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"Everybody Loves the Landlord": Evictions & the Coming Prevention Revolution

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"EVERYBODY LOVES THE LANDLORD": EVICTIONS AND THE COMING PREVENTION REVOLUTION

Brian G Gilmore[*]

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ABSTRACT

In the 1960's and early 70's, landlord-tenant law experienced a legal revolution. Tenants secured procedural rights and substantive rights they had never before been able to assert in landlord-tenant proceedings. This development resulted in major changes in how landlord-tenant cases were litigated and many jurisdictions across the country embraced developments in other state courts by codifying some of the changes to the law. However, forty years or more later, the benefits of that first revolution in the law are minimal

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to most tenants facing eviction. In addition, the country is currently facing an eviction epidemic in many jurisdictions. This article asks the most basic questions regarding this rise in evictions. Is it time for a second and more substantial legal revolution in landlord-tenant law and policy to address the eviction epidemic? Also, what current positive developments have been successful in reducing eviction?

The Ballad of the Landlord

Landlord, landlord,
My roof has sprung a leak.
Don't you 'member I told you about it
Way last week?

Landlord, landlord,
These steps is broken down.
When you come up yourself
It's a wonder you don't fall down.

Ten Bucks you say I owe you?
Ten Bucks you say is due?
Well, that's Ten Bucks more'n I'l pay you
Till you fix this house up new.

What? You gonna get eviction orders?
You gonna cut off my heat?
You gonna take my furniture and
Throw it in the street?

Um-huh! You talking high and mighty.
Talk on-till you get through.
You ain't gonna be able to say a word
If I land my fist on you.

Police! Police!
Come and get this man!
He's trying to ruin the government
And overturn the land!

Copper's whistle!
Patrol bell!
Arrest.
Precinct Station.
Iron cell.
Headlines in press:
MAN THREATENS LANDLORD

TENANT HELD NO BAIL
JUDGE GIVES NEGRO 90 DAYS IN COUNTY JAIL![1]

INTRODUCTION

In poet Langston Hughes' famous poem above, "The Ballad of the Landlord,"[2] a tenant is engaged in a protracted struggle with a landlord who refuses to complete the most basic repairs to an apartment the tenant is leasing. Hughes' tenant complains of a leaky roof and broken steps at the apartment. The tenant expresses his dismay at the landlord's refusal to fix the place he is renting but also at the landlord's threatening attitude. The tenant has properly advised the landlord of the problems but is still being ignored by the housing provider. In the end, the tenant (an African American) is threatened with eviction and eventually arrested by the police for attempting to have the landlord repair the apartment they were renting.

Hughes' poem is one of the best illustrations of the most basic but worst kind of landlord-tenant relationship: a landlord possesses all of the power, abuses that power, and with the state's assistance wields that power to inflict the most damage on a defenseless tenant. The tenant only wanted what most of us hope for today and what we believe the law provides: a safe, sanitary, and habitable apartment. Even following the law did not help the tenant achieve any of these goals.

Hughes' poem, "The Ballad of the Landlords," was composed in 1941.[3] It was published in his 1943 volume of poems, *Jim Crow's Last Stand.* [4] In the 1940's, landlord-tenant laws favored the landlords. This was a time long before the 1960's and 70's legal revolution occurred in landlord-tenant law that forever changed rental housing in the U.S., at least legally. That legal revolution discussed in this article occurred in the District of Columbia, and in other jurisdictions, and shaped the standard landlord-tenant procedural law for the rest of the country. Hard fought court victories revolutionized how landlord-tenant cases are litigated in court systems today. A few important cases expanded the procedural rights of tenants from the typical common law definitions of tenant rights.

However, these moderate expansions in the rights of tenants are no longer able to truly address the problem of safe, sanitary, and affordable housing in the U.S. In addition, whatever significant impact these cases had was hampered by the tenants' rights

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1. LANGSTON HUGHES, THE LANGSTON HUGHES READER 101 (1958).
2. *Id.*
3. Carter G. Woodson, *Jim Crow's Last Stand By Langston Hughes,* 28 J. NEGRO HIST., 373, 492-494 (1943).
4. *Id.*

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movement abrupt ending. Other court cases intervened and the law and outcomes for tenants overall has remained fairly stagnant since that time.

Needless to say, evictions, in the United States, have reached epidemic levels. Most tenants do not have the benefit of legal counsel if they are sued for eviction or just to assert their basic rights under the law. In addition, growing economic inequality in the U.S. has expanded dramatically resulting in additional challenges for tenants in meeting their rent obligations.

Today, states are beginning to again consider how to change the way their courts handle landlord-tenant cases in an effort to reduce evictions. This is mainly due to the eviction epidemic in this country. While some of these efforts have achieved success, there is more to be done in order to provide disadvantaged tenants with a basic level of legal representation and advocacy that will impact the eviction problem. In other words, there is a second legal revolution needed in landlord-tenant relationships to address the nation's national eviction crisis that has emerged in the last decade. This article will explore a variety of questions. What laws have already been implemented? What laws should be implemented? Which states and cities have taken the lead in trying to find solutions? Will the current focus on providing more tenants with legal representation in eviction proceedings be enough to make a difference?

This article will focus on developments related to procedural rights and matters in landlord-tenant disputes. Most of the developments in tenants' rights are related to procedural rights and tenants' substantive rights.

Part I of this article will briefly summarize in more detail the eviction crisis currently facing the country. Part II will focus upon the history of landlord-tenant laws and policies with an emphasis on the most significant cases of the twentieth century. Part III will discuss recent various state and city efforts and their respective success or failure. Part IV will propose recommended changes to positively impact the lives of thousands of tenants and alter the manner in which the judicial system handles landlord-tenant disputes. Part V will summarize a way forward, hopefully helping advocates and other stakeholders understand and utilize this article's specific arguments.

I. LANDLORD-TENANT, U.S.A.

A. An Eviction Epidemic

While working as a Staff Attorney at the Neighborhood Legal Services Program in Washington D.C. in 1994, I witnessed, in part and up close, an eviction of a family. I was their legal representative

(attorney). Initially, I stalled the eviction of a low-income single mother and her two children for non-payment of rent. However, they had legally withheld their rent payment because the landlord's mismanagement of their apartment violated the city's housing code. This allowed the family to withhold rent and pay their rental payment into the court registry while the case was litigated. However, they were unable to pay a court ordered payment and were subsequently evicted.

I received notice that the eviction was suddenly taking place when the mother (my client) called the legal services office where I worked. I arrived outside the family's apartment moments later. They were sitting, in the rain, beside their personal belongings, waiting for someone to come help them remove the items they were able to keep. They spent a few hours in my office where I worked that afternoon using the phone, but eventually departed after finding some temporary shelter. I have no idea what became of the family after they left my office. At that point, my work ended and charities and government agencies would work closely with the family to try and stabilize their lives. The eviction likely changed everything for them forever. They were already a poor family with few resources at their disposal to address a sudden financial and social challenge. This family's challenges are symptomatic of the broader eviction epidemic across the country.

According to Matthew Desmond, over 900,000 evictions occurred in 2016.[5] This equates to an estimated 2.3 million people in the United States who were affected by eviction in 2016.[6] These evictions are also an underestimate.[7] These are epidemic statistics and they have a devastating impact as one might expect. According to some of the latest studies, evictions may impact pertinent aspects of someone's life: their employment; their mental, emotional, and physical health; and may even affect children's education and ability to learn.[8] These same studies show eviction is a leading cause of poverty and homelessness.[9] The eviction epidemic is indeed disrupting the foundation of our society.[10]

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5. David Brancaccio and Katie Long, *Millions of Americans are Evicted Every Year— and Not Just in Big Cities,* MARKETPLACE (Apr. 9, 2018), https://www.marketplace.org/2018/04/09/eviction-desmond-princeton-housing-crisis-rent/.

6. *Id.*

7. *Id.*

8. Breezy A. Schmidt, *North Dakota Case Study: The Eviction Mill's Fast Track to Homelessness,* 92 N.D. L. REV. 595, 597-598 (2018).

9. *Id.*

10. *Id.*

While evictions have been a historical fact, Desmond contends that prior to recent years, evictions were "rare and scandalous."[11] Desmond asserts evictions used "to draw crowds" and "protests"; the community would collectively seek to confront the state over evictions when they did occur.[12] In 2000, this began to change. "[W]e've moved from a place where eviction was rare to a place where eviction is very common in the lives of the urban poor."[13]

In addition to eviction trends, other rental housing statistics add to the problem. For example, in 2019, the Joint Center for Housing Studies reports that almost half of all American renters in 2016 were rent-burdened.[14] Rent-burdened is defined as a renter spending more than thirty percent of their income on rent.[15] Of the rent-burdened renters reported in 2017, 11 million spent half their income or more on rent.[16] If future renters are spending too much of their income on rent, it could put them in danger of eviction. A sudden unemployment could hamper their ability to pay rent, thus resulting in an eviction. It also prevents them from spending their earned income in other parts of the economy or addressing other needs properly.

B. Landlord-Tenant Disputes: A History

In the United States, English feudal laws were originally the basis of landlord-tenant law.[17] Tenants possessed little if any rights with respect to their lease agreements with housing providers and landlords controlled the relationship.[18] The relationship was an "as is"[19] relationship and none of the various procedural rights which

11. Matthew Desmond & Colin Kinniburgh, *The Faces of Eviction,* DISSENT MAG., *Fall 2018*, (last accessed June 22, 2019) https://www.dissentmagazine.org/article/matthew-desmond-evicted-interview-photos-eviction-lab.

12. *Id.*

13. *Id.*

14. *America's Rental Housing Report 2017*, JOINT CTR. FOR HOUSING STUD. OF HARV. U., https://www.jchs.harvard.edu/americas-rental-housing-2017-interactive-tools (last visited Jan. 11, 2020).

15. Andrea Riquier, *We're Still Building the Wrong Kind of Homes for Renters*, MARKET WATCH (Dec. 18, 2017), https://www.marketwatch.com/story/were-still-building-the-wrong-kind-of-homes-for-renters-2017-12-14.

16. *Id.*

17. Charles Wm. Sullivan, *Forgotten Lessons from The Common Law, The Uniform Residential Landlord and Tenant Act, and the Holdover Tenant,* 84 WA. U. L. REV. 1287, 1291-92 (2006).

18. *Id.*

19. Jana Ault Phillips & Carol J. Miller, *Is Rent Escrow the Solution or the Obstacle to Tenant's Enforcement*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 3 (2016).

shall be discussed in this article existed during these years.[20] "As is" means the renter accepts the property in its present condition, whether faults are apparent or not, and waives all responsibility on behalf of the Landlord to maintain the property.

One of the most influential cases, slightly deviating from the English common law doctrine of tenant leasing "as is," is the case of *Sarah P. Ingalls & Another v. Warren Hobbs.*[21] Prior to *Hobbs*, in English cases there had been exceptions to the "as is" rule but no precedent was actually established by the court and the courts provided no legal reasoning for their rulings in favor of the tenants.[22] *Hobbs* was perhaps the first U.S. case where a court took the same tact in rendering its decision.[23]

In *Hobbs,* Sarah Ingalls sought to recover $500 from Warren Hobbs "for the use and occupation of a furnished dwelling house" in the summer of 1890.[24] Mr. Hobbs leased the unit from Ms. Ingalls and failed to pay the agreed upon the amount.[25] In addition, the "house was unfit for habitation when it was hired."[26] The only question for the court as stated in the case was "whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling house."[27]

While the court recognized the existence of the common law "as is" doctrine, in Hobbs the specific circumstances of the case motivated the court to expand the doctrine of "as is" and consider the unique circumstances of the case:

> In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more

20. Sullivan, *supra* note 17, at 1293-94.
21. Ingalls v. Hobbs, 156 Mass. 348 (Sup. Jud. Ct. Mass. 1892).
22. Warren Turner, *The Implied Warranty of Habitability in the Lease of a Furnished Home*, 11 WA. U. REV. 233, 233-34, (1926).
23. *Id*. at 234.
24. *Hobbs*, 156 Mass. at 348-49.
25. *Id.*
26. *Id.*
27. *Id.*

> important element entering into the contract than when there is a mere lease of real estate.[28]

While *Hobbs* did not result in an immediate and total rejection of the common law doctrine, the holding was an indication that courts might be willing to examine facts closely and consider implied terms in lease agreements. However, tenants would need much more intervention by court systems to impact hundreds of years of legal jurisprudence favoring landlords.

In 1933, in the case of *Lawler v. Capital City*, a court provided further clarification on the nature of landlord-tenant relationships.[29] *Lawler* is a commercial lease case that advanced the concept of "as is" leases, rather than the implied covenant of safety leases.[30] In *Lawler*, the court unambiguously held that the old doctrine of "as is" remained the law:

> In this situation the case is governed by the general rule applicable between landlord and tenant, where it is long established that upon the letting of a house there is no implied warranty by the landlord that the house is safe; or well built; or reasonably fit for the occupancy intended. The tenant is a purchaser of an estate in the property he rents, and he takes it under the gracious protection of caveat emptor.[31]

The same line of reasoning was followed as well in *Hughes v. Westchester Development Corporation*.[32] *Hughes*, a residential lease case, unlike *Lawler*, involved allegations by the tenants that the apartment "was overrun with cockroaches, bugs, and other insects, and thereupon reported its condition to the agents of plaintiff."[33] Tenants "made every possible effort through the use of chemicals, powders, and sprays to remedy this condition, to no avail."[34] Nevertheless, the Court invoked the doctrine established in *Lawler* and ruled in favor of the landlord, holding "it is long established that upon the letting of a house there is no implied warranty by the landlord that the house is safe; or well built; or reasonably fit for the occupancy intended" and that "the tenant is a purchaser of an estate in the property" and the agreement between the parties is essentially "*caveat emptor*."[35] *Hughes* was a

28. *Id.* at 349-50.
29. Lawler v. Capital City Life Ins. Co., Inc., 68 F.2d 438 (D.C. Cir. 1933).
30. *Id.*
31. *Id.* at 439.
32. Hughes v. Westchester Dev. Corp., 77 F.2d 550 (D.C. Cir. 1935).
33. *Id*. at 551.
34. *Id*.
35. *Caveat Emptor* is a Latin phrase meaning "let the buyer beware."

continuation of the "as is" doctrine. There was, at the time, "no duty to repair defects in the premises, regardless of whether they existed at the time of the lease or arose thereafter." [36] The tenant was obligated to pay rent for the property regardless of the condition of the unit and regardless of the maintenance of the unit by the landlord.

In effect, "a breach by the landlord of an express covenant, such as a covenant to repair, did not relieve the tenant of any part of his obligation to pay rent; and the breach by the tenant of his rent covenant did not give the landlord the right to retake possession."[37] In the 18th and 19th century when landlord-tenant law evolved, the law of leases somehow did not include or enshrine the important contractual concept of mutual promises in its jurisprudence.[38] Based upon this legal tradition, it is no accident that serious changes were due with respect to landlord-tenant law in the 20th century. Landlords, as the above-mentioned rulings demonstrated, had the law all to themselves; the consumers (the renters) had nothing.

II. THE REVOLUTION

The Neighborhood Legal Services Program (NLSP) handled five important cases relating to long term reform in the landlord-tenant system. According to the longtime director of the program, Willie Cook Jr., these cases are the "five pillars."[39] These five pillars and the issues that were advanced on behalf of the rights of tenants are: *Brown v. Southall Realty* (void leases), *Javins v. First National Realty* (implied warranty of habitability), *Edwards v. Habib* (retaliatory evictions), *Bell v. Tsintolas* (protective orders of rent payment into the court registry during pendency of a landlord-tenant dispute), and *Saunders v. First National Realty* (right to jury trial in a landlord-tenant proceeding). Here is a brief summation and analysis of each of these important cases.

A. *Brown v. Southall Realty*

Brown v. Southall Realty commenced when Lillie Brown was sued by her landlord for non-payment of rent.[40] Brown rented an apartment in the District of Columbia by signing a lease.[41] However,

36. Edward H. Rabin, *The Revolution in Landlord Tenant Law: Causes and Consequences,* 69 CORNELL L. REV. 517, 521-22 (1984).
37. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law,* 23 B.C. L. REV. 503, 511 (1982).
38. *Id*. at 510.
39. Interview with Willie Cook, Jr., Director, NLSP in Washington, D.C. (2005).
40. Brown v. Southall Realty Co., 237 A.2d 834, 835 (D.C. Cir. 1968).
41. *Id*. at 836.

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upon arriving at the apartment to take possession and move into the premises, the apartment was in violation of the local housing code.[42] Specifically, the unit had an "obstructed commode, a broken railing, and insufficient ceiling height in the basement" which rendered the unit uninhabitable.[43] The landlord, Sinkler Penn, was well aware of the violations well before the lease signing, and took no action to address these problems.[44] Ms. Brown sued for $230, but not desiring to occupy the unit, alleged an "illegal contract" as her defense to the lawsuit.[45]

While the trial court held that Ms. Brown was in violation and ruled in favor of the landlord, the D.C. Court of Appeals reversed that decision in Brown's favor.[46] Applying contract principles and precedent to the case, the D.C. Court of Appeals found that to "uphold the validity of this lease agreement" with the acknowledged violations "would be to flout the evident purposes" of the housing code.[47] That code, among other things, required housing providers to only rent units in a "safe and sanitary condition" and "free from rodents and vermin."[48]

The key discussion in *Brown,* and the law it advanced, was the manner in which contract principles became the foundation of the court's ruling. Because the lease was considered a contract and that the apartment was in violation of the housing code, the landlord could not meet the legal obligations under the lease. "The lease contract," the court noted, "was . . . entered into in violation of the Housing Regulations."[49] The unit was not in a "safe and sanitary" condition and was not "properly maintained."[50] It must also be stressed that in the *Brown* decision, the fact that the unit was in disrepair prior to Brown taking possession is likewise important. Brown never took possession of the unit and she also never attempted to enforce the lease.[51] Her argument, at trial, was the lease contract was illegal.[52] This rendered the contract, at least according to the appeals court, void.

The contribution of the *Brown* decision and similar cases is the use of contract principles to resolve a landlord-tenant leasehold dispute involving housing code violations. *Brown* did not make a ruling on whether the lease could be declared void after a tenant took

42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*. at 835.
46. *Id*. at 837.
47. *Id*.
48. *Id*. at 836.
49. *Id*.
50. *Id*.
51. *Id*. at 835.
52. *Id*.

possession and such violations occurred. However, the most important development in the case is a landlord-tenant relationship was deemed to be governed by contract law as opposed to real property law according to the court.

B. Edwards v. Habib[53]

Edwards v. Habib, another landlord-tenant lawsuit from the District of Columbia, involved Yvonne Edwards who rented an apartment from landlord Nathan Habib. The apartment had housing code violations, and Edwards complained to the D.C. Department of Licenses and Inspections regarding these unsanitary conditions.[54] Habib, as was customary at the time in the world of landlord-tenant relationships, immediately commenced actions to evict Edwards from the apartment.[55]

Initially, Edwards' attempt to raise a defense of retaliatory eviction in the action to evict her from the unit was unsuccessful.[56] In fact, the trial court ruled that any evidence as to the "purpose" of the landlord "in bringing the action was inadmissible."[57] The trial court directed a verdict in favor of the landlord.[58] The D.C. Court of Appeals agreed with the trial court and likewise rejected all of her arguments and possible defenses.[59] The United States Court of Appeals for the D.C. Circuit accepted the case on appeal and overruled both the trial court and the D.C. Court of Appeals.

Specifically, Judge Wright ruled that Edwards should be permitted to try to prove to a jury that her landlord who seeks to evict her harbors a retaliatory intent.[60] If Edwards could not present such evidence it would defeat the intent of the D.C. Housing Code, according to Wright.[61] Brian Olmstead, trial attorney in the case, and one of the lawyers for Ms. Edwards on appeal, made these arguments.[62] While the overall policy of *Edwards* was not accepted uniformly by courts, the doctrine for the most part has remained intact.

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53. Edwards v. Habib, 397 A.2d 687 (D.C. Cir. 1968).
54. *Id*. at 688.
55. *Id*. at 690.
56. *Id*.
57. *Id*.
58. *Id*. at 689.
59. *Id*.
60. *Id*. at 690.
61. *Id*. at 701.
62. Telephone Interview with Brian Olmstead, Attorney (May 4, 2006).

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C. *Javins v. First National Realty*

By far the most important landlord-tenant case in history is *Javins v. First National Realty*.[63] *Javins* is about "housing code violations which arise during the term of the lease."[64] The question is whether those violations "have any effect upon the tenant's obligation to pay rent."[65]

The *Javins* cases involved tenants renting apartments in Washington D.C. at a complex known as Clifton Terrace.[66] There were over 1,500 housing code violations alleged by the tenants in the non-payment cases before the Landlord-Tenant Branch of the D.C. Superior Court.[67] Evidence of these violations was ruled "inadmissible" by the Court as proof in a non-payment of rent case.[68] On appeal, the Court effectively changed landlord-tenant law as it had been known historically. Indeed, the modern truth of landlord-tenant arrangements was taken into account by the Court when it presented its analysis:

> But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek 'shelter' today, they seek a well-known package of goods and services— a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.[69]

The Court's legal rationale is that while landlord-tenant law has its roots in an "agrarian" tradition and in "feudal law", in the modern world, more and more landlord-tenant disputes were a reflection of life in urban areas.[70] The suggestion by the *Javins* Court is that the old landlord-tenant laws that governed these relationships are "inappropriate"[71] for our modern world.[72]

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63. Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970).
64. *Id*. at 1072.
65. *Id*.
66. *Id*. at 1073.
67. *Id*.
68. *Id*.
69. *Id*. at 1074.
70. *Id*.
71. *Id*.
72. *Id.* at 1074-75.

To absolve a landlord of "all obligation to repair" with laws and ideas that "originated in the early Middle Ages" was consistent with the modern world.[73] These laws were developed at a time when "land was more important" and a "tenant farmer was fully capable of making repairs."[74] *Javins*, a case involving an apartment in a huge urban complex, in a big, highly populated city, with little if any farming, could not be more different. In the end, *Javins* firmly established a concept (implied warranty) rooted in consumer protection law and makes it clear that a tenant can present evidence of housing code violations as a defense in a non-payment of rent case. The Court held that "rigid doctrines of property law" should no longer "inhibit the application" of consumer concepts such as "implied" warranties.[75] The Court's opinion stated the new concept quite plain:

> We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. The housing code— formally designated the Housing Regulations of the District of Columbia— was established and authorized by the Commissioners of the District of Columbia on August 11, 1955. Since that time, the code has been updated by numerous orders of the Commissioners. The 75 pages of the Regulations provide a comprehensive regulatory scheme setting forth in some detail: (a) the standards which housing in the District of Columbia must meet; (b) which party, the lessor or the lessee, must meet each standard; and (c) a system of inspections, notifications and criminal penalties.[76]

Javins became the new paradigm for landlord-tenant disputes when non-payment was the issue. A tenant could present evidence of violations of the lease contract and courts were directed to take this evidence under consideration using housing codes as part of an implied warranty inherent in the product the landlord was offering.

It should be noted that while *Javins* has become the leading case for the concept of "implied warranty of habitability," it was not the first time the concept was recognized and upheld by a court of law. In *Pines v. Perssion*, the implied warranty of habitability was upheld by a Wisconsin court[77] many years before the *Javins* case fully advanced the concept. At the time of *Pines*, the accepted legal rule

73. *Id*. at 1077.
74. *Id*.
75. *Id*. at 1076.
76. *Id.* at 1080.
77. Pines v. Perssion, 111 N.W.2d 409, 409 (Wis. 1961).

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was "that there are no implied warranties of habitability to the effect" in residential leasehold agreements.[78] However, *Pines*, in its opinion, forever changed landlord-tenant law, though it would take years for its holding to be more acceptable by courts. First, the Court noted the following:

> The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent 'tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners.[79]

This is no different from the rationale Judge Skelly Wright would use to make the *Javins* decision. Shelter was important to consumers and their ability to reside in safe and sanitary dwellings should not be their responsibility. It should be the responsibility of the housing provider.

The *Pines* court then noted the important concept consistent later with the implied warranty of habitability: the covenant to pay rent and the covenant to maintain a safe and sanitary unit were mutually dependent.[80] As such, in *Pines*, that implied warranty had been breached.[81]

Following the *Javins* decision, a number of other jurisdictions followed the case's holding and likewise upheld the concept.

D. Bell & Pernell

The final two cases out of the District of Columbia that directly impacted landlord-tenant law are *Bell v. Tsintolas*[82] (escrow) and *Pernell v. First National Realty*.[83] *Bell* is important because it established that tenants could pay their rental payments into escrow (the court registry in *Bell*) during the pendency of a landlord-tenant case.[84] *Pernell* established a right to a jury trial in a landlord-tenant proceeding.[85]

Here, the primary issue was determining the proper balance between the considerations of indigent tenants who need to be able

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78. *Id.* at 412.
79. *Id.* at 413.
80. *Id.*
81. *Id.* at 409.
82. Bell v. Tsintolas Realty Co., 430 F.2d 474 (D.C. Cir. 1970)
83. Pernell v. Southall Realty, 416 U.S. 363 (1974).
84. *See Bell,* 430 F.2d at 479-80.
85. *See Pernell,* 416 U.S. at 363.

to proceed forward despite their indigent status with the level of protection allocated to landlords as the case was litigated through the legal system. Thus, the solution to this problem is the Court's conclusion in *Bell*.

"Under a variety of circumstances," the *Bell C*ourt sought to provide "an indigent" with access to the judicial system.[86] If a "meritorious defense cannot be litigated" by an indigent "because a monetary barrier has been erected," the entire reason for "the adversary system is frustrated" the Court contended.[87] Thus, one of the primary barriers to tenants being able to litigate their complaints before the court was prepayment of rent in order to proceed—as this would, regardless of the reasons for the non-payment, prevent litigation of the tenant's claims.

On the other hand, the landlord should be afforded some protection in the litigation as well as the matter proceeds through the system. Therefore, the *Bell* Court explained that the nature of landlord-tenant summary proceedings rarely made prepayment of the rent in dispute to be paid into a court fund (escrow) necessary.[88] In fact, a much more equitable approach by the court was to grant payment of rent escrow (protective order) "only when the tenant has either asked for a jury trial or asserted a defense based on violations of the housing code, and only upon motion of the landlord and after notice and opportunity for oral argument by both parties."[89] In addition, *Bell* held that "the protective purpose of the rent payment requirement . . . will be well served simply by requiring only future payments falling due after the date the order is issued to be paid into the court registry."[90] In sum, this approach protected both parties: the tenants were allowed to proceed with their claims and the landlord's future interests were protected as the parties litigated the disputed rent and housing code violation claims.

Pernell, while one of the more important of the procedural gains from this period of revolutionary legal change in the landlord-tenant litigation system, is an ordinary landlord-tenant case. The case established a right to a jury trial in landlord-tenant proceedings in the District of Columbia.[91] While the case is a District of Columbia case, it is a case decided by the U.S. Supreme Court. Using the Seventh Amendment as its primary legal support, the Court held that in "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .".[92] It added that "like other provisions of the Bill of Rights, it is fully

86. *See Bell*, 430 F.2d at 480.
87. *Id*.
88. *Id*. at 481-82.
89. *Id*. at 483.
90. *Id*.
91. Pernell v. Southall Realty, 416 U.S. 363 (1974).
92. *Id*. at 370.

applicable to courts established by Congress in the District of Columbia."[93] The decision is a case for the District of Columbia, but as a result of the use of the U.S. Constitution, it is difficult to argue that the Court did not mean for this decision to be applicable to any and all cases involving summary proceedings in a landlord-tenant setting.

E. Lindsey v. Normet

The legal revolution had begun to wane on February 23, 1972, when the U.S. Supreme Court issued its opinion and order in *Lindsey v. Normet.*[94] While *Lindsey* is prior to the *Bell* and *Pernell* decisions, *Lindsey* signals a desire to limit some of the changes in summary proceedings. *Lindsey* did not overturn any of the procedural rights gained in previous cases, but it does provide limitations on how far state courts would be allowed to expand the rights of tenants in these court matters.

Lindsey was a challenge to Oregon's eviction process.[95] The tenants, through their attorneys, sought to have Oregon's statute declared unconstitutional on its face as a violation of due process. Oregon's statute for resolving landlord-tenant disputes was particularly tough on tenants:

> Service of the complaint on the tenant must be not less than two nor more than four days before the trial date,[96] a tenant may obtain a two-day continuance, but grant of a longer continuance is conditioned on a tenant's posting security for the payment of any rent that may accrue, if the plaintiff ultimately prevails, during the period of the continuance.[97] The suit may be tried to either a judge or a jury, and the only issue is whether the allegations of the complaint are true.[98] The only award that a plaintiff may recover is restitution of possession.[99]

Despite the short time period to prepare for a possible trial for a tenant, the Supreme Court declined to strike down the statute on its face as a violation of due process.[100] The Court stated it was "unable to conclude that either the early trial provision or the limitation on

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93. *Id.*
94. Lindsey v. Normet, 405 U.S. 56 (1972).
95. *Id.* at 63-64.
96. OR. REV. STAT. § 105.135 (2019).
97. OR. REV. STAT. § 105.140 (2019).
98. OR. REV. STAT. §§ 105.145, 105.150 (2019).
99. OR. REV. STAT. § 105.155 (2019).
100. *Id.*

litigable issues is invalid on its face under the Due Process Clause of the Fourteenth Amendment."[101] The Court did not agree "that the Oregon statute allows an unduly short time for trial preparation" because the Court felt that tenants would "have as much access to relevant facts as their landlord."[102] The relevant facts, according to the Court were "the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary."[103]

In short, the Court was unwilling to declare Oregon's eviction process unconstitutional even under circumstances that made it quite difficult for a tenant, especially one without an attorney, to present a coherent defense. Oregon's process was particularly quick; yet, the Court still upheld the process. It is also notable that not only was the Oregon process difficult for tenants, the process was based on the "as is" rental model that preceded the modern era. This concept meant that repair of a property was the responsibility of the tenant.

Over the years, critiques of the case have been particularly harsh. Immediately after the case it was noted that while tenants have a right to an opportunity to be heard in rental cases where possession, rent, and housing conditions are in dispute, the degree to which they are to be heard is open to interpretation.[104] It has also been pointed out that the case essentially "closed the door on a Fourteenth Amendment right to shelter through the Equal Protection Clause."[105] The case not only upheld the Oregon statute; it placed a limitation on individual rights related to housing.

Overall, *Lindsey* is a defense of self-help evictions.[106] A tenant has an opportunity to be heard but barely. *Lindsey* refused to expand rights of tenants; and also, the case took a conservative approach to the law by leaving such expansions of rights, procedural or substantive, to the legislatures.[107] It was effectively the end of all progress tenants and their advocates had been able to gain in the court system.

III. A Tenant Rights Movement

While the cases above do represent important changes in how landlord-tenant disputes were resolved in court, the developments in

101. *Id.* at 64-65.
102. *Id.*
103. *Id*.
104. *Right to Hearing Before Taking of Property*, 86 HARV. L. REV. 85, 91 (1972).
105. Inez Smith Reid, *Law, Politics, and the Homeless*, 89 W. VA. L. REV. 115, 143 (1986).
106. Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process A Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759 (1994).
107. *Lindsey*, 405 U.S. 56 (1972).

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the law and in rental housing rights generally were more complex and expansive. The time period of these cases, the 1960's and early 1970's, can be described as a movement. With over seventy million renters in the United States by 1971, and with the emergence of other movements at the time (civil rights, welfare rights, etc.), "support" for tenant rights increased.[108] By 1969, the emergency of tenants' rights was described as a "multi-class national movement."[109]

This development, as demonstrated above by the cases discussed above, was a long time coming. The movement in the United States was incredibly behind historically, as noted in the aftermath of the change:

> America, in marked contrast to the United Kingdom, had, until recently, relatively little legislation on the topic of landlord and tenant. No American jurisdiction has any legislation remotely approaching the scope of the Law of Property Act and we have little which corresponds to the Rent Acts or to the various Landlord and Tenant and Housing Acts. The Second World War legislation designed to control the price of rented housing and to give tenants some measure of security of tenure was repealed in almost every American jurisdiction shortly after the war.[110]

It also did not help that landlord-tenant relationships in the United States were governed (as they are still today) mostly by state law.[111] For many states, this meant the affairs of big urban areas were controlled by individuals who likely did not reside in urban areas. Individuals not from urban areas did not really grasp or care about the problems particular to urban areas such as the lack of standards and laws governing landlord-tenant relationships.[112]

According to David A. Super, a Georgetown University Law Center professor and former staff attorney at Community Legal Services in Philadelphia,[113] the tenants' rights movement mirrored the welfare rights movement at the time. Each movement had specific goals in their advocacy efforts. Landlord-tenant reform organizers specifically identified the five goals of the movement.[114]

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108. Tova Indritz, *The Tenants' Rights Movement,* 1 N.M. L. R. 1, 1 (1971).

109. *Id*.

110. Charles Donahoe, Jr., *Change in the American Law of Landlord and Tenant*, 37 MOD. L. REV., 242, 242 (1974).

111. *Id*.

112. *Id*. at 242-43.

113. David A. Super, GEORGETOWN LAW, https://www.law.georgetown.edu/faculty/david-a-super/ (last accessed Apr. 30, 2020).

114. David A. Super*, The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 398-99 (2011).

The five goals were as follows: (1) replace the estates in land paradigm in landlord-tenant relationships with one based on contract law; (2) improve "the quality of urban housing through the agency of tenants of substandard units; (3) redistribute wealth from landlords to tenants; (4) improve the lives and the standard of living of the nation's most "hard pressed tenants;" and (5) promote social stability by improving the lives of low income-tenants.[115]

During the 60’s and 70’s, there was also an increase in housing code enactments. In 1954, there were only fifty-six housing codes in the United States to regulate standards in rental housing conditions.[116] Ten years later, by 1964, there were approximately 4,900 housing codes in the United States.[117]

Additionally, in 1971, the U.S. Department of Housing and Urban Development (HUD) greatly expanded the rights of tenants in public housing.[118] All of the 1,900 local housing authorities that exist in the Country were suddenly required by HUD "to adopt lease provisions and grievance procedures that meet certain general standards."[119]

Tenant organizing work began to be implemented in specific cities as previously noted.[120] In 1963, tenants in the Harlem neighborhood of New York City famously began organizing and seeking better housing conditions in their neighborhood.[121] Government officials and residents organized a rent strike. The strike was described as a "contestation over residential space," and "consumer resistance" to “slumlords” but also a challenge to all parties.[122] While the strike itself was unsuccessful, it did lead the formation of the National Tenants Organization, a national advocacy organization for low-income renters. Historically, the organization is described as "a confederation of about 100 local tenant groups, the majority being in public housing projects."[123]

The legal developments accomplished in the 60's and early 70's also led to substantial activity by legal professional associations deciding how the law would be applied. The American Bar

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115. *Id*.

116. Committee on Leases*, Trends in Landlord-Tenant Law, Including the Model Code*, 6 REAL PROP. PROB. & TR. J. 550, 552 (1971).

117. *Id*.

118. George Lefcoe, *HUD's Authority to Mandate Tenants’ Rights in Public Housing*, 80 YALE L. J. 463, 463 (1971).

119. *Id*.

120. *Tenant Organizing Classes Are Forming,* PHILA. TR. 19 (Mar. 1974).

121. Mandi Isaacs Jackson, *Harlem's Rent Strike and Rat War: Representation, Housing Access and Tenant Resistance in New York, 1958-1964*, 47 AM. STUD. 53, 54 (2006).

122. *Id.*

123. Lefcoe, *supra*, note 118, at 473.

Association and public interest lawyers were heavily involved in advancing tenants' rights.[124]

One by-product of this particular approach was the Uniform Residential Landlord-Tenant Act (URTLA), a tool still in use today although it is controversial and rejected by some.[125] The URTLA was completed through the efforts of housing lawyers, advocates from across the country, and the American Bar Association.[126] A subcommittee was formed to draft an act that would eventually become the complete model law for states to formulate a modern landlord-tenant law in their jurisdictions.[127]

The "stated purpose of the drafters of the proposed [URTLA] [was] to simplify, clarify, modernize and revise the law governing landlord-tenant relations" throughout the country.[128] In addition, the "underlying purpose and general attitude of the Act would appear to legislate a balance in the bargaining positions of the landlord and tenant in the residential field."[129]

It is apparent in examining the substantive portions of the URTLA that it reflects the holdings in landlord-tenant cases discussed above. The URTLA also reflects the reality of modern landlord-tenant relationships. The major change that the URTLA recognizes is that "residential leases" should now be "interpreted according to contract law and not according to real property law."[130] This was a major shift.

While the URTLA did not attempt to dictate procedurally how it could be implemented, law firm guidance was provided on a variety of topics including landlord obligations, security deposits, retaliatory evictions prohibitions, and implied warranty of habitability. [131] For example, the act prohibited the use of exculpatory clauses to "limit the liability of the landlord."[132] To date, the URTLA has been adopted by twenty-one states.

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124. Myron Moskovitz, *The Model Landlord Tenant Code —An Unacceptable Compromise*, 3 URB. LAW. 597 (1971).

125. Subcommittee on the Model Landlord Tenant Act of Committee on Leases, *Proposed Uniform Residential Landlord Tenant Act*, 8 REAL PROP. PROB. & TR. J. 104, 104 (1973).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Brian J. Strum, *Proposed Uniform Residential Landlord and Tenant Act: A Departure from Traditional Concepts*, 8 REAL PROP. PROB. & TR. J. 495, 495 (1973).

131. *Id.* at 496-98.

132. *Id*. at 502.

IV. LANDLORD-TENANT: THE MODERN ERA

A. Implied Warranty

While landlord-tenant law has not changed since the early 1970's, many limitations still remained on the ability of tenants to maximize the landlord-tenant relationship and to navigate the legal system when lawsuits arose. One example of the stagnation in progress is the inherent limitations on the implied warranty of habitability since it came into wide use by the legal system under *Javins*.[133]

Initially, the success of the implied warranty concept could be seen when the majority of states all across the country adopted the concept into their laws and the defense (or counterclaim) was readily available to tenants all across the country.[134] Yet, the evidence fifty years later is that the concept was not transforming.

A study in New York City supports the fact that implied warranty was not the revolutionary fix of the landlord-tenant system that advocates wanted it to be.[135] In fact, the benefits of tenants raising the defense at all is minimal:

> The study found that very few tenants with meritorious warranty of habitability claims actually benefited from the law. Overall, less than 2 percent of tenants who had meritorious claims received rent abatements. Perhaps even more astonishing, only 7 percent of tenants whose landlords have been cited by the City for hazardous or immediately hazardous Housing Code violations—a subset of those who had meritorious claims— received abatements. The findings also rule out the possibility that tenants with meritorious claims are reaping other types of benefits from their claims.[136]

It is notable that if a tenant is represented by counsel, the percentage of tenants who do receive a rental abatement increases to 70 percent.[137] However, for the most part, various studies over the years indicate that the use of the defense of implied warranty is not

133. Javins v. First Nat'l Realty, 428 F.2d 1071 (D.C. Cir. 1970).
134. HOUSING AND COMMUNITY DEVELOPMENT, CAROLINA ACAD. PRESS 298 (3d ed. 1999).
135. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020).
136. *Id*. at 150-51.
137. *Id.* at 151.

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very successful.[138] Rental abatements in these cases remain consistently rare.[139]

In addition to the shortcomings of implied warranty over the years, its failure exposes the fact that tenants lack the ability to present their claims and complaints in housing court. Many tenants, all across the country, seek to have problems with their apartments addressed by withholding their rent, forcing their landlords to sue them in court where they can then countersue their landlords for violations of the lease.[140] This approach is this approach risky for tenants but some limited data proves that it does not achieve the goals tenants are seeking: improving the conditions of their housing units.

B. Evictions and Legal Counsel

While the various legal holdings and advocacy efforts of the 1960's and 1970's changed the landlord-tenant relationship, these changes did not address the issue of legal representation of tenants. Tenants are not guaranteed a right to counsel when they appear in housing courts, and rarely are most of them able to afford an attorney.

Lawyers in New York City have been pressing the issue of legal representation for decades and in 1989 they finally began to make the demand for the right to "Civil Gideon" for tenants in housing court cases.[141] "Gideon" refers to the famous *Gideon v. Wainwright* case that guaranteed criminal defendants legal counsel.[142] In the District of Columbia, only 10 percent of tenants who are sued in eviction court receive legal representation.[143] In Philadelphia, as another example, only 11 percent of tenants have legal counsel in their eviction cases in housing court.[144] By contrast, 90 percent of the landlords who file eviction lawsuits in the court have counsel.[145]

138. *Id.* at 166-69.

139. *Id.*

140. *Id.*

141. Lauren Shay, *Poor Tenants Want N.Y. to Pay for Lawyers in Evictions*, 75 A.B.A. J. 16 (Sept. 1989).

142. Gideon v. Wainwright, 372 U.S. 335 (1963).

143. Charles Allen, Kenyan R. McDuffie & Mary M. Cheh, *Low Income Tenants in D.C. May Soon Get Help*, WASH. POST (May 18, 2017), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/05/18/low-income-tenants-in-d-c-may-soon-get-legal-help/?noredirect=on.

144. Caitlin McCabe, *Philly Council Passes Right to Counsel*, PHILA. INQUIRER (Nov. 14, 2019), https://www.inquirer.com/real-estate/housing/right-to-counsel-bill-helen-gym-city-council-tenants-eviction-lawyer-20191114.html.

145. *Id.*

In other jurisdictions across the country, it is the same: in housing cases, tenants rarely have legal counsel in eviction suits.[146] It must be noted that the outcomes in these cases are usually judgments for the landlord, whether the tenant received legal representation or not.[147] Anecdotal evidence suggests that the reason for the consistent results in these cases is systemic court bias in favor of landlords.[148]

One of the most important reasons why legal representation for tenants in court matters is because for the first time since 1965, more households in the U.S. are headed by renters.[149] The number of renters increased by 7.6 million between 2006 and 2016.[150] Considering the eviction statistics reported the last few years, leaving millions of tenants without legal counsel in eviction proceedings is contrary to public policy. While the number of renters began to decrease in 2017, there is still a large quantity of renters already in the housing market that must be taken into account in the future.[151] These kinds of societal trends are especially dangerous for poor tenants, as expressed in a1988 article concerning tenants receiving legal assistance:

> For low-income tenants, the trauma and disruption associated with eviction are no longer merely transitory. There is now a significant possibility that, because of the unavailability of affordable housing for low-income households, eviction will result in homelessness. Thus, eviction proceedings threaten not only a tenant's ability to remain in the same dwelling or community, but often his access to any shelter at all. Due to the low-income housing stock which is diminishing nationally at a rate of half a million units per year and the federal government's virtual abandonment of its role in providing publicly subsidized housing, there is close to a complete

146. Russell Engler, *Connecting Self Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed,* 37 FORDHAM URB. L. J. 37, 46-47 (2009).

147. *Id.*

148. *Id*. at 51.

149. Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting Than at Any Point in 50 Years,* PEW RES. CTR. (July 19, 2017), https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/.

150. *Id.*

151. Andrea Riquier, *We're Still Building the Wrong Kind of Homes for Renters,* MARKETWATCH (Dec. 18, 2017), https://www.marketwatch.com/story/were-still-building-the-wrong-kind-of-homes-for-renters-2017-12-14.

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> absence of housing affordable to low-income individuals in many parts of this country.[152]

Now that rental housing is even less affordable, the situation is even more dangerous. According to the National Low Income Housing Coalition, "a full-time worker with a standard 40-hour work week earning the federal or prevailing state minimum wage cannot afford a two-bedroom rental home at fair market rent in any U.S. county and can afford a one-bedroom rental in fewer than 99 percent of counties (28 out of more than 3,000 counties) nationwide."[153] The combination of less affordable housing, increased amounts of renters in the market, and few tenants being able to afford legal representation, creates a situation with destructive outcomes for individuals, families, and communities.

V. EVICTION PREVENTION AND TENANT RIGHTS: THE NEXT REVOLUTION

It might be inaccurate to call what is needed in landlord-tenant relationships a revolution. This is mostly because much of what is needed in landlord-tenant relationships is fairly simple in nature and will likely never seem revolutionary. It is important to note, also, that some of it is already happening in the U.S., albeit on a small scale. It is possible that there is actual change coming to the various court systems around the country.

In Washington D.C., when I first began practicing law as a pro bono Staff Attorney at the Neighborhood Legal Services Program, our program regularly appeared in the city's D.C. Superior Court (Landlord-Tenant Branch) and assisted tenants in court. In addition to our program, the Law Students in Court Program of the District of Columbia appeared in court every day to provide tenants with legal representation. However, given the large volume of eviction actions filed each day in the District of Columbia's Landlord-Tenant Branch of the court, it was impossible for our two programs, with others appearing occasionally as well, to represent most of the tenants. The vast majority of the tenants who had been sued did not speak to an attorney and had a judgment entered against them on that day without a hearing. There was no formal, goal-oriented approach to the effort either. The court did not assist our program

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152. Andrew Scherer, *Gideon's Shelter: The Need To Recognize A Right To Counsel For Indigent Defendants In Eviction Proceedings,* 23 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 557, 564-65 (1988).

153. *NLIHC Releases "Out of Reach 2019": National Housing Wage is Nearly $23 Per Hour for a Modest Two-Bedroom Rental*, NAT'L LOW INCOME HOUSING COALITION (July 24, 2019), https://nlihc.org/resource/nlihc-releases-out-reach-2019-national-housing-wage-nearly-23-hour-modest-two-bedroom.

https://open.mitchellhamline.edu/policypractice/vol41/iss3/5

with identifying tenants, nor did the court slow down its work to accommodate our attempt to assist tenants.

In some jurisdictions that approach is finally beginning to change. On August 11, 2017, New York City became the first city in the U.S. "to make legal services available to all tenants facing eviction in housing court and public housing authority termination of tenancy proceedings."[154] The law, known as "the Universal Access law, tasks the Office of Civil Justice (OCJ) of the Human Resources Administration (HRA) with implementing a program that would achieve this historic milestone by 2022."[155] By early indications, the program appears to be on track to accomplish some, if not all of its main goals.[156]

In fiscal year (FY) 2018, "21,955 New Yorkers whose tenancies were threatened by eviction were able to stay in their homes after OCJ-funded lawyers represented them in court."[157] In short, as legal representation of the tenants increased, evictions decreased.[158] These results are in contrast to periods where the city simply increased funding for legal services to attempt to provide more representation.[159] This approach dramatically changed the outcomes during the one-year control period at least.[160] Prior to this comprehensive approach only 1 percent of tenants in Housing Court proceeded with legal representation. In New York's FY 2018, 34 percent of the tenants received legal representation or legal assistance.[161]

Some cities have also increased funding for legal counsel for low income tenants in recent years.[162] In 2018, Washington D.C. spent $4.5 million on lawyers for low income tenants; Philadelphia spent $800,000.[163] Philadelphia, by way of a study by the Philadelphia Bar Association, learned that by investing $3.2 million per year on legal counsel, it could save $45.2 million.[164] This study likely led to the

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154. N.Y.C. HUMAN RES. ADMIN., OFFICE OF CIVIL JUSTICE, *Universal Access to Legal Services Report* (2018), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA-2018-Report.pdf.

155. *Id.*

156. *Id.*

157. *Id.* at 2.

158. *Id.*

159. *Id.* at 4.

160. *Id.*

161. *Id.* at 3-4.

162. J. Brian Charles, *The Right to An Attorney,* GOVERNING: THE FUTURE OF STATES AND LOCALITIES (June 2019), https://www.governing.com/topics/public-justice-safety/gov-right-to-attorney-legal-defense.html.

163. *Id.*

164. STOUT RISIUS ROSS, *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants*, PHILA. B.

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law recently passed by the Philadelphia City Council, guaranteeing tenants the right to legal counsel in landlord-tenant termination proceedings.[165]

Testimony by Barrett Marshall, Esq., the Director of the Philadelphia Eviction Prevention Project, is particularly specific in describing the current problems in rental housing and the current solutions that are being proposed:

> You've all heard the statistics. The eviction crisis is disproportionately affecting black women and their children. It is tearing apart long-standing communities. It is destroying the possibility of a future for so many families. And it is costing us dearly, in every way. We know that legal representation has the power to change this. The power to create access, to generate equity, to save lives. We have seen the difference that this representation makes. We know that home is our foundation. That stable housing is a health measure. We know that creating stability for individual families leads to healthy children, thriving communities, and a productive City. We know the value that home has for each of us. And we know how to protect it.[166]

Marshall sums up not just the current crisis with rising evictions but the fundamental problem that the lack of housing presents to low income individuals and families. Individuals with means, despite the challenges, have the ability to prevent most calamities in their lives. However, low income tenants face a far greater dilemma when they face housing problems, evictions, and do not have access to legal representation.

In addition to New York and Philadelphia, other cities have passed similar laws: Newark, Cleveland, and San Francisco have all enacted similar laws providing tenants with the right to counsel in landlord-tenant termination proceedings.[167] In addition, Denver, Detroit, and Los Angeles are all considering enacting similar

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ASS'N (Nov. 13, 2018), https://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/PhiladelphiaEvictionsReport.pdf.

165. Robert D. Lane, Jr., *Philadelphia Enacts 'Right To Counsel' Eviction Law,* NAT'L L. REV. (Nov. 19, 2019), https://www.natlawreview.com/article/philadelphia-enacts-right-to-counsel-evictions-law.

166. Barrett Marshall, Esq., *Right To Counsel Vote,* PHILA. CITY COUNCIL (Nov. 14, 2019), https://clsphila.org/wp-content/uploads/2019/11/Marshall-Right-to-Counsel-Vote-Testimony-Final-111419.pdf.

167. *Id.*

laws.[168] Whether this trend will increase remains unclear, but two things are certain: many cities are determined to address the eviction crisis in their city, and providing low income tenants with legal representation is part of their proposed solution.

A. Eviction Diversion

In 2009, the city of Kalamazoo, Michigan began a program known now as the Eviction Diversion Program.[169] The program began at the Michigan 8th District Court in Kalamazoo, Michigan. The program is one of the first of its type in the nation. The program partners "with tenants, landlords and Department of Human Services and Housing Resources Inc. staff to prevent or resolve evictions more quickly."[170] The program sought to improve "the coordination of legal and social service interventions, preventing homelessness for numerous families facing eviction right at the court facility."[171] In sum, the Eviction Diversion Program provided tenants with legal representation in their court cases in housing court and also linked them with social services resources through the Michigan Department of Health and Human Services or financial resources and case management all in an effort to prevent an eviction.

Judge Julie K. Phillips, the presiding Kalamazoo judge over the eviction docket when the program was commenced described it as an "innovative and amazing coalition of community partners."[172] The court, according to Judge Phillips, "is acting as a broker to bring landlords and tenants together to avoid eviction by drawing on community resources . . . ."[173]

Based on the development of the program in Kalamazoo, Michigan's 55th District Court in Mason, Michigan launched its own Eviction Diversion Program.[174] The program was created in Mason specifically to address not only the issue of evictions in the area but

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168. *Id.*

169. MICHIGAN REALESTATERAMA, *Housing Resource, Inc. of Kalamazoo Executive Director Ellen Kisinger-Rothi Receives Top MSHDA Honor for Helping Homeless Eviction Diversion Program Hailed as Model for Michigan Statewide Conference*, REALESTATERAMA (Oct. 19, 2010), http://michigan.realestaterama.com/housing-resource-inc-of-kalamazoo-executive-director-ellen-kisinger-rothi-receives-top-mshda-honor-for-helping-homeless-eviction-diversion-program-hailed-as-model-for-michigan-at-statewide-conferenc-ID0326.html.

170. *Id.*

171. *Id.*

172. Housing Resources of Kalamazoo County, LETTERS HOME NEWSL. (2010).

173. *Id.*

174. The author was part of the program in Mason from its commencement as Director of the Michigan State University Housing Law Clinic.

also the problem of placing more and more families into the shelter system. For example, the area that served the court, at the time the program was proposed was "number two in the State in the amount of money spent on shelters."[175] Additionally, data also showed that "the majority (57 percent) of those in Ingham County shelters were" parents and children."[176]

Through the program, tenants receive legal representation in housing court proceedings, social services through the Michigan government. It is an opportunity for individuals and to remain in housing and avoid an immediate (or quick) judgment and eviction.[177]

Prior to the creation of the programs, individuals sued for eviction often would enter into consent judgments in the proceedings and the judgment would appear on their credit. Even if they remained in the unit and were able to pay all of the back rent owed, the judgment would remain on their record. The services provided by the Eviction Diversion Program in Mason and in other courts prevents this from happening. By receiving legal representation, a Conditional Dismissal is negotiated and executed on behalf of the tenant. Supervised law students working in the MSU Housing Law Clinic or law students participating in externships at Legal Services of South Central Michigan, seek to obtain terms for tenants matching their economic profile and challenges. The dismissal agreements contain settlement terms for the payment of rent in order to remain in the unit and a date of completion of terms. As a compliment to the legal assistance, the tenants can also receive social services counseling and can apply for financial assistance that assists them in remaining in their units. Employees from the Michigan Department of Health and Human Services are on site at the courthouse to electronically accept requests for monetary assistance. On a limited basis, other organizations have participated in providing monetary assistance such as the Salvation Army and Volunteers of America.

The success of the Michigan Eviction Diversion Programs is in the statistical details and in how the ideas and programming was duplicated in other areas. On both accounts, the program has been a great success despite the inherent shortcomings of its approach. First, in terms of statistics the program has accomplished the direct goals it wanted to achieve. In the Mason District Court, Evictions have steadily decreased since 2012.[178] Specifically, in 2012, 27

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175. Housing Resources of Kalamazoo County, *supra* note 172.

176. *Id.*

177. Roberta M. Gubbins, *55th District Court Announces New Eviction Diversion Program,* LEGALNEWS.COM (Sept. 20, 2012), http://legalnews.com/ingham/1367405.

178. *Landlord-Tenant Case Data,* MASON DISTRICT CT. (Oct. 24, 2019).

percent of cases resulted in evictions; in 2019, the number of evictions has decreased to 19.5 percent.[179] Default judgments have also decreased since 2012, which demonstrates that more tenants are deciding to appear for their hearings and access the services offered.[180]

More impressive than the steady decrease in evictions in the court are the number of jurisdictions who have consulted with the Mason program in designing their own Eviction Diversion Programs. The cities of Durham, North Carolina, Richmond, Virginia, and Greensboro, North Carolina all have consulted with members of the Mason program or visited the court on the day the program was in operation in an effort to address eviction issues in their cities. Richmond and Durham specifically reached out to Mason participants and actually launched programs with initial success rates.

In Durham, the Eviction Diversion Program is a cooperative effort of the Duke University Law School, Legal Aid, and the Department of Social Services in the state.[181] It has a success rate of 67 percent, meaning in 67 percent of the cases they accept, the tenant avoids eviction.[182] The future goal is to assist more tenants who are facing evictions because the success rate indicates that there is value in extending the resources in a direct manner to prevent homelessness.[183] Considering evictions are the "top driver of homelessness," addressing evictions can have an effect upon the number of homeless families and individuals and on related government services as well.[184]

Richmond, which only began its Eviction Diversion Program in 2019, also reports statistical evidence of success by using this approach. Richmond, prior to the introduction of their program, and coordination with Michigan programs and other resources, had one of the worst eviction rates in the country statewide.[185] As a result,

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179. *Id.*

180. *Id.*

181. Jake Sheridan, *The Fight for a Home in Durham: The Duke Law School's Civil Justice Clinic Defends Evictees,* THE CHRON. (Nov. 28, 2018), https://www.dukechronicle.com/article/2018/11/the-fight-for-a-home-in-durham.

182. *Id.*

183. Duke University School of Law, *Eviction Diversion Program Gains Support From Durham City Council Amid Eviction Crisis*, DUKE LAW (June 28, 2018), https://law.duke.edu/news/eviction-diversion-program-gains-support-durham-city-council-amid-eviction-crisis/.

184. Jarrett Murphy, Evict*ions Are Top Driver of Homelessness*, CITY LIMITS (Nov. 13, 2014), https://citylimits.org/2014/11/13/evictions-are-top-driver-of-homelessness.

185. Center for Urban and Regional Analysis, *RVA Eviction Lab*, VA. COMMONWEALTH U., https://cura.vcu.edu/ongoing-projects/rva-eviction-lab/ (last visited Mar. 17, 2020).

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the city created the Richmond Eviction Task Force, in an effort to address the problem.[186] It was, like many programs emerging around the country, a collaborative effort between the government, non-profit legal services organizations, and the court system.

CONCLUSION

More can be done to address landlord-tenant relationships. Rent continues to be a financial challenge for millions of renters. The amount of affordable housing units remains inadequate in the United States. The eviction process, in most jurisdictions, despite the expansion of tenants' rights from the 1960s and 1970s, remains a rapid, complex process that few tenants are able to navigate effectively in most jurisdictions. Lastly, the aforementioned eviction crisis is at this juncture, catastrophic.

In the District of Columbia, a "Housing Conditions" docket was started years ago that "allows tenants to sue landlords for District of Columbia Housing Code violations on an expedited basis."[187] The cases on the Housing Condition Calendar are the first hearings scheduled less than a month after the suit is filed.[188] This is one of the few new novel developments in landlord-tenant relationships that allows tenants to take affirmative action on their own to assert their rights somewhat easily. Other than this, landlord-tenant relationships have functioned like this since the first period of revolutionary change came to an end.

It is time now for major change to address the eviction crisis and to make landlord-tenant relationships more cohesive and balanced. The push for a right to counsel for tenants in court proceedings and for eviction diversion programs in various jurisdictions is potentially the beginning of a new revolutionary moment. The results of balancing the playing field in landlord-tenant eviction actions are well documented. Tenants benefit from having legal representation in their eviction actions. There is nothing revolutionary about that ideal. The real revolution would be for this society to commit to providing legal representation for tenants while taking the necessary steps some cities have to address the eviction crisis.

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186. The City of Richmond, *City of Richmond Creates Eviction Task Force*, PATCH (Nov. 13, 2019), https://patch.com/virginia/richmond/city-richmond-creates-eviction-task-force.

187. *Housing Conditions Calendar*, D.C. COURTS, https://www.dccourts.gov/services/civil-matters/housing-conditions-calendar (last visited Mar. 17, 2020).

188. *Id.*