

## **The Case Against Summary Eviction Proceedings: Process as Racism and Oppression**

*The Right to Counsel in evictions helps level the playing field,  
but it's time to revise the rules of the game.*

*Andrew Scherer\**

“Civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all.”

— Adam Smith

“History, despite its wrenching pain, cannot be unlived, however, if faced with courage, need not be lived again.”

— Maya Angelou

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\*Andrew Scherer is a Professor of Law and the Policy Director of the Wilf Impact Center for Public Interest Law at New York Law School. He is also the author of the treatise, *Residential Landlord-Tenant Law in New York*. I could not be more grateful to colleagues who took the time to read and comment on drafts of this Article. The insights and suggestions of these colleagues have helped shape the final version of the Article and made it far better than it would otherwise have been. My esteemed group of reviewers, all of whom are leading thinkers in areas related to the subject matter of this Article, and people I admire greatly, include Deborah Archer, Penelope Andrews, Emily Benfer, Richard Chused, Matthew Desmond, Marika Dias, Hon. Marcy Friedman (Ret.), Leah Goodridge, Rasheedah Phillips, Kathryn Sabbeth, Hon. Jean Schneider (Ret.), and Neil Steinkamp. Thanks also to my NYLS colleagues for their helpful comments at a Septemberr 2022 faculty workshop. I also wish to acknowledge and thank my 2021–22 NYLS Research Assistants, Carly Gartenberg, Kira Lopez, and Joseph Rochman, and my 2022–23 Research Assistants Tuhfa Begum, Mavelyn Boza, and Daniella Styagova for their extensive and enormously helpful research and editing assistance with this Article, NYLS student Marissa Zanfardino for her useful research, and the editors at the *Seton Hall Law Review* for their meticulous editing. Finally, this Article takes inspiration from the work of tenant leaders and organizers of the Right to Counsel NYC Coalition who fight every day to defend homes, preserve communities, and change the laws, policies, and practices that frustrate the fundamental human right to housing.

*This Article argues that because of the many ways in which summary eviction proceedings privilege landlords and disadvantage tenants, their very structure is patently unfair. Moreover, because of the racialized nature of landlord-tenant relations, the summary eviction process perpetuates a race-based power imbalance and is structurally racist. This Article explains why the time has come to dispense with the use of the shortcut summary eviction process.*

*Summary eviction proceedings—truncated and expedited exceptions to normal civil process—were first devised for eviction cases in the late eighteenth and early nineteenth centuries by state legislatures comprised of white male property owners who were voted into office by other white male property owners to give themselves a simple judicial remedy to evict. Black people were mostly enslaved; white men who did not own land (i.e., tenants) were unable to vote; and women could neither vote nor own property. The speed and procedural constraints of summary eviction process advantage landlords and disadvantage tenants. Two centuries have passed and all states still use summary eviction processes. Over the course of those two centuries, a conspiracy of public policies and private actions has racialized landlord-tenant relations by perpetuating racial segregation, depriving Black people of homeownership opportunities, and relegating them to tenant status. Black people are not only more likely to be tenants, they are more likely to be evicted and to suffer the devastating consequences of eviction—homelessness; disruption of family life; adverse effects on health, education, and employment; and the loss of place and community.*

*Physical eviction from one's home is one of the most violent acts resulting from a judgment of our civil courts. Eviction has devastating short- and long-term consequences, yet the legal process to secure an eviction judgment is one of the simplest. The process for litigation that aims to evict people from their homes should be handled on par with other civil litigation; it should have more, not fewer, safeguards. A judgment of eviction, if permitted at all, should only be obtainable through a fair process that corresponds to the importance of a home to people's lives, health, and well-being; the dire consequences at stake for tenants who are evicted; and the complexity of the law.*

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## INTRODUCTION

There is a series of books that was popular in the 1990s called *Magic Eye*. The books contain illustrations that appear at first to be abstract two-dimensional geometric designs. But when you take the time to look at the illustrations carefully and you squint your eyes just so, discernable three-dimensional images—of animals, faces, objects—emerge out of those abstract designs. As with the “magic eye” images, sometimes when we look at something, we do not see what it really is, or what is really happening. It just is what it is, has been what it is as long as anyone can remember, and has survived that way without challenge, without question, without analysis.

Summary eviction proceedings are like that. Also known in many jurisdictions as “forcible entry and detainer” proceedings,<sup>1</sup> and in others as “unlawful detainer proceedings,” “special process proceedings,” “summary proceedings,” or “special proceedings,”<sup>2</sup> these truncated, expedited processes by which most evictions are litigated in the United States have, since their adoption, been the way they are. They have been part of the jurisprudential landscape since the earliest days of the republic. Evictions have been handled in summary fashion for over 200 years to give landlords a quick remedy. In effect, summary evictions proceedings provide landlords a speedy method, with fewer procedural tools for tenants to prepare or defend than are available in other civil proceedings. Summary eviction proceedings enable landlords, when they claim nonpayment of rent, expiration of the lease, or other cause, to obtain an expedited judgment to remove tenants from their homes. They are “summary” in the dictionary sense that they are “done without delay or formality: quickly executed.”<sup>3</sup> The underlying premise for that expedited approach is that the landlord’s interest in recovering possession so far outweighs the tenant’s interest in staying in their

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<sup>1</sup> See Luis Jorge DeGraffe, *The Historical Evolution of American Forcible Entry and Detainer Statutes*, 13 SETON HALL LEGIS. J. 129, 129–30 (1990); Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000); Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 398–99 (2022).

<sup>2</sup> In Massachusetts, for example, they are known as “summary process” proceedings (MASS. GEN. LAWS ch. 239 §1 (2021)), while in New York, they are known as “summary proceedings for recovery of real property” (N.Y. REAL PROP. ACTS. § 81 (2022)). Other states call these statutes “unlawful detainer” actions, or “summary ejectment.” ROBERT S. SCHOSHINSKI, *AMERICAN LAW OF LANDLORD AND TENANT*, 409 (1980).

<sup>3</sup> *Summary*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2020).

home that it warrants exempting landlords from the pace, procedural requirements, and norms of ordinary civil litigation.<sup>4</sup>

The demographic and legal context for tenancies has evolved enormously with industrialization and urbanization over the two centuries since the adoption of summary eviction proceedings. A confluence of anti-Black, racist public policies and private action related to housing and other areas, including employment, education, transportation and health care, has racialized the status of the tenant<sup>5</sup>—and tenants are disproportionately Black<sup>6</sup> and other people of color.<sup>7</sup> Tenants who have eviction cases filed against them are disproportionately Black, and tenants who are physically evicted from their homes are disproportionately Black.<sup>8</sup> The stakes for tenants in eviction proceedings, of course, could not be higher. Given the paucity of available affordable housing in most places in the United States, when tenants face eviction, they not only risk losing their homes, they risk the very ability to have a home. They face the dire consequences of eviction that can affect every facet of life: leaving them unhoused, fracturing the integrity of their families, crushing their livelihoods, damaging their mental and physical health and their safety, depriving them of their place in community and, ultimately, tearing apart the fabric of their communities. Summary eviction proceedings are structurally racist, and the vastly disproportionate rates of eviction and eviction’s dire consequences on Black people

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<sup>4</sup> The terminology for statutory summary eviction proceedings changes from jurisdiction to jurisdiction. Spector, *supra* note 1, at 137. This Article will use the general terms “summary proceedings” or “summary eviction proceedings” to refer to all statutory provisions that provide an expedited court process for evictions.

<sup>5</sup> See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES / FROM THE 1960S TO THE 1980S* 64 (2d ed. 1994) (“We employ the term racialization to signify the extension of racial meaning to a previously racially unclassified relationship, social practice or group.”).

<sup>6</sup> This Article will follow AP style and capitalize the term “Black.” The term “white” will be lower-case. *Explaining AP Style on Black and White*, AP NEWS (July 20, 2020), <https://apnews.com/article/archive-race-and-ethnicity-9105661462>) (“AP’s style is now to capitalize Black in a racial, ethnic or cultural sense, conveying an essential and shared sense of history, identity and community among people who identify as Black, including those in the African diaspora and within Africa. The lowercase black is a color, not a person. AP style will continue to lowercase the term white in racial, ethnic and cultural senses . . . . White people generally do not share the same history and culture, or the experience of being discriminated against because of skin color.”).

<sup>7</sup> See *infra* Part II.A.

<sup>8</sup> See *infra* Part II.A.

have only been exacerbated and brought into stark relief by the COVID-19 pandemic.<sup>9</sup>

The word “evict” derives from the Latin word *evincere*, which means to “conquer” or “overcome completely.”<sup>10</sup> By design, summary eviction proceedings reinforce a power relationship that maintains the landlord—or “lord of the land”—in a superior position and the tenant in an inferior position in court. White male property owners—the only people permitted to vote or hold office at the time—originally devised summary eviction proceedings to serve their own purposes, to provide themselves the wherewithal to conquer, to vanquish—to evict—their tenants.<sup>11</sup> Summary proceedings, in both original and current race-based practice, reflect the power relationship between landlords and tenants. The summary eviction process is a relic of a long bygone era, crafted in the early days of the republic when landlord-tenant relations were, in most respects, a vestige of medieval feudal land tenure norms.<sup>12</sup>

Tenancies, for the most part, are no longer rural or land-based. A tenant is far more likely to live in an urban apartment than on an acreage of land. With the growth of cities in the two centuries or more since the advent of summary proceedings, landlord-tenant law has become vastly more complex. The landlord-tenant relationship is increasingly governed by common law, statutes, and regulations that have substantially and permanently altered the rights and responsibilities of both parties. These changes include housing, building, and zoning codes; the evolution of the lease from a conveyance to a contract; a host of local, state, and federal housing and

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<sup>9</sup> See, e.g., Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, J. URB. HEALTH 1, 4–5 (2021).

<sup>10</sup> *Evict*, OXFORD ENGLISH DICTIONARY (2020). See also Paula A. Franzese & Cecil J. Thomas, *Disrupting Dispossession: How the Right to Counsel in Landlord-Tenant Proceedings is Reshaping Outcomes*, 52 SETON HALL L. REV. 1255, 1267–68 (2022) (“From the Latin *evincere*, to evict means to “overcome and expel, conquer, subdue, vanquish; prevail over; supplant. Intervention to avoid the intrinsic violence and pain of displacement can promote stability and well-being, but too often the societal response is insufficient or nonexistent.”).

<sup>11</sup> Of course it bears noting that the property owned by these white male property owners had been acquired in the first place by removing and displacing indigenous peoples from their ancestral lands.

<sup>12</sup> For discussion of the origins and history of summary eviction proceedings, also known as forcible entry and detainer statutes, see DeGraffe, *supra* note 1, at 131; Spector, *supra* note 1, at 139; Richard H. Chused, *Landlord-Tenant Court in New York City at the Turn of the Nineteenth Century*, ARTICLES & CHAPTERS 411, 413–420 (2000), [https://digitalcommons.nyls.edu/fac\\_articles\\_chapters/1222](https://digitalcommons.nyls.edu/fac_articles_chapters/1222).

benefit programs; the doctrines of warranty of habitability and constructive and retaliatory eviction; anti-discrimination legislation at the federal, state, and local levels; good-cause eviction requirements; and rent and eviction regulations.

The statutory jargon speaks of the landlord “recovering possession,” but in the contemporary urban world, landlords mostly never had, nor did they seek, possession in the literal sense.<sup>13</sup> They generally never occupied the space, nor did they ever seek to occupy it. In seeking eviction, landlords seek to assert control over a housing unit where the tenant and the tenant’s family make their home—a thing of value to both parties. But the value to each of those parties is of a very different sort—a place to live on the one hand, and a commodity, a source of profit, on the other. And landlords seek to recover the tenant’s home using a legal process devised by their property-owning forebearers that denies sufficient time<sup>14</sup> and procedural protections to provide for fairness and assure a just result. They do so in a forum, an “eviction court,” that thus becomes a “site of social struggle,” addressing “tensions between divergent societal values.”<sup>15</sup> The imbalance, mostly race-based, in these eviction courts is palpable—proceedings are sped through at warp speed; landlords are mostly represented by counsel while tenants are not; the spaces are cramped, filthy, and crowded; and the judges, magistrates, or other decision-makers are expected to handle an overwhelming volume of cases.

It does not have to be this way. In much of Europe and in South Africa, there are far more procedural and substantive safeguards built into the eviction process that serve to avert evictions, not the least of which is the obligation of the government to ensure alternative

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<sup>13</sup> In the property law sense, landlords have legal title or ownership, but their relationship to the leased property is, in almost all instances, for income and not for use or “possession.”

<sup>14</sup> The race-based deprivation of adequate time to prepare and defend is a typical, but under-examined, characteristic of oppression. Raheedah Phillips, *Race Against Time: Afrofuturism and Our Liberated Housing Futures*, 9 AFROFUTURISM & L. 16, 16 (2022) (“Class oppression and institutional racism are reinforced by the union between time, temporality, and the law, and yet, these areas are underexamined in critical writing in legal discourse. These relationships play a daily and crucial role in how Black people—particularly those standing at the intersections of marginalized identities of gender and class—are valued, treated, punished, or underserved by and within the legal system.”).

<sup>15</sup> See Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 400 (2022). See generally DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS (2016).

housing.<sup>16</sup> And in the United States, the measures taken during the pandemic to stem the spread of COVID-19, including court closings, moratoria on evictions, emergency rental assistance programs, and a proliferation of court-ordered eviction diversion programs, showed that the eviction process is not sacrosanct.<sup>17</sup> Moreover, the successful and growing movement to establish a right to counsel for tenants who face eviction is upending the conventional wisdom about summary eviction proceedings.<sup>18</sup> The right to counsel for tenants who face eviction, without question, shifts the power relationship between landlords and tenants. It is often said to level the playing field, and it certainly makes the playing field more level in a most fundamental way. The presence of counsel as of right alters the expectations of the parties and the courts about the process itself. It brings eviction proceedings into the ambit of our adversarial system of justice in which both sides, in theory at least, have the legal resources to use the law to their advantage. But, to carry the analogy one step further, by privileging landlords and disadvantaging tenants with expedited and truncated summary proceedings for eviction, the game that is played on that playing field is still rigged. The right to counsel for tenants makes the playing field more level, but who designed that playing field and to what purpose?

The presence of counsel as of right also sheds light on the nature of the process itself<sup>19</sup> and, like those “magic eye” images in the 1990s,

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<sup>16</sup> Sarah Fick & Michel Vols, *Best Protection Against Eviction: A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution*, 3 EUR. J. COMP. L. & GOVERNANCE 40, 58 (2016). See generally EVICT, <https://www.eviction.eu> (last visited Sept. 23, 2022).

<sup>17</sup> Emily A. Benfer et al., *COVID-19 Housing Policy: State and Federal Eviction Moratoria and Supportive Measures in the United States During the Pandemic*, HOUSING POLICY DEBATE, June 10, 2022, at 19, <https://www.tandfonline.com/doi/pdf/10.1080/10511482.2022.2076713?needAccess=true>.

<sup>18</sup> See, e.g., Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. WOMEN'S L.J. 55, 70 (2018). As of publication, sixteen localities and three states have adopted a right to counsel for tenants in eviction proceedings. For thorough and up-to-date information on the right to counsel movement, including detailed information on the right to counsel statutes in jurisdictions where the right to counsel has been, see NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL, <http://civilrighttocounsel.org> (last visited Oct. 2, 2022).

<sup>19</sup> In the law review article, Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022) (manuscript at 49–50), the authors similarly point out that the presence of criminal defense counsel has allowed us to see how much is wrong with the criminal justice system and is part of the reason there is so much more literature about the failings of the criminal justice system than the civil justice system.



helps make the eviction process and its faults visible in ways that are obscured by the fundamental imbalance created when one side has counsel and the other does not.<sup>20</sup> Indeed, the recalibration of the power relationship in the eviction process and the momentum brought about by the successful campaigns to win a right to counsel provide an ideal perch from which to understand the further changes that are needed to assure fairness and equity in eviction proceedings. This shift of power also fosters a knowledgeable power base that can help bring about those changes.<sup>21</sup>

This Article argues that because of the many ways in which summary eviction proceedings privilege landlords and disadvantage tenants, their very structure is patently unfair.<sup>22</sup> Moreover, because of the racialized nature of landlord-tenant relations, that unfairness—whether it any longer manifests intent or is simply a relic of a bygone era—is structurally racist. This Article explains why the time has come to abandon the use of summary proceedings for evictions and to handle the eviction process on par with other civil litigation in a manner commensurate with the importance of the subject matter, the

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<sup>20</sup> Of course, while achieving the right to counsel and revising the rules governing the eviction process would have an enormously beneficial effect, see discussion *infra* Parts III, V; decent, stable, and affordable housing can only be achieved with substantive measures that make rents affordable, assure compliance with housing and building codes, and provide tenure rights that extend beyond the term of a lease (known as just cause eviction statutes). Moreover, a guarantee of decent, stable, and affordable housing will, in the long run, require recognition of housing as a fundamental human right. For a discussion of the importance of the right to housing, see Chester Hartman, *The Case for a Right to Housing*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 177, 180 (Rachel G. Bratt et al., eds. 2006); Kristen David Adams, *Do We Need a Right to Housing?*, 9 *NEV. L.J.* 275, 321 (2009).

<sup>21</sup> Organizing for change can be powerful. Remarkably effective grassroots organizing campaigns brought the right to counsel to New York City in 2017, and that campaign lasted several years. Low-income tenants are most directly affected by evictions and played a leading role in the campaign. For extensive background information on the campaign, see Susanna Blankley, *Our Rights! Our Power! The Right to Counsel (RTC) Campaign to Fight Evictions in NYC*, VIMEO (Sept. 11, 2020, 2:51 PM), [https://vimeo.com/457047852?embedded=true&source=vimeo\\_logo&owner=120125981](https://vimeo.com/457047852?embedded=true&source=vimeo_logo&owner=120125981). The energy, engagement, and skills that were the hallmarks of that campaign are having an impact on housing organizing in general. See TAKEROOT JUSTICE, <https://takerootjustice.org/resources/organizing-is-different-now-how-the-right-to-counsel-strengthens-the-tenant-movement-in-new-york-city> (Mar. 22, 2022).

<sup>22</sup> This Article focuses solely on residential eviction proceedings. Commercial eviction proceedings are beyond the scope of this Article.

dire consequences at stake for tenants, and the complexity of the law that applies.<sup>23</sup>

Part I of this Article discusses the act of eviction and its causes and consequences. Eviction from one's home is one of the most wrenching, and violent results of civil litigation; "one of the harshest decrees known to the law."<sup>24</sup> It imposes devastating short- and long-term consequences for individuals, families, whole communities, and the social fabric. It follows that the process permitting it to go forward should provide more, not fewer, protections than exist for other forms of civil litigation. Part II discusses the racial demographics of a rental housing market informed by public policies and private discriminatory actions that have consistently denied Black people access to the generational wealth and other economic benefits of homeownership, relegated them to the status of tenants, and too-often forced them to live in inadequate, unaffordable housing. Part II also discusses the historic roots of the racial disproportionality of eviction proceedings and eviction of people of color, particularly Black renters. Part III discusses the origins, history, and nature of summary eviction proceedings; the use of process to achieve predetermined results; and why a summary approach to eviction litigation privileges landlords and severely disadvantages tenants. Part IV explains why a summary eviction process that apportions privileges and disadvantages along racial lines constitutes structural racism. Part IV also explains why the right to counsel, as monumental and transformative as it is in eviction proceedings, is not enough. And Part V argues for the dismantling of the summary approach to evictions and replacing it with a system intended to prevent evictions and achieve justice rather than a system that provides a shortcut to eviction.

#### I: EVICTION MATTERS—A HOME IS A PRECIOUS THING TO LOSE

It is worth stating the obvious. A home could not be more essential to our well-being as humans. Home is our refuge, our place of privacy from the rest of the world. Home is the space in which we raise our children and take care of our elders. Home is where we rest, cook, eat, entertain. Home situates us in a community, in the political

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<sup>23</sup> An argument can certainly be made that eviction is itself too harsh and damaging to be an available remedy for any but the most serious claims against a tenant. This Article, however, leaves that argument for another day, or another author.

<sup>24</sup> *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 215 (N.Y. 1989) (Bellacosa, J., concurring).

world. Home is our base, the place we leave from and return to for our work, our education, our consumption, our interactions with others. Home is the place we can be ourselves.<sup>25</sup> It is worth stating the obvious because the legal structure designed to evict tenants from their homes is swift, harsh, and demeaning. It reflects neither respect nor consideration for the value of what is taken. That legal structure is, by design, intended to achieve the goal of eviction as rapidly as possible, without the trappings of normal civil litigation, and in service of a “remedy” that leaves people devastated and damaged.

In most jurisdictions, an eviction is carried out by an armed public official: a sheriff, marshal, or someone acting on behalf of the government whose court-issued mandate is to remove the household (statistically, most likely a Black, female-headed household)<sup>26</sup> from their home. The family’s possessions, in most places in the United States, are simply put out on the street.<sup>27</sup> In many cases, given the acute shortage of alternative affordable housing, eviction leads to homelessness, with all its attendant devastating consequences. And, whether or not people who are evicted become homeless, eviction is traumatic. There is an inevitable lasting toll from eviction, including adverse effects on physical and mental health, disruption of education, much greater cost burden for tenants in the next place that they find to live (if they can find the next place), disruption of family life and

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<sup>25</sup> A home is so elemental a need that it is often simply taken for granted. On the other hand, the home is the subject of endless rhapsodic quotes from everyone from Benjamin Franklin—“A house is not a home unless it contains food and fire for the mind as well as the body”—to Joan Rivers—“I told my mother-in-law that my house was her house, and she said, ‘[g]et the hell off my property.’” *Home Quotes*, BRAINY QUOTE, <https://www.brainyquote.com/topics/home-quotes> (last visited Sept. 23, 2022); *Joan Rivers Quotes*, BRAINY QUOTE, [https://www.brainyquote.com/quotes/joan\\_rivers\\_163112](https://www.brainyquote.com/quotes/joan_rivers_163112) (last visited Sept. 23, 2022); see generally Lorna Fox O’Mahony, *The Meaning of Home: From Theory to Practice*, 5 INT’L J.L. BUILT ENV’T 156, 156–59 (2013).

<sup>26</sup> See *infra* Part II.

<sup>27</sup> The shocking, archaic, and inhumane practice of simply putting the possessions of an evicted household on the streets is an area ripe for advocacy. Some jurisdictions have abandoned that practice. In New York City, for example, for more than a half-century, evictions have been executed by City Marshals, who are required to either leave the tenant’s property in the premises or take it to a warehouse. See CITY OF N.Y. DEP’T OF INVESTIGATION, N.Y.C. MARSHALS HANDBOOK OF REGULATIONS (2013), at § 6-4. This minimal measure to protect a tenant’s goods upon eviction is no doubt an advance over the more crude practice of simply placing belongings on the street, but the act of eviction is still violent and the evicted household is still very much in jeopardy of losing all its worldly possessions in New York City.

education, loss of employment, increased involvement with the criminal justice system, and loss of community and sense of place.<sup>28</sup>

A. *Broad Economic, Social, and Political Forces—as well as Individual Forces—Lead to Eviction Proceedings*

There is a fundamental, underlying structural tension between the interests of landlords and those of tenants. A tenant's interest is deeply personal. Tenants seek an affordable, safe and secure home in a livable community. A landlord's interest is pecuniary. For a landlord, a living unit is a commodity that serves to generate income.<sup>29</sup> A home, however, is a commodity like no other. It is immobile. It is a fundamental necessity for human existence. For most of us, it is the repository for all our worldly possessions. And, for tenants, it is effectively on loan from the provider to the user for a monthly fee rather than, as with most commodities, a transfer of ownership and control. The types of tensions that arise between the provider and the user of the home—the landlord and the tenant—are related to rent levels, rent payments, living conditions, and conditions placed on the use of the property which can lead to conflicts, litigation, and eviction. Landlord-tenant litigation, almost always initiated by the landlord, almost always carries with it the threat of eviction. And the framing for that litigation is as different from other civil litigation as housing is from other commodities.

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<sup>28</sup> See generally Benfer, *supra* note 9, at 5. In 1987, the author wrote a law review article about the need for a right to counsel in eviction proceedings. The article contains a fictionalized account of a tenant's experience of eviction based on a composite of the author's clients in eviction defense cases in the South Bronx at the time. Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 558–59 (1988).

<sup>29</sup> Nonprofit landlords of affordable housing and operators of government-owned housing have a somewhat different motivation. They are mission-driven, with the articulated goal of addressing the human need for a home factored into the need to generate revenue. While not all nonprofits necessarily prioritize their mission in their relationships to their tenants, to that extent they do, their interests could be considered to coincide with those of tenants more than the interests of their private-sector counterparts. Nonetheless, landlord-tenant conflicts between public or nonprofit landlords and their tenants still inevitably arise. While these public and nonprofit landlords may not share the same motivations as private landlords, they function within the same system of economics and legal process as their profit-motivated counterparts. In particular, those conflicts that arise get funneled into the same summary expedited litigation framing as do the conflicts between private landlords and their tenants, and mission-driven landlords reap the same benefits as private owners from the systemic power advantages the summary eviction process provides.

The immediate precipitating factors that lead to eviction litigation for the most part take the guise of individual conflicts between individual tenants and individual landlords. These factors, however, almost always reflect broad social and economic conditions as well as government action—or failure to act—that causes those conditions. Evictions in the South Bronx are a perfect example of the interaction between individual tenant hardship and social forces that lead to large-scale dislocation. In the 1970s and early 1980s, New York City was going through a period of disinvestment and economic downturn, and there was large-scale abandonment of multi-family housing, particularly in the Bronx.<sup>30</sup> The abandonment and deterioration of housing and communities in the South Bronx was prompted, in no small part, by intentional municipal policies of “planned shrinkage” and “benign neglect” that deprived low-income neighborhoods like the South Bronx of code enforcement, sanitation, transportation, and other public services.<sup>31</sup> Seeing no long-term economic benefits from their properties, landlords refused to provide heat, failed to make repairs, and ultimately resorted to arson in order to collect insurance money.<sup>32</sup> The city failed to take title to tax-delinquent properties, thus prolonging the period of deterioration. The Bronx, it was said, was burning;<sup>33</sup> the seventies were, in effect, a “decade of fire.” Housing Court in the Bronx in that era was overwhelmed with eviction cases. Tenants withheld rent in an often-futile attempt to pressure landlords into making repairs or used their money to buy space heaters or pay for cooking gas because they were using their ovens to heat their homes. This was decades before New York City established the right to counsel for tenants who face eviction, and unrepresented tenants were evicted by the thousands each year. Many more simply fled their

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<sup>30</sup> Andrew Scherer, *Is There Life After Abandonment—The Key Role of New York City’s in Rem Housing in Establishing an Entitlement to Decent, Affordable Housing*, 13 N.Y.U. REV. L. & SOC. CHANGE 953, 954–55 (1984).

<sup>31</sup> See El Muriella, *Planned Shrinkage*, CODES ST.: URB. STUD. BLOG (June 2, 2010, 1:12 PM), <http://thecodesofthestreet.blogspot.com/2010/06/planned-shrinkage.html>.

<sup>32</sup> The author was a young legal services attorney in the Bronx in this era and witnessed these conditions first-hand. For a thorough account of that era, see CAROLYN McLAUGHLIN, *SOUTH BRONX BATTLES; STORIES OF RESISTANCE, RESILIENCE, AND RENEWAL* (2019); *Decade of Fire* (Independent Television Service 2019). See generally Andrew Scherer, *Is There Life After Abandonment? The Key Role of New York City’s In Rem Housing in Establishing an Entitlement to Decent, Affordable Housing*, 13 N.Y.U. REV. L. & SOC. CHANGE 953, 954 (1984); JONATHAN MAHLER, *LADIES AND GENTLEMEN, THE BRONX IS BURNING: 1977, BASEBALL, POLITICS, AND THE BATTLE FOR THE SOUL OF A CITY* (2006).

<sup>33</sup> See sources cited *supra* note 27.

homes before an eviction judgment could be rendered or executed. New York City's public policies, as well as vastly inadequate funding for legal counsel to help fend off evictions,<sup>34</sup> all contributed to a massive wave of displacement.<sup>35</sup>

Fast forward to the current era—huge high-rise apartment buildings are under construction throughout the South Bronx<sup>36</sup>—and Bronx Housing Court remains packed with eviction cases (except during the pandemic-related eviction moratorium and temporary halt to court operations)<sup>37</sup> These cases are just as traceable in the current era to public policies, albeit different policies, as they were during the “decade of fire.” Policies such as zoning density changes and tax incentives foster or allow gentrification and displacement of low-income people from their homes due to rising rents, insufficient rent subsidies, and inadequate procedural safeguards to protect their tenure. The low-income population gets displaced whether the Bronx is burning or rising.

That macro forces generate the micro event of an individual household's eviction is a hardly new phenomenon. Nor is it a new phenomenon that those who face eviction are overwhelmingly Black people and other people of color. History is rife with example after example of dispossession of majority Black and Latinx communities. In Manhattan, for example, Black-owned farms and housing were displaced in the eighteenth century to develop the neighborhood of Greenwich Village; the majority-Black settlement of Seneca Village was demolished to clear land for Central Park in the mid-nineteenth century; and Black and Latinx people were displaced from the neighborhood of San Juan Hill to make way for Lincoln Center in the mid-twentieth century.<sup>38</sup> Racialized displacement continues in the

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<sup>34</sup> See LEGAL SERVS. CORP., <https://justicegap.lsc.gov/resource/executive-summary> (last visited Sept. 23, 2022).

<sup>35</sup> See Scherer, *supra* note 32, at 953–74.

<sup>36</sup> See generally C.J. Hughes, *In the Bronx, Mott Haven Suddenly Gets a Skyline*, N.Y. TIMES, Oct. 20, 2021.

<sup>37</sup> N.Y.C. HUM. RES. ADMIN., DEP'T OF SOC. SERVS., NYC OFFICE OF CIVIL JUSTICE 2020 ANNUAL REPORT 26 (2020), [https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_Annual\\_Report\\_2020.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2020.pdf).

<sup>38</sup> N.Y. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., RACIAL DISCRIMINATION AND EVICTION POLICIES AND ENFORCEMENT IN NEW YORK 64 (2022), <https://www.usccr.gov/files/2022-03/New-York-Advisory-Committee-Evictions-Report-March-2022.pdf>; *Weekend History: Three UWS Communities That Were Bulldozed Long Ago*, W. SIDE RAG (Dec. 6, 2015, 6:08 PM), <https://www.westsiderag.com/2015/12/06/weekend-history-three-uws-communities-that-were-bulldozed-long-ago>.

twenty-first century in many New York City neighborhoods including Harlem, Williamsburg, Bedford-Stuyvesant, and Chinatown.<sup>39</sup> And it is the residents of those communities who find themselves facing eviction in the courts as a consequence of those market-based forces of displacement.

While broad economic, social, and political forces, characterized both by action and the failure to act, set in motion conflicts at the macro level that lead to eviction, at the micro level the precipitating causes for eviction often appear to be quite routine and quotidian. A landlord's refusal to renew a lease may reflect a rising real estate market, a pattern of racial bias, or a plan for redevelopment. A claimed failure to pay rent may reflect rent-withholding because of poor living conditions due to rampant disinvestment, a pattern of harassment, the underfunding or bureaucratic snafus of public housing or other housing subsidy programs, the failings of a rent regulatory system, a pandemic, or an economic downturn. An allegation of a nuisance or violation of the lease terms may reflect the deficits of a social services and mental health care system, a clash of cultures in a changing neighborhood, or a landlord's scheme to break a lease to take advantage of a vulnerable tenant. Or the routine and quotidian may be just what it seems to be on the surface: an ordinary conflict over rights to a unit of housing—a home—that has ripened into litigation. In the end, for the purpose of evaluating the validity of the truncated and expedited process used for eviction cases to remove people from their homes, it does not really matter whether or not the underlying cause is related to broad social and economic conditions. Nor does the nature of the specific claim for which eviction is sought matter. Regardless, the conflict should be resolved through an adjudicative process that is fair and does not privilege one side and disadvantage the other, particularly along racial lines.

B. *Losing a Home is Devastating. Eviction Has Serious Long-term Deleterious Consequences.*

1. Eviction is Violent and Traumatic

In 1984, in the course of an eviction, police shot and killed an elderly Black woman named Eleanor Bumpurs who was alleged to be mentally ill.<sup>40</sup> Ms. Bumpurs, who was renting a New York City public

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<sup>39</sup> N.Y. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., *supra* note 38, at 64.

<sup>40</sup> Selwyn Raab, *Officer Indicted in Bumpurs Case*, N.Y. TIMES, Feb. 1, 1985, at A1; *People v. Sullivan*, 503 N.E.2d 74, 75–76 (1986).

housing development apartment for \$96.85 per month, refused to open the door when a city marshal came to evict her, pursuant to a court judgment and warrant of eviction against her.<sup>41</sup> The judgment had been granted on default when Ms. Bumpurs failed to appear in court on the appointed court date.<sup>42</sup> Unable to execute<sup>43</sup> the warrant because this elderly woman refused him entry, the marshal called the police.<sup>44</sup> When the police arrived, they broke in the door to Ms. Bumpurs's home and fatally shot her with a 12-gauge shotgun.<sup>45</sup> The killing of Eleanor Bumpurs is a horrifying and graphic reminder of the potential for violence inherent in the very act of eviction.

The Eleanor Bumpurs case was, of course, exponentially more violent than ordinary evictions. But the thousands of mundane evictions executed in the United States daily by public officials or their designees with guns are, by their very nature, always violent. And they carry the threat of escalating violence. Indeed, the possibility of harm from an armed individual executing the eviction, the use of force to break into a home and remove possessions, and the damage to and disposal of those possessions make the act of eviction one of the most physically violent and psychologically traumatic consequences to result from a civil court judgment.

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<sup>41</sup> Raab, *supra* note 40; *Sullivan*, 503 N.E.2d at 75–76.

<sup>42</sup> Raab, *supra* note 40; *Sullivan*, 503 N.E.2d at 75–76.

<sup>43</sup> Evictions, like other orders of the court, are said to be “executed.” Yet it is another instance where the nomenclature is telling, and particularly chilling, in light of the Bumpurs matter. The state acts with violence when it enforces orders. “The state literally *enforces* those judgments parties refuse or are unable to satisfy. If a losing party fails to pay a monetary judgment, a sheriff will forcibly seize her assets. If a landlord wins an eviction case, an agent of the state will forcibly remove any tenant who remains in possession of the property.” Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 Wis. L. REV. 287, 297 (2018).

<sup>44</sup> Selwyn Raab, *Civilian Describes the ‘Struggle’ Before Shooting of Bumpurs*, N.Y. TIMES (Jan. 14, 1987), <https://www.nytimes.com/1987/01/14/nyregion/civilian-describes-struggle-before-shooting-of-bumpurs.html?searchResultPosition=14>.

<sup>45</sup> Greg B. Smith, *Eleanor Bumpurs’ Namesake Kin Inherits Legacy of NYCHA Neglect and Disrepair*, CITY (Jan. 24, 2021), <https://www.thecity.nyc/2021/1/24/22247526/eleanor-bumpurs-nycha-disrepair-bronx-nypd>; Selwyn Raab, *supra* note 40; Selwyn Raab, *Autopsy Finds Bumpurs was Hit by Two Blasts*, N.Y. TIMES, Nov. 27, 1984, at B3. While New York City subsequently revised its protocols for situations like the Bumpurs case, it remains true that evictions are violent acts that carry the risk of injury and death. An indictment against Officer Steven Sullivan, the police officer who pulled the trigger, was dismissed in 1986. *Sullivan*, 503 N.E. 2d at 78.



The publication in 2016 of Matthew Desmond's book, *Evicted: Poverty and Profit in the American City*,<sup>46</sup> has drawn long-overdue attention to eviction and its consequences. Desmond's portrait of the role of eviction in the lives of eight Milwaukee families in the early twenty-first century demonstrated in detail the vicious spiral that ensues when a family is evicted: belongings are lost, children miss critical schooling, jobs are lost, illness and depression follow.<sup>47</sup> Desmond's description of one such eviction in Milwaukee around 2008–09 reflects the commonplace banality of that violence:

John hung up the phone and waved the movers in. At that moment, the house no longer belonged to the occupants, and the movers took it over. Grabbing dollies, hump straps, and boxes, the men began clearing every room. They worked quickly and without hesitation. There were no children in the house that morning, but there were toys and diapers. The woman who answered the door moved slowly, looking overcome. A sob broke through her blank face when she opened the refrigerator and saw that the movers had cleaned it out, even packing the ice trays. She found her things piled in the back alley. Sheriff John looked to the sky as it began to rain and then looked back at Tim. "Snowstorm. Rainstorm. We don't give a shit." Tim said, lighting a Salem.<sup>48</sup>

Desmond justifiably concludes that "eviction is a cause, not just a condition of poverty."<sup>49</sup> Data collection and academic literature addressing eviction has exploded since the publication of *Evicted*,<sup>50</sup> and amply demonstrates what is really at stake in the eviction process.

## 2. Eviction Leads to Homelessness

Among the travails faced by households that get evicted, homelessness is no doubt the worst. Eviction is a leading immediate or eventual cause of homelessness.<sup>51</sup> Eviction does not always cause

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<sup>46</sup> MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 114–15.

<sup>49</sup> *Id.* at 297.

<sup>50</sup> Desmond's project, the Eviction Lab, founded in the wake of publication of *Evicted*, has become the preeminent research institute on eviction. EVICTION LAB, <https://evictionlab.org> (last visited Aug. 8, 2022).

<sup>51</sup> Cf. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 299 (2015) (hypothesizing that eviction leads to prolonged periods of homelessness, forgoing of basic necessities such as clothing, food, and medical care, and renders families ineligible for federal housing assistance).

homelessness, and homelessness may not always be experienced immediately following an eviction—an evicted family or individual is more likely first to double-up with friends or family, or spend down meager resources or take on debt by staying at a hotel or motel before living in a car, turning to a homeless shelter or resorting to life on the streets. Nonetheless, a lack of affordable housing and bars to securing replacement housing as a result of having been evicted all too often lead to homelessness. The data demonstrating this fact is extensive.

Neil Steinkamp of Stout Financial has gathered much of the research on the consequences of eviction for his work evaluating the relative costs and benefits of establishing a right to counsel for tenants.<sup>52</sup> Study after study has shown localities have found eviction to be a leading cause of homelessness.<sup>53</sup> For example, the Massachusetts Interagency Council on Housing and Homelessness found that 45 percent of people experiencing homelessness or at risk of experiencing homelessness cited eviction as the reason for their housing instability.<sup>54</sup> A 2017 report by The Institute for Children, Poverty, and Homelessness found that in New York City, 25 percent of families with children eligible for shelter cited eviction as the reason for their homelessness.<sup>55</sup> Other studies abound.<sup>56</sup>

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<sup>52</sup> See STOUT, THE ESTIMATED COST OF AN EVICTION RIGHT TO COUNSEL OUTSIDE OF NEW YORK CITY (2022), [https://assets.nationbuilder.com/righttocounselnyc/pages/1294/attachments/original/1646928176/Stout\\_Report\\_-\\_Cost\\_of\\_RTC\\_ONYC\\_March\\_2022.pdf?1646928176](https://assets.nationbuilder.com/righttocounselnyc/pages/1294/attachments/original/1646928176/Stout_Report_-_Cost_of_RTC_ONYC_March_2022.pdf?1646928176) (reporting for the New York Right to Counsel Coalition).

<sup>53</sup> *Id.*

<sup>54</sup> MASS. INTERAGENCY COUNCIL ON HOUS. AND HOMELESSNESS, REGIONAL NETWORKS TO END HOMELESSNESS PILOT FINAL EVALUATION REPORT 76 (2011), <http://westernmasshousingfirst.org/wp-content/uploads/2011/03/wmn-icch-final-report-complete.pdf> (analyzing a variety of reports generated by the state's shelter system to generate its conclusions).

<sup>55</sup> INST. FOR CHILD., POVERTY & HOMELESSNESS, ON THE MAP: THE DYNAMICS OF FAMILY HOMELESSNESS IN NEW YORK CITY 40 (2017), <https://www.icphusa.org/wp-content/uploads/2017/04/On-the-Map-Family-Homelessness-Full-Report-Excluding-Districts.pdf>. See also N.Y.C. INDEP. BUDGET OFF., N.Y.C. DEP'T OF HOMELESS SERVS., THE RISING NUMBER OF HOMELESS FAMILIES IN NYC, 2002–2012: A LOOK AT WHY FAMILIES WERE GRANTED SHELTER, THE HOUSING THEY HAD LIVED IN & WHERE THEY CAME FROM 7 (2014) (finding that eviction was the most common reason for families entering city homeless shelters between 2002 and 2012).

<sup>56</sup> See WHITNEY FLEMING, COAL. FOR THE HOMELESS HOUSTON/HARRIS CNTY., CAPACITY AND GAPS IN THE HOMELESS RESIDENTIAL AND SERVICE SYSTEM, HARRIS AND FORT BEND COUNTIES 5 (2011), <https://irp-cdn.multiscreensite.com/2d521d2c/files/uploaded/Capacity-and-Gaps-in-the-Homeless-Residential-and-Service-System-Harris-and-Fort-Bend-Counties.pdf> (finding in Harris and Fort Bend Counties, Texas,

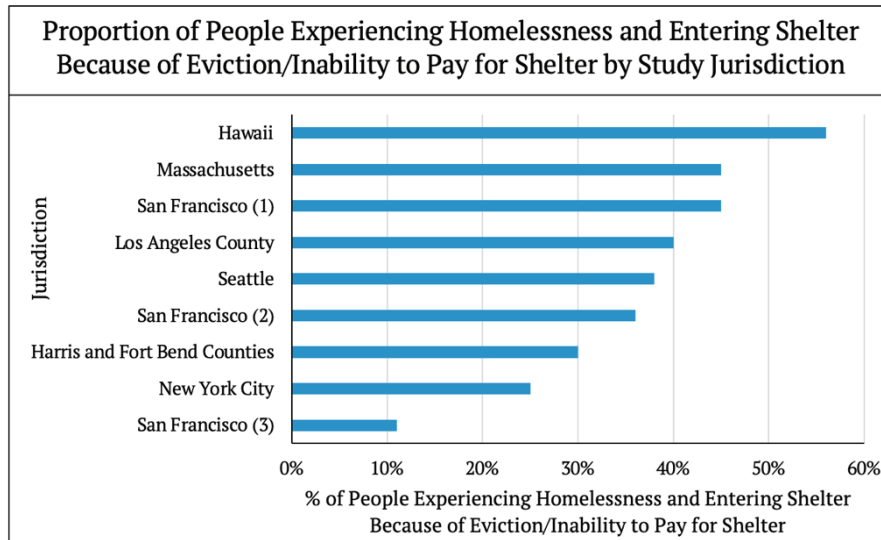
Conversely, preventing eviction not only averts homelessness in the short term but also can lead to long-term housing stability. A 2018 study of the effects of evictions on low-income households in New York City suggests that “averting evictions isn’t simply delaying an inevitable bout of homelessness but leading to persistently different housing stability.”<sup>57</sup> The same study found that eviction increased the share of days spent in shelter during the first two years after an eviction by 5 percent, or about thirty-six days.<sup>58</sup> Figure 1 shows, by jurisdiction, the percentage of people reporting that they were experiencing homelessness and entering shelter because of eviction or an inability to pay rent.

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approximately 30 percent of people experiencing homelessness identified eviction by a family member or a landlord as a cause of their homelessness); JOHN AND TERRY LEVIN CTR. FOR PUB. SERV. AND PUB. INT., SAN FRANCISCO RIGHT TO CIVIL COUNSEL PILOT PROGRAM DOCUMENTATION REPORT 3, 17 (2014), <https://law.stanford.edu/index.php?webauth-document=child-page/341183/doc/slspublic/SF%20RTCC%20Documentation%20Report.pdf> (explaining that in San Francisco, 11 percent of families in homeless shelters identified evictions—legal and illegal—as a cause of their homelessness. The Housing and Homeless Division Family and Prevention Services Program Manager in San Francisco stated that the number of families experiencing homelessness as a result of an eviction was potentially up to 50 percent higher when considering intermediate living arrangements made with friends and family before entering the shelter system); THE SEATTLE WOMEN’S COMM’N & THE HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS’N, LOSING HOME: THE HUMAN COST OF EVICTION IN SEATTLE 3 (2018), [https://www.kcba.org/Portals/0/pbs/pdf/HJP\\_LosingHome\\_%202018.pdf](https://www.kcba.org/Portals/0/pbs/pdf/HJP_LosingHome_%202018.pdf) (explaining that among Seattle tenants who had been evicted, rather than people experiencing homelessness, 37.5 percent were living unsheltered and 50 percent were living in a shelter, transitional housing, or with family and friends. Only 12.5 percent of evicted respondents had been able to secure another home).

<sup>57</sup> ROBERT COLLINSON & DAVIN REED, THE EFFECTS OF EVICTIONS ON LOW-INCOME HOUSEHOLDS 25 (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).

<sup>58</sup> *Id.* at 25.

Figure 1<sup>59</sup>

The well-documented devastation wrought by homelessness cannot be overstated. Unhoused people suffer enormous physical, emotional, and social harm. People who experience homelessness due to an eviction face a decreased lifespan and increased rates of diabetes, hypertension, heart attack, and depression.<sup>60</sup> They are subject to the elements, to disease, to injury, to hunger, and to death.<sup>61</sup> They suffer

<sup>59</sup> STOUT, *supra* note 52, at 35 fig.1.

<sup>60</sup> NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, HOMELESSNESS & HEALTH: WHAT'S THE CONNECTION? FACT SHEET (2019), <https://nhhc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf>. See also Anna Gorman & Harriet Blair Rowan, *The Homeless are Dying in Record Numbers on the Streets of L.A.*, KAISER HEALTH NEWS, (Apr. 24, 2019), <https://khn.org/news/the-homeless-are-dying-in-record-numbers-on-the-streets-of-la> ("In Los Angeles County, the average age of death for homeless people was 48 for women and 51 for men. The life expectancy for women in California in 2016 was 83 and 79 for men.").

<sup>61</sup> Erin McCormick, *'Homelessness is Lethal': U.S. Deaths Among Those Without Housing are Surging*, THE GUARDIAN (Feb. 7, 2022), <https://www.theguardian.com/us-news/2022/feb/07/homelessness-is-lethal-deaths-have-risen-dramatically> ("An examination of 20 U.S. urban areas found the number of deaths among people living without housing shot up by 77 [percent] in the five years ending in 2020."); NEW YORK CITY DEP'T OF HEALTH AND MENTAL HYGIENE, SIXTEENTH ANNUAL REPORT ON DEATHS AMONG PERSONS EXPERIENCING HOMELESSNESS 8 (2021), [https://a860-gpp.nyc.gov/concern/parent/zg64tp214/file\\_sets/j9602313t](https://a860-gpp.nyc.gov/concern/parent/zg64tp214/file_sets/j9602313t) ("Overall, DHS and OCME reported 640 deaths among persons experiencing homelessness in NYC, representing an increase of [4 percent] in the overall number of deaths compared to FY20 (613).").

theft, violence, sexual assault, rape, and murder.<sup>62</sup> They experience lasting psychological effects, which are particularly harmful to children. Their families, friendships, community, and human connections are fractured. They face huge obstacles to employment and education.<sup>63</sup> And their very existence subjects them to criminalization.<sup>64</sup>

Homelessness is not only devastating for the families and individuals who experience it but also costly to society. There is extensive literature documenting the financial burden homelessness imposes on society:

The Massachusetts Housing and Shelter Alliance estimates that a homeless individual residing in Massachusetts creates an additional cost burden for state-supported services [and functions] (homeless shelter, emergency room visits, incarceration, and the like) that is \$9,372 greater per year than an individual [who has stable] housing. Each [family experiencing homelessness that] enters the state-run emergency-shelter system, [costs the] state [an] estimated \$26,620.<sup>65</sup>

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<sup>62</sup> Matt Katz, *Number of Homeless People Killed in NYC is Increasing*, GOTHAMIST (Mar. 15, 2022), <https://beta.gothamist.com/news/number-of-homeless-people-killed-in-nyc-is-increasing?betaRedirect=true> (“Data compiled by city agencies shows that the killings are part of a larger pattern. Since 2018, the number of homeless people killed in New York City has increased 300 percent. Seven people were killed that year, 10 in 2019, then 11 in 2020, and finally 22 in the last fiscal year. It’s a trend that homeless advocates told The Washington Post holds true nationally, though there is no definitive national data.”); NAT’L COAL. FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF BIAS-MOTIVATED VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS IN 2016-2017 4 (2018), [https://nationalhomeless.org/wp-content/uploads/2019/01/hate-crimes-2016-17-final\\_for-web2.pdf](https://nationalhomeless.org/wp-content/uploads/2019/01/hate-crimes-2016-17-final_for-web2.pdf).

<sup>63</sup> NAT’L COAL. FOR THE HOMELESS, EDUCATION OF HOMELESS CHILDREN AND YOUTH (2007); NAT’L CTR. FOR HOMELESS EDUC., IN SCHOOL EVERY DAY: ADDRESSING CHRONIC ABSENTEEISM AMONG STUDENTS EXPERIENCING HOMELESSNESS (2017), <https://nche.ed.gov/wp-content/uploads/2018/10/chron-absent.pdf>; INST. FOR CHILDREN, POVERTY, & HOMELESSNESS, EMPTY SEATS: THE EPIDEMIC OF ABSENTEEISM AMONG HOMELESS ELEMENTARY STUDENTS (2015), [https://www.icphusa.org/wp-content/uploads/2016/09/ICPH-Policy-Report\\_Empty-Seats\\_Chronic-Absenteeism.pdf](https://www.icphusa.org/wp-content/uploads/2016/09/ICPH-Policy-Report_Empty-Seats_Chronic-Absenteeism.pdf).

<sup>64</sup> See, e.g., Sabbeth, *supra* note 18, at 67.

<sup>65</sup> Linda Wood-Boyle, *Facing Eviction: Homelessness Prevention for Low-Income Tenant Households*, 2015 CMTYS. & BANKING 20, 21 (2015), <https://www.bostonfed.org/publications/communities-and-banking/2015/winter/facing-eviction-homelessness-prevention-for-low-income-tenant-households.aspx>.

Studies in other states have had similar findings.<sup>66</sup>

### 3. Eviction Damages Health

Whether or not eviction leads to homelessness, a significant amount of research has demonstrated the deleterious effect of eviction on physical and mental health. Professor Emily Benfer has compiled much of that research. Benfer's taxonomy of the health effects of eviction appears in the following chart:

Figure 2<sup>67</sup>

Eviction Leads to Long-Term Negative Health Outcomes

Physical Health	Mental Health (conditions can attach at filing stage of eviction)	Associated Conditions Among Women	Associated Conditions Among Children	Exposure to Sub- Standard Living Conditions	Barriers to Livelihood (barriers occur even when case dismissed)
<ul style="list-style-type: none"> <li>• Higher Mortality</li> <li>• Respiratory Conditions</li> <li>• High Blood Pressure</li> <li>• Poor Self-Rated General Health</li> <li>• Coronary Heart Disease</li> <li>• Sexually Transmitted Infections</li> <li>• Drug Use</li> </ul>	<ul style="list-style-type: none"> <li>▪ Depression</li> <li>▪ Anxiety</li> <li>▪ Mental Health Hospitalization</li> <li>▪ Exposure to Violence</li> <li>▪ Suicide</li> </ul>	<ul style="list-style-type: none"> <li>▪ Physical Assault</li> <li>▪ Sexual Assault</li> <li>▪ Drug Use and Related Harms</li> <li>▪ Pre-term Pregnancies</li> <li>▪ Future Housing Instability</li> </ul>	<ul style="list-style-type: none"> <li>▪ Lead Poisoning</li> <li>▪ Academic Decline</li> <li>▪ Food Insecurity</li> <li>▪ Emotional Trauma</li> <li>▪ Risk of Chronic Disease in Adulthood</li> <li>▪ Low Birthweight</li> <li>▪ Decreased Life Expectancy</li> </ul>	<ul style="list-style-type: none"> <li>▪ Lead</li> <li>▪ Mold</li> <li>▪ Poor Ventilation</li> <li>▪ Pest</li> <li>▪ Infestations</li> <li>▪ Crowding</li> </ul>	<ul style="list-style-type: none"> <li>• Failing credit scores</li> <li>• Downward move</li> <li>• Unemployment</li> <li>• Residential instability</li> <li>• Homelessness</li> <li>• Inability to access social services</li> </ul>

<sup>66</sup> The Central Florida Commission on Homelessness reported that the region spends \$31,000 per year per person experiencing homelessness on law enforcement, jail, emergency room, and hospitalization for medical and psychiatric issues. Kate Santich & Orlando Sentinel, *Cost of Homelessness in Central Florida? \$31k Per Person*, ORLANDO SENTINEL (May 21, 2014), <https://www.orlandosentinel.com/news/os-xpm-2014-05-21-os-cost-of-homelessness-orlando-20140521-story.html>. MaineHousing, a state agency providing public and private housing to low- and moderate-income tenants in Maine, found the average annual cost of services per person experiencing homelessness associated with physical and mental health, emergency room use, ambulance use, incarceration, and law enforcement to be \$26,986 in the greater-Portland area and \$18,949 statewide. Alex Acquisto & Erin Rhoda, *The \$132k Idea That Could Reduce Bangor's Eviction Problem*, BANGOR DAILY NEWS (Sept. 24, 2018), <https://www.bangordailynews.com/2018/09/24/news/bangor/one-idea-to-reduce-bangor-evictions-at-132k>. A New Jersey study of people eligible for Medicaid-funded tenancy support services found that health care spending for Medicaid-eligible people experiencing homelessness were between 10 and 27 percent higher than costs for the Medicaid-eligible who were stably housed. Joel C. Cantor et al., *Medicaid Utilization and Spending among Homeless Adults in New Jersey: Implications for Medicaid-Funded Tenancy Support Services*, 98 MILBANK Q. 106, 107 (2020). Similarly, a Michigan study found that Medicaid spending for adults experiencing homelessness was 78 percent higher than the statewide average and 26 percent higher for children experiencing homelessness than the statewide average. BROOKE SPELLMAN ET AL., COSTS ASSOCIATED WITH FIRST-TIME HOMELESSNESS FOR FAMILIES AND INDIVIDUALS 26 (2010).

<sup>67</sup> Benfer, *supra* note 9, at 5.

*Table and sources available in Emily Benfer et al.,  
Eviction, Health Inequity, and the Spread of COVID-19:  
Housing Policy as a Primary Pandemic Mitigation  
Strategy.* J. URB. HEALTH. (2021).

Extensive research has documented the multiple ways and the extent to which people who are evicted have an increased likelihood of negative health effects<sup>68</sup> such as feelings of anxiety, depression, and hopelessness;<sup>69</sup> increased emergency room visits;<sup>70</sup> mortality from substance abuse;<sup>71</sup> increased incidence of high blood pressure, heart disease, respiratory illnesses, sexually transmitted infections; and exacerbation of HIV/AIDS.<sup>72</sup> In almost every interview for a study in Middlesex County, Connecticut, individuals who had experienced an eviction reported that their eviction negatively impacted their physical and mental health. Approximately two-thirds reported feeling more anxious, depressed, or hopeless, and individuals who had previously struggled with mental health issues reported that the stress from the eviction exacerbated their conditions. Interviewees also reported that eviction led to inadequate sleep, malnourishment, physical pain, and

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<sup>68</sup> See generally Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 61 (2016) (“[T]here is a well-documented, clear connection between housing quality and residents’ health outcomes.”).

<sup>69</sup> RILWAN BABAJIDE ET AL., THE MIDDLESEX CNTY. COAL. ON HOUS. AND HOMELESSNESS, EFFECTS OF EVICTION ON INDIVIDUALS AND COMMUNITIES IN MIDDLESEX COUNTY 27 (2016); see also THE SEATTLE WOMEN’S COMM’N AND THE HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS’N, *supra* note 56 (documenting that, in Seattle, approximately 37 percent of survey respondents who had experienced eviction reported feeling stressed, roughly 8 percent experienced increased or new depression, anxiety, or insomnia, and 5 percent developed a heart condition they believed to be connected to their housing instability).

<sup>70</sup> ROBERT COLLINSON & DAVIN REED, THE EFFECTS OF EVICTIONS ON LOW-INCOME HOUSEHOLDS 25, 26 (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) (finding an increase in the probability in emergency room visits in one to two years after an eviction filing of about 3.5 percentage points, or .38 visits in one to two years after filing, a 70 percent increase over the mean of non-evicted households).

<sup>71</sup> Ashley C. Bradford & W. David Bradford, *The Effect of Evictions on Accidental Drug and Alcohol Mortality*, 55 HEALTH SERVS. RSCH. 9, 15 (2020).

<sup>72</sup> See Gracie Himmelstein & Matthew Desmond, *Eviction and Health: A Vicious Cycle Exacerbated by a Pandemic*, HEALTH AFFAIRS (Apr. 1, 2021), <https://www.healthaffairs.org/doi/10.1377/hpb20210315.747908/>.

increased use of drugs and alcohol.<sup>73</sup> Other studies arrive at similar conclusions.<sup>74</sup>

The health effects of eviction on children and families are particularly disturbing. In a 2016 national survey of approximately 2,700 low-income mothers, from twenty cities across the country, who experienced a recent eviction, the mothers reported that eviction led to far worse health for themselves and their children. Detrimental effects included increased depression and greater parental stress than mothers who had not experienced eviction. These effects were persistent: two years after experiencing eviction, mothers still had higher rates of material hardship and depression than mothers who had not experienced eviction.<sup>75</sup> A Seattle study found that among survey respondents who had been evicted and had school-aged children, 89 percent reported that their children experienced a negative health impact, with approximately 56 percent indicating that their children's health suffered "very much," and approximately 33 percent indicating that their children's health suffered "somewhat."<sup>76</sup>

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<sup>73</sup> BABAJIDE, *supra* note 69, at 27.

<sup>74</sup> CTR. ON URB. POVERTY AND CMTY. DEV. CASE W. UNIV., THE CLEVELAND EVICTION STUDY: OBSERVATIONS IN EVICTION COURT AND THE STORIES OF PEOPLE FACING EVICTION 17, 30 (2019) (noting that a Case Western University survey of tenants facing eviction in Cleveland found that 45 percent of interviewed tenants reported they had been mentally or emotionally impacted by the eviction process and that their children were also mentally or emotionally impacted; and approximately 21 percent reported that they were experiencing poor physical health); COLLINSON & REED, *supra* note 70, at 25; *see generally* Univ. of Granada, *The Enormous Impact of Home Evictions on Mental Health*, DISABLED WORLD (Jan. 19, 2018), <https://www.disabled-world.com/disability/housing/eviction.php>; *see also* THE SEATTLE WOMEN'S COMM'N AND THE HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS'N, *supra* note 56, at 17 (documenting that in Seattle, approximately 38 percent of survey respondents who had experienced eviction reported feeling stressed, 8 percent experienced increased or new depression, anxiety, or insomnia, and 5 percent developed a heart condition they believed to be connected to their housing instability).

<sup>75</sup> Desmond & Tolbert Kimbro, *supra* note 51, at 2.

<sup>76</sup> THE SEATTLE WOMEN'S COMM'N AND THE HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS'N, *supra* note 56 (documenting that, in Seattle, approximately 38 percent of survey respondents who had experienced eviction reported feeling stressed, 8 percent experienced increased or new depression, anxiety, or insomnia, and 5 percent developed a heart condition they believed to be connected to their housing instability); *see also* Gabriel L. Schwartz, *Cycles of Disadvantage: Eviction and Children's Health in the United States* (2020) (Ph.D. dissertation, Harvard University) (DASH) (finding that children evicted in their first year of life had twice the likelihood of being diagnosed with lead poisoning by age three, compared to children who were not evicted. Subsequent evictions were shown to exacerbate this disparity. Between ages three and five, children evicted in both the first and third years of life had an 11



These detrimental health effects of evictions can last a lifetime and can become multigenerational. A 2021 study comparing birth outcomes of close to 100,000 infants in Georgia found that a mother's eviction during pregnancy is associated with adverse birth outcomes. These adverse outcomes include lifelong implications for social and medical health, including lower infant birth weight and increased incidence of prematurity.<sup>77</sup>

Data suggests that evictions can even trigger suicide. In 2015, the American Journal of Public Health undertook a comprehensive national study of housing instability as a risk factor for suicide. The study identified 929 eviction- or foreclosure-related suicides, which accounted for 1 to 2 percent of all suicides and 10 to 16 percent of all financial-related suicides from 2005 to 2010.<sup>78</sup> Eviction rates are associated with higher rates of mortality, and the risk of eviction leads to “deaths of despair” associated with substance abuse.<sup>79</sup>

The health impacts of eviction fall particularly heavily on people of color. The COVID-19 pandemic brought into sharp relief the connection between housing, eviction, and health and its particular impact on people of color. Eviction and displacement are associated with increased COVID-19 infection and mortality rates.<sup>80</sup> Professor Benfer's research documents the disproportionate impact of eviction on people of color associated with disproportionate rates of COVID-19 infection and mortality.<sup>81</sup>

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percent likelihood of being newly diagnosed with lead poisoning compared to a 2 percent likelihood had they never been evicted).

<sup>77</sup> Grace Himmelstein & Matthew Desmond, *Association of Eviction with Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, 175 JAMA PEDIATRICS 494, 496–98 (2021).

<sup>78</sup> Katherine A. Fowler et al., *Increase in Suicides Associated With Home Eviction and Foreclosure During the US Housing Crisis: Findings From 16 National Violent Death Reporting System States, 2005-2010*, 105(2) AM. J. PUB. HEALTH 311, 313–14 (2015).

<sup>79</sup> Ashley C. Bradford & W. David Bradford, *supra* note 71, at 9, 16 (finding a 1 percent increase in eviction was associated with higher substance-related deaths between .114 percent and .596 percent per 100,000 population each year).

<sup>80</sup> See Anjalika Nande et al., *The Effect of Eviction Moratoria on the Transmission of SARS-CoV-2*, 12 NATURE COMM'NS 1, 4 (2021); see also Himmelstein et al., *supra* note 72, at 3–4.

<sup>81</sup> Emily Benfer, *supra* note 9, at 1.

#### 4. Eviction Harms Children and Families, and Disrupts Education

When families are evicted, the disruption of children's lives and family life can have a range of negative effects. One study found that five-year-old children evicted in early childhood experienced food insecurity at over twice the rate of children who had never been evicted.<sup>82</sup> In a Seattle survey of evicted respondents with school-age children, "85.7% said their children had to move schools after the eviction and 87.5% reported their children's school performance suffered 'very much' because of the eviction."<sup>83</sup> A study in Sweden found that twelve children who experienced eviction were removed from their families by child welfare authorities for every non-evicted child.<sup>84</sup> Evicted mothers are more than twice as likely than mothers who have never been evicted to be involved with the criminal justice system.<sup>85</sup>

#### 5. Eviction Leads to Job Loss

Eviction can lead to job loss, diminished wages and other employment problems, further burdening an already struggling family. When an evicted tenant is employed, the instability that eviction creates often affects work performance and may lead to absenteeism and job loss.<sup>86</sup> A recent Harvard University study suggests "the likelihood of being laid off to be 11 to 15 percentage points higher for workers who experienced an eviction or other involuntary move, compared to matched workers who did not."<sup>87</sup> A similar analysis in

<sup>82</sup> Kathryn M. Leifheit et al., *Eviction in Early Childhood and Neighborhood Poverty, Food Security, and Obesity in Later Childhood and Adolescence: Evidence from a Longitudinal Birth Cohort*, 11 SSM – POPULATION HEALTH 1, 6 (2020).

<sup>83</sup> THE SEATTLE WOMEN'S COMM'N AND THE HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS'N, *supra* note 56, at 60.

<sup>84</sup> Lisa Berg & Lars Brännström, *Evicted Children and Subsequent Placement in Out-of-Home Care: A Cohort Study*, PLOS ONE, 1, 6, 8 (2018).

<sup>85</sup> Aaron Gottlieb & Jessica W. Moose, *The Effect of Eviction on Maternal Criminal Justice Involvement*, 4 SOCIUS 1, 6–7 (2018).

<sup>86</sup> See Desmond & Tolbert Kimbro, *supra* note 51, at 5–6 (explaining that "research has found the likelihood of being laid off to be 11 to 15 percentage points higher for workers who experienced an eviction or other involuntary move, compared to matched workers who did not") (citing Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, SOC. PROBS. (2016), <https://scholar.harvard.edu/files/mdesmond/files/desmondgershenson.sp2016.pdf?m=1452638824>).

<sup>87</sup> *Id.* at 5–6 (citing Desmond & Gershenson, *supra* note 86); see also NAT'L L. CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS 17–18 (2018)

Wisconsin, the Milwaukee Area Renters Study, found that workers who involuntarily lost their housing were approximately 20 percent more likely to subsequently lose their jobs compared to similar workers whose housing remained stable.<sup>88</sup> Approximately 42 percent of respondents in the Milwaukee Area Renters Study who lost their jobs in the two years prior to the study also experienced an involuntary move.<sup>89</sup>

The impact of job loss and eviction disproportionately affects Black people, who face significant “discrimination in both the housing and labor markets.”<sup>90</sup> Disputes with a landlord and stressful encounters with the court system generally precede an eviction.<sup>91</sup> Workers preoccupied with losing their homes often underperform at work or make mistakes which can threaten their employment.<sup>92</sup> After an eviction, workers may need “to miss work to search for new housing,” and because they now have an eviction record, finding a landlord willing to rent to them may increase the time it takes to secure new housing.<sup>93</sup> Workers who are forced to move because of an eviction may need to live farther from their jobs, further increasing the likelihood of tardiness and absenteeism.<sup>94</sup> Given these collateral consequences of eviction, it is no surprise that eviction is associated with between \$1,000 and \$3,000 reduction in total earnings in the one to two years after the filing of an eviction case.<sup>95</sup>

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<https://homelesslaw.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf> (discussing one study conducted in North Dakota, which found that evicted renters were “15 percent more likely to lose their employment” and another study in Milwaukee that found “displaced renters were 20 percent more likely to lose their jobs”).

<sup>88</sup> Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22 INST. RSCH. ON POVERTY 1, 5 (2015), <https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>.

<sup>89</sup> Desmond & Gerhenson, *supra* note 81, at 10.

<sup>90</sup> *Id.* at 15.

<sup>91</sup> *See id.* at 5 (stating that “[t]he period before the move—which may be characterized by conflicts with a landlord or lengthy encounters with the judicial system . . .”).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> COLLINSON & REED, *supra* note 57, at 27.

## 6. Eviction Destroys Communities

It is not only individuals and families who feel the sting of an eviction and its long-term effects, but also communities at large. Communities that experience evictions on a large scale suffer effects that are felt beyond the individual families that are evicted.<sup>96</sup> Drawing on extensive data connecting evictions with voting records, a 2021 study concluded that residential eviction rates negatively impacted voter turnout during the 2016 election; eviction, the study concluded, affects democratic participation.<sup>97</sup>

Low-income households rely heavily on their neighbors for childcare, elder care, transportation, and security, often because they cannot afford to pay for these services independently. These informal support networks within communities develop over time and create a sense of stability.<sup>98</sup> But when people are displaced from their communities, these informal networks are likely to become threatened or disappear altogether.<sup>99</sup> This makes the people living in these communities more susceptible to crises.<sup>100</sup> Eviction can account for high residential instability rates in neighborhoods with high levels of poverty, holding all other factors equal.<sup>101</sup> High turnover in a neighborhood causes residents to feel less invested in their community and diminishes the community's capacity to thrive and sustain a supportive living environment.<sup>102</sup>

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<sup>96</sup> See generally Jake Blumgart, *To Reduce Unfair Evictions, Tenants Need Lawyers*, PLAN PHILLY (Mar. 16, 2017), <https://why.org/articles/to-reduce-unfair-evictions-tenants-need-lawyers>.

<sup>97</sup> Gillian Slee & Matthew Desmond, *Eviction and Voter Turnout: The Political Consequences of Housing Instability*, PRINCETON U. POL. & SOC'Y 1, 21 (2021), <https://journals.sagepub.com/doi/pdf/10.1177/00323292211050716>.

<sup>98</sup> See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1992); see also Julie Mah, *Gentrification-Induced Displacement in Detroit, Michigan: An Analysis of Evictions*, 31 HOUS. POL'Y DEBATE (2020).

<sup>99</sup> Mah, *supra* note 98, at 18 ("For less affluent residents, proximity enables social networks to exist and flourish, and the loss or fraying of these networks carry greater weight as these networks often help with basic needs and quotidian survival.").

<sup>100</sup> *Id.*

<sup>101</sup> ELAINA JOHNS-WOLFE, *THE CIN. PROJECT, YOU ARE BEING ASKED TO LEAVE THE PREMISES: A STUDY OF EVICTION IN CINCINNATI AND HAMILTON COUNTY, OHIO, 2014-2017* 3 (2018).

<sup>102</sup> Katie Moran-McCabe & Scott Burris, *Eviction and the Necessary Conditions for Health*, N. ENG. J. MED. 1443, 1443 (2021), <https://www.nejm.org/doi/pdf/10.1056/NEJMp2031947?articleTools=true>.

7. Eviction Forces People into Inferior, More Expensive Housing, Screens Them out of Future Housing Opportunities, and Leads to More Eviction

Even when eviction does not lead to homelessness, it is likely to lead to an inferior housing situation for families and individuals who are evicted. In a tight rental market, replacement housing is likely to be more costly, in a more crime-ridden neighborhood with fewer resources, and in worse condition than the place where a tenant lived before eviction.<sup>103</sup> This pattern has a disproportionate impact on women of color, who already experience discrimination in the housing market even if they are not evicted.<sup>104</sup>

Tenant screening companies maintain databases of households that have been evicted and sell their information to landlords who are selecting tenants. Screening reports that contain a record of eviction or even an eviction proceeding (regardless of outcome) will make it difficult, if not impossible, for an evicted tenant to re-rent.<sup>105</sup> This then forces the tenant to find housing in a less desirable neighborhood that lacks adequate access to public transportation, is farther from their job, has limited or no options for childcare, and lacks grocery stores.<sup>106</sup> A spokesperson for one tenant screening company stated that “[i]t is the policy of 99 percent of our [landlord] customers in New York to flat out reject anybody with a landlord-tenant record, no matter what the reason is and no matter what the outcome is.”<sup>107</sup> A University of North Carolina Greensboro study found that tenants who were evicted had increased difficulty obtaining decent, affordable housing after

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<sup>103</sup> See generally Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO. J. ON POVERTY L. & POL’Y 97, 105–11 (2019); Manaire T. Vaughn, *Practicing with Grace COVID-19 and the Coming Eviction Crunch*, 78 BENCH & BAR MINN. 26, 26 (2021).

<sup>104</sup> NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 87, at 15.

<sup>105</sup> *Id.* at 31; Kathryn A. Sabbeth, *Erasing the ‘Scarlet E’ of Eviction Records*, THE APPEAL (Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records> (suggesting that given the racialized demographics of who gets evicted, tenant screening likely contributes to increased segregation and inequality); see Esme Caramello & Nora Mahlberg, *Combating Tenant Blacklisting Based on Housing Court Records: A Survey of Approaches*, NAT’L CLEARINGHOUSE REV. (Sept. 2017), <https://perma.cc/PZX2-9HJE?view-mode=server-side>; see also Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1360 (2006).

<sup>106</sup> Desmond & Kimbro, *supra* note 51, at 299.

<sup>107</sup> Kleysteuber, *supra* note 105, at 1347 (referencing Teri Karush Rogers, *Only the Strongest Survive*, N.Y. TIMES, Nov. 26, 2006).

eviction.<sup>108</sup> Damage to a renter's credit score from an eviction can also make other necessities more expensive, as credit scores are often considered to determine the size of an initial deposit to purchase a cell phone, cable and internet, and other basic utilities.<sup>109</sup> Moreover, tenant screening reports have been found to be highly inaccurate. A study that reviewed of over 3.6 million administrative court records from 12 states found that "22% of eviction records contain ambiguous information on how the case was resolved or falsely represent a tenant's eviction history."<sup>110</sup> And they have been found to be inherently racist.<sup>111</sup>

A tenant who has been evicted is more likely to be evicted again in the future<sup>112</sup> or to experience housing instability.<sup>113</sup> Serial eviction and exacerbated housing instability are, of course, a reflection of poverty and the failure of social services supports, but the trauma and disruption resulting from eviction is, as Desmond points out, a cause as much as an effect of poverty.<sup>114</sup> A Milwaukee study found that tenants who experienced an involuntary move were 25 percent more likely to have long-term housing instability compared to other low-income tenants.<sup>115</sup> A Seattle study found that 80 percent of survey respondents were denied access to new housing because of a previous

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<sup>108</sup> Stephen J. Sills et al., *Greensboro's Eviction Crisis*, UNIV. N.C. GREENSBORO CTR. FOR HOUS. AND CMTY. STUD. 6–7 (2018).

<sup>109</sup> *Credit Score: Definition, Factors, and Improving It*, INVESTOPEDIA, [https://www.investopedia.com/terms/c/credit\\_score.asp](https://www.investopedia.com/terms/c/credit_score.asp), (last visited Sept. 29, 2022).

<sup>110</sup> Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records and Implications for Renters*, 31 HOUS. POL'Y DEBATE 377, 378 (2021), <https://www.tandfonline.com/doi/full/10.1080/10511482.2020.1748084>.

<sup>111</sup> Tenant screening algorithms "use historical data as input to produce a rule that is applied to a current situation," and therefore, "[t]o the extent that historical data reflects the results of de jure segregation, Jim Crow laws, redlining, restrictive covenants, white flights, and other explicitly and implicitly racist, laws, policies, and actions, any given algorithmic 'rule' is likely to produce racist results, including when those patterns reflect past discrimination." Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52 COLUM. HUM. RTS. L. REV. 251, 274–75 (2020).

<sup>112</sup> N.Y. ADVISORY COMM. TO THE U.S. C.R. COMM'N, *supra* note 38, at 57–58.

<sup>113</sup> Sills et al., *supra* note 108, at 6.

<sup>114</sup> Eviction Lab research has shown that inexpensive access to eviction proceedings for landlords and their ability to recover fines and fees from tenants has fostered serial eviction filings and the use of housing courts as rent collection agencies. *See generally* Lillian Leung et al., *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316 (2021).

<sup>115</sup> DESMOND, *supra* note 46.

eviction, and one-third of respondents were not able to re-rent because of a monetary judgment from a previous eviction.<sup>116</sup> Evictions can also have a detrimental impact on tenants' eligibility for federal housing assistance, such as Section 8 vouchers.<sup>117</sup>

This extensive data on the consequences of eviction only confirms the obvious: the stakes for tenants in eviction proceedings could not be higher. In facing eviction, tenants risk losing their homes and quite possibly the very ability to have a home. They face the dire consequences of eviction that can affect every facet of life: living unhoused, having the integrity of their families fractured, their place in a community uprooted.

## II. EVICTION HARMS BLACK PEOPLE DISPROPORTIONATELY

Black people,<sup>118</sup> other people of color, and women suffer in vastly disproportionate numbers from eviction and its devastating effects. Homeownership is the Nation's primary source of generational wealth and has been fostered for white people for generations through the housing finance system, the tax system, zoning laws, and even the federal highway system.<sup>119</sup> Yet, anti-Black, racist government policies

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<sup>116</sup> THE SEATTLE WOMEN'S COMM'N AND THE HOUS. JUST. PROJECT OF THE KING CNTY. BAR ASS'N, *supra* note 56, at 60.

<sup>117</sup> Desmond & Kimbro, *supra* note 51, at 299.

<sup>118</sup> A challenge for an Article like this is to strike a balance between being underinclusive and overinclusive. Unquestionably, the fundamental unfairness of summary eviction proceedings and the overt, implicit, and structural biases built into the eviction process fall disproportionately on other people of color in addition to Black people, including: women, immigrants, members of the LGBTQ+ community, and disabled people. Indeed, the research shows that it is Black women with children who are the most likely to be evicted. As Matthew Desmond has said, in the age of mass incarceration, Black men get locked up and Black women get locked out. DESMOND, *supra* note 46. A thorough examination of all of the groups that face a disproportionate impact of an unfair and imbalanced eviction system is clearly needed. This Article, however, focuses in particular on the anti-Black racism that permeates the eviction system. There is a direct connection between this country's original race-based sin of enslaving Black people, depriving them of virtually all the democratic and economic rights on which the country was founded, using their labor to build intergenerational white wealth and power, and the present-day use of law, policy and practice to sustain that wealth and privilege. This Article attempts to explore that immensely important connection and leaves detailed examination of the broader reach of the unfairness and biases of the eviction process for another day.

<sup>119</sup> See generally Deborah N. Archer, "White Men's Roads Through Black Men's Homes": *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1288 (2020); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICAN* (2017). Indeed, the federal highway system

that foster segregation, redlining, and exclusion, coupled with widespread private discriminatory action that has been embedded in the norms and culture of this Nation since its inception, have conspired to deprive Black people from access to homeownership. These policies and practices, rooted in enslavement and Jim Crow, have relegated Black people to tenant status with, as is the case with tenancy, a more tenuous legal hold on their homes.<sup>120</sup>

Given that Black people and other people of color are tenants in a proportion far greater than white people, they make up a disproportionate share of the pool of people vulnerable to eviction. But their disproportionate status as renters is only part of the story. The same forces that relegate people of color to tenant status have also forced them into housing that (1) is more deteriorated, (2) demands a higher portion of income for rent, and (3) is located in communities that are far more vulnerable to gentrification and displacement on the one hand and to deterioration and environmental degradation on the other. Given this, the conflicts that give rise to eviction proceedings and executed evictions fall far more heavily on Black people than on others.

A. *Black People are Disproportionately More Likely to be Renters*

Segregation and discrimination in housing has, in intent and effect, been a national project throughout our Nation's history. The roots of this project run deep. Black people were prohibited from owning property when they were enslaved.<sup>121</sup> The few free Black

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played a particularly significant role in fostering and entrenching segregation and frustrating homeownership of Black people. Highways spirited white people out of the inner cities to segregated communities with restrictive covenants and other bars to Black homeownership, they were constructed right through Black communities causing displacement and disruption, and they served as barriers between Black and white communities. Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2136 (2021).

<sup>120</sup> Of course, it is not just discriminatory public policies and private discrimination in the housing realm that has relegated Black people to disproportionately low levels of homeownership. A parallel sordid history of discrimination in employment and education has frustrated opportunity, decreased income, and led to higher levels of poverty in the Black population which, in turn, has diminished the possibilities for Black families to secure homeownership and other vehicles for intergenerational wealth accumulation. This Article, however, limits the historic discussion to housing and development policies and practices.

<sup>121</sup> Charles Lewis Nier III, *The Shadow of Credit: The Historical Origins of Racial Predatory Lending and Its Impact upon African American Wealth Accumulation*, 11 U. PA. J.L. & SOC. CHANGE 131, 135–36 (2007).



people who were legally able to acquire property in the early years of the republic were viewed as threats by whites and often faced vicious discrimination and violence. In 1848, in a speech following a series of anti-Black race riots, Fredrick Douglas said, “[n]o man is safe—his life—his property—and all that he holds dear, are in the hands of a mob, which may come upon him at any moment at midnight or mid-day, and deprive him of his all.”<sup>122</sup>

Post-bellum public policies, starting with the *de jure* residential segregation rules of the Jim Crow era and extending through today, continue to deny Black people homeownership opportunities and relegate them to tenancies. When the Civil War ended, formerly enslaved people were promised “forty acres and a mule.”<sup>123</sup> This promise went largely unfulfilled while white “homesteaders” were given up to one hundred sixty acres of indigenous land under the various homestead acts of the late nineteenth century.<sup>124</sup> In recent years, many scholars and journalists, including Keeanga-Yamahtta Taylor, author of “Race for Profit,”<sup>125</sup> and Richard Rothstein, author of “The Color of Law,”<sup>126</sup> have amply documented the long and sordid history of anti-Black government policies that shaped the racialized dimensions of the current real estate market. These actions were intentional and coordinated to foster and maintain segregation, as well as a racialized hierarchy in the tenure rights, location, cost, and comfort of housing.

New Deal housing policy in the 1930s was a prime example of blatantly racist twentieth century federal government policy, with a scope and impact that lasts to the present day. When the Roosevelt Administration created the federal public housing program at the

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<sup>122</sup> *Id.* at 142 (citing LEON LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790–1860* 102 (1961)).

<sup>123</sup> N.Y. ADVISORY COMM. TO THE U.S. C.R. COMM’N, *supra* note 38, at 19.

<sup>124</sup> N.Y. ADVISORY COMM. TO THE U.S. C.R. COMM’N, *supra* note 38, at 19 (citing The Homestead Act of 1862).

<sup>125</sup> KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* (2019).

<sup>126</sup> See also Katie Nodjimbadem, *The Racial Segregation of American Cities was Anything but Accidental*, SMITHSONIAN MAG., May 2017, <https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494>; Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-us-government-segregated-america>; *Segregated by Design*, UNITED NATIONS INT’L SCH. HUM. RTS. PROJECTS (Jan. 9, 2020), <https://www.unishumanrightsproject.org/segregation>; see generally ROTHSTEIN, *supra* note 119.

outset of the New Deal, the Federal Housing Administration (FHA) distributed funds to support public housing by conditioning it on racial segregation in public housing development projects.<sup>127</sup> Intentionally segregated public housing, beginning in the 1930s, “served to isolate Black populations in under-resourced communities with less access to quality jobs and quality education that could lead towards accumulating enough wealth to buy a home.”<sup>128</sup> Other federally supported housing constructed in connection with New Deal programs, such as the Civilian Conservation Corps, the Tennessee Valley Authority, and the Public Works Administration, were similarly segregated.<sup>129</sup>

When the federal government stepped in during the Depression to shore up the banks and the real estate industry, it first created the Home Owners Loan Corporation (HOLC), which drew maps to guide banks in making loans. These maps encouraged lending to homeowners in white communities and had red lines around Black communities to discourage lending. When this initial redlining was followed by a system of insuring home mortgages through the FHA, racial segregation became an official requirement of the mortgage insurance program. The federal government would only provide mortgage insurance for homeownership in segregated communities.<sup>130</sup>

The federal government’s policy of redlining, following and rooted in the explicitly racist mortgage insurance policies of the FHA, had an obvious segregative effect. The FHA’s maps ranked neighborhoods based on the race and ethnicity of the residents. The maps marked neighborhoods comprised of people in the color red to indicate that loans and investments would be denied to residents.<sup>131</sup> This, of course, effectively prevented Black families from becoming homeowners. It also meant that Black people who did own property were more likely to be denied loans, or were charged higher interest rates to borrow, maintain, and improve their properties, all of which made their ability to remain in their homes more precarious. In many

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<sup>127</sup> ROTHSTEIN, *supra* note 119, at 64. Notably, the legacy of these policies are still seen today because the FHA still relies on these policies when determining New York City project residencies.

<sup>128</sup> N.Y. ADVISORY COMM. TO THE U.S. C.R. COMM’N, *supra* note 38, at 62.

<sup>129</sup> ROTHSTEIN, *supra* note 119, at 36.

<sup>130</sup> *Id.* at 50

<sup>131</sup> *Redlining*, BRITANNICA, <https://www.britannica.com/topic/redlining>.

localities, contemporary property values still directly correspond to the HOLC maps from 1937.<sup>132</sup>

Mid-twentieth-century urban renewal policies contributed greatly to the destruction of communities of color and the dislocation of their residents. From the late 1940s to the early 1960s, low-income communities of color throughout the country were demolished with federal funds distributed to localities under the Urban Renewal program—at the time, referred to by James Baldwin and other commentators as the “negro removal” program.<sup>133</sup> The Urban Renewal program in Los Angeles displaced 20,000 people, the majority of them people of color.<sup>134</sup> The Country’s largest urban renewal project in terms of dislocation was the Kenyon-Barr project in Cincinnati, which displaced at least 4953 families, 4824 of which were Black.<sup>135</sup> Mill Creek Valley, a 454-acre densely populated Black community near City Hall in the center of St. Louis was razed to the ground in 1959, displacing 20,000 residents for the Plaza Square Urban Renewal Area.<sup>136</sup> Two-thirds of those displaced by urban renewal each year were people of color, and three-quarters of the people of color displaced were homeowners.<sup>137</sup> Unlike homeowners, tenants were provided no compensation for the loss of their homes or any assistance to defray the costs of relocation.<sup>138</sup>

Public policies contributing to segregation have hardly been the sole province of the federal government. From the Jim Crow era to date, localities have passed legislation and adopted policies that serve to segregate and reinforce racialized hierarchies. Zoning laws are a prime example. In the early part of the twentieth century, municipalities adopted zoning statutes that explicitly mandated separate neighborhoods for Black and white residents. In 1917, the Supreme Court in *Buchanan v. Warley* held one such zoning ordinance, in Louisville, Kentucky, to be unconstitutional under the Fourteenth

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<sup>132</sup> Rothstein, *supra* note 119, at 64.

<sup>133</sup> Brent Cebul, *Urban Renewal Meant Negro Removal*, LA PROGRESSIVE (Jul. 29, 2020), <https://www.laprogressive.com/racism/urban-renewal>.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Ryan DeLoach & Jenn DeRose, *Urban Renewal and Mill Creek Valley*, DECODING THE CITY, <http://www.decodingstl.org/urban-renewal-and-mill-creek-valley> (last visited Sept. 30, 2022).

<sup>137</sup> Terry J. Tondro, *Urban Renewal Relocation: Problems in Enforcement of Conditions on Federal Grants to Local Agencies*, 117 U. PA. L. REV. 183, 184 (1968).

<sup>138</sup> *Id.*

Amendment, but only on the theory that the zoning restriction abridged the freedom of contract of the white seller who sought to sell to a Black purchaser.<sup>139</sup> In response to *Buchanan*, private racially restrictive covenants in deeds that passed between sellers and purchasers took the place of racially restrictive zoning and were a widespread practice. The government, at all levels, both promoted and supported these covenants.<sup>140</sup> And the Supreme Court did not declare racially restrictive covenants illegal until it decided *Shelley v. Kramer* in 1948.<sup>141</sup>

The standard and prevalent, but increasingly criticized, practice of what is often referred to as Euclidean zoning<sup>142</sup> is another prime example of the racializing impact of law and public policy.<sup>143</sup> The Supreme Court, in *Euclid v. Ambler Realty*, upheld the concept of area and use zoning against a takings challenge. The decision includes a discussion of the importance of creating low density communities with abundant light and space and includes a not-particularly-veiled abhorrence of apartment life:

[T]he development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their

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<sup>139</sup> 245 U.S. 60, 78–79 (1917).

<sup>140</sup> ROTHSTEIN, *supra* note 119, at 94–95.

<sup>141</sup> 334 U.S. 1, 20 (1948).

<sup>142</sup> 272 U.S. 365, 380–81 (1926).

<sup>143</sup> See Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RESV. L. REV. 597, 597–98 (2001) (“I view *Euclid* as an enabler of the very problems I decry. Its place in the history of land use planning is not nearly as attractive as its boosters suggest. Indeed the history is pretty ugly. That ugliness—derived from and embedded with the racism of the era in which the case was decided—helps explain why a group of very conservative Supreme Court Justices approved zoning despite their well-known objections to many forms of government economic regulation.”).

safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed.<sup>144</sup>

Since its inception, the regulatory tool of zoning has been weaponized to exclude low-income people and people of color from suburban communities. Decades-long litigation in New Jersey starting in the 1970s, which challenged the racially discriminatory and exclusionary zoning practices of the Township of Mount Laurel,<sup>145</sup> shed light on the practice of and motivations behind exclusionary zoning, but there has been little success in eradicating the practice.<sup>146</sup>

“Planned Shrinkage” was a New York City public policy in the 1960s and ‘70s that called for depriving certain communities of color of municipal services like public transportation and sanitation.<sup>147</sup> A study conducted in the early 1970s by the New York City-Rand Institute (“Rand”) and the United States Department of Housing and Urban Development (HUD) concluded that, when city services are removed, surrounding populations are reduced.<sup>148</sup> The study advised depopulating certain areas of the city to make space for non-residential uses.<sup>149</sup> Rand’s data (later determined to be incorrect) concluded that arson committed by community residents caused most fires in poor neighborhoods.<sup>150</sup> New York’s then-Senator Daniel Patrick Moynihan took this pseudofact and ran with it, publicly diagnosing New York’s

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<sup>144</sup> *Euclid*, 272 U.S. at 394.

<sup>145</sup> See generally *S. Burlington Cnty. NAACP v. Mount Laurel*, 336 A.2d 713 (N.J. 1975); *S. Burlington Cnty. NAACP v. Mount Laurel*, 456 A.2d 390 (N.J. 1983); *Hills Dev. Co. v. Bernards Twp.*, 510 A.2d 621 (N.J. 1986); *In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous.*, 110 A.3d 31 (N.J. 2015); John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL’Y 555 (2000).

<sup>146</sup> Laura Denker, *Future of Fair Housing at Stake: The Persistence of Exclusionary Zoning in Our State*, FAIR SHARE HOUS. CTR. BLOG (Nov. 2, 2012), <https://fairsharehousing.org/blog/entry/future-of-fair-housing-at-stake-the-persistence-of-exclusionary-zoning-in-o>; Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1303 (1997).

<sup>147</sup> See, e.g., Muriella, *supra* note 31 (excerpting from DEBORAH WALLACE AND RODRICK WALLACE, *A PLAGUE ON YOUR HOUSES: NOW NEW YORK WAS BURNED DOWN AND NATIONAL PUBLIC HEALTH CRUMBLLED* (2001)).

<sup>148</sup> See *id.*

<sup>149</sup> See *id.*

<sup>150</sup> See *id.*

low-income population as a lawless people with antisocial proclivities, using this characterization as a means to advocate for “benign neglect” of their communities. Here is some text from a 1970s Moynihan memo to President Nixon published in the *New York Times* in which he racialized and weaponized “fire data”:

Many of these fires are the result of population density. But a great many are more or less deliberately set. . . . Fires are in fact a “leading indicator” of social pathology for a neighborhood. They come first. Crime, and the rest, follows. The psychiatric interpretation of fire-setting is complex, but it relates to the types of personalities which slums produce . . . . The time may have come when the issue of race could benefit from a period of “benign neglect.”<sup>151</sup>

“Benign neglect” was a hands-off policy that allowed neighborhoods to die on their own and proscribed resuscitation. “Planned shrinkage” was a related, but “more aggressive policy of triage which actively look[ed] for sick neighborhoods and pull[ed] services from them to free the resources for healthy neighborhoods.”<sup>152</sup> Roger Starr, a New York City Housing Administration Commissioner, first articulated the theory of “planned shrinkage” in *Urban Choices: The City and its Critics* in 1966. He suggested that certain “sick” neighborhoods (i.e. the Black, poor, neighborhoods of South Bronx, Brownsville-East New York, and East Harlem) should be purposefully deprived of essential municipal services (i.e., schools, libraries, garbage removal) to force people to leave so industrial areas could be developed.<sup>153</sup> These policies led to the abandonment and devastation of many of New York City’s communities of color.

Contemporary public policy continues to foster segregation. Gentrification and displacement has become a ubiquitous phenomenon in low-income communities of color throughout the Nation’s major cities. Twenty-first century zoning changes in New York City in low-income communities of color that were intended to promote higher density and higher income tenancies were also

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<sup>151</sup> *Text of the Moynihan Memorandum on the Status of Negroes*, N.Y. TIMES, March 1, 1970, at 59. See also, Ben Kenigsberg, ‘Decade of Fire’ Review: A Documentary Remembers the Blazes That Scorched the Bronx, N.Y. TIMES, May 2, 2019; Deborah Wallace & Rodrick Wallace, *Benign Neglect and Planned Shrinkage*, VERSO (Mar. 25, 2017), <https://www.versobooks.com/blogs/3145-benign-neglect-and-planned-shrinkage>.

<sup>152</sup> *Id.* The notion of “sick” neighborhoods echoes the use of the phrase “blight” in urban renewal policies to justify the destruction of communities of color, all too often without regard to the consequences for residents.

<sup>153</sup> *Id.*

understood by the policymakers themselves to foster displacement of community residents that would exceed the modicum of mandated affordable housing units in these re-zoned areas.<sup>154</sup> And facially benign policies that purport to promote affordable housing for low-income people can still have a segregative effect. New York City's "affordable housing lottery," established in the 1980s and still in effect, for example, was found to deepen entrenched racial housing patterns.<sup>155</sup>

Predatory lending practices leading to the 2008 recession and beyond continue to foster segregation, deprive Black people of homeownership opportunities, and relegate them to tenant status. For instance, a 2014 mortgage lending discrimination case in Buffalo, New York revealed that a map created by Evans Bank to define its lending area automatically excluded predominantly Black communities from its mortgage products regardless of an individual's credit-worthiness and excluded those communities from their marketing efforts.<sup>156</sup>

As a result of this history of anti-Black racist policies and practices of both the public and private sectors, racial segregation persists and,

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<sup>154</sup> Abigail Savitch-Lew, *City's Tenant Protection Effort Breaks Ground and Ruffles Feathers*, CITY LIMITS (Jul. 21, 2015), <https://citylimits.org/2015/07/21/citys-tenant-protection-effort-breaks-ground-and-ruffles-feathers> ("While the city hopes its rezoning plan will help the de Blasio administration achieve its goal of building and preserving 200,000 units of affordable housing over the next ten years, the city has also acknowledged that investment in rezoning neighborhoods will incentivize landlords to use illegal measures to push out existing tenants."); Emma Whitford, *City Nearly Doubles Budget for Lawyers Who Help NYers Fight Evictions*, GOTHAMIST (Sept. 28, 2015), <https://gothamist.com/news/city-nearly-doubles-budget-for-lawyers-who-help-nyers-fight-evictions?br=1>.

<sup>155</sup> Expert Report of Professor Andrew A. Beveridge at 5, 7–9, *Noel v. New York*, 2019 WL 6245395 (2019) (No. 15-CV-05236), <http://www.antibiaslaw.com/sites/default/files/BevMain.pdf>; J. David Goodman, *What the City Didn't Want the Public to Know: Its Policy Deepens Segregation*, N.Y. TIMES (Jul. 16, 2019), <https://www.nytimes.com/2019/07/16/nyregion/segregation-nyc-affordable-housing.html>.

<sup>156</sup> Press Release, New York State Attorney General's Office, A.G. Schneiderman Secures Agreement with Evans Bank Ending Discriminatory Redlining in Buffalo (Sept. 10, 2015), <https://Ag.Ny.Gov/Press-Release/2015/Ag-Schneiderman-Secures-Agreement-Evans-Bank-Ending-Discriminatory-Mortgage>. In another press release, the New York Attorney General's office stated that it found a similar pattern of discrimination by five star bank in Rochester, New York. Press Release, New York State Attorney General's Office, A.G. Schneiderman Secures Agreement With Five Star Bank To End Racially Discriminatory Mortgage Lending Practices In Rochester (Jan. 15, 2015), <https://ag.ny.gov/press-release/2015/ag-schneiderman-secures-agreement-five-star-bank-end-racially-discriminatory>.

in many respects, is more pronounced than ever.<sup>157</sup> One study found that “[o]ut of every metropolitan region in the United States with more than 200,000 residents, 81 percent (169 out of 209) were more segregated as of 2019 than they were in 1990.”<sup>158</sup> Moreover, this history of discriminatory and segregative policies, which coincides with the history and pre-history of the United States, has meant that Black people have been, and continue to be, deprived of access to land, capital, and housing. This has led to astonishing racial disparities in homeownership in the United States. In 2021, only 42 percent of Black households were homeowners in 2018, compared to 73 percent of non-Hispanic white households.<sup>159</sup> This gap exceeded the homeownership gap at the passage of the Fair Housing Act, more than a half-century prior.<sup>160</sup>

Viewed in terms of renter status, while 27.9 percent of white households rent their homes, 58 percent of Black households rent, 52 percent of Latino households rent and just under 40 percent of Asian households rent.<sup>161</sup> Moreover, renters who are Black, as well as other people of color, are more likely to be extremely low income renters. Thirty-eight percent of American Indian or Alaskan Native renter households, “35% of black renter households, and 28% of Hispanic renter households have extremely low incomes.”<sup>162</sup> In contrast, “22% of white non-Hispanic renter households” have extremely low incomes<sup>163</sup>

Figure 3 below shows this disproportionality in New York:

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<sup>157</sup> Stephen Menendian et al., *The Roots of Structural Racism Project: Twenty-First Century Racial Residential Segregation in the United States*, OTHERING & BELONGING INST. (Jun. 30, 2021) <https://belonging.berkeley.edu/roots-structural-racism>.

<sup>158</sup> *Id.*

<sup>159</sup> Drew Desilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR., (Aug. 2, 2021), <https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s>.

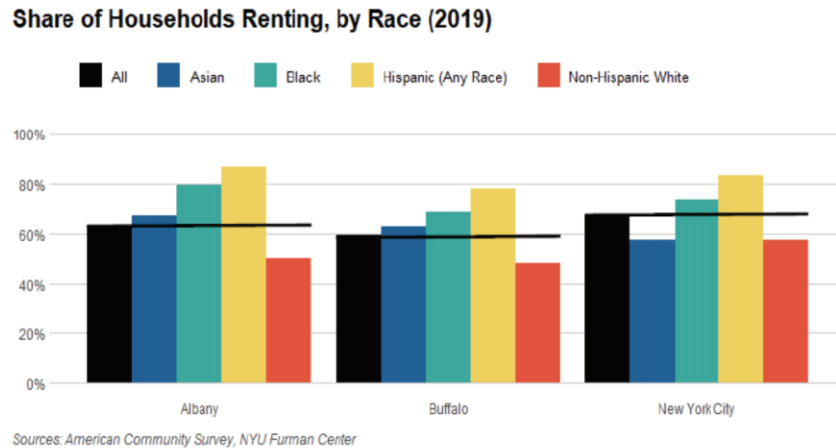
<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Racial Disparities Among Extremely Low-Income Renters*, NAT’L LOW INCOME HOUS. COAL., (Apr. 15, 2019), <https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters>.

<sup>163</sup> *Id.*



Figure 3<sup>164</sup>

**B. Black People are Disproportionately Likely to Have High Rent Burdens and Live in Poor Quality Housing.**

Disputes between landlords and tenants that lead to eviction proceedings can arise for many reasons, but they are particularly likely to arise when tenants have difficulty paying rent because they are rent-burdened, i.e., pay an inordinately high portion of their income for rent. Similarly, disputes are likely to arise when living conditions for tenants are uninhabitable because their landlords have failed to maintain the property in good repair or to provide necessary services like heat and hot water. Under these circumstances, tenants may be unwilling to pay rent until they are provided habitable conditions. They also may be unable to pay rent because they are forced to spend rent money on space heaters or oven use for heat when heat is not provided, on emergency plumbing repairs rather than live without a functioning toilet, and on takeout foods when they have no functioning stove. High rent burdens and inadequate living conditions fall disproportionately on Black people and no doubt contribute to their higher rate of evictions.

According to the National Equity Atlas, the percentage of households that are rent-burdened overall increased from 39 to 49 percent between 2000 and 2019.<sup>165</sup> The data shows that Black families

<sup>164</sup> N.Y. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., *supra* note 38, at 91.

<sup>165</sup> *Housing Burden*, NAT'L EQUITY ATLAS, [https://nationalequityatlas.org/indicators/Housing\\_burden#](https://nationalequityatlas.org/indicators/Housing_burden#) (last visited Sept. 30, 2022).

are significantly more rent-burdened than white families. In 2019, 55 percent of Black families and 57 percent of Latinx families were rent-burdened in comparison to 45 percent of white families in the United States at all income levels.<sup>166</sup> Rising housing prices have displaced Black renters disproportionately. For example, in San Francisco, between 2000 and 2015 as housing prices rose, the city lost 17 percent of its low-income Black population.<sup>167</sup> Another reflection of the disproportionately high rent burdens of Black renters is the high rate of “Black tenants in subsidized housing which, at [39 percent], is approximately three times higher than the Black population.”<sup>168</sup>

Black people are also more likely to live in unaffordable, deteriorated housing.<sup>169</sup> A May 2020 report from the United States Government Accountability Office found notable differences in housing conditions among different races and ethnicities.<sup>170</sup> The report found that the proportion of Black households that lived in rental “units with substantial quality issues (estimated at twenty-four percent) was slightly higher than the overall proportion of Black [renter] households (estimated at twenty-one percent).”<sup>171</sup> The report defined rental units with substantial quality issues as units that: “had at least one deficiency among quality-related variables and scored above our modeled statistical threshold for substantial quality issues. “The most common profiles were the presence of (1) cracked walls and rodents, (2) uncomfortably cold periods, heating equipment breakdowns, and rodents, or (3) cracked walls and water leaks.”<sup>172</sup> A report from the National Center for Biotechnology Information included the following graph, which depicts racial and ethnic disparities in the prevalence of severe and moderate substandard housing by race and ethnicity:

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<sup>166</sup> *Id.*

<sup>167</sup> U.C. BERKELEY’S URB. DISPLACEMENT PROJECT & THE CAL. HOUS. P’SHP, RISING HOUSING COSTS AND RE-SEGREGATION IN SAN FRANCISCO 1, 3 (2021), [https://www.urbandisplacement.org/wp-content/uploads/2021/08/sf\\_final.pdf](https://www.urbandisplacement.org/wp-content/uploads/2021/08/sf_final.pdf).

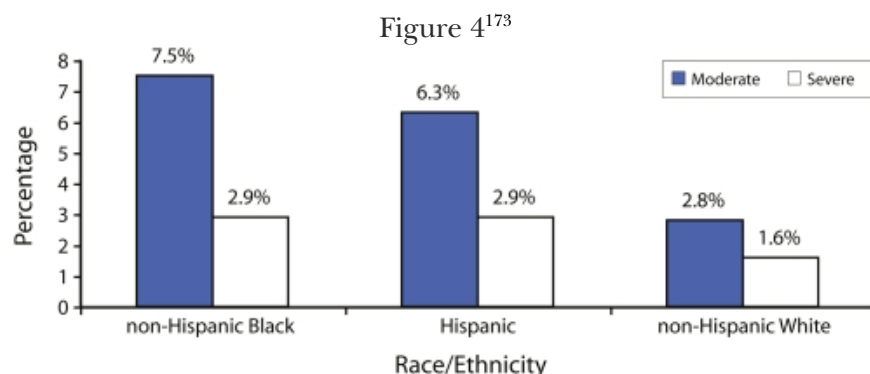
<sup>168</sup> N.Y. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., *supra* note 3838, at 63.

<sup>169</sup> See Pouya Bavafa, *The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analysis in Property Rentals Discrimination*, 43 COLUM. J.L. & SOC. PROBS. 491, 495 (2010) (explaining how landlords rent substandard apartments to minority groups for profit).

<sup>170</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-427, AS MORE HOUSEHOLDS RENT, THE POOREST FACE AFFORDABILITY AND HOUSING QUALITY CHALLENGES 29 (2020).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 27.



Prevalence of severe and moderate substandard housing by race and ethnicity:  
American Housing Survey, 2005.<sup>174</sup>

The report also found that poor housing quality was connected to disparities in health outcomes for Black and Hispanic households as compared to white households. It quotes Florence Nightingale’s observation that “[t]he connection between health and the dwelling of the population is one of the most important that exists.”<sup>175</sup>

### C. Black People are Evicted in Disproportionately High Numbers

Given their disproportionate status as tenants and their disproportionate experience of housing stressors, including poor living conditions and high rent burdens, it is not surprising that Black people face eviction proceedings and are evicted in disproportionately high numbers. The Eviction Lab at Princeton University reviewed racial and gender disparities in national eviction rates between 2012 and 2016 and found large disparities in both eviction filings and evictions between Black and white renters.<sup>176</sup> In a different study, research from the New York University Furman Center indicated that this disproportionality is not correlated with income—wealthy Black households are more likely to be evicted than white households.<sup>177</sup> The study found that white renters made up 51.5 percent of all adult renters, but only 42.7 percent of eviction defendants,<sup>178</sup> while Black

<sup>173</sup> David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH 115, 116 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222490>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> N.Y. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., *supra* note 38, at 81–82.

<sup>177</sup> *Id.* at 84.

<sup>178</sup> Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653 (2020).

renters “made up 19.9 percent of all adult renters but 32.7 percent of all eviction filing defendants.”<sup>179</sup> This disproportionality was even more pronounced during the COVID-19 pandemic, when Black renters, who account for 22 percent of all renters in areas tracked by the Eviction Lab, were the subject of over 33 percent of eviction filings.<sup>180</sup> This impact was felt particularly strongly by LGBTQ+ people of color who, at 30.2 percent, were more than three times as likely to be in rental arrears than white non-LGBTQ+ people.<sup>181</sup>

The Eviction Lab study analyzed neighborhood data for 1,195 counties in thirty-six states, “consisting of 1.44 million eviction cases with 660,000 judgments.”<sup>182</sup> They relied “on neighborhood- and county-level demographics, rather than the individual-level, because eviction records do not record the demographic characteristics of defendants.”<sup>183</sup> On a national level, the study found that, based on demographic patterns of communities, eviction and eviction filing rates for Black renters were almost double that of white renters: Black renters had a filing rate of 6.2 percent and eviction judgments at a 3.4 percent rate, while white renters had a filing rate of 3.4 percent and eviction judgments at a 2 percent rate.<sup>184</sup> Furthermore, nearly 25 percent of all Black renters live in a county in which the Black eviction rate was at least double the white eviction rate.<sup>185</sup> Figure 5 depicts the Eviction Lab’s findings:

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<sup>179</sup> *Id.*

<sup>180</sup> Peter Hepburn et al., *Preliminary Analysis: Eviction Filing Patterns in 2021*, EVICTION LAB (Mar. 8, 2022), <https://evictionlab.org/us-eviction-filing-patterns-2021>.

<sup>181</sup> See Bianca D.M. Wilson et al., *LGBT Renters and Eviction Risk*, UCLA SCH. L., WILLIAMS INST. 3 (Aug. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Eviction-Risk-Aug-2021.pdf>.

<sup>182</sup> N.Y. ADVISORY COMM. TO THE U.S. COMM’N ON C.R., *supra* note 38, at 81.

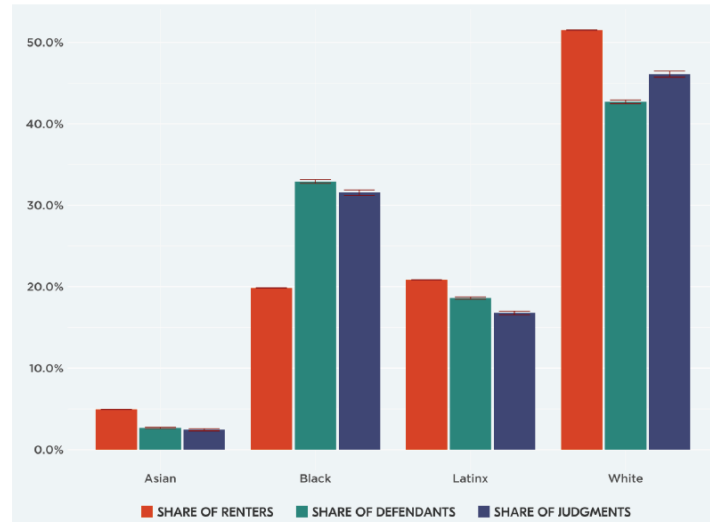
<sup>183</sup> *Id.* at 81–82. There is a paucity of racial demographic data on evictions. This is problematic and an area in much need of reform. See *id.* at 83–84.

<sup>184</sup> *Id.* at 151.

<sup>185</sup> *Id.* at 152.

Figure 5<sup>186</sup>

## Key Results: National



A huge number of regional and local studies confirm the Eviction Lab’s findings.<sup>187</sup> For example, a statewide analysis of Michigan found higher eviction filing rates were correlated with Black neighborhoods, “single-mother households, and the presence of children.”<sup>188</sup> A separate study found that 53 percent of all tenants served by Michigan’s Eviction Diversion Program (EDP) were Black, while only “14 percent of Michigan’s population is Black.”<sup>189</sup> A study in Baltimore found that Black-headed households experience evictions at nearly

<sup>186</sup> *Id.* at 83.

<sup>187</sup> Neil Steinkamp has compiled many of these studies for his report: STOUT, COST-BENEFIT ANALYSIS FOR PHILADELPHIA RIGHT TO COUNSEL FOR LOW-INCOME TENANTS FACING EVICTION (2022), <https://www.stout.com/en/experience/cost-benefit-analysis-for-philadelphia-right-to-counsel>.

<sup>188</sup> ROBERT GOODSPEED ET AL., UNIV. OF MICH. POVERTY SOLS., MICHIGAN EVICTIONS: TRENDS, DATA SOURCES, AND NEIGHBORHOOD DETERMINANTS 20 (2020), <https://poverty.umich.edu/files/2020/06/Michigan-Eviction-Project-working-paper.pdf>.

<sup>189</sup> ELIZABETH BENTON ET AL., UNIV. OF MICH. POVERTY SOLS., REDUCING MICHIGAN EVICTIONS: THE PANDEMIC AND BEYOND 65 (2021), <https://www.rocketcommunityfund.org/wp-content/uploads/2022/05/The-Estimated-Economic-Impact-of-an-Eviction-Right-to-Counsel-in-Detroit.pdf>.

three times the rate of white renters.<sup>190</sup> These studies more than amply document the consequences of public policies and private action that

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<sup>190</sup> TIMOTHY A. THOMAS ET AL., BALTIMORE EVICTION MAP, EVICTIONS STUDY (May 8, 2020), <https://evictions.study/maryland/report/baltimore.html>; see also Terrence McCoy, *Eviction Isn't Just About Poverty. It's Also About Race—and Virginia Proves It*, WASH. POST (Nov. 10, 2018), [https://www.washingtonpost.com/local/social-issues/eviction-isnt-just-about-poverty-its-also-about-race—and-virginia-proves-it/2018/11/10/475be8ae-d7bd-11e8-aeb7-ddcad4a0a54e\\_story.html](https://www.washingtonpost.com/local/social-issues/eviction-isnt-just-about-poverty-its-also-about-race—and-virginia-proves-it/2018/11/10/475be8ae-d7bd-11e8-aeb7-ddcad4a0a54e_story.html) (establishing that approximately 60 percent of majority Black neighborhoods in Virginia have an annual eviction rate above 10 percent—four times the national average—even when controlling for poverty and income. And for every 10 percent increase in the Black population, eviction rates increase by more than 1 percent, while white population increases at that rate resulted in an eviction rate decrease of approximately 1 percent); *Massachusetts*: Brief for Matthew Desmond et al. as Amici Curiae Supporting Defendants at 4–5, *Matorin v. Commonwealth*, 2020 WL 12847146 (2020) (No. 2084-cv-01344) (highlighting that Black tenants face eviction more than twice as often as white tenants, even though Black tenants are only “[11 percent] of the renting population,” and that Black women are at a particularly high risk of experiencing eviction—nearly “[two and a half] times as often as white women despite their much smaller share of the population”);

*New York*: Oksana Mironova, *Race and Evictions in New York City*, CMTY. SERV. SOC'Y N.Y. (June 22, 2020), <https://www.cssny.org/news/entry/race-evictions-new-york-city#E3> (“Between 2017 and 2019, tenants living in majority Black zip codes were more than three times as likely to be evicted as tenants living in majority white zip codes.”); URB. JUST. CTR., *TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT* 6 (2013), [https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB\\_doc\\_Report\\_CASA-TippingScales-full\\_201303.pdf](https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB_doc_Report_CASA-TippingScales-full_201303.pdf) (finding that 58 percent of the tenants appearing in Bronx Housing Court were Black and 29 percent were Latinx);

*Washington State*: TIMOTHY A. THOMAS ET AL., UNIV. OF WASH., *THE STATE OF EVICTIONS: RESULTS FROM THE UNIVERSITY OF WASHINGTON EVICTIONS PROJECT* (2020), <https://evictions.study/washington/index.html> (finding that Black defendants make up a disproportionate number of eviction filings relative to their share of the population: Black renters are evicted 5.5 times more frequently than white renters in King County and 6.8 times more often in Pierce County);

*Pennsylvania*: Michaelle Bond, *Black Philadelphia Renters Face Eviction at More Than Twice the Rate of White Renters*, PHILA. INQUIRER (Feb. 5, 2021), <https://www.inquirer.com/real-estate/housing/black-renters-eviction-white-tenants-philadelphia-reinvestment-fund-20210204.html> (revealing that an analysis of 2018–2019 residential eviction filings in Philadelphia found the annual filing rate against Black Philadelphia renters was approximately 9 percent, while the eviction filing rate against white Philadelphia renters was approximately 3 percent and that, although Black Philadelphians make up approximately 45 percent of the city's renters, they make up 66 percent of eviction filings);

*Washington, D.C.*: BRIAN J. MCCABE & EVA ROSEN, GEORGETOWN UNIV., *EVICTION IN WASHINGTON, DC: RACIAL AND GEOGRAPHIC DISPARITIES IN HOUSING INSTABILITY* 15 (2020), <https://georgetown.app.box.com/s/8cq4p8ap4nq5xm75b5mct0nz5002z3ap> (finding that in Washington, D.C., evictions are disproportionately filed and executed in Wards seven and eight, which have the largest share of Black residents and the

has racialized the status of tenants, with the result that tenants are disproportionately Black and other people of color, tenants who have eviction cases filed against them are disproportionately Black, and tenants who are actually evicted are disproportionately Black. Eviction and its consequences fall disproportionately on Black people.

### III. WHOEVER CONTROLS PROCESS CONTROLS OUTCOME. SUMMARY EVICTION PROCEEDINGS ARE UNFAIR BY DESIGN.

The general rules for civil litigation contemplate (implicitly, at least) a dispute resolution methodology for conflicts between adversaries of similar fire power, with no particular pre-ordained resolution, and a burden of proof placed on the party who initiates the litigation. The process is orderly. A summons and complaint is served and filed. A defendant or respondent is allowed time to file an answer to the complaint, time to secure counsel, and an opportunity to ascertain defenses and counterclaims. A period ensues in which the parties are permitted, through various mechanisms, including depositions and interrogatories, to “discover” the strengths and weaknesses of each other’s claims and defenses. Trials are scheduled sufficiently in advance to allow time to gather evidence and prepare

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highest poverty rates in the District, while Wards two and three, with the smallest share of Black residents, have the lowest filing rates);

*Louisiana*: JANE PLACE NEIGHBORHOOD SUSTAINABILITY INITIATIVE, UNEQUAL BURDEN, UNEQUAL RISK: HOUSEHOLDS HEADED BY BLACK WOMEN EXPERIENCE HIGHEST RATES OF EVICTION 6 (2019), <https://storage.googleapis.com/wzukusers/user-27881231/documents/c670b0a2e06345a9a01b065887a840db/Unequal%20Burden%2C%20Unequal%20Risk%20Eviction%20Report%20JPNISI%20Final.pdf> (highlighting a finding by court monitors in Orleans Parish that, while 59 percent of the Parish is Black, approximately 82 percent of tenants facing eviction were Black, with 57 percent of eviction proceedings being brought against Black women);

*Missouri*: KANSAS CITY EVICTION PROJECT, EVICTION IN KANSAS CITY: AN ANALYSIS OF 2017 EVICTION FILINGS IN JACKSON COUNTY, MO 1 (2018), <https://static1.squarespace.com/static/59ba0bd359cc68f015b7ff8a/t/5b342626352f5303fcd320e/1530144296847/KC+Eviiction+Project+-+2017+Update.pdf> (finding race to be the most important factor in predicting whether a person would be evicted);

*Ohio*: ELAINA JOHNS-WOLFE, THE CINCINNATI PROJECT, ‘YOU ARE BEING ASKED TO LEAVE THE PREMISES’: A STUDY OF EVICTION IN CINCINNATI AND HAMILTON COUNTY, OHIO, 2014–2017, 7–8 (2018), [https://cincinnati.legalaid.net/wp-content/uploads/Eviiction-Report\\_Final-1.pdf](https://cincinnati.legalaid.net/wp-content/uploads/Eviiction-Report_Final-1.pdf) (showing that, on average, majority Black neighborhoods have the highest eviction filing rates, while neighborhoods with few Black residents experience few evictions and that, controlling for poverty rates and housing cost burden, eviction filing rates increase by more than 8 percent for every 1 percent increase in Black residents); Fay Walker, *Eviction in Cleveland*, RPUBS (Feb. 26, 2019), <https://rpubs.com/faywalker/Cleveland-Eviiction> (noting that the top ten census tracts with the highest eviction filings from 2000 to 2016 are majority Black communities).

witnesses for trial. If there is a jury trial, a jury is empaneled. Sufficient time is set aside for trial. Adjournments, when need is demonstrated, are granted. Motion practice of all sorts can pepper the litigation: to request accelerated judgment; to seek preliminary injunctive relief; to seek and then force the adversary to comply with orders of the court. In due time, a decision and judgment are rendered. And if compliance with the judgment is not forthcoming, tools of enforcement such as attachment, garnishment, and contempt of court are employed.

Most of these trappings of civil litigation are eliminated or severely curtailed in scope or timing in summary eviction proceedings. The very purpose of the litigation, as universally described, is to secure a specific remedy—possession of the premises—for the landlord. The pace of the litigation is fast and furious.<sup>191</sup> Representation of the tenant by counsel is clearly not expected. Little time (or in some jurisdictions, no time) is available to secure counsel, or to prepare a defense before the first court appearance, which is generally a matter of days—sometimes as few as two days—after the first court notice is served.<sup>192</sup> In some states, lease clauses waiving prior statutory notices have been upheld.<sup>193</sup> An Oregon eviction statute that the Supreme Court upheld in *Lindsey v. Normet*, for instance, required a trial no later than six days after service of process.<sup>194</sup> For low-income tenants, the effort to secure counsel (except in the small but growing number of jurisdictions that are adopting the right to counsel) is often futile given the dearth of free or affordable counsel.<sup>195</sup> Many jurisdictions permit

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<sup>191</sup> See Spector, *supra* note 1, at 157 n.81 (2000) (citing ARIZ. REV. STAT. ANN. § 12-1175.A (West 1994) (stating that service two days before trial with continuance for three days available upon showing of good cause); CAL. CIV. PROC. CODE § 1167.3 (West 2000) (explaining litigation can be five days); ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 6:14 (1980) (providing a representative sample of times available under various state laws).

<sup>192</sup> See Spector, *supra* note 1, at 161; see also Luis Jorge DeGraffe, *The Historical Evolution of American Forcible Entry and Detainer Statutes*, 13 SETON HALL LEGIS. J. 129, 136 (1990); SCHOSHINSKI, *supra* note 2, at 416.

<sup>193</sup> SCHOSHINSKI, *supra* note 2, at 408.

<sup>194</sup> *Lindsey v. Normet*, 405 U.S. 56, 64 (1972).

<sup>195</sup> The federal Legal Services Corporation estimates that “[l]ow-income Americans do not get any or enough legal help for 92% of their substantial legal problems.” See generally LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.



adjudication by non-attorneys,<sup>196</sup> underscoring the failure to consider laws and rights as an integral part of the process. In some jurisdictions, the tenant may not even be permitted to present defenses or counterclaims in the proceeding which determines possession.<sup>197</sup> The niceties of civil litigation, such as motions, discovery, and adjournments, are often barred, or they are severely limited. And even when some of these procedures are authorized, they are unavailing without counsel. And even when a tenant is able to obtain counsel, available litigation tools are regularly foregone under the pressure of the mandate for speed. Judgments are generally rendered immediately from the bench or within a matter of days. Judgments for eviction are executed post haste, within days or weeks at the most.

The lightning-fast nature of summary proceedings has not offended the U.S. Supreme Court.<sup>198</sup> In *Lindsey v. Normet*, in 1972, the Court decided that an Oregon summary eviction proceeding satisfied both the Due Process and Equal Protection clauses of the U.S. Constitution even though the statute provided for a trial within two to four days from commencement of the proceeding through service of process, and precluded consideration of defenses based on landlord failure to maintain the premises.<sup>199</sup> While the Court reversed the outrageous requirement that tenants post a bond at twice the judgment amount to be permitted to appeal, the opinion blithely, and with no analysis, declares that housing is not a fundamental right.<sup>200</sup>

On the other hand, our Supreme Court jurisprudence has not entirely ignored the consequences of the summary nature of eviction proceedings. A couple of years after its decision in *Lindsey*, the Supreme Court upheld the right to a jury trial in a Washington D.C. summary eviction proceeding in *Pernell v. Southall Realty*, holding that:

Some delay, of course, is inherent in any fair-minded system of justice. A landlord-tenant dispute, like any other lawsuit,

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<sup>196</sup> Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 383 (2022); see generally Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287 (2022).

<sup>197</sup> SCHOSHINSKI, *supra* note 2, at 422; see also Richard H. Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385, 1386 (1979).

<sup>198</sup> And views on the relative merits of summary eviction proceedings, of course, differ; see also Moshe B. Nachum, *The Landlord Blues: Inequity, Inefficiency, and Untimeliness of Summary Proceedings in New York City*, 61 N.Y.L. SCH. L. REV. 509, 516 (2016) (arguing that summary proceedings are not summary enough).

<sup>199</sup> *Lindsey v. Normet*, 405 U.S. 56, 64 (1972).

<sup>200</sup> *Id.* at 874.

cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.<sup>201</sup>

Is it any wonder, then, that the process to evict tenants was designed to serve the interests of the men who had exclusive control over the formulation of laws? Is it any wonder that the process was designed to achieve a specific remedy—eviction—and not, as with other civil litigation, to serve the orderly resolution of conflicts between presumed equals? In spite of the passage of two or more centuries since their adoption; in spite of the evolution of the context for landlord-tenant relationships from a primarily agrarian setting to a primarily urban setting, both industrial and post-industrial; in spite of the passage of a host of laws and court decisions that provide substantive rights to tenants regarding habitability, government ownership and operation of significant amounts of housing, retaliation, and rent levels; and in spite of the conceptual recategorization of a lease from a conveyance to a contract, we have retained the truncated, expedited, summary approach to eviction that was devised so long ago.

It is true that eviction is not inevitable in all cases. Indeed, as discussed below, representation by counsel can avert eviction in the majority of cases. And in many jurisdictions and many instances, the eviction proceeding is used as a tool for bill collecting, and the courts are used as bill collectors for landlords. When landlords prioritize rent collection over displacing tenants from their homes, the number of evictions is reduced. Nonetheless, whether it can be tempered by providing counsel for tenants, or avoided through payment, the streamlined path to eviction in summary eviction proceedings tips the scales of justice decidedly in favor of landlords and assures that they hold the upper hand in the power dynamic with tenants.

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<sup>201</sup> *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974). Justice Douglas's dissent in *Lindsey* represents quite a different point of view than that of the majority. *Lindsey*, 405 U.S. at 89–90 (Douglas, J., dissenting) (“But where the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where man's roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend. Then he loses the essence of the controversy, being given only empty promises that somehow, somewhere, someone may allow him to litigate the basic question in the case.”).

The movement for a right to counsel in eviction proceedings poses a serious challenge to the longstanding norms and expectations of summary eviction proceedings. It provides tenants who cannot otherwise retain counsel with legal firepower that can match that of their landlords. In effect, it makes the playing field far more level. And the right to counsel is having an enormously salutary effect in the jurisdictions where it has been adopted. Though the right to counsel helps level the playing field, the old rules of the game played on that field remain largely intact—the rules that shoehorn eviction litigation into a process that was designed from the outset to achieve a particular result and not designed for fairness or to achieve justice.<sup>202</sup>

A. *Process Matters—the Design of Process Is Political and the Result Replicates Power Relationships*

Process matters. The formation of laws, both procedural and substantive, often matters more than their application. Process informs, if not dictates, outcome. Process has, in a certain sense, the guise of neutrality. What could be more neutral than the rules to a game, particularly a game that has been played the same way for centuries? Process can be seen as simply the steps and the order of the steps that must be taken.<sup>203</sup> In litigation, process saves us from chaos.

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<sup>202</sup> Justice, of course, is a subjective concept. The property owners who devised summary eviction proceedings viewed, and (at least to a great extent) their contemporary counterparts no doubt view, the availability of a rapid legal process to secure a money and possessory judgment, particularly where liability for rent can accrue during litigation, as achieving justice. Plaintiffs, however, in all litigation for all causes of action would doubtlessly prefer an expedited process that likely achieves a swift result in their favor as opposed to a measured process that allows both sides a full and fair opportunity to be heard. To the extent that in some cases a more attenuated process can delay judgment and increase a tenant's liability for rent and a landlord's difficulty in collecting that rent, the onus to address that issue should not be on the judicial system; it should be on the legislative and executive branches of government to devise rent subsidies and other "upstream" policies to avert or resolve underlying disputes. That the process and results of litigation frustrate parties is hardly anathema to our justice system. Compare, e.g., landlord-tenant litigation with bankruptcy proceedings in which the system is designed to deny, diminish or delay creditors' compensation for liabilities that are generally not even disputed. *See, generally*, 11 U.S.C. §§701–84.

<sup>203</sup> One legal dictionary defines process as "[a] series of actions, motions, or occurrences; a method, mode, or operation, where by a result or effect is produced; normal or actual course of procedure; regular proceeding, as, the process of vegetation or decomposition; a chemical process; processes of nature." *Progress*, FREE DICTIONARY, <https://legal-dictionary.thefreedictionary.com/Process>.

It shapes and imposes a rational means to resolve conflict. Without a commonly understood process and the willingness—or obligation—to comply with it, the practice of law could descend into a “Vale Tudo” or “No Holds Barred” combat sport.

Process is necessary, yes. Indeed, the Constitution guarantees us the right to due process.<sup>204</sup> But the Constitution is not, at this point at least, understood to guarantee that the power to define process be shared by the people ultimately governed by it. Those who control the formulation of the rules of the game have generally constructed those rules to their advantage. The act of determining the process for conflict resolution reflects the power relationship between the parties who are, or potentially will be, in conflict. Where both sides have power, each side vies for control of the rules of the game. When one side has power and the other does not, the party with power writes the rules in its own interest.

The process set out for a particular type of dispute resolution generally corresponds to the value placed on the objective of the process by whoever has the power to design the system. Where the people designing the system can see themselves on either side of a dispute—as with civil litigation in general—they are more likely to devise a system that balances the interests of both sides. When the people who have the power to design the system also have a dominant power relationship with the people most likely to be their adversaries and can only envision themselves on one side of a potential dispute, it stands to reason they will design a system that reinforces that dominance.

That those in power devise processes for resolving conflicts to serve their own interests and to reinforce existing power relationships is true in many areas of law. For instance, the political and social forces of Jim Crow influenced the way the Supreme Court drafted novel rules of criminal procedure in the 1940s.<sup>205</sup> The new rules essentially wrote race into procedure and contributed to the construction of “separate and unequal courtrooms,”<sup>206</sup> in much the same way that eviction courts

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<sup>204</sup> The summary process for eviction certainly raises due process concerns, but that argument is beyond the scope of this Article.

<sup>205</sup> Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 2–3 (2021).

<sup>206</sup> *Id.* (contending that, unlike the civil rules, the Federal Rules of Criminal Procedure were shaped with racist goals and outcomes in mind); see also Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017). Similar observations have been made about other areas of rulemaking. See, e.g., Brooke D. Coleman, #Sowhitemale: Federal Civil Rulemaking, 113 NW. U. L. REV.

are in many ways “separate and unequal” to other civil courts. Similarly, the Supreme Court’s “procedural” decision in *Wal-Mart v. Dukes*,<sup>207</sup> denying class certification in a sex discrimination class action, set the course for substantive diminution of the rights of plaintiffs in sex discrimination litigation.<sup>208</sup>

The judge-made “procedural” rule of “qualified immunity,” which shields police officers from liability for misconduct unless, among other requirements, their actions violate “clearly established law,” is another example of a provision that has been criticized as a “procedural rule that is ‘neutral’ on its face, but biased in effect.”<sup>209</sup> While qualified immunity may in fact be more substantive than procedural in that it establishes a defense to liability that would otherwise not be available, landlord-tenant laws presented in the guise of procedure do the same. For example, rent bonds, that require tenants who are sued for eviction to deposit rent before they can interpose defenses, have dispositive substantive effects.

Yet another example of the implications of process is the ongoing political debate over the structure of Immigration Court, which, as an office of the Justice Department, is often seen as lacking the independence necessary for fair decision-making.<sup>210</sup> That lack of independence, along with limited opportunities for deliberative thinking, low motivation, and low risk of judicial review have been seen to make immigration judges particularly prone to implicit bias.<sup>211</sup>

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407, 408 (2018) (arguing that the homogeneous composition of the Federal Civil Rules Committee—116 out of 136 members have been white men over the Committee’s eighty-two year history—has limited the quality of the rules produced and perpetuates inequality today).

<sup>207</sup> See generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

<sup>208</sup> See generally Roger W. Reinsch & Sonia Goltz, *You Can’t Get There from Here: Implications of the Walmart v. Dukes Decision for Addressing Second Generation Discrimination*, 9 NW.J.L. & SOC. POL’Y 264 (2014).

<sup>209</sup> Edward A. Purcell Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. PA. L. REV. 2583, 2545 (2021).

<sup>210</sup> See Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–80 (2007) (summarizing Judge Posner’s rebukes of immigration court decisions). Judge Posner has famously complained that “the adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice.” *Benslimane v. Gonzales*, 430 F.3d 828, 830 (2005).

<sup>211</sup> See Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW. ENG. L. REV. 417, 428–40 (2011).

B. *Summary Eviction Proceedings Were Designed to Favor Landlords*

The U.S. Constitution gives the states the power to determine who is permitted to vote.<sup>212</sup> The original colonial states, followed by the others as they entered statehood, uniformly restricted voting rights to property owners and, with some minor exceptions, white people and males.<sup>213</sup> All others—who were not white, male, or property owner—were denied the franchise to vote.<sup>214</sup> These restrictions, along with bars to voting against Jews and Catholics in most states, left only a small portion of the population eligible to vote.<sup>215</sup>

The justifications that were articulated for restricting the vote to white male property owners reflect the class, race, and gender biases, norms, and attitudes of the day and help explain why the process for eviction was designed to so heavily favor landlords over tenants. John Adams, for example, maintained that “[s]uch is the Frailty of the human Heart, that very few Men, who have no Property, have any judgment of their own.”<sup>216</sup> “Warren Dutton of Massachusetts said in 1820” that a lack of property “indicated that a person was either ‘indolent or vicious.’”<sup>217</sup> Henry Ford of New Jersey argued in 1806 that “[i]n every commercial society . . . wealth is the measure of respectability, and the foundation for that spirit of independence absolutely essential to unbiased elections.”<sup>218</sup> While the property qualifications for voting were generally phased out from the 1820s to

<sup>212</sup> The Elections Clause, U.S. CONST. art. I, §4, cl. 1, provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of choosing Senators.”

<sup>213</sup> Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L.J. 473, 476–77 (1997).

<sup>214</sup> *Id.*; cf. S.C. CONST. of 1788, art. XIII (restricting eligible voters to those who recognized the existence of God).

<sup>215</sup> *Who Voted in Early America*, CONST. RTS. FOUND., <https://www.crf-usa.org/bill-of-rights-in-action/bria-8-1-b-who-voted-in-early-america> (last visited Oct. 1, 2022).

<sup>216</sup> Cogan, *supra* note 213, at 477 (quoting Letter from John Adams to James Sullivan (May 26, 1776), in 4 PAPERS OF JOHN ADAMS 208, 210 (Robert J. Taylor ed., 1979)).

<sup>217</sup> *Id.* at 480 (citing JOURNAL OF DEBATES AND PROCEEDINGS IN THE CONVENTION OF DELEGATES, CHOSEN TO DEVISE MASSACHUSETTS CONVENTION OF 1820–21 247 (rev. ed., Bos. Daily Advertiser, 1853) (statement of Warren Dutton)). Daniel Webster said at that convention that “it is entirely just that property should have its due weight and consideration in political arrangements.” *Id.* at 479 n.38.

<sup>218</sup> Cogan, *supra* note 213, at 480 (quoting HENRY FORD, AN ORATION, DELIVERED IN THE PRESBYTERIAN CHURCH AT MORRIS-TOWN, JULY 4, 1806 8–9 (Henry P. Russell ed., 1806)).

the 1840s, many states replaced these qualifications with policies that excluded “paupers” from suffrage.<sup>219</sup> New York State eliminated property tests for white males during this era but retained the requirement for Black males.<sup>220</sup>

Denying suffrage to women was premised on the fact that women were not even permitted to own property. By law, women “conferred upon their husbands, by the marriage contract, all their civil rights: not absolutely, . . . but on condition, that the husband will make use of his power to promote their happiness, and the propriety of their children.”<sup>221</sup> Thus, it was maintained, because their legal status was subsumed in that of their husbands, women could not possibly qualify for suffrage.<sup>222</sup>

Enslaved Black people, of course, were considered property, with “no rights which the white man was bound to respect.”<sup>223</sup> Rhode Island was the first state to permit free Black men to vote in the antebellum period, followed by only four other northern states prior to the Civil War.<sup>224</sup> To the extent that the denial of suffrage to Black people was debated at all, the idea of extending suffrage to Black people was dismissed with viciously racist language, as in: “the minds of the blacks are not competent to vote,” and “too much degraded to estimate the value, or exercise with fidelity and discretion that important right,” adding that the vote “would be unsafe in their hands.”<sup>225</sup>

The legislators who enacted the original summary eviction statutes were generally required to have the same property-owner qualifications for holding office as were required to vote.<sup>226</sup> Thus,

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<sup>219</sup> Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 335 (1989).

<sup>220</sup> Eric Ledell Smith, *The End of Black Voting Rights in Pennsylvania: African Americans and the Pennsylvania Constitutional Convention of 1837–1838*, 65 PA. HISTORY: J. MID-ATLANTIC STUD., 279, 293 (1998).

<sup>221</sup> Cogan, *supra* note 213, at 485 (quoting WILLIAM C. JARVIS, THE REPUBLICAN; OR, A SERIES OF ESSAYS ON THE PRINCIPLES AND POLICY OF FREE STATES, HAVING A PARTICULAR REFERENCE TO THE UNITED STATES OF AMERICA AND THE INDIVIDUAL STATES 66 (Pittsfield. Phineas Allen 1820)).

<sup>222</sup> Cogan, *supra* note 213, at 485.

<sup>223</sup> *Scott v. Sandford*, 60 U.S. 393, 407 (1857).

<sup>224</sup> R.I. FAMILY LIFE CTR., RHODE ISLAND’S SHRINKING BLACK ELECTORATE (2005), [https://static.prisonpolicy.org/scans/ririghttovote/RI\\_BlackElectorate.pdf](https://static.prisonpolicy.org/scans/ririghttovote/RI_BlackElectorate.pdf).

<sup>225</sup> See Cogan, *supra* note 213, at 490–91.

<sup>226</sup> Katherine Levine Einstein & Maxwell Palmer, *Land of the Freeholder: How Property Rights Make Local Voting Rights*, 1 J. HIST. POL. ECON., 499, 505 (2021); Cogan, *supra* note 213, at 478–79.

legislators elected by a white male property-owning electorate, who were themselves white male property owners, designed summary eviction proceedings to give themselves a shortcut route to eviction judgments that circumvented the conventional requirements of civil litigation.

When this nation first adopted summary proceedings statutes in the late eighteenth and early-to-mid-nineteenth centuries, an articulated purpose was to give landlords a quick court procedure to evict tenants in order to discourage landlords from using “self-help” evictions without court authorization. As one oft-cited treatise puts it, summary proceedings statutes were enacted “to accommodate the desire of landlords to expeditiously recover possession of leased premises upon termination of a tenancy or breach of its terms and, at the same time, to protect tenants from forcible ouster by landlords.”<sup>227</sup> Self-help, if too violent, could result in litigation challenging the eviction as unduly “forcible,” and the courts had difficulty drawing the line between “peaceable” and “forcible” entry.<sup>228</sup> Landlords did have the option of bringing an ejectment action, but ejectment actions—plenary actions that followed the normal rules of civil procedure—were viewed as too cumbersome and time-consuming. One New York case has described the basis for summary proceedings as follows, “[s]ignificantly, delays [in the procedural process of an action for ejectment] caused social breakdowns by ‘prompt[ing] landlords to short circuit the judicial process by resort to self-help.’ Therefore, nonpayment summary proceedings provided an important ‘right of the landlord to the immediate possession of his property.’”<sup>229</sup> Encouraging the handling of eviction disputes in the courts in place of violent self-help evictions was a step forward. But the summary nature of the processes, which were put in place to encourage landlords to use the courts, assured that there would be little change in the power relationship between landlords and tenants.

The truncated and expedited nature of summary proceedings has always been premised on the notion that the legal issues in these

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<sup>227</sup> SCHOSHINSKI, *supra* note 2, at 408–09.

<sup>228</sup> Spector, *supra* note 1, at 155–56.

<sup>229</sup> *Hognestad v. Rabideau*, 55 Misc. 3d 977, 982 (N.Y. City Ct. 2017) (internal citations omitted); *see also* ROBERT F. DOLAN, *RASCH’S NEW YORK LANDLORD AND TENANT, INCLUDING SUMMARY PROCEEDINGS* § 29:5 (5th ed. 2022); *see generally* Reich v. Cochran, 94 N.E. 1080 (1911); *Zenila Realty Corp. v. Masterandrea*, 123 Misc. 2d 1 (N.Y. Civ. Ct. 1984).



proceedings are “simple.”<sup>230</sup> At the time of their origin, these proceedings were in fact simpler than they are today. The summary approach to eviction litigation was forged in the earliest days of the American experiment, in the late eighteenth and early nineteenth centuries, when the roles of tenant and landlord were played out in a mostly agrarian setting that was largely rooted in the feudal relationship between the so-called “lord of the land” and *his* tenant.<sup>231</sup> As in feudalism, landlords set the terms and conditions of the relationship, and tenants had very few rights.<sup>232</sup> There were no interdependent covenants between landlord and tenant. The tenant’s obligation to pay rent was not premised on an obligation to maintain the premises in good repair or to provide services like heat and hot water. There were no housing codes, no government subsidies, and no rent regulations. But there were factual questions that would have to be resolved of personal jurisdiction, title, lease obligations, and payment. Proceedings based on other causes, like lease violations, lease terminations, or nuisance, were less simple because the factual questions were more nuanced and complex, even without the layers of government regulation that were adopted in the ensuing two centuries. And without counsel, it had to have been, as it is today, extremely difficult for a tenant to prove or disprove relevant facts, or even to understand the process.

Summary proceedings are intended to—and do—privilege landlords, advantaging the plaintiff or petitioner while disadvantaging the defendant or respondent. The language used to describe summary eviction proceedings amply demonstrates this outcome-determinative purpose. These proceedings intend to give landlords a quick remedy to gain legal possession. Summary proceedings were seen as more efficient for landlords than “cumbersome, expensive, and time-consuming” actions in ejectment.<sup>233</sup> An early twentieth-century New York case held that the state’s summary eviction statute of 1820 was “designed to remedy this evil [ejectments] by providing the landlord with a simple, expeditious and inexpensive means of regaining

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<sup>230</sup> See Sabbeth, *supra* note 15, at 378 n.138–40.

<sup>231</sup> See Brian G. Gilmore, “Everybody Loves the Landlord”: *Evictions and the Coming Prevention Revolution*, 41 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC., 201, 206–07 (2020); Charles Wm. Sullivan, *Forgotten Lessons from the Common Law, the Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287, 1291–92 (2006).

<sup>232</sup> See generally Gilmore, *supra* note 231.

<sup>233</sup> See Spector, *supra* note 1, at 154.

possession of his premises in cases where the tenant refused upon demand to pay rent.”<sup>234</sup>

According to West’s Encyclopedia of American Law, “[l]egal proceedings are regarded as summary when they are shorter and simpler than the ordinary steps in a suit. Summary proceedings are ordinarily available for cases that require prompt action and generally involve a small number of clearcut issues.”<sup>235</sup> To the extent other litigation is “summary,” none involves anything nearly as fundamental as a home. States have, for instance, created special courts and adopted streamlined processes to litigate small claims.<sup>236</sup> The process is rapid; there are few of the standard litigation tools available; both sides are ordinarily relatively evenly matched; and counsel is rarely involved in, and sometimes barred from, representing either side.<sup>237</sup> Most importantly, this abbreviated form of litigation is available for monetary claims only, and only when the amount sought falls below low threshold jurisdictional amounts.<sup>238</sup> The claims, in other words, are small.<sup>239</sup> In some jurisdictions, small claims courts even handle evictions.<sup>240</sup> Yet, eviction from a home is anything but a “small” claim. Other than summary eviction proceedings, it is hard to imagine any form of litigation designed to give the instigator of the litigation the result sought, rather than designed to arrive at a just resolution. A contract dispute? A property dispute between abutting property owners? A marital dispute?

In any event, eviction proceedings are no longer “simple,” if they ever were. Summary eviction proceedings were designed in an agrarian era. They were premised on a legal relationship between landlord and tenant that derived directly from feudalism and provided

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<sup>234</sup> Reich, 94 N.E. at 454.

<sup>235</sup> WEST’S ENCYCLOPEDIA OF AMERICAN LAW (Shirelle Phelps & Jeffrey Lehman eds., Gale 2d ed. 2005).

<sup>236</sup> James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDCL REV. 177, 178–79 (2000).

<sup>237</sup> *Id.* at 179–80.

<sup>238</sup> *Id.* at 180.

<sup>239</sup> *See id.* at 179–82 (summarizing small claims practices in each state).

<sup>240</sup> Sabbeth, *supra* note 15, at 377. *See also*, Ajax Woolley, *Eviction in Durham Isn’t a “Small Claim” Anymore*, DATAWORKS NC (Mar. 11, 2022), <https://dataworks-nc.org/2022/eviction-in-durham-isnt-a-small-claim-anymore> (claiming “[i]t is very easy for Durham landlords to get an eviction judgment (‘summary ejectment’) in Small Claims court”); *see generally* LSC Eviction Laws Database, LEGAL SERVS. CORP., <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database> (last visited Oct. 1, 2022).

very few rights to tenants or constraints on landlords. Land and livelihood were closely linked, and the right to occupy was generally based on providing the landlord with a share of the crop yield.<sup>241</sup> Cities, as we know them, were in their nascent stages, and the residential landlord-tenant relationship was far more likely to be rural than urban. The first U.S. census in 1790 reported that only 5.1 percent of the population lived in places with populations that exceeded 2,500 people,<sup>242</sup> and the 1800 census reported 6.0 percent.<sup>243</sup> Subsequent to the passage of the summary proceedings laws in the early-mid 1800s, the urban population began to grow rapidly, and the United States became a nation of cities and city dwellers. By 1860, over 40 percent of the population lived in places with populations that exceeded 100,000 people.<sup>244</sup> City dwellers were more likely to rent than own their homes. In the late nineteenth century, for example, most Bostonians were renters.<sup>245</sup> And, according to the 2020 census, 86 percent of Americans now live in metropolitan areas.<sup>246</sup>

In the two centuries of evolution since the advent of summary proceedings, layers of complexity have developed with the growth of cities, the expansions of statutory and common law rights, and the increasing interdependence of civic life.<sup>247</sup> This led the New York State

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<sup>241</sup> DAVID J. MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 150 (2016).

<sup>242</sup> *History: Through the Decades: 1790 Overview*, U.S. CENSUS BUREAU [https://www.census.gov/history/www/through\\_the\\_decades/overview/1790.html](https://www.census.gov/history/www/through_the_decades/overview/1790.html) (last visited Oct. 13, 2022); *Increasing Urbanization: Population Distribution by City Size, 1970 to 1890*, U.S. CENSUS BUREAU, <https://www.census.gov/dataviz/visualizations/005> (last visited Oct. 13, 2022).

<sup>243</sup> *History: Through the Decades: 1800 Overview*, U.S. CENSUS BUREAU [https://www.census.gov/history/www/through\\_the\\_decades/overview/1800.html](https://www.census.gov/history/www/through_the_decades/overview/1800.html) (last visited Oct. 13, 2022).

<sup>244</sup> *1860 Census: Population of the United States*, U.S. CENSUS BUREAU <https://www.census.gov/library/publications/1864/dec/1860a.html> (last visited Oct. 13, 2022).

<sup>245</sup> ROBERT A. SILVERMAN, LAW AND URBAN GROWTH: CIVIL LITIGATION IN THE BOSTON TRIAL COURTS, 1880–1900 83 (1981).

<sup>246</sup> Katherine Sypher, *By the Census: Increasingly Metropolitan and Diverse Population Foreshadows United States' Future*, APM RSCH. LAB (Sept. 13, 2021), <https://www.apmresearchlab.org/10x-census>.

<sup>247</sup> Indeed, the author's treatise, ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK (2021–2022 ed.), is over 1400 pages long because of the breadth and complexity of the laws governing landlord-tenant relations. See also Michael Weinberg, *From Contract to Conveyance: The Law of Landlord and Tenant, 1800–1920 (Part I)*, 5 S. ILL. U. L.J. 29 (1980) (discussing the history of the English common law of landlord-tenant and early American legal developments); Edward H. Rabin, *Revolution in Residential*

Court of Appeals to declare in 1981 that the law applicable to summary proceedings was an “impenetrable thicket confusing not only to laymen but to lawyers.”<sup>248</sup>

Most jurisdictions now view a lease as a contract with mutually dependent obligations, rather than a conveyance of property.<sup>249</sup> Housing and building codes and warranty of habitability laws establish enforceable rights to decent housing quality and have, in most jurisdictions, provided tenants with bases for defenses and counterclaims, including defenses of constructive and retaliatory eviction.<sup>250</sup> In most jurisdictions, for example, a tenant can notify a landlord and withhold or abate rent if a landlord does not maintain the premises or provide required services. Anti-discrimination laws, most notably the federal Fair Housing Act adopted in the 1960s,<sup>251</sup> have added protections from discrimination in rental housing that can be raised in summary eviction proceedings.<sup>252</sup> Public housing programs and federal, state, and local housing subsidy programs have developed a panoply of regulatory requirements setting forth rights and obligations relevant to the eviction process.<sup>253</sup> “Just cause” legislation in New Jersey and elsewhere requires lease renewal absent a statutorily authorized basis to terminate a tenancy.<sup>254</sup> Public benefits and other financial factors may become relevant to housing disputes<sup>255</sup> This was

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*Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 533–39 (1984) (discussing the history and development of eviction law in the United States, including: retaliatory eviction, just cause eviction, limitations on eviction for condo-conversion, and limitations on a landlord’s common law remedies for eviction after a tenant breach); MaryAnn Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 544, 550–552 (1982) (explaining that regulatory landlord-tenant law reflects “ever-changing compromises among . . . the interests involved, as well as diverse views about the relationship of law to economic and social reality. It is therefore susceptible to more frequent, abrupt and unpredictable changes than are the private law remnants of property and contract”).

<sup>248</sup> *La Guardia v. Cavanaugh*, 423 N.E.2d 9, 10 (N.Y. 1981) (quoting 89 Christopher Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1974)).

<sup>249</sup> See *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071, 1075, 1082 (D.C. Cir. 1970).

<sup>250</sup> Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 533–39 (1984).

<sup>251</sup> Fair Housing Act, 42 U.S.C. §§ 3601–31.

<sup>252</sup> See generally Rabin, *supra* note 247.

<sup>253</sup> See, e.g., 24 C.F.R. § 960.203; 24 C.F.R. §§ 247.3, 247.4, 247.5, 247.6; 9; CODE OF PUBLIC LOCAL LAWS OF BALT. § 9-14; 28 RCNY § 3-18(a); 68 RCNY § 10-02; 68 RCNY § 10-03(a)(6)(D).

<sup>254</sup> N.J. STAT. ANN. § 2A:18-61.1 (West 2013).

<sup>255</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3 (2022).

particularly true during the COVID-19 pandemic when a patchwork of federal and state eviction moratoria and rent relief statutory provisions and administrative directives added to the complexity of the eviction process.<sup>256</sup> And New York City, as well as other jurisdictions in New York State, California, and elsewhere, have rent regulation systems that regulate rent level, housing conditions and bases for eviction,<sup>257</sup> all of which must be dealt with in “summary” proceedings.

Despite the passage of two centuries since summary proceedings were originally conceived, despite the Industrial Revolution, enormous population growth, and the migration of the majority of the population to cities, and despite the evolved complexity of landlord-tenant law, eviction proceedings remain summary in the modern era. The default rate for tenants is high in most jurisdictions, and when the tenant does appear, the time spent before a judge in eviction cases is shockingly brief. A report on Chicago’s eviction court in the early 2000s found that “[t]he most striking characteristic of the monitoring data is the painfully short period of time allowed for each trial. The average period of time spent per case was [one] minute and [forty-four] seconds, a marked decrease from an average of less than three minutes reported in [a] 1996 study.”<sup>258</sup> A 1986 report on the New York City Housing Court found that judges spent an average of five minutes on eviction cases that appeared before them.<sup>259</sup> In Memphis, Tennessee, observers found in 2021 that 94 percent of eviction hearings took less than two minutes and 70 percent took less than one minute.<sup>260</sup> Indeed, despite the many changes in other aspects of civil procedure over the past two centuries, the fundamental structure of summary proceedings has not changed much.<sup>261</sup> In Mecklenberg County, South Carolina, approximately 103 summary ejection cases

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<sup>256</sup> See, e.g., Emily A. Benfer et al., *supra* note 17; Sam Gilman, *The Return on Investment of Pandemic Rental Assistance: Modeling A Rare Win-Win-Win*, 18 IND. HEALTH L. REV. 293 (2021); Nino C. Monea, *Tenant Protections in the COVID-19 Pandemic*, 22 J.L. SOC’Y 38 (2022).

<sup>257</sup> N.Y.C. ADMIN. CODE § 26-501; CAL. CIV. CODE § 1954.52(a).

<sup>258</sup> KAREN DORAN ET AL., CHI.-KENT COLL. OF L. CLASS OF 2004 HONORS SCHOLAR, NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 11 (2003), <https://www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf>.

<sup>259</sup> MONITORING SUBCOMM., CITY WIDE TASK FORCE ON HOUS. CT., 5 MINUTE JUSTICE OR “AIN’T NOTHING GOING ON BUT THE RENT!” 22 (1986).

<sup>260</sup> See Mason, *supra* note 1, at 415.

<sup>261</sup> See Richard H. Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385, 1396 (1979).

were filed per day in fiscal year 2015-2016.<sup>262</sup> In many jurisdictions, only a single issue is presented: Who is entitled to possession? And this question is usually answered within six to ten days after the action is commenced.<sup>263</sup> Even in jurisdictions where both possession and liability for rent are determined, the proceedings move swiftly. There is often as little as three days between service of a summons and appearance for trial.<sup>264</sup> Standard civil litigation, in contrast, takes far more time. A 2015 study by the Civil Justice Initiative found, for example, that the average time from filing to disposition of civil cases is 306 days, or approximately ten months.<sup>265</sup>

### C. *It Doesn't Have to be This Way*

It doesn't have to be this way. The eviction process can be less unfair and traumatic. Evictions in other countries are often far less summary than they are in the United States.<sup>266</sup> Both Europe and South Africa, for example, consider a fundamental human right to housing as part of the equation in eviction cases.<sup>267</sup> Under Article 8(2) of the European Convention on Human Rights, a tenant in one of the forty-seven nations that are signatories to the convention may defend against eviction by arguing “that the adverse effects of the eviction are not proportional to the purpose it aims to achieve.”<sup>268</sup> The possibility of homelessness is a factor that weighs against eviction.<sup>269</sup> Under Section 26(3) of the South African Constitution, “a court must

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<sup>262</sup> ASHLEY WILLIAMS CLARK WITH JUSTIN LANE ET AL., CHARLOTTE-MECKLENBURG EVICTIONS, PART 1: AN INTRODUCTION TO EVICTIONS IN CHARLOTTE-MECKLENBURG 25 (2017), <https://mecklenburghousingdata.org/wp-content/uploads/2017/09/Charlotte-Mecklenburg-Evictions-Report-Part-1.pdf>.

<sup>263</sup> Spector, *supra* note 1, at 137.

<sup>264</sup> *Id.* at 154.

<sup>265</sup> CIV. JUST. INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 28 (2015), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/13376/civiljusticereport-2015.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf).

<sup>266</sup> *See generally* DIRECTORATE-GEN. FOR EMP., SOC. AFFS. & INCLUSION, EUR. COMM'N., PILOT PROJECT—PROMOTING PROTECTION OF THE RIGHT TO HOUSING—HOMELESSNESS PREVENTION IN THE CONTEXT OF EVICTIONS (P. Kenna et al., eds., 2016) [<sup>267</sup> Sarah Fick & Michel Vols, \*Best Protection Against Eviction?: A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution\*, 3 EUR. J. COMPAR. L. & GOVERNANCE 40, 41 \(2016\)](https://op.europa.eu/en/publication-detail/-/publication/0c16776d-1e4e-11e6-ba9a-01aa75ed71a1/language-en; LOSS OF HOMES AND EVICTIONS ACROSS EUROPE: A COMPARATIVE LEGAL AND POLICY EXAMINATION (Padraic Kenna et al. eds., 2018).</a></p>
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<sup>268</sup> *Id.* at 47.

<sup>269</sup> *Id.* at 49.

consider all relevant circumstances,” including whether the defendant has alternative accommodations, to determine if an eviction will be “just and equitable.”<sup>270</sup>

Some European countries have “social shock absorbers” that assist in delaying or suspending instances of eviction until alternative housing can be found or for other reasons; many employ “extra-judicial measures (such as mediation, for example), protective proceedings, and various” other methods “to prevent or identify alternatives to eviction.”<sup>271</sup> “In France, the Enforceable Right to Housing Act (DALO) permits individuals to invoke the State’s obligation to provide accommodation through a hearing before a mediation committee and if necessary an administrative court” before an eviction can be executed.<sup>272</sup> All European countries include provisions “to limit the brutal consequences of eviction,” such as winter bans on eviction.<sup>273</sup> Rules for length of nonpayment before legal proceedings may commence in other countries also make the eviction process less “summary.” For example, Romania requires one year or arrears of at least 1500 euros; Austria, Czech Republic, Estonia, France (in some cases), Latvia, Slovakia, Hungary, Netherlands, and Poland all require three months.<sup>274</sup> Australia, Czech Republic, Germany, Denmark, Finland, the Netherlands, Poland, Sweden, and other European countries require exhaustion of social avenues before resorting to judicial measures in instances where children are involved.<sup>275</sup> Most European Union Member States have provisions that bar “evictions to nowhere” and suspend the execution of eviction orders for vulnerable households or households with children.<sup>276</sup> European courts also often have the authority to reschedule debts and redefine the amount of debt; in Finland, civil courts have the power to cancel debt.<sup>277</sup>

Evictions are also more prevalent in the United States than in many other countries. A 2021 study done by the Organization for

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<sup>270</sup> *Id.* at 55.

<sup>271</sup> THE FOUNDATION ABBE PIERRE & FEANTSA, SECOND OVERVIEW OF HOUSING EXCLUSION IN EUROPE 91 (2017).

<sup>272</sup> *Id.* at 103.

<sup>273</sup> *Id.* at 112.

<sup>274</sup> *Id.* at 91.

<sup>275</sup> *Id.* at 104.

<sup>276</sup> DIRECTORATE-GENERAL EMPLOYMENT, SOCIAL AFFAIRS & INCLUSION, EUR. COMM’N, *supra* note 266, at 11.

<sup>277</sup> THE FOUNDATION ABBE, *supra* note 271, at 104.

Economic Cooperation and Development (OECD) found that, among the member states studied, the United States had the highest rate of evictions initiated at 6.1 percent of all rental households and the highest rate of eviction orders issued at 2.3 percent of all rental households.<sup>278</sup> “At the other end of the spectrum,” several European countries (Finland, Latvia, Poland, Spain and Sweden) had eviction initiation rates below 1 percent and “no European country, with the exception of Greece and Italy, had an eviction order rate above 1 [percent].”<sup>279</sup> Both the comparative prevalence of evictions and their comparative lack of procedural protections for the most vulnerable in the United States are reflections of the summary eviction proceeding approach, which prioritizes evictions over problem-solving measures.

*D. The Right to Counsel Helps Level the Playing Field, but the Rules of the Game Remain Unfair.*

The growing and successful movement for a right to counsel for tenants facing eviction has profound implications for the balance of power in eviction litigation. It provides tenants with the wherewithal, previously unavailable, to use substantive laws and legal processes to defend themselves and advocate for their interests.<sup>280</sup> The right to counsel laws that have been adopted have been enormously successful in keeping tenants in their homes, changing the norms and expectations around eviction proceedings, and generally leveling the playing field.

The right to counsel movement is growing at a rapid pace. New York City adopted the first eviction right to counsel law in July 2017, and since then, seventeen other jurisdictions, including three states and fourteen localities, have followed suit. Figure 6 lists the jurisdictions that have enacted right to counsel statutes between 2017 and 2022:

Figure 6

**Jurisdictions That Enacted Eviction Right to Counsel Legislation  
Between 2017 and 2022**

<sup>278</sup> DIRECTORATE-GENERAL EMPLOYMENT, SOCIAL AFFAIRS & INCLUSION, EUR. COMM’N, *supra* note 266, at 11.

<sup>279</sup> ORG. FOR ECON. COOP. & DEV. – SOC. POL’Y DIV., HC3.3 EVICTIONS 2 (2021), <https://www.oecd.org/els/family/HC3-3-Evictions.pdf>.

<sup>280</sup> See Erica Braudy & Kim Hawkins, *Power and Possibility in the Era of Right to Counsel, Robust Rent Laws & COVID-19*, 28 GEO. J. POVERTY L. & POL’Y 117, 119 (2021).



**Cities:**

New York City, NY (2017) <sup>281</sup>	San Francisco, CA (2018) <sup>282</sup>	Newark, NJ (2018) <sup>283</sup>
Cleveland, OH (2019) <sup>284</sup>	Philadelphia, PA (2019) <sup>285</sup>	Boulder, CO (2020) <sup>286</sup>
Baltimore, MD (2020) <sup>287</sup>	Seattle, WA (2021) <sup>288</sup>	Louisville, KY (2021) <sup>289</sup>
Denver, CO (2021) <sup>290</sup>	Toledo, OH (2021) <sup>291</sup>	Minneapolis, MN (2021) <sup>292</sup>

<sup>281</sup> N.Y.C. ADMIN. CODE § 26-1302 (2017); Kriston Capps, *New York City Guarantees a Lawyer to Every Resident Facing Eviction*, BLOOMBERG: CITYLAB (Aug. 14, 2017, 7:00 AM), <https://www.bloomberg.com/news/articles/2017-08-14/new-york-ensures-right-to-counsel-for-all-eviction-cases>.

<sup>282</sup> S.F., CAL., ADMIN. CODE § 58.4 (2018); Laura Waxmann, *Tenant Advocacy Groups Get Funding Under 'Right to Counsel'*, S.F. EXAM'R, Nov. 28, 2018, at 7.

<sup>283</sup> NEWARK, N.J., NEWARK CODE § 19:3-2 (amended 2021); Jared Brey, *Tenants' Right to Counsel on the Move, Next Stop Newark*, NEXT CITY (Jan. 10, 2019), <https://nextcity.org/urbanist-news/tenants-right-to-counsel-on-the-move-next-stop-newark>.

<sup>284</sup> CLEVELAND, OHIO, CODE OF ORDINANCES § 375.12 (effective June 30, 2020); *Legislation Passes to Protect Children in Homes Facing Eviction by Providing Free Legal Help for Low-Income Tenants*, NEWS 5 CLEVELAND (Oct. 1, 2019, 9:32 AM), <https://www.news5cleveland.com/news/local-news/cleveland-metro/legislation-passes-to-protect-children-in-homes-facing-eviction-by-providing-free-legal-help-for-low-income-tenants>.

<sup>285</sup> PHILA., PA., PHILA. CODE § 9-808 (2019); Michael D'Onofrio, *City Council Passes Bill Right to Counsel Bill for Low-Income Tenants*, PHILA. TRIB. (Nov. 14, 2019), [https://www.phillytrib.com/news/local\\_news/city-council-passes-bill-right-to-counsel-bill-for-low-income-tenants/article\\_2399399e-6d67-5e5d-a328-28127ed0dbd8.html](https://www.phillytrib.com/news/local_news/city-council-passes-bill-right-to-counsel-bill-for-low-income-tenants/article_2399399e-6d67-5e5d-a328-28127ed0dbd8.html).

<sup>286</sup> BOULDER, COLO., MUN. CODE § 12-2-9 (2020).

<sup>287</sup> BALT., M.D., BALT. CITY CODE § 6A-3 (2020).

<sup>288</sup> SEATTLE, WASH., MUN. CODE § 22.206.195 (2021).

<sup>289</sup> LOUISVILLE, KY., LOUISVILLE/JEFFERSON CNTY. METRO GOV'T CODE OF ORDINANCES § 151.61 (2021); Bailey Loosemore, *Louisville Approves Free Legal Services for Low-Income Families Facing Eviction*, LOUISVILLE COURIER J. (Apr. 22, 2021, 7:02 PM), <https://www.courier-journal.com/story/news/local/2021/04/22/louisville-metro-council-approves-right-to-counsel/7340394002>.

<sup>290</sup> DENVER, COLO., CODE OF ORDINANCES § 27-213 (2021).

<sup>291</sup> TOLEDO, OHIO, MUN. CODE § 1768.02 (2021).

<sup>292</sup> MINNEAPOLIS, MINN., CODE tit. 7, ch. 143 (2021).

Kansas City, MO (2021) <sup>293</sup>	New Orleans, LA (2022) <sup>294</sup>	Detroit, MI (2022) <sup>295</sup>
<b>States:</b>		
Washington State (2021) <sup>296</sup>	Maryland (2021) <sup>297</sup>	Connecticut (2021) <sup>298</sup>

The implementation of the right to counsel for tenants is having an enormously beneficial effect. In New York City, the Office of Civil Justice, which is responsible for overseeing the implementation of the right to counsel, reported in 2021 that since the right was enacted, 84 percent of represented tenants represented through the program resolved their cases in a manner that permitted them to remain in their homes.<sup>299</sup> Additionally, evictions declined by more than 30 percent in the zip codes initially provided with a right to counsel during the rollout of the law.<sup>300</sup> A 2022 study of the rollout of the New York City Right to Counsel program by the National Bureau of Economic Research found that: “[I]ncreases in legal representation lead to better outcomes for tenants in housing court. Tenants with lawyers are considerably less likely to be subject to possessory judgments, . . . less likely to have eviction warrants issued against them.”<sup>301</sup> The report also found that represented tenants face smaller monetary judgments (i.e. less back rent owed) and found suggestive evidence that lawyers

<sup>293</sup> KAN. CITY, MO., CODE ch. 35, art. III, §§ 35-20–35-25 (2021); Rebecca Rivas, *Kansas City Residents Will Soon Have the Right to an Attorney in Eviction Proceedings*, KAN. REFLECTOR (Dec. 28, 2021, 9:30 AM), <https://kansasreflector.com/2021/12/28/66ilwau-city-residents-will-soon-have-the-right-to-an-attorney-in-eviction-proceedings>.

<sup>294</sup> NEW ORLEANS, LA., CODE ch. 50, art. V, § 50-150 (2022).

<sup>295</sup> DETROIT, MICH., DETROIT CITY CODE ch. 22, art. VIII § 22-8-1 (2022).

<sup>296</sup> WASH. REV. CODE § 59.18.640 (2021).

<sup>297</sup> MD. CODE ANN. REAL PROP. §§ 8-901–8-911 (West 2022); Elizabeth Weill-Greenberg, *Maryland Could Be the First State to Provide Lawyers for Tenants Facing Eviction*, THE APPEAL (April 16, 2021), <https://theappeal.org/maryland-first-state-access-to-counsel-tenants-evictions>.

<sup>298</sup> CONN. GEN. STAT. § 47a-75 (2022).

<sup>299</sup> OFF. OF CIV. JUST., NEW YORK CITY HUMAN RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FOUR OF IMPLEMENTATION IN NEW YORK CITY 8 (2021).

<sup>300</sup> *See id.*

<sup>301</sup> MICHAEL T. CASSIDY & JANET CURRIE, THE EFFECTS OF LEGAL REPRESENTATION ON TENANT OUTCOMES IN HOUSING COURT: EVIDENCE FROM NEW YORK CITY’S UNIVERSAL ACCESS PROGRAM 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 29836, 2022).

reduced the probability of executed evictions.<sup>302</sup> The report concluded that, “our findings contribute to a small but growing literature showing that legal representation can substantially improve the lives of poor families [at risk of eviction] at modest cost.”<sup>303</sup>

Providing a right to counsel for tenants has been similarly beneficial in other jurisdictions that have initiated programs. In San Francisco, the second jurisdiction to adopt the right to counsel for tenants, data from 2018 to 2019 showed that eviction filings had declined by 10 percent.<sup>304</sup> Additionally, 67 percent of those receiving full-scope representation through the program were able to resolve their cases in a manner that permitted them to stay in their homes.<sup>305</sup> During the first six months following the enactment of a right to counsel statute in Cleveland, Ohio, 93 percent of represented tenants who sought to remain in their homes were able to avoid an eviction or involuntary move, and approximately 83 percent of represented tenants seeking thirty days or more to move were successful.<sup>306</sup> Approximately 89 percent of represented tenants seeking to mitigate their damages were able to do so.<sup>307</sup> The remarkable success in the jurisdictions that have adopted the right to counsel in evictions has inspired advocates in other jurisdictions to seek similar legislation. Other states jurisdictions with legislation introduced include New

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 32.

<sup>304</sup> Press Release, Dean Preston, Supervisor, San Francisco Bd. of Supervisors, Supervisor Dean Preston Holds Hearing on Implementation for Right to Counsel Law (Feb. 24, 2020), [http://civilrighttocounsel.org/uploaded\\_files/262/PRESS\\_RELEASE\\_-\\_Supervisor\\_Dean\\_Preston\\_Holds\\_Hearing\\_Monday\\_on\\_Implementation\\_for\\_Right\\_to\\_Counsel\\_Law.pdf](http://civilrighttocounsel.org/uploaded_files/262/PRESS_RELEASE_-_Supervisor_Dean_Preston_Holds_Hearing_Monday_on_Implementation_for_Right_to_Counsel_Law.pdf).

<sup>305</sup> *Id.*

<sup>306</sup> UNITED WAY OF GREATER CLEVELAND & LEGAL AID SOC'Y OF CLEVELAND, ANNUAL REPORT TO CLEVELAND CITY COUNCIL AND COURTESY REPORT TO CLEVELAND MAYOR'S OFFICE 2 (2021). <https://unitedwaycleveland.org/wp-content/uploads/documents/2020-Right-to-counsel-annual-report.pdf>.

<sup>307</sup> *Id.*

York,<sup>308</sup> Minnesota,<sup>309</sup> Massachusetts,<sup>310</sup> South Carolina,<sup>311</sup> Nebraska,<sup>312</sup> and Indiana.<sup>313</sup>

Of course, the implementation of a right to counsel itself makes eviction proceedings less “simple.” When tenants have attorneys defending them, it can only be expected that those attorneys will be aware of and raise the defenses and counterclaims available to the tenants they represent. Without counsel, tenants are unlikely to be aware of potential defenses and counterclaims, and even if they are aware, they are ill-equipped to make arguments, present evidence, and otherwise navigate formal court proceedings without the help of counsel. A whole host of laws that inform the eviction process address matters such as constructive eviction, retaliatory eviction, consumer protection, warranty of habitability and housing codes, rent regulation, government subsidies, and benefits programs and the like. These laws, however, are of little value when they are on the books but not available for litigants who are not aware of them and must defend themselves *pro se*. Eviction proceedings are no longer “simple,” if they ever really were, and they should no longer be “summary.”

#### IV. SUMMARY EVICTION PROCEEDINGS ARE STRUCTURALLY RACIST

Because of a host of factors that barred Black people and other people of color from homeownership and relegated them to tenant status to satisfy their human need for a home, and because of a long history of housing discrimination that continues to today, tenants are, in general, disproportionately people of color, and in many places, mostly people of color.<sup>314</sup> In sheer numbers, because they are disproportionately tenants, Black people are disproportionately defendants in eviction proceedings. But the disproportionality is far more pronounced. Because Black people and other people of color disproportionately suffer the failings of the housing market—poor housing quality, unaffordable rents, communities that face

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<sup>308</sup> Assemb. B. A07570C, 2021 Leg., Reg. Sess. (N.Y. 2021).

<sup>309</sup> H.R. HF2593, 2019 Leg., 91st Sess. (Minn. 2019).

<sup>310</sup> Shira Schoenberg, *Tenants in Eviction Cases Get Powerful Beacon Hill Ally in Boston Mayor Marty Walsh*, MASSLIVE (July 17, 2019, 9:58 AM), <https://www.masslive.com/news/2019/07/tenants-in-eviction-cases-get-powerful-beacon-hill-ally-in-boston-mayor-marty-walsh.html>.

<sup>311</sup> H.R. H3072, 2021 Leg., 124th Sess. (S.C. 2021).

<sup>312</sup> L.B. 419, 2021 Leg., 107th Sess. (Neb. 2021).

<sup>313</sup> S.B. 350, 122d Gen. Assemb., Reg. Sess. (Ind. 2021).

<sup>314</sup> See discussion *supra* Part II.

displacement from gentrification or abandonment—they find themselves in landlord-tenant conflicts that are likely to lead to eviction proceedings to a greater degree than their white counterparts, even controlling for their disproportionate status as tenants.<sup>315</sup> And, even controlling for their disproportionate status as tenants and their disproportionate share of housing issues, Black tenants and other tenants of color get evicted in disproportionate numbers.<sup>316</sup> Thus, the structural power imbalance and the disadvantage imposed on tenants in eviction proceedings reflected in their summary nature, which was devised, quite transparently, to advantage landlords over tenants, has become racialized. The unfairness of the process bears down far more on people who are Black. The structure of the system itself is racist.

Racism, bias, and discrimination manifest themselves in the eviction process in ways that are not only structural—the attitudes on display in the courts that adjudicate eviction proceedings reflect anti-Black and other forms of explicit bias.<sup>317</sup> The physical structure and condition of the courthouses and courtrooms where eviction proceedings are heard are small, overcrowded, and convey disrespect and disregard to the low-income litigants of color and others who face the trauma of eviction daily. The mostly low-income tenants of color facing eviction have historically been unable to obtain counsel to defend them in court. The movement for a right to counsel for tenants has been changing that, but not fast enough. Home loss, displacement from community, and homelessness resulting from evictions falls disproportionately on people of color. The eviction system reflects “public policies, institutional practices, cultural representations[,] and other norms that work in various, often reinforcing ways, to perpetuate racial group inequity”<sup>318</sup> and is thus a classic example of structural racism.

#### A. *Structural Racism Defined*

The notion that racism can be structural as well as attitudinal, interpersonal, systemic or institutional has been brought into sharp

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<sup>315</sup> See *supra* Part II.B.

<sup>316</sup> See *supra* Part II.C.

<sup>317</sup> See, e.g., Leah Goodridge, *Professionalism as a Racial Construct*, 69 UCLA L. REV. 38 (2022); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 539–41 (1992).

<sup>318</sup> KEITH LAWRENCE ET AL., ASPEN INST., STRUCTURAL RACISM AND COMMUNITY BUILDING 11 (2004), [https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/aspen\\_structural\\_racism2.pdf](https://www.aspeninstitute.org/wp-content/uploads/files/content/docs/rcc/aspen_structural_racism2.pdf) [hereinafter ASPEN INST. REP.].

focus by the works of Professor John Powell (lowercase intentional) and others over the past several decades. As Professor Powell puts it:

Structural racism or racialization emphasizes the interaction of multiple institutions in an ongoing process of producing racialized outcomes. Research in the field of dynamic and complex systems theory teaches that the structures matter. The structure of a system gives rise to its behavior. A systems approach helps illuminate the ways in which individual and institutional behavior interact across domains and over time to produce unintended consequences with clear racialized effects.<sup>319</sup>

Princeton Professor Keeanga-Yamahtta Taylor attributes the term structural racism to a 1967 work of Stokely Carmichael and Charles Hamilton. Professor Taylor defines structural racism as:

[T]he policies, programs, and practices of public and private institutions that result in greater rates of poverty, dispossession, criminalization, illness, and ultimately mortality of African Americans. Most importantly, it is the *outcome* that matters, not the intentions of the individuals involved.<sup>320</sup>

Others have defined structural racism similarly. A 2004 report from the Aspen Institute defines structural racism as

a system in which public policies, institutional practices, cultural representations and other norms work in various, often reinforcing ways to perpetuate racial group inequity. . . . The structural racism lens allows us to see that, as a society, we more or less take for granted a context of white leadership, dominance, and privilege. This dominant consensus on race is the frame that shapes our attitudes and judgments about social issues. It has come about as a result of the way that historically accumulated white privilege, national values, and contemporary culture have interacted so

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<sup>319</sup> John A. Powell (lowercase intentional), *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 791 (2008).

<sup>320</sup> KEEANGA-YAMAHTTA TAYLOR, FROM #BLACKLIVESMATTER TO BLACK LIBERATION 8 (2016) (crediting Stokely Carmichael and Charles Hamilton with coining the phrase “institutional racism,” which is said to be synonymous with “structural racism”) (citing STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 5–7 (1967)) (“Institutional racism relies on the active and pervasive operation of anti-black attitudes and practices. A sense of superior group position prevails: whites are ‘better’ than blacks; therefore[,] blacks should be subordinated to whites.”). See also Florence Wagman Roisman, *Structural Racism in Housing in Indianapolis*, 18 IND. HEALTH L. REV. 355, 355 (2021).

as to preserve the gaps between white Americans and Americans of color.<sup>321</sup>

A hallmark of structural racism is that, because it is structural, it does not need to be intentional and in fact is often unintentional. There may be no animus involved, and none is needed. The system does the work of creating and maintaining racialized differentials in power and status. As John Powell has put it, “[r]acism need not be either intentional or individualist. Institutional practices and cultural patterns can perpetuate racial inequity without relying on racist actors.”<sup>322</sup>

The notion that discrimination and racism does not need to be intentional is one of the core reasons that anti-discrimination laws make disparate impact actionable. To prove a violation of the Fair Housing Act based on disparate impact, for example, the plaintiff must demonstrate either that (1) the housing transaction in question will have a greater adverse impact on a protected class (such as racial minorities) or (2) that the housing transaction in question perpetuates

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<sup>321</sup> ASPEN INST. REP., *supra* note 318, at 11–12. William Wiecek provides a similar framing of structural racism, stating that “[s]tructural racism is a complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color. It comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities in life outcomes.” William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 Ky. L.J. 1, 5 (2011). According to Wiecek, eight characteristics distinguish structural racism from its traditional Jim Crow predecessor: “[1] s]tructural racism is to be found in racially-disparate outcomes, not invidious intent[; (2) s]tructural racism ascribes race as a basis of social organization to groups through a process of ‘racialization’[; (3) w]hite advantage is just as important an outcome as [B]lack subordination, if not more so[; (4) s]tructural racism is invisible and operates behind the illusion of colorblindness and neutrality[; (5) s]tructural racism is sustained by a model of society that recognizes only the individual, not the social group, as a victim of racial injustice. This individualist outlook refuses to acknowledge collective harm, group responsibility, or a right to collective redress[; (6) t]he effects of structural racism are interconnected across multiple social domains (housing, education, medical care, nutrition, etc.)[; (7) s]tructural racism is dynamic and cumulative. It replicates itself over time and adapts seamlessly to changing social conditions[; and (8) s]tructural racism operates automatically and thus is perpetuated simply by doing nothing about it. *Id.* at 6–7. *See also* Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES 3–4 (2020), <https://academic.oup.com/jlb/article/7/1/Isaa036/5849058> (“Structural racism operates at a societal level and refers to the way laws are written or enforced, which advantages the majority, and disadvantages racial and ethnic minorities in access to opportunity and resources.”).

<sup>322</sup> Powell, *supra* note 319, at 795.

segregation.<sup>323</sup> In *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, the Supreme Court found that a facially neutral policy for distribution of tax credits was subject to a Fair Housing Act challenge because its claimed impact was that housing was “made otherwise unavailable because of race.”<sup>324</sup> In *Thomas v. U.S. Department of Housing and Urban Development*, the court permitted plaintiffs’ discovery of materials going back seventy-five years to show that defendants had been segregating Baltimore housing developments since the 1930s; the court held that the HUD had violated the FHA by failing to affirmatively further Fair Housing.<sup>325</sup>

History matters. In *Gaston County v. United States*, the Supreme Court struck down a facially race-neutral North Carolina literacy test requirement for voter registration as violating the Voting Rights Act of 1965 based on the continued presence of education discrimination due to past *de jure* segregation. The Court concluded that “[Gaston County] deprived its black residents of equal educational opportunities, which in turn deprived them of an equal chance to pass the literacy test.”<sup>326</sup> Similarly, in *Griggs v. Duke Power Co.*, the Supreme Court explained that employment practices and procedures may be facially neutral, and neutrally intended, but still discriminatory. In the context of structural racism, causation is best understood as a cumulative process within and across domains, rather than a singular, linear narrative.<sup>327</sup>

Another often-cited example of structural racism is the original exclusion of agricultural and domestic workers from eligibility for Social Security benefits in 1935. A purportedly facially neutral policy barred “agricultural and domestic workers” from collecting old-age or unemployment benefits. This exclusion deprived these farm laborers, domestic workers, and childcare workers—who constituted the bulk of the Black labor force in the New Deal South—of the opportunities that

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<sup>323</sup> See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 137–38 (2012).

<sup>324</sup> *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 520 (2015).

<sup>325</sup> *Thompson v. United States HUD*, 404 F.3d 821, 824–25, 829, 834 (4th Cir. 2005).

<sup>326</sup> Chauncey D. Smith, Note, *Deconstructing the Pipeline: Evaluating School-to-Prison Pipeline Equal Protection Cases through a Structural Racism Framework*, 36 FORDHAM URB. L.J. 1009 (2009).

<sup>327</sup> Powell, *supra* note 319, at 795–98; see also *Gaston Cnty. v. United States*, 395 U.S. 285, 293, 295–96 (1969).



whites enjoyed for survival assistance in economic downturns and old age. While Black people were not explicitly excluded, the facially neutral proxy phrase “agricultural and domestic workers” did the job effectively. This and other New Deal policies “stunted Black wealth accumulation at the same time that they created a cornucopia of opportunity for Whites.”<sup>328</sup> These types of analyses could certainly be applied to the vastly different impact of summary eviction proceedings on people of color.

#### B. *Structural Racism Analysis Applied*

Because structural racism is so easily and deeply embedded in systems that appear to be neutral on their face, we largely do not encode the racist norms as being racist. This blind spot phenomenon clearly exists in the world of summary eviction proceedings. For two centuries, the expedited and truncated nature of the eviction system has been taken as normal. That the system itself creates and maintains drastic disparity in litigation power between landlords and tenants has always been true, but not explicitly acknowledged. Over the course of the last century, this disparity has become increasingly racialized. This too has fallen into a collective blind spot. “Racism need not be either intentional or individualist. Institutional practices and cultural patterns can perpetuate racial inequity without relying on racist actors.”<sup>329</sup>

It should not be overlooked—or surprising—that summary eviction proceedings are infected with less subtle forms of racism than the structural racism of their fundamental design. In the aftermath of the murder of George Floyd and other police killings of unarmed Black people, along with the huge public outcry in response, New York State’s Chief Judge appointed former Homeland Security Secretary Jeh Johnson to lead an inquiry into racial disparities in the New York courts. The resulting report from Secretary Johnson’s inquiry documents extensive evidence of racism throughout the New York Court system, but it singles out the New York City Housing Court as one of the “poor people’s” courts that “serve[s] a primarily minority population in a physically intolerable setting that shows callous disregard for the litigants.”<sup>330</sup> The Johnson Report confirmed findings

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<sup>328</sup> Wiecek, *supra* note 321, at 5.

<sup>329</sup> Powell, *supra* note 319, at 795.

<sup>330</sup> N.Y. STATE UNIFIED CT. SYS., REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN N.Y. STATE COURTS 2–3 (2020), <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>. See also SPECIAL COMM’N TO THE FUTURE OF THE

made twenty years prior by another New York commission charged with investigating racism in the courts,<sup>331</sup> and it echoed findings by Community Action for Safe Apartments (CASA), a Bronx community group that, two years before the Johnson Report, found that 94 percent of housing cases are initiated by landlords, with stipulations signed during “unethical, unmonitored hallways negotiations.”<sup>332</sup>

And it is not just the filthy and demeaning physical plant of the New York City Housing Court that reflects an underlying current of racism. Racist, biased attitudes regularly surface in interpersonal interactions in the courthouse. In one incident, New York’s intermediate appellate court sanctioned a male, middle-aged white landlord’s attorney for calling a young female, Black attorney a “bitch” in the hallway of the court because she would not accede to his demand that they immediately go before a judge to resolve a procedural dispute between them.<sup>333</sup> The maligned attorney filed a disciplinary complaint with the regulatory authorities, and their decision to discipline the attorney was upheld on appeal with a sharp rebuke from the court, stating

[i]n this matter, respondent repeatedly denied the scope of his wrongdoing and attempted to justify his actions. His claim that he only stated the complainant ‘acted like a bitch,’ instead of calling her one, is mere semantics. His claim that the use of the gender pejorative language was the result of the ‘atmosphere’ in the Brooklyn Housing Court neither justifies nor excuses his actions.<sup>334</sup>

This incident was telling in a number of ways. In addition to being a blatant indication of racist and misogynistic dynamics between a long-established white-male landlord bar and a growing tenants’ bar that is increasingly composed of women of color, the incident was a reflection of a court culture and underlying biases, as Secretary Johnson documented, that seethe with disrespect and disregard for respondents’ homes and well-being, as well as for their representatives.

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N.Y.C. HOUS. CT., REPORT TO THE CHIEF JUDGE 2, 18 (2018), [http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/housingreport2018\\_0.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/housingreport2018_0.pdf).

<sup>331</sup> N.Y. State Judicial Commission on Minorities, *Report of the New York State Judicial Commission on Minorities*, 19 FORD. URB. L.J. 181, 187 (1992).

<sup>332</sup> NEW SETTLEMENT’S CMTY. ACTION FOR SAFE APARTMENTS (CASA) TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT 11 (2013), [https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB\\_.doc\\_Report\\_CASA-TippingScales-full\\_201303.pdf](https://newsettlement.org/wp-content/uploads/2018/01/CDP.WEB_.doc_Report_CASA-TippingScales-full_201303.pdf).

<sup>333</sup> *Matter of Seth E. Denenberg*, 192 A.3d 76, 77–79 (N.Y. App. Div. 2020).

<sup>334</sup> *Id.* at 80.

And it reflected the mad pace and expectations of a summary eviction court that has speed and a rush to judgment as well as an expectation of one-sided representation embedded in the court experience.

The Denenberg matter is currently the only incident of bias in New York City Housing Court to reach the appellate courts, but it is hardly unique. A group of housing advocates who practice in the New York City housing courts compiled anonymous accounts of scores of incidents of racist, sexist, and homophobic behavior in the courts by judges, landlord lawyers and landlords over the course of several years.<sup>335</sup> This documentation, when presented to court administrators, led to an ongoing dialogue about “civility” in the court. But query— isn’t the frantic pace of summary eviction proceedings, the crowded, filthy and demeaning physical condition of the court and the underlying biases of so many players in the system to blame, and can a dialogue about “civility” really be the cure?

These more overt indications of racial bias in eviction court only serve to lend further support to a more overarching truth. The unfair and imbalanced structure of summary proceedings, a legal process that privileges one side and disadvantages the other, is racialized. Discriminatory public policy and private action have deprived Black people of homeownership opportunities and relegated them to tenant status in disproportionate numbers.<sup>336</sup> Black people are disproportionately likely to live with conditions such as poor quality housing and high rent burdens that lead to landlord-tenant conflicts.<sup>337</sup> Black people are disproportionately likely to be sued for eviction and to be evicted.<sup>338</sup> The unfair structure of the system, conceived to reinforce the dominant relationship between white, primarily rural property-owners and their white tenants, continues to reinforce landlord dominance against a tenant population that is disproportionately Black. This is a textbook example of structural racism.

#### V. SUMMARY PROCEEDINGS MUST GO

It is time to abandon the archaic practice of summary eviction proceedings—a practice that privileges landlords who seek eviction with a truncated and expedited form of legal process that is designed

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<sup>335</sup> This compilation is on file with the author.

<sup>336</sup> See *supra* Part II.A.

<sup>337</sup> See *supra* Part II.B.

<sup>338</sup> See *supra* Part II.C.

to serve their litigation goals; a practice that exempts them from the traditional rules of civil litigation; a practice that has been racialized and that disadvantages Black people and other people of color disproportionately. This practice, a relic of an agrarian era and devised by white male property owners who were uniquely privileged to vote and hold political office, was designed to serve the interests of property owners. The practice is unfair, imbalanced, and structurally racist.<sup>339</sup>

The growing movement for a right to counsel for tenants is an enormous step forward toward a more balanced and equitable approach to eviction litigation, but the eviction process itself needs to be completely overhauled. The summary eviction process was not designed with the expectation that both sides in eviction litigation would have legal representatives with the capacity to take full advantage of the parties' legal rights. Now, however, the increasing number of jurisdictions adopting a right to counsel for tenants places the inequity of the process itself in sharp relief and makes this the right time to reconsider the validity of summary eviction proceedings.

Eviction courts have often been criticized as "collection agencies" for landlords, rather than "real" courts, with the singular focus for which they were designed—providing a swift remedy for landlords. One advocacy report critiquing the NYC Housing Court in the 1980s was justifiably called "5-Minute Justice."<sup>340</sup> But the right to counsel upends this expectation that laws and rights don't really figure into the eviction litigation equation. The right to counsel creates an expectation that an attorney will be there for tenants to help them navigate the legal process and assert their rights and defenses, whatever those may be. The right to counsel, by its very nature, makes summary eviction proceedings less summary because, as is customarily available in civil litigation, it creates the possibility of motion practice, legal briefs addressing conflicts over the interpretation of the laws, the testing of evidence, the presentation of testimony, and appeals.

The right to counsel does not, however, reconfigure the rules of the game. The structure of the eviction process, its rapid and summary

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<sup>339</sup> Other commentators have drawn, or at least implied, similar conclusions. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 603 (1992); Spector, *supra* note 1, at 209; Mason, *supra* note 1; Sabbeth, *supra* note 15, at 400.

<sup>340</sup> CITY WIDE TASK FORCE ON HOUS. CT., 5 MINUTE JUSTICE OR "AIN'T NOTHING GOING ON BUT THE RENT!": A REPORT OF THE MONITORING SUBCOMMITTEE OF THE CITY WIDE TASK FORCE ON HOUSING COURT 22 (1986).

nature, and its pared down procedures, all create obstacles to a tenant's meaningful engagement with counsel. There is little or no time to secure counsel in advance of court appearances, limited or no opportunity for counsel to test the validity of the landlord's claims through discovery, little or no time to investigate and prepare defenses. And because of the structure of the litigation, and its failure to contemplate a balanced form of litigation with counsel on both sides, the courthouses in which the litigation takes place are often not designed to accommodate real litigation—they are dirty, crowded, and inhospitable. Perhaps what is most problematic, however, is that the summary eviction process, as designed and implemented, conveys the message that there is urgency to achieve a result for the landlord and no urgency to see that justice is done when a tenant's home and well-being are at stake.

How could this change be brought about? How could the summary eviction process be replaced with a more equitable approach? There is certainly the possibility of litigation challenging the practice as a denial of due process or equal protection. Much has been written, including several articles by this author, about the legal claims that could be (and in some instances have been) made to achieve a right to counsel for tenants.<sup>341</sup> The same types of constitutional due process, equal protection, and other claims and analyses could be applied to challenge summary eviction proceedings. Fleshing out the potential legal claims that could result in injunctive relief to force a change in the summary eviction process is a worthwhile exercise. It is, however, beyond the scope of this Article. And in any event, the framing of the rules for eviction litigation, as with other litigation, has historically been a political exercise of legislative bodies. In our federal system, the state legislatures determine legal processes and, two centuries ago, devised summary eviction proceedings—sometimes referred to as “creatures of statute.”<sup>342</sup> The state legislatures are well-positioned to re-think the process in light of contemporary reality. And however one might justifiably criticize those

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<sup>341</sup> See, e.g., Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUBL. L. POL'Y & ETHICS J. 699 (2006); Andrew Scherer, *Why a Right: The Right to Counsel and the Ecology of Housing Justice*, NY. L. SCH. IMPACT (2016); Kathryn A. Sabbeth, *supra* note 18, at 67. Braudy & Hawkins, *supra* note 280.

<sup>342</sup> See, e.g., Pecenic v. Adam, N.Y.S.2d 256 (N.Y. Civ. Ct. 1981); Century Realty v. Grass, 457 N.Y.S.2d 731, 731–32 (N.Y. City Civ. Ct. 1982); Rotunno v. Gruhill Const. Corp., 816 N.Y.S.2d 139 (N.Y. App. Div. 2006).

contemporary legislatures for their shortcomings in racial, gender and diverse representation in general, they are no longer the sole province of property-owning white men as they were when summary eviction proceedings were created.<sup>343</sup>

It is worth speculating what would happen if the litigation rules for eviction ceased to be “summary.” All states allow causes of action for “ejectment,” plenary proceedings to evict.<sup>344</sup> Ejectment proceedings—which are subject to the traditional rules of civil process, including its pace, the availability of defenses, and the availability of discovery and procedural motions—would become the default process for eviction claims with the repeal of summary proceedings. Most civil litigation in the United States settles and does not go to trial.<sup>345</sup> This has been true for summary eviction proceedings as well,<sup>346</sup> and there is no reason to think that eviction cases would not continue to be settled if they are litigated via plenary, and not summary, process. Indeed, the incentives to settle would be greater in light of the potential for a more methodical and balanced litigation process that is more time consuming. Settlements would likely be more lasting, with parties devising terms that are more likely to avoid a return to court.

With a right to counsel and a plenary approach to eviction proceedings, litigation itself would be lengthier if and when it needs to be because there would be real, contested legal matters for the courts to resolve, along with the tools and pace of litigation to resolve those issues. As the Supreme Court has noted, “[w]ithin the limits of professional propriety, causing delay and sowing confusion not only are [the lawyer’s] right but may be his duty.”<sup>347</sup> A more substantial and protracted litigation process would presumably be an incentive to devise more and better efforts to settle conflicts before bringing them

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<sup>343</sup> See, e.g., Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, STATE LEGISLATURE MAG., Dec. 2015 (for example, while still sorely underrepresented compared to their percentages in the population, there were six times as many women serving in state legislatures in 2015 than in 1971. “By 2009, their portion had grown from a meager 4 percent to nearly 25 percent” in 2015. “Likewise, African-Americans, between 1971 and 2009, jumped from 2 percent to 9 percent of all state lawmakers.”).

<sup>344</sup> Schoshinski, *supra* note 191, at § 6.10.

<sup>345</sup> Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339 (1994); FED. R. CIV. P. 16(a)(5).

<sup>346</sup> See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 116 (1997) (finding that in New Haven, Connecticut, most cases settle before trial).

<sup>347</sup> *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 325 (1985); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1288 (1975).

to court in the first place, as well as greater incentives to settle in court once cases are commenced.

One of the benefits of the right to counsel in New York City has been a sharp reduction in eviction case filings.<sup>348</sup> Apparently, the mere expectation that the tenant will have counsel deters some landlords from filing eviction cases. The expectation that the process is designed to give both parties the tools and time to litigate fully is likely to have a similar effect. The eviction courts, as currently designed, would be severely challenged to accommodate litigation that is no longer in the “5-minute justice” mode. There would, no doubt, be pressure to locate eviction matters in courtrooms designed with the capacity to accommodate plenary litigation, with judges who are equipped with the time and training<sup>349</sup> to adjudicate contested litigation.<sup>350</sup>

The shift away from summary eviction proceedings has both the practical and symbolic value of addressing the traumatic and devastating effect of evictions and the importance of having procedures in place to prevent them—or at the very least to assure that all rights can be asserted. The prospect of full-fledged civil litigation and a more measured and less frantic approach to eviction litigation would, no doubt, create pressure for upstream solutions that address the underlying causes of eviction and that could avoid the need for eviction litigation altogether in appropriate cases. Hopefully, the pressure would lead to legal and policy measures to make housing

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<sup>348</sup> NYU FURMAN CTR., STATE OF THE CITY 2019: EVICTION FILINGS (2019) <https://furmancenter.org/stateofthecity/view/eviction-filings> (“The reductions in New York City filings were large: eviction filings decreased by about one third in New York City between 2013 and 2019, with the largest annual decrease occurring between 2018 and 2019.”).

<sup>349</sup> In seventeen states, the judges who adjudicate eviction cases are not required to have law degrees. Sternberg Greene & Renberg, *supra* note 196, at 1287 (arguing that “allowing a system of nonlawyer judges perpetuates long-standing inequalities in our courts” and “that the phenomenon of lay judges is a symptom of a much larger problem in our justice system: the devaluation of the legal problems of the poor, who are disproportionately Black and Latinx”).

<sup>350</sup> Manhattan Housing Court in New York City is located a few short blocks from the U.S. District Court of the Southern District of New York. It is hard to imagine a more striking contrast between courts. The Housing Court (with the exception of the pandemic period) is a high-volume court with crowded hallways, tightly packed courtrooms, filthy floors, and a loud cacophony of high-volume voices—babies crying, court clerks yelling, people arguing, a court where that one judge has said looks like a place where nothing important goes on. The S.D.N.Y., in contrast, is a low-volume court paved with carrera marble, has quiet hallways where one can hear the click of lawyers’ footsteps, large, subdued courtrooms that are rarely filled, where people speak in hushed voices, designed to inspire awe and majesty.

more affordable and more habitable, which would help avert litigation altogether. And even when eviction cases get filed, there would be incentives to institute measures to achieve just resolutions without protracted litigation. In recent years, for example, there have been increasing efforts to implement “eviction diversion” programs.<sup>351</sup> A report from the Urban Institute acknowledges that the contours of such programs are somewhat “fuzzy,” but describes them as efforts “to divert cases from formal legal proceedings via negotiation, mediation, or arbitration, often in combination with legal assistance or other supports.”<sup>352</sup> In Michigan, for example, the Kalamazoo County Eviction Diversion Program was created in 2010 as a partnership between social service organizations, legal aid groups, the area district court, and the county human services agency. It was designed “to provide rental assistance, landlord negotiation and mediation services, case management, and referral services.”<sup>353</sup> Other Michigan counties later adopted this Kalamazoo model. With funding from the Coronavirus Aid, Relief, and Economic Security (CARES) Act, it was expanded during the pandemic to the entire state.<sup>354</sup> In 2020, the city of Philadelphia launched an Eviction Diversion Program in partnership with nonprofit organizations that offer housing counseling and mediation to tenants and landlords to try to avoid formal eviction proceedings. The Eviction Diversion Program was

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<sup>351</sup> See AMER. BAR ASS’N & HARV. NEGOT. & MEDIATION CLIN. PROG., DESIGNING FOR HOUSING STABILITY: BEST PRACTICES FOR COURT-BASED AND COURT-ADJACENT EVICTION PREVENTION AND/OR DIVERSION PROGRAMS (2021) (hereinafter ABA REPORT); LOC. HOUS. SOL., COVID-19 EMERGENCY RENTAL ASSISTANCE PROGRAMS IN TEN LOCALITIES (2021), <https://localhousingsolutions.org/wp-content/uploads/2021/05/COVID-19-Emergency-Rental-Assistance-Programs-in-Ten-Localities.pdf>; Mychal Cohen & Eleanor Noble, *Preventing Eviction Filings: Piloting a Pre-Filing Eviction-Prevention Clinic*, URB. INST. (May 2020), <https://www.urban.org/sites/default/files/publication/102297/preventing-eviction-filings-piloting-a-pre-filing-eviction-prevention-clinic.pdf>. See, also Press Release, The White House Briefing Room, Fact Sheet: White House Summit on Building Lasting Eviction Prevention Reform (Aug. 2, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/02/fact-sheet-white-house-summit-on-building-lasting-eviction-prevention-reform>.

<sup>352</sup> MARK TRESKON ET AL., EVICTION PREVENTION AND DIVERSION PROGRAMS: EARLY LESSONS FROM THE PANDEMIC 3 (2021), [https://www.urban.org/sites/default/files/publication/104148/eviction-prevention-and-diversion-programs-early-lessons-from-the-pandemic\\_0\\_0.pdf](https://www.urban.org/sites/default/files/publication/104148/eviction-prevention-and-diversion-programs-early-lessons-from-the-pandemic_0_0.pdf).

<sup>353</sup> *Id.* In the author’s opinion, mediation programs can only work if there is legal representation on both sides. Otherwise, the imbalance in the power relationship between landlord and tenant, whether or not the landlord has representation, will disadvantage the tenant.

<sup>354</sup> *Id.*



modeled on the previously successful Philadelphia Residential Mortgage Foreclosure Diversion Program, which was developed in response to the 2008 recession and housing crisis.<sup>355</sup>

These efforts were accelerated during the COVID-19 pandemic because of the heightened awareness of the connection between housing and health. In New York, for example, the state adopted the Tenant Safe Harbor Act,<sup>356</sup> which bifurcates judgments for nonpayment of rent for people who are unable to pay because of hardship during the pandemic. A landlord could obtain a money judgment for rent owed during the pandemic period, but not a possessory judgment to evict a tenant who suffered pandemic-related hardship and is unable to pay.<sup>357</sup> That bifurcation between money judgments and eviction judgments is something well worth considering in a post-summary-eviction world. A plenary, rather than summary, approach to evictions could lead to a court culture in which eviction is seen as a last resort and not a sword of Damocles hanging over a tenant's head. Moreover, the shift to plenary actions would create pressure that could lead to increased community and political organizing for more effective efforts to address affordability, address housing quality, and transform the culture of the courts and their physical attributes.

In a post-summary-eviction world, it would also make sense to look at and consider adopting measures that other countries, particularly European nations and South Africa, have adopted to ameliorate the worst consequences of eviction. Some of these measures include: preventing “evictions to nowhere” and weighing the likelihood of homelessness when the tenant does not have alternative housing; preventing evictions of vulnerable households; forbidding evictions in

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<sup>355</sup> *Id.* at 11.

<sup>356</sup> Tenant Safe Harbor Act, S.B. S8192B, 2019–2020 Legis. Sess. (N.Y. 2019).

<sup>357</sup> *See id.* The idea of limiting the availability of eviction for nonpayment of rent when a tenant's failure to pay is due to hardship is worthy of examination. A landlord is provided a remedy—a money judgment that can be executed like any other money judgment through garnishment, attachment, or other means. A money judgment in New York is good for 20 years. *See* Juliet Brodie & Larisa Bowman, *The Eviction Ban Should Remain in Effect Long After the Pandemic is Over*, CNN (Jan. 22, 2021, 12:25 PM), <https://edition.cnn.com/2021/01/22/opinions/eviction-moratorium-reform-covid-19-brodie-bowman/index.html>.

winter months;<sup>358</sup> and requiring arrears of several months, or a year, before eviction is permitted.<sup>359</sup>

It would be naïve to disregard the likelihood that a move away from summary eviction proceedings would generate substantial pushback. Change that disrupts existing norms always does that; and change that disrupts longstanding power relationships does that to a greater degree. Likely complaints would be that the shift to a plenary approach and away from the “rush to judgment” summary approach only delays the inevitable, that it frustrates the ability of landlords to collect rent, that it is more costly and, in the case of claims of nuisance, that it could put other tenants in harm’s way. Arguments would no doubt be made that eliminating summary process would particularly harm small landlords who own few properties and depend on rents for their family income. It would also be argued that, unlike with most other conflicts over contractual relations, the tenant may continue to accrue liability as the litigation proceeds.<sup>360</sup>

But the expectation that a judgment of eviction is inevitable, and that speed and lack of process is indispensable, is based on an underlying premise rooted in historic and vast imbalances in wealth and power between landlords and tenants, reflected in a common contemporary understanding of summary proceedings. That premise—that the purpose of the summary process is to serve the property interests of landlords in securing judgments and not to serve the human interests of tenants or, ultimately, the interests of justice—has led to a process in which the structures of law and the availability of defenses are often considered irrelevant. Once that premise is replaced with the premise that justice should be the goal of the process and should shape the forum that adjudicates landlord-tenant disputes, the interests of both parties will be more fairly balanced.

Litigation is costly, so why should eviction litigation be available at bargain-basement prices? The cost of litigation could, in fact, spur

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<sup>358</sup> See Sarah Holder, *Should U.S. Cities Ban Winter Evictions?*, BLOOMBERG NEWS, (Nov. 2, 2017, 1:23 PM), <https://www.bloomberg.com/news/articles/2017-11-02/the-case-for-banning-winter-evictions>.

<sup>359</sup> See *supra* Part III.C.

<sup>360</sup> It should be noted that the availability of partial or complete debt relief through bankruptcy proceedings demonstrates that in some matters, at least, our civil justice system entirely bars a creditor from recovering a debt. 11 U.S.C. §§ 701–84. But perhaps the corporations and individuals seeking bankruptcy protection are deemed more deserving than tenants facing eviction?

efforts to resolve disputes without litigation.<sup>361</sup> The ability of landlords to collect rent would, of course, likely be delayed in some cases, but there is no reason why most landlords would not ultimately be able to collect rent due, if a court determines that it is in fact due. Of course, many tenants who are evicted have low enough incomes to be judgment proof, but in a post-summary eviction world with a right to counsel for tenants, the hope is that evictions would become a rarity and the resolutions worked out via stipulation or judgment would permit tenants to remain in their homes and landlords to recover any rent legitimately owed. And plenary actions would of course be subject to the same procedures for preliminary injunctive relief that are available in all litigations. Thus, in the rare case where a landlord can demonstrate a threat of irreparable harm to other tenants and a probability of success on the merits, the landlord would be able to secure court-ordered interim relief.

#### CONCLUSION

The use of summary proceedings to evict is a glaring injustice. The truncated, expedited legal process used to evict represents the prioritization of profit and property interests over the fundamental human interest in a home. Summary eviction proceedings were conceived and first implemented in an era in which Black people, women, and tenants were barred, *de jure*, from the decision-making process. For more than two centuries, we have lived with the legacy of a decision made by an empowered minority that denied the rights of and completely disregarded the needs, concerns, and voices of the majority. A conspiracy of discriminatory public policies and private action has racialized that power imbalance and the summary eviction process, unfair since its inception, is also structurally racist.

Winning a right to counsel for tenants who face eviction in a growing number of jurisdictions has been an enormous achievement. It demonstrates that a major shift in the longstanding assumptions and expectations about the highly imbalanced system for eviction is truly possible. The right to counsel is a major step forward toward a more even-handed system of justice that shows that it is possible to achieve change and shift power; it shows that possibility can become reality, especially when the people most affected by an injustice, in this case tenants themselves, insist on that change and organize and agitate to make it happen. The right to counsel is a symbolic victory as well,

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<sup>361</sup> See Sabbeth, *supra* note 43, at 291–92 (arguing that decreasing costs is not always normatively positive and in fact costs of litigation can be socially useful).

because it imparts a greater sense of fairness, dignity, and respect to eviction proceedings. The right to counsel has been achieved because advocates, particularly tenant leaders, have thought big, developed a vision for reform, and refused to accept the idea that things cannot change, even where change seems insurmountable.

Achieving the right to counsel should inspire us to seek other victories, to continue to think big, to conceive of and fight for a world in which there are no evictions. The right to counsel gives us the wherewithal to upend the existing power imbalance and, at the least, achieve a legal process for landlord-tenant disputes that is fair and just.

There are many possible alternatives to summary eviction proceedings as we know them in the United States. Ultimately, however, a vision for the law and policies that govern landlord-tenant disputes is a political decision. And that decision can only be fair and equitable if the voices of those directly affected are part of the discussion. As Rasheedah Phillips of PolicyLink has so eloquently put it, “[i]f we have any hopes of fundamentally breaking away from patterns of the past and rupturing the inadequate present, the future can no longer be envisioned only by those with the privilege of time and space to imagine.”<sup>362</sup>

The right to counsel is helping even the playing field. The time has come to change the rules of the game that is played on that field. Summary eviction proceedings must go.

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<sup>362</sup> *Creating Housing Futures Together*, POLICYLINK, <https://www.policylink.org/housing-futures> (last visited Sept. 30, 2022).