

2021

## The High Cost of Eviction: Struggling to Contain a Growing Social Problem

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### Recommended Citation

Judith Fox, *The High Cost of Eviction: Struggling to Contain a Growing Social Problem*, 41 Mitchell Hamline L. J. of Pub. Pol'y & Prac. 167 (2020).

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**MITCHELL HAMLIN**  
**LAW JOURNAL OF**  
**PUBLIC POLICY AND PRACTICE**

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VOLUME 41

2020 SYMPOSIUM EDITION

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**THE HIGH COST OF EVICTION: STRUGGLING TO  
CONTAIN A GROWING SOCIAL PROBLEM**

*Judith Fox\**

I.	INTRODUCTION.....	167
II.	EXPLORING THE CAUSES OF EVICTION.....	169
	A. <i>Affordability</i> .....	171
	B. <i>Institutional Landlords</i> .....	174
	C. <i>Substandard Housing</i> .....	178
III.	BUILDING COALITIONS TOWARDS BETTER HOUSING CONDITIONS.....	182
IV.	EVICTION COURT.....	185
	A. <i>Indiana Court Watch</i> .....	186
	B. <i>Court Mediation</i> .....	187
V.	CAN WE STEM THE TIDE OF EVICTIONS?.....	192
	A. <i>Increase the Availability of Housing</i> .....	192
	B. <i>Governmental Reforms</i> .....	195
	C. <i>Eviction Diversion Programs</i> .....	196
	D. <i>Law Reform</i> .....	197
VI.	CONCLUSION.....	198

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I. INTRODUCTION

*Evicted: Poverty and Profit in the American City*, Matthew Desmond’s Pulitzer Prize winning book, in a remarkable way, focused public attention on the issue of eviction.<sup>1</sup> As important as the book has been—and it has been quite important—Desmond’s tales were not new to those of us who have been working with low-

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1. MATTHEW DESMOND, *EVICTED: POVERTY & PROFIT IN THE AMERICAN CITY* (Crown Publishers, 2016).

income tenants for years. In fact, my favorite part of the book was the way in which it made me feel as if I were sharing what I have been observing for years, but what is hidden from most of the people I interact with daily. The symposium—Eviction, Poverty and other Collateral Consequences—sponsored by the Dispute Resolution Institute at Mitchell Hamline School of Law was a similar experience. It was a rare opportunity for academics, policymakers, and those who directly serve impoverished populations most impacted by eviction to meet and discuss this crucial issue. The stories shared at this event were very similar to those Matthew Desmond provided in his book. They are, unfortunately, universal.

Desmond, unlike many scholars, did not simply sit on his laurels after publishing his groundbreaking book. Instead, he has used his moment of fame to try to make a difference. In 2018, he created the Eviction Lab, the first “nationwide database of evictions.”<sup>2</sup> This, even more so than the book, was eye-opening. For the first time, there is a source for eviction statistics nationally.<sup>3</sup> For many, including myself, the number of evictions occurring in their community was shocking. South Bend, Indiana, ranked eighteenth in evictions nationally.<sup>4</sup> Two other Indiana cities, Fort Wayne and Indianapolis, ranked even higher.<sup>5</sup> Community leaders took note and became equally concerned and began to ask why the numbers were so high. Desmond was even invited to town to speak on this issue.<sup>6</sup> These conversations are being repeated across the nation, and this symposium was one such example. It was an opportunity to discuss the problem of eviction and, more importantly, possible solutions, especially those involving alternative dispute resolution. This paper attempts to dig deeper into the reasons behind the eviction numbers and to offer possible policy changes to help address this national crisis.

Part one of the paper examines some of the suggested causes of our current, high eviction numbers. Part two explores one alternative

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2. EVICTION LAB, <https://evictionlab.org/> (last visited Dec. 20, 2019).

3. It should be noted that the eviction lab has thus far has only tracked those evictions that proceed through court in a formal landlord tenant proceeding. Informal evictions that did not require court action (foreclosure evictions and tax sale evictions) are not included in the numbers. As a result, the figures underestimate the actual number of evictions. *Methods: What Data has the Eviction Lab Collected?*, EVICTION LAB, <https://evictionlab.org/methods/#what-data> (last visited Dec. 20, 2019).

4. *Top Evicting Large Cities in the United States*, EVICTION LAB, <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en> (last visited Dec. 20, 2019).

5. Fort Wayne placed 13th and Indianapolis placed 14th. *Id.*

6. Joseph Dits, *Young Stops in South Bend to Talk About Task Force to Fix Affordable Housing Crisis*, SOUTH BEND TRIBUNE (Aug. 15, 2018), [https://www.southbendtribune.com/news/local/young-stops-in-south-bend-to-talk-about-task-force/article\\_b6c361ab-4cb8-5392-89db-4d316aaa700f.html](https://www.southbendtribune.com/news/local/young-stops-in-south-bend-to-talk-about-task-force/article_b6c361ab-4cb8-5392-89db-4d316aaa700f.html).

dispute intervention: building coalitions with stakeholders to address deplorable rental conditions. Part three addresses a topic that was central to the symposium: the role of courts in the eviction crisis. Finally, in part four, I offer some policy interventions that may make an impact on this crisis.

## II. EXPLORING THE CAUSES OF EVICTION

Scholars have tried to identify the causes of evictions for decades, finding poverty the obvious and enduring culprit; however, Desmond offers a novel theory, that eviction is not a condition of poverty, but instead its underlying cause.<sup>7</sup> Two recent studies suggest the issue is far more complicated. One, published in 2019, reviewed seventeen years of eviction data from Cook County, Illinois, and compared people who were evicted with those whose cases were dismissed.<sup>8</sup> Those evicted had worse credit histories than their neighbors who never faced eviction.<sup>9</sup> When comparing those who were evicted with those whose cases were dismissed, the study found “no substantial relative increase in financial strain.”<sup>10</sup> The study found that there was a “dramatic increase” in their use of payday loans in the “[three] years leading up to [the] eviction filing,” a clear indication of pre-eviction financial strain.<sup>11</sup> Those evicted were poor before they were evicted. They were not poor because they were evicted.

An earlier study of New York City Housing Court data had similar findings.<sup>12</sup> It concluded that evictions do not seem to be “a principal driver of overall poverty in New York City,” largely

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7. *Why Eviction Matters*, EVICTION LAB, <https://evictionlab.org/why-eviction-matters/> (last visited Dec. 20, 2019).

8. John Eric Humphries, Nicolas Mader, Daniel Tannenbaum & Winnie van Dijk, *Discussion Paper 2186: Does Eviction Cause Poverty? Quasi-Experimental Evidence from Cook County, IL*, YALE U. COWLES FOUND. FOR RES. IN ECON. (July 2019), at 27–28 (a study of 17 years of Cook County Illinois evictions finding very small difference in the magnitude of long-term economic strain proceeding eviction cases between those who were evicted and those that were not evicted).

9. *Id.* at 13.

10. *Id.* The researchers do acknowledge some constraints with their research. For instance, they only looked at families with credit histories, though the Consumer Financial Protection Bureau has documented that nearly 30% of low-income individuals have no credit history. They are “credit [in]visible.” *Id.* at 11.

11. *Id.* at 15.

12. Robert Collinson & Davin Reed, *The Effects of Eviction on Low-Income Households*, N.Y.U. 30–31 (Dec. 2018), [https://www.law.nyu.edu/sites/default/files/upload\\_documents/evictions\\_collinson\\_reed.pdf](https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf) (a study of New York eviction cases finding a connection between eviction and homelessness, but also finding that “formal evictions are probably not a principal driver of overall poverty in New York City).

because those being evicted were already living in poverty.<sup>13</sup> What they did find, however, is that evicted tenants are more likely to apply to homeless shelters and more likely to spend more time in a homeless shelter once there.<sup>14</sup> The study also found that eviction “increases the number of emergency room visits [for households] . . . about seventy percent over the mean for non-evicted households.”<sup>15</sup> Most of these visits are attributed to mental health stress, though the study observed an overall decline in health due to evictions.<sup>16</sup> So, while evictions may not cause poverty, they certainly make impoverished life more unpleasant and more expensive. These eviction costs are not just born by those being evicted, they are spread out into society as increased medical costs and increased needs for emergency services, including emergency shelter.<sup>17</sup> The poor are more likely to be evicted partially because more poor people rent.<sup>18</sup> At the same time, the poor are clearly not the only renters evicted so there must be more to the story.

Eviction is also expensive for the landlords, neighbors, and society generally. Yet, as a society, we clearly favor the right of the owner over the renter. Eviction is viewed almost as a moral right of ownership, supported by the government.<sup>19</sup> Professor Desmond argues that governmental support and intervention make the eviction problem worse. According to Desmond, governmental policy that “legitimizes and defends landlords’ right[s] to charge as much as they want,” “forcibly removes a family at landlords’ request by dispatching armed law enforcement officers” and “records and publicizes evictions, as a service to landlords and debt collection agencies” causes exploitation in the housing markets.<sup>20</sup> The shortage of low-income rentals, coupled with the deplorable condition of many of the available low-income rental properties

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13. *Id.* at 31.

14. *Id.* at 24.

15. *Id.* at 25.

16. *Id.* at 26. There is an extensive body of research linking foreclosure evictions to poor health outcomes. It seems clear that rental evictions would have similar ill effects. See LINDA E. FISHER & JUDITH FOX, *THE FORECLOSURE ECHO: HOW THE HARDEST HIT HAVE BEEN LEFT OUT OF THE ECONOMIC RECOVERY*, 152–55 (Cambridge U. Press, 2019).

17. *Ending Chronic Homelessness Saves Taxpayers Money*, NATIONAL ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/resource/ending-chronic-homelessness-saves-taxpayers-money-2/> (last visited Mar. 29, 2020).

18. “A majority (53 percent) of households earning less than \$35,000 rent their housing,” while more than “60 percent of households earning less than \$15,000” rent. *America’s Rental Housing 2017*, JOINT CENTER FOR HOUSING STUDIES OF HARV. U., (2017) [hereinafter *Rental Housing*].

19. In fact, one of the indices of property ownership is the right to exclude others. *E.g.* Jonathan Klick & Gideon Parchomovsky, *The Value of the Right to Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 955–56 (2017).

20. Desmond, *supra* note 1, at 307.

have left many vulnerable to this exploitation.<sup>21</sup> Eviction is complex and while it is impossible to pinpoint a single cause, all these factors ring true to many, like myself, who work daily with people facing eviction.<sup>22</sup> In the end, it is nonpayment of rent, for whatever reason, that most often prompts an eviction filing.<sup>23</sup> Many people across America simply do not have enough money to pay rent.

#### A. Affordability

The problem of rental affordability has been growing for decades.<sup>24</sup> The Great Recession exacerbated the problem,<sup>25</sup> and even now, homeownership rates are considerably lower than their peak in 2005, largely due to the financial crisis of 2008.<sup>26</sup> Homeowners continue to be disproportionately white, with African Americans having the lowest ownership rate.<sup>27</sup> Furthermore, six million households left the housing market because of the foreclosure crisis,<sup>28</sup> yet we have failed to see a corresponding rise in the number of rental households.<sup>29</sup> These displaced homeowners need somewhere to live, and this has put a strain on the market. Where did all those households go? Fewer households have been created than would be expected when considering both the foreclosure numbers and demographic changes over time. The result is a “net shortfall of 5.2 million” households.<sup>30</sup> This shortfall is made up of “renters displaced by the diverted homeowners” and

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21. Tracey Ross, Chelsea Parsons & Rebecca Vallas, *Creating Safe and Healthy Living Environments for Low-Income Families*, CTR. FOR AM. PROGRESS, (July 20, 2016), <https://www.americanprogress.org/issues/poverty/reports/2016/07/20/141324/creating-safe-and-healthy-living-environments-for-low-income-families/>.

22. See David A. Dana, *An Invisible Crisis in Plain Sight: The Emergence of the “Eviction Economy,” Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935, 943 (2017) (critiquing Michael Desmond’s explanations for the high number of evictions).

23. For example, in a recent, yet unfinished, research project to examine what occurs in small claims eviction hearings, our team observed 77 eviction hearings in three Indiana Counties. Nonpayment of rent was cited as the reason for the eviction in 64 of those 77 cases. Lease violations was the reason in most others.

24. See John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn’t It More Affordable?*, 18 J. ECON. PERSP. 191, 198-200 (2004).

25. See Dowell Myers, Gary Painter, Hyojung Lee & JungHo Park, *Diverted Homeowners, the Rental Crisis and Foregone Household Formation*, RESEARCH INST. FOR HOUS. AMERICA, 6 (2016).

26. Dept. of Commerce, U. S. Census Bureau News, *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019* (CB19-157, Jan. 30, 2020), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

27. Rental Housing, *supra* note 18, at 2.

28. Myers et al., *supra* note 25, at 11.

29. *Id.*

30. *Id.*

“[m]illennials who were denied opportunity to form households in the first place.”<sup>31</sup> Those over age 55 form the largest group of new renters entering the market, with this number increasing by more than 4 million since 2005.<sup>32</sup>

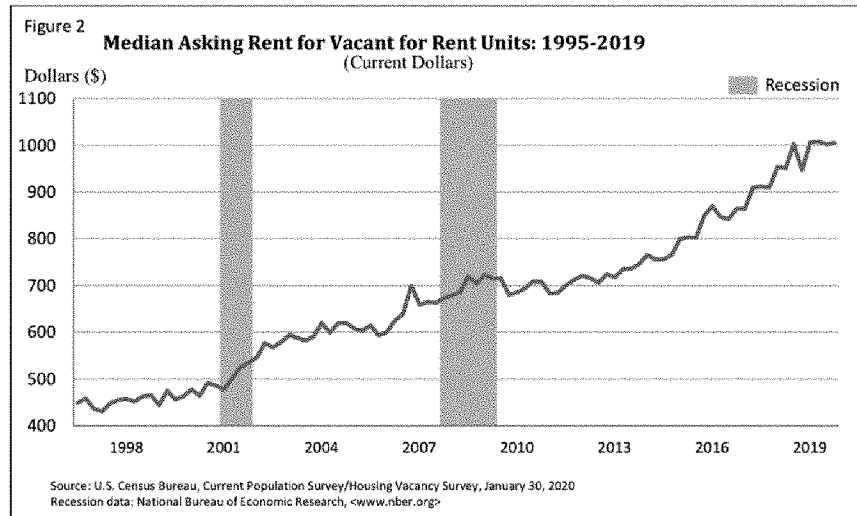


Chart One: Rental Increases from 1995-2019<sup>33</sup>

While vacancy rates for both homeowners and renters have declined, the post-recession drop in vacancies for renters has been much more dramatic. At the end of the fourth quarter of 2019, the U.S. Census Department determined that the rental vacancy rate was down 6.4 percent from a high of 9.8 percent in the third quarter of 2011, the end of the recession.<sup>34</sup> Basic rules of supply and demand tell us that as the supply decreases and demand increases, prices will rise; and they have risen.<sup>35</sup>

Rent has risen for all demographic groups, but the crisis is more acute for low-income families, especially families of color.<sup>36</sup> Nearly

31. *Id.*

32. *American Families Face A Growing Rent Burden*, THE PEW CHARITABLE TR. 5 (Apr. 2018) [hereinafter *Rent Burden*].

33. Dept. of Commerce, U. S. Census Bureau News, *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019* (CB20-05, Jan. 30, 2020), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

34. Dept. of Commerce, U. S. Census Bureau News, *Quarterly Residential Vacancies and Homeownership, Fourth Quarter 2019* (CB20-05, Jan. 30, 2020), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf>.

35. See Myers et al., *supra* note 25, at 14 (noting that decreasing vacancies contributed to rental increases from rents likely increased from 2006-12).

36. See, e.g., Whitney Airgood-Obryski & Jennifer Molinsky, *Estimating the Gap in Affordable and Available Rental Units for Families*, JOINT CTR. FOR HOUSING STUDIES OF HARV. U. (Apr. 2019), <https://www.jchs.harvard.edu/research-areas/working-papers/estimating-gap-affordable-and-available-rental-units-families>; Liza Getsinger, Lily Posy,

half of all renters are minorities and “one in five rental households is foreign-born.”<sup>37</sup> The percentage of income that renters spend on housing has increased steadily since 1960, but the rise has been most significant for low-income renters.<sup>38</sup> In 2015, more than a third of all renters were considered rent-burdened. Rent burdened means that someone spends more than thirty percent of his or her pretax income on rent.<sup>39</sup> For African American families, the numbers are much worse. By 2015, forty-six percent of all African American families were rent burdened, and twenty-three percent were severely rent burdened.<sup>40</sup>

The U.S. Department of Housing and Urban Development (“HUD”) found that “8.3 million renters . . . have very low incomes, lack housing assistance, and have either severe rent burdens or severely inadequate housing (or both).”<sup>41</sup> The most recent research conducted by the National Low Income Housing Coalition found that “only 35 homes exist for every 100 extremely low-income renter household.”<sup>42</sup> The Urban Institute created both a report and, based on that research, an interactive map, displaying the number of housing units available to extremely low-income renters by county.<sup>43</sup> According to the 2017 update, discussing 2014 data, St. Joseph County, Indiana (home of South Bend) has only forty-nine

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Graham MacDonald, Josh Leopold & Katya Abazjian, *The Housing Affordability Gap for Extremely Low-Income Renters in 2014*, URB. INST. (Apr. 2017), [https://www.urban.org/sites/default/files/publication/89921/gap\\_map\\_report.pdf](https://www.urban.org/sites/default/files/publication/89921/gap_map_report.pdf); Elizabeth La Jeuneese, Alexander Hermann, Daniel McCue & Jonathan Spader, *Documenting the Long-Run Decline in Low-Cost Rental Units in the US by State*, JOINT CTR. FOR HOUSING STUD. OF HARV. U. (Sept. 2019), <https://www.jchs.harvard.edu/research-areas/working-papers/documenting-long-run-decline-low-cost-rental-units-us-state>; U.S. DEPT. OF HOUSING AND URB. DEV. OFFICE OF POLICY DEV. AND RES., WORST CASE HOUSING NEEDS, 2017 REPORT TO CONGRESS (2017) <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>.

37. Rental Housing, *supra* note 18, at 2.

38. Quigley & Raphael, *supra* note 24, at 198, T. 3.

39. Rent Burden, *supra* note 32, at 11.

40. *Id.* A Severely rent burdened tenant is defined as someone whose rent is more than fifty percent his pretax income.

41. S. DEPT. OF HOUSING AND URB. DEV. OFFICE OF POLICY DEV. AND RES., WORST CASE HOUSING NEEDS, 2017 REPORT TO CONGRESS 4 (2017) <https://www.huduser.gov/portal/sites/default/files/pdf/Worst-Case-Housing-Needs.pdf>; “Very low incomes are those incomes of no more than 50 percent of the Area Median Income (AMI), and extremely low incomes are those incomes of no more than 30 percent of AMI—typically below the poverty line.” *Id.* 1 n. 4; “Severe rent burden means a renter household is paying more than one-half of its income for gross rent (rent and utilities).” *Id.* at 2.

42. *The Gap: A Shortage Of Affordable Homes*, NAT’L LOW INCOME HOUSING COALITION, 2 (2018), [https://reports.nlihc.org/sites/default/files/gap/Gap-Report\\_2018.pdf](https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf).

43. Getsinger, *supra* note 36.



homes available for every hundred low income renters, but these figures really only account for the number of units, not whether those units are available and habitable.<sup>44</sup> While rent has risen substantially in the last four decades, renters' income remain stagnant.<sup>45</sup> As a result, the portion of income families must devote to housing has increased.<sup>46</sup>

Again, as the demand for affordable housing has increased, the supply has decreased. During the Great Recession, housing construction came to a standstill.<sup>47</sup> When construction has occurred, new rental construction has heavily been in favor of multi-family, high-end rentals.<sup>48</sup> This is largely due to the high cost of construction.<sup>49</sup> It is just not economically feasible to build low-income rental housing. As a result, much of the low-income housing needs are now being met by older, existing housing.<sup>50</sup> The government has been reducing federal expenditures on housing since the Regan administration, failing to build new low-income housing units or maintain existing units. Government policy strongly favors homeownership over renting.<sup>51</sup> This perfect storm created by dwindling supply, growing demand, and stagnating wages have combined to create a housing affordability crisis being felt across the nation.

### B. Institutional Landlords

Many homeowners lost their homes to foreclosure during the Great Recession. These previously owner-occupied properties are being converted to rentals.<sup>52</sup> This has created new problems for prospective homeowners and renters alike. Encouraged by the government, private-equity and hedge funds have entered the market, spending a “combined \$36 billion on more than 200,000 homes in ailing markets across the country.”<sup>53</sup> Institutional investors are buying large quantities of single-family homes primarily to turn them into rental properties. As one analyst put it, single-family

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44. *Id.*

45. Lawrence Mishel, Elsie Gould & Josh Bivens, *Wage Stagnation in Nine Charts*, ECON. POL'Y INST 6 (Jan. 5, 2015), <https://www.epi.org/publication/charting-wage-stagnation/>.

46. Quigley & Raphael, *supra* note 24, at 198.

47. Myers et al., *supra* note 25, at 14.

48. Rental Housing, *supra* note 18, at 17.

49. *Id.*

50. *Id.* at 3.

51. Fisher & Fox, *supra* note 16, at 6-9.

52. Rental Housing, *supra* note 18, at 2.

53. Alana Semuels, *When Wall Street is Your Landlord*, THE ATLANTIC 2 (Dec. 19, 2019), <https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394/>.

rentals are now the “‘darlings’ of the real-estate sector.”<sup>54</sup> As a result, there are fewer available homes for those who want to be homeowners and sometimes the landlord is less than ideal.

Institutional investors do not have the best track record as landlords. Institutional owners often file evictions very quickly, even when a tenant is a day late on the rent. They may not necessarily be seeking to evict. Instead, the filings allow institutional landlords to charge late fees and collect attorney costs, along with the amount of rent owed which the tenant must pay to avoid the eviction.<sup>55</sup> But often landlords do seek to evict. An investigation into the institutional landlords in Atlanta discovered they “were 18 percent more likely to evict than small landlords.”<sup>56</sup> Mom and Pop landlords<sup>57</sup> are often more willing to work with their tenants when they encounter hard times. If a landlord lives within the community, he or she is easy to reach when a problem occurs. On the other hand, out-of-state landlords are able to change their management company or, strangely, sometimes simply disappear. One Notre Dame Clinical Law client went to their management company to pay their rent and was told, unbeknownst to them, that the management company had been fired. We spent five years trying to locate the out of state homeowner to no avail. The property ultimately sold at a tax sale.

Institutional landlords also change with little notice to the renters. The Notre Dame Clinical Law Center recently experienced this while working with approximately 50 families from Western Manor, formerly a low-income housing project in South Bend. The housing project had been funded through the Low-Income Housing Tax Credit Program (“LIHTC”).<sup>58</sup> The LIHTC was created in 1986 to fund the construction or rehabilitation of low-income housing.<sup>59</sup> As a condition for receiving the credit, the investor had to provide a certain number of low-income housing units, although some could remain at market rates. The building also had to provide those low-income rental units for thirty years; but then they were able to stop offering them as low-income rental units.<sup>60</sup> This is exactly what

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54. *Id.* at 15.

55. *Id.*

56. *Id.* at 12.

57. By Mom and Pop landlords, I am referring to those landlords who own several properties as opposed to the institutional investors who typically own hundreds.

58. 26 U.S.C. § 42 (1986).

59. *Id.*; see also Andrea J. Boyack, *Equitably Housing (Almost) Half a Nation of Renters*, 64 *BUFF. L. REV.* 109, 134-42 (2017).

60. See generally Corianne Payton, Amanda Gold & Nicole DuBois, *The Low-Income Housing Tax Credit How it Works and Who it Serves*, *URBAN INST.* (July 2018), [https://www.urban.org/sites/default/files/publication/98758/litc\\_how\\_it\\_works\\_and\\_who\\_it\\_serves\\_final\\_2.pdf](https://www.urban.org/sites/default/files/publication/98758/litc_how_it_works_and_who_it_serves_final_2.pdf).

occurred at Western Manor: the obligation expired, so the apartment complex was sold to an out of state investor.<sup>61</sup> In fairness, the investor had spent a significant amount of money making long overdue repairs to the apartments. In return, however, all the units were then converted to market rate. The complex housed two hundred families, most of whom could no longer afford to live in the units.

To further exacerbate the problem, utilities at Western Manor had always been included in the rental rate. With thirty-days' notice, tenants found their rent was increasing by as much as seventy-five percent and tenants had to begin paying utilities.<sup>62</sup> Many of these residents had not had utilities in their name for decades. Therefore, the utility company demanded deposits of up to \$600 dollars. A panic developed. Community meetings were held with standing-room only capacity. Local media and politicians became involved.<sup>63</sup> Everyone seemed surprised when I informed them that it is perfectly legal to increase the rent and require tenants to pay for utilities.<sup>64</sup> In fact, institutional landlords are more likely to raise, and continue to raise rent and accompanying costs.<sup>65</sup> Indiana, like most parts of

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61. Boyack, *supra* note 59, at 137 (This problem is occurring across the nation as LIHTC apartment complexes are aging out of their compliance periods. Between 1995 and 2014 there were 1420 projects funded in this way. The low-income mandates on these will begin to expire in 2025.).

62. Lauren Becker, *Tenants in Western Manor Apts say they're being forced out, with rent increasing over \$200*, WSBT (Aug. 1, 2019), <https://wsbt.com/news/local/tenants-in-western-manor-apts-say-theyre-being-forced-out-with-rent-increasing-over-200>; Jeff Parrott, *Tenants of Western Manor apartments in South Bend angry about rent increase*, SOUTH BEND TRIB. (Aug. 14, 2019), [https://www.southbendtribune.com/news/business/tenants-of-western-manor-apartments-in-south-bend-angry-about/article\\_548cb55a-6fef-581c-912c-9a941f26bb32.html](https://www.southbendtribune.com/news/business/tenants-of-western-manor-apartments-in-south-bend-angry-about/article_548cb55a-6fef-581c-912c-9a941f26bb32.html).

63. Monica Murphy, *Community leaders step up to help residents at Western Manor Apartments*, WNDU (Aug. 30, 2019), <https://www.wndu.com/video?vid=558764092> (All the attention did have some positive results. Several charitable organizations worked with the residents to get the utility deposits paid. In addition, the tenants have formed a not-for-profit to assist other tenants facing these issues in the future.).

64. It should be noted that most of the tenants did not have current leases, so they were month-to-month tenants. The few with valid leases will not face the increases until their leases expire. Month-to-month tenancies are common among low income clients. They also provide the least protection against eviction.

65. Semuels, *supra* note 53, at 12-14.

America, has no rent control statutes.<sup>66</sup> Many Western Manor families were evicted, and many more left voluntarily.<sup>67</sup>

Those who stayed faced problems as well—issues experienced by many tenants who suddenly find themselves with an institutional landlord. Many of the tenants were elderly who had previously paid rent by visiting the first-floor office in person when their Social Security checks arrived. The new owner required them to mail their checks to Wisconsin, virtually guaranteeing that rent would be late, and then charged a late fee. Again, tenants of institutional landlords report higher fees and less maintenance, partially due to the distance between the landlord and the property.<sup>68</sup> When the tenants complained of the new rent payment requirements, they were provided with a phone application from which to pay the rent, something that was not helpful to the several octogenarian tenants without smart phones and no desire to acquire one.

Institutional landlords like to set up standard practices for all their tenants, but standard practices do not always work in states with different legal requirements. Western Manor, located in Indiana, continues to follow a process governed by Wisconsin law. This caused some confusion in the early days of the transition. In fairness, the massive media attention has made a difference. This institutional owner has listened to community concerns. It is making repairs to Western Manor, a property neglected for years. Despite this, communication is still difficult. Tenants who have for years been able to talk to the local maintenance worker must now call or write to an out-of-state entity, something many are uncomfortable with and some do not have the capacity to accomplish. Tenants of institutional landlords often complain about the lack of maintenance and the inability to reach anyone to do anything about it.<sup>69</sup>

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66. Melissa Adan, *Tenants Suffer as California Rent Control Law Looms*, NBC SAN DIEGO (Nov. 12, 2019), <https://www.nbcsandiego.com/news/local/tenants-suffer-as-california-rent-control-law-looms/2109620/> (California passed Assembly Bill 1482 that will cap rent increases from 7 to 8% a year. Unfortunately, this prompted landlords to increase rent quickly, before the law goes into effect in 2020.); Bobby Allen, *New York Landlords call Rent Control Laws an 'Illegal Taking' in New Federal Lawsuit*, NPR (July 12, 2019); See John W. Willis, *Short History of Rent Control Laws*, 6 CORNELL L. REV. 54 (1950) (New York passed a renter protection and rent stabilization bill that was quickly challenged by landlords in federal court).

67. Informal evictions are hard to track. The Eviction Lab data is likely underestimating the number of evictions.

68. See, Semuels, *supra* note 53.

69. *Id.*

### C. Substandard Housing

Unfortunately, all these factors have led to a second problem in the rental market: the large number of substandard housing units in the market. There is ample evidence that housing conditions, especially in low-income neighborhoods, are quite bad.<sup>70</sup> Many of the single-family rentals that have come into the market post-recession were previously foreclosed properties. Foreclosed properties tend to be under-maintained.<sup>71</sup> While it is easy to understand how low incomes and high rents contribute to eviction, it is not as obvious to understand the connection between eviction and substandard housing.

When low-income homeowners lose their properties to foreclosure, investors replace them in many of those neighborhoods by purchasing the properties. In 2011, the What Works Collaboration funded studies in four cities (Las Vegas, Cleveland, Atlanta and Boston) to determine the impact of investors in this REO market.<sup>72</sup> An overview of all four studies found that at the initial stages of the mortgage foreclosure crisis, most investors were small, at least early on.<sup>73</sup> This began to change, especially in distressed communities, when targeted sales organized by HUD, Fannie Mae and Freddie Mac began selling large nonperforming loan portfolios. While originally advertised as a way for homeowners to save their home through loss mitigation, it soon became clear that investors had no interest in working with borrowers. Most properties were foreclosed and then rented or flipped.<sup>74</sup>

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70. GREEN & HEALTHY HOMES INITIATIVE, <https://www.greenandhealthyhomes.org/home-and-health/home-health-hazards/> (last visited Mar. 20, 2020) (The Green and Healthy Home Initiative claims that “six million households live with moderate to severe housing hazards. The Green and Healthy Homes Initiative originated in Maryland in 1986 as an effort to combat lead poisoning in children. It has evolved to include multiple municipalities in efforts to address areas of substandard housing. South Bend recently joined the initiative.”); ADVANCING HEALTHY HOUSING: A STRATEGY FOR ACTION, 1, 8 (2013), [https://www.hud.gov/program\\_offices/healthy\\_homes/advhh](https://www.hud.gov/program_offices/healthy_homes/advhh) (citing to U.S. Census data, a 2013 Report from the Federal Healthy Homes Work Group claims “millions of homes have moderate to severe housing problems”).

71. FISHER & FOX, *supra* note 16, at 152.

72. Christopher Herbert, Irene Lew & Rocio Sanchez-Moyano, *The Role of Investors in Acquiring Foreclosed Properties in Low- and Moderate-Income Neighborhoods: A Review of Findings from Four Case Studies*, JOINT CTR. FOR HOUSING STUDIES OF HARV. U. 1, 5 (Oct. 2013), [https://www.jchs.harvard.edu/sites/default/files/w13-11\\_herbert\\_lew\\_moyano.pdf](https://www.jchs.harvard.edu/sites/default/files/w13-11_herbert_lew_moyano.pdf).

73. *Id.* at 11.

74. FISHER & FOX, *supra* note 16, at 109-11.

Many investors who purchased these properties soon discovered that they were in horrible condition. They were in depressed neighborhoods. Fixing them up would not be economically feasible, so they resurrected an old form of sale, with a twist.<sup>75</sup> Institutional owners began re-selling the properties in rent-to-own, land contracts.<sup>76</sup> Rent-to-own contracts are highly predatory products for a number of reasons. What is relevant for this discussion is that they are created to fail. The contracts place all the burdens of homeownership--taxes, insurance, and maintenance—on the “buyer”, but none of the benefits.<sup>77</sup> Miss one payment and you are a renter who can be quickly evicted. In many states, missing one payment also means losing all your equity and the value of improvements you may have put into the property.<sup>78</sup>

Not all investors are created equal. Allan Mallach identified classes of investors based on their investment goals: appreciation or cash flow.<sup>79</sup> Dan Immergluck adapted these categories to divide real estate investors into two broad groups: (1) those who are buying to resell; and (2) those who buy to hold and rent. Each of these groups were further divided into “milkers,” “short-term holders,” and “medium-long term holders.”<sup>80</sup> The “milker” raises concerns. “Milkers” look at properties as short-term means of cash flow. They “minimize any improvements to the property and worry more about short-term costs than longer-term revenue generation or property

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75. See Jeremiah Battle, Sarah Mancini, Margot Sanders & Odette Williamson, *Toxic Transactions: How Land Installment Contracts Once Again Threaten Communities of Color*, NAT'L CONSUMER L. CTR. (July 2016).

76. Land contracts go by different names in different parts of the country. They can be called deeds for sale, conditional sales or installment land contracts. Their features, however, are the same. The title to the property remains in the name of the seller until the buyer has paid 100 % of the selling price. They are similar as well in that they rarely result in the buyer actually obtaining title to the property.

77. Alexandra Stevenson & Matthew Goldstein, *Rent-To-Own Homes: A Win-Win For Landlords, a Risk for Struggling Tenants*, N.Y. TIMES (Aug. 21, 2016), [https://www.nytimes.com/2016/08/22/business/dealbook/rent-to-own-homes-a-win-win-for-landlords-a-risk-for-struggling-tenants.html?\\_r=0/](https://www.nytimes.com/2016/08/22/business/dealbook/rent-to-own-homes-a-win-win-for-landlords-a-risk-for-struggling-tenants.html?_r=0/).

78. TEX. PROP. CODE ANN. § 5.079 (Texas has the most protection for land contract buyers. Land contracts are automatically transformed into deeds of trust and buyers treated as if the home was a mortgage); 2015 Tex. Sess. Law Serv., ch. 996, § 8 (effective Sept. 1, 2015). See generally, Skendzel v. Marshall, 301 N.E.2d 641 (Ind. 1973) (Indiana has no statutory protections, but the Indiana courts have created some common law protections. In 1973, the Indiana Supreme Court ruled that land contract buyers could not be evicted, and defaults must be treated as foreclosures unless the buyer had abandoned the property or made only minimal payments).

79. Allan Mallach, *Investors and Housing Markets in Las Vegas: A Case Study*, JOINT CTR FOR HOUSING STUDIES OF HARV. U. 1, 20 (2013).

80. Dan Immergluck, *The Role of Investors in the Single-Family Market in Distressed Neighborhoods: The Case of Atlanta*, JOINT CTR. FOR HOUSING STUDIES OF HARV. U. 1, 20 (2013).

appreciation.”<sup>81</sup> This group is “most likely not to keep properties up to code, to own substandard housing, and to see a great deal of turnover in their properties.”<sup>82</sup> They tend to be out-of-state investors, but not always. Research suggests that when investors are local investors, who have some stake in the community, they are more likely to maintain their properties.<sup>83</sup> When properties are sold in bulk, most small, local investors cannot afford to buy. As result, many purchasers of these large portfolios of properties are institutional, out-of-town investors who are more likely to be “milkers.”

Rent-to-buy sellers are also “milkers” because they are not actually selling the property. If they were, there is no reason not to offer a buyer-financed mortgage.<sup>84</sup> Instead, they milk the property for profit by shifting the cost of maintenance and rehabilitation to the buyer while reaping thousands of dollars in down payment income. Rent is not the money generator. The down payment is. The table below illustrates the history of with one such property “sold” to twelve buyers in fourteen years by Rainbow Realty.

Date of Sale	Price	Down Payment	Monthly Rent	Total Paid Before Evicted
6/7/2004	109,900	5,000	800	14,600
2/3/2005	116,900	6,000	750	15,000
3/10/2006	114,900	2,000	750	11,000
3/1/2007	109,900	2,500	750	11,500
1/26/2008	109,900	2,500	750	11,500
3/27/2008	107,900	5,000	750	14,000
4/14/2008	114,900	3,000	775	12,300
5/28/2008	114,900	3,000	850	5,500
7/14/2008	114,900	3,500	850	13,200
10/26/2015 <sup>85</sup>	84,900	8,500	850	18,700
2/25/2016	84,900	8,500	850	18,700

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81. *Id.* at 21.

82. *Id.*

83. Sarah Treuhaft, Kalima Rose & Karen Black, *When Investors Buy Up the Neighborhood: Preventing Investor Ownership from Causing Neighborhood Decline*, 23 COMMUNITY INV. 1, 1 (2011).

84. A seller financed mortgage operates like a bank-financed mortgage. The seller does not give the buyer any funds, instead he receives a mortgage to guarantee that the loan is repaid. The advantage for the buyers are significant including the right to a mortgage foreclosure and redemption after default. In addition, land contract buyers are unable to obtain financing for home repairs, while a mortgage buyer can get a second mortgage. Land contract buyers also have difficulty obtaining FEMA aid after a disaster.

85. After 2008, prices plummeted in Indianapolis, as they did across the nation. But, as the housing prices fell, the rental prices grew.

3/23/2018	104,900	10,500	900	21,300 <sup>86</sup>
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Table two: History of 396 N Huber, Indianapolis<sup>87</sup>

It is unclear whether the people who tried to buy these properties paid all the rent due. It is clear that all were eventually evicted despite the “seller” collecting \$60,000 in option fees. This would be a profit of more than fifty percent over the asking price of \$109,000. It is unlikely the seller even paid that price for the property. If the rent was also paid during this period, the profit margin increases to over 150%. During the rental period, the seller had no maintenance costs, taxes, nor insurance to pay. Clearly, this is an attractive option for the seller.

These abusive products began to attract the attention of policymakers and lawyers alike. The *New York Times* ran a series of stories that prompted the federal government to take a closer look at their role in this problem.<sup>88</sup> Numerous lawsuits were filed across the nation. In Indiana, one lawsuit may have ended this practice. In 2019, the Indiana Supreme Court held that rent-to-own schemes were rentals throughout the tenancy period.<sup>89</sup> As such, the property must be delivered to a tenant in a safe and habitable condition.<sup>90</sup> Any provisions that attempted to waive these protections were void.<sup>91</sup>

This holding had the potential to change rental landscape in Indiana.<sup>92</sup> Unfortunately, Indiana tenants have not felt the impact of this decision within eviction court. Instead, tenants in substandard housing have few alternatives. They can remain in the dangerous living conditions or they can move elsewhere. However, if they choose to move, there is virtually nowhere for them to go.

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86. The last two entries are for the same buyer who got two contracts on different dates.

87. Expert Report, Judith Fox, Fair Housing Center of Central Indiana v. Marshall Welton, 1:18-cv-1098-JMS-DLP.

88. See FISHER & FOX, *supra* note 16, at 140-44.

89. *Rainbow Realty v. Carter*, 131 N.E.3d 168, 176 (Ind. 2019).

90. *Id.*

91. *Id.*

92. See Florence Wagman Roisman, *Indiana Landlord-Tenant Law: An Important Step Forward in Theory Needs to be Made Real by the Courts*, 53 IND. L. REV. (forthcoming 2020) (for a history of warranty of habitability law in Indiana and the potential for *Rainbow Realty* to change the way small claims courts address condition issues).



### III. BUILDING COALITIONS TOWARDS BETTER HOUSING CONDITIONS

In January of 2019, South Bend community leaders convened a summit to discuss issues relating to housing and eviction.<sup>93</sup> Over one hundred people from across the community attended. These included homeowners, renters, landlords, property investors, social workers, legislators, legal professionals, academics, and members of the financial sector. The discussion split into three broad topics: affordability, sustainability and safety. Conversations continued after the original session and several issues emerged. The top concern was the lack of safe, affordable housing; however its relationship to eviction was still elusive.

Many of the summit participants recounted similar stories. Tenants were forced to rent substandard housing because no other suitable housing was available. These substandard homes were not being rented for substandard prices. Rather, the rental prices were quite high. Landlords expressed frustration that some were taking advantage of low-income renters which reflected poorly on the entire industry. Others asked why tenants would agree to rent substandard properties at inflated prices. One significant reason was that landlords who rented these homes often ignored credit histories, criminal records, and previous evictions. Tenants could rent these properties without disclosing information that would ordinarily mark them as an ineligible tenant. Though, once in the properties, their problems mounted.

The Notre Dame Clinical Law Center has represented tenants for decades. Their experiences matched those reported at the summit. Clients often rent properties that fail to meet minimal housing standards and are over-priced considering both the quality of the home and prevailing market prices. In desperation, tenants sometimes withheld their rent in an effort to force the landlord to fix what he refused to repair. More often, the landlord promises to make certain repairs before the tenant moves in, but when the tenant arrives with all their things the repairs remain incomplete. With nowhere else to go, they move in. Social workers and legal professionals all describe the same problem: many of their clients were being evicted because they had withheld rent in an effort to

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93. Press Release, City Partners with United Way, Notre Dame Clinical Law Center on Housing Summit (Jan. 17, 2019), available at <https://southbendin.gov/2019/01/17/city-partners-with-united-way-notre-dame-clinical-law-center-on-housing-summit/> (The event was sponsored jointly by the Notre Dame Clinical Law Center, the United Way of St. Joseph County, Indiana and the City of South Bend); Press Release, United Way of St. Joseph County, Housing Summit (Jan. 18, 2019), <https://uwsjc.org/wp-content/uploads/2019/03/housing-summit-release.pdf>.

force the landlord to make these necessary repairs.<sup>94</sup> While it is legal to withhold rent in some states, the law in Indiana is quite unclear on that issue. At the time of the summit, there was no clear statute or case law allowing a tenant to withhold rent.<sup>95</sup> As such, small claims judges are reluctant to entertain condition arguments as a defense to eviction.

Though it is too early to determine their real impact, two cases from late 2019 may change the equation. The first, *Husainy v. Granite Management, LLC*, upholds a jury verdict allowing a tenant to withhold rent when a landlord had failed to make requested repairs.<sup>96</sup> The jury found a breach of quiet enjoyment for “frequent interruptions of cold and/or hot water” and heat during the cold.<sup>97</sup> He was awarded the equivalent of six months’ rent in damages.<sup>98</sup> The second, *Rainbow Realty*, discussed in the previous section, established a clear warranty of habitability in Indiana.<sup>99</sup>

A consensus began to develop among the participants of the summit. Rental properties should be habitable. If we could provide tenants with more tools to assert their right to habitable housing, perhaps they would have a better chance in court when faced with eviction. Better still, if we could ensure that all rental housing was habitable, we could prevent the conditions that caused people to withhold rent and face eviction. Yet, how do we get there?

Prior to the summit, I began working with the City of South Bend on an ordinance to deal with the poor condition of rental properties. The summit introduced the ordinance to the public. It was the first step in building coalitions and consensus in support of real change. Several public meetings were held to review the ordinance and take public comment. Stakeholders from across the city met and offered changes to the ordinance. Coalitions of tenants and homeowners formed in support. Most of the initial opposition to the bill came from real estate investors. To our surprise, the two

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94. It is important to point out that we are not talking about cosmetic items. We are talking about homes with no heat, no toilets or other bathroom fixtures, holes in the walls, etc. We are talking about major health and safety issues.

95. See *Breezewood Mgmt. Co. v. Maltbie*, 411 N.E.2d 670, 671 (Ind. Ct. App. 1980); *Pinnacle Properties Development Group, LLC v. Oliver*, 59 N.E.3d 1102 (Ind. Ct. App. 2016) (an unpublished decision that allowed a tenant to withhold one month’s rent when the landlord failed to repair the air conditioning).

96. *Husainy v. Granite Mgmt. LLC.*, 132 N.E.3d 486, 486 (Ind. Ct. App. 2019) (upholding judgment in favor of a tenant who withheld rent when repairs were not made); see also Creighton Suter, “Finally Free”: Jury finds in favor of tenant in apartment dispute, THE EXPONENT (Sept. 20, 2018), [https://www.purduexpont.org/city/article\\_27296dc8-d885-5cda-8f38-c683cfe94b22.html](https://www.purduexpont.org/city/article_27296dc8-d885-5cda-8f38-c683cfe94b22.html).

97. See *Husainy*, 132 N.E.3d at 494.

98. *Id.* at 495.

99. *Rainbow Realty*, 131 N.E.3d at 176.

local landlord associations ultimately spoke in favor of the final draft. It was a true community collaboration.

On February 25, 2019, the ordinance unanimously passed the South Bend Common Council.<sup>100</sup> The Rental Safety Verification Program (RSVP) was born.<sup>101</sup> As a community, we agreed no one should be forced to live in an uninhabitable rental unit. Equally important, we agreed that the landlords who allowed it were sullyng the entire industry and should be stopped. The ordinance passed, but the work had only just begun.<sup>102</sup>

Legal professionals and social workers remain concerned about the number of people being evicted for withholding rent in an attempt to force landlords to make necessary repairs. This became a primary motivating factor in passing the ordinance. While it was our hope that the ordinance would decrease evictions, we were aware it would likely cause an increase in the short-term. Many tenants already occupied uninhabitable homes. Some were even under vacate and seal demolition orders when they were rented out. Once identified, the city could not allow people to continue to occupy these properties. As result, we needed to develop an interim solution.

The City of South Bend, Notre Dame Legal Aid Clinic, and St. Vincent DePaul joined together to form an emergency response team. The code inspectors began enforcement of the RSVP program with the rental properties already identified as problematic. When one of these homes was condemned—and many were—the family would be immediately referred to Notre Dame for possible legal intervention and to St. Vincent DePaul for emergency housing assistance. A fund was obtained through grant money to provide moving expenses, emergency housing, and first month's rent as needed.

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100. SOUTH BEND IND. MUNICIPAL CODE § 10644-19 (2019).

101. *Rental Safety Verification Program*, South Bend, Indiana, <https://southbendin.gov/rental-safety-verification-program-2/> (last visited Feb. 28, 2020).

102. See Associated Press, *Advocates Say Indiana Regulation Limit Threatens Renters*, U.S. NEWS (March 10, 2019), <https://www.usnews.com/news/best-states/indiana/articles/2020-03-10/advocates-say-indiana-regulation-limits-threaten-renters> (Despite this good news, the program now appears in danger. In response to an effort by the city of Indianapolis to assist renters in eviction, the Indiana House slipped an amendment into a bill that would disallow any municipality from enacting ordinances on landlord tenant issues. The Senate rejected the change because it was unrelated to the underlying bill. The amendments were then inserted into a different Senate bill and approved. There were no hearings on these amendments, despite protests by members of the Senate and great public outcry. The bill has not been signed into law and many advocates are urging him to veto the bill.).

We quickly realized that we underestimated the demand. Between May and December of 2019, more than sixteen properties were condemned, and thirteen families were referred for assistance.<sup>103</sup> Thus far, all of these families have found alternative housing, and most have had their money refunded by the landlords, though a few cases are still pending. However, as December 2019 came to an end, so did our supply of alternative housing. We ran out of places to send people. A local hotel offered to provide emergency housing at a discount, but for many families to come, we are left with the reality that we may not have viable and safe housing options to replace condemned rental properties.

This project highlights the problem many families face, especially low-income families. Do you call code enforcement and risk having the house condemned, or do you continue to live in a dangerous situation because there is no viable alternative? This reality becomes especially frustrating when a family is trying to articulate to a judge why they did not simply move instead of choosing to withhold rent. Most judges do not understand the reality of the severe housing crisis. Instead, the tenant is evicted and becomes another statistic in a growing, national crisis. This reality leads to the next possible point of intervention: the court system itself.

#### IV. EVICTION COURT

In their contributions to this volume, Professors Spaid and Bednarczyk discuss the eviction process in depth from the perspective of many states. I will focus on small claims eviction court only to the extent that is necessary. While small claims courts were intended to make it easier for pro se litigants to defend themselves, they have become a means to quickly move people through a system they neither understand nor can navigate.<sup>104</sup> In Indiana, along with most states, eviction hearings are grouped together on the same calendar. Because of the number of cases, each tenant has as little as two or three minutes to present a defense to the eviction.

To make matters more complicated, in Indiana the process is typically bifurcated. First, there is an immediate possession hearing where preliminary possession is most often awarded to the landlord.<sup>105</sup> This is followed by a trial on damages and a final

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103. Some families found alternate living arrangements and did not need the emergency help.

104. Samuel Spaid, *A Home Is a Good Thing: An Argument for Changing the Eviction Process*, 41 MITCHELL HAMLINE L. J. OF PUB. POL'Y & PRAC. (SYMPOSIUM ISSUE) (2020).

105. Some judges will issue permanent possession in the immediate possession hearing, especially if the tenant fails to appear.

possessory order. If the landlord is awarded temporary possession, he must pay a bond to the court before the tenant is required to vacate. However, the tenant can pay a counter-bond in the same amount and remain in their home until the final trial.<sup>106</sup>

#### A. *Indiana Court Watch*

In 2019, I began a court watch program in small claims courts in Indiana. The data is very preliminary, but some disturbing observations have already emerged. We have data from seventy-seven eviction hearings in three Indiana counties. Sixty were immediate possession hearings that resulted in forty-eight evicted tenants. We found that eighty percent of the cases we observed ended with an eviction.

Only three tenants successfully defended the eviction.<sup>107</sup> The first was successful because the landlord admitted to refusing to accept rent. The second because the landlord illegally locked the renter out. The third because the renter had already moved. The emerging data presents a negative trend for those attempting to defend themselves against an eviction. Many tenants have tried, and a strong majority have failed.

Even though every tenant has a right to post a counter-bond to stay eviction pending a final hearing, the judge failed to inform the tenants of this right in all but three of the sixty cases observed. One tenant had the audacity to ask the judge about the counter-bond and was told it would be discussed at the final hearing, when it would be too late for him to post a bond.

Several years ago, the Indiana Supreme Court became concerned with the proceedings in Marion County's small claims court and established a task force to examine small claims proceedings.<sup>108</sup> Professor Florence Roisman from Indiana University McKinney Law School submitted, as part of the task force, a report on landlord-tenant court across the state.<sup>109</sup> The report documented numerous issues with the small claims court. Despite her findings, eight years have passed, and little has changed.

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106. 32 IND. CODE § 30-3-8 (2018).

107. The remainder were continued to another day.

108. SMALL CLAIMS TASK FORCE: REPORT ON THE MARION COUNTY SMALL CLAIMS COURTS 1, 7 (May 1, 2012), <https://www.in.gov/judiciary/files/pubs-smclaims-rept-2012.pdf>. (Marion County small claims courts have a different structure than the small claims courts in the rest of the state. They are organized by township. At the time of the investigation, Marion County small claims courts were not even considered courts of record.)

109. BRIENNE DELANEY & FLORENCE WAGMAN ROISMAN, *Report #1 on Landlord-Tenant Court Proceedings in Indiana* (Feb. 2012), [https://mckinneylaw.iu.edu/instructors/roisman/report\\_1\\_landlord\\_tenant\\_proceedings\\_in\\_indiana.pdf](https://mckinneylaw.iu.edu/instructors/roisman/report_1_landlord_tenant_proceedings_in_indiana.pdf).

Several disturbing practices are emerging from our current court watch program, which Professor Roisman is also a collaborator. The most disturbing occurred in the small claims court in Elkhart County. We witnessed several hearings where the tenant was evicted with virtually no evidence presented. In one instance, the landlord had documentary evidence to present. When the landlord attempted to show the tenant, he was admonished by the judge who demanded, “Give it to me.” The judge looked at it, handed it to his clerk, admitted it into evidence, and then asked the tenant to react to the evidence he was not permitted to view. When the tenant could not, he was evicted.

The small claims courts were intended to be easy for non-lawyers to navigate. This was not the result. To aid litigants through the small claims courts, Indiana court rules mandates that the judicial conference create a small claims manual.<sup>110</sup> Such manual is available to be reproduced and made available to each litigant in small claims courts across the state.<sup>111</sup> In many courts, my request to see this manual is usually received with surprise. The manual is not made readily available, rather accessible solely online; a means that presents a barrier to many low-income litigants who do not have access to computers or printers.

More alarming, sections of the manual are entirely inaccurate. For instance, Indiana Code mandates that every rental property must be delivered and maintained in a safe and habitable manner and in accordance with all the applicable housing codes.<sup>112</sup> The manual states that landlords have no duty “to make repairs to a leased premises unless the landlord agrees to do so by the lease terms or otherwise.”<sup>113</sup> This is contrary to the statute and the holding in *Rainbow Realty*, where the Indiana Supreme Court specifically stated that landlords are required to deliver a rental property in habitable condition.<sup>114</sup>

### B. Court Mediation

Communities across the country have begun to assess the eviction crisis and propose solutions. Many of these suggestions include reforms to the court eviction process. These discussions are not new; over the years, mediation has been the most common reform suggested and tried. The success of a mediation program is often measured by the number of agreements achieved, as opposed

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110. IND. SMALL CLAIMS R. 13 (2020).

111. *Id.*

112. 32 IND. CODE § 31-8-5 (1-2) (2018).

113. SMALL CLAIMS MANUAL, IND. JUDICIAL CTR. 20 (2014), <https://www.in.gov/judiciary/files/small-claims-manual.pdf>.

114. *Rainbow Realty*, 131 N.E.3d at 175.

to the number of evictions prevented.<sup>115</sup> Mediation in small claims court is problematic for several reasons. Tenants lack information about their rights. The mediation, a forum intending for equal bargaining, turns into a negotiation. The set agenda entails how and when the tenant will pay the landlord and move out of the house. Another concern is many mediators are not neutral. As employees of a burdened court system, easing the court docket becomes their primary role.<sup>116</sup> Every agreement reached in mediation is one less trial. However, sometimes a trial is necessary. Tenants may feel pressured to agree because they are outnumbered and underrepresented, and they may not understand their defenses to the eviction. When the mediator is perceived to be part of the court system, a tenant may feel that the judge is exerting pressure to settle. A settlement reached under these circumstances is not just.

My perception of court mediation programs may be clouded by my observations. It is important to point out that I am not philosophically opposed to mediation. I have been a certified mediator and have mediated mortgage foreclosure cases for the state of Indiana for the last eight years. My concern is that these programs are often viewed not as a way to mediate a dispute, but also as a way to move the docket so the judge does not have to schedule a trial. When a tenant attempts to assert a defense to eviction, he is immediately sent to mediation. These mediations resolve very quickly, usually in a matter of minutes. This suggests that there is no real evaluation of the issues. In mediation, there are no public records of the findings. This makes the results are hard to ascertain. Our ongoing court watch study suggests the result of an eviction proceeding is almost always an eviction and payment plan to the landlord. The only time we witnessed a tenant being granted a hearing before a judicial officer to contest an eviction was when she was represented by counsel. Unrepresented tenants were always referred to mediation.

Because of the limited amount of data available, these observations may well be atypical. Regardless, I will recount two situations that illustrate these concerns. The first involves a tenant who claims she had receipts for all her rent payments. At mediation, it was explained to the tenant that the only issue to discuss was how much she would pay the landlord and when. It appeared as if an earlier judgment had gone unpaid and the judge had ordered a bench warrant for her arrest. She claims she was told to sign the current

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115. See Generally William H. Ross, *Measuring success in mediation*, MEDIATION JOURNAL 4 (2000) <https://minds.wisconsin.edu/bitstream/handle/1793/38211/ross2.pdf?sequence=1&isAllowed=y>.

116. This is not intended to denigrate the role of a mediator and how they are performing. Mediators are working hard and sincerely according to the mandates given. It is the mandates that raise concerns.

order or be arrested on the prior order. She signed an agreed order and payment plan. Unfortunately, because mediation proceedings are confidential, there is no way to know if this is what actually occurred. What is clear is that this tenant did not perceive this as a fair process. She believed that she was forced to agree to a judgment she felt was unjust to avoid going to jail for an unpaid debt. This is not what mediation should feel like. Mediation should be a process wherein two fully informed parties come to a mutual agreement; as opposed to a process where one party has no viable option outside of agreeing to the landlord's terms. Such instances undermine public confidence in the court as a fair and neutral forum.

In the second case, the tenant admitted he was behind with his rent payment and inquired to the judge whether a payment plan could be a viable remedy. The parties were sent to mediation. As a result of the mediation, the tenant found himself signing a consent judgement and order to pay one lump sum, not installments. The tenant appeared confused as this order was entered into the record. I was quite similarly confused sitting in the gallery.

Both these situations highlight the disparities in small claims mediation when parties are unrepresented: neither tenant knew their rights. In traditional mediation, you can agree to the terms of settlement and then reduce it to writing. All issues are open for discussion. Here, the issues seem to be limited to when will you pay and how much. There is even a pre-printed form to be filled out and entered. Once entered, it becomes a court order. If you disobey that order, you can be held in contempt and jailed. Debtors' prisons may have been abolished in the nineteenth century, but it is not illegal to jail people for violating court orders. Indiana courts are jailing people who fail to meet the terms of these payment orders.<sup>117</sup> These tenants have no idea that by signing these agreements, they are placing themselves in legal jeopardy. They are not informed of their right to exemptions from collection.<sup>118</sup> They are not informed of anything because a mediator is not supposed to inform parties of their legal rights.

Mediated agreements are virtually impossible to set aside. The proceedings are not of record and mediators cannot be called to testify as to what occurred in the mediation.<sup>119</sup> In fact, the Indiana

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117. See AM. C. L. UNION, *A Pound of Flesh: The Criminalization of Private Debt* (2018), <https://www.aclu.org/report/pound-flesh-criminalization-private-debt>; see also Chris Serres & Glenn Howatt, *In Jail for Being in Debt*, STARTRIBUNE (Mar. 17, 2011), <http://www.startribune.com/in-jail-for-being-in-debt/95692619/>.

118. Both Federal Law exempts certain federal benefits such as social security from collection. 42 U.S.C. § 407(a) (1988). In addition, debtors cannot be obligated to pay more than a certain percentage of their income on debts. IND. CODE 24-4.5-5-105.

119. IND. A.D.R. RULE 2.12.



Supreme Court has ruled that, with regard to mediation proceedings, only agreements reduced to writing are admissible in court.<sup>120</sup> Therefore, it is impossible for those sent to mediation to contest what occurred during the course of that mediation. They could refuse to sign or reach an agreement; however, that is not clear either. No one asked them if they would like to mediate. The unrepresented parties are sent by the judge to make a deal. The process can be incredibly coercive. It is not reasonable to think pro se litigants will come back to the judge who sent them off to make a deal without one. There are countless individuals waiting for their time in court. I seriously doubt many tenants in this situation would come back to the judge without an agreement and demand a hearing. It is not even clear if such a request would be entertained by the court.

Despite these concerns, some communities are pushing ahead with the notion that mediation programs will work. I strongly urge them to reconsider. Better options are available. Jesse McCoy II created one such model, the Eviction Diversion Program at Duke Law School.<sup>121</sup> His program has been successful for three important reasons. First, the intervention occurs prior to the eviction filing.<sup>122</sup> An eviction filing creates a stain on a renter's record whether or not the tenant is subsequently evicted. Professor McCoy and his students seek to negotiate a resolution with the landlord to preserve the tenancy.<sup>123</sup> The goal is not to avoid a hearing, it is to avoid an eviction.<sup>124</sup> Second, the program collaborates with the Durham County Department of Social Services, which provides caseworkers and, to those that qualify, emergency rental assistance.<sup>125</sup>

An eviction can easily prevent the renter from being able to ever rent again or force him to rent a substandard rental unit because landlords in those situations will often turn a blind eye to a credit report in exchange for a tenant who in turn does not raise concerns about a home's conditions. Jesse McCoy's program does not turn a blind eye to conditions, and this is the final reason the program is

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120. Garrett S. Taylor, *Be Careful What You Say In Mediation-Indiana Supreme Court Rules That Oral Settlement Agreements Reached in Mediation Must Be in Writing to be Enforceable-Kirk E. and Martha Vernon v. Adam J. Acton*, 201 J. OF DISP. RESOL. 375, 379 (2001).

121. Max Blau, *It does Something to Your Soul When Everyone Losing Their Homes Looks Like You*, POLITICO MAG. (May 24, 2018), <https://www.politico.com/magazine/story/2018/05/24/what-works-next-durham-evictions-218416> (explaining the eviction diversion program, a collaboration with Duke Law School's Civil Justice Clinic and Legal Aid of North Carolina).

122. *Id.* at 3.

123. *Id.*

124. *Id.*

125. *Evictions in Richmond: Overview, Current Responses, and Program Proposals* 37 (Aug. 2019), <https://vpm.org/sites/default/files/2019-08/Richmond%20Eviction%20Report.pdf>.

working. When necessary, Professor McCoy and his students can represent a tenant in court to defend a wrongful eviction. The tenants are not coerced into settling what ought to be litigated.<sup>126</sup>

Professor Brian Gilmore runs a similarly successful program at Michigan State Law School.<sup>127</sup> Recently, a formal evaluation of the program was written, documenting their success. The program has reduced the number of evictions by nearly thirteen percent and the number of defaults by twelve percent.<sup>128</sup> Unlike the program at Duke, the interventions at Michigan State Law School (MSU) occur after the eviction has been filed. Lawyers and law students meet with the tenant and the landlord, if willing, to try to reach an alternative to eviction. According to a report done on the program, landlords “typically agree to allow the tenant to stay in the residence, and the tenant [agrees] to pay a specific amount of money.”<sup>129</sup> This may seem like the Indiana mediation program discussed above, but it is not for very significant reasons. In this program, the tenants have an advocate--someone who is informing them of their rights and helping to evaluate their case.

Default judgments also dropped significantly, especially compared to other eviction courts in the same area not involved in the program.<sup>130</sup> Getting more people to come to court is a significant improvement. Whenever I ask a tenant why he or she failed to appear at their eviction hearing, I get one of two answers: (1) I did not know about it, or (2) it would not matter because everyone gets evicted. Perhaps information about this program has given people less confidence in reason number two and more hope that, if they come to a hearing, they may be able to stay in their home. More investigation is probably needed, but more people appearing for hearings is never a bad outcome regardless of the reasons for the increase.

What the MSU and Duke programs have in common may well be their key to success. Tenants have a lawyer or other advocate guiding them through the process and litigating when necessary. Both have emergency funds available to assist with past-due rent. All these factors are necessary for a program that works to stem the flow of evictions.

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126. *Id.*

127. Michigan State Law School Housing Clinic, <https://www.law.msu.edu/clinics/housing.html> (last visited Apr. 10, 2020).

128. Nick Gambler, Jordan Galvin & Andrew Sanders, *An Analysis of the Eviction Diversion Program at the 54-A District Court 4* (2017), <https://www.lansingmi.gov/DocumentCenter/View/5528/2017-Eviction-Diversion-Pilot-Program-Final-Report>.

129. *Id.* at 150.

130. *Id.* at 30.

## V. CAN WE STEM THE TIDE OF EVICTIONS?

I am reminded of the famous quote, “for ye have the poor always with you.”<sup>131</sup> We will always have the poor and, likewise, we will always have evictions. We could be satisfied with that, but I hope we are not. The impact of Matthew Desmond’s work is clearly visible when you compare the governmental response to the financial crisis of 2008 to that of the coronavirus pandemic of 2020. Evictions were not halted during the financial crisis.<sup>132</sup> As of March 20, 2020, every state except Utah has halted all or some evictions.<sup>133</sup> Indiana is among them.<sup>134</sup> HUD secretary Ben Carson has asked for permission from Congress to suspend all public housing evictions, citing the important connection between health and housing.<sup>135</sup>

Every eviction will not be prevented, but many could be with a few simple steps. Eviction diversion programs have succeeded because they provided supportive services to the tenant. They are not focused on easing the burden to the court, though this may be an unintended result. If we are truly going to get the crisis under control, several things must occur.

### A. Increase the Availability of Housing

The lack of safe, affordable housing is clearly the most obvious problem and the one most difficult to address. Professor Desmond advocates for the creation of a universal housing choice voucher, something like food stamps for all those who qualify financially.<sup>136</sup> Housing Choice vouchers are funded by the federal government. The tenant pays the equivalent of thirty percent of their income, and the government pays the rest.<sup>137</sup> It enables landlords to charge

131. *Matthew* 26:11 (King James).

132. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009). Title VII gave limited protection to tenants who were current on the rent, but whose landlords had failed to make the mortgage payment.

133. Emily Bremer, Visiting Associate Professor at Columbia has been compiling a spreadsheet of court and Governors’ orders from across the country. Nineteen states and the District of Columbia have expressly banned evictions during the crisis (DE, HI, ID, IN, IA, KS, KY, MA, MD, MI, MN, NH, NJ, NY, OR, PA, SC, TX, WA). The rest of the bans apply broadly to all civil actions. Emily Bremer, email March 20, 2020 (on file with author).

134. Ind. Exec. Order No. 20-06 (Mar. 6, 2020), [https://www.in.gov/files/EO\\_20-06.pdf](https://www.in.gov/files/EO_20-06.pdf).

135. Press Release, White House Coronavirus Task Force (March 21, 2020) ([https://www.gwinnettdaily.com/multimedia/live-white-house-coronavirus-task-force-press-conference--/article\\_b1174dde-6b8b-11ea-83ea-ab91916ab9fa.html](https://www.gwinnettdaily.com/multimedia/live-white-house-coronavirus-task-force-press-conference--/article_b1174dde-6b8b-11ea-83ea-ab91916ab9fa.html)).

136. Jake Blumgart, *What an Affordable Housing Moonshot Would Look Like*, SLATE (July 2, 2016), <https://slate.com/business/2016/07/its-time-for-universal-housing-vouchers.html>.

137. 42 U.S.C. § 1437f(o)(2)(A) (2018).

market rent while at the same time providing tenants affordable rent.<sup>138</sup> It is a steady flow of income to landlords, so one might think landlords would universally accept them. Unfortunately, housing choice vouchers come with their own set of issues for landlords. Federal regulations require a lease for at least the first year, and one that complies with all state and local laws.<sup>139</sup> You would think this would not be an issue for landlords, but you would be wrong. Rental leases are full of illegal and unenforceable provisions.<sup>140</sup> Many tenants do not know what is or is not enforceable in a lease. As long as landlords can get away with these illegal provisions, they have no reason not to include them in the lease. Tenants will unknowingly obey them.

Homes rented through the voucher program must also meet certain quality standards,<sup>141</sup> though in practice those standards are certainly not universally enforced.<sup>142</sup> Some landlords simply do not want to bring the property up to building code standards, so they do not accept vouchers. Landlords who accept vouchers can only evict tenants for good cause during the term of the lease and they cannot evict if the housing authority, not the tenant, fails to pay its portion of the rent.<sup>143</sup> This may also discourage participation by some landlords. Some landlords do not accept vouchers as a pretext to not renting to minorities. Unfortunately, federal law does not require landlords to accept vouchers.<sup>144</sup> Some have argued that refusing to accept housing vouchers is a violation of the Fair Housing Act in that it adversely affects minorities, specifically African Americans. The Fifth Circuit Court of Appeals disagreed in *The Inclusive*

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138. 24 C.F.R. § 982.1 (2015).

139. 24 C.F.R. § 982.308 (2015).

140. See Meriam Furth-Makin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from Residential Rental Market*, 9 HARV. J. OF LEGAL ANALYSIS 1 (2017).

141. 24 C.F.R. § 982.401 (2015).

142. For example, Miami Hills had been a HUD property in South Bend, Indiana that had for years “passed” inspections. See *Apartment at South Bend’s Miami Hills first to be condemned under city’s new rental inspection program*, SOUTH BEND TRIB. (May 24, 2019), [https://www.southbendtribune.com/news/local/apartment-at-south-bend-s-miami-hills-first-to-be/article\\_abcd3e1-e98f-5808-bf5a-7bb2c70747d0.html](https://www.southbendtribune.com/news/local/apartment-at-south-bend-s-miami-hills-first-to-be/article_abcd3e1-e98f-5808-bf5a-7bb2c70747d0.html); See also Judith Fox, *Viewpoint: Miami Hills Issues Demonstrate South Bend Needs Safe, Affordable Housing*, SOUTH BEND TRIB. (June 4, 2019), [https://www.southbendtribune.com/news/opinion/viewpoint/viewpoint-miami-hills-issues-demonstrate-south-bend-needs-safe-affordable/article\\_b55b2258-4837-5e03-b47b-5d0416ab0786.html](https://www.southbendtribune.com/news/opinion/viewpoint/viewpoint-miami-hills-issues-demonstrate-south-bend-needs-safe-affordable/article_b55b2258-4837-5e03-b47b-5d0416ab0786.html).

143. 24 C.F.R. § 982.310 (a), (b) (2016).

144. See *Karim-Panahi v. 4000 Mass. Apts.*, 302 F. Supp. 3d 330, 337 (D.C. 2018); see also *Austin Apt. Ass’n v. City of Austin*, 89 F. Supp. 3d 886, 890 (W.D. Tex. 2015).

*Communities Project, Inc. v. Lincoln Property Company*.<sup>145</sup> There is a petition for certiorari pending at the U.S. Supreme Court, so we may have an answer to this question in the coming months.

Some landlords simply will not accept vouchers because their users are poor. Others reject them because housing is in such short supply that they can charge more for other tenants.<sup>146</sup> Federal law does not prevent discrimination based on source of income.<sup>147</sup> When cities or states have enacted laws against source of income discrimination, research shows an increase in landlords who accept vouchers.<sup>148</sup> Currently, eleven states and over fifty cities and counties have laws that prohibit landlords from refusing vouchers.<sup>149</sup> Requiring landlords to accept housing vouchers would increase housing options currently available to low-income individuals without the expense of building it.

Yet, expanding the number of landlords who accept vouchers will not solve the entire problem. We need to expand the numbers of vouchers, hence the idea of a universal voucher.<sup>150</sup> The 2013 budget sequestration cuts eliminated 100,000 housing vouchers.<sup>151</sup> While the number of vouchers has been increasing since the end of the financial crisis, they are not keeping up with demand.<sup>152</sup> In fact, the increase is almost completely offset by the loss of public housing or privately owned, subsidized housing.<sup>153</sup> Even before sequestration, the vouchers did not meet demand. Cities such as South Bend have waiting lists that are years long. Increasing the available vouchers would certainly help the eviction problem, but it

145. *Inclusive Cmty. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890 (5th Cir. 2019), *petition for cert docketed* (Oct. 17, 2019).

146. *See* U.S. DEP'T HOUS. URBAN DEV., *A PILOT STUDY OF LANDLORD ACCEPTANCE OF HOUSING CHOICE VOUCHERS* (Sept. 2018), <https://www.huduser.gov/portal/portal/sites/default/files/pdf/Landlord-Acceptance-of-Housing-Choice-Vouchers.pdf>.

147. Allison Bell, Barbara Sard & Becky Koepnick, *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results: Lessons From Cities and States that Have Enacted Source of Income Laws*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 20, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/10-10-18housing.pdf>.

148. *Id.* at 5-6.

149. *Id.* at 2-3. California, Delaware, Minnesota and Wisconsin have statutes that prohibit discrimination based on source of income, but these exclude housing vouchers. *Id.* at 1. For a complete list of the locations that have voucher protecting laws, *see id.* at 16-21.

150. *See* Blumgart, *supra* note 136.

151. Douglas Rice, *Obama Budget Restores Housing Vouchers: Targets Vouchers to Reduce Homelessness, Help Victims of Domestic Violence, Keep Families Together*, CTR ON BUDGET & POL'Y PRIORITIES 1 (Mar. 24, 2015).

152. Alician Mazzara, *Housing Vouchers Work: Huge Demand, Insufficient Funding for Housing Vouchers Means Long Wait*, CTR ON BUDGET & POL'Y PRIORITIES (Apr. 19, 2017), <https://www.cbpp.org/blog/housing-vouchers-work-huge-demand-insufficient-funding-for-housing-vouchers-means-long-waits>.

153. Rice, *supra* note 151, at 12.

won't cure it. Making them universal and requiring landlords to accept them, might.

### *B. Governmental Reforms*

Adequate housing is a human right.<sup>154</sup> Loss of housing is devastating and has negative consequences not just for the person losing the housing, but society in general. It is especially damaging to children. This does not mean that governments must provide housing for everyone. What it does mean is that governments must combat the policies and spending priorities that are preventing people from being housed.<sup>155</sup> In addition, governments are charged with ensuring adequate protection from eviction, including “adequate compensation for any real or personal property affected by the eviction” and ensuring that the evicted do not become homeless.<sup>156</sup> Our current legal process is failing to do either. Many evicted families leave behind all their belongings because they have nowhere to move them or store them. Charities are continually charged with providing the most basic items, new beds particularly, for evicted families. Homeless centers are strained to capacity. Many families find themselves homeless, living on the street or in cars.

The eviction process is incredibly stressful and hard to navigate for those with little knowledge of the legal system. Frankly, it is hard to navigate even for those with decades of experience in the courts. Small claims courts, while designed to make the process easier, are simply overwhelmed. As a result, these courts have become a system dedicated to moving people through the eviction process and out of their homes as quickly as possible. The judiciary too is underfunded. Lawyers often act to slow down the process in those cases where it is necessary. In addition, lawyers can work with landlords to settle those cases that really can be settled before reaching the judge. It just makes sense to provide counsel for all eviction defendants.

There has been a chorus of voices advocating for the right to an attorney in eviction cases for years.<sup>157</sup> Intuitively, the benefit of

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154. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

155. U.N. Off. of the High Comm’r for Hum. Rts., *The Human Right to Adequate Housing*, Fact Sheet No. 21/Rev. 1 (Nov. 2009), [https://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf).

156. *Id.* at 5.

157. See generally Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187 (2009); Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 *FORDHAM URB. L.J.* 1507 (2004); Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before A Public Housing Eviction Board*,

counsel seems obvious. Several studies have been done, all concluding that tenants get better substantive results if they have a lawyer.<sup>158</sup> These studies are often criticized as flawed. Economists would prefer a study of randomly selected sample of litigants, some directed to lawyers and others left to fend for themselves.<sup>159</sup> To my knowledge, no such study has been published. Therefore, we must rely on the available research that does suggest parties would be better off with an attorney.

### C. Eviction Diversion Programs

Eviction diversion programs are having some success. We should expand on this success, but not fall back into the old, flawed, model of courthouse mediation. We have seen what works. Programs need to have attorneys or advocates who are working with and advocate for tenants. The programs cannot be designed specifically to avoid trials. Instead, they should be designed to avoid evictions. There is a difference.

Richmond has one of the highest eviction rates in the nation.<sup>160</sup> In August of 2019, several law students in the Richmond, Virginia area collaborated to create a report on evictions and strategies to address it.<sup>161</sup> Virginia recently passed a number of laws relating to eviction. One of these created pilot eviction diversion programs in four Virginia Cities: Danville, Hampton, Petersburg and Richmond. This new law is slated to begin in July of 2020.<sup>162</sup> The report is a wonderful roadmap into what is needed to stem the tide of evictions. Richmond is attempting to duplicate programs like those run by Professors Gilmore and McCoy. Both of these programs have a key asset missing from most court sponsored efforts: case workers and emergency funds available to stop the eviction.<sup>163</sup>

Most evictions are the result of nonpayment of rent for whatever reason. If the tenant had all the available back rent, he would not be facing eviction. Most evicted tenants are low-income, meaning they

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26 L. & SOCIETY REV. 627 (1992); Jared H. Fink, *The Right to Counsel in Eviction Proceedings; A Moral, Social, and Economic Imperative* (Aug. 13, 2017), available at SSRN: <https://ssrn.com/abstract=3193417>.

158. See, e.g., John Pollock, *Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*, 42 NAT. HOUSING L. BULLETIN 73 (Mar. 1, 2012), available at SSRN: <https://ssrn.com/abstract=2557654>; see also Monsma, *supra* note 157.

159. In their study of New York Housing Court, Professors Collinson and Reed indicate that they will be “studying the effectiveness of legal representation in future work.” Collinson, *supra* note 12, at 31. This may well be the study we have been waiting to see.

160. *Id.* at 1.

161. Evictions in Richmond, *supra* note 125, at 1-2.

162. VA. CODE ANN. §§ 55.1-1262 (2019).

163. Evictions in Richmond, *supra* note 125, at 33.

are unlikely able to pay rent and an additional amount to catch up. The expansion of programs like these will help keep those individuals susceptible to eviction out of the courts. One of the most promising programs, and one discussed in the symposium, is currently running in St. Paul, Minnesota. CommonBond Communities is a non-profit that provides housing servicers across the Midwest. Several years ago, it developed an eviction prevention program.<sup>164</sup> The program provides case managers who intervene as soon as a person is unable to pay the rent. It looks to the causes of the problem and helps the individual address the problem before it becomes an eviction. It was not cheap, but the return on the dollar is significant. A recent report on the program showed that for every dollar spent, the program returned \$4 in social benefits.<sup>165</sup> These social benefits include children who did not have to change schools, improved health, and increased local spending, to name just a few.<sup>166</sup> Like the Duke Law School diversion program, CommonBond has shown that intervention before the eviction is filed is the most effective way to prevent evictions.<sup>167</sup> Programs like this can make a significant difference to renters, landlords and their communities.

#### *D. Law Reform*

Finally, we need to change the laws that govern eviction. I began this article with a quote from Matthew Desmond. I return to that now. A policy that “legitimizes and defends landlords’ right to charge as much as they want . . . forcibly removes a family at landlords’ request by dispatching armed law enforcement officers; and that records and publicizes evictions, as a service to landlords and debt collection agencies” causes exploitation in the housing markets.<sup>168</sup> An eviction filing, whether or not the person is evicted, has negative consequences for the tenant. Yet, these records stay on the record indefinitely. Few states allow tenants to seal their eviction record and, even then, only if it was the result of a foreclosure on the rental property.<sup>169</sup> Minnesota gives the court discretion to expunge an eviction record for other reasons, but the burden is high. To prevail, a renter must show that the case was without a basis in

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164. CommonBond Communities, *Social Impact Measurement of CommonBond’s Eviction Prevention Activities* 1 (2018), <https://commonbond.org/wp-content/uploads/2018/08/CommonBond-Social-impact-report-Final.pdf>.

165. *Id.* at 30.

166. *See id.* at 25-29.

167. *Id.* at 30-31.

168. MATTHEW DESMOND, *supra* note 1, at 307.

169. *See* CAL. CIV. PROC. CODE 1161.2(a)(1)(F) (West 2013); *see also* 735 ILL. COMP. STAT. 5/15-1701(h)(6) (2013); MINN. STAT. § 484.014 (2010).



fact or law, that expungement is in the interests of justice and these interests outweigh the public's interest in knowing about the record.<sup>170</sup> Being evicted for failing to pay your rent is simply not going to be enough.

It seems only fair that a tenant should not be scarred with an eviction record when her only error was to rent from a landlord who failed to make his mortgage payments. Likewise, a tenant who successfully defended against the eviction should not be so branded. Unfortunately, that is not the case. Because so many court dockets are now available online, many landlords simply look up the name. If a filing appears, they will refuse to rent to the applicant, regardless of the outcome of the case. A tenant who wins his case should be permitted to seal or expunge the eviction record. Negative credit records stay on your credit report for seven years,<sup>171</sup> but a court eviction filing is available forever. Is an eviction ten years ago really relevant to a person's ability to rent today? Tenants should be able to remove these negative records that are preventing them from being able to access safe, affordable housing.

Tenants must have a reasonable right to defend themselves in eviction proceedings. This includes being able to reach a judicial officer when they have a defense. When a tenant withholds rent in a desperate attempt to force the landlord into making necessary repairs, those conditions should be a defense to eviction. Finally, leases should be mandatory. Most of my low-income clients are at-will, month-to-month tenants and not by choice. The landlord refuses to give them a lease. An at-will tenant can be evicted for no reason at all. Human rights norms require governments to create policy that "ensure security of tenure to all."<sup>172</sup> As the appalling eviction statistics document, we are currently providing security of tenure to none.

## VI. CONCLUSION

Eviction is a national crisis. It is a humanitarian crisis. It is a health crisis. Yet, it has been a silent crisis because most of its victims are poor. For a brief moment during the coronavirus pandemic of 2020, policymakers seemed to recognize the connections between health, housing and overall economic growth. We need to cease this moment and mobilize against this eviction crisis. Universal housing vouchers would provide housing for thousands who currently cannot afford rent. Adequately funded diversion programs that provide both representation and emergency funds could keep many in their homes who are facing eviction due

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170. MINN. STAT. § 484.014, subdiv. 2 (2019).

171. 15 U.S.C. § 1681c(a) (2019).

172. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 155, at 3.

to a sudden loss of income. Attorneys for all tenants facing eviction could prevent evictions that should not occur from occurring and smooth the transitions for the cases where eviction will inevitably occur. Finally, our laws and court processes must be reformed to acknowledge the fundamental right of housing. Until our legal system considers the rights of tenants as at least equivalent to the rights of landlords, we will continue to see these staggering eviction numbers. We can, and must, do better.

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