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Housing Injustice and the Summary Eviction Process: Beyond *Lindsey v. Normet*

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HOUSING INJUSTICE AND THE SUMMARY EVICTION PROCESS: BEYOND *LINDSEY v. NORMET*

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Abstract

The COVID-19 pandemic has generated an unprecedented level of attention on one of the most pressing civil justice issues of our day: evictions. Each year, millions of Americans are at risk of losing their housing through dispossession and displacement. Despite decades of efforts at all levels of government to improve and increase the supply of safe and affordable housing, it remains unattainable to many, especially low-income people of color. This Article argues that the legal process that governs evictions, known as the summary eviction process, is the root of housing insecurity. The summary eviction process prioritizes a landlord's claim to possession above all other considerations. The process significantly curtails important aspects of the civil litigation process in favor of moving cases quickly and efficiently through the court system, which benefits landlords to the detriment of tenants. Every state utilizes the summary eviction process, and the U.S. Supreme Court upheld its constitutionality in the 1972 case of Lindsey v. Normet. *The Article closely examines the* Lindsey *decision, challenging much of the Court's legal reasoning and its underlying assumptions about eviction and the realities of the landlord-tenant relationship. The Article argues that the* Lindsey *decision has hampered meaningful reform of the inherent inequities in the landlord-tenant relationship and further entrenched the devastating individual, social, and racial justice consequences of eviction, which begin, but do not end, in the courtroom. The Article also identifies serious legal issues raised by the summary eviction process and suggests that states need to consider significant reforms of the eviction process itself to address these imbalances.*

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Introduction

The coronavirus pandemic that began in March 2020 has brought with it the threat of an eviction and homelessness crisis in the United States approaching the scale of the Great Depression.[1] The pandemic wreaked havoc on the American economy. State and local economies shut down, reopened, then shut down once again in the face of virus outbreak surges. The social distancing measures that the CDC and state and local governments recommended and enforced to contain the health effects of the virus compounded the economic toll.[2] Tens of millions of people lost their jobs and income.[3] As the pandemic unfolded, the media focused on an issue that has plagued low-income Americans for decades: evictions.[4] While COVID-19 brought new attention to evictions, the problem of eviction and its effects on housing insecurity and neighborhood instability has been a pervasive and persistent toxin in the fight against poverty and inequality.[5]

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1. *Analysis on Unemployment Projects 40-45% Increase in Homelessness This Year*, CMTY. SOLS. (May 11, 2020), https://community.solutions/analysis-on-unemployment-projects-40-45-increase-in-homelessness-this-year/.

2. *See, e.g.*, Pallavi Gogoi, *You're Not Welcome Here: How Social Distancing Can Destroy the Global Economy*, NPR (Oct. 26, 2020, 2:03 PM ET), https://www.npr.org/2020/10/26/927064268/youre-not-welcome-here-how-social-distancing-can-destroy-the-global-economy.

3. In July of 2020, 16.9 million people faced unemployment in the United States, with 9.6 million of those unemployed attributing their loss of work to the pandemic. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STAT., https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm (Nov. 10, 2021). An additional 31.3 million people reported that they had been unable to work at some point within four weeks prior to survey, due to pandemic-related closures or loss of business. *Id.*

4. *See, e.g.*, Katy O'Donnell, *Black Community Braces for Next Threat: Mass Evictions*, POLITICO (June 12, 2020, 4:30 AM EDT), https://www.politico.com/news/2020/06/12/mass-evictions-314699; Grace Himmelstein & Matthew Desmond, *Eviction and Health: A Vicious Cycle Exacerbated by a Pandemic*, HEALTH AFFS. (Apr. 1, 2021), https://www.healthaffairs.org/do/10.1377/hpb20210315.747908/full/ ("The adverse health effects of housing insecurity were evident before the emergence of COVID-19, but the pandemic-induced financial crisis for low- and middle-income households has increased housing precarity and related health risks."); Erika Rickard & Qudsiya Naqui, *National and State Efforts Continue to Prevent Pandemic-Related Evictions*, PEW CHARITABLE TRS. (June 9, 2021), https://www.pewtrusts.org/en/research-and-analysis/articles/2021/06/09/national-and-state-efforts-continue-to-prevent-pandemic-related-evictions.

5. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIOLOGY 88, 89 (2012) ("Increased residential mobility is associated with a host of negative outcomes, including higher rates of adolescent violence, poor school performance, health risks, psychological costs, and the loss of neighborhood ties." (citations omitted)).

Decades of reform efforts at all levels of government have failed to significantly alleviate the lack of affordable and decent housing. Segregated neighborhoods continue to pervade cities, and high levels of residential mobility and displacement persist, especially for low-income tenants of color. This Article contends that a root cause of all these issues is the ease and speed with which property owners can displace residential tenants through the summary eviction process. The summary eviction process is a holdover from land disputes under English common law that made its way to the United States and has been adopted by every state.[6] Designed to provide a quick and efficient judicial alternative to landlord self-help, this process prioritizes the landlord's claim to possession above all other considerations.[7] To accomplish the goal of moving cases quickly through the court system, traditional aspects of civil litigation are cut out of the process. While the specifics vary by state, summary eviction proceedings typically move quickly from complaint to trial and have significant limitations on defenses, counterclaims, discovery, and motion practice.[8]

It has been fifty years since there was a serious legal challenge to the summary eviction process. In 1972, the Supreme Court decided the case of *Lindsey v. Normet*, in which a group of tenants in Portland, Oregon, challenged Oregon's summary eviction statute on due process and equal protection grounds.[9] The Supreme Court upheld the constitutionality of the summary eviction process.[10] The *Lindsey* decision came amid a wave of social and legal reforms that were intended to address issues of social, racial, and economic injustice in American society.[11] These included the Civil Rights Movement, the implementation of social safety net programs like food stamps and Medicaid, and some movement toward expanded

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6. *See* Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137, 139–52, 156 (2000).

7. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 512 (1982).

8. *See infra* Part IV.

9. Lindsey v. Normet, 405 U.S. 56, 58 (1972).

10. *Id.* at 64, 69. The *Lindsey* decision is also frequently cited for its holding that there is no constitutional right to housing. *See id.* at 74 ("[T]he Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

11. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 392–93 (2011).

tenants' rights.[12] There were many gains, both in legislatures and in courts, including prohibitions against many forms of discrimination[13] and the recognition of the right of children to have an education.[14] One glaring omission, however, was a correction of the power imbalance in the landlord-tenant relationship. The summary eviction process is the embodiment of that imbalance, and neither legislatures nor courts have meaningfully addressed the legal process itself within the past fifty years, leaving firmly in place an antiquated and lopsided system. It prevents the true, meaningful reform that would result in improvements for both tenants and landlords.

While there have been some positive tenants' rights developments by states before and since the *Lindsey* decision,[15] the summary eviction process remains a significant impediment to additional reforms and to meaningful progress on housing justice. Successfully addressing issues of housing affordability and ongoing residential segregation requires confronting the issues of legal and illegal, formal and informal, displacement of low-income tenants through eviction. Scholars have acknowledged that the results of some of the most important reforms brought about by the tenants' rights revolution "have been far from what their advocates predicted."[16] An overlooked but fundamental reason for the lack of reforms is the summary process itself. The Supreme Court's *Lindsey* decision paved the way for decades of stunted efforts at addressing problems of housing segregation, equity, and affordability. For years, scholars considered eviction to be an inevitable consequence of poverty resulting from falling behind on one's rent or from crime, illegal drugs, or domestic violence.[17] Research by social scientists such as Matthew Desmond has shown that eviction is not just a

12. *See id.* at 391.

13. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (holding that the use of separate school facilities for children of different races was a violation of the Equal Protection Clause of the Fourteenth Amendment); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (outlawing discrimination on the basis of race, color, religion, and national origin in voting, schools and public accommodations, and employment).

14. Plyler v. Doe, 457 U.S. 202, 215 (1982) (holding that a Texas law denying children of undocumented immigrants the right to attend public schools was in violation of the Equal Protection Clause of the Fourteenth Amendment).

15. *See* Super, *supra* note 11, at 392–93.

16. *Id.* at 394. Super argues that there are a number of reasons, correlating with the failures of the welfare rights revolution, that the tenants' rights revolution has not been as successful as its champions predicted. *Id.* at 394–97.

17. *See* Desmond, *supra* note 5, at 89–90.

result of poverty; it is, in fact, a *driver* of deepening poverty and neighborhood instability.[18] Eviction is also a racial and socioeconomic divider in the United States; residential renters have significantly fewer rights with regard to their constitutionally protected interests in their homes than homeowners do, and the households for people of color are more likely to be rented than White households.[19] This means that most people who are evicted or threatened with eviction are more likely to be Black or brown.[20] In fact, the group with the highest risk of eviction is Black women with children.[21] A move toward greater social and racial justice requires addressing the systemic injustices in the eviction legal system.

To make meaningful progress toward housing justice, the summary eviction process must be analyzed, challenged, and reformed by state governments. A key piece of that is a reexamination of the Supreme Court's decision in *Lindsey* and an analysis of how the same assumptions about the landlord-tenant relationship that the Court made in *Lindsey* have continued to stunt many meaningful developments in tenants' rights. Legislative reform, rather than litigation, is necessary and must happen at the state level; legislatures and courts must understand and address the ways in which the summary eviction process perpetuates long-standing imbalances in the landlord-tenant relationship that continue to hinder progress in achieving housing justice. Part I of this Article describes the history and development of the summary eviction process, beginning in common law England and discussing its migration to, and development in, the United States in the nineteenth and twentieth centuries. Part II details ways in which the landlord-tenant relationship has undergone some reform at the state level before and since *Lindsey* and describes some advancements of the tenants' rights revolution, including codification of the implied warranty of habitability and protections against retaliatory eviction. This Part, however, suggests that these reforms have never reached their full potential and argues that states' continued reliance on the summary eviction process, authorized by the *Lindsey* decision, is a primary driver of this dynamic. Part III closely examines the *Lindsey* case and provides a detailed analysis of the

18. *Id.* at 91.

19. Based on data from the 2019 U.S. Census, 58% of Black American households and 53% of Hispanic households are rented, while less than 31% of White households are rented. *Who Are the Renters in America*, USAFACTS, https://usafacts.org/articles/who-is-renting-in-america-cares-act/ (Feb. 25, 2021, 12:56 PM PST).

20. *See* Desmond, *supra* note 5, at 102–04.

21. *Id.* at 102.

Supreme Court's decision, identifying the problematic legal reasoning and assumptions the Court made about the landlord-tenant relationship and the tenants' rights at stake. Part IV argues that even with positive reforms that states have made since the 1960s, empirical data and evolving notions of racial and social justice demonstrate that the progress is insufficient, necessitating the dismantling of the summary eviction process by state legislatures and courts. Part V suggests specific reforms that state governments should consider when seeking to advance housing equity and justice through changes to the summary eviction process.

I. Early Development of the Summary Eviction Process in the United States

A review of the history of the summary eviction process is necessary to understand why the process is out of step with modern conceptions of justice and equity and how the summary eviction process came to occupy a place of primacy in the laws that govern residential tenancies. Modern American landlord-tenant law has been called a "hybrid" of different areas of law.[22] It mixes property law, contracts law, and, increasingly, consumer-law principles.[23] Because landlord-tenant law is not situated squarely in one particular area, courts and scholars have prioritized one or more of these areas over the others, leading to a mishmash of statutes and judicial decisions that can vary greatly between jurisdictions.[24] This Part discusses the roots of the summary eviction process in English common law and examines how many of those principles have been adopted in the United States.

The summary eviction process in the United States is traceable to English laws governing the landlord-tenant relationship and repossession of

22. Glendon, *supra* note 7, at 505. Glendon asserts that the "history [of landlord-tenant law] is that of a hybrid legal institution, neither entirely contractual nor entirely proprietary." *Id.*

23. *See* Spector, *supra* note 6, at 179–94 (discussing ways in which federal consumer protection laws apply to the landlord-tenant relationship).

24. *See* Glendon, *supra* note 7, at 521–28; Spector, *supra* note 6, at 195–97 (discussing differences among lease forms in different states). Additionally, some states treat the covenants of the landlord and tenant as mutually dependent, while others treat them as independent. For example, at the time of the *Lindsey v. Normet* decision in 1972, Oregon treated the covenant of the tenant to pay rent and the covenant of the landlord to maintain the property as independent obligations, meaning that "[t]he practical effect of *Lindsey* . . . would be that a tenant in default in his rental obligation could be permitted to raise a habitability defense in an action for rent but denied this opportunity in an action for possession only." Glendon, *supra* note 7, at 537.

property. The notion of possession of real property is deeply rooted in ancient conceptions of social hierarchy.[25] In common law England, a person—at that time, nearly always a man—asserting possession of land might trace his ownership to the Norman Conquest of 1066, thereby establishing his social status.[26] Eventually, around the beginning of the sixteenth century, royal courts in England came to recognize a tenant's possessory interest in a piece of real property, yet the tenant's interest was always subjugated to the landlord's greater ownership interest.[27] The status conferred upon landowners and the prioritization of their possessory interests have dominated the landowner-lessee relationship ever since.[28]

The problem of a person not entitled to possession attempting to gain or hold possession inevitably led to the question of who was entitled to possession of a piece of property. The early laws that governed who should possess a piece of property were grounded in the criminal law of trespass and provided penalties of imprisonment for people who violated them.[29] These statutes also allowed landlords who were parties to possession disputes to engage in their own extrajudicial methods to recover possession—otherwise known as self-help.[30] Landlords were often allowed to engage in actions like "seiz[ing] a tenant's personal property to satisfy the overdue rent or simply using self-help eviction to expel tenants from the leased premises."[31] Conversely, tenants "enjoyed absolutely no self-help remedies and had very few judicial remedies for the wrongful actions of their landlords."[32]

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25. Spector, *supra* note 6, at 141–43.

26. *Id.* at 141.

27. *Id.* at 149–50 ("[R]ecognition of the tenant's interest as a real property interest did not mean that the tenant enjoyed all of the benefits that landownership conferred on the landlord. . . . [W]hatever new rights the new status conferred on the tenant for years—e.g., ability to petition courts—those rights were subject to interpretation in a legal framework that had been designed to protect persons with greater status and rights by restoring possession to freeholders, and treating all non-possessory issues as secondary.").

28. *See id.* at 150–53 (tracing the relationship between English conceptions of landlord status to the development of American landlord-tenant law).

29. *See id.* at 150–52; *see also* Soffer v. Beech, 409 A.2d 337, 340 (Pa. 1979).

30. Spector, *supra* note 6, at 150–51 ("Such methods might include locking the tenant out of the premises or seizing the tenant's property until back rent was paid.").

31. Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 937 (1984).

32. *Id.*

Prior to the development of the summary eviction process, a landlord's judicial remedy for recovering possession of property lay mainly in the form of an ejectment action.[33] These types of cases, however, tended to be "fraught with procedural complexities and delays," and it was not unusual for landlords to forego that process altogether in favor of self-help.[34] The summary eviction process was intended to provide a quick and efficient judicial remedy that was an alternative to landlord self-help.[35]

The history of forcible entry and detainer ("FED") actions began in England with the Forcible Entry Act of 1381,[36] with revisions in 1391, 1402, 1429, and 1623.[37] FED laws also emerged in colonial America; Massachusetts passed a version of an FED law as early as 1671.[38] Other states with early FED statutes include Maryland in 1793, Pennsylvania in 1772, Ohio in 1795, Texas in 1840, Washington in 1854,[39] North Carolina in 1854, and Tennessee in 1821.[40] The first reference to a "summary proceeding" as it relates to FED statutes was in New York in 1820.[41] In the early twentieth century, courts recognized that "[o]riginally the statute was confined to cases of forcible entry and detainer, and to cases where the strictly conventional relation of landlord and tenant, created by agreement, existed between the parties."[42] American courts and legislatures necessarily began to develop landlord-tenant law when industrialization and waves of immigration resulted in higher concentration of urban tenants, many low-income, in larger cities across the country.[43] In 1879, Tennessee removed the requirement for a jury trial in its FED statute, which is still in effect in Tennessee General Sessions Courts today.[44] North Carolina, however, did

33. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 6:10, at 409 (1980).

34. *Id.*

35. *Id.*

36. Jean Pierre Nogues Jr., Comment, *Defects in the Current Forcible Entry and Detainer Laws of the United States and England*, 25 UCLA L. REV. 1067, 1070 n.13 (1978).

37. *Id.* at 1070 n.14.

38. Page v. Dwight, 48 N.E. 850, 851 (Mass. 1897).

39. Spector, *supra* note 6, at 152 nn.55–56.

40. Robert Larry Brown, Note, *Right to a Jury Trial in Forcible Entry and Detainer Actions in General Sessions Courts in Tennessee*, 6 MEM. ST. U. L. REV. 59, 62 (1975).

41. *See* Stephen Ross, *Converting Nonpayment to Holdover Summary Proceedings: The New York Experience with Conditional Limitations Based upon Nonpayment of Rent*, 15 FORDHAM URB. L. J. 289, 295 (1987).

42. Reich v. Cochran, 94 N.E. 1080, 1081 (N.Y. 1911).

43. Glendon, *supra* note 7, at 510.

44. Brown, *supra* note 40, at 62–63.

not remove the right to a jury trial until 1971, although the 1869 statute contained amendments titled "summary ejectment."[45] Wisconsin appears to have updated its statute to include a process that resembles summary eviction effective in 1971.[46]

As the summary process developed, it "[p]rimarily . . . benefited landlords by giving them an alternative to the time-consuming and expensive action of ejectment."[47] State legislatures also intended to provide some protection to tenants against forcible removal from the property they were renting and to protect public peace by deterring violence that might result from landlord self-help.[48] However, the summary process in most states did not provide mechanisms for tenants to assert defenses like the habitability of the premises.[49] This was partially due to the move toward urbanization and the lack of written leases for residential tenancies in urban areas.[50] By the end of the nineteenth century, leases began to look less like traditional conveyances of land and more like contracts, especially in the context of commercial land transactions.[51] "The written lease, especially in commercial contexts, became longer . . . [and contained] sets of mutual promises in which the parties provided for contingencies and otherwise worked out the details of what was to be a continuing relationship."[52]

While this development certainly influenced landlord-tenant law as a whole, urban residential lease arrangements were increasingly periodic tenancies without written leases.[53] It was not until the mid-twentieth century that significant reforms that would benefit lower-income, urban tenants gained traction. Part II discusses these developments.

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45. *Id.* at 62.

46. Robert F. Boden, *1971 Revision of Eviction Practice in Wisconsin*, 54 MARQ. L. REV. 298, 299 (1971).

47. Glendon, *supra* note 7, at 512.

48. *See generally* SCHOSHINSKI, *supra* note 33, § 6:10, at 409.

49. *See* Glendon, *supra* note 7, at 533, 537.

50. *See id.* at 508–09.

51. *Id.* at 508.

52. *Id.*

53. *Id.* As a result, "[t]he economic circumstances of urban residential tenants . . . militated against the use of written leases. The periodic tenancy was barely visible in the case law and legal literature." *Id.* at 508–09. The consequence of this absence from "case law and legal literature" was that there was relatively little development or scholarly scrutiny of residential landlord-tenant law, to the detriment of low-income tenants. *See generally id.* at 509.

II. Landlord-Tenant Law Developments Before and Since Lindsey

The Supreme Court decided *Lindsey v. Normet* during the height of the tenants' rights revolution. The Court's decision, however, did not entirely halt state-level efforts to provide greater protections to residential tenants. In the past fifty years, some states have made important and meaningful changes to landlord-tenant law, while others have made minimal reforms.[54] This has resulted in significant variations between jurisdictions regarding tenants' rights and the eviction process. This Part details some of the gains made in this area since the 1960s and 1970s while emphasizing that these gains have been piecemeal and incomplete.

A. The Tenants' Rights Revolution

The tenants' rights revolution was a series of judicial and statutory reforms of residential landlord-tenant law that occurred across the country primarily between 1968 and 1973.[55] These reforms largely benefited tenants in relation to landlords.[56] Beginning in the early 1960s, courts began to shift how they conceptualized tenants' rights in residential rental housing and to move away from the "classical" conception of landlord-tenant law.[57] The so-called tenants' rights revolution that followed resulted in some apparent gains for tenant protection, as tenants' advocates tried to address some of the most egregious imbalances in the landlord-tenant relationship.[58] The revolution sought to address several different aspects of the landlord-tenant relationship, including the implied warranty of habitability, expansion of rent control measures, security of tenancy at the expiration of a lease, and limitations on a landlord's ability to retaliate against a tenant for asserting her rights under the law, among others.[59] Despite the revolution's noble goals and mentionable successes, half a century later, it is clear that a fundamental restructuring of the landlord-tenant relationship has not come

54. *See id.* at 521–28 (identifying shifts in landlord-tenant law beginning in the mid-1960s).

55. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984).

56. *Id.*

57. *See* Glendon, *supra* note 7, at 520, 522–23.

58. *See* Super, *supra* note 11, at 391.

59. *See* Rabin, *supra* note 55, at 520–40.

to pass.[60]

The tenants' rights revolution had its roots in the social, racial, and economic justice movements of the 1960s.[61] The Civil Rights Movement played a major role in raising awareness of—and outrage about—previously tolerated social conditions.[62] Moreover, two presidential commissions under President Lyndon Johnson, the Douglas Commission and the Kaiser Committee, recommended the development of millions of units of new low-income housing.[63] In 1968, both had found a serious lack of quality affordable housing across the country, especially in urban centers.[64] These developments unquestionably influenced judges who were adjudicating legal challenges by tenants dissatisfied with the landlord-tenant relationship.[65] Professor David Super describes five principles that motivated judges and legislatures toward reform during the tenants' rights revolution: first, the desire to modernize the landlord-tenant relationship and frame it in terms of contract law instead of property law; second, the goal of ameliorating poor conditions in rental housing; third, the attempt to redistribute the wealth of landlords to their poorer tenants; fourth, the "humanitarian" goal of providing a "better life" for poor tenants; and fifth, providing "social stability" during the turbulent 1960s.[66]

One way courts contributed to the tenants' rights revolution was to challenge the primacy of landowners' rights, once a fundamental principle of property law, by instead imposing the more equitable frame of contract law, in which both parties to a contract are responsible for their obligations and breaches.[67] While this reframing of the landlord-tenant relationship

60. *See, e.g.*, Super, *supra* note 11, at 423 (noting "extremely low rates of success for tenants with meritorious claims under the implied warranty of habitability," notwithstanding attempted landlord-tenant law reform).

61. Rabin, *supra* note 55, at 546–49.

62. *See id.* at 546–47.

63. *Id.* at 543–45.

64. *Id.*

65. *Id.* at 545. In a letter to Professor Rabin in 1982, Judge J. Skelly Wright, who sat on the D.C. Circuit and wrote the 1970 decision in *Javins v. First National Realty Corp.*, one of the most prominent implied warranty of habitability cases, acknowledged that his decision in *Javins* was influenced by the social change and unrest of the 1960s. *Id.* at 548–49. He wrote, "I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust." *Id.*

66. Super, *supra* note 11, at 400–04.

67. Rabin, *supra* note 55, at 521. "Traditionally, courts considered the landlord's rights to determine the amount of rent, to gain possession at the end of the term, and to choose tenants, and the right of the parties to decide on the extent of landlord services as basic rights

should have meant that the two parties to a lease contract would be treated more equitably, the continued prioritization of the landlord's right to possession as the primary issue in eviction cases precluded equitable treatment. Ultimately, the two main developments that emerged from the tenants' rights revolution were the recognition and codification of the implied warranty of habitability, as well as protections against retaliation by property owners toward tenants asserting their rights.

B. Codification of the Implied Warranty of Habitability

The implied and codified warranty of habitability has long been hailed as one of the great successes of the tenants' rights revolution.[68] Prior to the mid-twentieth century, the prevailing legal doctrine had been that of independent covenants between landlord and tenant; neither party's obligation was dependent on the other's performance.[69] A precursor to the statutory warranty of habitability was the doctrine of constructive eviction, which allowed a tenant to terminate a lease agreement if a landlord failed to perform necessary repairs.[70] However, by the time courts began to seriously consider expansion of the doctrine of constructive eviction in the mid-twentieth century, the emphasis on the warranty of habitability brought by the tenants' rights revolution made expanding constructive eviction unnecessary.[71] The origins of the statutory warranty of habitability in the United States is traceable to municipal building codes, which municipalities began to implement in the early twentieth century.[72] Building codes became ubiquitous by the end of the 1960s, due in large part to the federal government linking funds to the adoption of building codes.[73] Beginning in

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that rested on fundamental legal principles." *Id.; see also* Super, *supra* note 11, at 400–01. "Some courts and legislatures sought to explain the implied warranty of habitability, and the process of treating it as mutual with the tenant's duty to pay rent, as harmonizing landlord-tenant law with broader principles of contract law." *Id.* at 400.

68. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 148 (2020).

69. *See id.* at 154.

70. *See* Glendon, *supra* note 7, at 512–13. "As courts [in the nineteenth century] began to routinely permit 'constructive eviction' to serve as a remedy for a landlord's breach of covenants in the lease, the legal fiction became a functional substitute for the missing doctrine of mutually dependent covenants." *Id.* at 513.

71. *Id.* at 514.

72. *See generally* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 800 (2013) (noting New York City enacted the first local building code in 1901).

73. *See* Rabin, *supra* note 55, at 551–52.

1954, municipalities were required to adopt building codes in order to receive "federal urban renewal funds and other forms of federal assistance."[74] As building codes proliferated, and with them, litigation, many state courts started allowing negligence tort claims against landlords who violated the codes.[75]

Beginning with *Pines v. Perssion*, decided by the Wisconsin Supreme Court in 1961, courts have articulated an interdependency between the obligations of the landlord and the tenant.[76] In 1970, Judge J. Skelly Wright of the District of Columbia Circuit Court of Appeals authored the opinion in *Javins v. First National Realty Corp.*, in which he articulated a very strong relationship between the tenant's obligation to pay rent and the landlord's obligation to maintain the premises.[77] In the wake of *Javins*, there was hope that the tenants' rights revolution would equalize the landlord-tenant relationship and result in permanent social changes.[78] Tenants' advocates hailed the warranty of habitability as a welcome counterbalance to the ease with which courts had allowed landlords to displace tenants through the eviction process.[79] Yet, in reality, it has offered limited victories on those fronts.[80]

Despite this radical revision of firmly rooted legal doctrines, the warranty of habitability has not yielded the hoped-for results of incentivizing landlords to improve maintenance of rental housing units and empowering tenants to assert their legal rights. Instead, "[t]he most prominent result of the [tenants' rights] revolution . . . was reading an implied warranty of habitability into residential leases, with a corollary

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74. Glendon, *supra* note 7, at 519.

75. *Id.* at 520.

76. *See* Rabin, *supra* note 55, at 552; Glendon, *supra* note 7, at 525; Super, *supra* note 11, at 394, 404.

77. 428 F.2d 1071, 1082 (D.C. Cir. 1970).

78. *See* Super, *supra* note 11, at 399.

79. *See* Super, *supra* note 11, at 401.

> The courts had long provided landlords with a service essential to their businesses: eviction procedures, operating far more expeditiously than other civil actions, allowed landlords quickly and inexpensively to coerce and remove any tenants not paying rent. The courts would now demand that, in exchange for this extraordinary help in requiring tenants to perform their legal obligations, landlords comply with the laws on health and safety.

Id.

80. One study of 2016 data from New York City found that fewer than 2% of tenants who had meritorious claims of habitability concerns actually received rent abatements in compensation. Summers, *supra* note 68, at 190.

prohibition on evictions in retaliation for asserting these new rights."[81] The first appellate court in the country to recognize the implied warranty of habitability was the 1961 Supreme Court of Wisconsin case of *Pines v. Perssion*.[82] It was followed in 1970 by *Javins v. First National Realty Corp.*, widely regarded as one of the pivotal decisions on the warranty of habitability.[83] There, the court held that leases should be construed as contracts and that, as typical in contract law, the mutual dependency of the parties' covenants should apply.[84]

C. Protections Against Retaliation

One of the other important advancements of the tenants' rights revolution was the establishment of protection for tenants against retaliatory eviction by landlords. This protection went hand-in-hand with the warranty of habitability because it prevented landlords from evicting tenants who asserted their rights under the warranty of habitability.[85]

D. Uniform Residential Landlord-Tenant Act

In addition to the gains of the tenants' rights revolution, there have been other important landlord-tenant law developments since the *Lindsey* decision. In 1972, the same year as the *Lindsey* decision, the National Conference of Commissioners on Uniform State Laws published the Uniform Residential Landlord-Tenant Act.[86] While this was certainly a significant gain for tenant protection, it did not protect tenants in all states from eviction for nonpayment of rent because only certain states allow

81. Super, *supra* note 11, at 393.

82. 111 N.W.2d 409, 412–13 (Wis. 1961); *see also* Dale A. Whitman, *Fifty Years of Landlord-Tenant Law: A Perspective*, 35 U. ARK. LITTLE ROCK L. REV. 785, 785 (2013).

83. 428 F.2d 1071, 1082 (D.C. Cir. 1970).

84. *Id.* at 1081–82; *see also* Rabin, *supra* note 55, at 524. *Javins* is famous for Judge J. Skelly Wright's statement that "[w]hen American city dwellers, both rich and poor, seek 'shelter' today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance." 428 F.2d at 1074.

85. Super, *supra* note 11, at 393.

86. Ashby Richbourg Scott, *The Tennessee Uniform Residential Landlord and Tenant Act—"A Hodge-Podge of Statutory Exclusions,"* 34 U. MEM. L. REV. 903, 911 (2004).

tenants to seek rent abatements to offset a nonpayment claim due to a landlord's failure to maintain the premises.[87]

III. Lindsey v. Normet*: Judicial Impediment to Equalizing the Landlord-Tenant Relationship*

Despite the legislative and judicial gains of the tenants' rights revolution, both the summary process of evictions and the ongoing prioritization of the landlord's right to possession over all other considerations in the landlord-tenant relationship have limited the continued development of landlord-tenant law. This limitation is due in large part to the Supreme Court's 1972 decision in *Lindsey v. Normet*.

A. Underlying Facts and the District Court Decision

Decided by the Supreme Court in 1972, *Lindsey v. Normet*[88] was a class action brought by a group of tenants in Portland, Oregon, who were seeking a declaratory injunction against Oregon's FED statute.[89] The tenants claimed that the FED statute violated their constitutional rights of due process and equal protection under the law.[90] The tenants were all low income and living in substandard housing conditions.[91] They had asked their landlords to make repairs, and the landlords refused.[92] The tenants then decided to withhold rent in an effort to obtain the repairs, and the landlords threatened to evict them for nonpayment of rent.[93] Before the landlords could actually file eviction papers, the tenants went to court seeking to enjoin the landlords from doing so.[94]

The plaintiff-tenants asserted eight causes of action in their complaint, all based in either due process or equal protection.[95] The three-judge district

87. *See, e.g.*, TENN. CODE ANN. § 66-28-502 (West 1975); Super, *supra* note 11, at 394 (explaining that, while many states took the approach of making the implied warranty of habitability and the landlord's obligation to make repairs "mutual with the tenant's covenant to pay rent," not all states have done so).

88. 405 U.S. 56 (1972).

89. Lindsey v. Normet, 341 F. Supp. 638, 639 (D. Or. 1970), *aff'd in part*, *rev'd in part*, 405 U.S. 56 (1972).

90. *Id.* at 641.

91. *Id.* at 639.

92. *See id.*

93. *See id.*

94. *Id.*

95. *Id.* at 640.

court panel ruled against the plaintiff-tenants on all their claims.[96] The court did not discuss all the causes of action in detail, but it broke down the allegations in the complaint into five categories.[97] It first discussed the due process and equal protection challenges to the notice requirements of the Oregon FED statute.[98] The plaintiffs alleged that due process was not satisfied because the FED statute only required an eviction complaint to state the names of the landlord and tenant, the address of the premises, and that an FED action was initiated, but not the grounds on which it was based.[99] The plaintiffs also asserted that the notice requirements violated equal protection because "defendants are in greater need of information than are plaintiffs."[100] The district court dismissed both allegations, stating, "[T]he usual F.E.D. case is one in which the tenant, like a taxpayer, knows whether or not he has paid, how much he has paid, and, if he has not paid, why he does not think he should pay. Detailed notice in such cases tends to elevate form over substance."[101]

The second category of the plaintiffs' "attack" against the Oregon FED statute concerned the quick turnaround from complaint to trial, which the tenants asserted was unreasonably short.[102] Oregon's statute allowed courts to schedule an eviction trial as soon as two to four days after the complaint was served, including weekends.[103] Again, the court showed a complete lack of understanding of the tenants' realities in its justification for why the tenants did not require any additional time: "As noted above, a tenant knows in most cases whether or not he has paid his rent, and, if not, why not. The tenant would not be any the wiser if the law were to be rewritten to give him ten days' notice."[104] With this statement, the court conflated notice to the tenant with the tenant's ability to adequately prepare for the hearing

96. *Id.* at 642.

97. *Id.* at 641–42.

98. *Id.* at 641.

99. *See* Transcript of Oral Argument at 8, 10, Lindsey v. Normet, 405 U.S. 56 (1972) (No. 70-5045).

100. *Lindsey*, 341 F. Supp. at 641.

101. *Id.*

102. *Id.* The court's use of the word "attack" is consistent with the disregard of the tenants' rights by the three-judge panel.

103. Transcript of Oral Argument at 7, *Lindsey*, 405 U.S. 56 (No. 70-5045). The tenants' attorney stated that a tenant could be served with a complaint on a Friday and expected to go to trial on Monday or Tuesday. At most, the tenant would be entitled to an additional two-day adjournment, at the discretion of the court. *Id.*

104. *Lindsey*, 341 F. Supp. at 641.

and erroneously assumed the simplicity of the issues that nonpayment eviction cases present. The more advance notice that tenants have, the more likely they will be able to secure legal counsel, especially if they need to rely on oversubscribed legal aid offices.[105] The solution does not lie in a tenant getting ten days' notice versus four days' notice; rather, the extremely short time frame makes it effectively impossible for tenants to secure counsel and to understand their rights.

The third category the court discussed related to Oregon's requirement that, should a tenant seek a continuance of the case and wish to remain in the leased premises, the tenant must post a cash security for the amount of rent due during that entire time period.[106] The tenants asserted that this requirement violated due process because it denied access to a continuance for poor tenants who could not afford to post the cash.[107] The district court dismissed this allegation, stating that "[i]t is . . . not unreasonable to require that a person whose eviction is sought for nonpayment of rent post security for the rent if he wishes to litigate the duty to pay."[108] While this statement is not objectively unreasonable, the court failed to consider that Oregon required the tenant to post multiple months of rent payments in advance to obtain a continuance of longer than one month—an insurmountable barrier to many poor tenants.[109]

The fourth category of the plaintiffs' allegations concerned the Oregon FED statute's limitations on the defenses that a tenant could raise in an eviction proceeding.[110] Here, the court focused on the Oregon legislature's distinction between the covenants of the landlord and the tenant.[111] According to the court, allowing the landlord to retake possession of the property during the appeals process was not "so clearly unreasonable as to render the statute unconstitutional."[112] However, the court failed to consider

105. According to the Legal Services Corporation, in 2017, federally funded legal aid offices received 1.7 million requests for civil legal assistance, including for housing matters, but had to refuse more than half of those requests "due to a lack of resources." LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74.

106. *Lindsey*, 341 F. Supp. at 641.

107. *Id.*

108. *Id.*

109. Transcript of Oral Argument at 12–13, *Lindsey*, 405 U.S. 56 (No. 70-5045).

110. *Lindsey*, 341 F. Supp. at 642.

111. *Id.*

112. *Id.*

the realities of what it would mean to disrupt the status quo by dispossessing the tenant during ongoing litigation.

The final category of the plaintiff-tenants' allegations that the district court considered related to the requirements for tenants seeking to appeal eviction judgments.[113] Oregon's FED statute required that a tenant who lost possession of the premises after trial needed to "post a bond for double the amount of rent that [would] accrue pending the appeal."[114] The Oregon Supreme Court had already ruled on the constitutionality of this provision in *Scales v. Spencer*.[115] The district court reiterated the reasoning from *Scales*, stating that "without a provision for some reasonable measure of liquidated damages (the doubled rent pending appeal), every ousted tenant would appeal, secure in the knowledge that he had nothing to lose thereby."[116] Despite the ruling of the Oregon Supreme Court and the decision of the district court, this was the only holding that the U.S. Supreme Court ultimately overturned.[117]

B. The Supreme Court Decision

After the district court's ruling, the tenants appealed directly to the U.S. Supreme Court. They presented eight questions for Court's consideration, all of which, again, pertained to issues of due process and equal protection.[118] The appellants-tenants focused their arguments on three features of Oregon's FED law:

> [T]he requirement of a trial no later than six days after service of the complaint unless security for accruing rent is provided; the provisions of [the statute] which, either on their face or as construed, are said to limit the triable issues in an FED suit to the tenant's default and to preclude consideration of defenses based on the landlord's breach of a duty to maintain the premises; and the requirement of posting bond on appeal from an adverse decision in twice the amount of rent expected to accrue pending appellate decision.[119]

113. *Id.*
114. *Id.*
115. 424 P.2d 242 (Or. 1967).
116. *Lindsey*, 341 F. Supp. at 642.
117. Lindsey v. Normet, 405 U.S. 56, 64, 69, 74 (1972).
118. Brief for Appellants at 7–8, *Lindsey*, 405 U.S. 56 (No. 70-5045).
119. *Lindsey*, 405 U.S. at 64.

Of these issues, the Court held that only the third, the requirement to post double bond pending appeal, was unconstitutional.[120]

The Court discussed separately the other two issues under the frameworks of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. First, the Court addressed the question of whether the requirement of a quick trial violated the Due Process Clause by providing an "unduly short time for trial preparation."[121] Under Oregon's FED statute, FED cases could proceed from complaint to trial in as few as six days, which is substantially similar to the time frames still in place in many states.[122] At oral argument, the tenants argued that the turnaround was "so short as to make a mockery of the judicial system."[123] Ultimately, the Court disagreed.[124] In justifying its holding that the short timeframe did not violate due process, the Court stated that

> [t]enants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary.[125]

With this statement, the Court revealed its fundamental misunderstanding of the realities of the landlord-tenant relationship, especially for low-income tenants. For decades, poor tenants have struggled with the expectation that they continue to pay rent for substandard housing, which was the situation for the plaintiff-tenants in *Lindsey*.[126] In the next paragraph, the Court referred to the "simplicity of the issues in the typical

120. *Id.* at 64, 74.

121. *Id.* at 65.

122. For example, Tennessee law requires that an FED complaint be served "not . . . less than six (6) days" before the trial is to take place. TENN. CODE ANN. § 29-18-117 (2021).

123. Transcript of Oral Argument at 17, *Lindsey*, 405 U.S. 56 (No. 70-5045). The tenants' position was supported in amicus briefs by several legal aid organizations around the country; for example, one brief came from the Legal Aid Bureau of Baltimore. *See* Motion for Leave to File Brief Amicus Curiae and Brief for Legal Aid Bureau, Inc. as Amicus Curiae, *Lindsey*, 405 U.S. 56 (No. 70-5045), 1971 WL 133282.

124. *Lindsey*, 405 U.S. at 73.

125. *Id.* at 65.

126. *See id.*; Kathryn A. Sabbeth, *(Under) Enforcement of Poor Tenants' Rights*, 27 GEO. J. ON POVERTY L. & POL'Y 97, 99–100 (2019) [hereinafter Sabbeth, *(Under)Enforcement*].

FED action."[127] Many tenants, especially low-income tenants, would take issue with the Court's characterization of their disputes.[128]

Next, the Court addressed whether Oregon's statute violated due process by limiting the defenses a tenant may raise.[129] Oregon's law limited the tenant from asserting, for example, claims that the landlord had failed to properly maintain the premises.[130] The Court said that because the Oregon statute also prohibited landlords from asserting claims other than possession in an FED suit, including any claims for back rent, there was not a due process violation.[131] While these limitations on the landlord's claims in Oregon existed at the time of the *Lindsey* decision, most states today allow landlords to assert claims for back rent in addition to claims for possession.[132] If anything, this allowance further prejudices tenants because they are frequently prevented from, either by statute or practice, asserting defenses to dispute or mitigate the amount the landlord claims is owed.[133] As part of this discussion, the Court also stated that it saw nothing in the Constitution to prevent Oregon from treating the covenants of the landlord and tenant as independent and not dependent.[134] This supported the majority's assertion that even though "[d]ue process requires that there be an opportunity to present every available defense,"[135] Oregon's—and other states'—structuring of the independent covenants of the landlord and tenant meant that the tenant's defense of the landlord's failure to habitably maintain the premises was not in fact a defense that was "available" under

127. *Lindsey*, 405 U.S. at 65.

128. *See generally* Sabbeth, *(Under)Enforcement*, *supra* note 126.

129. *Lindsey*, 405 U.S. at 65.

130. *Id.* at 65–66.

131. *Id.*

132. *See* Super, *supra* note 11, at 405, 424.

133. For example, in General Sessions Courts in Shelby County, Tennessee, after landlords (or, more frequently, their attorneys) state the amount that they claim is owed by a tenant, the judge will usually ask the tenant, "Do you agree or disagree?" If the tenant says she agrees, regardless of any mitigating circumstances, a judgment is entered against the tenant for possession and money, and the tenant is told to "go out in the hallway" to see if something can be worked out with the landlord to avoid actual eviction. *See generally* KATY RAMSEY MASON & AUSTIN HARRISON, MEMPHIS HOUSING (IN)JUSTICE: AN ANALYSIS OF THE EVICTION PROCESS IN SHELBY COUNTY, TN 10–11 (forthcoming 2022).

134. *Lindsey*, 405 U.S. at 68.

135. *Id.* at 66 (quoting American Surety Co. v. Baldwin, 287 U.S. 156, 168 (1932)).

state law.[136] The Court declined to see any constitutional problem with that system.[137]

The Court then turned to the equal protection issues. The appellants-tenants argued that Oregon's FED statute unconstitutionally treated tenant-litigants differently than all other civil litigants because of the quick turnaround from complaint to trial, as well as the limitation on defenses and other claims.[138] The Court disagreed, however, stating that while the statute may treat tenants differently from other civil litigants, it does not treat tenants differently from each other: "The statute potentially applies to all tenants, rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness."[139] With this statement, the majority again demonstrated its misapprehension of landlord-tenant law and the actual differences between rich, poor, residential, and commercial tenants.[140] As part of this discussion, the Court also stated that

> [t]here are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else.[141]

With this statement, the Court reinforced the legal system's centuries-long prioritization of the landlord's right to possession above all other considerations in the landlord-tenant relationship. This prioritization is a hierarchical conception that assumes the rights of better-resourced landowners are more important than the rights of their non-landowning, poorer tenants.[142] To drive its point home, the Court next stated the holding for which the *Lindsey* case is most frequently cited—that the Constitution

136. *See id.* at 66–69.
137. *Id.*
138. *See* Transcript of Oral Argument at 31, *Lindsey*, 405 U.S. 56 (No. 70-5045).
139. *Lindsey*, 405 U.S. at 70.
140. *See infra* Section IV.B.
141. *Lindsey*, 405 U.S. at 72.
142. *See supra* Part I.

does not provide a fundamental right to decent housing.[143] It also rejected the tenants' contention that they had a "fundamental interest" in the "right to retain peaceful possession of one's home."[144]

Finally, the Court turned to the requirement of Oregon's FED statute that a tenant seeking to appeal an adverse judgment had to post a bond of twice the amount of rent that had accrued from "the commencement of the action in which the judgment was rendered until final judgment in the action."[145] The Court agreed with the tenants that this double-bond requirement violated the Equal Protection Clause because it prevented poor people from accessing the courts in the way that rich people could.[146] The Court emphasized that its decision on this issue was grounded in the fact that there need not be any demonstration that the double bond was related to actual rent or damages.[147] While the Court's decision laudably reflected statutory and judicial changes arising from the tenants' rights revolution, many states still impose onerous requirements on tenants seeking to appeal judgments in FED cases. For example, Tennessee requires that a tenant be prepared to post a bond equivalent to a year's worth of rent, an amount that is likely impossible for even nonindigent tenants.[148] When tenants are unable to post this bond, courts will routinely grant landlords' motions to issue a writ of possession, deciding the issue of who is entitled to possession and leaving only the issue of monetary damages, if asserted.[149]

C. The Lindsey *Dissents*

Although both Justice Douglas and Justice Brennan concurred with the Court's ruling on the double-bond requirement in *Lindsey*, each filed a

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

144. *Id.* at 73–74.

145. *Id.* at 76 (quoting OR. REV. STAT. § 105.160 (repealed 1977)).

146. *Id.* at 77, 79. Yet the Court also stated, "The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon." *Id.* at 79.

147. *Id.* at 78–79.

148. *See* TENN. CODE. ANN. § 29-18-130(b)(2) (2021).

149. *See, e.g.*, Docket Entry on August 28, 2020, Rivergrove v. Butler, No. CT-2810-20 (Shelby Cnty. Ct., Tenn. July 15, 2020), https://circuitdata.shelbycountytn.gov/crweb/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=CT-2810-20&begin_date=&end_date= (granting the landlord's motion to issue a writ of possession due to the defendant's failure to "post the required bond to maintain possession during the appeal").

dissent.[150] Notably, Justice Douglas grounded his opinion in the notion that "[m]odern man's place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary."[151] In outlining his objections to the majority's assertion that Oregon's FED statute did not restrain access to the courts for poor tenants, he quoted the *Javins* decision, describing the "well known package of goods and services" that a tenant expects when renting a residence.[152] If a tenant does not receive those goods and services and withholds rent, or if a landlord otherwise decides that he or she has grounds to seek eviction, Justice Douglas agreed with the tenants that the summary procedure that allows for only a few days between complaint and trial "usually will mean in actuality no opportunity to be heard" and should be considered a due process violation.[153] Justice Douglas demonstrated a much more complete understanding of the actual challenges that low-income tenants face in finding decent and affordable housing and accessing the courts to assert their rights when things go wrong.

Justice Douglas also articulated the challenge of situating landlord-tenant law in the legal canon. He wrote, "The issue that confronts the Court is not whether such a view is constitutionally compelled, but whether, since Oregon has gone this far as a matter of state law, the requirements of due process permit a restriction of contract-type defenses in an FED action."[154] Justice Douglas identified the inconsistencies of whether and how courts should apply principles of contract law to landlord-tenant disputes that also have roots in property law. The majority had relied on the property law conception of the landlord's right to possession above all else.

IV. The Continuing Insufficiency of the Summary Eviction Process

Despite some positive developments at the state level, the summary process itself still poses an insurmountable barrier to meaningful reform of the eviction process. The *Lindsey* decision ensured that the summary process for evictions, which prioritizes the landlord's claim of possession above all other considerations, remains the law of the land to this day. Thus, the constitutional issues raised in *Lindsey* still plague low-income tenants.

150. *Lindsey*, 405 U.S. at 79–80; *id.* at 90 (Douglas, J., dissenting in part); *id.* at 92 (Brennan, J., dissenting in part).

151. *Id.* at 82 (Douglas, J., dissenting in part).

152. *Id.* at 84 (quoting Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074).

153. *See id.* at 85.

154. *Id.* at 89.

To equalize the legal relationship between landlord and tenant, states must consider serious revisions to the summary process. This Part argues that due to the legal, political, and social changes that have occurred since *Lindsey*, the summary eviction process has become increasingly out of sync with modern conceptions of justice. This Part details the empirical data and scholarship that show that even with the reforms described in the previous Part, the summary eviction process remains an inadequate legal mechanism for modern considerations. However, the effects of eviction do not end with a court judgment; its consequences reverberate through the lives of tenants and their families for years to come. As a result, there are serious implications for racial justice, and the current legal structure does not adequately account for those impacts.

A. Evidence of the Insufficiency of the Summary Eviction Process

Tenants' advocates across the United States have long lamented the perceived unfairness of the summary eviction process. Until recently, there were relatively few empirical studies of eviction courts to document and support this perception.[155] Beginning in the 2010s with Matthew Desmond's groundbreaking research in Milwaukee,[156] there has been an expanding recognition of the importance of empirical data about the eviction process. Legal and social sciences scholars have begun to examine various aspects of eviction proceedings, including the disparate rate of legal representation between landlords and tenants, enforcement of the warranty of habitability, and opportunities for tenants to present defenses to eviction.

1. Overcrowded Dockets, Short Hearings, and Due Process Concerns

In the past twenty years, data has accumulated to demonstrate how the eviction court process is manifestly unfair to tenants. In the *Lindsey* opinion, the Supreme Court ruled on several due process concerns raised by the tenants-appellants,[157] but one issue the Court did not address was the length of eviction court hearings. Scholars have analyzed the number of

155. One major exception was Barbara Bezdek's 1992 study of rent court in Baltimore, in which she documented the ways in which "Baltimore's rent court systematically excludes from the law's prescriptions litigants who are members of socially subordinated groups," including people of color, low-income tenants, and women. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 534, 534 n.4 (1992).

156. *See generally* Desmond, *supra* note 5.

157. *See supra* text accompanying notes 95–117.

cases that appear on eviction court dockets and measured the amount of time that tenants are afforded in front of judges.[158] The results of these studies have brought to light additional due process deficiencies in the summary eviction process.

One of the most striking commonalities of eviction courts throughout the United States is the high volume of cases that are scheduled on one docket. Relatedly, tenants are afforded very little time to make their cases in front of a judge. Research in Baltimore during the early 1990s showed that "a single judge deals with as many as 2500 cases on a daily docket."[159] A 2003 study of housing courts in Chicago found that eviction hearings took an average of one minute and forty-four seconds.[160] A 2021 study of eviction hearings in Memphis showed that more than 95% of cases were heard in fewer than two minutes.[161]

These high-volume dockets and extremely fast hearings have serious due process implications for tenants.[162] In its most basic form, procedural due process consists of notice and the opportunity to be heard.[163] All too often in eviction cases, the only party whose case is heard is the landlord. In many courts, landlords (or their attorneys) will state their case, and the judge will simply ask the tenants whether they agree with the landlord's statement.[164] In eviction proceedings in Memphis, nearly 74.5% of tenants

158. *See infra* notes 159–61.

159. Bezdek, *supra* note 155, at 534–35.

160. KAREN DORAN ET AL., LAWS. COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 4 (Dec. 2003), https://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf.

161. *See* RAMSEY MASON & HARRISON, *supra* note 133, at 10.

162. *See* Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 64 (2016). Commenting on the report from the Lawyers' Committee for Better Housing, Gold writes, "The brevity of [eviction] cases produces repeated procedural and substantive law failures." *Id.*

163. *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970). "The fundamental requisite of due process of law is the opportunity to be heard." *Id.* at 267 (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

164. Bezdek, *supra* note 155, at 566 (describing the "dullingly standard script" of eviction proceedings in Baltimore); RAMSEY MASON & HARRISON, *supra* note 133, at 11. This is consistent with this author's observations of numerous eviction proceedings in Memphis, where judges ask tenants if they "agree or disagree" with the landlord's allegations, usually about the amount of rent money owed. If the tenants say that they agree, a judgment is entered immediately, and tenants are told to go wait in the hallway to see if

raise no defense in their cases, and the vast majority of those cases result in possessory-only or possessory and monetary judgments against the tenant.[165]

Another consideration for the tenant's opportunity to be heard is the length of time that tenants have in front of judges. It is perhaps an obvious conclusion that if judges are handling dockets approaching a hundred cases within a span of two hours, most litigants will have a very short amount of time to present their cases. In court observation data collected in Memphis in 2021, 85.5% of eviction hearings took fewer than two minutes, and more than 70% took under one minute.[166] These durations strongly indicate that tenants' due process rights are not fully protected in eviction proceedings.

2. Lack of Legal Representation for Tenants

Another consideration the *Lindsey* Court did not address was the right to access legal counsel in eviction proceedings and the effect that would have on case outcomes. Subsequently, this has been one of the most widely studied areas regarding the eviction court process. According to the Eviction Lab at Princeton University, an estimated 3.7 million eviction cases are filed against tenants each year in the United States.[167] In most courts, however, fewer than 10% of tenants are represented by attorneys, while upwards of 90% of landlords have lawyers.[168] Most tenants who do not have attorneys cannot afford them.[169] The result of this representation

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they can "work something out" with the landlord before the statutory ten-day stay on the execution of the eviction writ expires.

165. *See* RAMSEY MASON & HARRISON, *supra* note 133, at 11.

166. *Id.* at 10.

167. EVICTION LAB, https://evictionlab.org/ (last visited May 12, 2022).

168. *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 (2010). In many courts, the rate of representation of tenants is well below 10%. For example, a 2021 study conducted in Shelby County, Tennessee General Sessions Court, which includes Memphis, found that around 4% of tenants were represented by attorneys in eviction cases, though that number was likely higher than normal due to the availability of legal aid and volunteer attorneys through the Emergency Rent Assistance Program, funded by federal pandemic stimulus funds. *See* RAMSEY MASON & HARRISON, *supra* note 133, at 8, 10. Almost 90% of landlords had legal representation. *Id.* at 10.

169. Russell Engler, *When Does Representation Matter?*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 71, 72 (Samuel Estreicher & Joy Radice eds., 2016) [hereinafter Engler, *When Does Representation Matter?*].

imbalance is that landlords are more likely to prevail in their claims.[170] Relatedly, when judges become accustomed to only having lawyers on one side of eviction cases, they are more likely to favor the positions of landlords.[171]

The lack of access to legal representation compounds the barriers to tenants that the summary eviction process already presents. Even in courts where legal representation is uncommon on either side of eviction cases, the characteristics of the summary eviction process that are intended to promote efficiency mean that tenants are unable to effectively assert their rights.[172] Because of the primacy of the issue of possession in the summary eviction process, other issues that may impact the tenancy (or the tenant's ability or decision to pay rent) are subjugated to the tenant's defensive posture.[173] Most commonly, these issues are related to the conditions in the property.[174] While every state allows for tenants to affirmatively sue landlords who fail to meet their obligations under the lease contract, including failure to make repairs, few tenants actually do so.[175] Therefore, tenants are usually left to raise their complaints about landlords' behavior as a secondary consideration to whether the landlords are entitled to possession.[176] The

170. *See* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 427 (2001). Seron et al. found that when tenants were randomly assigned lawyers in housing court, only 32% of them had judgments entered against them, compared to 52% of tenants who were not assigned lawyers. *Id.*

171. Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 78–79 (2018) [hereinafter Sabbeth, *Housing Defense*]. Bezdek's study found that judges were more likely to award default judgments to landlords when tenants failed to appear in court or were late, yet judges were willing to hold the case and wait when the landlord was late. Bezdek, *supra* note 155, at 555–56.

172. *See generally* Bezdek, *supra* note 155, at 553–57. Even in Baltimore, where state law allows for tenants to seek rent abatements based on landlords' failures to properly maintain the premises, judgments were entered for landlords in two-thirds of eviction cases, and rent abatements were ordered by the court only 1.75% of the time. *Id.* at 554.

173. *See id.* at 559.

174. *See id.* ("[O]ver 60% of the respondent tenants in the exit interviews reported what they believed to be unsafe conditions in their homes."); Summers, *supra* note 68, at 37 (showing that 50% of tenants in nonpayment eviction cases in New York City asserted a need for repairs in their answers to eviction complaints).

175. For example, Bezdek's study in Baltimore found that tenants were plaintiffs in only 0.05% of landlord-tenant actions. Bezdek, *supra* note 155, at 554–55. Again, the lack of availability for free or low-cost legal services contributes to this problem, as court procedures can be costly and difficult to navigate for pro se litigants.

176. Bezdek, *supra* note 155, at 554–55.

data shows that the summary process is simply not equipped to address the problems affecting many tenants' experiences.

Recent scholarship suggests that the traditional explanations for overwhelmingly negative outcomes for tenants in eviction proceedings are incomplete, especially in situations where they are asserting warranty of habitability claims as defenses.[177] In theory, the summary eviction process allows for an efficient remedy for landlords seeking possession of rental properties and also provides opportunities for tenants to assert meritorious defenses to the claim of possession.[178] In the nonpayment eviction context, those defenses are most likely to relate to conditions.[179] Some states allow tenants to seek rent abatements during eviction proceedings as a remedy for a landlord's breach, though the success rate in abatement claims is generally very low.[180] Legal scholars have posited two main reasons for this: first, that the process for asserting defenses and counterclaims based on poor conditions is too burdensome for *pro se* litigants; and second, that there is insufficient access to legal counsel, even for tenants who have meritorious defenses and counterclaims.[181] However, lack of legal representation alone cannot account for the low success rate in abatement claims. Nicole Summers's recent study in New York City found that while tenants with legal representation were more likely to succeed on their abatement claims than unrepresented tenants, "[m]ost represented tenants—approximately three-quarters—with meritorious warranty of habitability claims did not receive rent abatements, even when they had open code violations in their units."[182] Other studies have similarly found that legal knowledge and legal representation do not necessarily account for the drastically different outcomes for landlords and tenants in eviction cases.[183] While Summers did not speculate about the reason for the unexpectedly low success rate, even for tenants with lawyers, it seems likely that it relates

177. Summers, *supra* note 68, at 52–53 (noting that a lack of legal representation, although contributory, could not entirely account for tenants' negative outcomes in eviction cases).

178. *See supra* notes 6–8, 48 and accompanying text.

179. *See supra* note 174 and accompanying text.

180. Summers, *supra* note 68, at 31. Summers's study found that less than 2% of tenants received rent abatements for meritorious claims based on the warranty of habitability. *Id.*

181. *Id.* at 32.

182. *Id.* at 49.

183. *See, e.g.*, Bezdek, *supra* note 155, at 562 ("Representation is a complicated and ultimately unsatisfying explanation for the differences in success rates between landlords and tenants.").

to the limitations of the summary eviction process itself. Tenants cannot achieve full justice, even with legal representation, if the process in which they operate is fundamentally flawed.

3. Tenants' Misunderstandings of Settlement Agreements

An issue related to the problem of insufficient legal representation for tenants is that *pro se* tenants, interacting primarily with attorneys representing landlords, are frequently expected to sign legally binding settlement agreements that they do not fully understand and that therefore present compliance obstacles for tenants.[184] The *Lindsey* Court did not address, or even necessarily foresee, the effects of high-volume, fast-moving eviction courts and the imbalance of legal representation between tenants and landlords. These factors, however, have tangible impacts for tenants in eviction court.

There are numerous problems with many eviction courts' reliance on settlement agreements entered into by *pro se* tenants. First, tenants may not understand that often, by signing a settlement or payment agreement, they are also consenting to a judgment that may go on their credit reports or eventually result in eviction if the tenant fails to meet all the terms of the agreement.[185] Second, tenants often agree to settlements in exchange for landlords agreeing to perform certain obligations, such as making repairs.[186] However, the landlords' obligations in the agreements are seldom enforced.[187] Third, in many jurisdictions—especially in larger cities with stronger tenants' rights schemes—settlement agreements are often reduced to writing. There are other jurisdictions, however, where tenants agree,

184. *See* Sabbeth, *Housing Defense*, *supra* note 171, at 79–80.

185. Harold J. Krent et al., *Eviction Court and a Judicial Duty of Inquiry*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 547, 550 (2016); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1989 (1999) ("Settlement agreements routinely involve the waiver of significant rights by unrepresented litigants."); *see also* Summers, *supra* note 68, at 33 ("Nearly all settlements take the form of repayment agreements in which the tenant agrees to pay the rental arrears owed within a stated period of time.").

186. *See* Summers, *supra* note 68, at 36. Summers describes the process of judicial review of settlement agreements in New York City Housing Court, which has stronger tenant protection measures than many other jurisdictions. "Judges . . . ask tenants whether repairs are needed as part of the judge's review of the settlement agreement. Whenever the tenant reports that repairs are needed, the judge will require that the agreement include a provision obligating their performance." *Id.* at 34.

187. *Id.* at 39.

knowingly or unknowingly, to the entry of judgments against them and later enter into informal, often unenforceable, settlement agreements with the landlords to avoid actual eviction.[188]

Some courts have recognized and tried to address the issue of tenants signing settlement agreements with which they cannot comply. One of the best examples is *Draper & Kramer, Inc. v. King*, an Illinois appellate court decision in which the court held that a settlement agreement signed by a *pro se* tenant should be vacated.[189] The tenant, a Section 8 housing recipient, had agreed to a judgment against her in the amount of $198.09, thinking that if she paid the full amount, she would be able to remain in her home under a "pay and stay" arrangement.[190] She did not understand that she had, in actuality, agreed to vacate the unit.[191] The court vacated the settlement agreement that the *pro se* tenant had signed with the landlord's attorney using a contract law analysis that requires a "meeting of the minds" when two parties sign a binding settlement agreement.[192] Given that the tenant did not understand the terms she was agreeing to, the court found that there was no meeting of the minds and vacated the agreement.[193] There have been other examples of courts vacating settlement agreements signed by tenants in similar circumstances. In *Community Realty Management, Inc. v. Harris*, the New Jersey Supreme Court ruled that because the tenant did not understand the terms of the settlement agreement she signed with her landlord, she could not be bound by them.[194]

These decisions underscore how the summary eviction process upheld by *Lindsey* is inadequate to meet even the basic procedural rights of tenants, especially when they are unrepresented by counsel. These concerns can be

188. For example, in Memphis, it is commonplace for judges to ask tenants if they "agree or disagree" with the landlord's allegations of rent owed. *See* RAMSEY MASON & HARRISON, *supra* note 133, at 11. If the tenant says they agree, a judgment is entered immediately—often without the judge articulating that it is happening. *See id.* at 10. Therefore, tenants frequently either do not understand that a judgment has been entered, or mistakenly believe that if they reach a post-judgment agreement with the landlord, outside of court, that they can avoid eviction. *See generally infra* notes 190–91 and accompanying text.

189. Draper & Kramer, Inc. v. King, 24 N.E.3d 851, 855, 869 (Ill. App. Ct. 2014).

190. *Id.* at 855.

191. *Id.*

192. *Id.* at 863, 869.

193. *Id.* at 864.

194. Cmty. Realty Mgmt., Inc. v. Harris, 714 A.2d 282, 290–92 (N.J. 1998). The court stated, "[F]or a consent judgment to be valid, like a contract, the parties' consent must be knowing and informed." *Id.* at 289.

alleviated in certain situations, such as when a judge takes the time to explain the terms of a settlement agreement to a tenant and ensure that the tenant understands. But in most jurisdictions, this practice is still by far the exception rather than the rule.[195] Other scholars have suggested additional reforms on the court's side,[196] as further discussed in Part V.

B. The Collateral Consequences of Eviction

The consequences of eviction are not limited to the outcomes in court. Research has demonstrated that the impacts of eviction continue far beyond the conclusion of the legal proceedings and can affect tenants and their families for years afterward. This research further underscores the need for reform of the process since the current process not only fails to account for these effects but in fact perpetuates them. This Section reviews some of the most significant collateral consequences of evictions.

First, in 2022, it is impossible to ignore the effects of the COVID-19 pandemic on the problem of housing injustice. Prior to the pandemic, research by Matthew Desmond had demonstrated that eviction is a serious problem for people of color; the population most at risk of eviction across the country is Black women with children.[197] People of color are generally at higher risk of eviction than their White counterparts,[198] mirroring who has been most affected by the COVID-19 pandemic.[199] People of color have been more likely to get sick, be hospitalized, and die from COVID-19,[200] and also to suffer the economic consequences of the pandemic, including job and income loss and food and housing insecurity.[201]

Desmond's research shows that eviction is not just a consequence of poverty; it often results in increased poverty and material hardship for

195. *See* Krent et al., *supra* note 185, at 551–52.

196. *See, e.g.*, Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741 (2015).

197. *See* Desmond, *supra* note 5, at 102.

198. *See id.*

199. *Health Equity Considerations & Racial & Ethnic Minority Groups*, CDC (Nov. 30, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

200. *Id.*

201. *See generally* Bradley Hardy & Trevon D. Logan, *Racial Economic Inequality Amid the COVID-19 Crisis*, BROOKINGS (Aug. 13, 2020), https://www.brookings.edu/research/racial-economic-inequality-amid-the-covid-19-crisis/.

tenants and their families.[202] Children of evicted tenants are likely to experience severe social and health impacts as a result of the eviction.[203] If families are evicted and become homeless, children's educational progress is likely to be disrupted, as the family may no longer reside in the district where the child was previously attending school, or the family may lack transportation to get the student to school.[204] If students are homeless for an extended period of time, they may be relocating frequently and thus unable to attend school regularly.[205] In fact, studies have shown that children who are homeless are significantly less likely to perform at grade level than their non-homeless peers.[206]

Additionally, eviction can negatively affect a tenant's credit rating and rental history. Following an eviction, or even an eviction court filing, tenants face difficulty in finding new housing because landlords who run background checks or credit checks may refuse to rent to tenants with prior evictions.[207] Eviction judgments, including monetary judgments, are often reported to credit bureaus and can stay on tenants' credit histories for years.[208] Even for tenants who manage to avoid a judgment in court, the filing itself can have a negative impact on their ability to find new housing since many prospective landlords will not distinguish between eviction filings and eviction judgments.[209] In situations where the eviction is reported to credit bureaus, it can negatively impact the tenant's ability to find employment or qualify for student loans.[210]

Recent research has shown eviction also impacts the health and wellbeing of tenants and their families. Substandard housing is already a

202. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 317 (2015).

203. *Id.*

204. Philip T.K. Daniel & Jeffrey C. Sun, *Falling Short in Sheltering Homeless Students: Supporting the Student Achievement Priority Through the McKinney-Vento Act*, 312 EDUC. L. REP. 489, 490–91 (2015).

205. *Id.*

206. *Id.* Daniel and Sun point out that "only one-third of homeless students read at the same grade level as more than half of their domiciled peers of the same age." *Id.*

207. *See* Desmond & Kimbro, *supra* note 202, at 299.

208. *See* D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 914 (2013).

209. Katelyn Polk, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW. J.L. & SOC. POL'Y 338, 339–40 (2020).

210. *See id.* at 345.

pervasive problem for low-income renters.[211] Many of the poor housing conditions that tenants live with have serious physical and mental consequences.[212] For example, common poor housing conditions—including dust, mold, lead paint, and inadequate ventilation—can lead to health problems such as "asthma, lead poisoning, elevated blood pressure, developmental delays, heart disease, and exposure to communicable diseases."[213] Eviction can exacerbate these issues: tenants who have been evicted are more likely to move into poorer-quality housing in worse neighborhoods than where they were living prior to the eviction.[214] Evicted tenants also experience negative mental health outcomes.[215] Housing instability can lead to depression, anxiety, and an increase in stress levels.[216] A recent study in Memphis, Tennessee, comparing eviction filing rates to mental health census data found a strong correlation between high numbers of eviction filings and self-reported poor mental health, especially in majority Black neighborhoods.[217]

Eviction has traumatic and long-lasting legal, social, and health consequences for tenants and their children. These effects are unaccounted for in structure of the summary eviction process, providing further justification for reform.

C. Racial Justice, Evictions, and Housing Instability

Beyond the negative consequences for individual tenants and their families, the continued use of the summary eviction process perpetuates systemic problems of housing instability and racial justice. It is no secret that people of color are at higher risk of eviction than their White counterparts.[218] Neighborhoods and communities of color are therefore more subject to the destabilizing effects of eviction.[219] One study of

211. *See generally* Gold, *supra* note 162, at 61.

212. *Id.* at 70–73 (describing the types of poor housing conditions that many low-income tenants deal with and their associated health effects).

213. *Id.* at 70.

214. Desmond, *supra* note 5, at 118–19.

215. Gold, *supra* note 162, at 73.

216. *Id.*

217. Courtnee Melton-Fant, Austin Harrison & Katy Ramsey Mason, *Race, Mental Health, and Evictions Filings in Memphis, TN, USA*, 26 Preventative Med. Reps. 1, art. no. 101736 (2022), https://www.sciencedirect.com/science/article/pii/S2211335522000432.

218. *See* Desmond, *supra* note 5, at 102.

219. Davida Finger, *The Eviction Geography of New Orleans: An Empirical Study to Further Housing Justice*, 22 UDC L. REV. 23, 39 (2020).

eviction filing data in New Orleans found that neighborhoods that were predominantly Black had as many as fifteen more evictions per block than neighborhoods that were not majority Black.[220] Studies document the disproportionate effect of eviction on Black neighborhoods in other cities across the country.[221]

V. Possibilities and Options for State-Level Reform

Despite the advancements of the tenants' rights revolution, states have, with few exceptions, continued to prioritize a landlord's claim for possession above all else.[222] As Justice Douglas implied in his dissent to *Lindsey*, the Court in 1972 took too narrow a view of the totality of the modern landlord-tenant relationship and ignored important considerations concerning access to justice and the subjugation of poor people's rights.[223] Since then, the issues that the Court overlooked have only grown in magnitude and importance. At this point, however, new federal litigation is unlikely to yield positive results because of the extremely conservative makeup of the federal judiciary and the Supreme Court.[224] Even in the depths of the COVID-19 pandemic, federal judges showed hostility to CDC measures intended to protect vulnerable tenants from eviction and mitigate the spread of the virus.[225] As a result, the possibilities for true reform of the

220. *Id.* at 37.

221. *See* Desmond, *supra* note 5, at 91 (examining neighborhoods in Milwaukee); Melton-Fant, Harrison & Ramsey Mason, *supra* note 217, at 2 (examining neighborhoods in Memphis).

222. There have been states that have moved further towards balancing the equities in the landlord-tenant relationship. For example, New York has imposed much stronger notice and pleading requirements in what it calls holdover eviction cases; that is, evictions that are based on something other than nonpayment of rent. *See generally* ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK ch. 8 (2020 ed.). For example, a notice to quit must be served on a tenant at least ten days prior to filing a lawsuit. N.Y. REAL PROP. ACTS. LAW § 713 (McKinney 2010).

223. *See* Lindsey v. Normet, 405 U.S. 56, 82 (1972) (Douglas, J., dissenting in part).

224. *See generally* Seung Min Kim, *Trump's Conservative Imprint on the Federal Judiciary Gives Democrats a Playbook – If They Win*, WASH. POST (Oct. 26, 2020), https://www.washingtonpost.com/politics/courts_law/court-barrett-senate-trump/2020/10/25/d9eed9c0-16bc-11eb-befb-8864259bd2d8_story.html (noting that three Supreme Court justices and approximately 30% of sitting circuit court judges were appointed by Trump).

225. *See, e.g.*, Tiger Lily, LLC v. U.S. Dep't of Hous. & Urb. Dev., 992 F.3d 518, 524 (6th Cir. 2021) (finding that the Public Health Service Act of 1994 did not grant the CDC power to impose a nationwide eviction moratorium).

summary eviction process lie with the states, and reform is urgently needed to address the imbalances and ongoing injustices perpetuated by the current outdated system. This Part presents questions and issues for states to consider as they contemplate the problems with the summary eviction process.

A. Dismantling the Primacy of the Landlord's Claim to Possession

The *Lindsey* Court never questioned the foundational assumption of the summary eviction process: that the landlord's primary remedy is and should be repossession of the rental property, no matter the basis for the dispute.[226] In 1972, when the Court decided *Lindsey*, this was already an outdated notion, and it has only become more so in the intervening fifty years. In addition to prioritizing the claim for possession, many states also allow landlords to join claims for unpaid rent and other damages.[227] Most eviction cases that are filed across the country are based on nonpayment of rent, and, even prior to the COVID-19 pandemic, many of those cases were brought for amounts less than one month's rent.[228] Yet in many situations, the summary eviction process has become pretext, allowing landlords to accomplish other goals while holding over tenants' heads the threat of displacement. The ease of eviction filing in many jurisdictions has resulted in what some scholars have called "serial eviction filing," which is defined as multiple evictions filed against the same address.[229] For some landlords, the goal of filing eviction cases is not to actually regain possession of the property but to collect the monetary debt the tenant owes.[230] This is

226. *See* Spector, *supra* note 6, at 157–59.

227. *See, e.g.*, TENN. CODE ANN. § 29-18-125 (2021) ("[T]he judge . . . trying the cause shall be authorized and it shall be the judge's duty to ascertain the arrearage of rent, interest, and damages, if any, and render judgment therefor if the judge's judgment shall be that the plaintiff recover possession.").

228. Emily Badger, *Many Renters Who Face Eviction Owe Less Than $600*, N.Y. TIMES: THEUPSHOT (Dec. 13, 2019), https://www.nytimes.com/2019/12/12/upshot/eviction-prevention-solutions-government.html. "In data [Matthew Desmond's] Eviction Lab has analyzed from 22 states, that situation of tenants deep in debt is rare. It's far more common, the lab has found, that tenants owe the equivalent of less than a month's rent." *Id.*

229. Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316, 316 (2020).

230. *Id.* at 318.

> This strategy may also allow property owners to profit from late payments. Tenants threatened with eviction not only must pay their rent in full; they are also charged late fines and legal fees, including costs associated with attorneys

accomplished either when the landlord obtains a judgment from the court, even if he or she chooses not to follow through on the actual eviction, or when the threat of eviction scares the tenant into paying the money owed.[231] Some landlords even prefer to keep tenants owing small amounts in arrears because it provides justification to seek repossession of the premises at any time, for any reason, under the legal cover of nonpayment of rent.[232]

Furthermore, the question of the right to possession does not adequately address the other factors that make up the totality of the circumstances of the landlord-tenant relationship. While the landlord may be statutorily entitled to seek rent debt as part of an action to recover possession, the limitations of the summary eviction process mean that the tenant is often not similarly entitled to raise issues that might mitigate or negate the obligation to pay rent.[233] The disconnect between the claims that landlords are allowed to make as part of the summary eviction process and those that tenants are allowed to make is especially stark in light of the modern trend towards consolidating issues in litigation into as few proceedings as possible.[234] This reality is sadly not surprising, given the long history of courts and governments failing to enforce the rights of poor tenants.[235]

To make real progress toward housing justice for tenants, the underlying assumption that possession is the ultimate issue must be challenged. This continued emphasis on the question of which party is entitled to possession is a significant obstacle to tenants, especially when a dispute's factual root is about money owed, condition of the property, or something else entirely. State courts and governments should consider dismantling the primacy of possession when seeking to reform the summary eviction process.

B. Dismantling the Traditional Summary Eviction Process

Given that possession is often not the primary goal in tenant-landlord disputes, the summary eviction process needs to be broken down and reconstituted in a form that more accurately reflects modern notions of

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> and court filings. These hidden costs of the housing crisis may be common if landlords routinely rely on eviction court for rent collection.

Id.

231. *See id.* at 318–19.

232. Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 638 (2019).

233. *See supra* Section IV.A.1.

234. *See* Spector, *supra* note 6, at 156–57.

235. *See generally* Sabbeth, *(Under)Enforcement*, *supra* note 126.

fairness and justice and more effectively addresses the parties' actual goals and considerations. This subsection outlines several suggestions for how states can modify the court process to account for these concerns.

1. Impose Higher Bars for Possession Claims

One of the hallmarks of the traditional summary eviction process is the speed and ease with which landlords can regain possession of their property. As detailed above, courts' prioritization of possession above all other considerations is alarmingly outdated. In service of the transition away from possession as the ultimate issue, courts and legislatures can impose more stringent requirements when landlords do, in fact, seek possession.

Research has shown that landlords are less likely to file eviction cases when the process is more complex and the monetary cost is higher.[236] Comparing eviction filings in Charleston, South Carolina, and Mobile, Alabama, researchers found that the stricter procedural requirements and higher court costs in Alabama resulted in significantly lower filing rates than in South Carolina.[237] Imposing stricter requirements on landlords seeking possession would deter landlords who use the summary eviction process as a mechanism to collect rent from proceeding with cases that result in significant, unnecessary harm to tenants.

2. Allow Joinder of Claims and Discovery in Possession Cases

In situations where a landlord is truly seeking to regain possession of the rental property, the factual circumstances can be complex. Contrary to the *Lindsey* Court's misguided assumption about the "simplicity of the issues in the typical FED action,"[238] the issues that eviction cases present can be quite complicated. While many jurisdictions allow tenants to raise defenses based on the conditions of the premises,[239] courts and legislatures should explicitly allow tenants to raise any relevant defenses and join any relevant counterclaims, just as they would be able to do in other civil proceedings. The dispossession of tenants from their homes is a drastic event, and the

236. Leung, Hepburn & Desmond, *supra* note 229, at 334–37.

237. *Id.* at 317, 334–37. However, the comparison is relative; even in Alabama, which had comparatively more onerous processes than South Carolina, the landlord was required to give the tenant a seven-day notice and pay $256 to file an eviction case. *Id.* at 335. Other civil actions are much more difficult to initiate and maintain.

238. Lindsey v. Normet, 405 U.S. 56, 65 (1972).

239. *Id.* at 69; Spector, *supra* note 6, at 171–73.

courts should treat it with the gravitas it deserves by allowing for the full hearing of relevant issues.

3. Create Pre-Filing Diversion Programs for Debt Claims

In situations where the landlord seeks to recover rent owed rather than repossession of the property, courts and legislatures should work to create pre-filing diversion programs. During the COVID-19 pandemic, there was an unprecedented influx of federal stimulus dollars to state and local governments designated for use in paying rental arrears on behalf of tenants who had fallen behind on rent during the pandemic.[240] While some criticized certain jurisdictions' slow pace in distributing the funds to renters and landlords,[241] there have also been examples of successful pre-filing diversion programs implemented at the state and local levels. Beginning in July 2020, Michigan used federal stimulus money to fund additional legal services for tenants, which averted some eviction cases pre-filing and helped tenants avoid eviction if a case had already been filed.[242] In Philadelphia, as of April 2021, landlords have been required to apply for rental assistance and enroll in the city's Eviction Diversion Program prior to filing a nonpayment eviction case in court.[243] The Eviction Diversion Program mandates mediation between landlords and tenants within thirty days of approval for the program.[244] According to the City of Philadelphia, over 70% of cases that go through mediation reach a settlement

240. *See How Federal Rental Assistance Works*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/coronavirus/mortgage-and-housing-assistance/renter-protections/emergency-rental-assistance-for-renters/ (last visited Jan. 1, 2022).

241. Jason DeParle, *Federal Aid to Renters Moves Slowly, Leaving Many at Risk*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/04/25/us/politics/rental-assistance-pandemic.html.

242. ELIZABETH BENTON ET AL., UNIV. MICH. POVERTY SOLS., REDUCING MICHIGAN EVICTIONS: THE PANDEMIC AND BEYOND 12 (June 2021), http://sites.fordschool.umich.edu/poverty2021/files/2021/05/Poverty-Solutions_Reducing-Michigan-Evictions_June2021.pdf.

243. Amended Order at 2, *In re*: Residential Eviction Moratorium and Exceptions, Service of Writs and Alias Writs of Possession (Phila. Mun. Ct. Apr. 1, 2021), https://www.courts.phila.gov/pdf/regs/2021/15-of-2021-PJ-ORDER.pdf; *see also* Editorial, *Philly May Have Just Revolutionized Evictions*, PHILA. INQUIRER (Apr. 5, 2021), https://www.inquirer.com/opinion/editorials/philadelphia-eviction-diversion-rent-20210405.html.

244. *Frequently Asked Questions (FAQ): City of Philadelphia's Eviction Diversion Program*, PHL EVICTION DIVERSION, https://eviction-diversion.phila.gov/#/FAQ (last visited Jan. 1, 2022).

agreement.[245] If the mediation is unsuccessful, landlords may continue with the regular eviction court process.[246]

Pre-filing eviction diversion programs could become a permanent part of eviction proceedings. One of the major advantages to programs that focus on pre-filing diversion is that they avoid the significant and long-lasting consequences for tenants of having eviction cases on their permanent records.[247] Especially when combined with increased access to legal services, pre-filing eviction diversion programs could be highly effective in achieving similar outcomes to cases that are settled in court and do not result in actual eviction.

C. Improving Housing Conditions and Habitability

One of the most common justifications that tenants cite for not paying their full rent is the poor conditions of their rental homes.[248] Scholars have posited numerous theories about the significance of warranty of habitability claims in the landlord-tenant relationship. These theories include criticisms of laws regarding housing conditions in rental properties and both the utility of the doctrine itself[249] and of the enforcement of existing standards.[250] Encouraging greater enforcement of housing conditions and habitability standards would reduce disputes between landlords and tenants and therefore the need for evictions.

D. Improving Access to Counsel

Addressing the inequities that the summary eviction process imposes on the landlord-tenant relationship requires improving tenants' access to legal representation. While legal representation is not a panacea to the injustices of the summary eviction process, it has demonstrable benefits to tenants

245. *Id.*

246. *Id.*

247. *See supra* notes 207–10 and accompanying text.

248. *See generally* Summers, *supra* note 68, at 147–48; Sabbeth, *(Under)Enforcement*, *supra* note 126, at 100.

249. *See generally* Super, *supra* note 11 (arguing that the failure to transform the landlord-tenant relationship has left tenants effectively unable to access the theoretical protections of the warranty of habitability); Summers, *supra* note 68 (demonstrating that even when tenants are able to claim the warranty of habitability as defenses or counterclaims, they rarely are able to obtain rent abatements).

250. *See generally* Sabbeth, *(Under)Enforcement*, *supra* note 126 (arguing that laws on the books provide significant recourse to tenants living with substandard conditions but that the systems in charge of enforcing those laws have failed).

seeking to advance legitimate claims and defenses in the eviction process. Studies comparing tenants who are represented by lawyers versus those who are unrepresented have shown—virtually unequivocally—that tenants' outcomes improve when they are represented.[251] Furthermore, New York City's Right to Counsel program, which has been in effect since 2017, has reduced eviction filings and improved housing stability for tenants.[252] Providing lawyers for tenants is an important piece of any housing justice solution.

Conclusion

While the COVID-19 pandemic brought the eviction crisis to national attention, it is a problem that existed before the pandemic and will almost definitely, unfortunately, continue long after the public health emergency subsides. While many scholars and policymakers have posited theories as to the best ways to address the lack of safe and affordable housing,[253] largely unstudied are the effects of the eviction court process itself. Addressing the problem of eviction is by no means exclusively a question of social policy. All fifty U.S. states now utilize a summary process for evictions, rooted in the property law system that existed in common-law England.[254] It is this summary eviction process, which was designed with the express purpose of making eviction as easy as possible for the landlord,[255] that deserves reexamination in our twenty-first-century context. Today, it reflects an antiquated conception of the complexities of the modern landlord-tenant relationship.

The mid-twentieth century saw major advancements in the rights afforded to traditionally marginalized social groups, including people of color, women, and indigent people.[256] The concentrated efforts around the rights of residential renters has become known as the tenants' rights revolution, and during the 1960s and 1970s, important legislative and

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251. Greiner et al., *supra* note 208, at 931, 934–35; Steinberg, *supra* note 196, at 744; Engler, *When Does Representation Matter?*, *supra* note 169, at 79.

252. Brian Bieretz, *A Right to Counsel in Eviction: Lessons from New York City*, HOUS. MATTERS (Dec. 31, 2019), https://housingmatters.urban.org/articles/right-counsel-eviction-lessons-new-york-city; *see also* Sabbeth, *Housing Defense*, *supra* note 171, at 81, 84.

253. *See generally* Super, *supra* note 11 (discussing the history of the doctrine of the warranty of habitability and tenants' expectations of safe housing).

254. Spector, *supra* note 6, at 137.

255. *See id.* at 156.

256. *See* Summers, *supra* note 68, at 157–58.

judicial advancements sought to equalize the imbalanced landlord-tenant relationship.[257] Chief among these developments was the codification of the implied warranty of habitability, which was supposed to guarantee the mutuality of the previously independent covenants of the tenant to pay rent and the landlord to maintain the premises in a fit and habitable condition.[258] While this was an important legal advancement intended to provide tenants with increased protections and rights in their residences, the reality of the warranty of habitability has not lived up to its supporters' aspirations.

The Supreme Court's 1972 decision in *Lindsey v. Normet* seriously undermined the promises of the tenants' rights revolution.[259] When the Supreme Court upheld the summary eviction process in the face of due process and equal protection challenges from a group of low-income tenants, it placed a huge roadblock in the path of meaningful reform of the landlord-tenant relationship and the advancement of tenants' rights. The Court's opinion relied on numerous outdated assumptions about the relative positioning of landlords and tenants and the complexities of the modern landlord-tenant relationship. As a result, the summary eviction process has continued to be the primary mechanism for judicial evictions in every state in the country.

The characteristics of the summary eviction process that make it appealing to landlords are the same characteristics that have made it devastating for the lives of many tenants. The quick turnaround from complaint to trial and the limitations on defenses, counterclaims, and discovery serve as insurmountable disadvantages to many tenants. As a result, the ease and speed with which landlords can obtain judgments and effectuate actual displacement of tenants has contributed to an incredibly imbalanced court process that has long-term consequences for tenants. Empirical research in recent years has underscored the effects that judgments and actual evictions have on tenants and their families, as well as their abilities to secure safe and affordable housing in the future.[260]

To address the ongoing effects of the *Lindsey* decision, state legislatures must consider significant reforms of the summary eviction process. First and foremost, the primacy of the landlord's claim to possession must be

257. *See* Super, *supra* note 11, at 391.

258. *Id.*

259. *See generally* Lindsey v. Normet, 405 U.S. 56, 64 (1972) (holding that Oregon's eviction process limiting tenants' triable issues did not violate the due process clause).

260. *See generally* Desmond & Kimbro, *supra* note 202 (discussing empirical data collected in a study to demonstrate the negative effects of eviction filings and judgements).

undone. Many, if not most, eviction cases are in actuality about a landlord seeking payment of a monetary debt, and the immediate remedy for nonpayment of rent should not be dispossession. Instead, states and courts should explore procedural and substantive reforms of the summary eviction process that equalize the positions of the landlord and tenant. Additionally, states should strengthen enforcement of habitability standards and access to legal counsel, both of which have been shown to reduce actual evictions. Eviction is a social scourge in modern American society, and housing justice can be fully achieved only by challenging and reforming the summary eviction court process that governs it.