

Volume 19 | Issue 1

Winter 2015

When Judges Don't Follow the Law: Research and Recommendations

Michele Cotton
University of Baltimore

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

 Part of the [Judges Commons](#)

Recommended Citation

Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. Rev. 57 (2015).

Available at: <https://academicworks.cuny.edu/clr/vol19/iss1/4>

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

When Judges Don't Follow the Law: Research and Recommendations

Acknowledgements

The author would like to acknowledge the substantial research support provided by her Graduate Assistants Frankie Lucas, Nija Bastfield, Lyndsay Bates, Mark Sioson, Beatrice Campbell, Nathan Hunt, and Rebecca Gorton. In addition, this article is based on the case studies done by Michelle Amory, Keegan App, India Beauford, Danielle Boone, Angel Brown, Beatrice Campbell, Sherketta Carter, Ambreen Chaudhry, Andrew Cryan, John Descoteaux, Chappin Eze, Rebecca Hymiller, Debra Johnson, Charlena Jones, Ashley Kidd, Cierra Nichols, Georgia Noone-Sherrod, Kristina Sargent, Pamela Skaw, Ernest Stevens, Alicia Tatum, Krystal Thompson, and Rebecca Ward. The author would also like to thank the Provost's Office at University of Baltimore for its generous grant to compile the archive of case materials that is the basis for this research project.

WHEN JUDGES DON'T FOLLOW THE LAW: RESEARCH AND RECOMMENDATIONS

Michele Cotton†

I. INTRODUCTION	57
II. AN ILLUSTRATIVE MULTI-CASE STUDY	62
III. WHY SUCH COURTS DON'T DELIVER JUSTICE	81
IV. WHAT CAN BE DONE	86

I. INTRODUCTION

The sense that our legal system enforces the rule of law and provides litigants with equal justice may be based on perceptions created by its most visible courts. The courts where high-profile, high-stakes litigation and appellate review take place are frequented by attorneys, studied by legal scholars, covered by the media, and no doubt shape our view of the legal system as a whole. But the most visible courts are the tip of the iceberg and may not be representative of what happens in the larger, more obscure part of our system, such as those civil courts that handle “small claims,” debt collection, landlord-tenant disputes, and the like. Litigants are seldom represented by attorneys in such courts, and their cases rarely make the news or are noticed by law professors. Yet whether it is actually true that our legal system enforces the rule of law and provides equal justice would seem to depend on what happens in just such courts, as they are the legal system as most people experience it.

If we care about the rule of law, we presumably do not want these so-called “lesser” courts to be places where high-minded

† Assistant Professor, Division of Legal, Ethical and Historical Studies, University of Baltimore Yale Gordon College of Arts and Sciences. A.B., The College of William and Mary, 1981; Ph.D., Brandeis University, 1985; J.D., New York University School of Law, 1988; Ed.M., Harvard Graduate School of Education, 2005. The author would like to acknowledge the substantial research support provided by her Graduate Assistants Frankie Lucas, Nija Bastfield, Lyndsay Bates, Mark Sioson, Beatrice Campbell, Nathan Hunt, and Rebecca Gorton. In addition, this article is based on the case studies done by Michelle Amory, Keegan App, India Beauford, Danielle Boone, Angel Brown, Beatrice Campbell, Sherketta Carter, Ambreen Chaudhry, Andrew Cryan, John Descoteaux, Chappin Eze, Rebecca Hymiller, Debra Johnson, Charlena Jones, Ashley Kidd, Cierra Nichols, Georgia Noone-Sherrod, Kristina Sargent, Pamela Skaw, Ernest Stevens, Alicia Tatum, Krystal Thompson, and Rebecca Ward. The author would also like to thank the Provost's Office at University of Baltimore for its generous grant to compile the archive of case materials that is the basis for this research project.

precedents established by appellate courts go to die. If we care about “access to justice,” we are presumably concerned about what justice consists of and what access actually amounts to. If we think the legal system matters to the health of civil society, then we must be interested in what happens to most people in the legal system, as their commitment to civil society is affected by their experience with its institutions. Knowing what goes on in these lesser courts is not simply knowledge for its own sake, but information that makes it possible to have meaningful conversations about what we want from our legal system.

To facilitate such discussion, this Article considers the implications of the findings of a multi-case study done of a civil trial court and how it determined outcomes in a particular type of case involving unrepresented litigants. Every year, the court in question handles hundreds of thousands of cases¹ in which one or more of the parties are unrepresented or likely to be unrepresented. Though their claims are in some sense “small,” these litigants may raise serious issues. For example, the cases that were the subject of this research were filed by tenants claiming that their rental housing conditions were unhealthy or hazardous to them and their families and that their landlords had failed to correct the problems—actions based on the so-called “warranty of habitability.” The conditions alleged included lack of heat and hot water, infestations of rodents and insects, leaks and mold, and falling ceilings and other structural problems. An examination of what happened in these cases provides some insight into how the rule of law and equal justice are faring in the less-visible part of our legal system. Many places have similar laws, as well as similar courts, similarly unrepresented tenants, and similar economic conditions affecting the housing market.² Therefore, this research provides a glimpse that could be more generally telling.

Studies of whether the courts that hear these kinds of cases actually follow the law or provide equal justice are relatively rare. These courts and the kinds of cases that are litigated in them tend

¹ *District Court of Maryland - Activity Report, July 2014 - June 2015*, MD.COURTS, <http://mdcourts.gov/district/statistics/2015/fy2015.pdf> [<http://perma.cc/ZR9J-JJAG>].

² See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 394 (2011) (describing adoption of the warranty of habitability by “almost every state’s legislature or courts”); see also Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 (2010) (“Despite some variation in details, the core features of the courts [that handle landlord-tenant cases] seem remarkably consistent.”).

to be studied—when they are studied—through statistical evidence. Case studies, by contrast, tend to be more time-consuming and labor-intensive³ and have a more complicated reputation than quantitative study.⁴ However, such qualitative research is nonetheless crucial to answering certain questions. Scholarship in this area has consistently shown that tenants attempting to enforce the warranty of habitability experience a low rate of success in court.⁵ Indeed, Chester Hartman and David Robinson have remarked regarding this research that “[s]tudies of the various courts have shown that the failure to apply the law is rampant.”⁶ But, strictly speaking, such research does not provide direct evidence that these courts fail to follow the law and to provide equal justice. It is possible that the low success rate of tenants indicates that they generally lack the facts necessary to win their cases, or that the law around the warranty of habitability is not well-designed for addressing their particular problems. The statistical evidence does not directly answer the question of why certain litigants are unsuccessful. Almost no case studies have been done of how such cases are actually adjudicated,⁷ but it is that kind of research that provides direct

³ ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 21 (5th ed. 2014).

⁴ Case studies are staples in many fields, including psychology, sociology, political science, anthropology, social work, business, education, nursing, and community planning. *Id.* at 4. However, “[t]he case study occupies a vexed position in the discipline of political science. On the one hand, methodologists generally view the case study method with extreme circumspection At the same time, the discipline continues to produce a vast number of case studies, many of which have entered the pantheon of classic works.” John Gerring, *What is a Case Study and What is it Good for?*, 98 AM. POL. SCI. REV. 341, 341 (2004) (citations omitted).

⁵ See generally Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit’s Landlord-Tenant Court*, 7 U. MICH. J.L. REFORM 8 (1973); Julian R. Birnbaum et al., *Chicago’s Eviction Court: A Tenants’ Court of No Resort*, 17 URB. L. ANN. 93, 109 (1979); Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163 (2003); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419 (2001); Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385 (1995); D. James Greiner & Cassandra W. Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L. J. 2118 (2012); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 76 (2010).

⁶ Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL’Y DEBATE 461, 479 (2003).

⁷ LEXIS searches and other inquiries reveal no published case study research involving unrepresented litigants. The unpublished Ph.D. dissertation of David L. Eldridge examines several cases, involving mostly represented litigants, from the perspective of the discipline of social work (but also makes thoughtful points about the law governing the cases). David L. Eldridge, *The Making of a Courtroom: Land-*

evidence of what courts are doing, and thus how and why these litigants receive the results they do.

Some researchers have tried to assess the quality of justice in these courts through surveys in which tenants are quizzed about their experiences.⁸ And surveys may even show that the majority of tenants believe they have been treated fairly.⁹ Under some theories, that result could perhaps be considered dispositive on the question of whether these litigants received justice. However, such research is not revealing about the actual quality of judicial decision-making, given that most non-lawyers are not well-situated to evaluate whether their cases were determined in accordance with law.

Paula Hannaford-Agor and Nicole Mott suggest that the “question of just outcomes may be the most important question of all” in the research on these courts.¹⁰ But they did not try to answer that question, because they concluded that “whether the litigant received a just or appropriate outcome” is “subjective” and “one of the most difficult questions for which to formulate accurate and reliable measures for empirical analysis.”¹¹ But if by “just or appropriate outcome” is meant one consistent with the law, and if the law in a given area is fairly well-defined, then the question can be answered with properly-conducted case studies as well as, if not better than, statistical studies can answer other kinds of questions. Further, to the extent that case studies are consistent with, and help explain, statistical study, they are not an alternative or inferior form of research so much as a complementary one that bears upon questions that are not readily answerable by statistical study

lord-Tenant Trials in Philadelphia’s Municipal Court (2001) (unpublished Ph.D. dissertation, University of Pennsylvania), <http://repository.upenn.edu/edissertations/1001/> [<http://perma.cc/3DFY-MYWC>]. Some published work does discuss case studies as pedagogical tools. See, e.g., Michael Millemann, *Case Studies and the Classroom: Enriching the Study of Law through Real Client Stories*, 12 U. MD. L.J. RACE, RELIG., GENDER & CLASS 219 (2012); Frank S. Bloch, *Framing the Clinical Experience: Lessons on Turning Points and the Dynamics of Lawyering*, 64 TENN. L. REV. 989 (1997). In addition, some published work does use tantalizing snippets from actual cases to illustrate a point. See, e.g., Jonathan I. Rose & Martin A. Scott, “Street Talk” Summons in Detroit’s Landlord-Tenant Court: A Small Step Forward for Urban Tenants, 52 J. URB. L. 967, 1009-11 (1975).

⁸ See, e.g., GINA KUBITS ET AL., FOURTH JUDICIAL DIST. OF THE STATE OF MINN. RESEARCH DIV., HOUSING COURT FAIRNESS STUDY 7-8 (2004), [http://www.mncourts.gov/Documents/4/Public/Research/Housing_Court_Fairness_\(2004\).pdf](http://www.mncourts.gov/Documents/4/Public/Research/Housing_Court_Fairness_(2004).pdf) [<http://perma.cc/78B6-T2JF>].

⁹ *Id.* at 30-31.

¹⁰ Hannaford-Agor & Mott, *supra* note 5, at 178.

¹¹ *Id.*

alone.¹²

The “new legal realists” have been advocating for expansion in the scope and methods of empirical work in legal scholarship to go beyond statistical study. For example, Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse, and David Wilkins have argued that we ought to be more concerned with “the impact of law on ordinary people’s lives” and therefore should “include in our toolkit some of the social science methods best suited for this task,” including “the qualitative methods developed by fields like anthropology and history for examining everyday experience.”¹³ Similarly, Victoria Nourse and Gregory Shaffer have called for “an empiricism that adopts anthropological and sociological approaches, in which academics leave their universities and investigate the world.”¹⁴ Here, the goal is to study “the law in action”¹⁵ by “tak[ing] account of people’s lived experience of the law in particular settings.”¹⁶ The multi-case study considered in this Article examines the phenomenon of how courts function in just such a way. It provides information about how the courts work for ordinary people, why they do what they do, and, accordingly, what might be done to make them more effective at enforcing the rule of law and providing equal justice.

The rule of law and equal justice under law are often described as founding principles of our society. Of course, all but the most naive are aware that these are aspirations that are not fully achieved. But when such aspirations are truly more honored in the breach, the damage is not simply to those who are misled and misused by the system, but also to the reputation and viability of the system itself. Thus, attention to “people’s lived experience of the law” is no mere anthropological undertaking, or even directed at reform that primarily benefits the least well off. Rather, it is a con-

¹² See YIN, *supra* note 3, at 10 (explaining that case studies answer “how” and “why” questions that are difficult to address with statistical study); see also *id.* at 40 (noting that properly-done case studies achieve analytic generalizability rather than statistical generalizability); Gerring, *supra* note 4, at 353 (explaining that the case study and other methods of research are “interdependent, and this is as it should be,” and such other forms of research “may be desperately in need of in-depth studies focused on single units”).

¹³ Howard Erlanger et al., *New Legal Realism Symposium: Is It Time for a New Legal Realism?: Foreword: Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 340 (2005) (footnote omitted).

¹⁴ Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 79 (2009).

¹⁵ *Id.*

¹⁶ Erlanger et al., *supra* note 13, at 345.

stitutive activity that focuses on what kind of system we want to have.

II. AN ILLUSTRATIVE MULTI-CASE STUDY

The fifty-nine cases¹⁷ examined for this multi-case study con-

¹⁷ The raw data used in this study are available on a Google drive administered by the CUNY Law Review at the following address: <https://drive.google.com/folderview?id=0B-UGVRZjr5NobjlOaFZaaVpUQUU&usp=sharing>. The data are accessible from any computer, and consist of the case files and audio proceedings, identified by condensed versions of court-assigned case numbers, which have been digitized. The condensed case numbers referred to throughout this Article are accompanied by full case citations and can be used to access the relevant raw data specifically referred to herein. The cases that were examined for this research are: Dixon v. Thaylor, Case No. 010100000012012 (2012 Dist. Ct. Balt. City) (on file as 1-12); Garris v. Camden Mgmt. Servs., Case No. 010100000022012 (2012 Dist. Ct. Balt. City) (on file as 2-12); Scales v. Cooke, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (on file as 5-12); Thompson v. Saffell, Case No. 010100000082012 (2012 Dist. Ct. Balt. City) (on file as 8-12); Myers v. Progressive Props., Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (on file as 15-2012); Singleton v. Edgewood Apartments, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (on file as 16-12); Brown v. Hamilton, Case No. 010100005002011 (2011 Dist. Ct. Balt. City) (on file as 500-2011); Mason v. Fleming, Case No. 010100165052011 (2011 Dist. Ct. Balt. City) (on file as 16505-11); Henson-Thomas v. Young, Case No. 010100166832011 (2011 Dist. Ct. Balt. City) (on file as 16683-11); Wellington v. Williamston, Case No. 010100246432011 (2011 Dist. Ct. Balt. City) (on file as 24643-11); Williams v. Dunne Wright Prop. Mgmt., Case No. 010100247342011 (2011 Dist. Ct. Balt. City) (on file as 24742-11); Edwards v. Progressive Prop. Real Estate, Case No. 010100247982011 (2011 Dist. Ct. Balt. City) (on file as 24798-11); Jones v. Gomez, Case No. 010100000182012 (2012 Dist. Ct. Balt. City) (on file as 18-12); McCray v. Godfrey, Case No. 01010000026012 (2012 Dist. Ct. Balt. City) (on file as 26-2012); Milner v. Thompson, Case No. 010100000282012 (2012 Dist. Ct. Balt. City) (on file as 28-2012); Robsinson v. CE Reality, Case No. 010100000342012 (2012 Dist. Ct. Balt. City) (on file as 34-2012); Peoples v. Mid-Atlantic Realty Mgmt., Case No. 010100000352012 (2012 Dist. Ct. Balt. City) (on file as 35-2012); Jordan v. HABC, Case No. 010100000362012 (2012 Dist. Ct. Balt. City) (on file as 36-2012); Gilbert v. Choi, Case No. 010100000392012 (2012 Dist. Ct. Balt. City) (on file as 39-12); Perez v. May, Case No., 010100000442012 (2012 Dist. Ct. Balt. City) (on file as 44-12); Marshall v. Mid Atlantic Realty Mgmt., Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (on file as 53-2012); Meade v. Md. Prop. Mgmt., Case No. 010100000562012 (2012 Dist. Ct. Balt. City) (on file as 56-2012); Sturgis v. Anomnachi, Case No. 010100000602012 (2012 Dist. Ct. Balt. City) (on file as 60-12); Smith v. Dominion Mgmt., Case No. 010100000732012 (2012 Dist. Ct. Balt. City) (on file as 73-2012); Beverly v. Balt. Preferred Prop., Case No. 010100000752012 (2012 Dist. Ct. Balt. City) (on file as 75-12); Powell v. Harris, Case No. 010100000822012 (2012 Dist. Ct. Balt. City) (on file as 82-12); Dixon v. Rice, Case No. 010100000872012 (2012 Dist. Ct. Balt. City) (on file as 87-12); Dorsey v. Keyhole Servs., Case No. 010100000902012 (2012 Dist. Ct. Balt. City) (on file as 90-2012); Patterson v. Md. Maint. & Mgmt. Co., Case No. 010100000912012 (2012 Dist. Ct. Balt. City) (on file as 91-2012); Brown v. Sage Mgmt. Inc., Case No. 010100000922012 (2012 Dist. Ct. Balt. City) (on file as 92-2012); Harmon v. Ford, Case No. 010100000972012 (2012 Dist. Ct. Balt. City) (on file as 97-12); Boyd III v. Mayberry, Case No. 010100000982012 (2012 Dist. Ct. Balt. City) (on file as 98-12); Parks v. Dickerson, Case No. 010100001102012 (2012 Dist. Ct. Balt. City) (on file as 110-12); Dukes

sisted of the court filings and audio recordings for “rent escrow actions” filed by tenants in Baltimore City District Court during a period from 2011 to 2012.¹⁸ The cases for study were randomly selected, though screened to target those in which there was at least one appearance before a judge of the court that was on the record, in order to gather information about how courts handled these cases.¹⁹ The results of the research have already been shared

v. Denise, Case No. 01011172012 (2012 Dist. Ct. Balt. City) (on file as 117-2012); Cox & Wray v. Kingsley, Case No. 010100001352012 (2012 Dist. Ct. Balt. City) (on file as 135-12); Johnson v. Upton Cts. Edgewood Mgmt., Case No. 010100001362012 (2012 Dist. Ct. Balt. City) (on file as 136-12); Ames v. Willis, Case No. 010100001402012 (2012 Dist. Ct. Balt. City) (on file as 140-12); Guy v. Mei, Case No. 010100001522012 (2012 Dist. Ct. Balt. City) (on file as 152-2012); Robertson v. Roloqas, Case No. 010100001542012 (2012 Dist. Ct. Balt. City) (on file as 154-12); Barrett v. Lyle, Case No. 010100001622012 (2012 Dist. Ct. Balt. City) (on file as 162-12); Stroud v. Progressive Prop. Inc., Case No. 010100001682012 (2012 Dist. Ct. Balt. City) (on file as 168-12); Davis v. North Ave. Equities LLC, Case No. 010100001702012 (2012 Dist. Ct. Balt. City) (on file as 170-12); Davida Moses-Jones v. Nat'l Prop. Mgmt, Case No. 010100001712012 (2012 Dist. Ct. Balt. City) (on file as 171-12); Dorothy Jones v. Terry Coffman Jr., Case No. 010100001732012 (2012 Dist. Ct. Balt. City) (on file as 173-12); O'Naya Frazier v. Dunn Wright/D&W Properties, Case No. 010100001742012 (2012 Dist. Ct. Balt. City) (on file as 174-12); Jean Minor v. Albert C. Murry Jr., Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-12); Terri Jones v. Summerfield Inv. Grp. LLC, Case No. 010100001852012 (2012 Dist. Ct. Balt. City) (on file as 185-12); Tonia Curry v. Laura L Snuggs & William T., Case No. 010100000422012 (2012 Dist. Ct. Balt. City) (on file as 42-12); Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12); Maynor v. Hous. Auth. Balt. City, Case No. 010100099072012 (2012 Dist. Ct. Balt. City) (on file as 9907-12); Staton v. Dowling, DowCo Mgmt, Case No. 010100099192012 (2012 Dist. Ct. Balt. City) (on file as 9919-12); Howell v. Weingarten, Case No. 010100099202012 (2012 Dist. Ct. Balt. City) (on file as 9920-12); Brown v. Cloverdale Partners, LLC, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (on file as 9921-12); Dotson v. Pearson, Case No. 010100099222012 (2012 Dist. Ct. Balt. City) (on file as 9922-12); Terry v. Hooks, Case No. 010100099292012 (2012 Dist. Ct. Balt. City) (on file as 9929-12); Donald v. German, Case No. 010100099402012 (2012 Dist. Ct. Balt. City) (on file as 9949-12); Moore v. Encomienda, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (on file as 9941-12); Kacherovsky v. Ruby, Case No. 9943-12 (2012 Dist. Ct. Balt. City) (final order) (on file as 9943-12).

¹⁸ Pronouns have been regularized in all descriptions herein of these cases, so that tenants are “she,” judges “he,” and landlords “he,” to reflect the most common constellation we saw in these cases and to avoid distracting changes where variation occurred.

¹⁹ The data for these cases studies were part of a larger research project in Baltimore City District Court that collected materials from several types of cases where at least one of the litigants was unrepresented and at least one appearance occurred on the record before a judge. This Article is based on the first fifty (plus) cases studies of rent escrow cases completed by graduate students for a research course using the database. The graduate students signed up for the cases on a live spreadsheet that identified the materials only by case number. The methodology for assembling the database of materials for study was as follows. After a meeting was held advising the court of the planned research, a calendar was made numbering the dates sequentially backward from that day from 1 to 180. A random number generator was obtained

with stakeholders, including judges of the court, to help verify the validity of the research.²⁰ In addition, these case studies reach a general result that is consistent with the findings of statistical research in the area, insofar as they show unrepresented tenants obtaining relatively little success in enforcing the warranty of habitability in court, which indicates that this research is reliable.²¹

Indeed, the failure of tenants to benefit much from the warranty of habitability is evidently long-standing and widespread. In the 1970s, after the warranty was first widely adopted, researchers in Chicago and Detroit were already warning of the “miniscule in-court impact of the new legislation”²² and sounding alarms that tenants seemed little better off than when they had no enforceable rights to livable housing.²³ Twenty years later, Barbara Bezdek’s extensive empirical study of the enforcement of the warranty in Baltimore found that “[d]espite the enactment of tenant-protective legislation in the mid-1970s, the rent court operates in virtually the same manner as it did” before, with tenants seldom obtaining the relief available under law.²⁴ More recently, Paris Baldacci observed that “[t]he plight of pro se litigants in New York City’s Housing Court and the broad outlines of some solutions have been recognized for at least two decades,” leading him to fear that his latest article on the subject would become “just one more . . . in a series . . . with little impact on the day-to-day experience of pro se liti-

online for numbers 1 to 180. The graduate student researchers looked at the dockets on dates according to the numbers determined by the random number generator and collected whatever cases were on the calendar on that date where at least one litigant was unrepresented and at least one appearance occurred on the record before a judge. After more than one hundred cases were collected using this method, the court lost the six months of paper docket sheets during a remodeling, and a new method had to be devised. The court agreed to allow the graduate assistant researchers to go to the records office once a week and pull twenty files at random where the filing was prior to the date the research was begun, and from these files to select for collection those cases that had at least one party unrepresented by counsel and at least one appearance on the record before the court. The remaining approximately 200 cases in the database were collected in this manner. Though random selection of cases is not considered important to case study design, it was approximated here on the theory that it would improve the chances of finding representative cases and valid replication evidence. See YIN, *supra* note 3, at 52, 61.

²⁰ See *id.* at 198-99 (explaining that review of case studies not merely by peers but also by participants increases the construct validity of the research).

²¹ *Id.* at 47.

²² Mosier & Soble, *supra* note 5, at 33.

²³ Birnbaum et al., *supra* note 5, at 109-11.

²⁴ Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 533-34 (1992) (footnote omitted).

gants”²⁵ The consensus, as David Super summed it up, is that the warranty of habitability has done little to aid tenants with sub-standard housing, in multiple jurisdictions across four decades.²⁶

Nonetheless, it is not unusual for the courts handling these kinds of cases to say that they follow the rule of law and endeavor to dispense equal justice to all litigants. And the court that is the subject of this multi-case study describes itself in just such terms. The Mission Statement of the Maryland District Court states that it will “ensure that every case tried herein is adjudicated expeditiously, courteously, and according to law”²⁷ Further, it promises it will “provide equal and exact justice for all who are involved in litigation before the Court.”²⁸ It even claims “unwavering and unyielding” commitment to these goals.²⁹

And, as is true with many of the laws regarding the warranty of habitability, the law that the Baltimore City District Court enforces gives the impression of being generally beneficial. The city’s rent escrow statute allows a tenant with serious housing code violations to pay her rent into a court-administered escrow account rather than to the landlord, and to obtain various other remedies including orders directing the landlord to make repairs, abating the rent paid to the landlord or into escrow to reflect the conditions, and awarding the tenant the amount paid into escrow in whole or in part.³⁰ Maryland’s highest court explained in *Neal v. Fisher* that this law is “remedial legislation” and should be interpreted “in a way that will advance [its] purpose, not frustrate it.”³¹ Further, a tenant may seek an offset against the rent for breach of the warranty of fitness for human habitation to reflect the “reasonable rental value” of the property in its deteriorated condition, going back to the date of first notice to the landlord of the conditions, as a claim

²⁵ Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 660 (2006).

²⁶ Super, *supra* note 2, at 458 (“Although appealing in the abstract, the new regime of landlord-tenant law inaugurated four decades ago has failed at achieving any of its major goals.”).

²⁷ *About District Court*, DIST. COURT OF MD., <http://www.mdcourts.gov/district/about.html> [<http://perma.cc/JB3V-8AVA>].

²⁸ *Id.*

²⁹ *Id.*

³⁰ BALT. CITY PUB. LOC. L. § 9-9 (2015), <http://archive.baltimorecity.gov/Portals/0/Charter%20and%20Codes/ChtrrPLL/02%20-%20PLL.pdf> [<http://perma.cc/VA65-U5CG>]. Maryland has both State and local laws providing for rent escrow. *See id.*; MD. CODE ANN., REAL PROP. § 8-211 (2012). The State law defers to the local law. *See id.* § 8-211(o). Accordingly, § 9-9 governs this situation.

³¹ *Neal v. Fisher*, 312 Md. 685, 693 (1988).

joined to the rent escrow action.³² Accordingly, it might seem as if tenants have appropriate legal mechanisms for affirmatively addressing poor housing conditions in court.

However, our findings suggest that unrepresented tenants face difficulties accessing the law's benefits. Even from the beginning of the case, the form petition frustrates tenants from pleading the relevant facts or requesting the appropriate remedies. Indeed, almost no tenants were able to accurately fill out the needlessly legalistic form. The form expects, for example, that tenants state whether they want relief based on violation of the "warranty of habitability" and the "covenant of quiet enjoyment," terms which have no meaning to these tenants or even most lay people.³³ To compound the problem, in the cases that we saw, judges seemingly ignored what was pleaded in the rent escrow petition (even though in Maryland the petition is required to be verified by the tenant). We did not see a judge make explicit or implicit reference to the petition in any case that we examined, even when it provided detailed factual averments or requests for particular remedies.

However, the inadequacy of the form petition cannot itself be blamed for the poor results obtained by tenants in these cases. Shortcomings in the pleadings do not themselves affect entitlement to relief—Maryland's District Court rules call for all pleadings to be "construed to do substantial justice,"³⁴ and the rent escrow law itself indicates that in disposing of the case the court "shall make any order that the justice of the case may require."³⁵ Accordingly, most problems with how tenants fill out the petition could be, and are supposed to be, addressed by the court's effort to do justice.

What more greatly impeded tenants' access to the law's relief may have been the court's failure to elicit and find the relevant facts, even though the rent escrow law explicitly requires it to do so.³⁶ The form for making findings of fact that can be found in most of the court files for these cases was left blank in every case that we looked at. Occasional shorthand notations were made on

³² See PUB. LOC. L. § 9-14.2(d) ("[Damages for violation of the warranty] shall be computed retroactively to the date of the landlord's actual knowledge of the breach of warranty and shall be the amount of rent paid or owed by the tenant during the time of the breach less the reasonable rental value of the dwelling in its deteriorated condition."); *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143 (2000).

³³ See MD. R.C.P. DIST. CT. R. 3-303(b) ("Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required.").

³⁴ See *id.*

³⁵ PUB. LOC. L. § 9-9(f).

³⁶ *Id.* ("The court shall make findings of fact on the issues before it . . .").

other forms, but they were cursory and did not amount to factual findings, nor did the judges make many remarks in the audio recordings of these proceedings that could be construed as findings of fact. Without explicit findings of facts, or the endeavor to make them, tenants' entitlement to particular legal remedies was often left inchoate and unexplored.

But the biggest problem for tenants was that the law seemingly played little role in how the judges disposed of these cases. Judges seldom made explicit reference to the law or explained their decision-making in terms of the law. Even on the rare occasion where a tenant pressed for an explanation for the court's decision, the judge generally did not invoke the law. For example, one replied, "I heard from you at length, I heard from the defense and I made a decision and that is what it is. So, if you would like to appeal it you certainly can do that"³⁷ Another simply announced, "Well, that's my decision," and told the tenant she could appeal if she paid the fee.³⁸

Even when the court purported to apply the law, it tended to be misinterpreted in ways that harmed tenants. For example, the landlord has to be given a "reasonable" amount of time to make repairs before a tenant can maintain a case, and the law establishes a presumption of unreasonableness where the landlord fails to make repairs within thirty days of receiving notice of the conditions.³⁹ Further, "actual notice" of the conditions from the tenant to the landlord is sufficient.⁴⁰ However, our case studies showed that judges routinely gave landlords thirty days to make repairs *from the date of the first court appearance in the case*,⁴¹ did not elicit evidence of actual notice, and even ignored evidence on the record of actual notice.⁴² For example, in a case where the housing inspection report found twenty-eight violations, ten of which were serious

³⁷ Rent Escrow Hearing at 9:35, *Marshall v. Mid Atlantic Realty Mgmt.*, Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (on file as 53-12).

³⁸ Rent Escrow Hearing at 28:24, *Ames v. Willis*, Case No. 010100001402012 (2012 Dist. Ct. Balt. City) (on file as 140-12).

³⁹ See PUB. LOC. L. § 9-9(d)(1) ("For the purposes of this subsection, what period of time shall be deemed to be unreasonable delay is left to the discretion of the court except that there shall be a rebuttable presumption that a period in excess of thirty (30) days from receipt of the notification by the landlord is unreasonable[.]").

⁴⁰ See *id.* §§ 9-14.1(b)(2)(c), 9-9(d)(1).

⁴¹ Rent Escrow Hearing at 1:18, *Robertson v. Roloqas*, Case No. 010100001542012 (2012 Dist. Ct. Balt. City) (on file as 154-12).

⁴² See, e.g., Rent Escrow Hearing at 5:44, *Mason v. Fleming*, Case No. 010100165052011 (2011 Dist. Ct. Balt. City) (on file as 16505-11). In this case, nine housing code violations were found, eight of which were serious, and the landlord did not appear despite being served. The tenant testified that the landlord had been noti-

enough to result in the issuance of a ten-day notice to the landlord by the housing department, and the tenant offered to show the judge emails to the landlord about the conditions, the judge disregarded them and said to the landlord, "I'd be happy to postpone this and let you get it done without establishing escrow if you can get it done in thirty days."⁴³ In another case, where there were twenty violations, seven of which were serious, and where the tenant testified that the landlord's agent had been informed about the conditions more than five months previously, with a list and walk-through, the judge still said that the landlord had thirty (more) days to make repairs.⁴⁴ Such a misinterpretation of the statute takes away any incentive for a landlord to make repairs when initially told by a tenant about the conditions. And because judges seldom developed evidence of actual notice to the landlord, any setoff against the rent that was awarded to the tenant was reduced from what it should have been, given that the court calculated it from the court date rather than the date of actual notice to the landlord.

But, in any event, judges seldom awarded these tenants the full relief to which they were legally entitled, even when they managed to establish a *prima facie* case, notwithstanding the failure of the court to explicitly find the facts or develop the evidence on actual notice. For example, although the majority of cases involved court-ordered inspections demonstrating the presence of housing code violations and testimony regarding the failure of the landlord to correct them, judges never ordered landlords to correct these violations in any of the cases we saw, even though an order to correct is one of the remedies available under law.⁴⁵

Although escrow accounts were much more frequently ordered by the court, they were still surprisingly sporadic for a proceeding called a "rent escrow action." Our research showed that escrows were set up less than half of the time on the first return date where a *prima facie* entitlement to escrow was established.⁴⁶

fied about the conditions three months previously. The judge stated that the violations "are going to have to be cleared up in 30 days." *Id.*

⁴³ *Thompson v. Saffell*, Case No. 01010000082012 (2012 Dist. Ct. Balt. City) (final order) (on file as 8-12); Rent Escrow Hearing at 5:00, *Thompson v. Saffell*, Case No. 01010000082012 (2012 Dist. Ct. Balt. City) (on file as 8-12).

⁴⁴ Rent Escrow Hearing at 21:04, *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-2012).

⁴⁵ See PUB. LOC. L. § 9-9(f)(8).

⁴⁶ Such a case was indicated where the landlord had been properly served and had notice of the conditions, did not establish that he had a viable defense, and a housing inspection report established that serious housing code violations existed. In addition to the other cases described herein, see Rent Escrow Hearing at 3:27, *Brown v. Sage*

The general attitude of the court may have been expressed by the judge who declined to set up an escrow in a case where inspections more than three months apart showed that repairs had not been made, when he remarked, "I believe we should postpone this and see how things go."⁴⁷ However, it did not appear to be the case that delaying escrow generally worked to the advantage of tenants, as repairs were not made or were not completed by the next court date in half of the cases where the court did not set up the escrow account on the first court date. Perhaps that is not surprising, as not setting up the escrow removes some of the leverage the law presumably intended to give the tenant.

Even heat complaints failed to inspire a sense of urgency in the court about establishing the escrow. For example, a tenant who filed a case on February 6 and was first in court on February 21 informed the judge that she had told the landlord about her lack of heat on January 23. Further, an inspection report documented that there was no heat. The judge told the tenant that any escrow would not be set up until the next court date of March 1, although no reason was given for the delay.⁴⁸ The law also requires heat complaints to be given an expedited hearing,⁴⁹ but that happened in no case involving a heat complaint that we saw.

In one case, the tenant initially went along with the delay of escrow, at the encouragement of the court.⁵⁰ On the second court date, when all the repairs had not been completed, though it was a month later, escrow was still not established. The judge stated, "I am not going to open an escrow account . . . I will indicate in the

Mgmt. Inc., Case No. 010100000922012 (2012 Dist. Ct. Balt. City) (final order) (on file as 92-2012); *Dukes v. Denise*, Case No. 01011172012 (2012 Dist. Ct. Balt. City) (final order) (on file as 17-12); *McCray v. Godfrey*, Case No. 01010000026012 (2012 Dist. Ct. Balt. City) (final order) (on file as 26-12); *Williams v. Dunne Wright Prop. Mgmt.*, Case No. 010100247342011 (2011 Dist. Ct. Balt. City) (on file as 24734-11); *Howell v. Weingarten*, Case No. 010100099202012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9920-12); *Marshall v. Mid Atlantic Realty Mgmt.*, Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (final order) (on file as 53-12); Rent Escrow Hearing at 1:06, *Dorsey v. Keyhole Servs.*, Case No. 010100000902012 (2012 Dist. Ct. Balt. City) (final order) (on file as 90-2012); Rent Escrow Hearing at 5:41, *Patterson v. Md. Maint. & Mgmt. Co.*, Case No. 010100000912012 (2012 Dist. Ct. Balt. City) (final order) (on file as 92-2012).

⁴⁷ Rent Escrow Hearing at 7:50, *Myers v. Progressive Props.*, Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (on file as 15-12).

⁴⁸ Rent Escrow Hearing at 17:23, *Davida Moses-Jones v. Nat'l Prop. Mgmt.*, Case No. 010100001712012 (2012 Dist. Ct. Balt. City) (on file as 17-12).

⁴⁹ See PUB. LOC. L. § 9-9(h).

⁵⁰ Rent Escrow Hearing at 5:30, *Thompson v. Saffell*, Case No. 010100000082012 (2012 Dist. Ct. Balt. City) (on file as 8-12).

file tenant prefers to pay rent directly to [the] landlord.”⁵¹ Two months later, the case was again in court for a status review of the case. A reinspection found that nine violations were still outstanding.⁵² The judge asked, “Why are we here, if there is no escrow account?”⁵³ and “I don’t know why we are here, literally, is what I’m trying to tell you.”⁵⁴ Presumably, the tenant felt much the same way.

In a case where there were thirteen violations, four serious, the judge asked the tenant, “Were you in the courtroom when I first came in and I said one of the things that has to happen before we can set up escrow is that not only do the life, health, or safety violations have to be, uh, proven, but we have to give the landlord a reasonable opportunity to correct those conditions before we can set up escrow?”⁵⁵ In this particular case, the tenant stated that the landlord knew about the conditions “before we moved in” over a year ago and promised he would fix them.⁵⁶ The representative for the landlord did not dispute this testimony but responded that the repairs could be done in “a day or two.”⁵⁷ Rather than set up an escrow account, the judge called for a reinspection twenty days later, and said, “You have a chance to get these conditions corrected, so, um, escrow has not been established, so that means the rent technically is owed.”⁵⁸ In other words, even though, according to the record, the landlord had failed to correct the conditions for over a year and had no reasonable explanation for the delay, the court still would not establish the escrow.

In a case where the tenant had particularly serious violations—namely an inoperable furnace in winter, a rat infestation, and overfusing of electrical circuits—the judge accepted the landlord’s suggestion that the escrow be delayed, remarking, “So we can do that and defer the decision on the escrow . . . I mean, it will save everybody a lot of aggravation.”⁵⁹ It is not clear that the tenant falls into the category of the “everybody” who considers the remedy an

⁵¹ *Id.* at 11:34.

⁵² *Id.* at 9:03.

⁵³ *Id.* at 18:44.

⁵⁴ *Id.* at 20:22.

⁵⁵ Rent Escrow Hearing at 2:20, *Brown v. Cloverdale Partners, LLC*, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12).

⁵⁶ *Id.* at 2:45.

⁵⁷ *Id.* at 4:05.

⁵⁸ *Id.* at 6:20–7:45.

⁵⁹ Rent Escrow Hearing at 1:10, *Brown v. Hamilton*, Case No. 010100005002011 (2011 Dist. Ct. Balt. City) (final order) (on file as 500-2011).

aggravation, but when it is regarded as an aggravation by the court, it is likely in any event to be avoided.

Another form of relief to which tenants are entitled under law is an abatement of rent paid into escrow to reflect the lower value of the housing in its defective condition.⁶⁰ However, judges almost never (only three times that we saw) abated the amount of rent to be deposited into escrow.⁶¹ That was so even though most tenants apparently established factual entitlement to abatement, and even though the rent escrow law puts the burden on the landlord to show cause why an abatement should not be granted.⁶² We only observed one case where the judge asked the landlord why the rent should not be abated.⁶³ Judges usually ignored or refused tenants' fairly frequent explicit requests to abate the rent going into escrow.⁶⁴ The norm was instead for the judge to assume that the rent going into escrow would not be abated, or even to state explicitly that it could not be abated.⁶⁵

Large numbers of violations and evidence of long-standing failure to make repairs didn't seem to make a difference. For example, in a case in which the inspector found eight code violations, and in which the tenant requested an abatement in court and alleged that she had given the landlord actual notice of the condi-

⁶⁰ Abatement is to be in "such an amount as may be equitable to represent the existence of the condition or conditions found by the court to exist." BALT. CITY PUB. LOC. L. § 9-9(f)(4) (2015).

⁶¹ Rent Escrow Hearing at 25:18, Henson-Thomas v. Young, Case No. 010100166832011 (2012 Dist. Ct. Balt. City) (on file as 16683-11); Rent Escrow Hearing at 8:25, Gilbert v. Choi, Case No. 010100000392012 (2012 Dist. Ct. Balt. City) (on file as 39-12); Rent Escrow Hearing at 13:40-14:10, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12).

⁶² PUB. LOC. L. § 9-9(f)(4) ("In all such cases where the court deems that the tenant is entitled to relief under this Act, the burden shall be upon the landlord to show cause why there should not be an abatement of the rent.").

⁶³ Rent Escrow Hearing at 9:55, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (final order) (on file as 163-12).

⁶⁴ See Myers v. Progressive Props., Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (final order) (on file as 15-12); Marshall v. Mid Atlantic Realty Mgmt., Case No. 010100000532102 (2012 Dist. Ct. Balt. City) (final order) (on file as 53-12); Smith v. Dominion Mgmt., Case No. 010100000732012 (2012 Dist. Ct. Balt. City) (on file as 73-12); Rent Escrow Hearing at 8:28, 12:54, Beverly v. Balt. Preferred Prop., Case No. 010100000752012 (2012 Dist. Ct. Balt. City) (final order) (on file as 75-12); Dukes v. Denise, Case No. 01011172012 (2012 Dist. Ct. Balt. City) (final order) (on file as 17-12); Rent Escrow Hearing at 11:20, Davis v. North Ave. Equities LLC, Case No. 010100001702012 (2012 Dist. Ct. Balt. City) (on file as 170-12); Moore v. Encomienda, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9941-12); Davida Moses-Jones v. Nat'l Prop. Mgmt, Case No. 010100001712012 (2012 Dist. Ct. Balt. City) (final order) (on file as 171-12).

⁶⁵ See Rent Escrow Hearing at 2:25-11:41, Brown v. Cloverdale Partners, LLC, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12).

tions two months previous to the filing of the petition, the judge denied the relief without explanation.⁶⁶ In another case in which the housing inspection found thirty-two violations, of which seventeen were serious, the landlord did not appear on the March return date even though he was served.⁶⁷ The tenant testified that the landlord had known about the conditions described in the inspection report since June of the previous year.⁶⁸ The judge established the escrow account but did not abate any of the tenant's \$900 monthly rent; in fact, the judge added a \$45 late charge to the amount because the tenant was a week late with the rent for that month.⁶⁹ While it might seem as if the landlord's failure to appear despite being served would make it difficult for him to meet his burden of showing why an abatement should not be granted, that case was not the only time we saw that happen.⁷⁰

At the conclusion of these cases, when it came time to disburse any escrow account or otherwise resolve claims based on the housing code violations, judges seldom gave tenants any meaningful monetary award. Thirty-three of the fifty-nine cases comprised situations where tenants managed to make out a prima facie case of entitlement to some monetary relief, whether abatement, damages, or return of some portion of the escrow.⁷¹ Since the court often did not elicit the facts on actual notice and other elements of the right to relief, and some number of tenants seemed to give up on the escrow action part of the way through it, this number probably represents an undercount of the total who had a right to it, as well as an underestimation of the extent of the relief to which they may have been entitled. In any event, no monetary relief at all was awarded by the court in nineteen of the thirty-three cases. In the fourteen cases where some monetary relief was awarded to the tenant, the amount was usually small, with the landlord generally receiving 75% of the lease rental amount or more. Further, the

⁶⁶ See *Moore v. Encomienda*, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9941-12).

⁶⁷ Rent Escrow Hearing at 0:27, *Scales v. Cooke*, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (on file as 5-12).

⁶⁸ *Id.* at 2:11.

⁶⁹ *Id.*

⁷⁰ Rent Escrow Hearing at 6:00, *Davis v. North Ave. Equities LLC*, Case No. 010100001702012 (2012 Dist. Ct. Balt. City) (on file as 170-12).

⁷¹ In those cases, there was evidence of serious housing code violations and either notice was on the record (even if not actually elicited by the judge) or the matter was in court long enough that the presumptively unreasonable period of more than 30 days had elapsed between the time of inspection finding the serious violations and the time of ultimate repair. See BALT. CITY PUB. LOC. L. §§ 9-9(d)(1), 14.2(c) (2015); see also Appendix for table of cases.

amounts awarded to tenants did not appear to be well-correlated with the seriousness of the conditions, and the judge seldom gave any, or any legally-cognizable, explanation of how he arrived at the amount awarded. It is difficult to reconcile these results with the rent escrow law's professed concern for housing conditions that "constitute a menace to the health, safety, welfare and reasonable comfort of its citizens," and its "declar[ation] that the interests of public policy require that meaningful sanctions be imposed upon those who would perpetrate or perpetuate such conditions."⁷²

Some judges evidently perceived a very high bar to tenants obtaining monetary relief. For example, a judge denied a tenant any portion of the rent escrow account, even though it had taken three months for repairs, because the premises—which had been documented by a housing inspection report as having seven violations, including four for mold—had not been rendered "unusable" by the conditions.⁷³ The law does not require that the housing be unusable to justify monetary relief; it just has to have serious deficits that reduce its value.⁷⁴ Even where evidence actually indicated that the premises were unfit for human habitation, judges tended to think that the landlord still ought to get most of the rental amount set forth in the lease. In one case, the tenant testified about a serious rodent infestation dating back three years and had an older inspection report to prove it, and the inspector testified as well that there was "a bad rat infestation in the property, a lot of openings . . . a lot of droppings throughout the property," even opining that the dwelling was unfit for human habitation "if you have small kids" (which the tenant did).⁷⁵ The judge awarded the tenant a refund of only two months' rent.⁷⁶

In another case, the tenant established that she was without heat from early November until mid-February and without hot water for one-and-a-half months of this same period.⁷⁷ Additionally,

⁷² PUB. LOC. L. § 9-9(a)(1), (4).

⁷³ See *Williams v. Dunne Wright Prop. Mgmt.*, Case No. 010100247342011 (2011 Dist. Ct. Balt. City) (on file as 24734-11).

⁷⁴ See PUB. LOC. L. § 9-9(f)(4) ("[Rent should be abated in] an amount as may be equitable to represent the existence of the condition or conditions found by the court to exist.").

⁷⁵ Rent Escrow Hearing at 6:50, *Garris v. Camden Mgmt. Servs.*, Case No. 01010000022012 (2012 Dist. Ct. Balt. City) (on file as 2-12).

⁷⁶ *Id.* at 9:36.

⁷⁷ Rent Escrow Hearing at 6:40–7:17, *Horn v. Payne*, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12); see also *Horn v. Payne*, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (final order) (on file as 163-12). This case is covered in detail in Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J. L. & Soc'y 61, 71-74 (2014).

the housing inspector found a total of seventeen violations.⁷⁸ The record also showed that the landlord admitted he had notice from the time of the first failure of the heat in early November.⁷⁹ Although the judge did indicate that he was abating \$900 going into the escrow account,⁸⁰ the actual abatement amount may have been only \$50 (because the judge appears to have ignored the tenant's testimony that she had already paid November's rent).⁸¹ In any event, the tenant was required to pay the full rental amount for the other months, and the escrow account was then returned in its entirety to the landlord at the conclusion of the case when the repairs were finally completed.⁸² Thus, the tenant received only a small percentage of the \$4,250 rent deposited during the five-month period covered by the proceeding—probably only \$50.⁸³ The court is seemingly not particularly receptive to heat complaints. In another case where the tenant had gone without heat for most of the winter, and where there were also other serious violations, the judge awarded the tenant relief amounting to only one month's rent.⁸⁴

In a case where there were twenty-eight violations (twelve of which were very serious), the tenant indicated that she had brought emails with her, showing notice to the landlord. Although the case stretched out to four hearings, and it took the landlord four months to correct all the violations, the court awarded the tenant no financial relief.⁸⁵

In another case in which the landlord did not dispute the tenant's testimony that he had known about the need for the repairs (thirteen violations, four serious) for over a year and had promised to fix them, the court not only gave nothing to the tenant but actually awarded the landlord a judgment for two months' rent that the landlord said had not been paid.⁸⁶

In a case that had been going on for eight months, and where

⁷⁸ Rent Escrow Hearing at 4:00–5:06, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12).

⁷⁹ *Id.* at 10:00–10:43; Cotton, *supra* note 77, at 75, 78.

⁸⁰ Rent Escrow Hearing at 13:27–14:10, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12).

⁸¹ *Id.* at 5:45–6:40; 13:27–14:10; Cotton, *supra* note 77, at 81-82.

⁸² Rent Escrow Hearing at 17:00, Horn v. Payne, Case No. 010100001632012 (2012 Dist. Ct. Balt. City) (on file as 163-12); Cotton, *supra* note 77, at 80-81.

⁸³ *Id.*

⁸⁴ Brown v. Hamilton, Case No. 010100005002011 (2011 Dist. Ct. Balt. City) (final order) (on file as 500-2011).

⁸⁵ Thompson v. Saffell, Case No. 010100000082012 (2012 Dist. Ct. Balt. City) (final order) (on file as 8-12).

⁸⁶ See Rent Escrow Hearing at 2:25–11:41, Brown v. Cloverdale Partners, LLC, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12).

multiple inspections showed that the repairs had still not been completed, the tenant finally restored the case to the court calendar because her lease was coming to an end. The judge remarked, “This case has gone on for eight months and has not been resolved. Usually, when a case goes on for six months, and I’m not satisfied that the landlord has made some effort or good faith effort to resolve the issues, all of the money goes to the tenant.” The judge was making an oblique reference here to the part of the rent escrow law that states:

[W]here an escrow account is established by the court and the condition or conditions are not fully remedied within six months of the establishment of such account, and the landlord has not made reasonable attempts to remedy the condition, the court shall award all monies accumulated in escrow shall be disbursed to the tenant [sic].⁸⁷

The landlord made some general statements to the judge about how difficult it had been to get the repairs done, which evidently persuaded the judge to award him 70% of the amount in escrow.⁸⁸

In addition to providing tenants with little of the relief available under law, judges tended to put obstacles in their paths. For example, they generally required tenants to deposit any alleged rent arrears into escrow before they would proceed with the case. As a result of the failure to meet this precondition, some tenants’ cases were summarily dismissed, regardless of the seriousness of the housing code violations established by inspection.⁸⁹ However, the requirement that tenants deposit alleged rent arrears prior to receiving an adjudication of whether the full amount of that alleged back rent is actually owed does not appear to be something that the rent escrow law calls for. Further, the requirement of such a deposit also appears to violate due process.

In fact, the form used by the court to order the deposit of alleged rental arrears uses language that seems to have been taken from an older, somewhat different version of the rent escrow law. It states that it is “ordered that the tenant shall pay into court the sum of \$___ . . . found by the court to be the amount of rent due and

⁸⁷ BALT. CITY PUB. LOC. L. § 9-9(g) (2015).

⁸⁸ Rent Escrow Hearing at 25:18, *Henson-Thomas v. Young*, Case No. 010100166832011 (2011 Dist. Ct. Balt. City) (on file as 16683-11).

⁸⁹ *See Scales v. Cooke*, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (final order) (on file as 5-12) (concerning a case with thirty-two violations, seventeen of which were serious); *see also* Rent Escrow Hearing at 14:00, *Guy v. Mei*, Case No. 010100001522012 (2012 Dist. Ct. Balt. City) (on file as 152-2012).

unpaid. . . .”⁹⁰ A previous version of the rent escrow law indeed calls for “payment by the tenant into court of the amount of rent found by the court to be due and unpaid”⁹¹ However, this previous version of the law applied when rent escrow was solely a defense and not available as an affirmative action brought by the tenant.⁹² And even that law required the deposit of an amount *found* by the court to be due and unpaid, not a deposit as a precondition to a finding by the court.⁹³ Moreover, the current version of the rent escrow law—which allows for the affirmative rent escrow action by the tenant—does not use that language; it calls for “payment . . . of the amount of rent called for under the lease . . . unless or until such amount is modified by subsequent order of the court. . . .”⁹⁴ That this requirement refers to *prospective* rent rather than rent arrears is demonstrated by the fact that all the rent escrow law’s remedies (including rent abatement) are entirely prospective in nature.⁹⁵ A different statute, the implied warranty of fitness for human habitation, deals with the retrospective remedy of damages.⁹⁶ In *Williams v. Housing Authority of Baltimore City*, the Maryland Court of Appeals pointed out that the rent escrow law applies to the “current situation” while previously accrued rent is involved in the “breach of warranty action looking back for some period.”⁹⁷ Not only is requiring the deposit of alleged rent arrears as a condition of proceeding inconsistent with the prospective-oriented relief of the rent escrow statute, but it is also inconsistent with how cases by the landlord for nonpayment of rent are handled, which do not require the tenant to deposit alleged arrears prior to adjudication.

Such a deposit requirement also appears to violate due process. Maryland’s Court of Special Appeals explained the issue in *Lucky Ned Pepper’s Limited v. Columbia Park and Recreation Association*, which dealt with a law that required the deposit of all rent allegedly due as a condition of obtaining a jury trial.⁹⁸ The problem with a

⁹⁰ See, e.g., *Scales v. Cooke*, Case No. 010100000052012 (2012 Dist. Ct. Balt. City) (Order to Pay Rent Into Court) (on file as 5-12).

⁹¹ S.B. 130, ch. 459, § 1(b)(2), 1968 Md. Laws 832, 832-34 (current version at PUB. LOC. L. § 9-9).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ PUB. LOC. L. § 9-9(d)(2).

⁹⁵ *Id.* § 9-9(f).

⁹⁶ *Id.* § 9-14.1(a)(2).

⁹⁷ *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 159-60 (2000).

⁹⁸ *Lucky Ned Pepper’s Ltd. v. Columbia Park & Recreation Ass’n*, 64 Md. App. 222, 230 (1985).

pre-trial deposit requirement, the court explained, is that it “presupposes a determination that the money is owed. ‘The word *due* always imports a fixed and settled obligation or liability’”⁹⁹ Accordingly, the court concluded that the rule requiring such deposit unreasonably interfered with the right to trial by jury.¹⁰⁰ Similar logic suggests that a deposit of alleged arrears in order to gain access to the rent escrow proceeding presupposes an obligation that has yet to be determined, likewise depriving a tenant of due process.

Nonetheless, judges often required tenants to deposit any alleged rent arrears before they would allow the maintenance of the rent escrow action. In the case where the inspector had found thirty-two housing code violations, the judge told the tenant that she was lucky the landlord hadn’t shown up for that court date, because then the case would probably have been dismissed immediately because she had not brought the arrears with her to deposit.¹⁰¹ This perspective was common among the judges of the court. For example, a judge stated to a tenant with regard to requiring the deposit of the full amount of alleged arrears, “In order to have a rent escrow case you have to pay the rent into the court,” and made no allowance for the fact that the housing inspection report listed multiple serious housing code violations that could have represented damages claims by the tenant against such arrears.¹⁰² Even in a case where a tenant actually pressed the court to take the housing code violations into account, the judge said, “I am not going to address any of that now. When the case is over with and the money is distributed, you can raise those issues then.”¹⁰³ He further informed the tenant that she had to pay the full amount of the alleged arrears, or the rent escrow case would be dismissed.¹⁰⁴ As one judge explained to a tenant whose housing inspection report established eight violations, five of which were

⁹⁹ *Id.* (quoting BLACK’S LAW DICTIONARY (5th ed. 1979)) (emphasis in original).

¹⁰⁰ *Lucky Ned Pepper’s Ltd.*, 64 Md. App. at 230.

¹⁰¹ Rent Escrow Hearing at 3:32, *Scales v. Cooke*, Case No. 01010000052012 (2012 Dist. Ct. Balt. City) (on file as 5-12).

¹⁰² *See* Rent Escrow Hearing at 2:05, *McCray v. Godfrey*, Case No. 01010000026012 (2012 Dist. Ct. Balt. City) (on file as 26-12). *See also* *Myers v. Progressive Props.*, Case No. 010100000152012 (2012 Dist. Ct. Balt. City) (final order) (on file as 15-12); Rent Escrow Hearing at 8:24, 9:50, 21:05, 24:15, *Ames v. Willis*, Case No. 010100001402012 (2012 Dist. Ct. Balt. City) (on file as 140-12); *Moore v. Encomienda*, Case No. 010100099412012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9941-12).

¹⁰³ Rent Escrow Hearing at 13:23, *Smith v. Dominion Mgmt.*, Case No. 010100000732012 (2012 Dist. Ct. Balt. City) (on file as 73-12).

¹⁰⁴ *Id.* at 11:11.

serious, “Did you see the movie *Jerry Maguire*? . . . In that movie, they said, Cuba Gooding Jr. said, ‘Show me the money.’ So show me the money, okay? You gotta pay it into the court This is not rent avoidance, this is rent escrow You can’t have a case unless you have the rent.”¹⁰⁵

As these examples illustrate, the escrow that should have protected tenants and given them leverage against the landlord was often treated as a cudgel against tenants. For example, in a case where the tenant received her social security check every month on the second Wednesday, she was repeatedly prevented from depositing the rent by the clerk’s office because, according to the judge’s order, she was late, and so she had to repeatedly request judicial intervention to permit it.¹⁰⁶ In that case, the landlord had received notice of the conditions in September of the previous year, and the tenant filed the case in February (where twenty housing code violations, seven of which were serious, were found). Repairs weren’t completed until June, after a proceeding that took six hearings in the court.¹⁰⁷ Each time the escrow payment was late over the course of the proceedings, the court admonished the tenant. When the judge permitted the late payment at the fifth hearing in May, he said, “Now, I gave you a little extra leeway, but you need to have made the payments when they were due, or the case gets dismissed. Do you understand that?” She responded, “I understand that. But can I explain something to you?” He said, “Just acknowledge that you have to do that.” The tenant could only respond, “Okay.” At the end of the case, the tenant received no monetary relief at all, according to the judge, “because everything has been corrected and because the tenant has not been paying into the account the way she was supposed to.”¹⁰⁸ The landlord didn’t make the repairs the way he was supposed to, and he had no defense for the delay, but received all the rent. The tenant suffered from multiple serious housing code violations for nearly a year, but got no offset.¹⁰⁹ When she objected to the release of the entire escrow to the landlord, the judge responded, “This is rent money. You can’t

¹⁰⁵ Rent Escrow Hearing at 11:50, 15:15, *Boyd III v. Mayberry*, Case No. 010100000982012 (2012 Dist. Ct. Balt. City) (final order) (on file as 98-12).

¹⁰⁶ See generally Rent Escrow Hearing, *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-2012).

¹⁰⁷ See *id.*

¹⁰⁸ *Id.* at 50:10.

¹⁰⁹ See *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (final order) (on file as 177-2012).

stay in a place for free. It's not your money, it's rent money."¹¹⁰ It seems as if some judges see their role as protecting landlords' claims for rent, but not as protecting the tenants' claims for damages for violations of the warranty of habitability.

It does make sense as a matter of efficiency for the court to resolve all related claims in the rent escrow proceeding. If there is in fact a claim on the part of the tenant for damages for violation of the warranty, it should be joined to the rent escrow action (and such joinder is called for by the law). And if the landlord has a defense of unpaid rent against such a warranty claim, it makes sense that that be considered as well. If the court then made an adjudication based on such competing claims, without requiring deposits by either party, then its decision-making would be both efficient and just. But, perversely, not only did judges in these cases often require tenants to deposit all alleged arrears in order to proceed, but they also generally declined to allow tenants to join their related claims for damages for violation of the warranty of habitability that were potential offsets against any alleged arrears. For example, in one case in which nine housing code violations were found, eight serious, the judge said to the tenant, in a frank misstatement of the law, "Are you aware that legally you cannot withhold rent simply because of the conditions of the property?"¹¹¹ The law explicitly states that tenants have a legal claim for damages against back rent,¹¹² and Maryland precedent makes clear that tenants must be allowed to join their warranty of habitability claims to these actions.¹¹³ Nonetheless, judges in these cases often informed tenants that such claims for damages were not allowed, or simply refused to allow them.

In a case in which the tenant had had an infestation of bedbugs and had pictures and an associated hospital bill to document the conditions¹¹⁴—and in which the landlord acknowledged pro-

¹¹⁰ Rent Escrow Hearing at 49:30, *Jean Minor v. Albert C. Murry Jr.*, Case No. 010100001772012 (2012 Dist. Ct. Balt. City) (on file as 177-2012).

¹¹¹ Rent Escrow Hearing, *Garris v. Camden Mgmt. Servs.*, Case No. 010100000022012 (2012 Dist. Ct. Balt. City) (on file as 2-12).

¹¹² See BALT. CITY PUB. LOC. L. § 9-14.2(b), (d) (2015) (stating that the breach of the warranty may be maintained as a defense in a landlord's action for summary ejection or distress for rent).

¹¹³ See *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 160 (2000). The Court of Appeals found that it would not "do substantial justice to require a tenant to split his or her claim[s]." *Id.* at 159.

¹¹⁴ Rent Escrow Hearing at 3:00, *Singleton v. Edgewood Apartments*, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (on file as 16-12).

viding several treatments for bedbugs¹¹⁵—the court awarded the tenant no damages,¹¹⁶ even after looking at the pictures and remarking, “it’s pretty bad.”¹¹⁷ The judge raised the issue of damages,¹¹⁸ but said “I’m going to have [to] leave that between the two of you.”¹¹⁹ When the tenant objected to paying rent for the previous two months,¹²⁰ which was evidently when the infestation occurred, the judge responded, “I’m going to have to rely on you all to work that out,”¹²¹ and “rent does have to be paid, and if you continue to have problems, what I’m suggesting is continue to document it, like you are, and see if you’re able to work out an exchange, such as if you decide to get a new mattress. They may pay that, but you [have to] keep receipts of all that, and you don’t —.”¹²² The tenant said that she had gotten new mattresses and added, “I have receipts.”¹²³ The judge continued to sidestep the tenant’s claim for damages, saying, “Certainly, if you sued, the court would absolutely consider that.”¹²⁴ The judge then dismissed the case, awarding the tenant nothing.¹²⁵

In a case in which the inspection showed twenty-five violations, twelve of them serious, the tenant requested reimbursement for the electric heater she had bought because her heat had not been working from sometime in December until January 28.¹²⁶ When she added that she was moving out in March, the judge said, “Well, there’s really no reason to have this case then” and added, “You’re going to owe the rent if you’re moving.”¹²⁷ He terminated the lease as of March 15 and dismissed the case, awarding no damages to the tenant.¹²⁸

In addition, we saw cases where tenants were whipsawed and unable to assert claims based on their housing conditions at all:

¹¹⁵ *Id.* at 1:30.

¹¹⁶ Singleton v. Edgewood Apartments, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (final order) (on file as 16-12).

¹¹⁷ Rent Escrow Hearing at 4:09, Singleton v. Edgewood Apartments, Case No. 010100089662012 (2012 Dist. Ct. Balt. City) (on file as 16-12).

¹¹⁸ *Id.* at 4:29.

¹¹⁹ *Id.* at 4:36.

¹²⁰ *Id.* at 5:12.

¹²¹ *Id.* at 5:40.

¹²² *Id.* at 6:15.

¹²³ *Id.* at 6:32.

¹²⁴ *Id.* at 6:46.

¹²⁵ *Id.* at 7:16.

¹²⁶ Rent Escrow Hearing at 0:35, 4:10, Barrett v. Lyle, Case No. 010100001622012 (2012 Dist. Ct. Balt. City) (on file as 162-12).

¹²⁷ *Id.* at 5:44.

¹²⁸ *Id.* at 6:20.

told by a judge when sued by the landlord for nonpayment of rent that a defense based on housing code violations was not permitted because such a claim was supposedly exclusive to the rent escrow action, but then unable to make the claim affirmatively in a rent escrow action because of failure to deposit the amount of alleged arrears (or the judgment amount resulting from the faster-moving nonpayment case). For example, in a nonpayment case, a judge instructed a tenant to take her problem with the conditions to a separate rent escrow action, and then granted the landlord a judgment against the tenant in the full amount of the alleged arrears.¹²⁹ The judge overseeing the rent escrow case would not consider the tenant's request for damages for the violation of the warranty of habitability, despite the inspection report indicating eight housing code violations, five of which were serious, because she was unable to first deposit the amount of the judgment against her with the court.¹³⁰ The judge then dismissed the rent escrow case, leaving the tenant unable to have warranty claims considered by either court.¹³¹ We even saw a few instances where judges gave landlords judgments against tenants in the amount of alleged unpaid rent in rent escrow cases—even in a case where the tenant defaulted and had no notice that by filing a rent escrow petition she was exposing herself to a judgment in whatever amount the landlord claimed was past due rent.¹³²

The evidence of these case studies indicates that the reason that tenants do not have much success in enforcing the warranty of habitability in court is because the court under-enforces that law as written. It is plausible to conclude from these case studies that the problem is not with the facts of tenant cases or with the law per se but with reluctance to enforce the law.

III. WHY SUCH COURTS DON'T DELIVER JUSTICE

One of the reasons sometimes surmised for why tenants do so poorly in enforcing the warranty of habitability is that judges' ethi-

¹²⁹ Rent Escrow Hearing at 11:50, 15:15, *Boyd III v. Mayberry*, Case No. 010100000982012 (2012 Dist. Ct. Balt. City) (final order) (on file as 98-12).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Rent Escrow Hearing at 8:04, *Sturgis v. Anomnachi*, Case No. 010100000602012 (2012 Dist. Ct. Balt. City) (on file as 60-12) (default case); Rent Escrow Hearing at 6:00, 2:25–11:41, *Brown v. Cloverdale Partners, LLC*, Case No. 010100099212012 (2012 Dist. Ct. Balt. City) (final order) (on file as 9921-12); Rent Escrow Hearing at 6:40, *Patterson v. Md. Maint. & Mgmt. Co.*, Case No. 010100000912012 (2012 Dist. Ct. Balt. City) (final order) (on file as 91-2012).

cal concern for maintaining impartiality impedes them from assisting tenants in establishing their cases.¹³³ However, judicial concern for impartiality does not seem like a good explanation for what we saw in our research. For one thing, there is nothing in Maryland's Code of Judicial Conduct that prohibits judges from making "reasonable accommodations"¹³⁴ for unrepresented litigants, as long as it does not lead to an "unfair advantage" to the litigant who is accommodated.¹³⁵ Judges merely eliciting the facts relevant to the remedies available under the warranty of habitability would not be going beyond making reasonable accommodations—they would in fact be doing what the statute directs, so that they can "make any order that the justice of the case may require."¹³⁶ In addition, declining to impose the law's remedies where litigants have established a *prima facie* right to relief, as happened in most of these cases, does not comport with the usual understanding of judicial impartiality.

Nor does it seem a potential explanation that judges in rent escrow cases are reacting to routine abuse of the warranty of habitability by unrepresented tenants. As the example where the judge upbraided the tenants for "rent avoidance" suggests, suspicion of tenants' motives may be a factor in judicial behavior. The sense that tenants have bad motives would not be an acceptable explanation for failing to do justice in any particular case, but it would at least provide a psychological account of why the court is not enforcing the law. However, our case studies showed that tenants seldom bring legally unjustified rent escrow claims. In fact, in the fifty-nine cases we examined, we only saw one rent escrow case where no serious housing code violations were found by the court inspector¹³⁷ and only one case where the violations were evidently caused by the tenant.¹³⁸ In all the other cases, the tenant had hous-

¹³³ See, e.g., Richard Zorza, *The Disconnect between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 424 (2004); Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L., ETHICS & PUB. POL'Y 367, 372 (2008); Baldacci, *supra* note 25.

¹³⁴ MD. CODE OF JUD. CONDUCT R. 2.2, <http://www.courts.state.md.us/rules/reports/codeofjudicialconduct2010.pdf> [<http://perma.cc/A4Q3-SQKW>].

¹³⁵ *Id.* at R. 2.6.

¹³⁶ BALT. CITY PUB. LOC. L. § 9-9(f) (2015).

¹³⁷ See *Terri Jones v. Summerfield Inv. Grp. LLC*, Case No. 010100001852012 (2012 Dist. Ct. Balt. City) (Checklist for Inspection) (on file as 185-12); *Rent Escrow Hearing at 0:10, Terri Jones v. Summerfield Inv. Grp. LLC*, Case No. 010100001852012 (2012 Dist. Ct. Balt. City) (on file as 185-12).

¹³⁸ See *Kacherovsky v. Ruby*, Case No. 9943-12 (2012 Dist. Ct. Balt. City) (final order) (on file as 9943-12). One other case was difficult to judge, because both parties

ing code violations of the kind meant to be covered by the law, usually several and sometimes many. And most of these cases involved record evidence of neglect on the part of the landlord in making repairs. If judicial behavior reflected a lower opinion of tenants than of landlords, it does not appear to have been based on whatever can be found on the record in these cases.

Legal scholars also point to biases on the part of the judges as a factor in low rates of tenant success in warranty of habitability cases. David Super, in part, blames “attitudes of the trial judges . . . [that] genuinely may not result from any organized, conscious decision making”¹³⁹ and suggests that their behavior may reflect an underlying belief that poor litigants are less morally worthy than others.¹⁴⁰ Whatever may be the acculturation of judges within the legal profession to follow the law and to provide equal justice, it is also true that judges operate within the same larger context as everyone else, in which low-income persons tend to be stigmatized. A sense that these litigants are not fully worthy of the protection of the law may lead judges to stint on its enforcement.

However, other factors may play a substantial, if not more than substantial, role. Judges are probably more likely to follow the law if they are in some sense disciplined for not following it, as by an appellate court that reverses a decision and writes an opinion explaining the shortcomings of the judge’s decision-making. Judges also have an incentive to follow the law if they are publicly embarrassed for not following it, as through adverse media coverage. And judges may follow the law because they have been otherwise persuaded by legal argument, such as by attorneys practicing before the court or relevant legal scholarship. Since this court’s decisions (and in fact those of most civil trial courts handling pro se cases) are not likely to be appealed, to get media attention, or to be frequently schooled by attorneys or legal scholars, such mechanisms are not available to affect judicial behavior. The absence of these features, generally found in more visible courts, may play a role in the results that these litigants receive.

Because having poor rental housing conditions is likely to correlate strongly with having limited resources, it is not surprising that the tenants with warranty of habitability complaints can sel-

seemed to be abusive of the law and had involved the police on a regular basis in their interactions. *See* Rent Escrow Hearing at 1:13, *Milner v. Thompson*, Case No. 010100000282012 (2012 Dist. Ct. Balt. City) (on file as 28-12).

¹³⁹ Super, *supra* note 2, at 440.

¹⁴⁰ *Id.* at 395-96, 459-60.

dom obtain counsel, and that these courts are thus places where attorneys can have little impact on judicial behavior. In Baltimore, as virtually everywhere, tenants who live in substandard housing cannot usually afford to hire an attorney and are unlikely to benefit from the limited supply of free ones.¹⁴¹ Many landlords who are small property owners may themselves be unrepresented by an attorney in such proceedings—although such landlords as “repeat players” may be more familiar with how the court works and may benefit from having greater financial and cultural capital.¹⁴² The lack of counsel means that the parties are particularly dependent on the court to ensure that the rule of law is applied.

In addition, there are seldom consequences for judges—in this court and in many courts—for failure to follow the law. Tenants often don’t even realize that mistakes of law have been made by the court, and in any event usually lack the capacity and wherewithal to prosecute an appeal *pro se*. We even saw instances where the judge encouraged the tenant to waive the right to appeal—as the form allowing for the release of escrowed funds actually has a line on it that releases the funds prior to the expiration of the thirty-day appeal period if appeal is waived.¹⁴³ Maryland law further stymies review and correction of district court mistakes by shunting tenant “appeals” into a trial *de novo* in a parallel court,¹⁴⁴ which accomplishes no actual review of the district court decision-making. And after the trial *de novo*, the only available review of legal mistakes is by certiorari to the State’s highest court, which is rarely granted. The district court thus functions as all but unreviewable

¹⁴¹ See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005); see also AM. BAR ASS’N FUND FOR JUSTICE AND EDUC., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1996); DIST. OF COLUMBIA ACCESS TO JUSTICE COMM’N, JUSTICE FOR ALL?: AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY, EXECUTIVE SUMMARY 7, 9 (2008) (noting that 97% of tenants in landlord-tenant cases proceeded *pro se*); Super, *supra* note 2, at 460 (referring to the small number of tenants represented in court as having won “the legal aid lottery”).

¹⁴² See Super, *supra* note 2, at 416 (discussing courts’ vulnerability to “capture” by landlords as repeat players).

¹⁴³ See Peoples v. Mid-Atlantic Realty Mgmt., Case No. 01010000352012 (2012 Dist. Ct. Balt. City) (Order for Disbursement of Escrow Funds and Termination of Court Escrow) (on file as 35-2012) (“We hereby waive our right to appeal so disbursement can be made prior to expiration of appeal period.”); see also Rent Escrow Hearing at 2:30, Peoples v. Mid-Atlantic Realty Mgmt., Case No. 1010000352012 (2012 Dist. Ct. Balt. City) (on file as 35-2012) (“If the parties agree, you can sign where the x’s are and this will avoid the 30-day appeal period so the money will come back more quickly.”).

¹⁴⁴ See MD. R.C.P. DIST. CT. R. 7-102 (providing for a *de novo* trial on appeal for District Court cases where the amount in controversy is less than \$5000).

for mistakes of law, which could very well reduce the court's incentives for following the law. Indeed, the sheer rarity of appellate review may create the impression that following the law in these cases is not a priority.

Further, because appeals by tenants are rare, not only do trial court mistakes go uncorrected, but relatively little appellate guidance on the relevant law gets developed, leaving judges freer to interpret the law in accordance with personal views. It may also be the case that any uncertainty about the law that results in an environment of limited appellate guidance will be resolved against the less powerful party in the litigation, which in this situation is the tenant. Of course, even where there is relevant precedent from the appellate courts, this multi-case study suggests that a court that has little chance of being appealed does not have to worry about accountability for not following that precedent.

But there is also an important logistical reality working against the ability of these courts to enforce the law, and that is the very large number of cases on their dockets.¹⁴⁵ In *Williams*, the Baltimore City Housing Authority actually made the argument to the Maryland Court of Appeals that tenant claims for damages for breach of the warranty of habitability should not be joined with rent escrow actions because the court simply would not have time to hear evidence on damages.¹⁴⁶ The Court of Appeals was unpersuaded, noting that the trial court already had to develop most of the same evidence in order to rule in the escrow case itself, and so finding the facts on damages would take little additional time.¹⁴⁷ (Of course, that conclusion reflects the assumption that trial judges are actually finding the relevant facts in rent escrow cases, while our research indicates that they are not.) The Court of Appeals pointed out that because the vast majority of cases on the court's docket are uncontested, judges actually have to hold hearings in only a few of them,¹⁴⁸ which suggests that insufficient time does not affect the adjudication of cases that actually go before the

¹⁴⁵ See, e.g., Super, *supra* note 2, at 434-35.

¹⁴⁶ *Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 159 (2000) (“[Respondent-appellee] expresse[d] concern that the trial of warranty [of habitability] claims together with rent escrow actions would hamper the court’s efficiency in handling the landlord-tenant dockets.”).

¹⁴⁷ *Id.* at 159-60 (“Except for the period of time involved—the rent escrow case focusing on the current situation and the breach of warranty action looking back for some period—the evidence necessary to establish a rent escrow claim will usually be the same evidence necessary to establish the warranty claim.”).

¹⁴⁸ The Court of Appeals pointed out that only a “few of the cases” on the docket require “an actual adjudication of disputed facts or law.” *Id.* at 159.

court. However, that does not mean that time pressure does not play a substantial role in shaping how the court operates. The large dockets burdening courts of this kind utterly depend on only a handful of cases getting significant judicial attention. If judges actually started enforcing the law, and word of that got around, it would encourage more tenants to demand the court's attention. Concern about keeping that potential flood at bay is likely to yield procedures and mores that reduce the enforcement of the law. Thus, the large dockets themselves provide a built-in disincentive for judges to provide tenants with the relief to which they would appear to be entitled.

Though lawmakers have established what in many respects seems like favorable law for tenants who are willing to sue landlords for poor conditions, they have not created a system where that law can readily serve its intended purpose. The system frustrates appellate correction and guidance, while imposing such heavy workloads on judges that the detailed work of following the law seems like an unaffordable luxury.

IV. WHAT CAN BE DONE

It is not difficult to imagine what the ideal legal system would look like. It would be one that enforced the rule of law effectively in all cases and provided equal justice to unrepresented as well as represented litigants. But it seems evident that neither the social commitment nor the fiscal capacity presently exist to provide that kind of legal system. And if the long failure of warranty of habitability litigation to address the unhealthy and hazardous housing conditions of our poorest citizens proves anything, it is that there are unlikely to be any substantial improvements overnight.

One heavily promoted reform is the adoption of a civil *Gideon* rule to increase representation of litigants by counsel.¹⁴⁹ It is true that the presence of more lawyers would add something that these courts are sorely lacking and that many other courts presumably do benefit from, which is the constant pressure to follow the law and the education in the law that results when lawyers are involved. But the provision of more free lawyers is an idea that is losing ground.

¹⁴⁹ See, e.g., Andrew Scherer, *Why People Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699 (2006); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Evictions Proceedings*, 25 Touro L. Rev. 187, 204-06 (2009); see also Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. Rev. 18, 27-28 (1990) (recommending that the Maryland Court of Appeals issue a rule requiring private attorneys to represent the poor).

The ratio of free lawyers to low-income litigants has declined over time,¹⁵⁰ and the U.S. Supreme Court shot down the most recent effort to constitutionalize a right to counsel in civil cases.¹⁵¹ State-level efforts to mandate more lawyers for low-income civil litigants have similarly faltered.¹⁵² Accordingly, it does not seem to be the most promising option for improving the situation.

In any event, adding more lawyers would have complicated effects in this situation. Tenants in rent escrow cases who had lawyers would presumably be able to seize the lion's share of the court's scarce resources, reducing the access to justice of those who remained unrepresented. And if enough lawyers were added to truly have an impact on the extent to which tenants' rights are prosecuted, then there would also need to be more judges to adjudicate the increased number of heavily-litigated cases. Any effort to provide counsel for all, or even a large number of, such unrepresented litigants is unlikely to succeed, because lawmakers are aware of the considerable expense involved—not only of paying for more lawyers but also for more judges.

There is, in fact, a fundamental mismatch between the cost of justice in this situation and the benefits provided to the litigants. It is of course overly simplistic to suggest that it would be more efficient for the judges presiding over these cases to be dismissed and their salaries reallocated to the cost of fixing up some of these decrepit buildings. But it may not be accidental that we have designed a system that mostly channels public funds to expensive administrative costs that are captured primarily by relatively powerful participants in the economic system, rather than to direct benefits to the less powerful. Civil *Gideon* and other strategies to increase

¹⁵⁰ In constant 2013 dollars, funding for the Legal Services Corporation has declined from a high of \$848 million in 1980 to \$340 million in 2013, the lowest level of funding in its history. See *2013 LSC By The Numbers*, LEGAL SERVS. CORP. (July 2014), <http://www.lsc.gov/sites/default/files/LSC/LSC2013BTN.pdf> [<http://perma.cc/SUW6-GHDP>]. At the same time, funding provided by interest on lawyers' trust accounts (IOLTA), which has been used to fund lawyers for the poor, has also drastically declined, from \$371 million in 2007 to \$93.2 million in 2011. See also Terry Carter, *IOLTA programs find new funding to support legal services*, AM. BAR ASS'N J. (Mar. 1, 2013, 7:29 AM), http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services [<http://perma.cc/KHH6-EBUV>]; see also I. Glenn Cohen, *Rationing Legal Services*, 5 J. OF LEGAL ANALYSIS 221, 221-22 (2013) (describing cuts to Legal Services Corporation funding as well as reductions in other sources of funding for legal services to the poor).

¹⁵¹ *Turner v. Rogers*, 131 S. Ct. 2507, 2515-20 (2011).

¹⁵² See, e.g., *King v. King*, 174 P.3d 659, 668 (Wash. 2007) (en banc); *Frase v. Barnhart*, 379 Md. 100, 125 (2003); *In re* Petition to Establish a Right to Counsel in Civil Cases, 2012 WI 14 (Feb. 24, 2012) (No. 10-08), <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=78599> [<http://perma.cc/TPQ8-UAEC>].

counsel for unrepresented litigants would exacerbate the allocation of resources upward rather than downward.

The new legal realists, such as Erlanger, have suggested that reformists not give in to “a nihilist surrender to pure critique,”¹⁵³ which is, of course, tempting in this situation. Indeed, after Bezdek’s extensive research effort involving the Baltimore District Court, nearly twenty-five years ago now, she herself did not present any agenda for improving the situation. Rather, she implied that the problems she documented needed to be solved through poor people recognizing their role as an exploited group and working together to bring about change.¹⁵⁴ Accordingly, she denounced even the standard recommendation of more attorneys for the unrepresented as being “parentalistic and . . . let[ting] us off the hook for our parts in the charade of legal entitlement and rights vindication.”¹⁵⁵ But poor people have not in the twenty-five years since managed to develop the political clout to obtain noticeable advances in the enforcement of the warranty of habitability. Bezdek was no doubt right that having middle-class and affluent persons drive reform is likely to lead to problematic results, including, perhaps, questionable allocations of resources. But if the rule of law and of equal justice are in fact a societal and systemic concern, then it makes little sense to conceive of the problem as something we need to wait for poor people to agitate to solve.

Further, as the new legal realists suggest, it may be possible to “chart[] a path between idealism and skepticism, by both remaining cognizant of hierarchies of power and the paradoxes they create for law, and also asking what can be done to work toward justice within the existing structures.”¹⁵⁶ There are some more feasible, comparatively low-cost ways to improve the decision-making of the less-visible courts that could chart such a path and become the focus of reform efforts.

For example, the adoption of routinized court processes that “automatize” the application of law can improve both the speed and correctness of decision-making.¹⁵⁷ More user-friendly petition

¹⁵³ Erlanger et al., *supra* note 13, at 345.

¹⁵⁴ Bezdek, *supra* note 24, at 604 (footnote omitted).

¹⁵⁵ *Id.* at 538 n.16.

¹⁵⁶ Erlanger et al., *supra* note 13, at 345.

¹⁵⁷ Super has suggested that when reforms are sought to benefit unrepresented tenants with warranty of habitability claims, “the system’s operation should be as automatic as possible. Relying on low-income people to negotiate even fairly simple procedures, or on bureaucracies to empathize with them and adjudicate in their favor, all but guarantees a high failure rate.” Super, *supra* note 2, at 462; *see also* ATUL GAWANDE,

forms for tenants and prescribed adjudication check-lists for judges could streamline the handling of cases and reduce idiosyncrasies in how the court operates. In addition, allowing for the participation of trained lay advocates and parajudicial officers, rather than relying exclusively on lawyers and judges, would stretch public dollars further and ensure that more attention is brought to bear on the cases of the unrepresented.¹⁵⁸ Such an approach could also better distribute expertise so that more expensive resources could be targeted to more complex cases and less expensive resources to less complex ones. Further, providing real and meaningful opportunities for appeal would allow for more appellate correction and guidance. For example, amending the law in Maryland to permit record appeals would at least allow for the possibility of more appellate supervision—and also signal that it actually matters whether the district court enforces the law.

In some sense it can be said that we already have the kind of legal system we want, one that, for example, displays some concern for those with substandard housing by giving them legal rights, but that lacks the social commitment that would enable those rights to be more than nominally enforced. The fundamentally superficial nature of our concern would explain why so little has changed over time and despite repeated efforts by reformers. But it is also true that the legal system, like all systems, is composed of mechanisms and procedures that may be tinkered with in ways that could produce improved outcomes, even without having to change the degree of social commitment. Case study research provides insights into where such tinkering might most advantageously occur. Further, the kind of data that case study research relies upon—data with a human face and the particulars of human experience—might even play a role in increasing the social commitment to do more.

THE CHECKLIST MANIFESTO (2009) (discussing generally how checklists increase the efficacy and consistency of decision-making processes).

¹⁵⁸ See generally Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259 (2014); see also Michele Cotton, *Experiment Interrupted: Unauthorized Practice of Law Versus Access to Justice*, 5 DEPAUL J. FOR SOC. J. 179 (2012).

APPENDIX

PRIMA FACIE CASES FOR MONETARY RELIEF

CASE NO.	TOTAL AT ISSUE	LANDLORD RECEIVED	TENANT RECEIVED	PERCENTAGE OF TOTAL AT ISSUE AWARDED TO TENANT
171-12	\$875	\$675	\$200	23
53-12	\$1460	\$1460	\$0	0
422-12	\$3150	\$2250	\$900	29
26-12	\$1000	\$500	\$500	50
136-12	\$260	\$260	\$0	0
75-12	\$788	\$788	\$0	0
763-12	\$4250	\$3350 / 4200	\$900 / 50	21 / 1
170-12	\$2700	\$2025	\$675	25
24734-11	\$2700	\$2700	\$0	0
110-12	\$800	\$800	\$0	0
9941-12	\$1500	\$1500	\$0	0
9920-12	\$3500	\$3500	\$0	0
98-12	\$640	\$640	\$0	0
140-12	\$2520	\$1468	\$1052	40
16505-11	\$1200	\$1200	\$0	0
8-12	\$3300	\$3300	\$0	0
24643-11	\$3000	\$2625	\$375	13
92-12	\$2700	\$2700	\$0	0
24798-11	\$1654	\$1404	\$250	15
97-12	\$10500	\$8750	\$1750	17
16683-11	\$8125	\$5680	\$2445	30
56-12	\$2958	\$2958	\$0	0
117-12	\$1600	\$1600	\$0	0
82-12	\$480	\$0?	\$480?	100
162-12	\$2225	\$2225	\$0	0
5-12	\$7200	\$7245	-\$45	0
9921-12	\$9000	\$9000	\$0	0
15-12	\$3180	\$3180	\$0	0
73-12	\$3500	\$2500	\$1000	28
39-12	\$3600	\$0	\$3600	100
177-12	\$6750	\$6750	\$0	0
35-12	\$795	\$795	\$0	0
500-11	\$5100	\$4250	\$850	17