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DISRUPTING THE EVICTION CRISIS WITH CONFLICT RESOLUTION STRATEGIES

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> *I think the courts should give the tenants an option to tell their story. A lot of people get in those situations; you don't know how they got there. I don't think people are just sitting around not paying rent just to not be paying rent, you know?*[1]

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1. BRITTANY LEWIS, UNIV. OF MINN. CTR. FOR URBAN AND REG'L AFFAIRS, THE ILLUSION OF CHOICE: EVICTIONS AND PROFIT IN NORTH MINNEAPOLIS 122 (2019) (story of a tenant described as a forty-six-year-old Black woman).

I. INTRODUCTION

Our nation faces a serious eviction epidemic. More than 2.3 million eviction actions are filed every year.[2] That equates to about *four per minute*.[3] The eviction crisis is a multi-faceted problem that will require a systemic, interdisciplinary approach. Studies have found "a complex combination of financial, social, relational and health factors contributes to the inability to pay rent."[4] The causes of the crisis include, among other things, poverty, increasing rents, decreasing wages, and vanishing affordable housing.[5] Evictions not

2. While there is no centralized data collection about eviction rates, the Eviction Lab at Princeton University estimates that millions of families are evicted every year. The Eviction Lab has developed a database to assist policymakers in understanding the scope of the problem. *National Estimates: Evictions in America*, THE EVICTION LAB (May 11, 2018), https://evictionlab.org/national-estimates/. *See also* Terry Gross, *First-Ever Evictions Database Shows:* "*We're in the Middle of a Housing Crisis*," NAT'L PUBLIC RADIO (Apr. 12, 2018, 1:07 PM ET), https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis.

3. THE EVICTION LAB, *supra* note 2.

4. Marleke Holl et al., *Interventions to Prevent Tenant Evictions: A Systematic Review*, 24 HEALTH & SOC. CARE COMMUNITY 532, 533 (2016).

5. Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RES. 362 (2017). Most of the families pushed out of their homes due to poverty include children, and Black mothers are disproportionately impacted. MATTHEW DESMOND, MACARTHUR FOUNDATION, POL'Y RES. BRIEF, POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 2 (2014), https://www.macfound.org/media/files/HHM_Research_Brief_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf. A Baltimore study of three hundred renters who came to Rent Court revealed the following statistics: 79% identified as women; 94% as African American/Black; 60% reported a household size of two to four persons and 65% housed at least one minor child in the rented unit. PUB. JUSTICE CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 12 (2015) [hereinafter JUSTICE DIVERTED].

only result from poverty,[6] they exacerbate poverty.[7] Evictions are traumatic experiences, especially for children, that can devastate communities.[8]

This urgent problem is not new. Many decades ago, scholars and tenant advocates sounded an alarm about the growing eviction problem.[9] Fast-forward to 2020, and the eviction epidemic persists, as do the scathing criticisms of the legal process as an expedited "housed-to-homeless pipeline." [10] One study in Baltimore, for example, described the city's "rent court" as a "broken system" that puts "long-standing tenant protections and basic housing standards second to landlords' bottom line."[11]

Jurisdictions across the country are attacking the problem in different ways. Some have increased legal protections for tenants.[12] Recognizing that legal rights are meaningless unless asserted in court, some cities now guarantee legal counsel for all tenants facing

6. According to the Eviction Lab, "most poor renting families spend at least half of their income on housing costs, with one in four of those families spending over 70 percent of their income just on rent and utilities." *Why Eviction Matters*, THE EVICTION LAB, https://evictionlab.org/why-eviction-matters/#affordable-housing-crisis (last visited Mar. 27, 2020).

7. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 296 (2016). As Matthew Desmond describes: "eviction does not simply drop poor families into a dark valley, a trying yet relatively brief detour on life's journey. It fundamentally redirects their way, casting them onto a different, and much more difficult, path. Eviction is a cause, not just a condition, of poverty." *Id.* at 298-99. *See also* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88 (2012).

8. DESMOND, *supra* note 7, at 298 (describing impact of evictions on communities, including higher violent crime and lack of neighborhood instability); Philip M.E. Garboden, Tama Leventhal& Sandra Newman, *Estimating the Effects of Residential Mobility: A Methodological Note*, 43 J. SOC. SERV. RES. 246 (2017); Holl et al., *supra* note 4, at 533.

9. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

10. JUSTICE DIVERTED, *supra* note 5, at 6.

11. *Id.*

12. Legal reforms include caps on the amount of rent or security deposits that can be charged, limits on rental increases, and "just cause" eviction laws. *See Justice Innovation*, STANFORD LEGAL DESIGN LAB, https://justiceinnovation.law.stanford.edu/resources/maps/eviction/#limit (last visited Mar. 25, 2020) (summarizing legal limits on landlords).

eviction. [13] Others call for increased affordable housing or recognition of housing as a basic human right.[14]

While these reforms are helpful, the ongoing eviction crisis should teach us that traditional legal approaches alone are not likely to make a meaningful difference. While some tenants have cognizable legal defenses, others do not. For a variety of reasons, they simply cannot afford to pay rent. In these cases, tenants may need something that a judge cannot give them: additional time, a payment plan, additional resources, or flexible options to keep them housed.[15]

Some states have experimented with proactive eviction prevention programs that combine mediation and problem-solving processes with legal advice and other types of rental assistance.[16] These programs connect tenants with available resources before they fall behind on their rent, and facilitate ongoing communication and conflict resolution between renters and property owners. In addition to pre-filing interventions, some courts offer mediation programs to help parties negotiate agreements to prevent eviction and address housing issues.

This article explores the potential benefits and challenges of using mediation and other conflict resolution approaches as part of comprehensive plan to disrupt the eviction crisis. Although not a panacea, early conflict interventions and mediation services may be valuable components of a multi-faceted eviction prevention strategy, especially when offered early—long before an eviction filing—and integrated with legal advice and other supportive services.

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13. *See* Jared Brey, *Is Tenants' Right to Counsel on Its Way to Becoming a Standard Practice?*, NEXT CITY (Dec. 10, 2019), https://nextcity.org/daily/entry/is-tenants-right-to-counsel-on-its-way-to-becoming-standard-practice (discussing right to counsel laws in New York City, Cleveland, Philadelphia, San Francisco, and Newark). The vast majority of tenants appear without counsel in housing court, but studies have shown that legal representation dramatically increases their chances of keeping their homes. D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001).

14. Lisa T. Alexander, *Evicted: The Socio-Legal Case for the Right to Housing*, 126 YALE L.J. F. 431 (2017). The call for recognition of housing as a basic human right finds support in the Universal Declaration of Human Rights, see G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone has the right to a standard of living adequate for health and well-being of himself and his family, including . . . housing.").

15. *See infra* Part II.

16. *See infra* Parts III and IV.

II. MEDIATION IN THE "RENT COURT"

The legal procedure for evictions, known as summary ejectment or unlawful detainer, has been criticized as an expedited, state-sanctioned collection process for landlords in which tenants are voiceless and powerless.[17] Eviction cases typically proceed on a rapid timeline—much faster than other civil cases.[18] In many jurisdictions, hearings occur in about a week's time, leaving little to no opportunity for tenants to seek legal advice or rental assistance, or even file a written defense to the action.[19] An eviction docket can include hundreds or even thousands of cases a day.[20] Although the majority of tenants do not appear,[21] the courtroom typically is crowded and chaotic.[22]

The legal issue in an eviction proceeding is repossession of the property due to the failure to pay rent. Most tenants lack awareness of their legal rights and do not have an attorney. Self-represented tenants who have cognizable legal defenses to an eviction may be afraid to raise them in the intimidating atmosphere of a courtroom.[23] Even if they speak up, studies have found that tenants who attempt to tell their stories about substandard housing conditions or

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17. JUSTICE DIVERTED, *supra* note 5, at vi; Bezdek, *supra* note 9, at 565. *See also* Rebecca Gale, *Why Landlords File for Eviction (Hint: It's Usually Not to Evict)*, CITY LAB (June 18, 2019), https://www.citylab.com/equity/2019/06/eviction-notice-process-rental-landlords-collect-late-rent/591553/ ("[F]iling for eviction turns tenants into chastened debtors, giving landlords additional leverage to deter them from complaining about a code violation or mistreatment. In courts, late rent takes precedence over unmade repairs and other issues.").

18. *See generally* Megan E. Hatch, *Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUSING POL'Y DEBATE 98 (2017) (providing a review and taxonomy of various state and local legal approaches to the landlord-tenant relationship); *Eviction Process by State: A 50-Stater Nationwide Overview*, VERTICAL RENT (Oct. 31, 2018), https://www.verticalrent.com/entry/eviction-process-by-state-a-50-stater-nationwide-overview.

19. JUSTICE DIVERTED, *supra* note 5, at 5-7 (describing Baltimore's rapid timeline for summary ejectment, in which tenants are served with process in two to four days and trial occurs within five to ten days).

20. *Id.* at 46-47 (showing that in Baltimore City, for example, a daily failure-to-pay rent docket usually includes a shocking 1,000 cases).

21. DESMOND, *supra* note 7, at 96 (describing the default rate in eviction actions across various states and cities ranges from 35% to more than 90%); *see also* Randy Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759 (1994); *see also* Erick Larson, *Case Characteristics and Defendant Tenant Default in a Housing Court*, 3 J. EMPIRICAL LEGAL STUD. 3 (2006).

22. JUSTICE DIVERTED, *supra* note 5, at 21 (describing that participants in rent court characterize process as "chaotic"); *see also* DESMOND, *supra* note 7, at 95-99 (describing eviction court at a Milwaukee county courthouse).

23. Bezdek, *supra* note 9, at 560-61.

temporary financial hardships are effectively silenced by the court.[24] No matter how empathetic judges may be to the tenant's circumstances on a human level, the reason the tenant cannot pay the rent often has no legal consequence. In most cases, the judge asks whether the tenant agrees that the rent is due and unpaid.[25] Many tenants respond "yes, but . . . " At that point, the court typically interrupts the tenant and takes but a few minutes[26] to sign an eviction order, putting the tenant on a path to homelessness.[27]

It is questionable whether an ethically sound and quality mediation process can, and more importantly should,[28] be integrated into a legal process widely criticized as broken, unjust, and pro-landlord. Mediation may have little efficacy when tenants face such grave consequences and have limited financial and housing options. Providing mediation when the tenant is on the brink of homelessness and lacks legal counsel is fraught with fairness concerns and process dangers.[29] In addition, the landlord's investment in the eviction process, and high likelihood of prevailing in court, diminishes their flexibility in last-minute negotiations.

Nevertheless, in appropriate cases, day-of-trial mediation may help some tenants avoid eviction and obtain other benefits, especially as compared to outcomes of summary ejectment adjudication. As described below, mediation may help tenants reach agreements that include flexible payment plans, reductions in the amount owed, specific timelines for repairs, a delayed move out date, or additional time to find new housing. Mediation also helps tenants to avoid an eviction judgment on their record that could affect future rental opportunities.

Likewise, mediation may allow property owners to avoid the hassle and expense involved with court filings and tenant turnover.[30]

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24. *Id.* at 586-90; *see also* JUSTICE DIVERTED, *supra* note 5, at 29 (noting that "rent court" judges discouraged tenants from raising "any issue other than whether they had paid the specific amount of money the landlord alleged was owed").

25. JUSTICE DIVERTED, *supra* note 5, at 34.

26. Bezdek, *supra* note 9, at 586.

27. *See, e.g.*, MD. CODE ANN., REAL PROP. § 8-401(e) (2019) (noting that after a judgment, many jurisdictions allow tenants to "redeem" the property by paying the rent owed, plus additional court costs and fees, to prevent an eviction).

28. *See* Noam Ebner & Sharon Press, *Eviction Mediation: An International Conversation Followed by Five More*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC., Symposium Issue No. 3 (2019) (discussing the wisdom of involving mediation in these proceedings, given inherent ethical challenges as well as the concern that mediation activity might allow courts or legislatures to avoid the need to make systemic change).

29. *Id.*

30. *See* Casey Schwab, *Landlord Tenant Mediation: A Modern Approach to Tenant Issues*, AVAIL (Sept. 16, 2019), https://www.avail.co/education/articles/landlord-tenant-mediation-a-modern-

Although often portrayed as the villain in this story, most landlords do not want to be perceived as the "bad guy."[31] Even property owners who sympathize with a tenant's financial predicament and comply with all housing standards simply cannot sustain a business when unpaid rent accrues. Some landlords attempt to work with tenants who experience sudden financial hardship and delay filing for eviction as long as possible.[32]

While larger property management companies can build eviction expenses into their business models, the eviction process can be especially burdensome and costly for smaller "mom-and-pop" landlords who operate rent-check-to-mortgage-payment.[33] To pursue an eviction action, landlords must pay a case filing fee, potentially hire an attorney, and incur additional fees for the actual eviction. The landlord then must prepare the property for a new renter and advertise for a new tenant. Given these costs, some landlords go so far as to pay tenants simply to leave the premises and return the keys without paying the rent, known as "cash for keys."[34]

Given these dynamics, there may be a window of opportunity for day-of-trial mediation in the eviction context, particularly in cases involving smaller landlords who have a longer relationship with a particular tenant. As described below, the benefits may include a greater sense of voice, broader remedial options, and increased flexibility.

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approach-to-tenant-issues (describing potential benefits of mediation for landlords). *But see* JUSTICE DIVERTED, *supra* note 5, at 4 (noting that compared to other types of civil small claims litigation, however, summary ejectment cases are less burdensome, with lower filing fees, expedited timelines, and other advantages for the landlord. This ease of filing may be one of the reasons that summary ejectment cases are the single largest type of case on the court dockets in many states).

31. *See* Bert Stratton, Opinion, *I'm Not Evil. I'm a Landlord*, N.Y. TIMES (Mar. 11, 2016), https://www.nytimes.com/2016/03/12/opinion/im-not-evil-im-a-landlord.html.

32. DESMOND, *supra* note 7, at 38-39 (describing landlord who worked with tenants and did not evict most tenants who owed back rent).

33. *See* Pam Fessler, *Low-Income Renters Squeezed Between Too-High Rents and Subpar Housing*, NAT'L PUB. RADIO MORNING EDITION (Mar. 30, 2016), https://www.npr.org/2016/03/30/471347546/low-income-renters-squeezed-between-too-high-rents-and-subpar-housing (quoting landlords who say they need the rent to pay for mortgage, tax bills, and repairs).

34. *See* LEWIS, *supra* note 1, at Findings: Landlords, http://evictions.cura.umn.edu/news/findings-landlords (describing "cash for keys").

A. Voice

Having a sense of voice—or opportunity to tell one's story—has been found to be a vital component of procedural justice.[35] Studies have found that tenants lack a sense of voice in the eviction legal process, which focuses predominantly on the landlord's claim for unpaid rent and discourages defenses by the tenant.[36] As described by one tenant:

> The only question they [judges in eviction cases] ask you is, "So you agree with the amount that's owed?" Like they don't, you know, take the time to get your side of the story or to see. . . why you haven't paid anything, or if there's anything wrong with the property.[37]

In her study of the many ways that the eviction process silences tenants, Professor Barbara Bezdek observed that judges frequently ask tenants, "Is there anything else you wish to tell me?" Tenants typically respond with "a human story which is not given legal credence." [38] When tenants attempt to explain the reasons for nonpayment of rent, "[t]he judge either waits through the story or interrupts it, but at either point, tells the tenant that her remarks are irrelevant, and orders judgment for the landlord." [39] Professor Bezdek characterized the court's silencing of tenant's personal stories as the result of a "rule-oriented" rather than "relation-oriented" account of disputes.[40]

Unlike the expedited, inflexible court proceeding, mediation offers a relational, problem-solving process. One of the most important benefits of mediation as compared to adjudication is the opportunity for parties to tell their stories directly to the mediator and the opposing side. Unlike judges, who must rule based solely on

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35. *See, e.g.*, E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 957 (1990) (finding that "voice *with* the possibility of influence . . . leads to even greater perceived fairness"); Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (finding voice heightens perception of procedural justice). *See also* Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49 (2004).

36. *See supra* notes 5 and 9 and accompanying text.

37. JUSTICE DIVERTED, *supra* note 5, at 34.

38. Bezdek, *supra* note 9, at 586.

39. *Id.*

40. *Id*. at 586-87 (citing John M. Conley & William M. O'Barr, *Rules Versus Relationships in Small Claims Disputes, in* CONFLICT TALK: SOCIOLINGUISTIC INVESTIGATIONS OF ARGUMENTS IN CONVERSATIONS 178 (Allen D. Grimshaw ed., 1990)).

evidence relevant to the legal claims at issue (i.e., the failure to pay rent), under most mediation frameworks practiced in small claims court, the mediators attempt to identify all issues that are important to all parties.[41] While relational issues tend to be irrelevant in a courtroom, they often constitute the heart and soul of the conversation in a mediation session. Lon Fuller described this as mediation's "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[42]

Studies of civil small claims mediation programs generally have found positive outcomes for the parties.[43] Research in the eviction mediation context is more limited, but likewise finds benefits. For example, a review of an ADR pilot program in the Baltimore City rent division found that both tenants and landlords reported a generally positive view of the experience on post-mediation evaluations.[44] The vast majority of participants reported that they felt heard by the other side (83%);[45] had enough time to say what they wanted to say (92%);[46] discussed all of the issues that brought

41. As Craig McEwen and Richard Maiman describe, mediation is based on principles of participation and consent. Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981). The mediator "encourages the parties to find a mutually agreeable settlement by helping them to sharpen the issues, reduce misunderstandings, establish priorities, vent emotions, find points of agreement, and ultimately, negotiate an agreement." *Id.* at 238.

42. Lon L. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

43. *See* Lorig Charkoudian, Deborah Thompson Eisenberg & Jamie L. Walter, *What Difference Does ADR Make? Comparison of ADR and Trial Outcomes in Small Claims Court*, 35 CONFLICT RESOL. Q. 7 (2017) (finding that parties who participated in ADR reported significant immediate and long-term benefits as compared to parties who proceeded to trial without ADR, including: improved party attitudes and relationship with each other; increased sense of empowerment and voice; increased likelihood of parties taking responsibility for the dispute; increased party satisfaction with the judiciary; and decreased predicted probability of returning to court in next year); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 LAW & SOC'Y REV. 323 (1995).

44. CENTER FOR DISPUTE RESOLUTION, UNIV. OF MARYLAND FRANCIS KING CAREY SCHOOL OF LAW (C-DRUM), REPORT ON THE 2016 RENT COURT ADR PILOT FOR THE DISTRICT COURT OF MARYLAND IN BALTIMORE CITY (2017), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1002&context=cdrum_fac_pubs.

45. *Id.* at 32-33.

46. *Id.* at 27-28. Out of 55 respondents, 50 agreed or strongly agreed that they had enough time to say what they wanted to say (92%), with nearly half (47%) strongly agreeing.

them to court (88%);[47] did not feel pressured to reach an agreement (81%);[48] would recommend the ADR process to others (86%);[49] were satisfied with the mediation (89%);[50] and were glad that ADR services are available (85%).[51]

The narrative comments that parties shared on their evaluations during the rent court ADR pilot confirmed the sense of voice evidenced in the data above. They included, for example:

- *This was a very easy process, it allowed me to speak with the other party in a relaxed setting[.]*
- *Both parties can speak.*
- *I learn't about the tennant's circumstances and resources available to help [.]*
- *Calming effect on parties to discuss all issues[.]*
- *Sitting at a table sometimes puts people at ease*
- *It was helpful to have a neutral third party hear our case.*
- *[I]t was good to be able to express differences in a controlled environment[.]*
- *It's helpful to get people to open up and work things out[.]*
- *It's a more compassionate way to settle differences[.]*[52]

During the ADR pilot, 81% of the cases referred to mediation reached an agreement.[53] Eighty-five percent of respondents agreed that the agreement met their needs.[54] Although mediation programs should not be evaluated based on settlement rates alone, the Maryland District Court ADR Program reports that failure-to-pay rent cases have the second highest settlement rate in mediation of all civil cases mediated in the statewide ADR program.[55]

While mediation may provide a sense of voice to some parties, this may not, on its own, warrant the establishment of eviction mediation programs. This would reinforce the perception some have of mediation as a "feel good" process that does not deliver bottom-

47. *Id.* at 28-29. The vast majority of participants, 88% (47), "agreed" or "strongly agreed" with the statement: "We discussed all the issues that brought us here." *Id.* at 29. There were five participants, however, who strongly disagreed with that statement. *Id.*

48. *Id.* at 29.

49. *Id.* at 30.

50. *Id.* at 31-32.

51. *Id.* at 34.

52. *Id.* at 34-35.

53. Thirty out of thirty-seven mediated cases reached agreement, twenty-three of which were "full" agreements and seven were "partial" agreements. *Id.* at 5.

54. *Id.* at 31.

55. *Mediation in the Rent Court*, DISTRICT COURT OF MARYLAND, https://mdcourts.gov/district/adr/home/rentcourt (last visited Mar. 25, 2020).

line benefits. Therefore, we must consider the fundamental question of whether mediation leads to positive outcomes for the parties, as well as the valid concern that tenants face the risk of exploitation in the mediation process.[56]

B. Day-of-Trial Eviction Mediation Programs

While research is limited, day-of-trial eviction mediation programs have been associated with positive outcomes. A study of a non-profit mediation program in Boston summary process cases found that mediation resulted in better overall results for tenants as compared to either court adjudication or a "hallway deal" with the landlord or its agent.[57] Notably, while adjudication *always* resulted in an eviction order, mediation averted this outcome in some cases.[58] While tenants lost all counterclaims asserted in the adjudicated cases, landlords agreed to reduce or waive rent in 10.8% of mediated cases due to housing conditions, and forgave or reduced back rent if the tenant moved out by a certain date.[59] Mediated agreements included other terms that could not be awarded by the court, such as positive references for future housing.[60]

A study of a mediation program conducted by a grassroots anti-poverty housing program in Northampton, Massachusetts likewise found that on the whole tenants fared considerably better in mediation than they did in court or informal settlements without mediation. The mediated agreements included payment plans in more than half of the mediated cases (58.8%), processes to maintain

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56. For articles about the potential risks of mediation for marginalized parties, *see, e.g.*, Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

57. Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 97-98.

58. While the landlord was awarded possession in 100% of the adjudicated cases, with no abatement of the rent and no order for repairs, 10.8% of the mediated agreements stated that the tenant would regain possession if the payment plan was fulfilled or if other conditions were met (including one agreement in which possession was contingent on the tenant entering an alcohol treatment program). *Id.* at 98-99.

59. *Id.* at 99.

60. Additional tenant benefits included the following examples:

> [O]ne landlord agreed to let the tenant store her furniture and boxes in a locked attic room. Another landlord agreed to speak to the other tenants in the building and request that they keep noise levels to a minimum when the defendant/tenant was in the building. One agreement even contained a provision stating that the tenant could avoid eviction by entering an alcohol rehabilitation program.

Id.

housing (41.2%), rent abatement (23.5%), and landlord agreements for repairs (9.8%).[61] Similarly, the 2017 review of the Baltimore City rent court ADR pilot found that 45% of the mediated agreements included a payment plan, 30% addressed living conditions and agreements to perform repairs, and 35% mentioned actions other than the rent or living conditions.[62]

Most poor tenants lack negotiation leverage in eviction cases, especially when they have no cognizable legal defenses to the non-payment of rent.[63] Even in these circumstances, however, mediators can assist the parties in negotiating a payment plan so tenants may remain in stable housing. A day-of-trial eviction mediation program in Franklin County, Ohio reports that it has "helped more than 3,500 residents annually avoid losing their homes through eviction."[64] The program states that mediation "is especially critical for tenants who have no legal defense, as their only hope of getting a pending eviction rescinded is if they work out a voluntary resolution with their landlord in mediation."[65]

If the tenant agrees to vacate the property during mediation, the parties can agree to a specific move-out date, providing the tenant additional time to secure new housing. Although the tenant may agree to vacate the property, a negotiated timeline for the move is far less traumatic than having an armed sheriff forcibly remove a family's belongings. Additional time may help the family to identify alternative living situations. Importantly, a mediated agreement allows tenants to avoid an eviction judgment on their record. With the wide accessibility of court records, some property owners bar tenants based simply on a record of a prior eviction filing record, even if the case was ultimately dismissed or if the tenant prevailed.[66] To address this problem, some states allow the parties to agree to expungement of any record of the initial eviction filing.

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61. *Id.* at 109.

62. C-DRUM, *supra* note 44, at 15-19.

63. Of course, tenants need a lawyer or at least basic legal information to understand whether they have any defenses. As described *infra*, some eviction prevention programs combine the provision of legal advice with mediation services.

64. *Housing Stabilization and Homelessness Prevention Program*, COMMUNITY MEDIATION SERVICES OF CENTRAL OHIO, https://communitymediation.com/mediation/mediation-for-individuals/housing_disputes/housing-stabilization-homelessness-prevention-program.html (last visited Mar. 25, 2020).

65. *Id.*

66. Some jurisdictions are passing eviction sealing laws or expungement laws to prevent access to eviction filing records unless a judgment is entered against the tenant. *See* Sophie Beiers et al., *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, AMERICAN CIVIL LIBERTIES UNION (Jan. 10, 2020), https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/.

C. Ethical Challenges

While helpful in appropriate cases, day-of-trial mediation in the eviction context presents an ethical minefield. While ethical tensions may be present in some form in all mediations, the enormity of the stakes and lopsided bargaining power present in eviction mediations strain four ethical principles: impartiality, neutrality, party self-determination, and role-slippage.

1. Impartiality

Mediators are required to be impartial, in the sense of not having any particular connection, sympathy, or identification with one party over the other.[67] In eviction cases, mediators might easily find themselves rooting for the tenant. This ethical quandary may even be baked into the eviction mediation program itself, if it defines its mission (officially or behind the scenes) as providing assistance to prevent an eviction and avoid homelessness. Conversely, some mediators may approach the mediation with the goal of accomplishing a payment plan or settlement at all costs. In their drive towards settlement, they may put undue pressure on tenants and favor the landlord's business interests in collecting the rent.

As discussed above, the inherent unbalanced power structure in eviction proceedings allows some landlords to pressure tenants into non-mediated "hallway" deals.[68] In these non-mediated negotiations, tenants have little opportunity to raise their own concerns and demands, such as rent abatement, payment plans, or repairs. As one tenant described after a "hallway negotiation" with the landlord's agent: "I tried negotiating. She didn't want to hear my side of the story but agreed to take my payments. Still, we have nowhere else to go. I didn't have a choice."[69]

Mediation might attenuate the concern about imbalanced opportunity to negotiate by inserting a professional third-party neutral to facilitate the process. Mediators can reshuffle the power relations between parties by providing the structure and time for the tenant to share her perspective and offer potential solutions. However, mediation may add yet another source of pressure on a self-represented tenant—a mediator's desire to maintain a high settlement rate. Mediators must check their own settlement statistics and ego at the door, and realize that from the tenant's vantage point, *no* deal might be better than a *bad* deal. It may be preferable for

67. AM. ARBITRATION ASS'N, AM. BAR ASS'N, AND ASS'N FOR CONFLICT RESOLUTION, MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard II (2005) (defining impartiality as "freedom from favoritism, bias or prejudice") (hereinafter MODEL STANDARDS).

68. JUSTICE DIVERTED, *supra* note 5, at 28-29.

69. *Id.* at 29.

some tenants to proceed in court rather than be forced into an unrealistic payment plan, or a settlement that exclusively favors the landlord.

2. Neutrality

Mediator ethical standards require that mediators maintain neutrality towards the issues under discussion, with no particular view as to how an issue should be resolved, what standards should be brought to bear, or who is 'right.'[70] Yet, given the lopsided bargaining power between self-represented tenants and many landlords, the potential for tenant coercion is enormous. Landlords also may lack legal knowledge, and may misstate the law during the mediation. Mediators might easily feel called upon to intervene by informing tenants of their legal rights, advocating for their interests, or appealing to landlords' sense of morality and conscience even when these are opposed to their financial interests and clearly stated positions. On the flip side, some mediators might inappropriately put pressure on tenants to settle for a payment plan, a confessed judgment, or other terms that favor the landlord.

3. Self-determination

Mediation is premised on the notion of party self-determination, often defined as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[71] Most tenants, however, lack basic information about their legal rights. The landlord may be in a position to make "free and informed choices" but most self-represented tenants are confused, fearful, and desperate to avoid homelessness. Even worse, landlords may misrepresent the law during the mediation. This put mediators in the Catch-22 of remaining neutral, which favors the landlord and coerces the tenant to make decisions based on incorrect information, or correcting the landlord, which violates neutrality, putting the mediator in the role of legal advisor and risking that the mediator may misstate the law as well. On the day of trial, tenants are under tremendous psychological pressure to agree to any terms presented by the landlord to keep a roof over their children's heads, even if the property has housing code violations or needs repairs. The shadow cast by the court (which is just down the hall) might loom so darkly that it compromises self-determination or essentially negates it.

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70. *See* Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16 SOC. & LEGAL STUD. 221 (2007).

71. *See* MODEL STANDARDS, *supra* note 67, Standard I.

4. Role-slippage

The ADR field debates the nature of the mediator's role and the essence of the service they provide to the parties: facilitating inter-party communication *or* providing case outcome evaluation.[72] It is widely accepted, however, that mediators are not the parties' lawyers, and that they are not to dispense legal advice or confuse the roles of advocate and neutral.[73] Nevertheless, in seeking to address power imbalances, it is easy to envision mediators providing parties, and particularly tenants, information about their rights or suggestions for legal maneuvers that would help them procedurally or substantively.

D. Addressing Ethical Concerns

1. Combined Legal Advice or Navigator-Plus-Mediation Model

To ensure mediator neutrality and assist tenants in making informed, self-determined decisions during a mediation, the ideal approach combines mediation with attorneys, ombudsmen, or other navigators who can advise tenants about their legal rights or represent them during the mediation. Several jurisdictions use this combined legal services and mediation approach. For example, a local Community Mediation & Restorative Services program in Minneapolis, Minnesota offers "housing stability mediation" in coordination with the court. The program increases awareness of the availability of pre-trial and day-of-trial mediation by including information about mediation services on the summons served on the tenant. The court facilitates the process by scheduling community mediators for every docket. In addition to mediation, tenants receive legal advice from volunteer attorneys at the courthouse. Some of the attorneys represent tenants during mediation, but most of the tenants receive information about their legal rights and then represent themselves in mediation.

In other programs, lawyers are present in the courthouse during the eviction docket. In the District Court for Baltimore City, for example, a walk-in legal aid office and a tenant advocate from the Public Justice Center are present in the courthouse. This

72. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996); Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Justice*, 82 MARQUETTE L. REV. 155 (1999).

73. The ethical standard under which this principle falls is "quality of the process." MODEL STANDARDS, *supra* note 67, Standard VI(A)(5) (stating "[t]he role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession is problematic and thus, a mediator should distinguish between the roles").

theoretically allows mediators to pause the mediation session so tenants can seek legal information and advice before agreeing to a settlement. Given the time constraints of the docket, however, this may not always be realistic.

Some courts provide non-lawyer "navigators" to help self-represented tenants respond to failure-to-pay-rent petitions. A study of a Navigators Pilot Project in Brooklyn Housing Court found that tenants assisted by navigators "were 87 percent more likely than unassisted tenants to have their defenses recognized and addressed by the court," and that judges ordered property owners to make repairs 50% more often in navigator-assisted cases.[74] While lawyers are still the preferred approach, navigators could be helpful in a mediation program context as well. Navigators perform a triage function, helping those tenants who have cognizable legal defenses to assert them in court, and assisting others to negotiate agreements for rent abatement, payment plans, repairs, or other terms the court cannot award.

Regardless of the model used, programs should not place mediators in the dual role of advocate-mediator, or presume that parties can process legal standards without the assistance of a lawyer or some other type of navigator or ombudsman. One Massachusetts eviction prevention mediation program provided a book of legal information, dubbed the "authoritative legal resource," that parties could consult during mediation sessions.[75] This approach is not advisable. Without interpretation and application to the unique facts of the case by legal counsel, statutes are simply confusing words on the page. Inevitably, the parties may ask the mediators what the information means, which implicates the role-slippage problem described above. This approach may also present significant barriers for tenants who have limited literacy or language barriers.

In another Massachusetts program, the mediators were educated about the law and expected to provide legal information to tenants during mediations.[76] This approach violates mediator ethical standards by putting the mediator in the position of playing the role

74. REBECCA L. SANDEFUR & THOMAS M. CLARKE, ROLES BEYOND LAWYERS, SUMMARY AND RECOMMENDATIONS OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 4 (Dec. 2016), http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf. The study was funded by the American Bar Foundation and the National Center for State Courts.

75. Joel Krutzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 93-94.

76. *Id.* at 111-12.

of both attorney and neutral. Mediators and court ADR programs should avoid the liability risks inherent in such an approach.

2. Neutral Protocols and Forms

Eviction mediation programs should ensure that their protocols and standardized forms do not include baked-in biases for a particular party. For example, the court in Ramsey County, Minnesota developed a form settlement agreement for its eviction mediation program. The form includes preprinted boxes that the parties and mediators can use to check off provisions of the deal. Many of the preprinted categories on the form favor the landlord's interests (dates and amount of rent the tenant will pay). While this may provide a framework for negotiating a payment plan, the form lacks preprinted sections addressing common tenant interests, such as rent reductions or repair agreements.

Programs must develop neutral forms and practices to ensure that the voices, interests, and needs of all parties can be part of the process. Forms also should include open-ended portions to allow the parties to define the terms appropriate for their situation.

3. Training for Mediators and Judges

To address impartiality concerns, programs should provide extensive training to mediators. Mediators should understand the general legal landscape in which these cases occur and the complex psychological dynamics involved in these matters. Mediators should know the professional resources available for the parties, and pause or conclude the mediation if parties would like to seek information or advice before agreeing to a settlement.[77] This is most feasible, of course, when mediation programs, legal services, and rental assistance programs work cooperatively in the same courthouse.

In addition, judges who preside over eviction cases should be educated about the mediation process. Judges who are accustomed to resolving eviction cases in a matter of minutes need to understand that the mediation process requires significantly more time to play out. The mediator needs to explain the process and have the parties sign participation agreement forms. The parties then need time to tell their respective stories and negotiate a potential resolution. While many judges think that mediation is more "efficient" than

77. Mediator ethical standards encourage mediators to inform the parties of their right to consult "other professionals to help them make informed choices." MODEL STANDARDS, *supra* note 67, Standard I(A)(2). This is often unrealistic in the midst of a day-of-trial mediation involving self-represented parties who must reach a deal to stop an eviction order. Having legal services and rental assistance resources in the same courthouse may help to facilitate informed decision-making by the parties.

litigation, a quality mediation process will not be faster than the typical five-minute judicial hearing in an eviction action. To allow time for a quality mediation process, programs should consider scheduling the docket so that the parties can first attempt to mediate—either at an earlier date or earlier in the morning. If the parties do not reach agreement during mediation, the case could proceed later in the afternoon or on a different date.

Courts should not evaluate mediation programs or mediators based solely on settlement rates. This creates undue pressure on the mediator to violate ethical limits.[78] Judges should be educated about the mediation process and the goals of the program as well. Judges should be encouraged to refer cases to mediation when they think appropriate or when the parties request it.[79]

Docket efficiency gains from mediation should be evaluated over the long term. Research in the small claims context has found that if the parties reach agreement in mediation, they may be less likely to return to court in the future.[80] The study also study found that parties who participated in mediation were more likely to report that the *court* cared about them, regardless of whether they reached agreement in mediation.[81] And, we suggest, efficiency assessments should expand beyond immediate docket clearing and take into account efficiency benefits of mediation as compared to other publicly funded systems beyond the courthouse. If a case takes a couple hours to mediate but saves parties dozens of hours of future interaction with other public systems (health, homeless services, education, employment, etc.), focusing only on judicial resources makes little sense, given they are all ultimately funded from the same state budget.

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78. The Model Standards of Conduct for Mediators provides: "A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressure from court personnel, program administrators, provider organizations, the media or others." MODEL STANDARDS, *supra* note 67, Standard I(B) (self-determination).

79. One of the reported challenges of the rent division ADR pilot in Baltimore City, for example, was the lack of referrals to mediation when the parties requested mediation. The program is set up such that a landlord or tenant must "request" mediation by filling out an orange paper form. The review of the pilot found that even when parties had filled out the form requesting mediation, some judges simply ignored them and proceeded to the hearing. C-DRUM, *supra* note 44, at 13-14 (noting that about half of the cases in which a party requested mediation was referred to mediation by the judge). At a minimum, courts should make parties aware of the availability of mediation services and allow them to mediate when both wish to do so.

80. Charkoudian, Eisenberg, & Walter, *supra* note 43, at 21 (finding that small claims cases that reached agreement in ADR were 21% less likely to return to court for enforcement action within one year as compared to cases adjudicated by the judge, settled by the parties in the "hallway" without ADR, or not settled in ADR).

81. *Id.* at 26.

Thus far, we have discussed the benefits that mediation may offer to parties and the system even when conducted under significant constraints: last minute, in the courthouse, with eviction looming, power imbalances at their utmost, and a judge down the hall ready to hear the matter. Next, we explore how reducing these constraints by implementing mediation before, rather than at, the courthouse can offer parties and the "system" far more significant benefits. We begin by exploring the potential of pushing this intervention back before the sharpest conflict watershed, with mediation taking place before the filing of an eviction action. Next, we consider moving such intervention even further upstream in the rental relationship.

III. PRE-FILING COMMUNICATION AND MEDIATION

Some evictions might be prevented if property owners and tenants communicated earlier in the life of an emerging problem. Tenants may be reluctant to speak up about life circumstances—for example, a job loss, unexpected medical cost, or family emergency—that imposes a temporary hardship that affects the ability to pay rent. Some landlords are willing to work with tenants who proactively raise issues and attempt to work out a plan. Tenants also may need assistance requesting repairs to the property. Emerging technological applications provide tenants with tools to facilitate communication about late rent and needed repairs. For example, a consortium of law schools and technology companies collaborated to design a free, web-based program called "Hello Landlord." The platform assists tenants in generating letters to their landlords when they cannot pay the rent or need to request repairs.[82] The program seeks to provide an "upstream solution" that targets "a communication gap" when tenants feel powerless or hesitant to reach out to landlords about a missing payment or other rental issues.[83]

When bilateral communications between the property owner and tenant fail, the parties may need the assistance of a neutral mediator to facilitate their conversations. To be most beneficial for all parties involved, mediation should occur well in advance of an eviction filing. This reduces sunk costs on the conflict—costs that can

82. *See* HELLO LANDLORD, https://hellolandlord.org/about/. The program "was created by LawX, the legal design lab at BYU Law School, the Innovation for Justice (i4J) Program at the University of Arizona College of Law, and SixFifty, the technology subsidiary of the law firm Wilson Sonsini Goodrich & Rosati." *Id.*

83. *Landlords Do Not Want Eviction: A New Online Tenant-Landlord Communication Tool to Help*, RENTAL HOUSING J. (Aug. 7, 2019), https://rentalhousingjournal.com/landlords-do-not-want-eviction-a-new-online-tenant-landlord-communication-tool-to-help/.

sometimes challenge resolution even more than the original conflict trigger (e.g., late payment of rent) does. Pre-filing mediation also helps tenants to avoid a stain on their rental history that could impair future housing opportunities. Finally, pre-filing mediation gives the parties more time to procure rental assistance and other resources to avoid an eviction or plan for a mutually agreeable move out date.

Pre-filing mediation also offers process flexibility and convenience lacking in the court process. Mediations can be scheduled at times and locations mutually convenient for the parties, including evenings and weekends. This allows the parties to avoid taking time off work. Once the case enters the court system, scheduling is out of the parties' hands and a failure to appear can result in the loss of one's case.

In addition to efficiency and convenience benefits, the mediation process itself can model effective communication and problem solving and help the parties to build a stronger relationship. In this sense, not only does pre-filing mediation resolve the immediate problem, it also acts to build constructive patterns for future conflicts. Day-of-trial mediation arrives at the end of a sharp conflictual interaction and focuses on putting out the presenting fire (i.e., non-payment of rent) rather than addressing the range of issues important to both parties in the rental relationship.

IV. UPSTREAM CONFLICT RESOLUTION STRATEGIES

The complexity of the eviction crisis requires us to think beyond the specific dispute resolution process to use in a particular eviction case already filed in court. To be sure, adding mediation as a pre-trial or day-of-trial option may serve as a safety net and provide the benefits described above for some parties. But this will not dam the river of eviction matters rushing towards adjudication; at best, on its own, the effect of these programs is akin to a stone that slightly alters the river's flow.

Given the complexity of the eviction epidemic, we need to apply a wider "ADR lens," one that does not zoom in on mediating eviction cases but rather identifies and addresses brewing problems at an earlier stage. Identifying how this wider ADR perspective might be helpful requires loosening our focus on eviction conflict per se, and instead exploring the underlying sources of conflict, which may be structural (systemic poverty and a dysfunctional legal process) or relational (patterns of interaction and communication between property owners and tenants). Exploring discrete interactional stages of the rental relationship through conflict analysis and dispute resolution glasses allows us to recognize the moments fraught with potential for conflict generation and escalation. We also should look beyond the rental relationship itself to examine how conflicts in other aspects of the tenant's life—their

employment, health, family dynamics, etc.—may lead to adverse consequences that put the tenant on a path towards housing instability.

A. Structural Conflicts and Early Intervention Programs

For many tenants, the source of conflict leading to eviction is structural, not relational:[84] the tenant simply does not have sufficient income or resources to pay the rent. This may be a temporary job loss or a sudden medical bill, or it may be more systemic poverty and lack of affordable housing options. Given the structural nature of the conflict, neither traditional litigation nor mediation will address the full scope of the problem. We need policy reforms that increase affordable housing, provide rental assistance, and attack the systemic causes of poverty.

Even so, there may be ways to assist tenants at the nascent stages of a crisis. Some jurisdictions have developed collaborative intervention programs that attempt to address problems at an earlier stage to avoid later evictions. These programs seek to reduce evictions and homelessness by supporting the tenant in resolving non-housing issues (employment, health, etc.) that may later affect their ability to pay rent.

San Francisco's Conflict Intervention Service ("CIS") provides one of the best examples of an upstream eviction prevention program.[85] CIS attempts to identify tenants at risk of missing rental payments and intervenes early to help the tenant resolve many different types of conflicts. CIS broadens the definition of "mediation" into problem solving of all kinds. CIS "mediators" help tenants resolve conflicts with social service providers and other entities to keep the tenant's housing situation stable.[86] Social service providers refer tenants to CIS as soon as they encounter difficulties that could later affect their financial and housing stability.

Another Eviction Diversion Program in Kalamazoo, Michigan brings together state health and human services, public assistance, tenant legal services, nonprofit charitable organizations, and the

84. Christopher Moore theorizes that conflicts arise from a variety of sources, including: structure, data, values, interests, and relationships. CHRISTOPHER MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (3d ed. 2004).

85. Roger Moss, *Conflict Intervention Service: How an Innovative Mediation Program Prevents Evictions*, BAR ASS'N S.F. (Sept. 26, 2018), https://blog.sfbar.org/2018/09/26/conflict-intervention-service-how-an-innovative-mediation-program-prevents-evictions/.

86. These are not "mediators" in the traditional sense. They seem to serve a variety of functions—such as ombuds, social worker, navigator, advocate, and conflict resolver, depending upon the needs of the tenant.

judicial system to provide resources to deter evictions.[87] The program attempts to find solutions before an eviction filing, when tenants are no more than three months behind on their rent.

The Program continues to support tenants if the property owner ultimately files for eviction. On the day of the hearing, attorneys from legal aid or law school clinical law programs conduct intake with tenants as they check in for the day's docket. The tenant receives legal advice about her rights and options. An attorney may assist the tenant in negotiating a deal with the property owner to avoid eviction. Qualified tenants may receive bridge funds to pay the rent. The program may help tenants find affordable housing to avoid homelessness. Importantly, landlord attorneys and judges are typically supportive of the program, which not only helps tenants avoid eviction and stay in their homes, but also decreases court dockets and the landlord's expense in pursuing evictions capable of resolution. This combination of early intervention work plus legal services and mediation at the courthouse has had significant impact: eviction judgments in Kalamazoo have decreased by 73% and homelessness is down 9%.[88]

Beyond early conflict intervention strategies, there are other programs which, while not mediation-focused, provide tenant services that could be augmented with conflict-specific aims and expertise. Amongst these are low-income housing programs that take a holistic approach to promoting housing stability for vulnerable tenants.

The non-profit program CommonBond, for example, provides support to tenants in order to help them achieve independence in three foundational areas: education and advancement, community building and engagement, and health and wellness.[89] While not a mediation program per se, CommonBond emphasizes the need to listen to and support residents in navigating complex systems and overcoming conflicts in the foundational areas of their lives. There may be opportunities to integrate mediation services into programs such as CommonBond to help tenants address conflicts as early as possible.

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87. According to one report, "[t]he project brings together representatives from the Department of Human Services, Legal Aid of Western Michigan, Eighth District Court, United Way, the City of Kalamazoo, 2-1-1- and Housing Resources, Inc." a non-profit that assists individuals experiencing a housing crisis. Kathy Jennings, *Working Together to Keep People in their Homes*, SECOND WAVE (May 17, 2012), https://www.secondwavemedia.com/southwest-michigan/features/2lesshomelessness0517.aspx.

88. *Id.*

89. *See* COMMON BOND COMMUNITIES, https://commonbond.org/advantage-services/ (last visited Mar. 30, 2020).

B. Relational Conflict Escalation

While many tenants experience eviction as one of the collateral consequences of structural poverty, evictions may also result from a pattern of conflict interaction between the parties to the rental relationship.

Evictions are not born in the courthouse, nor do they magically come into being at the moment the landlord files a court complaint. The presenting cause is typically the tenant's non-payment of rent. Inevitably, events, circumstances and conditions occurring long before non-payment of rent affected or determined whether rent would be paid, as well as whether this would result in an eviction action. Some of these events, circumstances, and conditions relate to realms familiar to those working in the housing or poverty law fields. For example, events related to employment, health, and family circumstances feed into an inability to pay rent later down the line.[90]

Other eviction triggers may relate to patterns of interaction between the property owner and tenant. For example, a tenant may withhold rent due to a lack of communication or action from the landlord to make a promised repair. A landlord may use an eviction filing to "communicate" with a tenant who has been avoiding the landlord's calls. A tenant may avoid the landlord's calls because she feels embarrassed to share events happening in her life that may be impacting her ability to pay rent.

Considering the eviction crisis through the lens of conflict theory offers a 'root cause' approach to understand, first, how something becomes a conflict in the first place and, second, how conflicts escalate in scope and intensity over time. Taken together, these models may help to explain the sources of conflict, which may be structural (lack of affordable housing, lack of access to legal services, and lack of access to health services, to name a few) or interactional (the path from peaceful rental relationships to full-blown, take-no-prisoners conflict across many contexts). Understanding these sources and patterns of conflict may identify opportune "off-ramps"—points at which a situation may be resolved earlier by addressing the structural or relational tensions causing the conflict.

1. Conflict formation

Richard Felstiner, William Able, and Austin Sarat have theorized that 'issues' or 'problems' become 'disputes' or 'conflicts'

90. For example, a death in the family might incur immediate burial and funeral costs, causing the family to fall behind on rent. The impact would be more severe if the deceased was a primary wage earner for the family.

by going through three stages of transformation, which they dub "naming, claiming and blaming."[91]

a. Naming

The first transformation leading to conflict is the situation's shift from being an "unPIE" to a "PIE"—that is, from an unperceived injurious experience, to a perceived injurious experience. "Perceiving" an injury means consciously recognizing that something harmful has occurred to us. We experience many potential slights over the course of a day that we may tune out. Imagine walking down a city street and being bumped by others or overlooking an unreturned text or phone call. Most of the minor harms and distresses we go through in the course of our lives remain unPIEs. Recognizing or *naming* the event and the harm--"I called the tenant about the late rent and she is ignoring my calls"--transforms the slight into a PIE.

b. Blaming

The next step along the path to conflict occurs when we attribute the PIE to the fault of someone else and believe that *they* should do something to rectify the situation. Your injurious experience has transformed into a grievance, which includes blame for the past and expectations for the future. However, we may keep this grievance to ourselves, rather than continue along the path to conflict. In fact, we do so most of the time.[92]

c. Claiming

In some cases, we decide to air our grievance directly to the person, entity, or organization we believe to be at fault, and express

91. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631 (1981).

92. In the legal dispute literature, this is known as 'lumping it': having cause for a legal claim, but preferring not to pursue it. As the benefits are outweighed by the time, costs and effort of pursuing the claim; even if you are sure you will win—the odds of which add yet another factor—risk—to the economically driven choice of pursuing a conflict. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). The conflict literature provides other reasons for not advancing a claim, suggesting that many people are conflict-avoidant and consciously or unconsciously refrain from advancing their grievances to the claiming phase. *See* BERNARD MAYER, THE DYNAMICS OF CONFLICT 42-47(2d ed. 2012). We introduce lumping it and conflict avoidance at this transformational stage, as this is where it is most common; of course, people who have pursued an issue through to the claiming stage often choose to lump legal disputes, or to avoid conflict, once it has already fully transformed.

our expectation that they take action to remedy the situation. This is called claiming. At this point we are on the brink of conflict, but it is not fully formed.

If the landlord confronts the tenant, reprimands them for being late with the rent, and demands immediate payment, two paths divide. On one path, the tenant responds and pays the rent. On the other, the tenant says "I don't owe you anything—you need to fix the leaky roof first, then I'll pay you rent," or even, "I don't have it now, I'll pay you in a week." Down the first path, the situation is defused. All the alternatives on the second path, on the other hand, lead to conflict. Conflict comes to life the moment we make a claim, and the other party *rejects* it. Rejecting our claim might take the form of saying "No" (or far less polite things) explicitly. It might take other forms, such as saying, "I'll get back to you" and not doing so. It might take the form of a counteroffer, which essentially rejects our claim before offering something else.

2. Conflict Escalation

Once conflict emerges, it typically does not subside or resolve on its own. It continues to transform, usually in an escalatory fashion.[93] Dean Pruitt and Sung Hee Kim[94] describe five types of transformations that commonly occur as conflict escalates:[95]

Conflict turns from light to heavy: Parties sharpen their tactics, responding to a previously sharpened tactic by their counterpart. A tenant confronts a landlord, requesting repair of the broken light fixtures in the hall. The landlord agrees, but fails to fix the lights. The tenant begins calling the landlord weekly, then daily. The landlord screens the tenant's calls. The tenant begins leaving garbage bags out in the hallway, underneath the light fixtures, rather than disposing of them. The landlord notifies the tenant she is in behavioral violation of the contract. The tenant writes back that she is withholding rent until the light fixtures are repaired.

Conflict moves from small to large: Single-issue conflicts turn into multi-issue conflicts, and as they do, each party incrementally

93. Escalation, as a term, can express one party using sharper tactics, intending to increase the pressure on their counterpart in excess of the pressure they experienced at the previous phase. It can also mean that, overall, the intensity of the conflict as experienced by both parties and perhaps by all around them has risen. These meanings overlap, largely because as one party takes escalatory action towards the other, the other responds in kind; the outcome is that the overall conflict intensity has risen. *See* DEAN PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 88-89 (3d ed. 2004).

94. *Id.* at 88-92.

95. Note that these transformations do not all always occur, nor do they appear in any particular sequence, but all are commonly observed in conflict.

commits increasing resources to the conflict. Consider this scenario: a conflict over a few days' delay in paying the rent transforms as the landlord accuses the tenant of a series of behavioral infractions. The tenant, in turn, responds by accusing the landlord of failing to fix windows that allow cold air and rain to seep in, raising the utility bills. The tenant demands that the landlord replace or seal the windows and pay for the utility costs. The landlord threatens eviction for failing to pay rent. The landlord files for eviction.

Conflict over specific issues become general conflicts: Sometimes a conflict about a single issue snowballs into a much larger dispute. For example, a landlord informs a tenant she has received complaints about noise from a neighbor, and he needs to keep it down. The tenant tells the landlord to install insulation in the paper-thin walls if she wants quiet in the building. The landlord informs the tenant she has received multiple complaints about the tenant regarding noise and smoke coming from the apartment. The tenant calls the landlord a slumlord and starts to ignore the landlord's calls. The landlord files for eviction.

Parties' goals shift and orient against the other: At some point during a conflict, parties stop perceiving the situation as an attempt to better their situation or to prevent the other from harming them. Instead, they want to *win*—to achieve an outcome that betters their situation *more than the other party's outcome betters theirs*. As conflict continues to transform, parties may no longer focus on their own outcome or situation at all; instead, they focus on causing or maximizing harm to the other party.

At first, a landlord might file for eviction in hopes of getting unpaid back rent, as they need the cash for some repairs around the property. When the tenant refuses to pay, the landlord wants to get their money back and "teach the tenant a lesson." By the time they reach court, the landlord may want to drag the tenant through the legal mud, kick them off the property, and put a mark on their permanent record—even though none of this brings them any closer to effecting the repairs they had hoped to make.

The number of people involved grows: Even when a conflict begins between two individuals, the number of individuals involved tends to multiply over time. Consider this scenario: a property manager might bring in the landlord and an attorney to engage with a tenant who is behind on their rent. The tenant might involve friends and family, housing and welfare services, attorneys, other renters on the property, etc. This results in more interactions, more voices, and an audience effect that escalates conflict.

3. Attribution Theory

An additional concept known as "attribution theory" is helpful for understanding why people make the shift from naming to blaming and claiming; as well as for understanding why people tend to respond to each other's moves with more intense escalatory tactics. Attribution theory suggests that our beliefs—conscious or unconscious—about why another person took the action he did influence our interpretation of and response to that action.[96]

One commonly encountered pattern is called "false attribution error": when someone does something that harms us, we tend to attribute her actions to her disposition or character, rather than her circumstances.[97] For example, when a tenant fails to pay rent, the landlord is likely to assume that the tenant is a freeloader, rather than consider whether the delay is due to an unfortunate hardship.

A closely related judgmental pattern is called "actor/observer bias": we tend to ascribe our own harm-causing actions to our circumstances, whereas we ascribe others' actions, similar as they may be, to their character.[98] If I, as a landlord, fix a broken water heater two weeks after the date by which I promised to do it, I will explain to myself that this reasonable delay happened because I was very busy and had a lot of work to do. But if my tenant pays the rent two weeks late, I may view this as ugly behavior that stems from his poor character.

Another form of attribution is "negative or sinister attribution,"[99] which occurs when someone does something that harms us, and we ascribe this harm not to circumstances, and not even to their character, but to their *intent.* We assume that the actor was targeting us, specifically, and that their motive was malevolent. For example, if our tenant does not pay the rent on time, we might not attribute this to their circumstances or even to their character as, for example, lazy freeloaders. Instead, we may perceive that they did this because they are out to harm us in particular, seeking to make us miss our mortgage payment or go into bankruptcy.

Returning to the conflict formation and escalation patterns discussed above, it is easy to see how attribution plays a role in

96. For discussion of the different types of attribution mentioned in this section, see Keith G. Allred, *Anger and Retaliation in Conflict: The Role of Attribution, in* THE HANDBOOK OF CONFLICT RESOLUTION 236 (Morton Deutsch & Peter T. Coleman eds., 2000).

97. *Id.*

98. *Id.*

99. For discussion of this form of attribution, see Roderick Kramer, *The Sinister Attribution Error: Paranoid Cognition and Collective Distrust in Groups and Organizations,* 18 MOTIVATION & EMOTION 199 (1994); see also Barbara Lopes et al., *Coping with Perceived Abusive Supervision: The Role of Paranoia,* 26 J. LEADERSHIP & ORG. STUD. 237 (2019).

moving the conflict along the formation and escalation spiral. When someone does something that harms us, we may attribute it to their poor character or hostile intent. As a result, it is hard to consider not blaming them, and not airing our grievances and demands. Moreover, when we experience someone else's escalatory behavior, we are pre-wired to interpret this not as a rational defense to our own previous escalation; rather, we are conditioned to see it as proof that the other person sought to harm us intentionally, out of the hostility they bear towards us. Naturally, our next move is likely to ratchet up the conflict even more. And remember—even as attribution carries us through these transformations, it is doing the same thing to our counterpart.

4. Opportunities for Upstream Relational Conflict Intervention

In our working session at the symposium,[100] we asked participants in the group (which included field workers in housing and poverty support agencies, attorneys representing tenants and corporate landlords, court staff and housing court referees) to share some common stories leading to eviction based on real or an aggregation of real cases. During this conversation, many participants emphasized the number of evictions that could be avoided if landlords received training in basic conflict resolution skills.

Participants stressed that it is imperative for landlords to understand the value of establishing positive communication and problem-solving relationships with tenants. They suggested that different jurisdictions could provide these trainings as a condition of granting a rental license. The participants emphasized that landlords should be educated about the potential benefits of using mediation and other conflict resolution interventions at the earliest possible stage.

One study found that landlords and property managers serially use the eviction process and the threat of eviction as a means of debt collection, not to regain possession of the property.[101] If landlords

100. This article was written as part of the Mitchell-Hamline School of Law 2019 Symposium, *An Intentional Conversation about ADR Interventions: Eviction, Poverty, and Other Collateral Consequences*. The participants in our group included attorneys representing tenants and property owners, judges and housing court personnel, non-profit service providers, and anti-poverty organizations.

101. Philip M.E. Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & COMMUNITY 638 (2019). The housing laws in some jurisdictions provide an incentive for the landlord to file for eviction as early as possible, rather than work things out with the tenant. For example, in Baltimore City, the tenant's right to redeem (or "pay to stay" in) the property is foreclosed after four eviction judgments. This may encourage landlords to rack up at least

understood that non-court conflict resolution processes could help them communicate with tenants and facilitate feasible payment schedules, that might decrease the use of the court eviction process as a rent collection mechanism.

In addition to landlord education, the symposium participants identified key points along the lifespan of the rental relationship that had high conflict potential. Timely intervention at these stages might de-escalate conflict, address problems at an earlier stage, and prevent a later missed rent payment or eviction filing.

The chart found at Appendix A summarizes the collective thinking of our session participants, as well as some after-the-fact application of the conflict dynamics theory described above, to the stages in the rental relationship ripe for conflict interventions or mediation. At these points, party communication could be facilitated, expectations could be clarified, questions could be posed, problems could be addressed, and cooperative communication could develop and be nurtured. Combined, these present a map of the conflict generation, escalation, prevention, and resolution potential identified at each stage of rental relationship.

For many—perhaps most—tenants affected by the eviction crisis, the systemic problem leading to the missed rental payment is structural poverty and lack of affordable housing, not necessarily a pattern of conflict escalation with the property owner or its agents. Even in these circumstances, however, earlier communication about emerging financial problems or repair issues may help the parties de-escalate conflicts, connect them with resources and rental assistance, and prevent later eviction filings.

V. CONCLUSION

While neither traditional litigation nor mediation approaches alone can fully address the eviction epidemic, a coordinated response that integrates early conflict intervention services and mediation options may help to prevent many evictions. In addition, both parties in the rental relationship, especially landlords, should be educated about how their patterns of interaction in the early stages of the rental relationship and as problems arise have the potential to escalate conflict in destructive ways. Likewise, tenants need education and support to facilitate early communication and problem solving with property owners as soon as problems in any aspect of their lives emerge that may later impact their housing stability.

Finally, courts, eviction prevention programs, tenant advocates, and property owner associations should collaborate with community

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three eviction judgments, giving them greater power to remove a tenant upon a fourth filing.

mediation and law school ADR programs to identify opportunities for the integration of conflict de-escalation measures. Early mediation and conflict intervention strategies may help to alleviate the need for eviction filings in the first place, and resolve such cases in ways that avoid the devastating systemic impacts of eviction for families and the larger community.

APPENDIX A: OPPORTUNITIES FOR CONFLICT INTERVENTION IN THE LANDLORD-TENANT RELATIONSHIP

Stage	**Description**	**Conflict potential**	**Internal Opportunities**	**External Interventions**
Showing the property	The owner or its agent (hereinafter "landlord") shows the residence to the prospective tenant. The landlord points out the benefits of the property and its facilities, and gauges the viewer and their suitability. The viewer assesses the residence's suitability.	Parties on their best behavior, rather than sharing realities. Landlord "selling" property, glossing over flaws, making promises to fix, etc. Asymmetric information exists. The tenant may not understand their rights or know what questions to ask. Discussion centers on everything going right, not on what can go wrong	Opportunity to share information	Opportunity for tenant education about general legal rights and questions to consider at this stage
Application submission	The prospective tenant generally fills out a questionnaire and provides personal information. Often, the tenant pays a non-refundable application fee. The landlord reviews the application	This process serves only the landlord's interests, causes information imbalance, and is funded by tenant. Tenant invests effort in filling out forms, money, and time waiting for response		Housing referral agencies could vet landlords, or collect reputation information, and publish it, to balance information. Online landlord reputation sites could be supported and improved. Specifically, such sites could

	and/or submits it to a tenant screening agency for a review of the tenant's history, etc.	at this stage. These sunk costs weaken their negotiation power and reduce their tendency to withdraw in the face of poor conditions or practices. Bad-apple landlords use this stage as a money-making opportunity —screen applicants one at a time, accept the first who passes, keep the rest of the fees even if rest of applicants are not screened.		provide information on application-fee scams. Passage and enforcement of laws to prevent application fee scams.
Lease negotiation	The landlord provides a form contract, filling in most of the details—e.g. rental term, rent, security deposit, and other terms—themselves. Lease is contract of adhesion and tenants have little to no power to negotiate, but may be able to ask for accommoda-tion on	Information imbalance One-time vs. experienced landlord One sided: Tenant's duties, landlord rights Tendency to focus on positional bargaining, or no realistic opportunity for tenant to negotiate	Opportunity to put tenant-specific information in the lease—e.g., date of rent payment; Opportunity to clarify process for early problem solving	Housing advocates and referral agencies could review specific contracts to provide advice. They could maintain a collection of leases landlords use, and advise tenants about potential unlawful clauses and points worthy of negotiation Community mediation centers could offer lease negotiation assistance,

	specific issues (e.g. rent payment date)			during which parties could clarify expectations, define a process for resolving disputes, and raise issues.
Handover of keys	The new tenant receives the keys and the right to inhabit the home. Sometimes, this is done at a joint meeting at the home, other times in a property management office.	This might be the first time the tenant sees actual home. May have been promised a different unit. Perhaps repairs or maintenance were not completed, or housing code violations exist. Tenant may attribute bad motives to the landlord	This is a significant moment in the relationship. Landlords could enact rituals and processes aimed at enhancing trust, mutual responsibility, and ongoing communication throughout the relationship.	Housing agencies could develop a checklist for documentation of repair issues upon move-in, to be provided to tenants and landlords. Landlords should develop early conflict resolution protocols to encourage tenants to raise issues as soon as possible Courts should educate landlords and tenants about available mediation services from the court, law school clinics, or community mediation programs
First problem report by tenant	At some point during the rental, the tenant approaches the landlord to raise an issue or make a request. This name, blame, claim process might be a reminder of promises	From landlord's perspective, this is the first opportunity to label the tenant as a "trouble-maker," or to establish patterns of open communica-tion and	Opportunity to improve property, to overcome a challenging moment, to review the lease, to communicate and resolve issues as they arise	Early intervention programs that help tenants communicate issues to landlords in constructive ways, and that also protect their legal rights by providing

	made in the showing or the lease negotiation that have yet to be fulfilled, a maintenance issue, a complaint about another tenant on the property, or anything else.	problem-solving First time landlord stands to spend/lose directly on this tenant. The topic may be one not specifically mentioned in the lease, or be a matter of perception. Landlord rejection of the claim instigates conflict, which might escalate.		record of communication Online communication support programs, such as "Hello Landlord"
First problem report by landlord (other than demand for rent)	The landlord approaches the tenant to raise an issue or make a request. This might be a reminder of promises made in the showing or the lease negotiation that have not been fulfilled, a request to maintain the premises in a better condition (e.g., noise, trash, yard, smoking, parking)	The topic may be one not specifically mentioned in the lease, or be a matter of perception. The tenant may feel in the right, and the landlord may rely on a power-based, command approach Tenant might feel third parties are to blame for the situation. Tenant rejection of the claim instigates conflict,	Opportunity to improve property, to overcome a challenging moment, to review the lease, to establish constructive problem solving. Opportunity to convene conversations involving others and reach group understandings.	Landlord certification can require basic communication and conflict resolution training and make landlord aware of community supports for difficult conversations, such as community mediation

		which might escalate.		
First broken promise on either side	This may precede the events described above, or follow them. It is a general catch-all name for the first occurrence of a promise being broken, or perceived as being broken. This could be a late rent payment, a delay of handing over the keys, a failure to show up on time and fix something, or anything else. The focus here is on the breach of a promise or lease provision, not its reporting to the other party.	Triggering of the conflict "name and blame" spiral The party who feels wronged now views the other party in a different light (negative attribution). This changes their perception not only of the harmful act, but of the other's character, intentions, trustworthiness, or integrity.	Opportunity to initiate a conversation, to consult outside experts (lawyers), to ask an outsider to intervene.	Landlord certification can require basic conflict resolution training and make landlord aware of community supports for difficult conversations, such as community mediation Lease can clarify conflict resolution processes, including mediation
Late notice	The tenant has not paid rent on time, and has received notice in some form (letter, text, angry call from landlord) that they must pay by certain date or legal action may be pursued	False, negative, or sinister attribution error kicks in on the landlord's side with the missed payment; it may kick in on the tenant's side with the late notice, especially if the tenant perceives the	The moment of demand is also a moment to defuse: In this typical name, blame, claim situation, conflict can be avoided by handing over a check, or apprising the landlord of special circumstances and agreeing to	Lease can clarify grace period for rent due date and process for notifying the landlord of the need for special accommodations in the event of hardship

		landlord's demand as hostile The standard wording of the notice might include some ominous threat of legal proceedings or 'full extent of the law'. Ominous meanings might be read into benign wording.	alternative payment date.	
Eviction preparation	The landlord prepares the paperwork necessary for eviction or hires and attorney or agent to do so for them.	Investment—time, money or both—in the eviction proceeding. The conflict may have been handed over to someone else (an agent or lawyer), and involving their set of interests makes it harder to walk things back. Tenant initiatives might be ignored by the landlord: "It's out of my hands."	At this point, eviction preparers might review tenant's record to see if this is isolated incident or on-going pattern	Opportunity for mediation or early conflict intervention services to identify the cause of the late payment, especially if first-time incident Opportunity to connect tenant with rental assistance or other resources Opportunity to negotiate agreement for payment plan, repair timeline (if applicable), or specific move out date if on-going affordability issue
Eviction filing & tenant notification	The landlord or their agent files the eviction action	More time and money has been invested, and there are by	Opportunity for mediated conversation	Court forms should include information about local mediation or

	(summary ejectment, unlawful detainer, etc.) with the court. The tenant receives notice of the eviction proceeding from the court. They share the news with others, receive advice and opinions, and perhaps seek out more expert advice.	now additional conflict facts on the ground. Landlord may be surprised when tenant avoids their calls and does not pay rent even after eviction action filed. Tenant, in turn, is insulted by the eviction filing and vows to withhold rent and/or file a counterclaim. Receiving the notice is experienced as sharp conflict escalation. False, negative, and/or sinister attribution error kick in on the tenant's side. Tenants might receive sympathy but bad advice. They might be empowered to take unhelpful action, or discouraged from taking helpful action.	prior to trial date	conflict intervention services and rental assistance programs for tenants

		Tenant is likely to counter-escalate, such as by vowing to withhold rent to save for new place, or preparing to raise housing violations as counterclaim The investment of the filing fee has made non-eviction solutions less appealing to the landlord (This is called "The $400 problem," in Minnesota due to the high cost of filing; other jurisdictions have low filing fees (e.g., $15 in Maryland), making eviction actions a low cost proposition for landlords).		
Waiting period	This is a period of a few days or 1-2 weeks, until the case is due to be heard in court.	In this period, both sides ruminate on the situation, attributing bad motives to the other side. This stewing might seek outlet, unlikely to	Opportunity for mediated conversation prior to trial date	Court forms should include information about local mediation or conflict intervention services and rental assistance programs for tenants. Rental assistance programs should not

		be constructive.		require formal eviction court order as prerequisite for assistance.
Courthouse steps negotiation / day-of-trial mediation	At the courthouse, parties meet, presenting a natural opportunity for negotiation. In some jurisdictions, parties are sent/offered to participate in a mediation-ish process before the hearing.	Extreme power imbalance. Tenant operating out of fear of eviction, or anger about condition of property due to landlord's failure to repair, or shame at being sued when the problem stems from structural poverty or other crises in their lives (health, domestic violence). Tenant may be pressured into "hallway" deals with landlord's agent, with no opportunity to discuss their own concerns and needs or negotiate terms favorable to them	Opportunity for day-of-trial mediation, combined with availability of tenant legal services or navigators to advise tenants of their rights and potential resources	Establishment of day-of-trial mediation programs, combined with legal information and services and tenant resources
Hearing	Parties appear before a judge or referee. In contrast to many other civil procedures	Tenant is marginalized and may not understand the process or her legal rights.	Judges have opportunity to educate parties about available courthouse programs (mediation and legal services)	Establishment of day-of-trial mediation programs, combined with legal information and services and

	and to small claims, in most jurisdictions this is a very short procedure, focusing on whether payment was made; little-to-no effort is made on bringing parties to an agreed-upon resolution.	Tenant viewed as the offender/ debtor. Tenant attempts to share her side of the story; may be interrupted or rejected as irrelevant. Landlord or its agent sees judge as partner in labeling tenant as shamed debtor, pressuring tenant to pay rent or get evicted	and refer appropriate cases to mediation	tenant resources Schedule docket later in day so parties may attempt mediation prior to the hearing
Post hearing / agreement compliance	Whether the proceeding ended in judgment or an agreement, parties comply (or do not) with the outcome. Over the course of the period until compliance, they may interact with each other numerous times. Even if the outcome is the tenant vacating the home, this may not happen immediately.	If parties do not comply, the potential for conflict returns and snowballs. Parties have more broken promises to each other than they did the first time around and their trust has diminished. Attribution dynamics flourish in this atmosphere, and conflict escalation might occur rapidly.		The parties can discuss the inclusion of mediation or other conflict resolution processes in their settlement agreements, whether upstream or on day-of-trial. Make available information about local mediation or conflict intervention services and rental assistance programs in the courthouse and mediation rooms, in the hopes that people will utilize them as

				a first resort in the future.