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RENTING WHILE POOR: HOW RENT ESCROW VIOLATES TENANTS' DUE PROCESS RIGHTS

Celia Feldman[*]

I. INTRODUCTION

In the late 1960s, a reform movement began in tenants' rights.[1] The old view of the landlord-tenant relationship as an interest in land no longer applied to most residential tenants, who resided in urban apartments.[2] These tenants sought more than just pieces of land; they desired homes in which to live and raise their families.[3] Unlike rural tenants, however, urban tenants were not able to recognize defects and complete repairs on their property without assistance.[4] As a result, tenants living in substandard apartments or rental homes faced the problem of landlords who still expected them to accept the property as-is.[5] This attitude had the most devastating effect on low-income tenants.[6] Because income and race are so often intertwined, landlords' reluctance to take responsibility for repairs heavily affected tenants of color.[7]

The growing problem of landlords' refusal to take responsibility for their properties' conditions led courts to establish an implied warranty of habitability in residential leases.[8] This warranty converted the leasehold relationship into a bilateral contract requiring the landlord to provide and maintain basic services (such as heat, electricity, and sewer service) in exchange for rental income.[9] If the landlord failed to comply, they had breached the contract, and the tenant could stop paying rent until the landlord fixed the problems.[10]

The establishment of the warranty infuriated landlords who felt entitled to the continued receipt of rental payments while their tenants retained possession.[11] In an attempt to appease landlords, courts established rent escrow (sometimes referred to as "protective

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1. *See infra* Section III.A.
2. *See infra* notes 86–88 and accompanying text.
3. *See infra* note 87 and accompanying text.
4. *See infra* note 88 and accompanying text.
5. *See infra* notes 83–85 and accompanying text.
6. *See infra* notes 83–85 and accompanying text.
7. *See infra* notes 145–46 and accompanying text.
8. *See infra* notes 89–94 and accompanying text.
9. *See infra* note 93 and accompanying text.
10. *See infra* note 94 and accompanying text.
11. *See infra* note 98 and accompanying text.

orders" or "Landlord Protective Orders"), which required tenants to pay rent into a court's escrow account while the tenants pursued a case against their landlord for breach of the warranty.[12] In theory, success on a tenant's claim meant they could recover at least some portion of the money in escrow.[13] If the tenant's claim failed, the landlord would receive the money in escrow along with a judgment for possession.[14] Although rent escrow was at least partially intended to appease landlords, many tenants' rights advocates also supported the measure as a means by which the tenants could show their "good faith."[15]

This Comment argues that the concept of "good faith" is based on a moral judgment implying that tenants who fail to make their escrow payments do not have a meritorious claim.[16] Because the tenants most likely to struggle with such payments are tenants with the lowest incomes, this Comment asserts that such a moral judgment is inextricably linked to these tenants' poverty.[17] This Comment argues that such moral judgments tied to poverty have a lengthy foundation in Anglo-American society and in the American legal system in particular. The application of such moral judgments in American Property Law has resulted in an inherently biased application of well-intentioned reforms to the landlord-tenant relationship.[18] Because low-income tenants are statistically more likely to be people of color, this Comment argues that the application of such moral judgments in the context of landlord-tenant law, and in the administration of rent escrow in particular, has a disparate impact on tenants of color by

12. *See infra* notes 100–04 and accompanying text; *see also* Jana Ault Phillips & Carol J. Miller, *The Implied Warranty of Habitability: Is Rent Escrow the Solution or the Obstacle to Tenant's Enforcement?*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 1, 25 (2018). Both terms refer to the rent escrow process, but the ways in which this process is implemented vary between states using "rent escrow" and states using "protective orders." *See infra* notes 100–04 and accompanying text. In states that use "rent escrow," tenants typically request the establishment of the escrow account affirmatively. *See infra* notes 100–04 and accompanying text. In states using a "protective order" process, landlords request that the court issue a "protective order" requiring the tenant to pay rent into the escrow account. *See infra* notes 100–04 and accompanying text. In this Comment, I use the terms "rent escrow" or "escrow" throughout for clarity and consistency.
13. *See infra* note 101 and accompanying text.
14. *See infra* note 102 and accompanying text.
15. *See infra* note 109 and accompanying text.
16. *See infra* note 134 and accompanying text.
17. *See infra* Section II.A.
18. *See infra* Part II; *see also infra* Part IV.

depriving them of their leasehold interests in land in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.[19]

Part II of this Comment provides background on income-based societal judgements generally.[20] Section II.A. discusses the application of such judgments in the modern era, and Section II.B. discusses how these judgments found their way into American property law through zoning and how they were ultimately applied in that context.[21] Sections III.A.–C. offer background on the reforms in landlord-tenant law and the effectiveness of the warranty of habitability.[22] Part IV discusses the ongoing biases that low-income tenants face in the American legal system and in landlord-tenant court in particular.[23] Part V discusses the ways in which such biases operate to violate these tenants' due process rights.[24] Part VI offers potential solutions to alleviate the problems discussed.[25]

II. SOCIETAL JUDGMENTS REGARDING POVERTY

Discrimination based on poverty and race stems from explicit or implicit bias.[26] Explicit bias reveals discrimination in its most obvious form—for example, slavery and later segregation in the Deep South.[27] Implicit bias is not so obvious.[28] It occurs when an individual prefers or abhors one group of people over another but is unaware of this preference or animosity.[29] These biases come from a variety of sources, including family values, societal values, and cultural and media stereotypes.[30] Because people are typically unaware of the implicit biases they hold, implicit bias takes root easily, and the assumptions it generates spread throughout society.[31]

19. *See infra* notes 160–64 and accompanying text; *see also infra* notes 169–72 and accompanying text.
20. *See infra* Part II.
21. *See infra* Sections II.A–B.
22. *See infra* Sections III.A–C.
23. *See infra* Part IV.
24. *See infra* Part V.
25. *See infra* Part VI.
26. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 19–21 (3d ed. 2017).
27. *See Two Types of Bias*, NAT'L CTR. FOR CULTURAL COMPETENCE, https://nccc.georgetown.edu/bias/module-3/1.php [https://perma.cc/V2FV-VETA] (last visited Sept. 25, 2021).
28. *See Implicit Bias*, PERCEPTION INST., https://perception.org/research/implicit-bias/ [https://perma.cc/J6HD-8BXM] (last visited Sept. 25, 2021).
29. *Id.*
30. *See id.*
31. *See id.*

Societal bias against the poor, like racial bias, was originally far more explicit than it is today.[32] Moral judgments against the poor date back to Elizabethan England, when impoverished individuals were classified as being "deserving" or "undeserving."[33] The deserving were seen as falling into poverty due to circumstances beyond their control, while the undeserving did not work despite their apparent ability to do so.[34] The undeserving appellation was applied frequently to women and minorities, and the distinction between the two categories of poor people continued into the twentieth century.[35]

A. Exclusion of Low-Income Americans from Aid Programs Based on Moral Judgments

The distinction between the deserving and undeserving poor continued into the twentieth century with the advent of government aid programs.[36] Such programs tended to favor the deserving at the expense of the undeserving.[37] Administrators of aid programs considered the undeserving to be lacking in good moral character because of their perceived fault in causing their own poverty.[38] The administrators of such programs and the government entities supporting them looked upon undeserving individuals with disfavor for seeking government assistance and denied many such individuals desperately needed benefits.[39]

In the modern era, explicit bias against the poor became less socially acceptable, but anti-poverty bias did not go away;[40] it merely took different forms, such as cuts to funding for public housing and other programs benefiting low-income individuals.[41] Ultimately, federal and state governments expected people to solve their own problems and found them deficient if they could not do so.[42]

Professor Jaime Lee notes that this attitude, which she refers to as "culturalism," only places stigma on poor individuals who seek

32. *See* Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 101 (2015).
33. *Id.*
34. *Id.* at 101–02.
35. *See id.* at 102–03.
36. *See id.* at 110–11.
37. *See id.*
38. *Id.* at 102.
39. *Id.* at 110–11.
40. *See, e.g.*, *id.* at 124.
41. *See id.*
42. *See id.* at 107.

government aid while middle- and higher-income individuals who seek government assistance do not face the same stigma.[43] Ultimately, only low-income people face stigma and blame when they attempt to ask the government for help, and because many low-income people are also women and people of color, this stigma allows race and gender-based stereotypes to flourish.[44]

B. Exclusion of Low-Income Minorities from Communities and Housing Through Moralistic and Exclusionary Zoning

Stereotypes linking poverty with moral deficiency carried over into American Property Law with the origins of zoning.[45] In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court found zoning to be an acceptable use of localities' police powers.[46] The Court stated:

> The harmless may sometimes be brought within the regulation or prohibition in order to abate or destroy the harmful. The segregation of industries, commercial pursuits, and dwellings to particular [zoning] districts . . . may bear a rational relation to the health, *morals, safety*, and general welfare of the community. The establishment of such districts . . . may . . . *facilitate the suppression of disorder* . . . .[47]

Despite the Court's claim that zoning, morals, and safety were interconnected, the Court only made broad assumptions on what the connection might be.[48] The Court also failed to explain how zoning could "facilitate the suppression of disorder."[49] However, its discussion of the supposed problems with apartment buildings

43. *See id.* For instance, Lee notes that tax deductions allow "people to buy what they could not otherwise afford." *Id.* at 104. While tax deductions are a form of government assistance, individuals who take them do not experience stigma. *Id.* In fact, they are essentially expected to take advantage of such opportunities to save money. *See id.*

44. *See id.* at 104–05 ("In singling out the poor as morally and behaviorally deficient, culturalism also provides thin cover for the perpetuation of noxious racial and gender stereotypes.").

45. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

46. *Id.* at 394–95.

47. *Id.* at 392 (emphases added) (quoting City of Aurora v. Burns et al., 149 N.E. 784, 788 (Ill. 1925)).

48. *See id.* at 392–95 (failing to elaborate on how zoning protects morals and safety).

49. *See id.* (failing to provide an explanation of how zoning could "facilitate the suppression of disorder").

suggests that it believed such buildings and their residents could be one source of the alleged "disorder."[50] The Court claimed that apartment buildings interfered with the development of "detached house[s]," and that apartments often prevented detached houses from being built altogether.[51] In these circumstances, the Court said, "the apartment house is a mere parasite," and apartments can become nuisances rather than desirable homes.[52] Because apartment buildings in the 1920s were more commonly inhabited by low-income urban workers, many of whom were also women and people of color, the Court's decision suggests that it was allowing cities to use zoning as a tool to facilitate biased land use decisions that would exclude certain types of people from their communities.[53] Although the Court's language was, for the most part, facially neutral, its inability to articulate a connection between zoning and "suppression of disorder" or to fully explain how zoning could rationally be linked to morals suggests a strong bias against potential residents of the Village of Euclid.[54]

Following *Euclid*, state courts viewed biased zoning restrictions as acceptable uses of the police power.[55] For example, in *Pierro v. Baxendale*, the Supreme Court of New Jersey upheld a city's prohibition on building motels.[56] At the time of the *Pierro* decision, motels were commonly viewed as places where people went to engage in immoral conduct.[57] The majority seemed to convey this

50. *See id.* at 392, 394–95 (describing apartment houses as "parasites"). Because tenement buildings and large apartment towers were the most common type of apartment buildings in the 1920s, and the inhabitants of these buildings were overwhelmingly poor and often people of color, the Court's negative attitude towards such dwellings suggests a strong bias against their occupants. *See* Deborah S. Gardner, *Notes on New York's Housing History*, THE ARCHITECTURAL LEAGUE NY, https://archleague.org/article/new-york-housing/ [https://perma.cc/45TP-X942] (last visited Sept. 21, 2021); *see also* Lee, *supra* note 32, at 102 ("In contrast to the 'worthy' poor, the 'unworthy' or 'undeserving' poor have been treated differently. Those deemed 'undeserving' include the seemingly able who do not work, nonwidowed single mothers, and blacks and other racial minorities.").
51. *Vill. of Euclid*, 272 U.S. at 394.
52. *Id.* at 394–95.
53. *See* Gardner, *supra* note 50; *see also* Lee, *supra* note 32, at 102.
54. *Vill. of Euclid*, 272 U.S. at 392; *see also supra* note 50 and accompanying text.
55. *See, e.g.*, Pierro v. Baxendale, 118 A.2d 401, 406 (N.J. 1955).
56. *Id.*
57. *Cf. id.* at 409 (Heher, J., dissenting) ("Conceding that motels 'as such are admittedly not immoral *per se*,' it is said in argument that it is the 'expressed conviction' of the mayor and council that 'such structures offer great temptation to the conduct of immoral actions' and the design of the supplement was to 'remove such temptation,'

bias when it stated that motels could rationally be prohibited because they were obliged to serve the general public as a whole and did not discriminate in the nature of their clientele.[58] In contrast, the majority considered rooming houses and boarding houses to be more acceptable within a community because they could carefully pick and choose their guests and were not open to the general public.[59] These contrasting assertions suggest that the majority saw motels' clientele as being particularly unsavory by default.[60] However, the majority did not actually establish a link between motels and harm to the morals or welfare of the communities in which they would be located, as required by the zoning standards set forth in *Euclid*.[61] Instead, the majority seemed to adopt moralistic views when it claimed that "reasonable restrictions designed to preserve the character of a community and maintain its property values are within the proper objectives of zoning."[62]

With the *Mount Laurel* cases of the 1970s, courts finally began to turn against the practice of using zoning to exclude certain categories of residents.[63] The *Mount Laurel* cases were central to this change.[64] In New Jersey, Mount Laurel and other townships in the state zoned their land exclusively for single-family housing and explicitly prohibited multifamily housing.[65] This prohibition continued despite changes in the region that brought in new businesses and commercial industry, resulting in the need for affordable local housing for employees of the businesses.[66] Due to the lack of affordable housing nearby, employees frequently had no choice but to live in substandard housing lacking in basic infrastructure such as electricity, running water, and sewage systems.[67] When township

and to avoid the 'potential evils' attending on occasion the operation of such facilities[.]").

58. *Id.* at 405.
59. *Id.*
60. *See id.* (implying that motels are unsavory institutions).
61. *See id.* at 405–06 (failing to explicitly extrapolate on the connection between motels and harmful effects on a community's health and welfare).
62. *See id.* at 407.
63. *See, e.g.*, S. Burlington Cnty. NAACP v. Mount Laurel Twp. (*Mount Laurel I*), 290 A.2d 465, 473 (N.J. Super. 1972), *modified*, 336 A.2d 713 (N.J. 1975).
64. *See id.*; *see also Mount Laurel I*, 336 A.2d at 727–28 (N.J. 1975); S. Burlington Cnty. NAACP v. Mount Laurel Twp. (*Mount Laurel II*), 456 A.2d 390, 415 (N.J. 1983).
65. *S. Burlington Cnty. NAACP*, 290 A.2d at 467.
66. *Mount Laurel I*, 336 A.2d at 719, 723.
67. *Id.* at 723.

officials discussed the problem, they expressed a desire to rid the township of low-income residents and to "get better citizens."[68]

In the first of the *Mount Laurel* cases, the New Jersey Superior Court found that Mount Laurel's exclusionary zoning practices constituted economic discrimination and that such discrimination was invalid.[69] Despite this finding, Mount Laurel and other townships persisted in their exclusionary zoning efforts, requiring intervention from the Supreme Court of New Jersey.[70] In two subsequent cases on the matter, the court held that *all* townships practicing exclusionary zoning must stop doing so and must provide a meaningful choice of housing to residents of all income levels.[71]

While the *Mount Laurel* cases demonstrated a recognition of blatant economic discrimination generally, courts still failed to recognize how socioeconomic discrimination in land use decisions could be inextricably linked to race through implicit bias.[72] In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, a nonprofit developer sought to build affordable housing on a large, undeveloped parcel of land in Arlington Heights, a suburb of Chicago.[73] At the time of the developer's effort, Arlington Heights had 64,000 residents, only twenty-seven of whom were Black.[74] The housing that the developer wished to build would have provided affordable housing to residents of Chicago who wished to live closer to their jobs but could not afford to do so due to a lack of affordable housing in the suburbs.[75] Many of the residents who would have been eligible to move into the proposed development were Black.[76]

Despite the need for affordable housing in the region, Arlington Heights opposed the project on the grounds that it would reduce the property values of the surrounding single-family homes.[77] However, Arlington Heights provided no evidence to support this claim.[78]

68. *S. Burlington Cnty., NAACP*, 290 A.2d at 468.
69. *Id.* at 473.
70. *Mount Laurel I*, 336 A.2d at 716–17.
71. *See id.* at 727–28; *see also Mount Laurel II*, 456 A.2d at 415 (reaffirming the holding of *Mount Laurel I*).
72. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 269–70 (1977).
73. *Id.* at 255–56.
74. *Id.* at 255.
75. *Id.* at 263–64.
76. *See id.* at 269.
77. *Id.* at 258.
78. *See id.* (failing to explain any facts or evidence presented by the residents of the Village that would support their assertion).

Despite this lack of substantiation and the U.S. Supreme Court's acknowledgement that denying the rezoning would have a "racially disproportionate impact," the Court held that the developer and the individual plaintiffs had to show that Arlington Heights had a "racially discriminatory intent or purpose" if they wanted to establish a violation of the Equal Protection Clause.[79] The Court indicated that evidence of such intent could include procedural irregularities, among other factors.[80] However, it found that no such factors were present in the case and the plaintiffs had therefore failed to show racially discriminatory intent or purpose behind the denial of the rezoning.[81]

III. REFORMS IN LANDLORD-TENANT LAW

While striking down exclusionary zoning practices, courts across the country also changed the fundamental nature of landlord-tenant law by establishing an implied warranty of habitability in residential leases.[82] Prior to these reforms, courts viewed landlord-tenant relationships as being based on an ownership interest in land.[83] Landlords and courts expected the tenant to accept the land as-is and to be able to handle any repairs that might be needed.[84] Under this view, the only way a tenant could be excused from paying rent was if he or she vacated the land.[85]

A. The Warranty of Habitability

In the 1960s and '70s, courts realized that the old view of tenancy no longer applied to modern-day tenants, the majority of whom were city dwellers seeking a place to live that offered shelter and basic utilities.[86] Such tenants were not long-term tenants with leaseholds in land, but shorter-term tenants living in individual apartments or houses.[87] Furthermore, these modern-day tenants were not in the same position of being able to spot and make needed repairs.[88]

79. *Id.* at 264–65, 269–70.
80. *Id.* at 266–68.
81. *Id.* at 269–70.
82. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–73 (D.C. Cir. 1970); Lemle v. Breeden, 462 P.2d 470, 474 (Haw. 1969); Tower W. Assocs. v. Derevnuk, 450 N.Y.S.2d 947, 951–52 (N.Y. Civ. Ct. 1982).
83. *Javins*, 428 F.2d at 1074.
84. *Id.* at 1077.
85. Phillips & Miller, *supra* note 12, at 4.
86. *See, e.g.*, *Javins*, 428 F.2d at 1074.
87. *See id.* at 1078.
88. *Id.*

The Court of Appeals for the D.C. Circuit acknowledged this problem in *Javins v. First National Realty Corp.*[89] In *Javins*, the court compared modern tenants' expectations to the expectations of consumers when buying products.[90] The court found that the landlord-tenant relationship had come to resemble the manufacturer-consumer relationship, in which warranties of fitness and merchantability protected buyers' expectations.[91] In keeping with this trend, the court held that tenants' residential leases contained an implied warranty of habitability, meaning that the landlord, in signing the lease, guaranteed that the leased premises were suitable for human habitation.[92] The court held that such leases must be treated like contracts and that the lease contractually obligated the landlord to carry out repairs when notified of defects.[93] If the landlord breached the contract by failing to perform repairs, the tenant would have a cause of action and could cease paying rent until the landlord fixed the problems.[94]

Subsequent court decisions clarified the scope of the implied warranty of habitability.[95] New York City's lower courts clarified that housing should be habitable and capable of utilization "in accord with [tenants'] reasonable expectations."[96] In addition, tenants had a right to expect not only the provision of basic services but also that such services would be reliable.[97]

B. The Origins of Rent Escrow

Once courts allowed tenants to claim breaches of the implied warranty of habitability as justification for nonpayment of rent, landlords sought to protect their right to continue receiving rental income during the pendency of tenants' actions.[98] The rent escrow system resulted from these efforts.[99]

89. *Id.* at 1075.
90. *Id.* at 1074–75.
91. *Id.* at 1075–76.
92. *Id.* at 1076–77.
93. *Id.* at 1075, 1080.
94. *Id.* at 1080, 1082.
95. *See, e.g.*, Tower W. Assocs. v. Derevnuk, 450 N.Y.S.2d 947, 951–52 (N.Y. Civ. Ct. 1982).
96. *See id.* at 951.
97. *Id.* at 951–52.
98 *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 428 (2011) ("[Landlord Protective Orders] may be attempts to appease landlords upset by the recognition of implied covenants of habitability in residential leases, offering a pretrial rent collection mechanism as a quid pro quo . . . .

In the rent escrow process, the court creates an escrow account into which the tenant pays rent until there is a final judgment in their case.[100] If the tenant succeeds, they may recover at least some of the money in the escrow account.[101] If the tenant fails, the landlord will receive all the money.[102] In some states, tenants may affirmatively request the establishment of the escrow account because they wish to raise a complaint relating to breach of the implied warranty of habitability.[103] In other states, rent escrow is a more adversarial process, in which the landlord requests the issuance of a "protective order" requiring the tenant to pay rent into the escrow account.[104] If the tenant in one of these states mentions at the initial hearing that they have a complaint related to breach of the implied warranty, the court may schedule a separate hearing on these issues to determine if they merit a reduction in the amount of rent to be paid into escrow.[105] However, there is no way for the tenant to contest the actual issuance of the protective order.[106]

Although both types of rent escrow processes were intended to benefit tenants living in substandard housing, in practice they ultimately punish low-income tenants who may struggle to find the money for the escrow payments.[107] Courts commonly use the escrow process as a condition for moving forward with the tenant's case, and if the tenant cannot make the payments on time and continuously, the case will be dismissed.[108] Despite this inequitable result, rent escrow had the support of advocates of both landlords' and tenants' rights

> [C]ourts were particularly inclined to point to a perceived change in the once summary nature of eviction proceedings to suggest that landlords deserve assured collection of any rent owed as compensation for delays.").

99. *Id.* at 425.

100. *E.g.*, Doug Donovan & Jean Marbella, *Dismissed: Tenants Lose, Landlords Win in Baltimore's Rent Court*, BALT. SUN (Apr. 26, 2017), http://data.baltimoresun.com/news/dismissed/ [https://perma.cc/62UH-ED9P].

101. *Id.*

102. *Id.*

103. *See id.*

104. *See, e.g.*, D.C. Bar Pro Bono Center, *Tenants: Protective Orders and Court Fees*, LAWHELP.ORG, https://www.lawhelp.org/dc/resource/tenants-protective-orders-and-court-fees [https://perma.cc/BZ9T-3QM2] (last visited Oct. 12, 2021).

105. *Id.*

106. *See, e.g.*, Dameron v. Capitol House Assocs., 431 A.2d 580, 582 (D.C. 1981) (holding that the entry of a protective order cannot be appealed because a protective order does not constitute a final judgment on the merits).

107. Donovan & Marbella, *supra* note 100.

108. *Id.*

who believed that the rent deposits would show the tenants' "good faith."[109]

C. Failures of the New Reforms

Despite the fact that rent escrow and the warranty of habitability were supposed to protect tenants' interests, the warranty of habitability often failed to achieve its intended goals.[110] Judges in landlord-tenant courts tended to overwhelmingly favor the landlords, even when tenants raised valid claims that the landlord had breached the warranty.[111] For example, a study of landlord-tenant cases in Baltimore, Maryland from 2011 to 2012 showed that judges frequently ignored tenants' allegations and failed to give legal reasoning for their decisions or failed to ask questions of the tenants appearing before them that could elicit findings necessary for a fair decision.[112] Instances such as these occurred even when tenants managed to demonstrate blatantly obvious breaches of the warranty.[113] In other cases, New York City courts failed to provide meaningful remedies to tenants either because their failure to pay rent was not based solely on breach of the warranty or because they failed to provide evidence of the breach that met the court's standards.[114]

109. *See* Super, *supra* note 98, at 428–29.

110. *See, e.g.*, Landmarks Restoration Corp. v. Gwardyak, 485 N.Y.S.2d 917, 918–19 (N.Y. Mount Vernon City Ct. 1985) (finding that the court found tenant withheld rent because of an inability to pay, not for a violation of the warranty of habitability); Tower W. Assocs. v. Derevnuk, 450 N.Y.S.2d 947, 952–53 (N.Y. Civ. Ct. 1982) (finding that the tenants' failure of the tenants to log temporal defects in the habitability of the property in writing offered insufficient proof of such defects, thereby reducing the damages available to them).

111. *See* Michele Cotton, *When Judges Don't Follow the Law: Research & Recommendations*, 19 CUNY L. REV. 57, 66–67, 73 (2015); *see also Landmarks Restoration Corp.*, 485 N.Y.S.2d at 918–19; *Tower W. Assocs.*, 450 N.Y.S.2d at 952.

112. Cotton, *supra* note 111, at 62–63, 66–67.

113. *Id.* at 73 ("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 *the [housing] inspector testified as well . . . even opining that the dwelling was unfit for human habitation*. . . . The judge awarded the tenant a refund of only two months' rent.") (emphasis added).

114. *Landmarks Restoration Corp.*, 485 N.Y.S.2d at 918–19 (noting that the tenant withheld rent partially due to inability to pay, and awarding possession to the landlord as well as attorneys' fees); *Tower W. Assocs.*, 450 N.Y.S.2d at 952–53 (awarding minimal damages to tenants due to their failure to maintain and provide written records of the landlords' breach).

IV. ONGOING SOCIETAL PREJUDICE AGAINST LOW-INCOME MINORITIES

Societal bias against low-income individuals continues to this day, and such bias is frequently linked to race, because racial discrimination has played a significant role in exacerbating poverty among minority groups.[115] Stereotypes about both poverty and race are ingrained in American media, and such stereotypes in turn take root in the minds of many Americans.[116] In the legal community, the resulting biases can make it difficult, or even impossible, for low-income individuals to be heard in a meaningful way.[117]

A. Bias Against Low-Income Americans in the Legal Community

According to Michelle Jacobs:

> In general, lawyers assume that for most purposes their clients' lives are orderly. The client who has the financial resources to pay a lawyer only comes to see a lawyer when the unusual or unexpected disrupts the orderly task of living. Once the interfering or upsetting factor is resolved . . . the client returns to an orderly life. The client living in poverty does not fit that description.[118]

This conflict of experiences between lawyers and low-income clients is reflected in the difficulties faced by legal aid programs seeking to expand.[119] Jacobs notes that the private bar has a history of stigmatizing pro bono work and has even gone so far as to oppose the expansion of legal aid programs.[120] Although the private bar has established some legal aid programs in the past, these programs are limited in scope and do little to offer long-term solutions to low-income clients and the communities in which they live.[121]

115. *See* Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1288 (2018).
116. *Id.* at 1333.
117. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 583–85, 588 (1992).
118. Michelle S. Jacobs, *Full Legal Representation for the Poor: The Clash Between Lawyer Values and Client Worthiness*, 44 HOW. L.J. 257, 269 (2001) (footnotes omitted).
119. *See id.* at 285.
120. *Id.*
121. *Id.* at 290 ("The bar had indeed established a tradition of charitable legal work for the poor, but, though the tradition was supported by the elites of the profession, it remained in the backwaters of professional interest. These legal rights efforts were *paternalistic, moralistic*, and limited in the services they delivered. They conceived

B. Bias Against Low-Income Americans in Landlord-Tenant Court

When lawyers become judges, they take their biases with them to the bench.[122] This is particularly noticeable in landlord-tenant court, where tenants already face the obstacle of an overcrowded docket being handled by just one or two judges.[123] It appears that some judges in landlord-tenant court use their biases as a way to clear their dockets.[124] For example, a study of landlord-tenant court in Baltimore City found that some of the judges there required tenants to prove that they provided notice of habitability problems to their landlord via certified letter, despite City laws permitting multiple forms of notice.[125] According to the study's author:

> The cultural barrier is the judges' evident belief that it is "no big deal" for tenants to write letters or otherwise create paper trails for what they know. This may be both an unconscious projection of official legal culture or of a world view that one pilots one's own life, grounded in the social and economic status accompanying judges' professional station.[126]

A prime example of this cultural barrier is *Tower West Associates v. Derevnuk*.[127] In that case, although the judge found that the landlord had breached the warranty of habitability, the judge nonetheless claimed that he could not adequately determine the amount of damages to be awarded because no tenant produced any written evidence of the breach.[128] While the judge did not discount the importance of the tenants' oral testimony, he seemed to believe that written evidence would be the only way to quantify the extent of the breach.[129] Because of the judge's failure to understand that keeping written records may not have been customary among the

their role as handling problems thrust upon them rather than seeking ways to assist the poor in finding long-term solutions to the problems produced by poverty.") (emphasis added) (footnote omitted).

122. *See* Bezdek, *supra* note 117, at 571–72, 588.
123. *See, e.g.*, *id.* at 534–35.
124. *See, e.g.*, *id.* at 571–73.
125. *Id.* at 571.
126. *Id.* at 571–72 (footnotes omitted).
127. *See* Tower W. Assocs. v. Derevnuk, 450 N.Y.S.2d 947, 952–53 (N.Y. Civ. Ct. 1982).
128. *Id.*
129. *See id.* at 952 ("While the oral testimony of a witness with regard to certain conditions is probative if believed, it is not as susceptible to a translation into damages as records kept, which memorialize those conditions in writing.").

affected tenants (and could have been impossible for tenants with limited literacy), the tenants ultimately suffered financially.[130]

C. How Rent Escrow Reflects the Legal Community's Bias

Rent escrow itself demonstrates the biases held by the legal profession against low-income (and, by extension, minority) tenants.[131] Rent escrow reflects the assumption that low-income tenants, like higher-income lawyers and judges, will make required payments if they are serious about trying to obtain relief.[132] Both landlords' and tenants' advocates believe that escrow payments are a means by which tenants can demonstrate their "good faith" and allow the courts to avoid frivolous claims.[133] By its nature, however, the concept of good faith implies that a tenant who does not make escrow payments has a frivolous claim.[134] In other words, such a tenant is acting in bad faith.[135] Such an assumption fails to account for the fact that the most vulnerable tenants appearing in landlord-tenant court are low-income and therefore will struggle to find the money to make their escrow payments.[136] This does not, however, mean that such tenants do not have viable claims.[137]

130. *Id.* at 952–53. An argument can be made that, with increased access to smartphones, tenants may at least be able to take pictures of damage even if they do not habitually keep written records (or are unable to do so). The problem with this argument is that it assumes that tenants understand the court's evidentiary standards in advance. Tenants with little to no knowledge of the legal system will not necessarily consider the possibility that their word alone may count for nothing. *See* Bezdek, *supra* note 117, at 588. Aside from this issue, however, the question of whether a tenant could photograph the defects in her apartment is moot if she is too poor to afford a smartphone.

131. *See* Super, *supra* note 98, at 435–36 ("Judges and clerks commonly assist landlords in making their cases and refuting their tenants' cases. Thus landlords, in sharp contrast to tenants, actually fare better in court unrepresented."); *see also id.* at 444 (noting that Landlord Protective Orders facilitate inequality between landlords and tenants by failing to prioritize the landlord's covenant under the warranty of habitability); *id.* at 446 (noting that courts have eliminated similar payment requirements in other types of civil cases).

132. *See id.* at 441 ("Middle-class judges and lawyers . . . pay for their purchases on time as a matter of pride, and by failing to do so without a deliberate, legally sanctioned plan, low-income tenants place themselves outside of the middle-class value system.").

133. *Id.* at 429, 441.

134. *See id.* at 441.

135. *Contra id.*

136. *See* Donovan & Marbella, *supra* note 100.

137. *See* Super, *supra* note 98, at 441 ("[L]acking funds is not an indication of dishonesty . . . .").

V. HOW RENT ESCROW VIOLATES DUE PROCESS

A. The Mathews *Standard*

Because the landlord-tenant court operates under the assumption that low-income tenants have the same level of understanding of the court's procedures as do higher-income tenants, rent escrow violates low-income minority tenants' due process rights by depriving them of their property (their leasehold interests).[138] The U.S. Supreme Court set the standard for evaluating whether a due process violation has occurred in the context of prejudgment remedies in *Mathews v. Eldridge*.[139] It requires a court to consider:

> [T]he private interest that will be affected by the official action . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; and . . . the Government's interest, including the function involved and the fiscal and administrative burdens that the additional substitute procedural requirements would entail.[140]

The Court further noted that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time *and in a meaningful manner*[,]'"[141] and that "the degree of potential deprivation that . . . a particular decision [may create] is a factor [that courts must] consider[] in assessing the validity of any administrative decision making process."[142]

138. *Cf. id.* at 396 ("[P]eople dependent on subsistence benefits, providing far less than even many part-time minimum wage jobs, nonetheless were [at the time landlord-tenant reforms took place] assumed to have the procedural sophistication to initiate and prosecute claims under a system of legal rules that even the Supreme Court characterized as 'an aggravated assault on the English language, resistant to attempts to understand it.'" (quoting Schweiker v. Gray Panthers, 453 U.S. 34, 43 n.14 (1985))); *id.* at 407 ("If the tenant does not understand what to say and when, her or his abstract awareness of the defense [of the implied warranty of habitability] will be for naught."); *see also* Bezdek, *supra* note 117, at 567–68 (Landlord-tenant court is a subset of civil litigation in which wronged parties are expected to bring claims and that this system expects the party with the weaker argument to settle. This assumption fails to take into account the existence of other factors that may have prevented the wronged party from initiating the claim.).

139. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

140. *Id.*

141. *Id.* at 333 (emphasis added) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

142. *Id.* at 341.

B. The Disparate Impact Standard

The *Mathews* framework presents a good starting point from which to evaluate whether prejudgment remedies such as rent escrow violate due process.[143] However, this framework may be insufficient when a prejudgment remedy disproportionately affects members of a suspect class, such as people of color.[144] This is important because the tenants facing the heaviest impact from rent escrow and failures of the warranty of habitability are low-income and, correspondingly, non-white.[145] As a result, the failures of the new landlord-tenant regime appear to have a disparate impact on minority tenants.[146]

The disparate impact standard set forth in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* provides a promising means by which to evaluate whether a prejudgment remedy such as rent escrow violates due process.[147] The disparate impact standard represents an improvement on the disparate treatment standard used in cases like *Village of Arlington Heights* in that, while disparate treatment requires a showing of discriminatory intent or purpose, disparate impact simply requires a showing that the defendant engaged in practices that "have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."[148] Once this adverse effect is established, the defendant must show that there are no "less discriminatory alternatives" that it can use to advance its interests.[149] Unlike disparate treatment, disparate impact allows "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[150] In other words, disparate impact provides a means of accounting for the implicit bias of individual defendants, systems, or institutions.[151]

143. *See infra* notes 186–200 and accompanying text.

144. *See, e.g.*, DAN PASCIUTI & MICHELE COTTON, PUB. JUST. CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 12, 15 (Dec. 2015), http://www.publicjustice.org/wp-content/uploads/2019/09/JUSTICE_DIVERTED_PJC_DEC15.pdf [https://perma.cc/HK4Z-QRB8].

145. *See, e.g.*, *id.* at v (providing demographic information on tenants appearing in rent court in Baltimore City).

146. *See id.* at 15.

147. *See* discussion *infra* at Section V.C.

148. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Cmtys.*), 576 U.S. 519, 524 (2015) (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)).

149. *Inclusive Cmtys.*, 576 U.S. at 526.

150. *Id.* at 540.

151. *See id.*

C. Due Process Evaluations of Rent Escrow

Despite the promise of the disparate impact standard, courts have only applied it in employment discrimination cases and to cases involving violations of the Fair Housing Act.[152] Meanwhile, rent escrow has been evaluated under the *Mathews* standard, which has resulted in it being found not to violate due process.[153]

1. Arguments That Rent Escrow Does Not Violate Due Process

The U.S. Supreme Court case of *Lindsey v. Normet* provides a pivotal example of the consequences of rent escrow being evaluated under the *Mathews* framework.[154] In *Lindsey*, the Court stated that the Constitution does not provide a remedy for the loss of shelter and the right to retain possession.[155] It noted that "[t]he tenant is, by definition, in possession of the property of the landlord"[156] and that it was the duty of the courts both to prevent the tenant from depriving the landlord of the right to his or her income derived from the property and to prevent the landlord from taking the law into his or her own hands by summarily repossessing the property.[157] The Court noted that protective orders assist with "speedy adjudication," which it stated "is desirable to prevent subjecting the landlord to *undeserved* economic loss[.]"[158] Furthermore, the Court found that protective orders could not be considered "irrational or oppressive" because "[i]t is customary to pay rent in advance, and the simplicity of the issues in the typical [Forcible Entry and Detainer] action will usually not require extended trial preparation and litigation, thus making the posting of a large security deposit unnecessary."[159]

152. *See, e.g.*, *Inclusive Cmtys.*, 576 U.S. at 540; *Ricci*, 557 U.S. at 592; Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

153. *See* Lindsey v. Normet, 405 U.S. 56, 73–74 (1972) (employing rational basis review of the statute in question under the Equal Protection Clause because the "assurance of adequate housing" is a "legislative, not judicial, function[]" beyond the reach of the Constitution). Even though the *Mathews* decision came after *Lindsey* was decided, *Lindsey* tracked the same considerations set forth in the *Mathews* test. NAT'L HOUS. L. PROJECT, PROCEDURAL DUE PROCESS CHALLENGES TO EVICTIONS DURING THE COVID-19 PANDEMIC 2 (2020), https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf [https://perma.cc/6S3R-WNEK].

154. *See Lindsey*, 405 U.S. at 73–74; *see also* NAT'L HOUS. L. PROJECT, *supra* note 153, at 2 (explaining how the *Mathews* framework is consistent with the *Lindsey* holding).

155. *Lindsey*, 405 U.S. at 73–74.

156. *Id.* at 72.

157. *Id.* at 72–73.

158. *Id.* at 73 (emphasis added).

159. *Id.* at 65.

2. How Rent Escrow Does in Fact Violate Tenants' Right to Due Process

Use of the disparate impact analysis reveals how rent escrow, as currently practiced, does in fact violate due process. Studies clearly show that the vast majority of tenants who lose their homes to eviction because they cannot bring their warranty of habitability cases through the rent escrow process are low-income tenants.[160] Due to historical and ongoing racial discrimination, such tenants are also overwhelmingly people of color.[161] This pattern clearly demonstrates that rent escrow, as applied, has a "disproportionately adverse effect on minorities."[162]

There is no legitimate basis for this discrepancy. As discussed earlier, rent escrow often results in cases being dismissed due to factors that are outside of tenants' control and that are inextricably linked to their poverty. These factors include an inability to provide written records that meet the court's standards; inability to pay rent into escrow on short notice (or at all); and judges' assumptions that, when tenants fail to comply with court procedures, their claims must be frivolous.[163] However, there is no rational basis to essentially make the assumption that tenants who cannot comply with the requirements of the current rent escrow system deserve to have their cases dismissed.[164]

Given the objectives behind the rent escrow system at its inception, it is clear that rent escrow, as it *should* be applied, would be the "less

160. *See, e.g.*, Donovan & Marbella, *supra* note 100.

161. *See* Peterman, *supra* note 115, at 1288 ("Due to past and ongoing racial discrimination, poverty rates are higher among many minority racial groups. Hence, many policies and practices that discriminate based on poverty have a disparate racial impact."); *see also* PASCIUTI & COTTON, *supra* note 144, at 12–13 (providing demographic information on tenants appearing in rent court in Baltimore City); OKSANA MIRONOVA, CMTY. SERV. SOC'Y, ADDRESSING THE EVICTION EPIDEMIC 2, 5 (2018), https://smhttp-ssl-58547.nexcesscdn.net/nycss/images/uploads/pubs/Addressing_the_Eviction_Epidemic.pdf [https://perma.cc/5LRB-XULC] (providing demographic information on tenants vulnerable to evictions in New York City); BRIAN J. MCCABE & EVA ROSEN, EVICTION IN WASHINGTON, D.C.: RACIAL AND GEOGRAPHIC DISPARITIES IN HOUSING INSTABILITY 6, 15, 21 (2020), https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap [https://perma.cc/M466-DVAN] (providing demographic information on tenants subject to evictions in Washington, D.C.).

162. Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc. (*Inclusive Cmtys.*), 576 U.S. 519, 524 (2015).

163. Tower W. Assocs. v. Derevnuk, 450 N.Y.S.2d 947, 952 (N.Y. Civ. Ct. 1982); Donovan & Marbella, *supra* note 100; Super, *supra* note 98, at 441, 446.

164. *See, e.g.*, Super, *supra* note 98, at 441.

discriminatory alternative" to use to advance the interests of both sides.[165] Rent escrow was intended to provide a means by which tenants could request enforcement of the bilateral contract (the lease) between themselves and their landlords while also protecting the landlord's interest if the tenant asserted a frivolous claim.[166] When utilized correctly, the system would allow the tenant to assert a violation of the warranty (in the affirmative process) or defend themselves based on such a violation (in the defensive version of the process).[167] After a meaningful evaluation of the claim, the court would either release escrow funds to the landlord to make repairs within a specified time and return the balance to the tenant while abating rent for the period in which the violations were ongoing or it would release the escrow funds to the landlord and grant a judgment for possession.[168] In reality, however, judges' biases towards tenants result in a rent escrow process that fails to grant tenants a meaningful opportunity to present a case and, more often than not, results in a judgment for possession for the landlord.[169]

Viewed from this perspective, the Court's decision in *Lindsey* clearly reflects a bias against low-income tenants and in favor of landlords (who tend to have higher incomes and more familiarity with the court system).[170] By assuming that, without a protective order in place, the tenant would deprive the landlord of rental income *without a good reason for doing so*, the Court automatically assumes that tenants who do not make escrow payments do not have a meritorious case for nonpayment of rent.[171] The Court's statement that "it is customary to pay rent in advance" reflects the assumption that all tenants are able to do so but fails to consider the fact that the cases that established the warranty of habitability allowed a tenant to

165. *See Inclusive Cmtys.*, 576 U.S. at 526.

166. *See* Donovan & Marbella, *supra* note 100; *see also* Super, *supra* note 98, at 428.

167. Donovan & Marbella, *supra* note 100; D.C. Bar Pro Bono Center, *supra* note 104.

168. Donovan & Marbella, *supra* note 100.

169. *See supra* Sections IV.B–C.

170. *See* Lindsey v. Normet, 405 U.S. 56, 65 (1972) (stating that Landlord Protective Orders are not "irrational or oppressive" and that in most cases their amount will be small); *see also id.* at 72 (stating that "[t]here are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants[]" and that, without a Landlord Protective Order, a tenant could deprive his or her landlord of the right to rental income); *cf.* Bezdek, *supra* note 117, at 556 (observing that very few small landlords appeared in Baltimore's landlord-tenant court).

171. *See Lindsey*, 405 U.S. at 72–73 (describing the landlord's prospective deprivation as "undeserved").

stop paying rent when the landlord breached the warranty.[172] Furthermore, although the Court states that the amount of the security deposit would not be large (and therefore could not be "irrational or oppressive"), the Court fails to consider that, for low-income tenants, asking them to pay *any* excess money into escrow is oppressive for people who do not have the financial resources to do so and cannot easily obtain such resources.[173]

Lindsey and other cases argue that the landlord has a constitutionally protected property interest in the rental income derived from his or her property.[174] However, the tenant also has a property interest in retaining his or her leasehold.[175] The *Lindsey* Court appeared to consider this latter interest not subject to the same constitutional protections as the landlord's interest because the Constitution does not protect a right to housing.[176] However, while a right to housing may not be a property interest within the meaning of the Due Process Clause, a leasehold interest in property *is* a property interest.[177] While the *Lindsey* Court seemed to think that the escrow payments are a necessary cost of doing business in landlord-tenant court, the warranty of habitability cases changed the nature of the leasehold interest by making all residential leases bilateral contracts containing an implied warranty of habitability.[178] If a tenant has alleged a breach of contract (a breach of the warranty), placing the burden of payment upon the non-breaching party (the tenant) is not consistent with basic principles of contract law.[179]

Although the affirmative rent escrow process appears to offer more protection to tenants by allowing them to request that the escrow account be established, in practice this process also violates tenants'

172. *Id.* at 65; Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–73 (D.C. Cir. 1970).

173. *Lindsey*, 405 U.S. at 65 (stating that Landlord Protective Orders are not "irrational or oppressive" and that in most cases their amount will be small); *Cf.* Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 164 (2020) (noting that tenants often use the rent withheld due to breach of the warranty to fix problems on their own).

174. *See Lindsey*, 405 U.S. at 72–73; *see also* Chernin v. Welchans, 844 F.2d 322, 325 (6th Cir. 1988).

175. *See* Super, *supra* note 98, at 443–44 ("Arguments that [Landlord Protective Orders] are required to avoid depriving landlords of property without due process of the law cannot bear serious scrutiny . . . the supposed deprivation of property suffered by a landlord . . . is no different from that suffered by any plaintiff with a meritorious claim.").

176. *Lindsey*, 405 U.S. at 74.

177. Super, *supra* note 98, at 448.

178. Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–23 (D.C. Cir. 1970).

179. *See* Super, *supra* note 98, at 429.

right to due process by depriving them of the opportunity to be heard.[180] In Doug Donovan and Jean Marbella's recent study of Baltimore City's rent escrow court, for example, tenants who filed complaints against their landlords still had their cases dismissed if they could not make their escrow payments, even where the landlord had clearly breached the warranty of habitability.[181] Even when tenants did get the opportunity to present their claim for breach of the warranty, judges often sided with the landlords, telling tenants that they could not live "rent-free" and asking them why they waited to file their complaints.[182] Judges displayed this attitude even when City housing inspectors or the Maryland Department of the Environment had fined or cited landlords and property management companies renting substandard properties.[183] In general, judges' sympathies tended to align with the landlords, who often accused tenants of making up problems to avoid paying rent or blamed the tenant for damage they caused.[184] Because the judges overwhelmingly took the landlords' side and disregarded both tenants' testimony and objective evidence provided by city and state officials, the rent escrow process ultimately left tenants with an empty opportunity to present their defenses.[185]

Because the rent escrow process deprives tenants of a meaningful opportunity to be heard, the "risk of an erroneous deprivation of such interest through the procedures used"[186] is significant for the tenants.[187] A landlord may lose a month or two of rent while a

180. *See generally* Donovan & Marbella, *supra* note 100.

181. *Id.* One tenant had a rodent infestation, leaking pipes, and no heat, and a housing inspector had taken photographs of the defects in the property. *Id.* After her case was dismissed due to her inability to make escrow payments, the tenant filed another complaint regarding additional problems that arose. *Id.* The judge told the tenant that she had seven days to pay $3,600 that the landlord claimed was due. *Id.* The judge explicitly told the tenant that she would dismiss the case if the tenant did not pay the requested amount into the escrow account. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* While it is certainly possible that some complaints are frivolous, it is also hard to see how tenants would create some of the problems alleged. *See id.* For example, one tenant in the study had to contend with their dining room ceiling falling in—an event far more likely to be the result of poor construction and neglected repairs. *Id.*

185. *See generally id.*

186. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

187. *See* Cotton, *supra* note 111, at 66–67, 77 (observing that judges in Baltimore's landlord-tenant court used procedures that tenants had difficulty following, that judges failed to elicit facts from tenants or to use legal reasoning in their findings, and that judges often required tenants to pay their back rent into escrow before they could

tenant's case proceeds to its conclusion.[188] While this loss may be more significant for small-scale landlords, it is negligible for large commercial landlords.[189] Any impact of such a loss, however, must be measured against the fact that, where a tenant has a meritorious case for breach of the warranty, it is logical for the landlord to face some sort of penalty if he or she has made no attempt to fix the problems alleged.[190] In contrast, a tenant faces the far greater loss of a place to live, which is not so easily remedied, and such a deprivation is far more likely to be erroneous than would be the deprivation of a landlord's interest.[191] Many landlords frequently appear in landlord-tenant court and are familiar with the system, and they often receive assistance from court personnel and from the judges involved in the proceedings.[192] In contrast, tenants receive little notice prior to their hearings and rarely have any realistic opportunity to obtain counsel.[193] Tenants are often intimidated by the court proceedings, with which they are not familiar, and they do not receive assistance from court personnel and judges in eliciting the facts necessary to present their cases.[194] As a result, many tenants fail

proceed with their cases); Bezdek, *supra* note 117, at 588 ("[T]he rule-oriented court talk expected and privileged by judges in low-level courts bears little or no relation to people's natural narratives. The rules of courtroom discourse are seldom explained to those witnesses expected to conform to them.").

188. *See, e.g.*, Super, *supra* note 98, at 443–44.

189. *See* Bezdek, *supra* note 117, at 556. Although small landlords are more prevalent in some jurisdictions, such as Baltimore City, and are therefore more likely to face financial hardship from delayed receipt of rental income, it is important to consider that landlords are in the best position to know the condition of their properties at the time of rental. *See* Donovan & Marbella, *supra* note 100. If a landlord knows that their property is not fit for human habitation, they should not rent it out in the first place. *Cf.* Super, *supra* note 98, at 429 ("[R]equiring the buyer to pay the purchase price to a breaching seller to correct the latter's noncompliance is hardly standard in contract law.").

190. Super, *supra* note 98, at 401.

191. *See* Lindsey v. Normet, 405 U.S. 56, 85 (1972) (Douglas, J., dissenting) ("For slum tenants—not to mention the middle class—this kind of summary procedure usually will mean in actuality no opportunity to be heard. Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words.").

192. Super, *supra* note 98, at 436.

193. *See, e.g.*, 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, 16–17 (1973) (describing how the Detroit court set cases for trial one week after the landlord's filing of a complaint and noting that many tenants were not served until three days before the court date).

194. *See* Bezdek, *supra* note 117, at 574–75 ("Tenant education in the rent court consists of a set of direct and powerful instructions. Informed by the judge's formal

to speak up and state their cases adequately.[195] Even when tenants do speak up, some judges proceed to disregard their claims without further investigation while others discount their claims due to their failure to present evidence that meets the judge's standards.[196] Because the risk that tenants will be erroneously deprived of their property interest is so great, the value of procedural safeguards should be significant.[197]

The government's interest in protecting tenants is significant because tenants asserting breaches of the warranty of habitability often address claims related to sanitation problems and other health and safety hazards.[198] Having safe and healthy housing that is fit for human habitation is an extremely compelling government interest because it prevents homelessness and generally serves the public health and general welfare.[199] Although there would be a significant burden on the government in implementing procedural safeguards, since none currently exist, the government interest seems sufficiently compelling to offset such a burden.[200]

instructions at the start of the docket, tenants are told that they cannot raise conditions issues if they did not have the foresight to write a letter, mail it certified, and keep a copy. Tenants see the judge try the landlords' cases. Tenants observe that few tenants participate or have much to say . . . . Tenants are placed under a different burden of production, presentation, and persuasion. The court makes no reference to tenants' rights and no admonishment to landlords at the start of the docket in order to honor tenants' entitlements.").

195. *See id.* at 578.

196. *See id.* at 586; *see also* Tower W. Assocs. v. Derevnuk, 450 N.Y.S.2d 947, 952 (N.Y. Civ. Ct. 1982).

197. *See supra* notes 136–37 and accompanying text.

198. *See* Super, *supra* note 98, at 449; *see also*, C.F. Seabrook Co. v. Beck, 417 A.2d 89, 91–92 (N.J. Super. Ct. App. Div. 1980) (finding numerous defective conditions likely to affect public health, including raw sewage accumulating beneath the house); Surratt v. Newton, 393 S.E.2d 554, 556 (N.C. Ct. App. 1990) (noting defective conditions included "flooding of sewage" and rodent infestation); Pleasant E. Assocs. v. Cabrera, 480 N.Y.S.2d 693, 694 (N.Y. Civ. Ct. 1984) (noting defective conditions that included a water leak near a bedroom electrical socket and "a rodent, roach and vermin infestation throughout the apartment . . . .").

199. *See Housing and Homelessness as a Public Health Issue*, AM. PUB. HEALTH ASS'N (Nov. 7, 2017), https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue [https://perma.cc/6JG4-Q73Z].

200. *Cf. e.g.*, *id.* (noting that unstable housing is one factor predictive of excessive emergency room visits and that lack of affordable housing contributes to housing instability).

VI. RECOMMENDATIONS

The problems presented in this Comment do not have easy solutions.[201] It seems clear that tenants desperately need assistance to navigate the rent escrow system and to have their claims heard in a meaningful way.[202] Know-your-rights presentations from legal aid attorneys or volunteers from the private bar could be a good start, but this is not enough.[203] Such presentations only go so far when implicit bias against poor client-tenants is deeply entrenched within the legal community itself.[204]

Given the presence of implicit bias within the legal community, it is important to start with measures to help attorneys and judges understand and overcome their biases.[205] One possible strategy is for cities and states to provide implicit bias training.[206] Aside from the obstacle of obtaining funding for such training, however, it is important to note that the judges and attorneys most in need of such training (the ones who show the most biased attitudes and results in their courtrooms) are also the people likely to be most resistant to such training.[207]

Overcoming this obstacle, then, seems to be more rooted in fixing the reasons behind judges' and attorneys' bias.[208] The American legal system prizes high grades, law school rankings, and law journal membership (among other things)—all goals that are statistically much more likely to be obtained by white law students from socioeconomically privileged backgrounds.[209] The racial disparities in law schools' means of advancement result in racial disparities in

201. *See, e.g.*, *supra* notes 115–21 and accompanying text.
202. *See supra* notes 125–30, 192–96 and accompanying text.
203. *See* Heidi Schultheis & Caitlin Rooney, *A Right to Counsel is a Right to a Fighting Chance*, CTR. FOR AM. PROGRESS (Oct. 2, 2019, 12:00 PM), https://www.americanprogress.org/article/right-counsel-right-fighting-chance/ [https://perma.cc/UT8Y-C48D]; *but see supra* notes 122–36 and accompanying text.
204. *See* discussion *supra* Part IV.
205. *See* discussion *supra* Part IV.
206. Stephanie Russell-Kraft, *Lawyers are Uniquely Challenging Audience for Anti-Bias Training*, BLOOMBERG L. (May 13, 2019, 4:51 AM), https://news.bloomberglaw.com/us-law-week/lawyers-are-uniquely-challenging-audience-for-anti-bias-training [https://perma.cc/6RKF-7YZL].
207. *See id.*
208. *Cf. supra* notes 115–18 and accompanying text (observing that anti-poverty bias in the legal community stems at least partially from deeply entrenched, pervasive societal stereotypes and fromvast differences between the day-to-day lives of attorneys and low-income Americans).
209. *See* Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 770–77, 781–86 (1996).

who ultimately becomes a lawyer.[210] This represents a significant problem for tenants trying to find a genuine advocate, as a lawyer from a more privileged background is likely to have more difficulty empathizing with a client from a less privileged background.[211] While this is certainly not true of all such lawyers, it does help to explain the pervasive bias among lawyers and judges, particularly when it comes to the idea that tenants need to show "good faith" when pursuing a warranty of habitability claim or in assuming that tenants understand court procedures and how they should conduct themselves in their hearings.[212] Resolving this problem will take time, but if the legal community puts meaningful effort into allowing a more diverse range of law students to have an equal opportunity to succeed tenants may have access to lawyers who are able to provide meaningful help to them.[213]

In the meantime, states and court systems can put measures in place to make landlord-tenant proceedings more meaningfully accessible to tenants.[214] Some states, including Maryland, now provide tenants in eviction proceedings with a right to counsel.[215] While Maryland only recently implemented its program, right to counsel programs in other cities, such as New York City and Cleveland, have shown signs of success.[216]

VII. CONCLUSION

Implicit bias clearly has a pervasive influence in rent escrow proceedings and represents a serious obstacle to reform.[217] However, without such reforms, low-income minority tenants will continue to

210. *See* Paul Willison, Comment, *Rethinking the Writing Competition: Developing Diversity Policies on Law Journals after FASORP I and II*, 71 CASE W. RSRV. L. REV. 351, 359–60, 372–73 (2020); *see also* Allison E. Laffey & Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/ [https://perma.cc/KFV7-8AZ3].

211. *See* quotations cited *supra* notes 118, 126.

212. *See* Super, *supra* note 98, at 396, 429.

213. *See* Willison, *supra* note 210, at 358–60; *see also* Laffey & Ng, *supra* note 210.

214. Donovan & Marbella, *supra* note 100 (describing measures under consideration in Maryland to improve the situation of tenants in rent escrow proceedings).

215. *Maryland's Right to Counsel Protects Renters from Eviction*, NAT'L LOW INCOME HOUS. COAL. (Sept. 30, 2021), https://nlihc.org/resource/marylands-right-counsel-protects-renters-eviction [https://perma.cc/336E-QM8Y].

216. *Id.*

217. *See supra* notes 122–37 and accompanying text.

be deprived of their property interests in violation of due process.[218] Providing tenants with counsel is a good start, but wider changes to the legal system are necessary to make truly meaningful impacts and to allow tenants to make their cases heard.[219]

218. *See supra* notes 184–97 and accompanying text.
219. *See supra* Part VI.