A Week to Prep, Two Minutes to Talk, and Two Days to Move: Why Oklahoma's Eviction Courts Are Out of Step with the Constitution

I. Introduction

> *[W]here the right is so fundamental as the tenant's claim to his home, the requirements of due process should be more embracing.*[1]

Imagine stepping into a courtroom where your home is at stake. You have no legal training, no money for an attorney, and have had only seven days to prepare.[2] And if you lose, you may have only forty-eight hours to move out, perhaps out of a home you have lived in for decades.[3] All the discretion lies with the judge.[4] She might give you more time to prepare or let you have a week to move instead of two days, but none of it is guaranteed. And often, the judge could not give you those things even if she wanted to because her docket is so overcrowded that efficiency demands speed and slim due process.[5] This is the reality of Oklahoma's eviction courts. The Fourteenth Amendment's Procedural Due Process Clause demands more fairness and better procedure in eviction court.

Evictions in urban parts of Oklahoma take place in small claims court where county judges often face hundreds of cases on a docket.[6] The overwhelming size of these dockets requires hearings so short that tenants often have only a handful of minutes to plead their case.[7] And tenants have

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1. Lindsey v. Normet, 405 U.S. 56, 90 (1972) (Douglas, J., dissenting).

2. The Oklahoma Small Claims Procedure Act outlines the notice requirements and procedures for small claims court, the courts that house eviction proceedings throughout the state. *See* 12 OKLA. STAT. §§ 1148.14, 1756, 1761 (2022).

3. If the judge in an eviction case sides with the landlord and issues a writ of execution, the law only requires two days (forty-eight hours) of notice to the tenant before the Sheriff forcibly removes the tenant. *See* ADAM HINES, OKLA. ACCESS TO JUST. FOUND., CASE BY CASE: A STUDY OF OKLAHOMA'S EVICTION COURTS AND A PATH TOWARD EQUITY 15 (2022), https://perma.cc/6Z2Q-7FEH; *see also* 12 OKLA. STAT. § 1148.10A (2022).

4. 12 OKLA. STAT. § 1761; *see also* Keeler v. Mike Fretz Homes, 2007 OK CIV APP 44, ¶ 5, 162 P.3d 244, 245.

5. HINES, *supra* note 3, at 5.

6. *Id.*

7. *Docket for Small Claims Cases – Oklahoma County All Events Scheduled on 06/30/2022*, OSCN (Sept. 7, 2023, 4:56 PM), https://www.oscn.net/applications/oscn/report.asp?report=WebJudicialDocketCaseTypeAll&errorcheck=true&database=&db=Oklahoma&CaseTypeID=26&StartDate=06%2F30%2F2022&GeneralNumber=1&generalnumber1=1 (documenting over 200 cases scheduled for a two-hour long docket).

only seven days to prepare for a hearing where one of life's most important interests is at stake: the roof over your head.[8] These processes are out of step with what the Fourteenth Amendment requires. At minimum, Oklahoma must add: (1) enough judges and courtrooms to ensure tenants have the opportunity to be heard; and (2) longer notice requirements to give tenants the time they need to prepare for court.

Evictions require more time and resources because the stakes are high and the consequences steep. The impact of an eviction is both immediate and chronic, trailing the tenant for years. In the short-term, the evicted lose their home and gain an eviction record that will severely limit their future housing options.[9] The limited ability to obtain housing triggers another crippling effect: a significant increase in the likelihood of job loss.[10] Then, the lasting consequences set in; along with increased rates of mental illness among adults, the instability and/or potential homelessness that follows an eviction disproportionately hurts children.[11] Out of the one million estimated evictions each year, mothers with children lose their homes more often than any other group.[12] These evicted children suffer delayed literacy skills, lower achievement overall, and a higher tendency to drop out of school.[13]

Eviction procedures in Oklahoma fail to create the necessary degree of confidence our society must have in making decisions with such dire consequences. All signs point to Oklahoma's duty to do more. Property law theory, the changing rental market, and the Supreme Court's own guidelines for procedural due process compel Oklahoma to take action.

Part II of this Comment outlines how both property law theory and recent census data support the argument for more due process in evictions. Part III traces the history of procedural due process and its consequences for tenants. Part IV applies the Court's framework for procedural due process to the landlord-tenant context. Finally, Part V uses property law analogies to highlight the abnormality of rushed eviction processes.

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8. 12 OKLA. STAT. § 1756.

9. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 299 (2015).

10. Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 47 (2016).

11. *See* Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 303, 320 (2013); *see also* Desmond & Kimbro, *supra* note 9, at 300.

12. *In America, A Million Evictions Take Place in a Normal Year*, ECONOMIST (May 13, 2021), https://www.economist.com/united-states/2021/05/13/in-america-a-million-evictions-take-place-in-a-normal-year; Desmond & Kimbro, *supra* note 9, at 298.

13. Desmond et al., *supra* note 11, at 320.

II. How Property Law Theories and Housing Data Support More Due Process for Evictions

Above all, this Comment centers on the importance of tenants' possessory interest in their homes. Both traditional and modern property law theories support the value of the tenant's interest.

John Locke's social compact theory and labor theory of property rights are essential for any due process analysis. His writings undergird America's philosophical origins, going so far as to have inspired the language for the Due Process Clause. Social compact theory imagines government as a voluntary agreement between the citizens and the state.[14] The Declaration of Independence listed the King's violations of that social compact to justify the American Revolution. The United States' first Chief Justice John Jay, and second President John Adams, viewed the Constitution itself as a form of Lockean social compact.[15] After the Civil War, the congressmen debating the Fourteenth Amendment invoked Locke to support their arguments. And it was the "Lockean triumvirate of absolute rights"—life, liberty, and property—that those congressmen enshrined in the Fourteenth Amendment.[16]

Locke's labor theory of private property posits that people who invest their time and energy into something impart a degree of ownership over the item.[17] Then, when people join together in a civil society, they delegate the power to the state to protect their interest in that item.[18] For Locke, government, with the power to pass and enforce law, defines property rights. But the government's power to enforce property rights is not limitless. According to Locke, the state's use of power must both preserve the property of its citizens and serve the common good.[19] The common good includes a duty of self-preservation. Before formal law and civil institutions, people had to preserve both themselves and the community as a whole to survive.[20] Thus, to be in accordance with Locke, government must address the needs of the community alongside the individual's property interests. Evictions exact a pernicious cost on not only the individual tenant

14. *See* Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 702–05 (1997).

15. *Id.* at 725.

16. *Id.* at 700.

17. Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 536 (2007).

18. *Id.* at 533.

19. *Id.* at 562.

20. *See id.* at 535–36.

but also society. Locke would instruct that government take this community impact into account when enforcing property rights among landlords and tenants.

A few hundred years on from Locke, Margaret Radin's personhood theory of property explains how and why the tenant's interest is so important. Personhood theory dissects property into two categories—personal property and fungible property.[21] Personal property is "bound up with personhood."[22] They are items people feel "are almost part of themselves."[23] Radin includes wedding rings, family heirlooms, and homes as examples of personal property.[24] On the other hand, fungible property includes items "perfectly replaceable with other goods of equal market value."[25] Here, the difference hinges not on the item itself but on the relationship the person has to the item. The wedding ring is personal to the fiancé but fungible to the jeweler.[26] Similarly, the apartment is personal to the long-term tenant but fungible "in the hands of the commercial landlord."[27]

Radin argues that personhood, like labor, is an element of ourselves we invest in property.[28] And like labor, personhood, when entangled with an item, gives someone more rights in relation to that item.[29] To Radin, personhood creates a "hierarchy of entitlements" where the "more closely connected" an item is with the person, the "stronger the entitlement."[30] To demonstrate how this hierarchy already appears in American law, Radin uses landlord-tenant laws.[31] Radin argues that as courts recognized a tenant's right in the property as "more closely related to the personhood of the tenant than to . . . the landlord," so they accordingly provided more protection for the tenant's interest.[32] That judgment led to more protection for tenants in some states.[33] In her original article, Radin suggests those

21. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 960 (1982).
22. *Id.* at 959.
23. *Id.*
24. *Id.*
25. *Id.* at 960.
26. *Id.* at 959–60.
27. *Id.* at 960.
28. Radin, *supra* note 21, at 959.
29. *Id.* at 960, 986.
30. *Id.* at 986.
31. *Id.* at 993.
32. *Id.*
33. *Id.* Scant few of the tenant protections that appeared in other states ever made it to Oklahoma where tenants still lack even basic protections from retaliatory evictions. *See*

judgments are overgeneralizations because some landlords do have personal connections to their rentals—such as the landlord who lives in one half of a duplex or rents out their old home.[34]

Radin is right that different types of landlords have different relationships to their properties. An older couple renting out their daughter's old room likely has a deep personal connection to the rental. Compare that to the large, corporate landlord renting a home to a young family. Where the corporation's connection to its property is purely financial, the couple is personally invested in the room as part of their relationship with their daughter.

But data and current trends suggest the corporate landlord is quickly becoming the more common story. According to the U.S. Census Bureau's Rental Housing Finance Survey, the number of rental units owned by corporations and other legal entities, such as LLCs and partnerships, has increased from 18.6 million in 2015 (39% of the market) to 22.4 million in 2021 (45% of the market).[35] The number of units owned by individuals, like mom-and-pop landlords and small personal investors, has shrunk from 22.9 million in 2015 (48% of the market) to 18.3 million in 2021 (37% of the market).[36] And these numbers were only the beginning of a larger trend of corporate home ownership that picked up during and after the pandemic.[37] Studies also suggest that corporate landlords evict tenants more often.[38] Combine the greater percentage of corporate landlords with their higher rate of eviction and the picture crystallizes. Evictions are most often disputes between a corporate landlord with a purely financial interest and a tenant with a personal interest in their home.

Sabine Brown, *Renters Need Protection Against Landlord Retaliation*, OKLA. POL'Y INST. (Mar. 15, 2023), https://okpolicy.org/renters-need-protection-against-landlord-retaliation.

34. *See id.*

35. *Rental Housing Finance Survey (RHFS)*, U.S. CENSUS BUREAU, https://www.census.gov/data-tools/demo/rhfs/#/?s_year=2018&s_type=2&s_tableName=TABLE2&s_byGroup1=0 (last visited Aug. 31, 2023) (select "Year" as 2015 or 2018; select "Current Ownership Entity of Property" to view breakdown by type). Note that the numbers are displayed in thousands, meaning 18,389 as written indicates 18,389,000 in reality.

36. *Id.* The remainder of the market not captured in these percentages is made up of other types of owners who own far fewer properties such as nonprofit organizations and trustees.

37. Alexander Ferrer, *The Real Problem with Corporate Landlords*, ATLANTIC (June 21, 2021), https://www.theatlantic.com/ideas/archive/2021/06/real-problem-corporate-landlords/619244/; Ryan Dezember, *If You Sell a House These Days, the Buyer Might Be a Pension Fund*, WALL STREET J. (Apr. 4, 2021), https://www.wsj.com/articles/if-you-sell-a-house-these-days-the-buyer-might-be-a-pension-fund-11617544801.

38. Ferrer, *supra* note 37.

These complex, personal, and financial interests involved in evictions require a system with the tools to adequately parse the different interests of each party. In Oklahoma and states like it, where evictions in urban areas are hurried processes in overbooked courtrooms, these stories are rarely told, not because the parties do not want to tell them, or because judges do not want to listen, but because the system does not provide the tools or time to tell them.[39] And in a world where the percentage of corporate landlords is on the rise, tenants need the time to tell their stories more than ever.

III. Requirements and Application of Procedural Due Process in Evictions

Legal philosophy and data can influence constitutional law, but the Supreme Court dictates the rules. The Court's history with procedural due process reflects an approach built to adapt to the context of any given issue. But what is procedural due process? Procedural due process represents the minimum safeguards necessary for fairness in the courtroom. A neutral judge, notice of the claims against you, and an opportunity to be heard by the court are classic examples. But the Court's guidance is more flexible than a list of requirements. Instead, the court adopted an interest balancing test. And this test, when applied to the context of evictions, requires the same result that Locke, Radin, and the data suggest: more procedural safeguards in evictions.

A. Modern Foundations of Procedural Due Process: Mullane*,* Goldberg*, and* Eldridge

In the latter half of the twentieth century, the Supreme Court revolutionized its approach to procedural due process with three cases: *Mullane v. Central Hanover Bank & Trust Co.*,[40] *Goldberg v. Kelly*,[41] and *Mathews v. Eldridge*.[42] Before *Mullane*, the Court's process for assessing due process was "fairly ad hoc."[43] The Court was not concerned with the "specific procedural protections required by the Due Process Clause."[44] Instead, the Court relied on a combination of "common law, history, tradition, and custom" to decide due process issues on a case-by-case

39. HINES, *supra* note 3.

40. 339 U.S. 306 (1950).

41. 397 U.S. 254 (1970).

42. 424 U.S. 319 (1976); *see also* Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1123–27 (2019).

43. Parkin, *supra* note 42, at 1123.

44. *Id.*

basis.[45] But starting with *Mullane*, the Court began building a structure for the Constitution's demand that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[46]

In *Mullane*, Justice Jackson called those words "cryptic and abstract."[47] It's no surprise then that he and the Court refused to adopt rigid, bright-line rules. Rather, the justices developed what remains the foundational approach for evaluating procedural due process—a context-dependent interest-balancing test. The issue in *Mullane* was whether publishing notice in the newspaper was sufficient notice for due process.[48] The party at risk of losing life, liberty, or property certainly has an interest in knowing his/her rights are under threat. Still the state has a competing interest in ensuring courts can resolve cases in a reasonable time. The Court opted to balance the interests of the individual against the interests of the state within the unique context of each case.[49] Thus, the Court crafted the now-famous requirement that notice be "reasonably calculated, under all the circumstances."[50] Exactly what those circumstances are for other due process requirements and how to calculate them came later in *Goldberg* and *Mathews*.

With *Goldberg v. Kelly*, the Court expanded both the interests due process protects and the interest balancing test itself.[51] *Goldberg* concerned whether a state could terminate welfare benefits without an evidentiary hearing.[52] Here, the "recipient's interest in avoiding [the] loss of" welfare benefits outweighed the government's interest in speedy adjudication.[53] To the Court, an interest in efficiency could not overbear a citizen's interest in "the very means by which to live."[54] These government-created interests demanded due process because without them a person's "situation becomes immediately desperate," leaving people without "the means for daily subsistence," much like the tenant who loses her home.[55]

Where *Goldberg* expounded the importance of the interest at stake, *Mathews v. Eldridge* refined the interest balancing test by creating a three-

45. *Id.*
46. U.S. CONST. amend. XIV, § 1.
47. Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950).
48. *See id.* at 309–11.
49. *Id.* at 314.
50. *Id.*
51. *See* Parkin, *supra* note 42, at 1116–17.
52. Goldberg v. Kelly, 397 U.S. 254, 255 (1970).
53. *Id.* at 263.
54. *Id.* at 264.
55. *Id.*

part formula.[56] In creating the formula, the Court reiterated the inherent fluidity of due process.[57] Due process has no "fixed content," rather it is all dependent on the "protections . . . the particular situation demands."[58] For the third time, the Court decreed that for due process, context is king. Without context, the Court cannot define what due process *is*, but it can and did define what due process *does*. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests . . . ."[59] Hence, any time the government makes a decision that will deprive a person of interests within the Due Process Clause, procedural due process attaches. Then, to evaluate what procedural safeguards are necessary before deprivation, the Court provided three factors:

(1) the importance of the individual's private interest impacted by the government action;

(2) the risk of an incorrect deprivation of said interest; and

(3) the burden any additional procedural requirements would place on the government.[60]

Taking each factor in turn reveals a guide for procedural due process.

First, courts must assess the gravity of the private interest at issue.[61] In simpler terms; what is at stake for the individual in these proceedings? According to the Court, losing a protected property right can be a "grievous loss."[62] Each loss can demand different due process, depending on the "degree of potential deprivation."[63] For example, criminal defendants face a unique "stigma and hardship" that requires heightened procedural safeguards above and beyond those in a civil case.[64] In essence, the significance of the potential loss should correlate with the required due process. So, the necessary procedures for small sums would be different

56. 424 U.S. 319, 321 (1976); Parkin, *supra* note 42, at 1119.

57. *Eldridge*, 424 U.S. at 334.

58. *Id.* (first quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961); and then quoting Morrisey v. Brewer, 408 U.S. 471, 481 (1972)).

59. *Id.* at 332.

60. *Id.* at 335.

61. *Id.*

62. *Id.* at 333 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

63. *Id.* at 341.

64. *Id.*

than those required for the deprivation of a more meaningful property interest, i.e. tenants' possessory interest in their home.

Second, Courts weigh the risk of an incorrect deprivation of property and ask if any additional procedures would lessen that risk.[65] The answer depends, according to the Court, on the character of the proceedings.[66] In *Eldridge*, the Court compared the proceedings for terminating welfare benefits to the same proceedings for disability.[67] By doing so, the Court gave direction on the meaningful differences between the two proceedings. Disability benefit termination depends on "routine, standard, and unbiased medical reports."[68] When the question is physical/mental disability, the probative value of expert reports will often answer the question. In contrast, decisions about welfare entitlements are more fact-intensive. Here, in *Eldridge*, the Court believed a "wide variety of information" was relevant, including witness testimony.[69] Where the credibility and veracity of evidence and witnesses are often the turning point of a case, the Court implied a greater risk of erroneous judgments. The Court's reasoning suggests one guiding rule: *where the issue is more fact-intensive, the likelihood of erroneous judgment is higher, making greater procedural safeguards necessary*.

Third, the Court examined what burden additional procedural requirements would place on the government and society.[70] In *Eldridge*, the disability recipients wanted evidentiary hearings.[71] More hearings necessarily meant more time in the courtroom, and extra time in the courtroom would increase the financial burden on the state.[72] Per the Court, such financial costs could "[a]t some point" outweigh the "benefit of . . . additional safeguard[s]."[73] But financial costs are not alone determinative.[74] Like everything in the interest balancing test, financial costs have greater or less weight depending on the other factors—i.e. the importance of the interest at stake and risk of erroneous decisions.

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65. *Id.* at 343.
66. *Id.*
67. *Id.* at 343–44.
68. *Id.* at 344 (quoting Richardson v. Perales, 402 U.S. 389, 404 (1971)).
69. *Id.* at 343–44.
70. *Id.* at 347.
71. *See id.*
72. *Id.*
73. *Id.* at 348.
74. *Id.* ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard . . . .").

Together, these three factors present a guide for assessing procedural due process. Some scholars have compared the *Eldridge* factors to a mathematical test where each element has a numerical value that the courts measure against one another.[75] While a clean, mathematical approach is appealing, it is also deceptive: the *Eldridge* factors remain rooted in the same, historical interest-balancing test. Each piece of the "formula" depends on detail and context, leaving the courts discretion to lean one way or the other. As the Court continued to apply the test, *Eldridge* revealed itself as more a guide to making case-by-case decisions than a precise formula.

B. The Evolution of Eldridge *in* Lassiter

The Court discarded any idea that *Eldridge* was a rigid formula in *Lassiter v. Department of Social Services*.[76] Before the Court even applied *Eldridge* to the issue at hand, it admitted that due process, despite all its grave consequences, "has never been, and perhaps can never be, precisely defined."[77] According to the Court, an even more "opaque" and "lofty" idea undergirds the *Eldridge* factors: "fundamental fairness."[78] Deciding what fundamental fairness requires includes "assessing the several interests . . . at stake" with the *Eldridge* factors and "considering any relevant precedents."[79] Hence, stare decisis and the *Eldridge* factors are a means to the end of fundamental fairness.

Lassiter considered whether due process required court-appointed counsel for parents in parental rights termination cases.[80] The right to counsel is helpful as a high-water mark for procedural due process. A right to counsel imposes significant financial and administrative burdens on the state, but the threat to personal freedom in criminal cases is so severe that it warrants such a burdensome process.[81] Thus, prior to *Lassiter*, the Court had established a presumption that the right to counsel could only apply when physical liberty was at issue.[82] Yet the Court still weighed the *Eldridge* factors against this presumption, implying that at least some

75. Nimrod Pitsker, Comment, *Due Process for All: Applying* Eldridge *to Require Appointed Counsel for Asylum Seekers*, 95 CAL. L. REV. 169, 183 (2007).

76. 452 U.S. 18, 24 (1981).

77. *Id.*

78. *Id.*

79. *Id.* at 25.

80. *Id.* at 32–34.

81. *Id.* at 25 (first citing Gideon v. Wainwright, 372 U.S. 335 (1963); and then citing Argersinger v. Hamlin, 407 U.S. 25 (1972)).

82. *Id.* at 25–27.

applications of *Eldridge* could be compelling enough to overcome stare decisis.[83] Such a possibility is important because a judicial holding that evictions demand heightened due process may require overturning *Lindsey v. Normet*, a Supreme Court decision that has tilted the scale against tenants for fifty years.[84]

C. Procedural Due Process for Evictions

Lindsey v. Normet is the Supreme Court's defining case on the summary eviction process.[85] The case predates *Eldridge* by four years, making no mention of interest balancing.[86] Instead, the *Normet* opinion considered Oregon's summary eviction procedures under a rational basis test.[87] Rational basis review examines the state's interest and reasoning in a particular statute.[88] If the government's interest is legitimate and the law is rationally related to the interest, then the Court will hold that the law is valid.[89] Using that framework allowed the *Normet* Court to sidestep the tenant's interest in favor of the state and the landlord.

Normet concerned impoverished tenants who lived in poor-quality housing.[90] When the landlord refused to make requested repairs, the tenants stopped paying rent, and the landlord threatened to evict.[91] The tenants brought suit, challenging Oregon's summary eviction statutes under the Equal Protection and Due Process Clause.[92]

The tenants argued the six-day trial preparation period was "so short as to make a mockery of the judicial system," because it failed to give them adequate time to prepare to defend their important interest in their homes.[93] The Court disagreed.[94]According to the Court, tenants have the same

83. *Id.* at 27 ("We must balance these [*Eldridge*] elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.").

84. *See generally* 405 U.S. 56 (1972).

85. Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond* Lindsey v. Normet, 74 OKLA. L. REV. 391, 393–94 (2022).

86. *Normet*, 405 U.S. at 56.

87. *Id.* at 74.

88. 16B C.J.S. *Constitutional Law* § 1279 (2023).

89. *Id.*

90. *See* Mason, *supra* note 85, at 393.

91. *Id.* at 405.

92. *Normet*, 405 U.S. at 62–63.

93. Mason, *supra* note 85, at 409 (quoting Transcript of Oral Argument at 17, *Normet*, 405 U.S. 56 (No. 70-5045)).

94. *Id.*

relevant knowledge as the landlord about the lease and rent.[95] Here, the Court hinted at an element relevant in the *Eldridge* test, the complexity of the proceedings.[96] Because the issues at hand were simple and the parties on equal footing, the Court found the short turnaround unproblematic.[97] But by presenting the proceedings as straightforward and equal, the Court failed to engage with the reality of landlord-tenant disputes.[98] Part IV below examines both the complexities of the proceedings and the disparity between landlord and tenant resources.[99]

Near the end of the *Normet* opinion, the Court betrayed its bias. Right before the Court pointed out the lack of any constitutional right to housing, it emphasized its worry about the landlord's "rights of income incident to ownership."[100] Then, after explaining the absence of a right to housing, the Court reiterated what the Constitution did protect. "Nor should we forget that the Constitution expressly protects against[, the] confiscation of private property or the income therefrom."[101] The Court was surely referencing the Due Process Clause of the Fifth and Fourteenth Amendments. With that statement, the Court implied that the Due Process Clauses protect a landlord's interest in their property and income but not a tenant's possessory interest in the property. That reveal exposes the unspoken value judgment in the *Normet* opinion: restoring the "income stream" to the landlord was more important than ensuring fairness for the tenant.[102]

Eight years later in *Greene v. Lindsey*, the Court did recognize that the Due Process Clause protects a tenant's possessory right to the property.[103] *Greene* involved notice for eviction proceedings in Kentucky.[104] The Court held unconstitutional a statute that allowed notice servers to physically post eviction notice on the property when no one of age was present.[105] The Court applied *Mullane* to the issue, not *Eldridge*, likely because *Mullane* was and remains the preeminent case for evaluating notice under the Due

95. *Normet*, 405 U.S. at 65.
96. *Id.*; *see also* Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 31 (1981).
97. *Normet*, 405 U.S. at 65.
98. Mason, *supra* note 85, at 406–09.
99. *See infra* Section IV.B.
100. *Normet,* 405 U.S. at 72–74.
101. *Id.* at 74.
102. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 202 (2000).
103. 456 U.S. 444, 450–51 (1982).
104. *Id.* at 446.
105. *Id.* at 447–49.

Process Clause.[106] Still, the *Mullane* standard is an interest balancing test much like *Eldridge*, requiring notice be reasonable given all the circumstances.[107]

In *Greene*, the Court appreciated the weight of tenants' interest, deeming it a "significant interest in property."[108] A "constitutional assessment" required the Court "look to the realities of the case before us."[109] To the Court, the tenants' possessory rights were a "right to continued residence in their homes."[110] In addition to the worth of the tenant's interest, the nature of eviction actions influenced the Court's opinion.[111] "The character of the action reflects" how far the state via the courts can "extend its power."[112] Since the state exerted its power over a serious property right, the Court applied the Due Process Clause to protect that interest.[113] Consequently, when a state fails to provide adequate due process of law "before issuing final orders of eviction," it violates the Fourteenth Amendment.[114]

The *Normet* and *Greene* decisions seemingly leave the Court in direct contradiction with itself. *Normet* dismisses the gravity of the tenant's interest while *Greene* recognizes and protects it. A possible explanation is an unspoken application of the third element of *Eldridge*: the cost of additional procedures to the state. In *Normet*, the tenants sought more time to prepare for court. More time to prepare means the courts would process fewer evictions each month unless the state spent more money on additional judges and space. Whereas in *Greene*, the tenants instead challenged notice procedures that could be altered with less cost to the state. Thus, the seemingly contradictory outcomes in *Normet* and *Greene* may be due to the court's implicit worries about costs for the state.

But such an analysis of costs for the state is too simplistic. Erroneous evictions cost the state just as they cost the tenant. Who pays for the newly jobless tenant's unemployment? Who subsidizes the non-profits who care for the newly homeless former tenant? Who funds the delayed child's remedial education? The state does. So, each time there is an erroneous eviction, the state pays the cost eventually. And such a cost must be taken

106. *See id.* at 450.
107. *Id.* at 449–50.
108. *Id.* at 451.
109. *Id.*
110. *Id.*
111. *Id.* at 450.
112. *Id.*
113. *Id.*
114. *Id.* at 456.

into account when assessing the value of better procedures to prevent erroneous evictions. Thankfully, another case provides a more thorough *Eldridge* analysis.

D. Santosky v. Kramer*: A Blueprint for Change*

Santosky v. Kramer exemplifies how a proper application of procedural due process can ensure fairness. *Santosky* concerned the necessary standard of proof for terminating parental rights.[115] Before addressing that issue, the Court explained how the standard of proof is inseparable from procedural due process.[116] The Court reasoned that, "the minimum standard of proof . . . reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."[117] Here, the Court echoed the *Eldridge* factors. That is, the Santosky Court balances the private interest (*Eldridge* factor one) and the public interest (*Eldridge* factor three) with the risk of error (*Eldridge* factor two).[118]

According to the Court, setting the standard of proof communicates "the degree of confidence our society thinks" necessary for different types of adjudication.[119] The two opposite ends of the standard of proof spectrum demonstrate this fact. Civil cases over money damages have a preponderance of the evidence standard because society has a "minimal concern with the outcome," and the litigants should equally share the risk of error.[120] Whereas the beyond a reasonable doubt standard in criminal cases is essential because a defendant's liberty and/or life is at risk.[121] Clear and convincing evidence applies to cases that fall somewhere between those two, where the interests at risk are "particularly important" and "more substantial than mere loss of money."[122]

In assessing the necessary standard of proof for terminating parental rights, the Court applied *Eldridge*, focusing its attention on the second factor by evaluating the risk of an erroneous judgment.[123] The Court

115. 455 U.S. 745, 747 (1982).

116. *See id.* at 747–48.

117. *Id.* at 755 (citing Addington v. Texas, 441 U.S. 418, 423 (1979)).

118. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (enumerating the factors as (1) the importance of the individual's private interest at stake; (2) the risk of erroneous judgment; and (3) the burden addition procedures would place on the government).

119. *Santosky*, 455 U.S. at 755 (quoting *Addington*, 441 U.S. at 423).

120. *Id.* (quoting *Addington*, 441 U.S. at 423).

121. *Id.* (citing *Addington*, 441 U.S. at 423).

122. *Id.* at 756 (quoting *Addington*, 441 U.S. at 424).

123. *Id.* at 761.

examined the nature of the proceedings to answer that question, just as *Eldridge* instructed.[124] Accordingly, hearings for the termination of parental rights bear "many of the indicia of a criminal trial"[125] Like in criminal trials, the state has to "establish a series of historical facts."[126] Lawyers for both sides submit "documentary evidence, and call witnesses who are subject to cross-examination."[127] Parental rights proceedings also have special "substantive standards that leave determinations unusually open to the subjective values of the judge."[128] The Court felt leaving such impactful decisions up to a judge's personal values posed a particular danger here because poor, uneducated, and minority parents often face these proceedings, leaving them "vulnerable to judgments based on cultural or class bias."[129] Also, unlike criminal defendants, parents lack a double jeopardy defense to protect against repeated attempts at terminating their rights.[130] For the Court, all these weaknesses of procedure combined with a preponderance of the evidence standard caused too great a threat of erroneous judgments.[131]

Because parental interests are so important and the likelihood of error so high, the Court held the preponderance standard in parental rights cases to be a violation of the Due Process Clause.[132] Preponderance was too low because it considers "quantity, rather than the quality, of evidence"[133] in deciding whether a given argument is more likely than not. The beyond a reasonable doubt standard was too high because the expert testimony in parental rights cases is "rarely susceptible to proof" at that level.[134] Accordingly, the Court marked clear and convincing evidence as the minimum standard of proof for parental rights terminations.[135]

The loss of a child is beyond comparison. But the loss of a home, where people and families take shelter and build their lives, poses a similarly grave threat to a tenant's livelihood, health, and family. Thus, *Santosky* provides a blueprint for the arguments and reasoning necessary to increase

124. *See id.* at 762; *see also* Mathews v. Eldridge, 424 U.S. 319, 343 (1976).
125. *Santosky*, 455 U.S. at 762.
126. *Id.*
127. *Id.*
128. *Id.* (citing Smith v. Org. of Foster Fam., 431 U.S. 816, 835 n.36 (1977)).
129. *Id.* at 763.
130. *Id.* at 764.
131. *Id.*
132. *Id.* at 768.
133. *See id.* at 764.
134. *Id.* at 768–69.
135. *Id.* at 769.

due process protections in evictions. The next Part attempts to bring that blueprint to life.

IV. Applying Due Process Principles to Preponderance of the Evidence Evictions

As the Court's decisions in *Mullane*, *Eldridge*, and *Lassiter* show, assessing the necessary due process is not a precise, mathematical analysis. Instead, the Court balances the interests of the individual against the interests of society and the state.[136] While the three *Eldridge* factors are not a solidified practice applied in every due process case, they are the clearest guidance for weighing the interests at stake. This section analyzes each of the factors in turn: (1) the gravity of the tenancy interest; (2) the risk of incorrect deprivation; and (3) the burden of additional procedures on the state.

A. The Gravity of the Tenancy Interest

The first part of the *Eldridge* analysis is the gravity of the individual interest at stake.[137] Here, that interest is the tenant's possessory right to their home. The amount people spend to secure housing proves its importance. The majority of "poor renting families" in the United States spend more than half of their income on housing.[138] The demands are even steeper for those who end up in eviction court; one-third of tenants in eviction court spent 80% of their income on housing, according to a recent survey.[139]

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136. Any argument for additional procedural protections in evictions that uses the Fourteenth Amendment's Due Process Clause must demonstrate state action because the Fourteenth Amendment applies to the states, not private actors. *See* NCAA v. Tarkanian, 488 U.S. 179, 191 (1988). Unlike the parental rights hearings in *Santosky v. Kramer*, where the state itself was the party bringing the action to terminate parental rights, in evictions the two parties are private citizens. Nevertheless, state action is a given in all procedural due process claims because it is the state that defines and enforces property rights. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954). This is why state action is never at issue in a case about notice such as *Mullane*. The state has "acted" by establishing the procedures for litigation, such as notice, the standard or proof, etc., and the Due Process Clause controls the fairness of those procedures, not the actions of the private parties in the litigation. In evictions, the state acts by creating the legal framework for evictions, setting the procedures for eviction, and providing the necessary force to remove tenants. *See* Spector, *supra* note 102, at 157–59.

137. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

138. Desmond & Kimbro, *supra* note 9, at 296.

139. *Id.* at 298.

An initial reaction to those numbers might be that those people were living outside their means. But the disparity between skyrocketing rent prices and stagnating wages suggests otherwise[140] The median monthly rent in the United States was "$371 in 1990, $483 in 2000, and $633 in 2006 (all in current dollars)."[141] That's an increase of 70% in only sixteen years.[142] Just in the first decade of the twenty-first century, median rents went up by 21% in the Midwest, 26% in the South, and 37% in the Northeast.[143] Yet, income levels only rose by single-digit percentages in the 2010s for all but the college-educated.[144] With rent so high and wages so low, it is no surprise that people end up spending over half their income on housing. Renters, especially poor renters, take on these financial burdens because they have no choice. Housing is a necessity.

The immediate and long-term effects of evictions also showcase the grave risk tenants face in eviction proceedings. An eviction follows a tenant for years afterward as a blemish on their court record, effecting their ability to find housing in the future.[145] The mark of an eviction makes it harder for tenants to secure housing in safer neighborhoods because those landlords often refuse to rent to tenants with recent evictions.[146] That reality means tenants displaced by eviction often resort to living in cheaper neighborhoods with high "levels of poverty and violent crime" and "substandard living conditions."[147] Another immediate effect of evictions is an increased likelihood of job loss. The recently evicted are between 11% and 22% more likely to lose their jobs.[148]

These immediate practical effects of eviction lead to long-term health and social issues, especially among mothers and children. For example, the trauma associated with eviction correlates with higher rates of depression.[149] "[I]nvoluntary housing loss" can cause "economic scarring" that psychological studies link to "recurrent episodes of major depression."[150] These adverse impacts disproportionately affect mothers and their children because evictions judgments are more likely for those women

140. *See id.* at 297.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 299.
146. *See id.* at 299–300.
147. *Id.* at 300.
148. Desmond & Gershenson, *supra* note 10, at 47.
149. Desmond & Kimbro, *supra* note 9, at 317.
150. *Id.* at 301.

than any other group.[151] In fact, children are the factor that increases the likelihood of eviction the most. "[A] 1 percent increase in the percentage of children is predicted to increase a neighborhood's evictions by 6.5 percent."[152] This correlation remains true even after controlling for "racial composition, poverty, female-headed households, vacancy rates," and other socio-economic demographic categories.[153]

Children suffering from evictions also endure the cost in other ways. Evictions often lead to homelessness and/or "high rates of residential mobility."[154] Both of those outcomes cause children to perform worse in school with lower test scores, "delayed literacy skills," and more frequent absences.[155] And since "evicted families, desperate to find new housing," often must turn to the slums, children must also face the negative effects such neighborhoods have on their "health, development and wellbeing."[156]

These negative effects on households with children have broader systemic effects on the community. When communities with high percentages of children also endure more frequent evictions, that "rapid turnover of households" inhibits "social capital, local cohesion and community investment."[157] Thus, the whole community withers under the effects of eviction. All these direct and indirect harms demonstrate not only the severe, individual interest of the tenant but also the broader social cost of evictions.

The Court has already recognized how such a social cost impacts the government's interest. In *Goldberg v. Kelly*, the Court decided that terminating welfare benefits without more procedure exacted too high of a social cost.[158] Much like the public aid at issue in *Goldberg*, a tenant's home is her "very means by which to live."[159] Losing that home, like losing her public aid, makes her situation "immediately desperate."[160] The poverty that often leads to eviction stems from similar forces outside the "control of the poor," such as disability, mental illness, or economic downturns.[161] When powers outside of tenants' control trigger evictions, the same

151. *Id.* at 298.
152. Desmond et al., *supra* note 11, at 304.
153. *Id.* at 319.
154. *Id.* at 320.
155. *Id.*
156. *Id.*
157. *Id.*
158. 397 U.S. 254, 264–65 (1970).
159. *Id.* at 264.
160. *Id.*
161. *See id.* at 265.

"widespread sense of unjustified frustration and insecurity" the Court feared in *Goldberg* weakens people's faith in the court system.[162] Afterall, it is the local sheriff who stacks a tenant's belongings on the curb, not the landlord. Therefore, the interest at stake in an eviction also includes the government's interest in ensuring fair, thorough process in hopes of maintaining society's belief in the courts.

Another part of the reason an eviction is so devastating and likely to erode institutional trust is the nature of the threat. The threat is both persistent and permanent. Eviction attempts are not one-time threats. Landlords can bring eviction actions persistently for different alleged lease violations. In *Santosky*, the lack of double jeopardy protections elevated the gravity of the parental interest because it left parents in a constant state of threat.[163] The same on-going fear plagues tenants. And if the tenant suffers an eviction, the loss is permanent.

Additionally, in *Eldridge*, the availability or lack thereof for "retroactive relief" informed the gravity of the interest at stake.[164] No retroactive relief exists for the life, love, and memories present in a home. Losing a home, possibly one with years of personal connection, is an irreplaceable loss. As Margaret Radin explained, the personal connection people develop with property by intermingling their lives with it elevates their interest in the property and the pain or harm associated with losing it.[165] With an eviction, people lose parts of their past, present, and future lives. They lose their home—the physical connection they have to life already lived. In the present, they lose their shelter.[166] Finally, they lose parts of their future, such as job opportunities, mental health, and stable family environments. An interest so wide-reaching and integral to human life demands more due process than rushed proceedings in overcrowded courtrooms.[167]

B. The Risk of Incorrect Deprivation

The second *Eldridge* factor, risk of incorrect deprivation, centers on the nature of the proceedings themselves.[168] In *Eldridge*, the Court explained that proceedings concerned with difficult assessments of a "wide variety of

162. *Id.*
163. Santosky v. Kramer, 455 U.S. 745, 764 (1982).
164. Mathews v. Eldridge, 424 U.S. 319, 340 (1976).
165. Radin, *supra* note 21, at 959.
166. *Goldberg*, 397 U.S. at 264.
167. HINES, *supra* note 3, at 5.
168. *Eldridge*, 424 U.S. at 335.

information" required more due process than routine, standardized issues.[169] The Court provided one example: the necessity of witness testimony to adjudicate the issue.[170] If witness testimony often decides a case, ensuring the validity of that testimony requires more stringent procedures. In *Santosky*, the Court applied this dichotomy between routine and fact-intensive proceedings. In part, a preponderance of the evidence standard was too low, according to the Court, because child neglect proceedings involved too many "imprecise . . . standards" left "open to the subjective values of the judge."[171]

This same danger plays out in eviction proceedings. Two of the most powerful and common defenses tenants have at their disposal are the covenant of quiet enjoyment and the implied warranty of habitability.[172] Both defenses require determinations about the condition of the premises, when the tenant notified the landlord, and how long the landlord took to fix an issue with the property.[173] Assessing notice, condition of the property, and the landlord's action demands both physical evidence—likely competing photographs or documents from each side—and competing witness testimony.[174] These are not routine, simple assessments. Rather, they demand specific, fact-intensive inquiry into the circumstances of each case.[175] When these decisions rest on such a slim margin of difference, the subjective values of the judge can too easily decide a case. Subjective values pose a particular danger in evictions because, like the parental termination hearings in *Santosky*, evictions often affect the poor, leaving them "vulnerable to judgments based on cultural or class bias."[176]

The inherent dangers of the summary eviction process amplify the already high risk of erroneous judgments. The expedited procedures have

169. *Id.* at 343–44.

170. *Id.* at 344–45.

171. Santosky v. Kramer, 455 U.S. 745, 762 (1982).

172. 33 E. GEORGE DAHER ET AL., MASSACHUSETTS PRACTICE SERIES: LANDLORD AND TENANT LAW § 10:13 (3d ed. 2022), Westlaw 33 MAPRAC § 10:13 (Covenant of Quiet Enjoyment); *id.* § 11:10, Westlaw 33 MAPRAC § 11:10 (Covenant of Habitability).

173. The Restatement (Second) of Property collapses the requirements and remedies for both the covenant of quiet enjoyment and implied warranty of habitability into one section. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 5.4 (AM. L. INST. 1977).

174. *Cf. Repairs & the Implied Warranty of Habitability*, HOUS. EQUAL. CTR. OF PENN., https://renters.equalhousing.org/repairs-security-deposit/repairs/ (last visited Aug. 2, 2023) (discussing notice and evidence of defects as essential components of a successful implied warranty of habitability claim).

175. *See* RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 5.4.

176. *Santosky*, 455 U.S. at 763; *see* Desmond & Kimbro, *supra* note 9, at 296.

negative consequences, each one making erroneous judgments more likely.[177] The "time pressures . . . intimidate defendants," leaving them and/or their attorney with little time to prepare adequate defenses.[178] This inability to adequately defend themselves incentivizes rushed settlements, "resulting in imbalanced, unsupervised settlements."[179] If the case does not settle, the frantic pace of the proceedings means judges often provide only a "cursory examination" of the landlord's evidence, allowing landlords to win their desired result despite "fatally defective proof."[180] These scenarios leave pro se tenants at an even greater disadvantage than in typical civil proceedings. Together, the fact-intensive nature of eviction proceedings and the natural consequences of rushing a case produce an unacceptable risk of erroneous judgments.

C. The Burden of Additional Procedures on the State

The final piece of the *Eldridge* analysis is the burden additional procedures would place on the state.[181] In essence, the last question is a practical one. Every state's financial situation is different. But, as the Court emphasized in *Eldridge*, "[f]inancial cost alone is not a controlling weight" in deciding the necessary due process.[182] All three of the *Eldridge* factors must be read together, balancing against one another to determine what due process requires in any given situation.[183] So, if the gravity of the interest is overwhelming and the risk of erroneous judgment staggering—as they are here—even a significant financial cost is worthwhile. To assess that cost, this section first explains what changes are necessary to reduce the risk of erroneous evictions. Then, it addresses why the costs of these changes are worthwhile.

This Comment's goal is to set the constitutional floor for due process in evictions, not the ceiling. In other words, when the cost of erroneous evictions is so high for both tenants and society, what due process is essential even in the face of significant cost? As the previous section explained, the crux of many erroneous evictions is a lack of preparation

177. *See* 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, 573 (1988).

178. *Id.* (quoting Randall W. Scott, *Housing Courts and Housing Justice: An Overview*, 17 URB. L. ANN. 3, 6–7 (1979)).

179. *Id.* (quoting Scott, *supra* note 178, at 6–7).

180. *Id.*

181. Mathews v. Eldridge, 424 U.S. 319, 347–48 (1976).

182. *Id.* at 348.

183. *See id.* at 347.

time and overburdened courts that leave tenants with little to no time to be heard. Tenants require at least the time and tools to tell their stories. Thus, for Oklahoma and states like it, meeting the constitutional floor means adding: (1) enough judges and courtrooms to ensure tenants have the opportunity to be heard; and (2) longer notice requirements to give tenants the time they need to prepare for court.

The staggeringly low span of time for the average eviction case highlights the necessity of investment in housing courts.[184] In 2002, housing court hearings in Chicago lasted one minute and forty-four seconds on average.[185] The Memphis housing courts in 2021 spent less than two minutes on more than 95% of their cases.[186] Cases fly by so quickly because the overwhelming size of the dockets demands a blistering speed.[187] In large urban areas such as Baltimore, dockets can saddle one judge with "as many as 2500 cases" in a single day.[188] Oklahoma also suffers from significantly overworked housing courts in urban areas.[189]

Such overworked courts pose serious due process issues because they can rob tenants of the opportunity to be heard.[190]And as the Court has explained many times, "The fundamental requisite of due process of law is the opportunity to be heard."[191] Recent observations of Oklahoma's urban housing courts recounted stories where tenants were cut off mid-sentence only minutes after the hearing began.[192] When courts are so overworked that judges cannot afford time for the minimums of due process, the system has failed both the tenants and the requirements of the constitution. Oklahoma must invest in its housing courts, not only to avoid erroneous evictions, but also to bring its courts into compliance with the constitution.

Lengthening notice requirements to provide more preparation time is harder because it would require either: (1) overturning *Lindsey v. Normet* where the court held that a six-day notice procedure was adequate; or (2) states to decide on their own to require notice earlier. This Comment insists

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

185. *Id.*

186. Mason, *supra* note 85, at 415.

187. *Id.*

188. *Id.*

189. *See* HINES, *supra* note 3, at 5.

190. Mason, *supra* note 85, at 415–16.

191. *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914)).

192. HINES, *supra* note 3, at 1.

Normet was wrongly decided[193] and that such short notice requirements violate the requirements of due process under the *Eldridge* analysis. Nevertheless, state action is more likely in the short term than overturning precedent. Thus, stakeholders should focus their efforts on lobbying state government to lengthen notice requirements.

One change could address both of these issues for Oklahoma. Oklahoma hears its eviction cases in small claims courts.[194] One scholar described small claims courts as "an assembly line, a collection agency with the imprimatur of the state."[195] Parties in these courts often have only a week to prepare and no Rules of Evidence and little to no discovery powers.[196] Without them, tenants lack the proper tools to make their case, especially when they often face well-funded, corporate landlords with lawyers.[197] As the previous section explained, facing eviction without adequate preparation increases the risk of erroneous outcomes because tenants' best defenses are often fact-intensive issues.[198] So, a major step toward meeting the constitutional minimum would be removing evictions from small claims and creating a dedicated housing court with better notice requirements and resources.

The common retort to investing in housing courts and lengthening notice requirements is that the cost for the state is simply too high. But this argument fails to consider the true cost of evictions for the state. When a tenant loses their job because of an erroneous eviction, the state pays their unemployment. When a tenant becomes homeless because of an erroneous eviction, the state spends money trying to address increased homelessness and/or subsidizes the non-profits who care for the homeless. When a tenant's child suffers delayed literacy and social skills, the state pays for remedial education in school or loses that child's future contribution to the state's economy. The state is already paying the cost for erroneous evictions when it performs damage control after the fact. Instituting the bare

193. *See* Mason, *supra* note 85, at 405–13 (providing an in-depth analysis of the majority's flawed reasoning).

194. *See* 12 OKLA. STAT. § 1761 (2022); *see also* Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls, in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 119, 129 (Richard L. Abel ed., 1982) (referencing the Bronx Landlord-Tenant Court).

195. *See* Lazerson, *supra* note 194.

196. *See* Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 260, 264–65 (2020).

197. *See Rental Housing Finance Survey*, *supra* note 36.

198. *See supra* Section IV.B.

minimums of due process at the beginning prevents the inevitable cost of erroneous evictions long term.

V. Property Law Analogies

States already recognize the multi-faceted costs of erroneous outcomes in other areas of property law. And they require heightened procedures to protect against them. For adverse possession and eminent domain, the courts require the claimant to prove their case by a clear and convincing evidence standard.[199] This higher standard of proof goes above and beyond the changes this Comment urges in evictions. Nevertheless, states require it because the cost of an erroneous adverse possession or eminent domain judgment is so high.

A brief explanation is necessary to understand the analogy. In an adverse possession claim, the adverse possessor has been using the property even though she has no legal right to it.[200] All adverse possessors start out as unlawful trespassers. The law allows such trespassers to take the legal rights from the original owner if they possess the land long enough, put it to good uses, and meet other statutory requirements.[201] That outcome typically seems absurd to non-lawyers. But the state allows it because it takes a wholistic view of the use of property. The state would rather a trespasser, who has put the property to good use for many years, own the land than a legal owner who has neglected the land for just as many years. But naturally, erroneous adverse possession judgments would undermine the legal rights of the property owner and encourage more trespassing. Thus, the courts demand a higher standard of proof to protect against abuse.

Due to a similar fear and skepticism, many states have adopted a clear and convincing evidence standard for eminent domain.[202] States adopted this change following the Supreme Court's decision in *Kelo v. City of London*.[203] In *Kelo*, the State of Connecticut took an elderly woman's home where she had lived since her childhood.[204] The Court upheld the taking, reasoning that it should grant great deference to the state's showing of "public use" by a preponderance of the evidence.[205] After the public outcry

199. 2 C.J.S. *Adverse Possession* § 27 (2023).

200. *See id.* § 26.

201. *Id.*

202. Dana Berliner, Trends in Eminent Domain Legislation and Use 25, 27 n.4, 28 n.6 (ALI-CLE Course Materials Aug. 14-16, 2013), Westlaw SV003 ALI-ABA 25.

203. *Id.* at 27.

204. Kelo v. City of New London, 545 U.S. 469, 475 (2005).

205. *Id.* at 489–90.

that followed, states raised the standard of proof to clear and convincing.[206] States recognized that the standard must be exacting to justify such severe harm to the individual.

Some would scoff at an analogy from adverse possession and eminent domain to evictions. After all, the relationship between the parties is different. An adverse possessor has no legal right to the property but a landlord does. And eminent domain involves the state, not the landlord, destroying property rights. But at base, courts are skeptical of adverse possession and eminent domain because of its potential abuse and social cost, and rightly so. Evictions have the same potential for abuse and an even steeper social cost. Again, an eviction makes finding new housing harder, forces tenants into poor often violent areas, increases the risk of homelessness and job loss, contributes to chronic mental illness, and worsens a child's performance at school.[207] These social costs are both far higher and more frequent than adverse possession and eminent domain, with experts estimating nearly one million annual evictions in the United States.[208] For that reason, the staggering consequences of an erroneous eviction should garner at minimum the same fear and skepticism as adverse possession and eminent domain.

VI. Conclusion

More than anything, this Comment elaborates on the context surrounding evictions to demonstrate that due process demands more of Oklahoma. To be in alignment with the Supreme Court's own guidelines for procedural due process, Oklahoma must change its eviction courts. At base, it must add: (1) longer notice requirements to give tenants the time they need to prepare for court; and (2) enough judges and courtrooms to ensure tenants have the opportunity to be heard. These evictions adjudicate supremely important property interests. Without these bare minimum protections, the risk of erroneous outcomes skyrockets. The loss of home and shelter tears through a person's life, disrupting their family, job, and even the long-term health of their children. With the stakes so high, unjust and unnecessary outcomes are unacceptable.

Adam H. Hines

206. Berliner, *supra* note 202, at 27 n.4, 28 n.6.

207. Desmond & Kimbro, *supra* note 9, at 300–01; Desmond et al., *supra* note 11, at 320.

208. *In America, A Million Evictions Take Place in a Normal Year*, *supra* note 12.