*, 29 GEO. J. POVERTY L. & POL'Y 73, 74 (2021) (using Washington D.C. as an example to "explore[] how modern housing code enforcement should be reformed to accomplish the broader goal of raising the overall standard of housing"); James Horner, *Code Dodgers: Landlord Use of LLCs and Housing Code Enforcement*, 37 YALE L. & POL'Y REV. 647 (2019) (exploring further the limits on the effectiveness of local housing code enforcement efforts in achieving habitable housing conditions); Shaun Yancey, *Turning a Blind Eye: The Effect of a Lack of Comprehensive housing codes in the Rural South*, 3 S. REG'L BLACK L. STUDENTS ASS'N L.J. 99 (2009) (exploring in-depth the problem of inadequate housing code enforcement in the Southern United States).

32. Firstly, the disparity between the ability of tenants and that of their landlords to access counsel in eviction cases is astonishing. Nationwide, only about 3% of tenants are represented compared to 81% of landlords. *See*, *Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention*, NAT'L COAL. FOR CIV. RIGHT TO COUNS. (Sept. 23, 2023), http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_.pdf [https://perma.cc/7UBS-NNQW]. In Massachusetts, for example, only about 8% of tenants are represented, as opposed to 78% of landlords. *See Additional Departmental Statistics,* MASS. HOUS. CT. DEP'T (2019), https://www.mass.gov/doc/2019-housing-court-self-represented-represented-litigants-by-court-location/download [https://perma.cc/DQ9Q-VLF3]. This enormous disparity in representation has led to a nationwide push for the right to counsel for low-income tenants in eviction cases. *See* Maria Roumiantseva, *A Nationwide Movement: The Right to Counsel for Tenants Facing Eviction Proceedings*, 52 SETON HALL L. REV. 1351, 1352 (2022); Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63, 66 (2020). Without access to reliable counsel, tenants' chances of succeeding in affirmative lawsuits to vindicate their rights to fully habitable housing are slim to none. Tenants walking into housing court are already in an environment marred with obstacles. *Compare* Adjartey v. Cent. Div. of Hous. Ct. Dep't, 120 N.E.3d 297, 306–07 (Mass. 2019) ("The challenges inherent in navigating a complex and fast-moving process are compounded for those individuals who face summary process eviction without the aid and expertise of an attorney. . . . The result, in most cases, is that the landlord

The warranty of habitability and a defense to eviction based on substandard conditions remains the primary mechanism by which tenants in many jurisdictions may obtain redress and repairs for substandard conditions in their homes without facing displacement. Yet proving violations of the warranty and defending against eviction is a path marred with obstacles.[33] Not only do several jurisdictions entirely disavow a defense to eviction based on a breach of the warranty of habitability, but the conditions precedent placed on tenants defending against eviction on the basis of substandard conditions are also a significant barrier in many jurisdictions nationwide.[34] Fortunately, many tenants live in jurisdictions with "progressive housing policies" and without onerous prerequisites to raising substandard conditions as a defense to eviction.[35] Even then, "progressive housing policies" on paper are currently not enough to consistently enable tenants to mount a successful defense to eviction based on the substandard conditions in their homes.[36] Even zealous and

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has an attorney who understands how to navigate the eviction process and the tenant does not.") *with* Dacey v. Burgess, 202 N.E.3d 1172, 1178 (Mass. 2023) (upholding a decision by a trial court to enforce – without the need on the landlord's part to first file an eviction case – a disabled tenant's agreement to move out of his home, which was entered into *not* as part of an eviction case but instead as part of a "mediation" during the tenant's own *pro se* code enforcement case).

33. *See* Moiser & Soble, *supra* note 17 (showcasing legal scholarship on the barriers that tenants face in asserting their rights under the warranty).

34. *See generally infra* Part III (discussing generally the variations in the warranty across jurisdictions); Campbell, *supra* note 15 (discussing the barriers created by courts imposing landlord protective orders in cases in which tenants assert a defense to eviction based on the warranty of habitability); Super, *supra* note 15 (discussing the significant barriers created by courts requiring rent escrow in the same types of cases). *Cf.* Summers, *supra* note 15 (warning that it is misguided to focus only on how "onerous" a jurisdiction's substantive prerequisites are for proving a breach of warranty, due to an unexplained operationalization gap between tenants with apparently meritorious claims and their ability to successfully recover under the warranty of habitability despite "good law" on paper, like in New York).

35. *See generally infra* Part IV.A (discussing the relevant standards in other jurisdictions with "progressive housing policies"). Massachusetts is an example of a jurisdiction that requires, among other relatively minor prerequisites, that tenants simply show that their landlords had notice of defects before they were behind on rent. *See* MASS. GEN. LAWS ch. 239, § 8A (1965). Other jurisdictions with "progressive housing policies," like New York, also have similarly relaxed prerequisites to a tenant's defense to eviction based on the warranty of habitability. *See* Summers, *supra* note 15.

36. Empirical scholarship by Professor Nicole Summers has demonstrated that tenants are often unable to fully enforce their rights under the warranty of habitability even when they have a meritorious claims and other factors, such as access to counsel and relatively robust landlord tenant-laws, weigh in their favor. *See* Summers, *supra* note 15 (using empirical data to demonstrate that there is still an operationalization gap between tenants with meritorious claims to substandard conditions and those that obtain recovery for those claims, even in New York City when there is a database of code violations available to the

aggressive representation is not enough in-and-of-itself to protect tenants who confront a judiciary focused on tightly gatekeeping their defenses to eviction.[37]

It is, therefore, high time to take a hard look at the standards governing the warranty of habitability and to reimagine what it may be in a manner which puts tenants, their health, families, and homes first.

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trial judge, more robust access to counsel, and lower substantive barriers to satisfy the rent withholding laws). To provide context to the power differentials at play in housing court which may contribute to the tenants underutilizing the warranty of habitability, further work by Professor Summers demonstrates that the typical eviction case results in a very large proportion of tenants actually ending up in "probation" agreements with their landlords—in an attempt to preserve their housing and presumably in a manner which does not fully vindicate their right to a habitable home. *See* Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847 (2023) (demonstrating how of one third of housing court cases in Massachusetts are resolved through a probationary agreement of the parties, rather than through litigation of the case to trial, often without regard to the tenant's potential defenses to the case).

37. Professor Summers' work has supported the theory that access to more reliable counsel improves outcomes for tenants enforcing their rights. *See* Summers, *supra* note 15, at 214 ("[The findings herein] strongly support[] providing increased access to counsel as one way to improve usage of the claim"). However, access to counsel, even according to Professor Summers, is not enough in and of itself. *See id.* ("Yet the findings should also sober expectations that a right to counsel will eliminate the warranty of habitability operationalization gap."). The lessons of empirical studies by Professor Jim Greiner provide useful insight and point to some models of tenant representation as being more effective than others, even when tenants receive broad access to representation. *See* D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Sept. 1, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078 [https://perma.cc/Z8L5-V9UB] (finding generally a significant outcome gap between "facilitative" versus "assertive"/"confrontational" models of legal representation, with the latter obtaining far greater results for tenants). *See generally* D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 919 (2013) (referencing the findings of the aforementioned unpublished study). Professor Greiner has thus indicated that zealous and aggressive advocacy for tenants is needed to overcome the power differentials at play and to fully vindicate tenants' rights. However, even zealous counsel is hamstrung if the judiciary can freely gatekeep a tenants' rights under the warranty of habitability by finding that defects in their homes are almost never substantial enough to satisfy the standard. If winning at trial ultimately depends on the capricious whims of a trial court judge who has a vested interest in pressuring tenants to settle their cases through agreements with their landlords, then no amount of access to aggressive representation or "good law" on paper will reliably prevent eviction from substandard housing. *See infra* Part IV.

III. THE BACKGROUND: THE WARRANTY OF HABITABILITY, RENT WITHHOLDING LAW, AND THE HOUSING CODE IN MASSACHUSETTS AND OTHER JURISDICTIONS WITH "PROGRESSIVE HOUSING POLICIES"

Legal scholars have spilled much ink discussing the warranty of habitability generally.[38] The earliest discussion occurred decades ago during a period of significant change to landlord-tenant law when many jurisdictions adopted the warranty by common law or statute.[39] Over time once the warranty of habitability caught wind, nearly every state in the nation adopted some form of the warranty of habitability—whether judicially or through statute.[40] It was, in fact, the D.C. Circuit that decided the seminal case in the nation, *Javins v. First National Realty Corporation*, in 1970 which spurred the adoption of the warranty of habitability nationwide.[41]

Out of this wave of progressive change in landlord-tenant relations came the emergence of the warranty of habitability as a creature of common law in Massachusetts in the 1973 case, *Boston Housing Authority v. Hemingway*.[42] The warranty emerged in Massachusetts at a time when state courts and legislatures nationwide adopted the warranty; the reasoning and analysis of courts in other jurisdictions clearly influenced the Massachusetts Supreme Judicial Court ("SJC").[43] Like many other

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38. *See generally supra* notes 14–15 and accompanying text.

39. *See, e.g.*, Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975); Neil K. Komesar, R*eturn to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement*, 82 YALE L.J. 1175 (1973); William E. Marshall, *Remedies of the Indigent Tenant in Substandard Housing-Past, Present, Future*, 6 WAKE FOREST INTRAMURAL L. REV. 119 (1970); John L. Zenor, *Judicial Expansion of the Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1970).

40. *See* ALICE NOBLE-ALLGIRE, RESEARCH MEMORANDUM TO MEMBERS OF THE URLTA DRAFTING COMMITTEE REGARDING 50 STATE SURVEY OF THE WARRANTY OF HABITABILITY (Feb. 12, 2012) (on file with NHLP) https://www.nhlp.org/wp-content/uploads/Research-Memo-re-50-State-Survey-of-the-Warranty-of-Habitability.pdf [https://perma.cc/ZE3Q-EYQT].

41. *See* Javins v. First Nat'l. Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); *see generally* Alan M. Weinberger, *Up from Javins: A 50-Year Retrospective on the Implied Warranty of Habitability*, 64 ST. LOUIS U. L.J. 443, 463–66 (2020) (discussing in-depth the *Javins* case and its profound impact on landlord-tenant law).

42. *See* Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831 (Mass. 1974).

43. The Massachusetts SJC in *Boston Hous. Auth v. Hemingway* cited directly to decisions in Washington D.C., California, Hawaii, Illinois, New Hampshire, New Jersey, New York, and Wisconsin. *See Hemingway*, 293 N.E.2d at 842 n.12 (citing *Javins*, 428 F.2d 1071; Hinson v. Delis, 102 Cal.Rptr. 661 (Cal. Ct. App. 1972); Lemle v. Breeden, 462 P.2d 470 (Haw. 1969); Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972); Kline v. Burns, 276 A.2d 248 (N.H. 1971); Marini v. Ireland, 265 A.2d 526 (N.J. 1970); Morbeth

jurisdictions around that time, the Massachusetts SJC responded to the steps the state legislature had taken in rental housing reform by establishing the common law warranty of habitability.[44]

To date, the concept of the warranty of habitability remains the legal theory at the core of Massachusetts tenants' claims to rent abatement and eviction defense, as is true for tenants nationwide.[45] Notably, the warranty itself does not allow Massachusetts tenants the legal right to defend against eviction for unresolved bad conditions in their home; the rent withholding statute does.[46] The rent withholding law integrates the warranty of habitability by giving tenants who are able to show a violation of the warranty—and meet a few more basic requirements—the opportunity to defend against their eviction.[47] Further, the warranty itself does not set the

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Realty Corp. v. Rosenshine, 323 N.Y.S.2d 363 (N.Y. Civ. Ct. 1971); Pines v. Perssion, 111 N.W.2d 409 (Wis. 1961)).

44. *See Hemingway*, 293 N.E.2d at 383–84.

45. Massachusetts tenants may also claim that substandard conditions existed to such an extent and that their landlord was so negligent in addressing them that the conditions breached their quiet enjoyment. *See* MASS. GEN. LAW ch. 186, § 14 (1950). A tenant dealing with bad conditions may further claim that the landlord committed an unfair and deceptive practice in violation of the Consumer Protection Act, MASS. GEN. LAW ch. 93A (1967). That said, actual damages under both the Consumer Protection Act and the statutory covenant of quiet enjoyment mirror the actual damages available for rent reduction under breach of the warranty of habitability (holding aside damages for property damage, emotional distress, and attorneys' fees).

46. The Massachusetts "rent withholding law" is found at MASS. GEN. LAW ch. 239, § 8A (1965). However, calling it the "rent withholding law" is a bit of a misnomer. *See* Davis v. Comerford, 137 N.E.3d 341, 350 (Mass. 2019) ("[The fifth paragraph of MASS. GEN. LAW ch. 239, § 8A (1965)] is the so-called rent withholding statute. It was originally enacted to provide a defense against eviction to a tenant who was not paying all or part of the rent due to uninhabitable premises. The Legislature has amended the statute, however, to 'increase the availability of counterclaims to tenants.' Section 8A now permits a tenant to raise '[a]ny and all counterclaims … to offset the rent' so long as they relate to the rental or tenancy." (alteration in original) (citations omitted)). Historically, tenants were only able to invoke this law if they could prove that they fell behind on rent due to an express desire in order to cause their landlord to make repairs and after following specific procedures to withhold rent. In its modern form, the 'rent withholding law' allows tenants to defend against eviction for non-payment—and also terminations 'without cause'—without having to prove that they ever intended to withhold rent to obtain repairs nor without having to escrow the unpaid rent *See generally* Rosemary Smith, *Locked Out: The Hidden Threat of Claim Preclusion for Tenants in Summary Process*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 1, 10 (2010).

47. Importantly, Massachusetts, like some other jurisdictions, does not require that tenants show that they were intentionally withholding rent to defend against eviction under the 'rent withholding' law. *Accord* Super, *supra* note 15, at 412–13 ("Impoverished tenants raising the warranty defensively after falling behind on their rent involuntarily are pivotal to the success of the warranty of habitability. This aligns tenants' incentives well with the new regime's housing quality aims: unlike the case of tenants contemplating deliberate withholding, involuntary defendants in the worst housing presumably have the greatest

minimum standards for fitness for human habitation in Massachusetts; a separate statewide housing code does.[48] The housing code outlines the procedures by which tenants may request inspections by local health inspectors to assess the condition of their home, the conduct of those inspections (including the documentation requirements), and the enforcement mechanisms by which the local health inspectors may seek compliance.[49] Even then, the housing code itself also does not create a private right to seek damages; instead, the warranty of habitability—and its integration into other laws intended to protect tenants—creates the private right of action for damages.[50] The schema for defending against eviction is complex, but—as in many jurisdictions—the warranty of habitability remains at its core.[51]

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chances of success. And as involuntary defendants likely are poorer as a group than deliberate rent withholders, their stronger incentives to raise the warranty comport with the reform's redistributive and humanitarian goals."); Martinez, *supra* note 15, at 272 ("[R]eforms must focus on helping tenants facing eviction for unintentional nonpayment of rent assert this important right").

48. The 'Minimum Standards of Fitness for Human Habitation' are found in regulations promulgated by the Massachusetts Department of Public Health, pursuant to authority from MASS. GEN. LAW ch. 111, §§ 3, 127A. These regulations are known as Chapter II of the State Sanitary Code. *See* 105 MASS. CODE REGS. 410 (2023). This code was amended and fully updated via regulations which became effective on May 12, 2023. The Massachusetts scheme is distinct from, for example, the current version of the Revised Uniform Residential Landlord-Tenant Act, which both integrates local health codes and attempts to enumerate the minimum standards of habitability for a home. *See* REVISED UNIFORM RESIDENTIAL LANDLORD TENANT ACT (RURLTA) § 302 (2015). The commenters to the Revised URLTA stated that including an enumerated list of conditions in the Revised URLTA was necessary because many jurisdictions lack robust local health codes. *See id.* at Comment to § 302. Massachusetts is certainly *not* one of those jurisdictions that lacks a detailed housing code.

49. *See* 105 MASS. CODE REGS. 410.600–950 (2023).

50. There is a private right of action for enforcement of the housing code against a landlord. *See* MASS. GEN. LAW ch. 111 § 127C–F, H (1965). However, the right to damages for substandard conditions is still found in: the warranty of habitability; a tenant's right to recover actual damages under the covenant of quiet enjoyment found at MASS. GEN. LAWS ch. 186, § 14 (1950); and, the right to recover actual damages under the Consumer Protection Act at MASS. GEN. LAWS ch. 93A (1967) and the related landlord-tenant regulations at 930 MASS. CODE REGS. 3.17.

51. While the types of claims which tenants might assert against their landlord are quite broad, a breach of the warranty of habitability remains the core of a defense under the rent withholding law for most tenants. *See e.g*, *Davis*, 137 N.E.3d at 351 ("A particularly important counterclaim [qualifying a tenant for a defense under the rent withholding law] is one based on breach of the warranty of habitability."). Even once tenants successfully prove a qualifying counterclaim against their landlord, the next step is the calculation of damages owed and the amount, if anything, the tenants must pay to the landlord to retain possession of their unit. *See Davis*, 137 N.E.3d at 350 ("[MASS. GEN. LAWS ch. 239, § 8A (1965)] provides a tenant or occupant with a defense against a landlord's suit for possession based on nonpayment of rent or no-fault termination where the tenant has damages from

Beyond Massachusetts, every jurisdiction nationwide—except one—has adopted a variation on the core concept of the warranty of habitability.[52] With variations in the legal prerequisites required to bring a claim, all jurisdictions with a warranty of habitability—*except eight*— also adopt the related right to defend against eviction on the basis of a violation of the warranty.[53] The standard for breaches of the warranty of habitability under the Uniform Residential Landlord-Tenant Act ("URLTA") is as follows:

> A landlord shall: . . . . Comply with the requirements of applicable building and housing codes materially affecting health and safety . . . . Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition; [And] [k]eep all common areas of the premises in a clean and safe condition [among other specifics requirements so enumerated in this section.][54]

The URLTA then goes on to imply that a violation of this provision may serve as a defense to eviction.[55] Twenty-two jurisdictions have adopted some variation of this language from the URLTA; however, two of these jurisdictions do not allow any defense to a landlord's eviction case even if a tenant can prove a breach of warranty.[56] Twenty-three other jurisdictions have adopted the warranty by statutes that are not modeled on the URLTA but that nevertheless contain core features of the warranty

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counterclaims that equal or exceed the landlord's damages. . . . Furthermore, even where the landlord's damages exceed the tenant's, the tenant has a mandatory seven-day cure period in which to pay the landlord's damages and retain possession." (citations omitted)).

52. *See generally* NOBLE-ALLGIRE, *supra* note 40 (showing a warranty of habitability in every jurisdiction except Arkansas).

53. Over the past decade or so, Professors Donald Campbell and David Super have each individually engaged in analyses of the state of the warranty of habitability nationwide, including the requirements of satisfying a tenant's defense to eviction. *See generally* Campbell, *supra* note 15; Super, *supra* note 15. The eight jurisdictions that do not allow for a defense to eviction based on a violation of the warranty of habitability are North Carolina, North Dakota, Georgia, Idaho, Indiana, Louisiana, Mississippi, and Texas. *See infra* notes 56–57.

54. UNIF. RESIDENTIAL LANDLORD TENANT ACT (URLTA) § 2.104 (1972).

55. *See id.* at § 4.105.

56. *See* NOBLE-ALLGIRE, *supra* note 40 (showing URLTA adoption in Alabama, Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Iowa, Kansas, Kentucky, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia, including citations). Notably, despite adopting a variation of the URLTA, there is no apparent statutory defense to eviction for a violation of the warranty of habitability in the landlord-tenant statutes of North Carolina and North Dakota.

of habitability; although, six of these twenty-three jurisdictions also do not allow a tenant to defend against eviction on the basis of a violation of the warranty.[57] The warranty of habitability remains a creature of common law in Washington, D.C, Illinois, Missouri, Massachusetts, and Pennsylvania —with all of these jurisdictions allowing a tenant to defend against eviction on the basis of a violation of the warranty.[58] Arkansas remains without any warranty of habitability at all.[59] Importantly, all 15 states defined herein as those with "progressive housing policies" adopt the warranty of habitability and *also* allow for a right to defend against eviction on the basis of a violation of this warranty.[60]

The question is thus: How achievable is the standard for proving that defects in a home actually breached the warranty of habitability so as to allow a tenant to defend against eviction?

IV. THE PROBLEM: THE "SUBSTANTIALITY" STANDARD MAKES THE COURT THE GATEKEEPER OF WHETHER DEFECTS ARE "BAD ENOUGH"

Despite the promises of the warranty of habitability on paper in jurisdictions with "progressive housing policies," tenants seeking to defend against eviction and correct substandard conditions in their homes are left in a lurch. Tenants often must reach an unduly high standard of "substantiality" to prove a breach of the warranty of habitability—the most basic guarantee of a 100% habitable home.[61] This standard empowers trial

57. *Id.* (showing warranty adopted by statute *not* modeled on URLTA in California, Colorado, Georgia, Idaho, Indiana, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Jersey, New York, Oregon, South Dakota, Texas. Utah, Vermont, Washington, Wisconsin, and Wyoming, including citations). Notably despite there being an apparent warranty of habitability, there is no statutory defense to eviction for a violation of such a warranty in Georgia, Idaho, Indiana, Louisiana, Mississippi, and Texas.

58. *Id.*

59. *Id.*

60. *See generally supra* note 11 and accompanying text (noting how this Article defines those jurisdictions with "progressive housing policies"). In fact, all these jurisdictions with "progressive housing policies" have enacted the right to defend against eviction on the basis of a breach of the warranty (however qualified) by statute – except for Illinois which continues to rely on common law principles (or local city ordinances) to allow for such a defense to eviction. *See generally* Jack Spring, Inc. v. Little, 280 N.E.2d 208 (Ill. 1972).

61. *See infra* note 67 and accompanying text (showing the substantiality standard in Massachusetts); *infra* notes 73–75 and accompanying text (discussing how the "materiality" standard in the URLTA is interpreted in Connecticut, Hawaii, and Delaware); *infra* note 76–83 and accompanying text (discussing the standard for finding breaches of the warranty of habitability in other jurisdictions with "progressive housing policies," including Nevada, new Hampshire, Wisconsin, Colorado, Washington, Illinois, Washington, D.C., and New York, which adopt a standard equal to that of substantiality).

court judges to pressure parties to settle and ultimately to gatekeep tenants' defenses to eviction. Such a standard cleaves the minimum standards of fitness for habitation set by local housing codes out of the warranty and capriciously denies recovery to tenants who seek to avoid eviction when the conditions in their home fall below the minimum standards set by law.[62] As a result, tenants' health and wellbeing suffer,[63] and courts evict tenants from substandard housing without a viable defense.[64] This is a problem.

A. The Substantiality Standard in Massachusetts and Other Jurisdictions with "Progressive Housing Policies"

To start, Massachusetts provides a clear example of the manner in which the judiciary—even in jurisdictions with "progressive housing policies"—has come to rely on a substantiality standard as a tool to prevent tenants with defects in their homes from defending against their eviction unless the defects are "bad enough." Despite beginning as the jurisdiction with arguably one of the most liberal warranties of habitability due to there being no express reference to "substantiality,"[65] the judiciary now firmly narrows tenants' claims to a breach of warranty. In Massachusetts, the past twenty-five years have brought about an unexplained shift in the way the

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62. *Id.*

63. *See generally supra* note 22 and accompanying text (discussing the public health impacts of inadequate housing).

64. For a discussion of how the warranty of habitability emerged as a critical tool for tenants' enforcing their right to a safe home and to defend against eviction, see generally *supra* Part III.

65. To contrast the early Massachusetts case law with that of other jurisdictions from around the same time, *Compare* Crowell v. MacCaffrey, 386 N.E.2d 1256, 1261–62 (Mass. 1979) ("We now find in the rental of a dwelling unit . . . an implied agreement by the landlord that the rented unit complies with the minimum standards prescribed by building and sanitary codes and that he will do whatever those codes require for compliance during the term of the renting." (citations omitted)), *and* Berman & Sons, Inc., v. Jefferson, 396 N.E.2d 981, 985 n.9 (Mass. 1979) ("[T]he landlord must comply at least with minimum standards prescribed by the State building and sanitary codes. Whether the scope of the warranty is broader is an open question." (citations omitted)) *with* Hinson v. Delis, 102 Cal.Rptr. 661, 667 (Cal. Ct. App. 1972) ("[T]he [landlord has a] . . . duty to substantially obey the housing codes and make the premises habitable."); Javins v. First Natl. Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir. 1970) ("[T]he basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term."); *Jack Spring, Inc.*, 280 N.E.2d at 217 (finding that the "implied warranty of habitability which is fulfilled by substantial compliance with the pertinent provisions of the Chicago building code."); Kline v. Burns, 276 A.2d 248, 252 (N.H. 1971) ("If a material or substantial breach of the implied warranty of habitability is found, the [tenant receives damages.]"). *Cf.* Pugh v. Holmes, 405 A.2d 897 (Penn. 1979) (mentioning nothing of substantiality).

judiciary analyzes the warranty.[66] Remarkably, the language of the most recent Massachusetts high court case could easily mislead readers into thinking that a "substantiality" standard was the clear legal doctrine underlying the warranty of habitability since its inception.[67] Yet, while it has certainly *not* always been the express standard, a substantiality standard is now the black letter law of the warranty in Massachusetts.[68]

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66. The SJC has only on three occasions narrowed the scope of the warranty of habitability in Massachusetts. *See* Doe v. New Bedford Hous. Auth., 630 N.E.2d 248, 253 (Mass. 1994) ("Today the plaintiffs ask us to expand the scope of the warranty so that it is breached by the presence on the premises of uninvited persons engaged in unlawful conduct. We decline to do so."); *see also* Goreham v. Martins, 147 N.E.3d 478, 486–88 (Mass. 2020) ("In *McAllister*, a tenant slipped and fell on ice on the exterior stairs of the landlord's premises and claimed that the landlord was liable under the implied warranty of habitability for failing to comply with State [housing] and building code provisions that require the removal of snow and ice. . . . [W]e concluded that [t]he natural accumulation of snow and ice is not such a defect. . . . Personal injury damages for such a slip and fall may not be recovered on a claim in contract under the implied warranty of habitability." (citing McAllister v. Boston Hous. Auth., 708 N.E.2d 95 (Mass. 1999))).

67. The SJC states the "substantiality" standard in *Goreham* as if it were a bare restatement of the 'black letter law' governing the warranty of habitability. *See Goreham,* 147 N.E.3d at 489. Such a standard has never been the clear law. Looking backward, a standard of "significance" – notably, not "substantiality" – only goes back to language from a 1999 case, *McAllister*, which itself raised the standard much higher than that which was stated previously in the case precedent. *See McAllister*, 708 N.E.2d at 99 ("Rather, the implied warranty of habitability applies to significant defects in the property itself.") (citing *Berman & Sons*, 396 N.E.2d at 981). *McAllister* itself cites *Berman & Sons* for the proposition that only "significant "defects in a home breach the warranty. *Id.* Yet there is no such support for this proposition in *Berman & Sons*. *See Berman & Sons*, 396 N.E.2d at 985 n.9 ("[T]he landlord must comply at least with minimum standards prescribed by the State building and [housing] codes. *Whether the scope of the warranty is broader is an open question*." (emphasis added) (citations omitted)). In fact, in addition to there being no extended discussion of why the SJC strays so far from the precedent, there is a string of citations in *McAllister*, which are alarming in the near cataclysmic standard of "significance" required to prove a breach of the warranty of habitability. *See McAllister*, 708 N.E.2d at 99 (collecting the following holdings: "apartment lacked adequate heat, hot water, and fire escape; was infested with cockroaches, mice, and rats; had unsanitary common areas; and had defective smoke detector, windows, and wiring" (citing Cruz Mgt. Co. v. Thomas, 633 N.E.2d 390 (1994)); "water and sewage repeatedly flooded apartment" (citing Simon v. Solomon, 431 N.E.2d 556 (1982)); "defective railing on third-floor porch [which collapsed, causing a tenant to fall and be seriously injured]" (citing *Crowell*, 386 N.E.2d at 1256)). Further, the SJC in *McAllister* goes into this discussion of the scope of the warranty despite the case being squarely about excluding the natural accumulation of snow and ice in common passageways from the warranty of habitability as a matter of public policy – nothing more.

68. *Compare Berman & Sons*, 396 N.E.2d at 986 n.11 ("[T]he State Sanitary Code . . . provides the proper yardstick for measuring the landlord's conduct.") *with Goreham*, 147 N.E.3d at 489 ("The emphasis is on whether the premises are fit for human habitation, not merely on whether the landlord committed a code violation. . . . [T]he warranty of habitability applies only to 'substantial' violations [of the housing code.]").

Beyond Massachusetts, in jurisdictions adopting some variation of the URLTA, the standard for finding a breach of the warranty of habitability is one of "materiality."[69] Yet, on its face, there is a lack of clarity within the URLTA as to the contours of "materiality."[70] Even the Revised URLTA continues to use an undefined standard of "materiality."[71] This lack of clarity, in practice, allows the judiciary in these states broad discretion to decide "how bad" a defect must be in order to be "material." In other words, the judiciary in URLTA states can make "materiality" equal "substantiality" if the standard is not well-defined and anchored to the idea of the right to 100% habitable housing.[72] In fact, this is exactly what has happened in states with "progressive housing policies" which rely on the URLTA. Courts in Connecticut,[73] Hawaii,[74] and Delaware[75] have all held the language of "materiality" in the URLTA requires a showing of "substantiality."

Further, in most other jurisdictions with "progressive housing policies" which *do not* adopt a statute mirrored on the URLTA, there is

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69. *See* URLTA § 2.104 (1972).

70. *Id.*

71. *See* RURLTA § 402 (2015).

72. *See* Campbell, *supra* note 15, at 819 (arguing that the standard for proving a breach of the warranty of habitability in many states focuses only on the most egregious conditions of uninhabitability and lags behind modern housing codes before concluding that it is "difficult to explain why the concept of 'habitability' has changed significantly within the past 40 years" and positing that "[p]erhaps the simplest answer is that what is considered as essential facilities for a habitable residence has not evolved, even as technology has advanced . . . [because] [c]ourts may view statutes such as the URLTA—which focus on basic housing and building [requirements]—as setting the outer limits of habitability, creating a hesitation to expand the concept beyond these statutory minimums.").

73. *See* Parrott v. Colon, 277 A.3d 821, 828 (Conn. App. Ct. 2022) ("[T]he sanctions available for a violation of [the statute modeled on URLTA that obligates the landlord to keep the premises in habitable condition] 'are not triggered until and unless evidence is adduced at trial establishing that there is a substantial violation or series of violations of housing and health codes *creating a material risk or hazard to the occupant* . . . .'" (citations omitted) (quoting Visco v. Cody, 547 A.2d 935, 938 (Conn. App. Ct. 1988))).

74. *See* Cho v. State, 155 P.3d 690 (Haw. Ct. App. 2007), *aff'd*, 168 P.3d 17 (Haw. 2007) ("The premises must be substantially unsuitable for living so that the breach of the warranty would constitute a constructive eviction of the tenant." (quoting Armstrong v. Cione, 736 P.2d 440, 445, *aff'd*, 738 P.2d 79 (Haw. 1987))).

75. *See* Brown v. Robyn Realty Co., 367 A.2d 183, 190 (Del. Super. Ct. 1976) ("[The landlord-tenant statute] provides for recovery of damages where the tenant has been deprived of a substantial part of the benefit and enjoyment of his bargain and the condition was caused wilfully or negligently by the landlord"); *see also* Norfleet v. Mid-Atl. Realty Co., No. CIV.A 95C-11-008WLW, 2001 WL 695547, at *3 (Del. Super. Ct. Apr. 20, 2001) ("[The landlord-tenant code] addresses any condition which deprives the tenant of a substantial part of the benefit and enjoyment of his bargain.").

still a requirement of substantiality. Nevada,[76] New Hampshire,[77] Wisconsin,[78] and Colorado[79] all use language of "substantiality" and "materiality" expressly within their landlord-tenant statutes. Washington requires that substandard conditions pose a "substantial risk of future danger."[80] Illinois common law requires that defects and code violations be "substantial."[81] Washington, D.C. common law aligns the warranty with the local housing code and allows a landlord to prove "substantial" compliance with the code as long as the landlord undertook "reasonable"

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76. In Nevada, "[a] dwelling unit is not habitable if it violates provisions of housing or health codes concerning the health, safety, sanitation or fitness for habitation of the dwelling unit or if it *substantially* lacks [any of the enumerated conditions of minimum habitability stated in the statute]." NEV. REV. STAT. § 118A.290 (2023) (emphasis added). Further, in the "remedies" section of the statute, Nevada requires the tenant to give the landlord notice of a defect which is "material" to habitability, before the tenant can seek a legal remedy. NEV. REV. STAT. ANN. § 118A.355 (West 2021). Under such a standard, there may be a wide berth for landlords to claim that there may have been code violations, but they were not "material" and, further, that there may have been defects but they were not "substantial." There does not appear to be any clear appellate law on this issue.

77. *See* Crowley v. Frazier, 788 A.2d 263, 266–67 (N.H. 2001) ("A defect that renders premises unsafe or unsanitary, and thus unfit for living therein, constitutes a breach of the implied warranty of habitability. . . . Where, as here, a material or substantial breach of the implied warranty of habitability is found, the measure of the tenant's damages is the difference between the agreed rent and the fair rental value of the premises as they were during their occupancy by the tenant in the unsafe, unsanitary, or unfit condition." (citations omitted) (quoting Kline v. Burns, 276 A.2d 248, 248 (N.H. 1971)).

78. *See* WIS. STAT. ANN. § 704.07(4) (West 2018) (stating that a tenant may enforce the rights typically associated with the warranty of habitability when there is a "substantial" violation of the landlord's duty to provide a habitable home).

79. *See* COLO. REV. STAT. § 38-12-503 (West 2023) (requiring a showing a substantial lack of certain conditions of minimum habitability which are enumerated in the statute).

80. Pham v. Corbett, 351 P.3d 214, 221 (Wash. Ct. App. 2015) ("Conditions that present a substantial risk of future danger will give rise to a claim for breach of warranty of habitability." (quoting Westlake View Condo. Ass'n. v. Sixth Ave. View Partners, LLC., 193 P.3d 161–67 (Wash. Ct. App. 2008))). Further, the landlord-tenant statute itself requires the landlord to "substantially" comply with applicable housing codes and to comply with an enumerated list of conditions for the residential premises. *See* WASH. REV. CODE § 59.18.060 (West 2023).

81. *See* Glasoe v. Trinkle, 479 N.E.2d 915, 920 (Ill. 1985) ("In order to constitute a breach of the implied warranty of habitability, the defect must be of such a substantial nature as to render the premises unsafe or unsanitary, and thus unfit for occupancy."); *see also* Jack Spring, Inc. v. Little, 280 N.E.2d 208, 217 (Ill. 1972) (finding that the warranty of habitability is "fulfilled by substantial compliance with the pertinent provisions of the Chicago building code."); Vanlandingham v. Ivanow, 615 N.E.2d 1361, 1368–69 (Ill. App. Ct. 1993) ("In order to constitute a breach of the implied warranty of habitability, the defect must be of such a substantial nature as to render the premises unsafe or unsanitary and, thus, unfit for occupancy. A landlord is not required to insure that the dwelling is in a perfect or aesthetically pleasing condition. Not every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. Whether there has been a breach of the warranty is a question of fact to be determined on a case-by-case basis.").

efforts to comply.[82] Finally, New York does not reference substantiality or materiality directly in its landlord-tenant statute; however, the New York courts continue to rely on seminal case law which requires a showing of "substantiality" of code violations or defects—despite language in the same seminal case law which could also imply a more liberal doctrine of habitability.[83]

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82. *See* Javins v. First Nat'l. Realty Corp., 428 F.2d 1071, 1081 (D.C. Cir. 1970) ("[T]he basic validity of every housing contract depends upon substantial compliance with the housing code[.]"); *see also* George Washington Univ. v. Weintraub, 458 A.2d 43, 49 (D.C. 1983) ("[A] landlord must exercise reasonable care to maintain rental premises in compliance with the housing code in order to fulfill the implied warranty of habitability."). *Cf.* Winchester Mgmt. Corp. v. Staten, 361 A.2d 187, 189 (D.C. 1976) ("[T]he landlord's duties under [the warranty of habitability] are discharged when [the landlord] has complied with the applicable standards set forth in the Housing Regulations.").

83. In New York, the statutory language of the warranty of habitability requires that a landlord provide premises "fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety[.]" N.Y. REAL PROP. Law § 235-b (McKinney 1975). However, the foundational case law of the warranty of habitability, which to date the New York judiciary has not abrogated, can be read to require substantiality—much in the same way as the contemporary law in Massachusetts. *Compare* Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979) ("Substantial violation of a housing, building or sanitation code provides a bright-line standard capable of uniform application and, accordingly, constitutes prima facie evidence that the premises are not in habitable condition. However, a simple finding that conditions on the lease premises are in violation of an applicable housing code does not necessarily constitute automatic breach of the warranty. In some instances, it may be that the code violation is De minimis or has no impact upon habitability. Thus, once a code violation has been shown, the parties must come forward with evidence concerning the extensiveness of the breach, the manner in which it impacted upon the health, safety or welfare of the tenants and the measures taken by the landlord to alleviate the violation. But, while certainly a factor in the measurement of the landlord's obligation, violation of a housing code or sanitary regulation is not the exclusive determinant of whether there has been a breach. Housing codes do not provide a complete delineation of the landlord's obligation, but rather serve as a starting point in that determination by establishing minimal standards that all housing must meet. . . . Threats to the health and safety of the tenant not merely violations of the codes determines the reach of the warranty of habitability. A residential lease is essentially a sale of shelter and necessarily encompasses those services which render the premises suitable for the purpose for which they are leased. To be sure, absent an express agreement to the contrary, a landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants." (citations omitted) (citing *inter alia* Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 844 n.16 (Mass. 1974))) *with* Kirkview Assocs. LP v. Amrock, 75 N.Y.S.3d 288, 291 (3d App. Div. 2018) ("Further, violation[s] of a housing, building or sanitation code were found in the apartment and, if substantial, would constitute[ ] prima facie evidence that the premises [were] not in habitable condition . . . ." (citations omitted) (quoting *Park W. Mgt. Corp.*, 391 N.E.2d at 1293–94)).

Only a few jurisdictions with "progressive housing policies" are distinct insofar as they do not *expressly* require tenants to prove the "substantiality" of substandard conditions to show breaches of the warranty. Minnesota[84] and Michigan[85] utilize language requiring "liberal construction" of the statutory mandate that rentals remain fit for habitation and in reasonable repair in compliance with local housing codes. Pennsylvania law remains focused on the "materiality" of a defect, a factor which the trial court judge has broad discretion in assessing and which the court has not to date clearly pegged to a standard of substantiality.[86] While not as ideal as an express standard requiring that a landlord provide a 100% habitable home to recover 100% of the rent and possession of the home, the lack of a clear reference to "substantiality" in these jurisdictions in theory does not as readily encourage trial courts to strictly gatekeep claims of substandard conditions.

In sum, out of the fifteen jurisdictions with "progressive housing policies," twelve jurisdictions impose standards which outright require the

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84. Minnesota does not appear to have any clear appellate case law on the scope of the warranty located within its residential landlord-tenant statute. Instead, the statute states only that the residential premises must be "fit," in "reasonable repair," and in compliance with local health codes. *See, e.g.*, Ellis v. Doe, 924 N.W.2d 258, 261 (Minn. 2019) ("The covenants of habitability, made a part of every lease in this state, are codified [in the landlord-tenant statute], which states that landlords covenant, among other things: (1) that the premises and all common areas are fit for the use intended by the parties; (2) to keep the premises in reasonable repair during the term of the lease or license . . . ; [and] (4) to maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government[.]" (alteration in original)) (quoting MINN. STAT ANN. § 504B.161, subd. 1(a)(1)–(2), (4)) (West 2024). While there is no clear appellate guidance provided, the fact that the text of the statute expressly states that it "shall be liberally construed" is hopeful insofar as the principle of a 100% habitable home is concerned. MINN. STAT. ANN. § 504B.161, subd. 3 (1999).

85. *See* MICH. COMP. LAWS § 554.139 (1968) (having no reference to a requirement of substantiality or significance); *see also* Allison v. AEW Cap. Mgmt., L.L.P., 481 Mich. 419, 751 N.W.2d 8 (2008) (having no reference to a requirement of substantiality or significance). *But see id.* at 441, 751 N.W.2d at 21 (Corrigan, J. concurring) ("The warranty extends only to significant defects in the property itself.") (quoting *McAllister*, 708 N.E.2d at 100).

86. *See* Pugh v. Holmes, 405 A.2d 897, 905 (Penn. 1979) ("The implied warranty is designed to insure that a landlord will provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes. . . . This warranty is applicable both at the beginning of the lease and throughout its duration. . . . In order to constitute a breach of the warranty the defect must be of a nature and kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers. At a minimum, this means the premises must be safe and sanitary of course, there is no obligation on the part of the landlord to supply a perfect or aesthetically pleasing dwelling. Materiality of the breach is a question of fact to be decided by the trier of fact on a case-by-case basis." (citations omitted)).

tenant to show "substantiality" of the defect or code violation.[87] Only three jurisdictions do not expressly make reference to a requirement of substantiality.[88] Still, none of the jurisdictions make clear that the home be 100% habitable with no beyond *de minimis* defects before the landlord can recover full contract rent and possession of the premises, in spite of the deep inequities that a contrary legal standard creates in practice.

The problem in the majority of jurisdictions with "progressive housing policies" is therefore clear—the problem is the same as that in Massachusetts. Trial court judges hearing landlord-tenant cases apply a standard which gatekeeps a tenant's right to 100% habitable housing. Whether trial courts apply the express "substantiality" standard in Massachusetts, a "materiality" standard on paper that equals to "substantiality" in a URLTA jurisdiction like Connecticut, or the statutory substantiality standard in a state like Wisconsin, the result is the same. Trial court judges flex their broad discretion to decide that conditions complained of by tenants were not "substantial enough," thereby placing a vice grip on tenants' defenses to eviction.

The issue of substantiality, therefore, is not an aberration in the doctrine of the warranty of habitability. This problem afflicts even the jurisdictions with the most "progressive housing policies" nationwide.

B. The Impact of the Substantiality Standard in Practice on a Tenant's Rights to Achieve Fully Habitable Housing and to Defend Against Eviction

A substantiality standard necessarily undermines tenants' confidence that a court will reliably award them damages for the defects in their home and ultimately prevent their eviction. In fact, the standard for determining whether the condition of a home is "bad enough" is one of the major factors in practice weighing against advising tenants to proceed to trial and to defend against their eviction.[89] This standard prevents tenants living with substandard conditions in jurisdictions with "progressive housing policies" from remaining convicted that they will receive a finding at trial that their landlord violated the warranty of habitability—a finding which would both entitle them to a rent rebate and the opportunity to defend against their eviction.[90] In turn, this necessarily pushes tenants to settle

87. These jurisdictions are: Massachusetts, Connecticut, Hawaii, Delaware, Nevada, New Hampshire, Wisconsin, Colorado, Washington, Illinois, Washington, D.C., and New York.

88. These three jurisdictions are Minnesota, Michigan, and Pennsylvania.

89. *See generally supra* note 36 (discussing empirical evidence of the many barriers to tenants litigating their claims fully at trial).

90. *See supra* Part III (explaining the background law).

with landlords who often insist on inequitable terms to settle an eviction case.[91] After all, a potential loss to the landlord at trial is merely financial; a potential loss to the tenant is one of a home.[92] Trial court judges are not oblivious—they are aware of this dynamic and can capitalize upon it to ensure the efficiency of their dockets by pressuring the parties to settle. In other words, the effect of this standard on the ability of tenants and their communities to successfully achieve safe and stable housing through the court system is debilitating. This is a profound issue of access to justice for tenants in even the most "progressive" jurisdictions.

Before arriving in front of a fickle judge who might decide that the conditions in a home are not "bad enough," many tenants already face the risk that their landlords will on a whim decide to terminate their tenancy.[93] Not only are landlords able to evict many tenants without express cause, but they are also able to do so in a nation with an enormous shortage of affordable housing options for a range of renters.[94] Naturally, evictions

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91. *See* Summers, *supra* note 36.

92. *See* Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 984–85 (Mass. 1979) ("[W]e note that the landlord's liability without fault is merely an economic burden; the tenant living in an uninhabitable building suffers a loss of shelter, a necessity.").

93. Currently, Massachusetts—like many jurisdictions nationwide—allows for termination of tenancies without cause, except for those tenancies pursuant to some sort of program which guarantees more tenure of tenancy. This means that a landlord does not need to show a reason—such as a lease violation, non-payment of rent, or some other 'good cause'—when deciding not to renew a lease or to terminate a tenancy at will. *See generally* MASS. GEN. LAWS ch. 239, § 1A (1973). These "no cause evictions" are deeply concerning for community stability and public health. *See* JENNIFER HISER ET AL., MASS. INST. OF TECH., JUST CAUSE EVICTION: RAPID HEALTH IMPACT ASSESSMENT, https://m-arcaya.mit.edu/sites/default/files/documents/HIA_Just_Cause_final.pdf [https://perma.cc/W95W-U6XE] (evaluating the potential impact on public health of the City of Boston's proposed ordinance to do away with no cause evictions); *see also* JADE VASQUEZ & SARAH GALLAGHER, NAT'L LOW INCOME HOUS. COAL., PROMOTING HOUSING STABILITY THROUGH JUST CAUSE EVICTION LEGISLATION, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/sites/default/files/Promoting-Housing-Stability-Through-Just-Cause-Eviction-Legislation.pdf [https://perma.cc/EFF2-9FGN] (discussing at a nationwide scale the critical importance of 'just cause' eviction protections which eliminate the potential for evictions without cause). *See generally* Eloisa C. Rodriguez-Dod, *"But My Lease isn't Up Yet!": Finding Fault with "No- Fault" Evictions*, 35 U. ARK. LITTLE ROCK L. REV. 839 (2013) (showcasing legal academic commentary on the factors weighing in favor of a policy against no cause evictions).

94. *See* JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2023 5 (2023), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf [https://perma.cc/Q6W8-SK7X] (finding that a total of 21.6 million households now spend more than 30% of pre-tax income on rent and approximately 7 million of those spend over 50% of their pre-tax income on rent, while the stock of low rent units has decreased by almost 10% in the past decade); Nicholas Chiumenti, *Federal Reserve Bank of Boston, The Growing Shortage of Affordable Housing for the Extremely Low Income in Massachusetts*, NEW ENGLAND PUB.

without cause combined with a severe shortage of affordable rental stock necessarily puts downward pressure on tenants' willingness to vigorously enforce their rights. It then takes no stretch of imagination to understand how tenants may feel intimidated in the face of landlords who can bring an eviction allegedly without cause after they request repairs.

Massachusetts—like many other jurisdictions—does provide legal protections from express retaliation and, if tenants can show a breach of the warranty of habitability, from an eviction without cause.[95] Yet, tenants risk termination of their tenancy followed by the court tightly gatekeeping their defenses, so the pressure to not say anything at all about substandard conditions (or to acquiesce and settle their cases on landlord-friendly terms once hauled into court) is enormous.[96] The law could theoretically temper the suppression of tenants' rights in this manner by actively facilitating a tenant's presentation of their defense to eviction where warranted. And yet, the gatekeeping function of the trial court judge under the substantiality standard remains in stark conflict with such an ideal. Tenants and their advocates understand that, in spite of the law on paper, the cards are stacked against them if they try to defend against their eviction at trial.[97]

Further, beyond the individual level, the lack of a clear and workable standard for finding violations of the warranty of habitability also undermines collective tenant action to resist eviction from substandard housing on a community-wide level.[98] Holding a landlord to the strict

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POL'Y CTR. REP. (Jan. 1, 2019), https://www.bostonfed.org/publications/new-england-public-policy-center-policy-report/2019/growing-shortage-affordable-housing-extremely-low-income-massachusetts.asp [https://perma.cc/VQ8C-CZB4] (demonstrating the severely constrained affordable housing supply in Massachusetts).

95. *See, e.g.*, MASS. GEN. LAWS ch. 239, § 2A (2013) (protecting tenants against an eviction in retaliation for complaining of bad conditions); *id.* § 8A (applying the rent withholding law expressly to an eviction case "where the tenancy has been terminated without fault of the tenant or occupant").

96. The legal standards governing a finding of a retaliatory eviction are another area of landlord-tenant law worthy of analysis. *See, e.g.*, Lindsey, *supra* note 14.

97. *See supra* notes 36–37 and accompanying text; *see, e.g.*, Franzese, *supra* note 15 (finding less than one hundred instances of the warranty of habitability asserted in answers to eviction cases in New Jersey our of tens of thousands of eviction cases filed).

98. Work by legal scholars has highlighted the way tenants might resist their displacement through fighting back collectively against eviction cases using all tools at their disposal and, in particular, the warranty of habitability. *See, e.g.*, Samantha Gowing, *Rent Strikes and Tenant Power: Supporting Rent Strikes in Residential Landlord-Tenant Law*, 120 MICH. L. REV. 877, 878 (2022) (discussing tenants' rights movements, using housing conditions as one tool in the fight against gentrification, in Los Angeles); Shekar Krishnan, *Advocacy for Tenant and Community Empowerment: Reflections on My First Year in Practice*, 14 CUNY L. REV. 215, 238 (2010) (discussing support for tenants' associations in gentrifying areas of New York City by litigating their conditions claims as

requirement of providing a fully habitable home is often a critical tool in the toolkit for tenants collectively advocating against their eviction and for better housing conditions for all.[99] Yet an unduly high substantiality standard for proving a breach of the warranty of habitability and for defending against eviction can hinder even the most vigorous collective strategy by tenants and their advocates.

Moreover, not only is the substantiality standard unduly high on paper, but also the discretion currently given to trial court judges to find (or, more often than not, to fail to find) breaches of the warranty of habitability is breathtaking.[100] Currently, trial judges in almost all jurisdictions with "progressive housing policies" have broad discretion to determine whether or not there was a substantial breach of the warranty of habitability, taking guidance from housing codes where they exist but ultimately being unbound by their dictates.[101] Yet, with broad discretion also comes broad power to undermine the claims by tenants and their advocates who appear in front of the court.

Overreliance on the discretion of trial court judges—individuals who often hear landlord-tenant cases but who just as often do not have on-the-ground expertise or training in the conditions that impact tenants' lives — creates issues.[102] A trial judge's lack of expertise may in turn lead to

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defenses to displacement). *See generally* Ayobami Laniyonu, *Assessing the Impact of Gentrification on Eviction: A Spatial Modeling Approach*, 54 HARV. C.R.-C.L. L. REV. 741 (2019) (analyzing empirically eviction trends, using a spatial analysis to observe how there are notable spillover effects leading to higher evictions in areas neighboring areas of high gentrification).

99. *See, e.g.,* Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507 (1991) (discussing the use of the right to not be evicted from substandard housing as a critical tool against eviction and displacement in a tenants' movement in Boston).

100. *See, e.g.*, Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 844 n.16 (Mass. 1974); Pugh v. Holmes, 405 A.2d 897, 905 (Penn. 1979).

101. *See supra* notes 73–88 and accompanying text (demonstrating the standard of substantiality across jurisdictions).

102. While there is very little need to explain how most judges may not have life experiences similar to those of the tenants who appear in front of them each day in court, *see*, *e.g.*, Asha Amin, *Implicit Bias in the Courtroom and the Need for Reform*, 30 GEO. J. LEGAL ETHICS 575 (2017). Legal scholars have commented on the difficulties inherent in relying on trial judges to assess violations of the warranty of habitability. *See, e.g.*, Jana Ault Phillips & Carol J. Miller, *The Implied Warranty of Habitability: Is Rent Escrow the Solution or the Obstacle to Tenant's Enforcement?*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 31–32 (2018) ("Trying disputes about housing conditions also requires different skills than many courts previously employed in breach of contract cases. Courts apply the implied warranty of habitability based on certain cultural understandings of what is meant by 'habitable' and what constitutes a habitable residence. Judges view the question of habitability through their own 'cultural lens,' which shapes how they interpret the landlord's obligations. There are various standards for determining the materiality of a

overreliance on reports by local health authorities or the lack thereof.[103] On paper, a tenant's right to call local health authorities may be clear.[104] However, trial court judges may not understand the practical barriers to adequate enforcement burdening tenants who do not receive reliable inspections from local health authorities—municipal agencies which may not even be regulated at a statewide level.[105] It is unsurprising that a dynamic involving the judiciary's lack of experience in housing conditions and undue reliance on health authorities further undermines tenants' abilities to prove breach of the warranty.

Ultimately, judges facing a docket full of eviction cases intuitively understand that the warranty of habitability is most often the key arrow in a tenant's quiver when attempting to defend against their eviction at trial.[106] Accordingly, in an effort to prevent tenants from defending against

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landlord's breach. . . . Most courts agree . . . that material breaches result in significant disruption of tenant's use of their property, often putting tenant and tenant's family in danger of physical harm. This is exactly the situation the implied warranty of habitability was designed to prevent.").

103. Legal scholars have acknowledged the pitfalls of trial court judges effectively requiring governmental verification of substandard conditions to prove violations of the warranty of habitability. *See* Summers, *supra* note 15, at 193 ("The data also showed that tenants were most likely to receive rent abatements when there were open code violations in the unit. Tenants were substantially less likely (approximately one-half to one-quarter as likely) to receive abatements when there was other evidence of conditions of disrepair but no code violations. This finding is striking."). The barriers to tenants obtaining such governmental verification are clear. *See* Sabbeth, *supra* note 15 (explaining generally the failings of local health and housing codes to adequately protect low-income tenants' rights). Furthermore, the overreliance on governmental verification of substandard conditions might be more broadly a part of the trial court judge's requirement that the tenant provide the "right type" of notice to a landlord before purporting to defend against eviction by arguing a breach of the warranty of habitability. *See* Bezdek, *supra* note 15, at 571 (stating evidence of "the practice of several rent court judges to prefer the statute's most stringent version of 'notice' of defects--a tenant's certified letter to the landlord, of which the tenant has kept a copy and the returned receipt."); *see also* Martinez, *supra* note 15, at 258 ("Rules [such as those requiring specific types of notice and/or an express intention to withhold] that prevent tenants from raising the implied warranty of habitability have led to what is effectively the re-creation of the power differential between tenants and landlords.").

104. *See, e.g.*, 105 MASS. CODE REGS. 410.600-950 (2023).

105. Remarkably Massachusetts, like many states, relies on local health departments with no mandatory statewide system of health code enforcement. For further commentary on the barriers to adequate code enforcement, see *supra* note 31 and accompanying text.

106. In Massachusetts, for example, there are approximately 25,000 eviction cases filed every year. *See Department of Research and Planning Civil Case Filings*, MASS. TRIAL CT., https://public.tableau.com/app/profile/drap4687/viz/MassachusettsTrialCourtCivilCaseFilings/AboutthisDashboard [https://perma.cc/NJ38-KD45]. However, there are only fifteen justices on the housing court. *See* MASS. GEN. LAWS ch. 185, § 8. Where there are over

every eviction at trial, judges concerned with docket efficiency gravitate toward strictly gatekeeping a tenant's defense.[107] The trial court judge's broad discretion to police the warranty of habitability can thereby become a critical institutional tool for sending a message to tenants and their advocates *not* to challenge the great majority of cases at trial and instead to settle. Rather than being that key arrow in a tenant's quiver to defend against eviction, a warranty of habitability afflicted by a substantiality standard becomes a tool for the trial judge to deny recovery to tenants and to hasten the case to a resolution.

There are, thus, several institutional factors to consider when evaluating the problem of a legal standard which requires tenants to prove that the defects in their homes were "substantial:"

1. Tenants face enormous power differentials in the court system—a system which they 9 times out of 10 navigate without representation.[108]
2. Tenants seeking repairs to their homes face the threat of termination of their tenancy (often without express cause) and later the risk of a loss of their home if they are unsuccessful in defending against their eviction at trial.[109]
3. Tenants must confront the implicit and explicit bias of a judiciary with different life experiences, and which may hold prejudices against them as a group made up disproportionately of low-income households of color.[110]
4. Tenants face judgment from the judiciary for their failure to provide the "right type" of verification or notice of substandard conditions through a governmental agency or otherwise.[111]
5. And tenants walk into a court system which prioritizes efficiency in the disposition of cases over the detailed litigation of each and every eviction case.[112]

1,600 eviction cases each year for every judge on the court, there are clear pressures to disincentivize litigation and to incentivize settlements between the parties.

107. Legal scholars have noted the influence of docket pressures on the judicial under-enforcement of the warranty of habitability. *See, e.g.*, Super, *supra* note 15, at 415–17 (2011) (arguing powerfully that, in short, "instead of focusing solely on adapting the courts to implement the new reforms, judges [have] to worry about the effect the reforms might have on their dockets, on their roles, and on the attitudes of landlords[,] [and] [t]hese worries undoubtedly diminish . . . the enthusiasm with which many courts welcomed their new roles implementing public policies against bad housing conditions and in favor of increased bargaining power for tenants.").

108. *See supra* note 32 and accompanying text.

109. *See supra* note 93 and accompanying text.

110. *See supra* note 102 and accompanying text.

111. *See supra* note 103 and accompanying text.

112. *See supra* notes 106–107 and accompanying text.

Taken altogether, a legal standard which gives the trial court judges broad discretion to find that the conditions in tenants' homes were not "bad enough" represents the calcification of all of the aforementioned factors of institutional disempowerment which already afflict tenants. It is no surprise, then, that such a system would, in turn, pressure tenants to settle what should otherwise be meritorious cases. Trial judges who already face enormous docket pressures and who hold their own biases are entrusted with the task of vindicating a tenant's right to 100% habitable housing—even if doing so means slowing down the process, awarding the tenant a rent reduction, and denying a landlord repossession of a property. When faced with the choice of fully vindicating tenants' rights to 100% habitable housing versus funneling cases toward an efficient resolution, the choice of the trial court judge—however perverse from a perspective of justice—becomes more comprehensible.

The substantiality standard is thus the crystallization of the freedom of the trial judge to subvert and narrow tenants' otherwise broad right to claim a right to a rent reduction and to defend against eviction each and every time there are non-trivial defects in their home. It stands then that, if the court is not to extinguish the "minimum" standards of habitability in favor of something more akin to the "bad enough" standards of uninhabitability, and if tenants are to reliably advocate for safe housing and to avoid forced displacement from their homes when they do so, the standard must change.

The law must ditch the substantiality standard. In doing so, the law must fundamentally reimagine the doctrine underlying the contemporary warranty of habitability in a manner which controls for and alleviates the multiple factors of disempowerment which tenants already face.

V. THE SOLUTION: MANDATING THAT BEYOND *DE MINIMIS* DEFECTS AND NON-ISOLATED CODE VIOLATIONS ALWAYS EQUATE TO A DEFENSE TO UNPAID RENT AND EVICTION

The only manner of achieving the promise of 100% habitable rentals is by fundamentally transforming the doctrine underlying the warranty of habitability. The standard must be one which evaluates whether a defect or code violation is beyond *de minimis*, and *not* whether the defect is substantial.[113] Under a reimagined standard, there is a breach of the warranty any time there are non-trivial defects or non-isolated housing

113. This would include any other language which effectively equals substantiality. *See supra* notes 73–88 and accompanying text (discussing the language used in other jurisdictions which either is that of substantiality or equals to that of substantiality).

code violations, which the landlord knows of and fails to resolve.[114] Such a standard tracks closely with the local housing code (in those jurisdictions with a robust housing code) so as to leave minimal room for judicial discretion. Under this standard, the landlord can only rebut a finding of a breach of warranty by demonstrating through clear and convincing evidence that known code violations were isolated or that the defects were *de minimis*. Such a standard limits the court's discretion by anchoring the warranty on the principle that any defect beyond *de minimis* entitles a tenant to some recovery. This standard then allows tenants and their advocates to assess ahead of trial whether tenants have a colorable defense to an eviction case and to what extent they are entitled to a rent rebate. In other words, by reimagining the doctrine of the warranty of habitability in a manner that exalts the guarantee of a 100% habitable home, tenants may more readily assert their rights through the legal process despite the many institutional factors weighing against them.

So what does it mean for a defect in housing to be beyond *de minimis* or a code violation to be non-isolated? It certainly does not mean that a defect or code violation must be substantial, given that the chasm between *de minimis* and substantial is quite expansive.[115] It goes without saying that such defects are less significant than those which traditionally would warrant common law "constructive eviction" due to the complete uninhabitability of a home.[116] However, considering squarely that a landlord has an obligation to provide 100% habitability throughout a tenancy, such a standard would really mean that, when the habitability of a home is impaired by 1% or more during a rental period, there is more than a *de minimis* violation of the warranty. It is that simple.

Under this reimagined standard, courts in jurisdictions with robust housing codes can rely on a strict application of the code. To apply such a standard, all a trial court judge must do is put aside their own opinion of

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114. *See, e.g.*, Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 844 n.16 (Mass. 1974). Naturally, a calculation of damages would be a different inquiry, even once a breach is established.

115. *See supra* Part. IV (discussing the substantiality standard in depth).

116. For example, the SJC in *Hemingway* noted that the elimination of the constructive eviction doctrine created a situation where such conditions warranting "constructive eviction" would be sufficient to prove a breach of the warranty of habitability *but were clearly not necessary*. *See Hemingway*, N.E. 2d at 844 n. 16 ("Proof of any violation of [the housing code] . . . would usually constitute compelling evidence that the apartment was not in habitable condition, regardless of whether the evidence was sufficient proof of a constructive eviction under our old case law."). Moreover, the housing code in Massachusetts even distinguishes code violations that are deemed to endanger or materially impair health, safety, or well-being, from situations where condemnation of the unit is warranted because the conditions are such an immediate threat to safety that the unit must be imminently vacated. *Compare* 105 MASS. CODE REGS. 410.630 *with* 410.650.

the "substantiality" of the violation and instead focus on the housing code's clear requirements. Using Massachusetts as an example, the housing code itself can do much of the work for the judiciary by providing a barometer for assessing the point at which code violations impair the habitability of a home beyond a *de minimis* degree.[117] Like the code in many other jurisdictions, the Massachusetts housing code itself exhaustively spells out the minimum standards applicable to rental housing, by going into great detail to dictate the minimum standards of fitness for human habitation in all areas of a home.[118] The schema of the housing code provides useful guidance—first—by enumerating those violations which impair the habitability of a home if not immediately corrected and—next—by setting a clear outer limit on the timeline for correction of those violations which are not trivial but which do not immediately impair the habitability of a home. [119] All a court must do is apply these standards.

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117. *See, e.g.*, Berman & Sons, Inc. v. Jefferson, 396 N.E.2d 981, 986 n.11 (Mass. 1979) ("[T]he State Sanitary Code . . . provides the proper yardstick for measuring the landlord's conduct. The *Hemingway* court removed the landlord's duties under the Code from the realm of private ordering. . . . Those duties cannot be waived, bargained away, or qualified by customary practice." (citations omitted)). In those jurisdictions which do not have as robust of a housing code as Massachusetts, the Revised URLTA actually specifies the minimum requirements necessary for a fully habitable home; while not as robust as that in Massachusetts, the Revised URLTA is still instructive as to how important it is to set out these minimum requirements for a trial court. *See supra* note 48.

118. For context, the table of contents in the Massachusetts Housing code lists the following areas of regulation: "Kitchen Facilities . . . Bathroom Facilities: Sinks, Toilets, Tubs, and Showers . . . Approved Toilets . . . Potable Water/Sanitary Drainage . . . Plumbing Connections . . . Hot Water . . . Heating Systems . . . Venting . . . Temperature Requirements . . . Provision and Metering of Electricity or Gas . . . Provision of Oil . . . Natural and Mechanical Ventilation . . . Owner's Laundering Responsibilities . . . Owner's Installation, Maintenance and Repair Responsibilities . . . Occupant's Installation and Maintenance Responsibilities . . . Asbestos-Containing beyond de minimis. . . Means of Egress . . . Locks . . . Electricity Supply and Illumination . . . Auxiliary Emergency Lighting Systems and Exit Signs . . . Electrical Service . . . Smoke Detectors and Carbon Monoxide Alarms . . . Owner/ Manager Contact Information and Notice of Occupants' Legal Rights and Responsibilities . . . Building Identification . . . Habitability Requirements . . . Natural Light and Obstructions . . . Temporary Housing . . . Homeless Shelters . . . Lead-based Paint Hazards in Residences . . . Owner's Responsibility to Maintain Building and Structural Elements . . . Occupant's Responsibility Regarding Building and Structural Elements . . . Protective Railings and Walls . . . Weathertight Elements . . . Installation of Screens . . . Elimination of Pests . . . Refuse . . . Maintenance of Areas in a Sanitary and Safe Condition[.]" 105 MASS. CODE REGS. 410 (table of contents).

119. The list of conditions deemed to endanger or materially impair the health, safety, or well-being and wellbeing of the occupant are found at 105 MASS. CODE REGS. 410.630 (2023). The timeline for repair of all conditions enumerated on this list is 24 hours. *Id.* at 410.640. The timeline for repair of all other conditions at maximum is 30 days. *See* 105 MASS. CODE REGS. 410.630 (2023) ("Any other violation of [the Code] not enumerated in

That said, a beyond *de minimis* standard still gives trial court judges some discretion to determine if certain code violations and defects truly are isolated or *de minimis*.[120] Certain defects may be technical violations of the code and nevertheless are so isolated and trivial that they are immaterial to the habitability of a home and to the tenant's experience of it.[121] This is good judicial line drawing. For example, the landlord may temporarily discontinue the water service for a few hours to work on the plumbing system, or the heating system may go out temporarily overnight during a snowstorm and is fully fixed in the morning; in such cases, prompt restoration of the one-time service disruption undermines a claim to that the defect was non-isolated.[122] In other cases, there may be a missing baluster on an exterior stairway, a broken outlet behind a couch, small holes in ceiling plaster, or a leak in a pipe so minimal that the moisture evaporates and dries up without impact; these defects may qualify as too trivial to breach the warranty. All of these are defects and housing code violations which may be present and yet do not impair the total habitability of a home by a single percent or more.[123]

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105 MASS. CODE REGS. 410.630(A) shall be deemed to be a condition which may endanger or materially impair the health, safety, or well-being and well-being of an occupant upon the failure of the owner to remedy said condition within the time so ordered by the board of health."); MASS. CODE REGS. at 410.640 (2023) ("If an inspection or examination . . . reveals that a residence does not comply with the provisions of [the Code], the board of health or its designated agent shall: . . . Within seven calendar days after the inspection, order the owner or occupant to correct, within 30 calendar days of service, any violations not listed in [the list of conditions deemed to endanger or materially impair the health, safety, or well-being and wellbeing of the occupants.]").

120. *See* Mckenna v. Begin, 362 N.E.2d 548, 551 (Mass. App. Ct. 1977).

121. Language from the Massachusetts Appeals Court as far back as 1977 is instructive as an example of this standard:

We also agree with the judge that [the tenant] is not entitled to receive damages for the minor code violations in this case. As we emphasized in our earlier opinion, not every defect gives rise to a diminution in rental value, and it has been held that isolated violations may be found not to constitute a breach of the warranty of habitability. . . . On the other hand, there may be instances in which minor violations in conjunction with major violations or a multitude of minor violations with a cumulative effect on habitability should be taken into consideration in reducing rent.

Id. (citations omitted). The "minor code violations" in this case were "loose and falling plaster in a bedroom, falling ceiling plaster and a leaking pipe in the bathroom, missing plaster and peeling ceiling paint in the kitchen and falling plaster and leaking roof in a common area hallway." *See id.* at 554 n.3.

122. *See id.* at 551.

123. *See* Boston Hous. Auth. v. Hemingway, 293 N.E.2d 831, 845 (Mass. 1974) ("[D]amages based on this breach would be the difference between the value of the dwelling as warranted (the rent agreed on may be evidence of this value) and the value of the dwelling as it exists in its defective condition.").

There may be some handwringing over the fear that somehow tenants will experience a windfall if more than *de minimis* but less than substantial code violations always entitle tenants to a rent rebate and a potential defense to eviction.[124] Yet this anxiety is unfounded and overblown, particularly when considered against the manner in which the current substantiality standard undercuts tenants' rights, public health, and community stability in practice.[125] Ultimately, landlords may still defend against a claim that they breached the warranty of habitability.[126] Landlords may defend that: (1) they never knew of certain defects; (2) defects were promptly repaired (using the housing code, if existing in that jurisdiction, as the reasonable timeline for repair); or, (3) certain defects were isolated, trivial, and thus *de minimis*.[127] Moreover, under the warranty of habitability, tenants necessarily receive only a percentage rebate of the rent that they paid (or else that they must pay), thereby leaving landlords either with a net positive in terms of cash flow or possession of the unit if the tenant cannot pay the final amount owed.[128] Put otherwise, a landlord is still receiving rent—the consequence of finding a breach of the warranty of habitability is simply that the landlord will not get the full contract rent and immediate repossession of a home if there were beyond *de minimis* defects in the home that were known and went unrepaired.[129] Tenants in such circumstances pay X% of the contract

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124. To be fair, scholarly discussions of the net positive versus negative impacts on stricter standards governing the warranty of habitability continues. *See generally* Michael A. Brower, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849, 863–66 (2011) (discussing the historical academic debate over the pros and cons of the warranty of habitability, engaging in an empirical analysis to show how the warranty may have led to increased rents in certain areas over time, and eventually concluding that there is still a net benefit of the warranty to low income tenants).

125. *See generally supra* Part IV.B.

126. *See, e.g.*, *Hemingway*, 293 N.E.2d at 843–45.

127. *Id.* The entire legal inquiry is never simply into the significance of the complained-of defect. *See, e.g., id.* at 845. ("The tenants' claim for damages based on this breach by the landlord should be limited to the period of time that each apartment remained uninhabitable after the landlord had notice of the defects. The measure of damages would be the difference between the value of each apartment as warranted and the rental value of each apartment in its defective condition."). *See* Jablonski v. Casey, 835 N.E.2d 615, 618–19 (Mass. App. Ct. 2005).

128. *See Jablonski,* 835 N.E.2d at 620–21. The damages available under the bare warranty of habitability is in contrast to that available under other statutes which may lead to greater recovery for tenants. *See generally* 43 AM. JUR. PROOF OF FACTS 3D 329 §6–7 (2024). For an example of alternative damage theories in Massachusetts, *see, e.g.*, 940 MASS. CODE REGS. 3.17 (Massachusetts Office of the Attorney General regulations for consumer protection standards in landlord-tenant matters). For alternate damages theories in other jurisdictions, *see* RURLTA § 302 (2015).

129. All that said, receiving a rent rebate is not the only remedy currently available to tenants who experience breaches of the warranty of habitability. In many jurisdictions,

rent for an X% habitable home, and, if any rent is left owing, they must pay this rent to retain possession.

There may be further concerns about the impact of such a standard on judicial efficiency given limited resources relative to the avalanche of eviction cases filed each year.[130] However, tenants are not the plaintiffs filing these cases. Creating judicial efficiency by making it harder for defendants to defend against a lawsuit is perverse—particularly if such lawsuits are disproportionately filed against households in low-income communities of color and place their homes on the line.[131] Instead, a reimagined standard strictly enforcing the warranty of habitability could change the calculus involved when landlords either file eviction cases or insist on taking them to trial if tenants do not agree to lopsided settlement terms.[132] If landlords clearly understand a tenant's potential for retaining possession of their home on a warranty of habitability claim and approach the pretrial settlement accordingly, the parties will still often settle cases. The result would be that the power differential would shift to create greater equality among the parties. Tenants with a significant chance of success at

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tenants may elect to void their tenancy and vacate when there is a proven breach of the warranty of habitability. This is a very different remedy than a rent reduction or a defense to eviction based on principles of rent withholding. Some may argue that lowering the threshold for proving a breach of the warranty of habitability could result in a windfall for non-indigent tenants who can elect to void their leases whenever there are unresolved – yet less than substantial – code violations or defects in their home. There is some validity to this concern. However, practically speaking, even if the remedy of the tenant's ability to void their lease based on a breach of the warranty of habitability remains in spite of the elimination of the substantiality standard, disaster will not follow. Firstly, this remedy is essentially made superfluous by the nature of a tenancy at-will. As for tenants on fixed-term leases which most often run for a year, there must be careful consideration of whether there truly will be an outbreak of tenants fleeing rentals with non-substantial - yet beyond *de minimis* - defects simply because the law says they can. The current nationwide housing crunch would point to tenants holding onto their homes, paying their rent, and using remedies to seek repairs rather than abandoning the premises at the first sign of landlord unresponsiveness to substandard confirms. *See* Summers, *supra* note 36, at 869. Given that the standard for lowering breach of habitability is likely more concerning for landlords facing tenants who are defending against eviction rather than those seeking to voluntarily vacate their units, this consequence of changing the standard seems more hypothetical than actually concerning. If housing market conditions change, this remedy might be revisited, and a different standard might be imposed to access the particular remedy of voiding a lease.

130. *See, e.g., Massachusetts Trial Court, Department of Research and Planning Civil Case Filings*, *supra* note 106 (highlighting that there are 1,600 eviction cases for every judge on the Massachusetts housing court).

131. *See* Summers, *supra* note 36 (discussing the undue influence of docket pressures in eviction cases).

132. *See* Hepburn, Louis, & Desmond, *supra* note 28, at 649 (discussing empirical evidence of the immense power imbalance which results in settlement of eviction cases on landlord-friendly terms).

trial would have greater leverage to either request terms that would allow them to stay in their home or to demand a better bargain if deciding to move. Ultimately, landlords may even file fewer eviction cases overall if their chances of success are weaker, opting instead to work with tenants before rushing to court to file for eviction.

Still, even with the adoption of a clear *de minimis* standard and with the abandonment of the substantiality standard, tenants—particularly low-income tenants of color—will continue to face obstacles to fully vindicating their rights.[133] Tenants simply may not know what their rights are under the housing code and what defects might qualify as code violations.[134] Local health inspectors may not be well trained and fully professional when dealing with tenants, leading to under-enforcement and under-coding of violations.[135] Landlords may decide that they would rather not invest in extensive repairs and instead risk the basic liability that comes from a tenant living in a substandard home.[136] Overall, tenants may simply continue to feel disempowered when facing a landlord who can on a whim decide not to renew their tenancy, particularly when they do not have a legal entitlement to defense counsel in an eviction case.[137]

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133. *See generally supra* Parts II, IV.B (discussing the many barriers that tenants face in asserting their rights fully).

134. To account for this, a liberal rent withholding law which includes "unintentional" withholding—such as that which is in place in Massachusetts in other jurisdictions with "progressive housing policies"—remains a critically important baseline policy so that tenants who only receive legal advice after their landlord hauls them into court have some chance of mounting a successful defense. *See* Super, *supra* note 15, at 412–13 (discussing the essential protection of laws that allow tenants to defend against 'unintended arrears'); Martinez, *supra* note 15, at 272 (discussing the same). Furthermore, efforts by local organizations to create public-facing materials for use by tenants in assessing the condition of their homes are important as well. *See* Edward W. De Barbieri & Jordan Fruchter, *Digitizing the Warranty of Habitability*, 13 UC IRVINE L. REV. 513, 548–49 (2023) (discussing the invention and implementation of an interactive program by Albany Law School in New York which allows tenants and their advocates to input the conditions of disrepair in a tenants' home, to obtain an estimate of damages based on the warranty of habitability, and then output documents to aid the tenant in filing a small claims case)*; see, e.g.*, MASS. LEGAL HELP, HOUSING CODE CHECKLIST 1–23 (2017), https://www.masslegalhelp.org/housing/lt1-booklet-2-housing-code-checklist.pdf [https://perma.cc/UW7E-GVSY].

135. *See* Yancey, *supra* notes 31, at 118 (noting the barriers to effective code enforcement).

136. The contract rent that tenants pay each month often binds the court in calculating the landlord's gross liability under a theory warranty of habitability; thus, some deep-pocketed landlords may disregard requests for repairs to all but "substantial" defects, making an economic calculation that they will always end up in with a net profit, even when the rare tenant fully asserts their rights.

137. *See* Summers, *supra* note 36 (discussing limited affordable housing options and the compounding effects of evictions without cause); *see* Franzese, *supra* note 15, at 18–20 (discussing the disparities in access to counsel between landlords and tenants).

However, there is hope: The judiciary nationwide can take an active role in all eviction cases in which there are claims to housing defects. The judiciary can hold landlords to a standard of proving that they provided a 100% habitable rental before recovering possession of a home and 100% of the contract rent, thus dignifying tenants everywhere in their search for safe and stable housing.[138] The judiciary can delineate a threshold breach of the warranty of habitability each and every time tenants present reliable testimony that their landlord failed to remedy known, non-trivial defects and non-isolated code violations in their home. In other words, code violations and defects beyond the *de minimis* must always equate to a breach of the warranty of habitability. In those jurisdictions with housing codes, trial judges can expressly defer to the housing code and the timelines therein, using limited discretion to decide whether defects are a breach of the warranty of habitability only in cases in which the violations are too trivial or isolated to be actionable.

This reimagined standard exalts the public health necessity of a 100% habitable home and the right to avoid displacement without fair compensation and repair. To achieve this, the standard applied in practice must change and, along with it, the manner in which courts view a tenants' right to a fully habitable home. Without a renewed judicial or legislative push to hold landlords firmly to the covenant of a fully habitable home, the public health mission of the minimum standards set for human habitation is kneecapped, and renters—particularly those who are part of low-income households of color—continue to suffer.

A beyond *de minimis* standard for evaluating claims to a breach of the warranty of habitability would, therefore, be a leap and bound in the right direction toward—racial and economic—justice for renters nationwide.

VI. CONCLUSION

Trial court judges stand at the gates, holding the keys to a tenant's fully habitable home. Tenants invoking the warranty of habitability are placed on the front lines of vindicating the public health goal of 100% habitable housing. And the majority of tenants placed on the front lines are low-income households of color. This demographic makes effective

138. For example, before entering judgment for unpaid rent and/or possession, the law could require trial judges to explicitly inquire into the conditions of the home to ensure that the landlord did not knowingly allow beyond *de minimis* defects to persist throughout the tenancy. *See* Martinez, *supra* note 15, at 275 (proposing a requirement to strengthen the warranty of habitability whereby trial judges must come to express findings in each case as to the conditions of the unit at issue).

assertion of the warranty of habitability critical to the project of safe housing for the most at-risk communities.

Yet, when trial court judges tightly gatekeep tenants' rights to fully habitable rentals rather than facilitating findings that reflect the reality of the conditions in their homes, the entire public health project of regulating landlords who neglect the quality of the housing stock in low-income neighborhoods falls apart. In such a system, tenants—both represented and unrepresented—have no viable defense and settle their cases under landlord-friendly terms. When trial court judges are emboldened with broad discretion to strictly gatekeep a tenant's ability to prove a breach of the warranty of habitability, courts prioritize the docket efficiency of resolving eviction cases in favor of a landlord over the attention that must be paid to each tenant's right to a fully habitable home. In other words, when a trial court judge hears a case and declines to award a recovery because the defects in a tenant's home were not substantial enough, the judge tells the tenant that "bad" conditions are not "bad enough" so "too bad" for them.

Tenants nationwide deserve better than this from the judicial system. It's time to reimagine the right to 100% habitable housing and ensure that renters can reliably vindicate this right every time their landlords haul them into court. While other barriers exist to prevent tenants from fully asserting their rights, and many jurisdictions lag behind even the baseline policies in place in jurisdictions with "progressive housing policies," reviving a standard by which beyond *de minimis* defects and non-isolated code violations *always* equate to a rebate and a defense to eviction is a necessary step in the right direction.

After all, our landlords demand 100% of the rent, so we must demand a 100% habitable home in return.