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PROPERTY LAW—Landlord-Tenant Law—The Iron Triangle of Residential Leases: Landlords, Tenants, and Economic Policy in America's Last State Without Implied Warranty of Habitability. *Alexander Apartments v. City of Little Rock*, 60CV-15-6339 (2017)

Wesley N. Manus

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PROPERTY LAW—LANDLORD-TENANT LAW—THE IRON TRIANGLE OF RESIDENTIAL LEASES: LANDLORDS, TENANTS, AND ECONOMIC POLICY IN AMERICA’S LAST STATE WITHOUT IMPLIED WARRANTY OF HABITABILITY. *ALEXANDER APARTMENTS V. CITY OF LITTLE ROCK*, 60CV-15-6339 (2017).

I. INTRODUCTION

Last among the states in its absence of an implied duty in residential leases for landlords to repair and maintain¹ their properties in habitable condition,² Arkansas carries forward a tradition from the Middle Ages³ in which tenants were expected, equipped, and qualified to work their rented lands to generate income and conduct repairs necessary to continue earning a living.⁴ In the Information Age,⁵ residential tenants are no longer equipped or qualified to work rented lands for income,⁶ instead using their rented residences as refuges from harm. Beyond a mere embarrassment for Arkansas, the absence of what is known as an “implied warranty of habitability” places undue burden on tenants with carryover effects that undermine property values,⁷ increase public health and related costs,⁸ and lower employee productivity.⁹

1. Order Granting in Part & Den. in Part Tenant Intervenor’s Mot. for Partial Summ. J. Against Alexander Apartments, LLC, Alexander Apartments, LLC v. City of Little Rock, 60CV-15-6339 (2017) [hereinafter *Alexander Order for Intervenor’s*].

2. Symposium, Ark. Non-Legislative Commission on the Study of Landlord-Tenant Law, *Report*, 35 U. ARK. LITTLE ROCK L. REV. 739, 764 (2013) [hereinafter *The Commission*].

3. *Middle Ages*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Middle%20Ages> (last visited Dec. 29, 2018).

4. Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L.J. 356, 356 (2004).

5. *Information Age*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Information%20Age> (last visited Dec. 29, 2018).

6. Lynn Foster, *The Hands of The State: The Failure to Vacate Statute and Residential Tenants’ Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1, 35 (2013).

7. See Paul Emrath, *Impact of Home Building and Remodeling on the U.S. Economy* 1–5 (May 1, 2014), <https://www.nahb.org/en/research/housing-economics/housings-economic-impact/impact-of-home-building-and-remodeling-on-the-u-s--economy.aspx>. The inference is clear: Remodeling increases home and property values, but allowing homes to fall into disrepair has the opposite effect.

8. David E. Jacobs et al., *The Relationships of Housing and Population Health: A 30-year Retrospective Analysis*, 117 ENVTL. HEALTH PERSP. 597, 603 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2679604/pdf/ehp-117-597.pdf>.

9. See *id.* at 602; Arindrajit Dube, Eric Freeman, & Michael Reich, *Employee Replacement Costs*, INST. FOR RES. ON LAB. & EMP. U.C. (2010), <http://irle.berkeley.edu/files/2010/Employee-Replacement-Costs.pdf>. This note argues, among other

In health care, the iron triangle of access, quality, and cost are equal priorities that, when balanced, optimize the system.¹⁰ A similar triad of interests exists in residential leases through the relationships between landlords, tenants, and economic policy. Where the interests of one group are skewed against the others, inefficiencies undermine the entire relationship. This note argues in favor of the August 9, 2017 order on an issue of first impression by the Pulaski County Circuit Court, which held that the City of Little Rock's ("the City") housing code effectively operates as an implied warranty of habitability in residential leases.¹¹ This interpretation of the housing code compliance requirements will provide some relief for Pulaski County tenants, advancing a portion of Arkansas law from its current last-place position and into alignment with every other state.¹² The possibility exists that rent rates could increase¹³ if landlords are required to maintain rental units in accordance with applicable housing codes. However, the Arkansas economy will benefit overall from a reduced public health burden¹⁴ and related economic benefits.¹⁵ Furthermore, any increase in rent would likely be marginal, and the benefit substantially outweighs the cost.¹⁶

This note advocates for the interpretation that the housing code creates an implied warranty of habitability in residential leases and further advocates for a more comprehensive and predictable statutory solution that implements the Revised Uniform Residential Landlord-Tenant Act (RURLTA).¹⁷ Recognizing this interpretation and codifying it in statutory form will bring Arkansas in line and follow the recommendations of a comprehensive 2012 Arkansas legislative study,¹⁸ which coincides with every other American jurisdiction.¹⁹

Arkansas courts should recognize the Pulaski County Circuit Court's interpretation that the housing code is an implied part of residential lease

things, that substandard housing detrimentally impacts health, which burdens businesses and the economy through reduced productivity and increased employee replacement cost.

10. WILLIAM L. KISSICK, *MEDICINE'S DILEMMAS: INFINITE NEEDS VERSUS FINITE RESOURCES* 2–3 (1994).

11. *Alexander Order for Intervenors*, *supra* note 1, at 8.

12. *Id.* at 6.

13. *Why is Arkansas the Only State in U.S. Without this Law?*, KNWA NEWS (Oct. 16, 2014), <http://www.nwahomepage.com/news/knwa/why-is-arkansas-the-only-state-in-us-without-this-law/146701136>.

14. *Fact Sheet: Health and Housing*, ARK. CTR. FOR HEALTH IMPROVEMENT (Mar. 2017), <http://www.achi.net/docs/462/>.

15. *Id.*

16. *See infra* Section III.B.

17. *See infra* Section III.A.

18. *The Commission*, *supra* note 2, at 773–74.

19. *See infra* Section III.A.2.

contracts, violations of which create private rights of action for tenants, and should apply it within their respective jurisdictions. Furthermore, appellate decisions should affirm this interpretation and apply the standard to all jurisdictions with housing codes in Arkansas. Housing codes should be enforced in residential leases in Arkansas to provide tenants some protection under lease contracts and protect landlords' investments. Implementing a statutory implied warranty of habitability that expands existing Arkansas landlord-tenant law to include the landlord duties under the RURLTA would afford greater market predictability and economic benefit to the State while also ensuring basic protections for tenants.²⁰

Part II of this note begins with a background of landlord-tenant law in Arkansas, including developments with the implied warranty of habitability.²¹ Next, Part III discusses the Pulaski County Circuit Court's order construing housing codes as an implied warranty of habitability in residential leases and the scope of the order.²² Finally, the note considers the implied warranty of habitability from an economic perspective, analyzing research data and comparable situations as evidenced by corporate reactions to social issues.²³ The final section incorporates additional public policy considerations, including the extreme imbalance in the landlord-tenant relationship that places undue burden on tenants, exposes landlords to risk, and leaves Arkansas in last place in advancement from an agrarian society.

II. BACKGROUND

Landlord-tenant law has a long history that can be traced back to England in the Middle Ages.²⁴ This section gives a brief overview of the original thinking behind landlord-tenant law and traces it through the twentieth century. With the contextual history outlined, the section continues with context for the development of the implied warranty of habitability, including its expansion throughout the United States and its history in Arkansas. The section ends with a case history of *Alexander Apartments, LLC v. City of Little Rock*.

A. Landlord-Tenant Law: A Brief History

Throughout the Middle Ages, tenants were expected, equipped, and qualified to work their rented lands to generate income and conduct repairs

20. See *infra* Section III.B.

21. See *infra* Section II.

22. See *infra* Section II.C.

23. See *infra* Section III.B.

24. See Geurts, *supra* note 4.

necessary to continue earning a living.²⁵ These ancient leases were both residential and commercial in nature. As our society began to move from its generalized agrarian roots, tenants began to specialize in trades or other advanced roles and gradually lost the skills and time necessary to conduct their own repairs.²⁶ As society moved into the contemporary era, residential tenants no longer worked land to earn income as they ventured further away from their leased properties to carry out their specialized work.²⁷ In contrast with ancient leases, the contemporary leases contemplated in this note are residential in nature and not commercial.

In the 1970s, laws began to catch up to changes in the expectations on tenants and their relationships with rented property and landlords.²⁸ In a landmark federal case that recognized the fundamental shift into our contemporary, specialized society, the United States Court of Appeals for the District of Columbia held in *Javins v. First National Realty* that “adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance” were implied components of a residential lease.²⁹ The *Javins* court held that “the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability.”³⁰

One of the earliest examples of a court recognizing an “implied warranty of habitability” was in *Lemle v. Breeden*.³¹ The *Lemle* court noted that the tenant discovered rats not present during a move-in inspection,³² which the court found to be in violation of the contractual relationship.³³ Popularized as a precedent in *Javins*,³⁴ the notion of a landlord’s implied contractual duty to repair and maintain leased residential premises was followed by a string of other jurisdictions,³⁵ leading to the creation of a

25. Geurts, *supra* note 4, at 356.

26. *Id.*

27. Foster, *supra* note 6, at 35.

28. See, e.g., *Javins v. First Nat’l Realty*, 428 F.2d 1071 (D.C. Cir. 1970); *Kline v. Burns*, 276 A.2d 248 (N.H. 1971); *Hinson v. Delis*, 102 Cal. Rptr. 661 (Cal. App. 1972); *Gillete v. Anderson*, 282 N.E.2d 149 (Ill. App. 1972); *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973).

29. 428 F.2d at 1074.

30. *Id.* at 1076–77.

31. 462 P.2d 470 (Haw. 1969); J. Clifford McKinney, II, *Caveat Who?: A Review of The Landlord/Tenant Relationship in The Context of Injuries and Maintenance Obligations*, 35 U. ARK. LITTLE ROCK L. REV. 1049, 1067 (2013).

32. *Lemle*, 462 P.2d at 471.

33. *Id.* at 476.

34. *Javins*, 428 F.2d at 1074.

35. See, e.g., *Kamarath v. Bennett*, 568 S.W.2d 658 (Tex. 1978); *Green v. Superior Court of S.F.*, 10 Cal. 3d 616, 517 P.2d 1168 (1974); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Bos. Hous.*

uniform law. In 1972, the Uniform Law Commission attempted to evenly balance the interests of landlords and tenants in the Uniform Residential Landlord-Tenant Act (URLTA).³⁶ Twenty-one states have enacted the URLTA.³⁷ An overwhelming majority of the states that have not enacted the URLTA have nonetheless created statutory protections for tenants.³⁸ Some of the statutory protections are modeled after the original URLTA and others are based on the nuanced needs of states where they are enacted.³⁹

Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Rome v. Walker, 38 Mich. App. 458, 196 N.W.2d 850 (1972). See also ALA. CODE § 35-9A-204 (West, Westlaw through 2018); ALASKA STAT. § 34.03.100 (West, Westlaw through 2018); ARIZ. REV. STAT. ANN. § 33-1324 (West, Westlaw through 2018); CALIF. CIV. CODE § 1941, et seq. (West, Westlaw through 2018); COLO. REV. STAT. ANN. § 38-12-503 (West, Westlaw through 2018); CONN. GEN. STAT. ANN. § 47a-7 (West, Westlaw through 2018); DEL. CODE ANN. tit. 25 § 5305 (West, Westlaw through 2018); D.C. Mun. Regs. tit. 14 § 301 (West, Westlaw through 2018); FLA. STAT. ANN. § 83.51 (West, Westlaw through 2018); GA. CODE ANN., § 44-7-13 (West, Westlaw through 2018); HAW. REV. STAT. ANN. § 521-42 (West, Westlaw through 2018); IDAHO CODE ANN. § 6-320 (West, Westlaw through 2018); IND. CODE ANN. § 32-31-8-5 (West, Westlaw through 2018); IOWA CODE ANN. § 562A.15 (West, Westlaw through 2018); KAN. STAT. ANN. § 58-2553 (West, Westlaw through 2018); KY. REV. STAT. ANN. § 383.595 (West, Westlaw through 2018); LA. CIV. CODE ANN. art. 2691 (West, Westlaw through 2018); ME. REV. STAT. ANN. tit. 14 § 6021 (West, Westlaw through 2018); MD. CODE ANN. REAL PROP. § 8-211 (West, Westlaw through 2018); 105 Mass. Code Regs. § 410:351 (West, Westlaw through 2018); MICH. COMP. LAWS ANN. § 554.139 (West, Westlaw through 2018); MINN. STAT. ANN. § 504B.161 (West, Westlaw through 2018); MISS. CODE ANN. § 89-8-23 (West, Westlaw through 2018); MO. ANN. STAT. § 441.234 (West, Westlaw through 2018); MONT. CODE ANN. § 70-24-303 (West, Westlaw through 2018); NEB. REV. STAT. ANN. § 76-1419 (West, Westlaw through 2018); NEV. REV. STAT. ANN. § 118A.290 (West, Westlaw through 2018); N.H. REV. STAT. ANN. § 48-A:14 (West, Westlaw through 2018); N.M. STAT. ANN. § 47-8-20 (West, Westlaw through 2018); N.Y. REAL PROP. LAW § 235-b (McKinney, Westlaw through 2018); N.C. GEN. STAT. ANN. § 42-42 (West, Westlaw through 2018); N.D. CENT. CODE ANN. § 47-16-13.1 (West, Westlaw through 2018); OHIO REV. CODE ANN. § 5321.04 (West, Westlaw through 2018); OKLA. STAT. ANN. tit. 41, § 118 (West, Westlaw through 2018); OR. REV. STAT. ANN. § 90.320 (West, Westlaw through 2018); 34 R.I. GEN. LAWS ANN. § 34-18-22 (West, Westlaw through 2018); S.C. CODE ANN. § 27-40-440 (West, Westlaw through 2018); S.D. CODIFIED LAWS § 43-32-8 (West, Westlaw through 2018); TENN. CODE ANN. § 66-28-304 (West, Westlaw through 2017); TEX. PROP. CODE ANN. § 92.052 (West, Westlaw through 2018); UTAH CODE ANN. § 57-22-4 (West, Westlaw through 2018); VT. STAT. ANN. tit. 9 § 4457 (West, Westlaw through 2018); VA. CODE ANN. § 55-248.43 (West, Westlaw through 2018); WASH. REV. CODE ANN. § 59.18.060 (West, Westlaw through 2018); W. VA. CODE ANN. § 37-6-30 (West, Westlaw through 2018); WIS. STAT. ANN. § 704.07 (West, Westlaw through 2018); WYO. STAT. ANN. § 1-21-1203 (West, Westlaw through 2018); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1978).

36. See generally, UNIF. RESIDENTIAL LANDLORD & TENANT ACT (UNIF. LAW COMM'N 1972), <http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta%201974.pdf>.

37. Foster, *supra* note 6, at 36.

38. *Id.* at 36-37.

39. *Id.* at 37.

The URLTA originally required landlords to comply with housing codes related to health and safety; maintain premises in a fit and habitable condition; keep common areas clean and safe; maintain utility infrastructure; provide for garbage removal; and provide water, hot water, and heat.⁴⁰ The uniform law was developed with balance between the interests of tenants and landlords in mind.⁴¹ In 2015, the Uniform Law Commission revised the URLTA, created the RURLTA, and added requirements for landlords to provide for “effective waterproofing and weather protection of the roof and exterior walls;”⁴² reasonable measures to control vermin and prevent exposure to hazardous substances; “floors, doors, windows, walls, ceilings, stairways, and . . . railings” in good repair; and working locks; safety equipment; and recycling receptacles.⁴³ These revisions reflect contemporary recognition of the economic⁴⁴ and environmental benefits⁴⁵ of improving energy efficiency, promoting factors that contribute to health and safety, and reducing waste.⁴⁶

B. Arkansas Landlord-Tenant Law

Arkansas remains the lone torchbearer in carrying on the ancient tradition of casting the entire burden to repair and maintain on the tenant while relieving the landlord of responsibility.⁴⁷ In 2007, the Arkansas General Assembly enacted the pro-landlord provisions of the URLTA but omitted the tenant-protection provisions.⁴⁸ Every other state has enacted some form of tenant protection and many have enacted some form of landlord protection, but Arkansas sits alone in its position of protecting only

40. *Id.*

41. *Id.*

42. REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 302 (UNIF. LAW COMM’N 2015), http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/RURLTA%202015_Final%20Act_2017mar30.pdf.

43. *Id.*

44. *Packaging and Recycling*, U.S. CHAMBER COM. FOUND. (2017), <https://www.uschamberfoundation.org/initiative/packaging-and-recycling>.

45. RECYCLING ECONOMIC INFORMATION (REI) REPORT, U.S. ENVTL. PROTECTION AGENCY (2017), <https://www.epa.gov/smm/recycling-economic-information-rei-report>.

46. *Benefits of Recycling*, U.S. DEP’T HEALTH & HUMAN SERVS. & NAT’L INSTS. OF HEALTH ENVTL. MGMT. SYS., <https://nems.nih.gov/environmental-programs/Pages/Benefits-of-Recycling.aspx> (last visited Sept. 29, 2018).

47. *Alexander Order for Intervenors*, *supra* note 1, at 2.

48. See Arkansas Residential Landlord-Tenant Act of 2007, No. 1004, sec. 1, 2007 Ark. Acts 5110, 5113 (codified at ARK. CODE ANN. § 18-17-101, *et seq.* (West, Westlaw through 2018)). See also Ginny Monk, ‘Habitable’ Not in Rules for State Landlords, ARK. ONLINE (Jul. 8, 2018, 4:30 AM), <https://www.arkansasonline.com/news/2018/jul/08/habitable-not-in-rules-for-state-landlo/> (articulating a more comprehensive history of attempts to enact tenant protections in Arkansas).

landlords.⁴⁹ Although the initial weight of the push to bring landlord-tenant law in line with the other areas of the law that have recognized the balance of interests requisite in an economically healthy society was made following the creation of the URLTA,⁵⁰ recent attention from a wide variety of domestic and international news outlets, independent research foundations, and human rights organizations has focused on Arkansas's position, which has been left behind by the rest of the country.⁵¹

In 2011, the Arkansas General Assembly created by statute a non-legislative commission to study the state of landlord-tenant laws in Arkansas.⁵² The Commission consisted of members "appointed by the Governor, legislators, [professors from each of] the two Arkansas law schools, [and] the Arkansas Bar Association."⁵³ The Commission also included representatives from the Arkansas Realtor's Association, Arkansas Bankers' Association, Landlords' Association of Arkansas, and Arkansas Affordable Housing Association.⁵⁴ The Commission's conclusions were consistent with much of what has been covered by the various authors noted previously, including that Arkansas stands alone and is considerably out of balance with other states regarding the state of its landlord-tenant laws.⁵⁵

49. *Alexander Order for Intervenor*, *supra* note 1, at 8.

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

51. Monk, *supra* note 48; Ron Wood, *Renters Have Few Rights Under Arkansas Law*, ARK. ONLINE (May 7, 2017), <https://www.arkansasonline.com/news/2017/may/07/renters-have-few-rights-under-arkansas-/>; John Pacenti, *Renters Beware: What's That Smell?*, FOX BUS. (Apr. 20, 2012), <http://www.foxbusiness.com/features/renters-beware-whats-that-smell>; Zaneta Lowe, *Renters Have Few Rights in Arkansas*, WREG NEWS (Feb. 5, 2015, 10:31 AM), <http://wreg.com/2015/02/05/renters-have-few-rights-in-arkansas/>; Eli Hager, *Can You Go to Jail for Not Paying Rent?*, MARSHALL PROJECT (Apr. 16, 2015, 5:42 PM), <https://www.themarshallproject.org/2015/04/16/can-you-go-to-jail-for-not-paying-rent>; Janet Portman, *Breaking Your Lease When Roaches Go Wild*, CHI. TRIB. (Nov. 19, 2010), http://articles.chicagotribune.com/2010-11-19/classified/ct-mre-1121-renting-20101119_1_landlord-roaches-habitable-premises; Christof Putzel, *In Arkansas, a Real Estate Loophole That Lets Landlords Neglect Renters*, AL JAZEERA (Feb. 2, 2016), <http://america.aljazeera.com/watch/shows/america-tonight/2016/2/in-arkansas-a-real-estate-loophole-that-lets-landlords-neglect-renters.html>; Spencer Chumbley & Mark Scialla, *Arkansas: Worst Place to Rent in America*, VICE NEWS (June 25, 2014, 11:25 AM), <https://news.vice.com/video/arkansas-the-worst-place-to-rent-in-america>; *Arkansas: Tenants Face Prosecution Over Rent Problems*, HUM. RTS. WATCH (Feb. 5, 2013, 12:45 AM), <https://www.hrw.org/news/2013/02/05/arkansas-tenants-face-prosecution-over-rent-problems> [hereinafter *Tenants Face Prosecution*]; *10 Things Your Landlord Won't Tell You*, N.Y. POST, (June 15, 2014, 5:22 PM), <http://nypost.com/2014/06/15/10-things-your-landlord-wont-tell-you/> [hereinafter *10 Things Your Landlord Won't Tell You*].

52. See *The Commission*, *supra* note 2.

53. Foster, *supra* note 6, at 3.

54. *Id.*

55. *The Commission*, *supra* note 2, at 2.

1. *Scholarly Research and Public Attention on Arkansas Landlord-Tenant Law*

A growing body of legal,⁵⁶ public health,⁵⁷ and economic research⁵⁸ joins an already expansive list of public interest⁵⁹ and media reporting⁶⁰ on the subject of the detrimental impacts resulting from the imbalance between landlord and tenant interests. Scholarly legal writing from around the country continues to analyze the absence of an implied warranty of habitability in Arkansas.⁶¹ For example, the absence of an implied warranty of habitability has been juxtaposed with the existence of Arkansas's failure to vacate and criminal eviction statutes.⁶² Another recent article discusses the doctrine of caveat lessee and the obligations currently imposed on landlords and tenants in Arkansas.⁶³ An article by a Louisiana State University law professor includes comparative foreign examples for implementing the RURLTA.⁶⁴ Yet another article by a Seton Hall Law School professor discusses the continued existence of the implied warranty of habitability and the current state of the law in the context of its development through case law in New Jersey.⁶⁵ This article is particularly relevant in the context of this note because, as one of the earliest adopters of

56. See, e.g., Foster, *supra* note 6; McKinney, *supra* note 31; Melissa T. Lonegrass, *A Second Chance for Innovation—Foreign Inspiration for the Revised Uniform Residential Landlord and Tenant Act*, 35 U. ARK. LITTLE ROCK L. REV. 905 (2013); Super, *supra* note 50; Marshall Prettyman, *Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007*, Ark. Code Ann. §§ 18-17-101 et seq., 35 U. ARK. LITTLE ROCK L. REV. 1031 (2013).

57. See, e.g., Ashley E. Bachelder et al., *Health Complaints Associated with Poor Rental Housing Conditions in Arkansas: The Only State Without a Landlord's Implied Warranty of Habitability*, 4 FRONTIERS PUB. HEALTH 1 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5120100/pdf/fpubh-04-00263.pdf>.

58. See, e.g., MIKE ROYS, MAGGIE DAVIDSON, SIMON NICOL, DAVID ORMANDY, & PETER AMBROSE, *THE REAL COST OF POOR HOUSING* 43 (2010), https://www.hud.gov/sites/documents/REAL_COST_POOR_HOUSING.PDF.

59. *Pay the Rent or Face Arrest: Abusive Impacts of Arkansas's Draconian Evictions Law*, HUM. RTS. WATCH (Feb. 4, 2013), <https://www.hrw.org/report/2013/02/04/pay-rent-or-face-arrest/abusive-impacts-arkansas-draconian-evictions-law> [hereinafter *Pay the Rent*].

60. See, e.g., Monk, *supra* note 48; Wood, *supra* note 51; Pacenti, *supra* note 51; Lowe, *supra* note 51; Hager, *supra* note 51; Portman, *supra* note 51; Putzel, *supra* note 51; Chumbley & Scialla, *supra* note 51; *Tenants Face Prosecution*, *supra* note 51; *10 Things Your Landlord Won't Tell You*, *supra* note 51.

61. See, e.g., Foster, *supra* note 6, at 3; Paula A. Franzese, Abbott Gorin, & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 68 RUTGERS L. REV. 1 (2016); McKinney, *supra* note 31, at 1069; Lonegrass, *supra* note 56, at 905; Super, *supra* note 50, at 394.

62. Foster, *supra* note 6, at 20.

63. McKinney, *supra* note 31, at 1049.

64. Lonegrass, *supra* note 56, at 916–22.

65. Franzese, Gorin, & Guzik, *supra* note 61, at 1.

an implied warranty of habitability interpreted in case law,⁶⁶ the New Jersey Supreme Court offers a potential template for its adoption in Arkansas.

The disparity between Arkansas's laws and the rest of the country has been gaining attention in national press⁶⁷ and among international groups.⁶⁸ Notably, an international group that monitors atrocities around the world, including places such as Afghanistan, Russia, Rwanda, and Syria,⁶⁹ reported on the status of Arkansas's landlord-tenant laws in 2013.⁷⁰

2. *Impact of Public Pressure*

This attention has placed pressure on lawmakers and elected officials in Arkansas, leading to several attempts toward bringing Arkansas up to the basic nationwide standards included in the RURLTA.⁷¹ As recently as 2017, competing bills were introduced in the Arkansas General Assembly. In one bill, sponsored by state Representative Laurie Rushing, implied quality standards were to be applied to residential leases, including requirements for landlords to maintain working heating, cooling, electrical, potable water, and sewage systems in addition to a “functioning roof and building envelope.”⁷² However, this bill gave landlords complete discretion over whether the standards were met, failed to include enforcement measures, and after its last amendment, actually deprived tenants of the meager rights they have under constructive eviction.⁷³ The bill failed *sine die* in committee in the Arkansas Senate.⁷⁴ Another another bill, sponsored by state Representative Warwick Sabin in the same legislative session, included a comprehensive list of provisions that reflected the landlord obligations under the URLTA that were excluded from the 2007 enactment by the

66. *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 276–77 (N.J. 1969).

67. Monk, *supra* note 48; Wood, *supra* note 51; Pacenti, *supra* note 51; Lowe, *supra* note 51; Hager, *supra* note 51; Portman, *supra* note 51; Putzel, *supra* note 51; Chumbley & Scialla, *supra* note 51; *Tenants Face Prosecution*, *supra* note 51; *10 Things Your Landlord Won't Tell You*, *supra* note 51.

68. *Pay the Rent*, *supra* note 59.

69. *Publications*, HUM. RTS. WATCH, <https://www.hrw.org/publications> (last visited Dec. 16, 2017).

70. *Pay the Rent*, *supra* note 59; *Arkansas: Tenants Face Prosecution Over Rent Problems*, HUM. RTS. WATCH (Feb. 5, 2013, 12:45 AM), <https://www.hrw.org/news/2013/02/05/arkansas-tenants-face-prosecution-over-rent-problems>.

71. *See, e.g.*, H.B. 1166, 91st Gen. Assemb., Reg. Sess. (Ark. 2017); H.B. 2135, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

72. H.B. 1166, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (The bill failed *sine die* in Senate committee.).

73. *Id.*

74. *Id.*

Arkansas legislature.⁷⁵ The provisions included were substantially identical to those required under the URLTA. Critically, Representative Sabin's bill specified the landlord's rights that accompanied the implied duties and provided procedures and remedies available to tenants in the event of landlord oversight.⁷⁶ Balancing the interests of landlords and tenants is at the heart of the failure of these bills.

On one hand, landlords point to the risks they take in leasing their properties, which may be damaged far beyond the dollar amount of the security deposit.⁷⁷ On the other hand, tenants and tenant groups point to the insecurity they face at the mercy of landlords,⁷⁸ who can have the ability to unilaterally evict them for even minor infractions with no corresponding recourse of their own.⁷⁹ Tenants may also be effectively forced, because of their options limited by income or credit, to live in uninhabitable conditions with no legal recourse.

One of the common criticisms against implementing the tenant-friendly portions of the RURLTA is the increased risk exposure for landlords, who are able to provide a market of among the lowest rent costs in the United States.⁸⁰ The argument holds that bringing Arkansas landlords in line with their interstate peers will increase their overhead costs, thus increasing rent prices, and put Arkansas landlords at the mercy of unscrupulous tenants.⁸¹ However, the argument presumes that the market will not level itself by attracting scrupulous tenants to improved units and implies that landlords artificially control rent prices at their tenants' expense. It also assumes that all Arkansas landlords offer substandard housing requiring substantial expense to bring it to a habitable standard. Furthermore, the Arkansas General Assembly enacted a statute that expressly limits landlord liability in tort.⁸² The effect of this statutory limit on liability in tort for landlords⁸³ is that most tort liability passes on to tenants, who are held to premises liability standards for injuries sustained by licensees and invitees.⁸⁴ Therefore,

75. H.B. 2135, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (The bill failed sine die in House committee.).

76. *Id.*

77. See Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107 (1986).

78. *Pay the Rent*, *supra* note 59.

79. *Super*, *supra* note 50, at 394.

80. *The Cheapest U.S. Cities for Renters: #14. Little Rock Arkansas*, CBS NEWS (Sept. 27, 2016, 6:11 AM), <https://www.cbsnews.com/media/cheapest-rent-housing-us-cities/8/>.

81. Laura Kelton, *The Top Ten Ways to Annoy Your Landlord*, U. OF TENN. AT CHATTANOOGA: THE LOOP (Sept. 19, 2009), <https://blog.utc.edu/TheLoop/2009/09/19/the-top-ten-ways-to-annoy-your-landlord/>.

82. ARK. CODE ANN. § 18-16-110 (West, Westlaw through 2018).

83. *Id.*

84. *Id.*

minimal risk exposure exists for landlords, whose liability is limited to circumstances where damages result from lease contract breach⁸⁵ unless the landlord agrees to maintain and repair and fails to perform in a reasonable manner.⁸⁶

C. Case Summary: Alexander Apartments, LLC v. City of Little Rock

Alexander Apartments, LLC, owns an apartment complex consisting of 141 units, which has been cited by the City for numerous housing code violations since the complex was purchased by Alexander Apartments, LLC, in March 2014.⁸⁷ On December 21, 2015, the Little Rock Fire Department issued a notice that it intended to terminate utility services to Alexander Apartments following repeated violations of the City's ordinances pertaining to housing codes⁸⁸ resulting in immediate threats to health and safety of residents.⁸⁹ According to the Little Rock Fire Department, terminating utility services meant the apartments were no longer habitable.⁹⁰ Later that same day, in response to a motion for a temporary restraining order against the City from Alexander Apartments,⁹¹ the Pulaski County Circuit Court ruled that it lacked sufficient jurisdiction to interfere with the fire department's action.⁹² After the hearing, notice was placed on the door of each of the residents, requiring the tenants to vacate by 5:00 p.m. on December 28, 2015, because of the pending termination of utility services.⁹³

1. *Tenant Intervention*

The tenants intervened in the ongoing litigation between the City and Alexander Apartments.⁹⁴ The intervenors cited numerous claims against the City, including violations of due process and federal and state laws.⁹⁵ The tenant intervenors also requested a temporary restraining order to prevent injury in the form of losing access to their rented residences during the

85. McKinney, *supra* note 31.

86. ARK. CODE ANN. § 18-16-110 (West, Westlaw through 2018).

87. Third Party Compl. & Mot. for TRO at 2, Alexander Apartments, LLC v. City of Little Rock, No. 60CV-15-6339 (Dec. 22, 2016) [hereinafter *Complaint and TRO*].

88. LITTLE ROCK, ARK., MUN. CODE § 8 (2018), https://library.municode.com/AR/little_rock/codes/code_of_ordinances?nodeId=COOR_CH8BUBURE.

89. *Complaint and TRO*, *supra* note 87.

90. *Id.*

91. *See generally*, Mot. for TRO, Alexander Apartments, LLC v. City of Little Rock, No. 60CV-15-6339 (Dec. 21, 2015).

92. *Complaint and TRO*, *supra* note 87.

93. *Id.* at 3.

94. *See generally id.*

95. *Id.* at 3.

winter and in a period of time that would have included a major holiday.⁹⁶ The intervenors also cited numerous claims against Alexander Apartments, including breach of contract,⁹⁷ breach of the implied covenant of quiet enjoyment,⁹⁸ conversion,⁹⁹ negligence,¹⁰⁰ and breach of the implied warranty of habitability.¹⁰¹

The intervenors filed a motion for partial summary judgment against Alexander Apartments on the issue of the intervenors' claim that the minimum standards included in the City's housing code are implicitly included as part of residential lease agreements and thereby creates an implied warranty of habitability in those residential lease agreements.¹⁰² The motion included two possibilities: (1) "Local laws or ordinances establishing minimum standards of habitability must be read into residential leases, and by implication create a warranty of habitability in residential leases which is measured by the standards set out in those local law[s] or ordinances; and"¹⁰³ (2) "[t]hat a general implied warranty of habitability exists in all residential lease agreements in the State of Arkansas, regardless of the existence of local laws or ordinances."¹⁰⁴

2. *Two Theories for Finding Minimum Standards in Existing Law*

On the first possibility, that local laws or ordinances establish minimum standards of habitability that must be read into residential leases, the court began by examining the City's Housing Code ("Code").¹⁰⁵ The Code applies to all leased properties irrespective of when they were "constructed, altered or repaired."¹⁰⁶ The Code requires buildings to be maintained, safe, and sanitary, and it further stipulates that noncompliant dwellings cannot be let or sublet.¹⁰⁷ The court noted that the Code includes minimum standards that "include sanitary facilities, hot and cold water supply, water heating facilities, heating facilities, cooking and heating

96. *Id.* at 5.

97. *Id.* at 6.

98. *Complaint and TRO*, *supra* note 87, at 6.

99. *Id.* at 7.

100. *Id.*

101. *Id.* at 8.

102. *See generally* Mot. for Partial Summ. J. Against Alexander Apartments, LLC, Alexander Apartments, LLC v. City of Little Rock, No. 60CV-15-6339 (Aug. 23, 2016).

103. *Alexander Order for Intervenor*, *supra* note 1, at 1.

104. *Id.* at 2.

105. *Id.* at 5.

106. LITTLE ROCK, ARK., MUN. CODE § 8-330 (2018), https://library.municode.com/AR/little_rock/codes/code_of_ordinances?nodeId=COOR_CH8BUBURE_ARTVHOCO_DIV1GE_S8-330SCCO.

107. *Id.* § 8-401.

equipment, . . . garbage disposal facilities[,]¹⁰⁸ . . . [I]ight and ventilation[,]¹⁰⁹ . . . [e]lectrical systems[,]¹¹⁰ . . . dwelling space,¹¹¹ and structural requirements.¹¹²

3. *Pulaski County Circuit Court Granted Summary Judgment*

Considering the overwhelming weight of authority from other jurisdictions throughout the United States, the court pointed to court decisions from around the country in which the minimum standards in housing codes have been interpreted as implied by operation of law in residential housing contracts.¹¹³ In *Javins*, the United States Court of Appeals for the District of Columbia Circuit held that the District of Columbia housing code created a privately enforceable duty and “that the basic validity of every housing contract depended upon substantial compliance with the housing code at the beginning of the lease term.”¹¹⁴ In issuing its order granting summary judgment, the Pulaski County Circuit Court acknowledged the long-held view of the Arkansas Supreme Court that laws in existence at the time when contracts are made and performed enter into and form part of those contracts.¹¹⁵ Additionally, the court pointed to the Arkansas Supreme Court’s position that parties are presumed to contract with existing laws in mind.¹¹⁶ Here, the court noted that the City’s Code in effect at the time the tenant intervenors’ leases were entered included minimum standards. Therefore, those requirements formed part of the lease contracts between the tenants and Alexander Apartments.¹¹⁷ The ruling is entirely consistent with the United States Court of Appeals for the District of Columbia Circuit’s ruling in *Javins* and the nationwide trend toward balancing the rights of tenants and landlords.¹¹⁸

108. *Id.* § 8-403.

109. *Id.* § 8-404.

110. *Id.* § 8-405.

111. *Id.* § 8-406.

112. LITTLE ROCK, ARK., MUN. CODE §§ 8-421 to -435 (2018), https://library.municode.com/AR/little_rock/codes/code_of_ordinances?nodeId=COOR_CH8_BUBURE_ARTVHOCO_DIV3MIST_PTBSTRE_S8-421FOUN.

113. *Alexander Order for Intervenor*, *supra* note 1, at 6 (citing *Javins v. First Nat’l Realty*, 428 F.2d 1071 (D.C. Cir. 1970); *Kline v. Burns*, 276 A.2d 248 (N.H. 1971); *Hinson v. Delis*, 102 Cal. Rptr. 661 (Cal. App. 1972); *Gillete v. Anderson*, 282 N.E.2d 149 (Ill. App. 1972); *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973)).

114. *Id.* at 7 (citing *Javins*, 428 F.2d 1071).

115. *Id.* at 8 (citing *Adams v. Spillyards*, 187 Ark. 641, 61 S.W.2d 686 (1933)).

116. *Id.* (citing *Ellison v. Tubb*, 295 Ark. 312, 749 S.W.2d 650 (1988)).

117. *Id.*

118. *See supra* Section II.A.

4. *The Arkansas General Assembly Bears Responsibility for Implementing an Implied Warranty of Habitability*

On the second possibility, whether a general implied warranty of habitability exists throughout Arkansas irrespective of local ordinances, the court noted Arkansas appellate decisions,¹¹⁹ which have consistently upheld the doctrine of caveat lessee in lease contracts.¹²⁰ The court noted the Arkansas Supreme Court's reluctance to establish a warranty of habitability through its powers, deferring the decision to the Arkansas General Assembly.¹²¹ The court also noted the General Assembly's enactment of a statute that eliminates the possibility of tort liability for landlords' liability to tenants or tenants' invitees proximately caused by defects or disrepair on a landlord's leased property.¹²² Furthermore, the court acknowledged the 2007 enactment of the landlord-friendly portions of the URLTA, noting that the pro-tenant provisions had been removed and that the 2011 Non-Legislative Commission on the Study of Landlord-Tenant Law had recommended creating implied warranty of habitability in Arkansas law.¹²³ In acknowledging previous appellate decisions, the circuit court wrote "Arkansas is the only state without a general warranty of habitability in all residential lease agreements."¹²⁴

III. ARGUMENT

Although the implied warranty of habitability has been considered from various angles in other states for more than fifty years, the concept that housing codes constitute implied portions of residential leases is an issue of first impression in Arkansas.¹²⁵ This section considers this first issue in an Arkansas court and weighs the health and economic impacts of implementing the implied warranty of habitability in Arkansas.

A. Impact as an Issue of First Impression

The Pulaski County Circuit Court's order establishes that the minimum standards included in the City's housing code forms part of residential lease

119. *Id.* at 3 (citing *Hadder v. Heritage Hill Manor, Inc.*, 2016 Ark. App. 303, 495 S.W.3d 628; *Thomas v. Stewart*, 347 Ark. 33, 60 S.W.3d 415 (2001); *Propst v. McNeill*, 326 Ark. 623, 932 S.W.2d 766 (1996)).

120. *Alexander Order for Intervenor*, *supra* note 1, at 3.

121. *Id.* (citing *Thomas*, 347 Ark. 33, 60 S.W.3d 415; *Propst*, 326 Ark. 623, 932 S.W.2d 766).

122. *Id.* (citing ARK. CODE ANN. § 18-16-110 (West 2016)).

123. *Id.* at 4.

124. *Id.*

125. *Alexander Order for Intervenor*, *supra* note 1, at 5.

agreements and thereby creates an implied warranty of habitability in those residential lease agreements.¹²⁶ This is an issue of first impression in Arkansas. Arkansas circuit courts only carry persuasive weight and not precedential authority in other Arkansas counties. Therefore, other jurisdictions must hear a case with similar facts before deciding on the issue and either agreeing or disagreeing with the Twelfth Division's interpretation. However, appellate courts may agree with the order and conclude that the interpretation applies to all jurisdictions in Arkansas under contract theory, merely requiring them to enforce existing housing codes and giving tenants a private right of action.

Approximately 44% of housing units in Little Rock, Arkansas, are rental units, which means that more than 40,000 of the city's 91,288 housing units are rentals.¹²⁷ Statewide, more than 34% of housing units are rental units, which translates to nearly 465,000 of Arkansas's 1,354,762 housing units.¹²⁸ With an average of 2.53 people per household statewide,¹²⁹ approximately 1,000,000 people live in rental housing in Arkansas and more than 100,000 of Little Rock residents live in rental units. These 1,000,000 Arkansans, who comprise more than 34% of the State's population, are the only renters in the United States living without basic guarantees of habitable housing.¹³⁰ The unimplemented landlord responsibility provisions of the RURLTA, when combined with the tenant responsibilities, offer the most balanced guidance between the interests of landlords and tenants.

1. *Health Impact of Unstandardized Housing on Arkansas Citizens*

Feces and raw sewage on the floor,¹³¹ a dead cat,¹³² mold,¹³³ broken smoke detectors,¹³⁴ and bed bugs¹³⁵ are just some examples of actual

126. *Id.* at 8.

127. *Quick Facts: Little Rock, Arkansas*, U.S. CENSUS BUREAU (2016), <https://www.census.gov/quickfacts/fact/table/littlerockcityarkansas/PST045216>.

128. *Quick Facts: Arkansas*, U.S. CENSUS BUREAU (2016), <https://www.census.gov/quickfacts/AR>.

129. *Id.*

130. *Alexander Order for Intervenors*, *supra* note 1, at 8; Monk, *supra* note 48; Wood, *supra* note 51; Pacenti *supra* note 51; Lowe, *supra* note 51; Hager, *supra* note 51; Portman, *supra* note 51; Putzel, *supra* note 51; Chumbley & Scialla, *supra* note 51; *Tenants Face Prosecution*, *supra* note 51; *10 Things Your Landlord Won't Tell You*, *supra* note 51.

131. Jason Pederson, *Alexander Apartments*, KATV NEWS (Nov. 14, 2014), <http://katv.com/community/7-on-your-side/alexander-apartments>.

132. Chelsea Boozer, *Little Rock Held Liable for Eviction Damages; Judge Says City's 2015 Order to Leave Apartments Violated Constitution*, ARK. ONLINE (Dec. 9, 2017, 4:30 AM), <http://www.arkansasonline.com/news/2017/dec/09/lr-held-liable-for-eviction-damages-201/>.

problems not only reported by tenants but also observed by housing inspectors in Arkansas.¹³⁶ As repulsive as these problems can be to current and potential tenants,¹³⁷ their detrimental effects on human health can lead to serious problems, including respiratory ailments, headaches, high blood pressure, and bites or infections¹³⁸ in addition to the more difficult to quantify impacts of living under stressful conditions with no way to leave.¹³⁹ A University of Arkansas for Medical Sciences study compared the substandard housing conditions with incidences of preventable but serious health issues.¹⁴⁰ Out of 951 Arkansas renters surveyed, more than one-third reported unresolved repair issues with their landlords and one-quarter of those reported experiencing health problems related to their housing conditions.¹⁴¹ In the study, Hispanic tenants were 51% more likely to face repair problems and were more likely to face a health issue than their white counterparts.¹⁴²

Scholarly research suggests that the elderly are more sensitive to their environments compared with younger people,¹⁴³ possibly putting elderly tenants at even greater risk. Tragically, children are at the greatest risk from environmental hazards and face exposure-related negative outcomes such as “growth retardation, diminished IQ, precocious puberty, microcephaly, and diminished lung volume.”¹⁴⁴ As the economy continues to recover from the housing market crash, people fifty-five and older have turned to the rental

133. Jonathan Rozelle, *Mold in Apartment Making Resident Sick*, ARK. MATTERS (Feb. 15, 2017, 7:40 PM), <http://www.arkansasmatters.com/news/local-news/mold-in-apartment-making-resident-sick/657141628>.

134. Boozer, *supra* note 132.

135. *Why is Arkansas the Only State in U.S. Without this Law?*, *supra* note 13.

136. *Complaint and TRO*, *supra* note 87, at 2.

137. John Lynch, *Little Rock Apartments Seek up to \$589,692 in Damages After City Closed Complex*, ARK. ONLINE (Dec. 12, 2017, 4:30 AM), <http://www.arkansasonline.com/news/2017/dec/12/apartments-seek-up-to-589-692-in-damage/>.

138. Bachelder et al., *supra* note 57, at 1–2.

139. Ginny Monk, *Study Links Sick Arkansas Tenants to Run-down Apartments*, ARK. ONLINE (Jul. 8, 2018, 4:30 AM), <https://www.arkansasonline.com/news/2018/jul/08/study-links-sick-tenants-to-run-down-ap/>.

140. Bachelder et al., *supra* note 57, at 1.

141. *Id.*

142. *Id.* at 3–4.

143. See, e.g., Suanne Iwarsson, *A Long-term Perspective on Person-environment Fit and ADL Dependence Among Older Swedish Adults*, 45 GERONTOLOGIST 327, 355 (June 1, 2005); Hans-Werner Wahl et. al, *The Home Environment and Disability-related Outcomes in Aging Individuals: What is the Empirical Evidence?* 49 GERONTOLOGIST 355, 355 (June 1, 2009).

144. Cynthia Bearer, *Environmental Health Hazards: How Children Are Different from Adults*, 103 ENVTL. HEALTH PERSP., at 10 (Sept. 1995).

market by an increase of 29% since 2009.¹⁴⁵ Although younger renters are more likely to recover from illnesses from their environment, they are more likely to rent than previous generations.¹⁴⁶ Perhaps more significantly, millennials—Americans born between 1981 and 1997¹⁴⁷—have overtaken baby boomers—Americans born between 1946 and 1964¹⁴⁸—as the largest living generation.¹⁴⁹ As the number of population segments who are renters increases, this exposes more people to the harmful effects associated with substandard housing.

Because housing codes, where they exist, establish minimum standards generally requiring the prevention of hazards and threats to human safety, enforcing them through a private right of action available to tenants would provide basic protections for people living in or considering moving to Arkansas. However, implementing standardized minimums for ensuring the protection of human life under residential lease contracts would offer uniformity for courts, landlords, tenants, and enforcement mechanisms, such as municipal inspectors or law enforcement. Such standards would also establish uniformity for property owners statewide.

2. *Comparison with Other States*

Arkansas's implementation of only the tenant responsibility portions of the URLTA, which includes landlord obligations, tenant obligations, and remedies along with limitations and landlord liability,¹⁵⁰ fell far short of the Act's intent of balancing the interests of landlords and tenants. Arkansas is the only state that has not implemented any obligation to maintain minimum standards on landlords.¹⁵¹ As has been discussed at length, every other state in the union has implemented some form of protections for tenants, and some have not implemented protections for landlords.¹⁵² Despite strong

145. Bob Sullivan, *Renting is Overtaking the Housing Market. Here's Why*, USA TODAY (Nov. 11, 2017, 11:00 AM), <https://www.usatoday.com/story/money/personalfinance/real-estate/2017/11/11/renting-homes-overtaking-housing-market-heres-why/845474001/>.

146. *Millennials Are Driving Up the Single-Family Rental Market--Here's Why*, FORBES (Oct. 17, 2017), <https://www.forbes.com/sites/forbesrealestatecouncil/2017/10/17/millennials-are-driving-up-the-single-family-rental-market-heres-why/#15feff4d2a8>.

147. Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>.

148. *Id.*

149. *Id.*

150. Lawrence R. McDonough, *Then and Now: The Uniform Residential Landlord and Tenant Act and the Revised Residential Landlord and Tenant Act--Still Bold and Relevant?*, 35 U. ARK. LITTLE ROCK L. REV. 975, 978 (2013).

151. See *supra* notes 1, 2, 6, 13, 31, 35, 48, 51, 57, 59, 87, 131, 132, 133, 137, & 139.

152. *Id.*

support from Arkansas landlords¹⁵³ and broad consensus on the need for tenant protections,¹⁵⁴ Arkansas stands alone as the only state without any protections for tenants but strong protections for landlords.

B. Economic Implications of Implementing an Implied Warranty of Habitability in Arkansas

On a small scale, becoming a landlord may occur by circumstance, as with an inheritance,¹⁵⁵ marriage,¹⁵⁶ or divorce,¹⁵⁷ or it can occur intentionally through purchasing an investment property or buying a new property and retaining the previous property to lease.¹⁵⁸ On a larger scale, an investor or group of investors may purchase a number of single or multifamily housing units and make a business out of providing housing to lessees.¹⁵⁹ Absentee ownership has been linked to a decrease in property value, increased crime, and substantial investment to revitalize historic neighborhoods.¹⁶⁰ In all cases, the leased properties are investments to the owner or owners and homes to the lessees. Because of the costs associated with not protecting their investments, landlords should welcome minimum standards as guides for long-term value increases of their properties.¹⁶¹ Furthermore, because landlords can only recover monthly expenses or see profit returns when properties are leased and generating revenue, occupancy rates are of critical importance.¹⁶² Because of the costs associated with decreased occupancy rates, it is in landlords' best interests to maximize occupancy rates over the

153. LANDLORDS ASS'N OF ARK., LEGIS. COMMITTEE, <http://www.arkansaslandlords.org/legislative-committee> (last visited Dec. 29, 2018) (“[T]he LAA is an organization of roughly 1,000 ‘mom and pop’ landlords, with memberships in chapters across the state [, which] support[s] . . . a Habitability Bill with minimum standard requirements that is fair to both landlords and tenants.”).

154. *The Commission*, *supra* note 2.

155. *See, e.g.*, ARK. CODE ANN. § 28-9-201, et seq. (West, Westlaw through 2018).

156. *See, e.g.*, ARK. CODE ANN. § 28-11-101, et seq. (West, Westlaw through 2018).

157. *See, e.g.*, ARK. CODE ANN. § 9-12-315. (West, Westlaw through 2018).

158. Laura Agadoni, *7 Things to Know Before Becoming a Landlord*, TRULIA: BLOG (Jul. 19, 2017, 4:00 PM), <https://www.trulia.com/blog/think-can-landlord-7-things-consider/>.

159. Marty Cook, *Oklahoma Investor Buys Mountain View Apartments in Fayetteville (NWA Real Deals)*, ARK. BUS. (Oct. 26, 2015, 12:00 AM), <http://www.arkansasbusiness.com/article/107781/oklahoma-investor-buys-mountain-view-apartments-in-fayetteville>.

160. *Community Development Group Transforms Arkansas Town*, FED. RES. BANK OF ST. LOUIS (2000), <https://www.stlouisfed.org/publications/bridges/fall-2000/community-development-group-transforms-arkansas-town>.

161. Luke Jones, *Sin City: How Apartment Managers Can Avoid Crime, Despair*, ARK. BUS. (Nov. 12, 2012, 12:00 AM), <http://www.arkansasbusiness.com/article/88596/apartment-managers-face-crime-disrepair>.

162. *2016 NAA Survey of Operating Expense Income & Expenses in Rental Apartment Communities*, NAT'L APARTMENT ASS'N (Aug. 2016), <https://www.nahq.org/news-publications/units/august-2016/article/2016-naa-survey-operating-income-expenses-rental>.

long term.¹⁶³ In the short term, occupancy results in reliable income, which can be used to cover expenses, including maintenance. Maintaining properties helps to retain and increase property value, which delivers an even greater return on investment for the landlord through refinancing or selling the property.

1. *Dispelling the Myth of Increased Rental Prices*

“Lemon tenants,” or those who commit waste on leased properties, are major sources of risk for landlords.¹⁶⁴ It is these tenants and landlords’ corresponding desire to protect their investments that have brought about protections in the law for landlords to mitigate potential damages caused by tenants.¹⁶⁵ In addition to this risk to landlords, limited evidence supports the notion that enforcing a quality standard in housing, under specific circumstances, could increase the cost to landlords, which would be passed on to tenants.¹⁶⁶ However, a quantitative study of existing literature on the subject of the effects of housing codes on housing costs found that while a positive correlation exists, it is limited to less than 5% and the majority of cost increases come from building codes and zoning requirements.¹⁶⁷ Considering Arkansas’s median gross rent price of \$689 in 2016,¹⁶⁸ even the maximum 5% increase would only increase rent by less than \$35.¹⁶⁹

2. *Economic Benefits to Landlords*

Short term costs for not repairing minor problems such as water intrusion and electrical malfunctions can be catastrophic to landlords, averaging \$4,700 nationwide for water damage repair and mold remediation and \$10,500 to repair smoke and fire damage after a small electrical fire.¹⁷⁰

163. *Id.*

164. John D. Benjamin, Kenneth M. Lusht, & James D. Shilling, *What Do Rental Contracts Reveal About Adverse Selection and Moral Hazard in Rental Housing Markets?* 26 REAL EST. ECON. 309, 309 (1998).

165. See ARK. CODE ANN. § 18-17-110 (West, Westlaw through 2018).

166. Corbett A. Grainger, *The Distributional Effects of Pollution Regulations: Do Renters Fully Pay for Cleaner Air?* 96 J. PUB. ECON. 840, 840 (2012).

167. David Listokin & David Hattis, *Building Codes and Housing*, 8 CITYSCAPE 1, 21 (2005), <https://www.huduser.gov/periodicals/cityscape/vol8num1/ch2.pdf>.

168. *Quick Facts: Arkansas*, *supra* note 128.

169. $689 * (.05) = 34.45$.

170. *How Much Does it Cost to Repair & Cleanup Water Damage?*, HOME ADVISOR (2007), <https://www.homeadvisor.com/cost/disaster-recovery/repair-water-damage/>; *How Much Does it Cost to Remove Mold and Toxic Materials?*, HOME ADVISOR (2017), <https://www.homeadvisor.com/cost/environmental-safety/remove-mold-and-toxic-materials/>; *How Much Does it Cost to Repair Fire & Smoke Damage?*, HOME ADVISOR (2017), <https://www.homeadvisor.com/cost/disaster-recovery/repair-fire-and-smoke-damage/>.

However, the costs of substantively correcting small problems immediately can prevent those drastic expenses in the long term and even increase the value of the property, preventing as much as a 10% reduction in value on appraisal.¹⁷¹ A study jointly conducted by the University of Connecticut School of Business and Syracuse University's Department of Economics suggests "maintenance adds roughly 1% per year to the value of the home."¹⁷² Investments in improvements, such as kitchen, bath, and infrastructure upgrades, can more than offset the cost of investment in these areas by increasing the resale value of the property.¹⁷³ The value return is often immediate.¹⁷⁴ However, rental property investment returns are most commonly realized in the long-term.¹⁷⁵ Therefore, it is in the inherent interest of landlords to ensure rental properties have no defects that could interrupt or deter occupancy rates. If all landlords were subject to the same minimum standards, true market competition would exist between them and promote a positive correlation between property desirability and occupancy.

3. *Economic Benefits to Tenants*

Tenants would also benefit from this structure through reduced expenditures on repairs undertaken on their own behalf, some of which may not meet landlord expectations and diminish property value. Tenants would benefit from fewer interruptions to their lives, including health related issues and missed work.¹⁷⁶ Decreased productivity increases employee turnover, which burdens Arkansas businesses by imposing higher training and opportunity costs.¹⁷⁷ Simply put, time and money spent on medical treatment for preventable illnesses associated with poorly maintained housing are time and money taken away from the Arkansas economy.¹⁷⁸ These expenses

171. John Riha, *How Much Does Regular Maintenance Add to Your Home?*, NAT'L ASS'N REALTORS: HOUSE LOGIC (2017), <https://www.houselogic.com/organize-maintain/home-maintenance-tips/value-home-maintenance/>.

172. John P. Harding, Stuart S. Rosenthal, & C. F. Sirmans, *Depreciation of Housing, Capital, Maintenance, and House Price Inflation: Estimates from a Repeat Sales Model* (June 30, 2006), at 4, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.571.5618&rep=rep1&type=pdf>.

173. Judy Dutton, *The Renovations That Will Pay Off the Most for Your Home in 2017*, REALTOR.COM (Jan. 11, 2017), <https://www.realtor.com/news/trends/best-and-worst-renovations-to-make-in-2017/>.

174. *Id.*

175. John Larson, *Top Reasons Why Real Estate Investing is so Popular*, FORBES (Oct. 30, 2017), <https://www.forbes.com/sites/forbesrealestatecouncil/2017/10/30/top-reasons-why-real-estate-investing-is-so-popular/#21cfcaa17c53>.

176. See Dube et al., *supra* note 9, at 2.

177. *Id.* at 2.

178. *Id.*; Jacobs et al., *supra* note 8, at 603.

contribute to the need for expansion in healthcare subsidization and decreased productivity for businesses.

4. *Benefits to the Arkansas Economy*

These economic factors combine to the detriment of Arkansas and its communities. Businesses currently in Arkansas may find their growth restrained¹⁷⁹ and those interested in relocating might never consider it as an option because of its treatment of its residents.¹⁸⁰ Issues such as the absence of implied warranty of habitability contribute to the negative stigma Arkansas has long fought to overcome¹⁸¹ and add doubt in the minds of companies who might otherwise plant seeds of investment in its fertile ground.¹⁸²

Economics research by the National Bureau of Economic Research has shown that improved “health has a positive and statistically significant effect on economic growth.”¹⁸³ The research suggests that improving a person’s life expectancy by one year contributes to a 4% increase in output.¹⁸⁴ This means a mere one-year increase in the life expectancy of the one million Arkansans who lease their residences could unlock \$1.65 billion.¹⁸⁵ If the study’s results carry beyond the initial year, the compounding impact on Arkansas’s economy could be enormous.

179. Jim Carlton, *Housing Crunch Threatens Reno’s Tech Boom*, FOX BUS. (Apr. 20, 2017), <http://www.foxbusiness.com/features/2017/04/20/housing-crunch-threatens-renos-tech-boom.html> (The article points to a lack of adequate housing as a restraint on growth potential, but the principle that disruption in housing prevents worker availability and consequently prevents smooth business operation and growth holds true in both contexts.).

180. Dan Schulman, *PayPal Withdraws Plan for Charlotte Expansion*, PAYPAL (Apr. 5, 2016), <https://www.paypal.com/stories/us/paypal-withdraws-plan-for-charlotte-expansion>.

181. C. Fred Williams, *Arkansas’s Image*, ENCYCLOPEDIA ARK. HIST. & CULTURE (May 5, 2017), <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=1>.

182. Nathan Layne, *Wal-Mart Support of Gay Rights Turns on Business*, REUTERS (Apr. 2, 2015, 6:04 AM), <https://www.reuters.com/article/us-walmart-arkansas-analysis/wal-mart-support-of-gay-rights-turns-on-business-idUSKBN0MT13E20150402>.

183. David E. Bloom, David Canning, & Jaypee Sevilla, *The Effect of Health on Economic Growth: Theory and Evidence*, NAT’L BUREAU ECON. RES. 5 (Nat’l Bureau of Econ. Research, Working Paper No. 8587, 2001), available at <http://www.nber.org/papers/w8587.pdf>.

184. *Id.*

185. *Regional Facts: Arkansas*, U.S. BUREAU ECON. ANALYSIS (Sept. 26, 2017), <https://bea.gov/regional/bearfacts/pdf.cfm?fips=05000&areatype=STATE&geotype=3> (The U.S. Department of Commerce’s Bureau of Economic Analysis reported Arkansas’s gross domestic product for 2016 as \$121.4 billion. Because renters comprise approximately 34% of Arkansas’s population, increasing their productivity by 4% would contribute to an overall gross domestic product increase of \$1.65 billion.).

Considering corporate reactions¹⁸⁶ to more divisive social issues, such as transgender bathrooms and laws denying discrimination protection on the basis of sexual orientation,¹⁸⁷ the economic downsides in the form of lost opportunity costs¹⁸⁸ and businesses overlooking Arkansas are potentially staggering.¹⁸⁹ For example, the opportunity cost North Carolina lost during its highly publicized transgender bathroom debate¹⁹⁰ included an initial investment of between \$77 million and \$201 million, \$42 million annually in salaries, and 650 jobs.¹⁹¹ Although such specific examples are not readily available for Arkansas, its tourism industry alone attracts \$7.2 billion annually.¹⁹² Damage to the Arkansas tourism industry and its associated jobs may serve as an indicator of other businesses opting to look elsewhere when making their decision to open a new location or headquarters.¹⁹³ Those

186. See Schulman, *supra* note 180.

187. See Jonathan M. Katz & Erik Eckholm, *Anti-Gay Laws Bring Backlash in Mississippi and North Carolina*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/us/gay-rights-mississippi-north-carolina.html>; Garrett Epps, *Public Accommodations and Private Discrimination*, ATLANTIC (Apr. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/04/public-accommodations-and-private-discrimination/390435/>.

188. Tasneem Nashrulla, *Here's Everyone Who Refuses to Work in North Carolina and Mississippi Over Anti-LGBT Laws*, BUZZFEED NEWS (May 20, 2016, 9:37 AM), https://www.buzzfeed.com/tasneemnashrulla/here-are-the-people-and-companies-that-refuse-to-work-in-nor?utm_term=.rfBWn6PNPD#.nf8G3E7O7o.

189. U.S. CONGRESS JOINT ECON. COMMITTEE DEMOCRATIC STAFF, *THE ECONOMIC CONSEQUENCES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY* (Nov. 2013), https://www.jec.senate.gov/public/_cache/files/8e0d743a-ec6b-4474-88e7-7e59e3938cd9/enda---final-11.5.13.pdf.

190. *North Carolina Transgender 'Bathroom Bill' Flushed by Lawmakers*, FOX NEWS (Mar. 30, 2017), <https://www.foxnews.com/politics/north-carolina-transgender-bathroom-bill-flushed-by-lawmakers>.

191. Will Doran, *North Carolina Economic Official Says HB2 Has Not Harmed the State Economy*, POLITIFACT (Oct. 28, 2016, 8:40 AM), <http://www.politifact.com/north-carolina/statements/2016/oct/28/john-skvarla/top-north-carolina-economic-official-says-hb2-has-/>.

192. Wesley Brown, *Arkansas Tourism Industry Hopes to Build Off Two-Year 'Hot Streak,' May Face Some Economic Headwinds in 2017*, TALK BUS. & POL. (Jan. 23, 2017, 11:37 AM), <https://talkbusiness.net/2017/01/arkansas-tourism-industry-hopes-to-build-off-two-year-hot-streak-may-face-some-economic-headwinds-in-2017/>.

193. Jill Disis, *The Controversy That Could Hold Back Some Amazon HQ2 Contenders*, CNN MONEY (Nov. 7, 2017, 1:03 PM), <http://money.cnn.com/2017/11/07/technology/business/amazon-hq2-state-laws/index.html>; Rick Morgan, *Atlanta bid for Amazon HQ2 gets new political problem: Georgia Adoption Bill*, CNBC (Feb. 23, 2018, 5:22 PM), <https://www.cnbc.com/2018/02/23/atlanta-bid-for-amazon-hq2-didnt-need-georgia-anti-lgbt-adoption-bill.html>.

social concerns may be mere indicators of a looming change in corporate thinking from short-term gains to long-term impact.¹⁹⁴

IV. CONCLUSION

Despite Arkansas's entrepreneurial spirit that surely carries forward from its origins on America's frontier, the State carries reputational baggage that weighs heavily in the minds of companies that might otherwise consider Arkansas in their expansion plans.¹⁹⁵ This baggage, one form of which is the unwillingness to adopt even the most basic of protections for renters, weighs on the minds of employers who increasingly consider employee happiness as part of their business calculus. Arkansas will likely never even cross these employers' minds as they look to better reputations and more inviting places from which to conduct their business.

This is an easy fix. Arkansas should follow the longstanding trend among every other state by enacting statutes that make basic moral, religious, and economic sense by ending the archaic tradition of forcing tenants to improve and maintain landlords' property investments. In the near-term, Arkansas courts should adopt the approach taken by the *Alexander* court and uphold existing laws, regulations, and ordinances. Arkansas appellate courts should recognize this approach and apply it statewide as a private right of action under contract theory.

Enforcing housing codes and enabling private rights of action for tenants encourages landlords to maintain their investments for their own economic gain and for the betterment of tenants. Landlords will suffer from fewer interruptions to their leases, enjoy increased and sustained occupancy rates, and enjoy increases in property values as the overall market increases

194. *BlackRock CEO to Companies: Pay Attention to Societal Impact*, FOX BUS. (Jan. 17, 2018), <http://www.foxbusiness.com/features/blackrock-ceo-to-companies-pay-attention-to-societal-impact>.

195. *See, e.g.*, Disis, *supra* note 193; Doran, *supra* note 191; Hayley Miller, *HRC Announces 60 Companies Launch Business Coalition for the Equality Act*, HUM. RTS. CAMPAIGN (Mar. 10, 2016), <https://www.hrc.org/press/hrc-announces-60-companies-launch-business-coalition-for-the-equality-act>.

* J.D., UA Little Rock William H. Bowen School of Law, *anticipated* 2020; M.P.S., Clinton School of Public Service, *anticipated* 2020; M.A., University of Oklahoma, 2011; B.A., University of Arkansas, 2006. I am grateful for the guidance of my professors and mentors throughout the writing and editing process, especially Professors Lynn Foster and Peter Alexander. My wife, Hannah, and daughter, Evelyn, are owed the greatest credit for any of my successes; with their constant love and support anything is possible. Finally, I dedicate this note to the memory of my sister, Lorraine, whose commitment to justice, fairness, and defense of the least among us inspired me to pursue a legal career.

in value. Beyond the economic benefit to landlords, the state and its businesses will benefit from more stable employees, who will suffer from fewer distractions of threats to their health and safety in their rented residences. Balancing the interests of all parties will unlock untapped potential in the Arkansas residential lease market and make Arkansas a more appealing choice for businesses interested in expanding operations.

*Wesley N. Manus**