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## Eviction Courts

Kathryn A. Sabbeth

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## ARTICLE

# EVICITION COURTS

KATHRYN A. SABBETH\*

This Article examines the legal mechanics of the courts that issue eviction orders. It analyzes these courts in the context of the COVID-19 pandemic and the federal eviction moratoria. The eviction phenomenon preceded the pandemic, but the pandemic exaggerated many of its features. How the eviction courts responded to the eviction moratoria reveals a great deal about how these fora have been functioning all along. While the eviction moratoria were important, the design of eviction courts limited their impact.

The Article identifies ten groups of laws that structure critical design features of eviction courts: (1) filing fee statutes that make it cheaper to pursue eviction than other forms of civil relief; (2) substandard method of service rules; (3) default rules that allow cases to be decided against tenants in their absence; (4) short turnaround times between complaint filing and trial; (5) limits on discovery procedures that might uncover evidence in support of tenants or create delay; (6) jurisdictional limits on the defenses and counterclaims tenants may raise; (7) rent bond requirements that prevent tenants from raising defenses unless they pay rent allegedly due; (8) laws structuring the provision of legal services so that pro se tenants and represented landlords are the norm; (9) laws establishing qualifications of adjudicators so they may operate without legal training; and (10) obstacles to appeals.

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\* Professor of Law, University of North Carolina at Chapel Hill. As 3Ls in the UNC Civil Legal Assistance Clinic, Shi Chen and Robert DiDomenico briefed and argued a successful motion to dismiss an eviction proceeding on the basis that the CDC's eviction moratorium applied to lease non-renewal cases, not only to nonpayments; preparing with them significantly sharpened my thinking on the subject. I also benefitted from the opportunity to share the ideas in this Article with the wonderful participants in the symposium at the University of St. Thomas, and I am grateful to the law journal editors, both for inviting me to join the interdisciplinary discussion of *American Contagions* and for their careful editorial work on this piece. I also appreciate the feedback on this Article provided by Kate Elengold, Jesse McCoy, Erika K. Wilson, and the participants in the Duke-UNC Clinic Scholarship Workshop, as well as the diligent and thoughtful research assistance of Katie DeAngelis, Catherine Goodman, Joel Green, and Hannah Marion. Finally, I wish to thank my clients, whom I have not named so as to protect their confidentiality, but from whom I have learned the most.

The Article concludes that eviction court operations reflect a legal architecture designed not to recognize tenants' rights, and instead this legal architecture supports hierarchical relations between owners and tenants. While the urgency of the eviction crisis may appear recent, the U.S. has a long history of depriving subordinated people of homes while others profit from the scarcity and instability of housing. The design features of eviction courts serve to maintain this social order.

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## INTRODUCTION

The public health crisis and economic fall-out of COVID-19 heightened awareness of an eviction problem that predated the virus but threatens

to expand exponentially because of it.<sup>1</sup> In the years leading up to the pandemic, alarm bells had already been ringing regarding the size and impact of the eviction phenomenon, particularly after sociologist Matthew Desmond grabbed national attention with his best-seller, *Evicted: Poverty and Profit in the American City*.<sup>2</sup> Popular media and social scientists have documented the harms that eviction imposes on families and communities.<sup>3</sup> Commentators have debated which market conditions produce evictions and which policy changes could mitigate the damage.<sup>4</sup> Yet remarkably little legal scholarship has developed,<sup>5</sup> which is somewhat surprising, given that eviction is a legal process, and, indeed, one that occupies a significant percentage of court dockets.<sup>6</sup> This Article seeks to contribute to the development of legal literature on the eviction process.

Inspired by the interdisciplinary symposium on *American Contagions*,<sup>7</sup> this Article marries the social science literature on the social causes and consequences of eviction with examination of the legal mechanics of the courts that issue eviction orders. How the eviction courts operate during a pandemic—and specifically how these legal structures respond or fail to respond during this extraordinary time—reveals a great deal about our soci-

1. See, e.g., LastWeekTonight, *Coronavirus IX: Evictions: Last Week Tonight with John Oliver* (HBO), YOUTUBE (June 29, 2020), <https://www.youtube.com/watch?v=R652nwUcJRA>; Lisa Edwards, Jared Trujillo & Jason Wu, *Why Fixing The Housing Crisis Is A Black Lives Matter Issue*, REFINERY29 (June 20, 2020, 11:01 AM), <https://www.refinery29.com/en-us/2020/06/9890811/housing-crisis-eviction-black-lives-matter>.

2. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

3. See *infra* notes 31–47 and accompanying text.

4. See *infra* notes 48–55 and accompanying text.

5. Nicole Summers, *Civil Probation*, 75 STAN. L. REV. \_ (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3897493](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897493) (manuscript at 9) [hereinafter *Civil Probation*] (“[E]viction courts, procedures, and jurisprudence are rarely the focus of legal scholarship.”). A small literature has discussed the right to counsel and experiences of pro se tenants, see, e.g., Paris Baldacci, *Assuring Access to Justice: The Role of Judges in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 696–97 (2006); Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J. L. & GENDER 55, 60–61 n.30 (2018) (collecting literature), and a handful of law review articles have presented empirical research on the operation of eviction courts. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 535 (1992); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 149 (2020) [hereinafter *Good Law*]; Lauren Sudeall & Daniel Pasciutti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 73 VAND. L. REV. 1365, 1368 (2021); cf. Megan Hatch, *Statutory Protection for Renters Classification of State Landlord-Tenant Policy Approaches*, 27 HOUS. POL’Y DEBATE 98 (2016) (policy analysis of landlord-tenant laws). But, outside of arguments specific to public housing, see, e.g., Gerald Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL’Y 1, 9–10 (2015), very few legal scholars have addressed the doctrine of eviction. Cf. Mary Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000).

6. See Paula Hannaford-Agor, Scott Graves & Shelley Spacek Miller, *The Landscape of Civil Litigation in State Courts*, NAT’L CTR. FOR STATE CTS., 17–19 (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).

7. JOHN FABIAN WITT, *AMERICAN CONTAGIONS* (2020).

ety's core commitments and priorities. The Article examines the eviction courts' functioning during the pandemic as a window into how they have been functioning all along. By interpreting the mechanics of eviction courts against the backdrop of COVID-19, we can see in sharp relief the social functions that these courts are designed to serve.

Part I situates eviction as a socio-legal phenomenon. It touches on the market conditions that make housing a scarce commodity and notes the gap between the cost of housing and income streams available to cover it.<sup>8</sup> Law sets the terms of the marketplace,<sup>9</sup> however, and this Part emphasizes the causes of eviction that can be found in the law.<sup>10</sup> These causes include laws of property and contracts that define tenants, owners, and the rights of each; laws of investment trusts that encourage the commodification of housing; and labor laws and public benefits laws that shape family earnings.<sup>11</sup> Embedded within and overlapping these are the many laws that have authorized the historical and present-day theft of labor and land from people of color, while promoting white ownership and wealth.<sup>12</sup> In addition to the laws defining substantive rights, procedural laws determine how disputes over such rights will be resolved.<sup>13</sup> Doctrine determines the process by which courts adjudicate conflicts between tenants and owners, and doctrine provides a mechanism for eviction.<sup>14</sup> By reviewing together market conditions and laws that result in eviction, Part I shows that eviction is the product of the legal system that political leaders have chosen to construct.

Part I concludes by introducing eviction's intersection with the pandemic. It suggests that the pandemic exacerbated the inequality wrought by eviction in at least three ways. First, the pandemic increased the number of people who face eviction and therefore get trapped in its collateral consequences, which results in the entrenchment of poverty and racial segregation.<sup>15</sup> Second, the race and gender inequities of the pandemic likely multiplied the raced and gendered aspects of eviction.<sup>16</sup> Third, COVID-19 made the stakes of eviction even higher. Eviction already posed a significant public health threat, but the pandemic made the dangers even more acute.<sup>17</sup>

Part II explores the operations of eviction courts during the pandemic. It briefly describes the governmental responses to the pandemic and to the threatened tsunami of evictions, namely rent subsidies and a series of evic-

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8. *See infra* Part I.A.

9. WITT, *supra* note 7, at 129.

10. *See infra* Part I.B.

11. *See infra* Part I.B.

12. *See infra* Part I.B.

13. *See infra* Part II.A.

14. *See infra* Part II.A.

15. *See infra* Part I.C.

16. *See infra* Part I.C.

17. *See infra* Part I.C.

tion moratoria. It reviews the federal eviction moratoria contained in the CARES Act of 2020 and the September 4, 2020 Order of the Centers for Disease Control and Prevention, the latter of which was extended but ultimately struck down by the U.S. Supreme Court.<sup>18</sup> Although the moratoria did successfully prevent many evictions,<sup>19</sup> a large number continued as if no federal law was in place.<sup>20</sup> Part II argues that close examination of eviction court procedures helps to explain the courts' failure reliably to implement the eviction moratoria.

The Article identifies ten significant aspects of eviction courts' design: (1) filing fee statutes that make it cheaper to pursue eviction than other forms of civil relief; (2) substandard method of service rules; (3) default rules that allow cases to be decided against tenants in their absence; (4) short turnaround times between complaint filing and trial; (5) limits on discovery procedures; (6) jurisdictional limits on the defenses and counterclaims tenants may raise; (7) rent bond requirements that prevent tenants from raising defenses unless they pay rent allegedly due; (8) laws structuring the provision of legal services so that pro se tenants and represented landlords are the norm; (9) laws establishing qualifications of adjudicators so they may operate without legal training; and (10) obstacles to appeals.<sup>21</sup> Part II argues that these design features made eviction courts an inhospitable environment for the federal moratoria. These features are the products of law, and yet, because of them, the forum is not equipped for faithful application of law, let alone careful interpretation of tenants' rights.

The third and final part of the Article tackles the question of what social functions eviction courts serve. In general, these courts respond to disputes between tenants and owners regarding control over real property. The courts decide who should get access to housing and who should be excluded from it. Yet, building on theoretical work of Alexandra Natapoff and Shaun Ossei-Owusu in the criminal context,<sup>22</sup> Part III.A asks whether eviction courts serve legitimate purposes of ascertaining facts and interpret-

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18. See *infra* Part II.B.

19. Jasmine Rangel, Jacob Haas, Emily Lemmerman, Joe Fish & Peter Hepburn, *Preliminary Analysis: 11 Months of the CDC Moratorium*, EVICTION LAB (Aug. 21, 2021), <https://evictionlab.org/eleven-months-cdc>.

20. See, e.g., Brittany P. Battle, Speech at Wake Forest University: There Was No Moratorium Here (Sep. 16, 2021); Carly Stern & Mollie Bryant, *How Landlords Dodge COVID-19 Eviction Bans Across the U.S.*, SUN HERALD (May 9, 2021), <https://www.sunherald.com/news/coronavirus/article251249264.html>; Chris Arnold, *Despite a New Federal Ban, Many Renters Are Still Getting Evicted*, NPR (Sept. 14, 2020, 5:00 AM), <https://www.npr.org/2020/09/14/911939055/despite-a-new-federal-ban-many-renters-are-still-getting-evicted> [<https://perma.cc/BX4K-49UM>] (“Legal aid attorneys in Houston also say it’s still too often business as usual at eviction hearings. The judges aren’t asking landlords if tenants sent them CDC declarations. Many tenants . . . don’t appear to even know about their rights under the CDC order. The judges don’t ask them about that.”).

21. See *infra* Part II.A.

22. Shaun Ossei-Owusu, *Kangaroo Courts*, 34 HARV. L. REV. F. 200, 200 (2021) (reviewing Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021)).

ing law, or, instead, if these fora can fairly be understood as kangaroo courts that produce particular outcomes.

To better understand the social meaning of the outcomes that eviction courts produce, Part III.B raises the possibility that perhaps the pandemic has not presented a housing crisis—if by crisis we mean something specific in time and in need of technical solutions—but, rather, a magnified view of a longstanding contest over resources. Recently, there has been increased concern regarding the number of people losing their homes through eviction,<sup>23</sup> but in our society unavailability of housing is not an isolated problem; for a significant portion of the population, it is and has been an ongoing threat.<sup>24</sup>

With that historical and political perspective in mind, how should we understand what eviction courts do? Part III concludes by arguing that eviction courts as currently designed serve to maintain the existing social order. This social order is one in which housing is a scarce and unstable resource for subordinated people, and such scarcity generates profit for those who benefit from the commodification of real estate. A hierarchy between owners and tenants, perpetuated by the courts, sustains these dynamics.

While multiple social factors facilitate courts serving this role, the influence of legal doctrine itself should not be overlooked. To put it simply, law creates evictions. To frame it in a more optimistic light, although the legal design of eviction courts serves to entrench social hierarchies, law remains contested, and changing it could change outcomes.

## I. EVICTION AS A SOCIAL PHENOMENON

An eviction can be understood as a landlord's forced removal of a tenant from a rented home. This can occur formally—through the filing of a court case, the issuance of a judgment for the landlord, and, if the tenant does not vacate first, an officer of the state enforcing the landlord's right to the tenant's involuntary departure. Alternatively, it may occur informally, through harassment, incentives to vacate, threats of formal action, or other landlord conduct that results in a tenant giving up possession without court involvement.<sup>25</sup> This Article focuses on formal evictions, the fear of which almost certainly casts a shadow that contributes to the prevalence of informal evictions.

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23. See sources cited *supra* notes 1, 20; *infra* notes 111–117.

24. See *infra* Part III.B.

25. See Matthew Desmond, Carl Gershenson & Barbara Kiviat, *Forced Mobility and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227, 246, 253, 255–56 (2015) (describing displacement due to substandard conditions); Matthew Desmond & Tracey Schollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1761 (2015) (describing high rates of informal evictions); see also Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 95 (2012) [hereinafter *Urban Poverty*] (explaining that “court records do not capture informal evictions—from illegal strong-arm lockouts to unofficial agreements”).

In a typical year before the pandemic, U.S. courts processed approximately 3.7 million eviction cases.<sup>26</sup> Between 2000 and 2016, there was approximately one eviction filing for every seventeen renter households,<sup>27</sup> and roughly one in forty renter households was formally evicted.<sup>28</sup> The number of cases filed is different from the number of actual evictions by court order. The number of evictions following court orders is lower, due to settlements and to the minority of cases in which tenants prevail.<sup>29</sup> But a court filing can also result in an actual eviction even without a judgment of possession, such as through a settlement whose terms require the tenant to vacate.<sup>30</sup>

Each one of the millions of annual evictions can carry tremendous consequences for the individuals involved, their families, and their communities.<sup>31</sup> The harms may be physical, emotional, or economic, and they include both short-term components and others that determine the trajectories of people's lives.<sup>32</sup> Immediate consequences may include the loss of possessions; costs of relocating; missed work and school; and extreme stress.<sup>33</sup> They can lead to longer-term issues, such as termination from employment, or difficulty enrolling children in a new school with little notice.<sup>34</sup> These events create logistical challenges, thwart academic and career progression, and undermine family members' physical and mental health.<sup>35</sup>

Aside from the trauma of the urgent and involuntary evacuation they demand,<sup>36</sup> court-ordered evictions bring particular economic harm because the court records themselves can have long-lasting impacts on a person's credit score and rental report.<sup>37</sup> This restricts tenants' ability to find new

26. EVICTION LAB, <https://evictionlab.org> (last visited Jan. 29, 2022).

27. *National Estimates: Eviction in America*, EVICTION LAB (May 11, 2018), <https://evictionlab.org/national-estimates>.

28. *Id.*

29. *See* Summers, *Civil Probation*, *supra* note 5 (highlighting the high percentage of cases that end in settlement).

30. Such settlements allow tenants to avoid judgments that will harm their credit. Unfortunately, the value of such settlements is somewhat limited for tenants, because the mere filing of a case can cause significant damage to a tenant's record. *See* Kathryn A. Sabbeth, *Erasing the "Scarlet E" of Eviction Records*, THE LAB (Apr. 12, 2021), <https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records>.

31. Sabbeth, *supra* note 5, at 64–69 (highlighting eviction as category of civil cases with collateral consequences).

32. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 298–99 (2015) (describing immediate harms); *Id.* at 316–17 (long-term harms).

33. Desmond & Kimbro, *supra* note 32, at 295–96, 299.

34. Desmond & Kimbro, *supra* note 32, at 296.

35. *See id.*; Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequality Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 70–73 (2016).

36. *See, e.g.*, Eli Saslow, *The Return of the 10-Minute Eviction*, WASH. POST (Dec. 15, 2021), <https://www.msn.com/en-us/news/us/the-return-of-the-10-minute-eviction/ar-AARPLlk?ocid=Msedgntp>.

37. Sabbeth, *supra* note 30.



housing and to participate in other aspects of civil society.<sup>38</sup> Notably, the mere filing of an eviction case in court, without even reaching judgment, can damage a tenant's rental record and access to future housing.<sup>39</sup>

Many think of eviction as the unfortunate result of difficult circumstances, but it can also be the cause of far more difficulty to come. Studies have shown that involuntary moves often push tenants into “worse”<sup>40</sup> neighborhoods<sup>41</sup>—further from community supports, job opportunities, resource-rich schools, and public infrastructure like transportation and parks<sup>42</sup>—and toward areas with increased risks of violence.<sup>43</sup> Under time pressure and with limited options, evicted families bunk with others in crowded spaces or move into residences that are dangerous, with substandard conditions that violate minimum housing code requirements.<sup>44</sup> Too often, the alternative to crowded or dangerous conditions is homelessness, which brings about its own unique threats to families' physical, emotional, and economic well-being.<sup>45</sup> Ultimately, the event of an eviction creates setbacks that lead to sustained poverty<sup>46</sup> and increased segregation and inequality.<sup>47</sup>

38. Sabbeth, *supra* note 30.

39. Sabbeth, *supra* note 30.

40. I put “worse” in quotes because, to the extent that eviction results increased racial segregation, I want to be clear that moving into a neighborhood with a larger percentage of Black or brown tenants is not inherently worse. What can make it truly worse is if that neighborhood lacks access to amenities. See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 477–78 (1976) (highlighting the difference between an inherent desirability of proximity to whiteness—as described in *Brown v. Board of Education*—and whiteness as a privilege that bestows benefits like a solid education); see also Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2400 (2021).

41. See Desmond, *Urban Poverty*, *supra* note 25, at 118.

42. 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) (“[Housing is] the central setting for so much of one’s personal and family life as well as the locus of mobility opportunities, access to community resources and societal status.”).

43. Nancy A. Denton, *Segregation and Discrimination in Housing*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 61, 71 (Rachel G. Bratt et al., eds. 2006).

44. Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants’ Rights*, 27 GEO J. ON POVERTY L. & POL’Y 97, 107–11 (2019) (describing why tenants move into substandard conditions).

45. Sabbeth, *supra* note 5, at 389–91; Sara Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.–C.L. L. REV. 367, 389–91 (2021); Deborah K. Padgett, *Homelessness, Housing Instability and Mental Health: Making the Connections*, 44 B.J. PSYCH BULLETIN 197, 197 (2020); Desmond & Kimbro, *supra* note 32, at 299.

46. See sources cited *supra* note 45.

47. Sabbeth, *supra* note 30. (“Eviction records limit access to housing and thereby exacerbate inequality. . . . Because so many landlords use eviction records in their assessment of potential tenants, the exclusion of residents on this basis contributes to housing segregation.”); see also Denton, *supra* note 43, at 71–72 (describing a “the interactive, self-reinforcing nature of residential segregation” in the context of home ownership).

### A. *Eviction Causes in the Market*

So, what are the causes of eviction, and why is it so widespread? The eviction phenomenon may be understood as subset of the problem of housing affordability. Many policy analysts argue that there is a housing shortage.<sup>48</sup> They view this as a problem of mismatched supply and demand, suggesting that there are literally not enough structures to house people.<sup>49</sup> They undertake sophisticated analyses of methods for generating an increased supply of housing stock, ranging from improving zoning laws<sup>50</sup> to offering incentives to private developers.<sup>51</sup> These discussions can be useful, but they portray housing as a scarce resource.

Another frame for the problem of affordable housing is to examine the market conditions that make housing *appear* scarce. This emphasizes the significance of social structures, rather than just physical structures.<sup>52</sup> That perspective is important for analyzing the threats to maintaining housing that already exists and for conceptualizing the distribution questions that underlie the apparent absence of housing as a resource.<sup>53</sup>

Looking at market conditions reveals a significant gap between the cost of housing and income streams available to cover it. For the past few decades, pre-pandemic, housing costs have grown faster than inflation, while wages and other income supports have stagnated or disappeared.<sup>54</sup> Rent as a share of household budget has grown, so it no longer occupies one-third of a family's budget, but often consumes fifty percent or more.<sup>55</sup>

48. See, e.g., Kathleen Howley, *Housing Shortage Likely to Outlast Other Pandemic-Driven Scarcities*, FORBES (Oct. 24, 2021).

49. Uri Berliner, *The Housing Shortage is Significant. It's Acute for Small, Entry-Level Homes*, NPR (Sept. 4, 2021) ("The country is nearly 4 million homes short of demand.")

50. See, e.g., Solomon Greene, & Ingrid Gould Ellen, *Breaking Barriers, Boosting Supply: How the Federal Government Can Help Eliminate Exclusionary Zoning*, URBAN INSTITUTE 1, 2–4 (2020).

51. See Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, NYU FURMAN CENTER (2018).

52. See Ezra Rosser, *Shelter, Mobility, and the Voucher Program*, 85 BRIGHAM-KANNER PROP. RIGHTS J. 85, 88 (2021) (describing federal government's "move from brick-and-mortar construction [of public housing] and towards rental subsidies, i.e., vouchers").

53. Cf. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019) (describing how in the 1960s and 1970s, the nation's first programs to encourage Black homeownership ended in Black foreclosures and property losses).

54. See Desmond & Kimbro, *supra* note 32, at 297–98 (summarizing literature).

55. Whitney Airgood-Obyrcki, Alexander Hermann & Sophia Wedeen, *The Rent Eats First: Rental Housing Unaffordability in the US*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. 1 (2021), [https://www.jchs.harvard.edu/sites/default/files/research/files/harvard\\_jchs\\_rent\\_eats\\_first\\_airgood-obrycki\\_hermann\\_wedeen\\_2021.pdf](https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_rent_eats_first_airgood-obrycki_hermann_wedeen_2021.pdf) ("Even before the COVID-19 pandemic, renters in the United States were facing a housing affordability crisis. Nearly a quarter of renter households were spending more than half of their incomes on rent each month."); Andrew Aurand, Dan Emmanuel, Ikra Rafi, Dan Threet & Diane Yentel, OUT OF REACH: THE HIGH COST OF HOUSING, NAT'L LOW INCOME HOUS. COAL. 8 (2021) [hereinafter OUT OF REACH], [https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach\\_2021.pdf](https://nlihc.org/sites/default/files/oor/2021/Out-of-Reach_2021.pdf) ("Prior to the pandemic . . . 85% of extremely low-

When rent eats a big share of the budget, it creates two problems. First, rent gets prioritized, so people have less left for healthcare, food, toiletries, and other essentials, not to mention the small treats that can help make life worth living.<sup>56</sup> Second, people are barely able to cover housing costs, and any sudden loss of income or increase in expenses, such as reduced work hours or a car maintenance emergency, will make the challenges of housing costs insurmountable. A person can fall behind on rent for one month and find herself in eviction court.<sup>57</sup>

The gap between housing costs and family income tells part of the story of why this happens, but it still leaves out a few pieces. For one, why does this gap exist between family resources and the cost of housing? For another, why does that gap result in people losing their homes? For the answers to these questions, we turn to law.

### B. *Eviction Causes in the Law*

As John Fabian Witt reminds us in *American Contagions*, laws of the market are not natural but rather constructed by society. Professor Witt explains, “For most people living in the United States, the law of the marketplace—the basic rules of private property, contract law and tort law—determine[ ] access to basic needs. Labor law set[s] the terms of people’s employment.”<sup>58</sup> If people cannot earn enough to pay for their housing, and the government provides neither housing nor the financial support to purchase it, these are not natural occurrences based on something essential to housing, but rather they are the products of how entitlements are defined and enforced.<sup>59</sup> The market does not act independent from law. Moreover, there is no such thing as the absence of regulation; the question is only what kind of regulation exists and what kinds of activity does it support or undermine.<sup>60</sup> In other words, there is never a legal vacuum but always a legal environment that shapes outcomes.

Multiple, varied sets of laws come into play in creating the eviction crisis. It is impossible to catalogue them all here, but these are some of the most important. First, on the income side of the equation, labor laws and

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income renters could not afford their rent, and 70% were spending more than half of their incomes on housing costs.”).

56. Airgood-Obrycki, Hermann & Wedeen, *supra* note 55, at 3 (“And with high housing costs that consume a substantial portion of household income, there is often little money left over to cover basic needs.”); OUT OF REACH, *supra* note 55, at 8 (“Severely housing cost-burdened households have to sacrifice other basic necessities to pay the rent—to cut back on basic nutrition or forgo needed medical care.”)

57. Airgood-Obrycki, Hermann & Wedeen, *supra* note 55, at 3 (“Rent is also an expense that occurs on a fixed schedule and must be paid or the household will face eviction.”).

58. WITT, *supra* note 7, at 129.

59. Sabbeth, *supra* note 44, at 107–11.

60. DAVID MADDEN & HERBERT MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 46–47, 131 (2016).

public benefits laws shape family earnings.<sup>61</sup> Second, regulations that encourage the commodification of housing, its sale and rental for profit, and particular forms of investment in it determine how expensive it will be.<sup>62</sup> These financial circumstances are created by policy choices. As one example, laws governing real estate investment trusts support the treatment of real estate as a liquid commodity and thereby shape the market for homes.<sup>63</sup>

Third, laws of property and contracts define who is an owner, who is a tenant, what are the benefits and burdens of each, and which members of society occupy each position.<sup>64</sup> That eviction is not a natural phenomenon is underscored by the fact that it occurs for members of particular social groups far more than others. Black women with children are dramatically overrepresented.<sup>65</sup> Intentional discrimination is likely one of the reasons for this.<sup>66</sup> I have written in detail elsewhere about additional reasons why Black women and their children are so frequently impacted.<sup>67</sup> For purposes of this paper, however, I want to focus on the impact of laws, and here I will highlight one particularly large and important category of laws.

The circumstances of renters in this country cannot be accurately understood without appreciating the far-ranging consequences of the laws that have supported the historical and present-day theft of labor and land from Black Americans and other people of color, while generating white wealth and promoting white ownership. These laws stretch from those permitting white colonists' theft of land from Native Americans,<sup>68</sup> to laws authorizing the ownership of Black people and their products during slavery and beyond,<sup>69</sup> to those that defined racial categories and reserved privileges for whites during Jim Crow,<sup>70</sup> to others explicitly excluding Black Americans from federal subsidies for home ownership and other wealth building op-

61. WITT, *supra* note 7, at 129.

62. MADDEN & MARCUSE, *supra* note 60, at 46–47, 131.

63. MADDEN & MARCUSE, *supra* note 60, at 34.

64. *See also* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1720–21 (1993) (describing how whiteness was embedded in the definition of property rights and who could exercise them, while Black Americans became commodified as objects of property).

65. Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653–56 (2020).

66. *See* Racial Discrimination and Eviction Policies and Enforcement in New York: A Report of the New York Advisory Committee to the U.S. Commission on Civil Rights 83–86, 106–07 (March 2022).

67. *See* Sabbeth, *Housing Defense*, *supra* note 5, at 90–94; Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022) (manuscript at 13–15).

68. *See generally* BRENNAN BHANDAR, COLONIAL LIVES OF PROPERTY (2018); K-Sue Park, *Race, Innovation, and Financial Growth: The Example of Foreclosure*, in HISTORIES OF RACIAL CAPITALISM 27 (Destin Jenkins & Justin Leroy eds., 2021) (describing creation of foreclosure as legal device for white colonists to steal land from Native Americans).

69. *See, e.g.*, Harris, *supra* note 64, at 1718–21.

70. *See, e.g.*, Frances L. Edwards & Grayson Bennett Thomson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 145, 151–55 (2010).

portunities offered to whites,<sup>71</sup> to those that supported the creation and exploitation of subprime markets for Black families,<sup>72</sup> and to those that today continue to permit discrimination<sup>73</sup> and perpetuate generational wealth<sup>74</sup> and poverty.<sup>75</sup> It is no accident that Black Americans are overrepresented among tenants,<sup>76</sup> given that they have been repeatedly deprived of the status of ownership.

It is also no coincidence that the rights of property owners, particularly the right to exclude,<sup>77</sup> have been defined so robustly, while tenants' rights have been paltry.<sup>78</sup> Laws define who occupies each legal category—tenant or owner—and what will be the significance of that status in terms of rights

71. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Mehrsa Baradaran, *Jim Crow Credit*, 9 U.C. IRVINE L. REV. 887, 887 (2019) (describing how the state created a “separate and unequal credit market—high-interest, non-bank, installment lenders in black ghettos and low-cost, securitized, and revolving credit card market in the white suburbs”).

72. See TAYLOR, *supra* note 53.

73. See Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 3 UTAH L. REV. 389, 427–28 (2014); Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PRO PUBLICA (June 25, 2015, 1:26 PM), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> (describing how the federal government declined to enforce the Fair Housing Act); Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. FORUM 571, 578–82 (2015).

74. See DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021).

75. See SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* (2021).

76. U.S. DEP’T OF HOUS. AND URBAN DEV. OFF. OF POL’Y DEV. & RSCH., *AMERICAN HOUSING SURVEY 2017 RESULTS* (2018), <https://www2.census.gov/programs-surveys/ahs/2017/info/graphs/2017%20Housing%20Profile%20Renters%20Profile.pdf>.

77. See *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (prioritizing right to exclude as fundamental); Harris, *supra* note 64, at 1736 (“Many theorists have traditionally conceptualized property to include the exclusive rights of use, disposition, and possession, with possession embracing the absolute right to exclude. The right to exclude was the central principle, too, of whiteness as identity, for mainly whiteness has been characterized, not by an inherent unifying characteristic, but by the exclusion of others deemed to be ‘not white.’”). Tenants’ right to exclude is a subject worthy of a separate essay. Compare Sherman P. Kimball, *Landlord’s Right to Enter*, 46 CHI. B. REC. 438, 438–39 (1965), with Jason Paul Bailey, *Are Landlords the New Police? The Unintended Consequences of the Arkansas Residential Landlord-Tenant Act’s Access Provision*, 67 ARK. L. REV. 627, 628 (2014), and NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 57 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

78. See Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 PENN. L. REV. (forthcoming) (manuscript at 54–57) (noting that “anti-tenancy” is “deeply embedded in the common law of property” but also that Black people in the U.S. South after the Civil War were often sharecroppers, and anti-tenancy doctrines discriminated against them), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4068843](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068843).

and freedoms.<sup>79</sup> Those rights and freedoms then shape our seemingly “neutral”<sup>80</sup> market-based relations.

Eviction depends on the statutes and common law that define the rights and responsibilities of landlords and tenants. These include the substantive rights of property ownership and rental, as well as the law governing hierarchies among rights when they conflict. The law also governs the procedures for what should happen when an owner of real estate wants to seize possession of a property where a tenant lives.<sup>81</sup> The law determines the process for adjudication of such disputes. As will be discussed further in Part II, the court process has been designed to promote easy, swift evictions.<sup>82</sup> Before turning to the courts’ operations during the pandemic, the next subpart will first introduce the social context of eviction in the pandemic.

### C. *Eviction in the Pandemic: Inequality Exacerbated*

Inequality is embedded in eviction, and Professor Witt’s book emphasizes that the pandemic, too, is entangled with inequality. He offers important observations about how, throughout history, the spread of disease has depended on social circumstances and varied by social status.<sup>83</sup> COVID-19 has been no different. As of the time of this writing, the death rates due to COVID-19 for Black Americans and other people of color have been significantly higher than for whites.<sup>84</sup> The statistics provide a gruesome illustration of how, like eviction, disease is not merely natural but socially constructed.

The intersection between the pandemic and the eviction phenomenon exacerbated the inequalities of eviction in at least three ways. First, as is well-known, the pandemic brought devastating economic consequences to millions. Because of the economic fallout of the pandemic, the threat of eviction spread dramatically. At one point, the Aspen Institute predicted that approximately forty million people were at risk.<sup>85</sup> Although millions of

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79. *Id.* at 6–52 (summarizing doctrines across a wide range of areas—from voting to tax to free speech—that privilege owners over tenants).

80. WITT, *supra* note 7, at 12.

81. These laws vary from state to state but share many similarities. *See generally* LSC Eviction Laws Database, LEGAL SERVS. CORP. (Jan. 1, 2021), <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database>.

82. *See infra* Part II.A (describing eviction procedures).

83. *See e.g.*, WITT, *supra* note 7, at 128–32.

84. Carla K. Johnson, Olga R. Rodriguez & Angeliki Kastanis, *As US COVID-19 Death Toll Nears 600,000, Racial Gaps Persist*, ASSOCIATED PRESS (June 14, 2021), <https://apnews.com/article/baltimore-california-coronavirus-pandemic-race-and-ethnicity-health-341950a902affc651dc268dba6d83264>.

85. Emily Benfer, David Bloom Robinson, Stacy Butler, Lavar Edmonds, Sam Gilman, Katherine Lucas McKay, Lisa Owens, Neil Steinkamp, Diane Yentel & Zach Neumann, *The COVID-19 Eviction Crisis: An Estimated 30-40 Million People in America Are at Risk*, ASPEN INST. (Aug. 7, 2020), <https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk>.

dollars have been pledged for rental assistance, as of the time of this writing, that money largely has not reached those who need it, and millions of evictions are still predicted.<sup>86</sup>

Evictions are not simply the product of inequality but the cause of it,<sup>87</sup> and the far-reaching economic consequences of the pandemic mean that millions more families are in danger of being pushed further down the social ladder. If evicted, they are more likely to experience the many physical, emotional, and economic consequences of eviction.<sup>88</sup> In particular, the records of the evictions during the pandemic will follow the tenants for years to come, frustrating their attempts to recover.<sup>89</sup>

Second, the race and gender inequities of eviction are likely multiplying. Prior to the pandemic, empirical evidence showed that women and people of color were more likely to be named in eviction cases and more likely to be actually evicted as a result of those cases.<sup>90</sup> Eviction already impacted Black women with children more than any other group.<sup>91</sup>

The people hit hardest by the pandemic are the same groups at disproportional risk of eviction before it. The job sectors that experienced the most downturn were those with low-wage-earners, overwhelmingly people of color, especially women who worked in childcare.<sup>92</sup> Additionally, women experienced job losses because they provided most of the care for children during online school and for relatives who become sick.<sup>93</sup> Although we lack empirical evidence showing increased racial and gender inequality in pandemic evictions, we may still see it in the months and years ahead.<sup>94</sup>

Finally, the pandemic has made the health threats of eviction increasingly dangerous. Prior to the pandemic, eviction and resulting homelessness

86. Glenn Thrush & Alan Rappeport, *About 89% of Rental Assistance Funds Have Not Been Distributed, Figures Show*, N.Y. TIMES (Aug. 25, 2021, 7:13 PM), <https://www.nytimes.com/2021/08/25/us/politics/eviction-rental-assistance.html>.

87. See *supra* notes 32–46 and accompanying text.

88. See *supra* notes 32–46 and accompanying text.

89. See Sabbath, *supra* note 30.

90. Hepburn, Louis & Desmond, *supra* note 65, at 653–55.

91. Hepburn, Louis & Desmond, *supra* note 65, at 659.

92. Naomi R. Cahn & Linda C. McClain, *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 4 (2021); Catherine Powell, *The Color and Gender of COVID: Essential Workers, Not Disposable People*, THINK GLOB. HEALTH (June 4, 2020), <https://www.thinkglobalhealth.org/article/color-and-gender-covid-essential-workers-not-disposable-people>; see also Angela P. Harris, Amy Kapczynski & Noah Zatz, *Where Is the Political Economy?*, LPE PROJECT (June 21, 2021), <https://lpeproject.org/blog/where-is-the-political-economy> (arguing that political economy must be defined to include childcare).

93. Claire Cain Miller, *The Pandemic Created a Child-Care Crisis. Mothers Bore the Burden.*, N.Y. TIMES (May 17, 2021), <https://www.nytimes.com/interactive/2021/05/17/upshot/women-workforce-employment-covid.html>; Ella Koeze, *A Year Later, Who Is Back to Work and Who Is Not?*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/interactive/2021/03/09/business/economy/covid-employment-demographics.html>.

94. *But see* Peter Hepburn et al., *U.S. Eviction Filing Patterns in 2020*, 7 SOCIUS 1, 9–10 (2021) (showing that racial and gender disparities in eviction persisted in the pandemic, but not demonstrating any increase and potentially suggesting a very slight decrease).

created long-lasting problems for mental and physical health, particularly but not only for children.<sup>95</sup> COVID-19, however, has created new risks and increased the likelihood of others. The frequent consequences of eviction—being pushed into crowded living arrangements, common spaces like shelters or public streets, or substandard housing units—raise more acute risks of illness and even death.<sup>96</sup>

Eviction in the pandemic compounds pre-existing inequities of the health care system. People of color are already more vulnerable.<sup>97</sup> This is due to a constellation of factors ranging from unsafe physical environments,<sup>98</sup> to the stresses of racism,<sup>99</sup> to the minimizing of their reports of pain,<sup>100</sup> and overall lesser medical treatment.<sup>101</sup>

Borrowing from the insights of historian Frank Snowden, Professor Witt argues that “the legal system’s responses to the coronavirus controversies” reveal a great deal about our “society’s structure” and “political priorities.”<sup>102</sup> The legal system’s response to the prospect of millions of evictions has been no exception.

## II. EVICTION COURTS IN A PANDEMIC

To the extent that government actors have sought to prevent the threatened tsunami of evictions during the pandemic, they have done so primarily in two ways. First, they have approved issuance of funds so that landlords may collect rent even if tenants are unable to pay it.<sup>103</sup> Second, at

95. See sources cited *supra* note 45.

96. Emily A. Benfer, David Vlahov, Marissa Y. Long, Evan Walker-Wells, J.L. Pottenger, Jr., Gregg Gonsalves & Danya E. Keene, *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1, 2 (2021); Kathryn M. Leifheit, Sabriya L. Linton, Julia Raifman, Gabriel L. Schwartz, Emily A. Benfer, Frederick J. Zimmerman & Craig Evan Pollack, *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, 190 AM. J. EPIDEMIOLOGY 2563, 2563 (2021).

97. See Martha A. Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 3–4 (2008).

98. Kelli DePriest & Arlene Butz, *Neighborhood-Level Factors Related to Asthma in Children Living in Urban Areas: An Integrative Literature Review*, 33 J. SCH. NURSING 8, 8–9 (2017); David Mudarri & William J. Fisk, *Public Health and Economic Impact of Dampness and Mold*, 17 INDOOR AIR 226, 229, 232–35 (2007); OFFICE OF THE SURGEON GENERAL, U.S. DEP’T OF HEALTH & HUMAN SERVICES., *THE SURGEON GENERAL’S CALL TO ACTION TO PROMOTE HEALTHY HOMES VII* (2009).

99. Jenna Wortham, *Racism’s Psychological Toll*, N.Y. TIMES MAG. (June 24, 2015), <https://www.nytimes.com/2015/06/24/magazine/racisms-psychological-toll.html>.

100. Sabbath, *supra* note 44, at 125.

101. Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL’Y 47, 88 (2014).

102. WITT, *supra* note 7, at 120–21 (quoting FRANK M. SNOWDEN, *EPIDEMICS AND SOCIETY: FROM THE BLACK DEATH TO THE PRESENT* 7 (2019)).

103. In addition to rental assistance, government actors have approved childcare tax credits, increased unemployment benefits, and other supplements which help tenants pay rent.



the local, state, and federal levels, they have created partial<sup>104</sup> eviction moratoria.

The issuance of rental assistance reveals much about our “society’s structure” and “political priorities.”<sup>105</sup> The size of rental assistance grants is unprecedented in our nation’s history, which might appear to suggest a break from the past, but the model’s steadfast commitment to maintaining tenants’ obligation to pay rent, and landlords’ entitlement to collect it, is perhaps more telling. Just for comparison, another option could have been to forgive rent for low-income tenants<sup>106</sup> and to provide financial support directly to landlords who demonstrate need.<sup>107</sup> Imagine a program that did not put tenants in the middle but required landlords to apply and show need, quality of conditions, and long-term commitment to maintaining decent and affordable housing.<sup>108</sup> Yet, instead of cancelling the rent,<sup>109</sup> we have erected structures that leave the burden—for administrative efforts,<sup>110</sup> stress if the disbursements flow more slowly than the court dockets,<sup>111</sup> and the ultimate cost if landlords thwart the rescue effort<sup>112</sup>—on tenants. And re-

104. All eviction moratoria include some exceptions.

105. WITT, *supra* note 7, at 120–21 (quoting FRANK M. SNOWDEN, *EPIDEMICS AND SOCIETY: FROM THE BLACK DEATH TO THE PRESENT* 7 (2019)).

106. See, e.g., Rent and Mortgage Cancellation Act of 2020, H.R. 6515, 116th Cong. (2020).

107. See Kathryn A. Sabbeth & Sophie House, *When the Home Is the Hazard: Pandemic Responses Must Address Housing Conditions*, NEXT CITY (Mar. 4, 2021), <https://nextcity.org/urbanist-news/when-the-home-is-the-hazard-pandemic-responses-address-housing-conditions> (recommending assistance directly to landlords, on the condition that they demonstrate need and provide safe, affordable housing).

108. *Id.*

109. Keeanga-Yamahatta Taylor, *Cancel the Rent*, NEW YORKER (May 12, 2020), <https://www.newyorker.com/news/our-columnists/cancel-the-rent>; Sasha Plotnikova, *The Case for Making the Rent Disappear*, L. & POL. ECON. PROJECT: L. & POL. ECON. BLOG (Feb. 23, 2021), <https://lpeproject.org/blog/the-case-for-making-rent-disappear/>.

110. See Annie Lowrey, *The Time Tax*, THE ATL. (July 27, 2021), <https://www.theatlantic.com/politics/archive/2021/07/how-government-learned-waste-your-time-tax/619568> (arguing that in many areas of public benefits, the government has “purposefully made the system difficult, shifting the burden of public administration onto individuals and discouraging millions of Americans from seeking aid. The government rations public services through perplexing, unfair bureaucratic friction. And when people do not get help designed for them, well, that is their own fault. The time tax is worse for individuals who are struggling than for the rich; larger for Black families than for white families; harder on the sick than on the healthy.”).

111. Chris Arnold, *Millions Could Face Eviction with Federal Moratorium Ending and a Logjam in Aid*, NPR (June 10, 2021, 5:01 AM), <https://www.npr.org/2021/06/10/1004046446/millions-could-face-eviction-with-federal-moratorium-ending-and-log-jam-in-aid>; CONG. RSCH. SERV., PANDEMIC RELIEF: THE EMERGENCY RENTAL ASSISTANCE PROGRAM (Oct. 21, 2021), <https://crsreports.congress.gov/product/pdf/R/R46688> (“Treasury data on spending of ERA-1 funds showed that approximately \$7.5 billion of the \$25 billion in ERA-1 funding allocated to states and localities had been spent . . . . The rate of expenditure of ERA-1 funds has caused some to raise concerns . . . .”).

112. Arthur Delaney, *Some Landlords Would Rather Evict Tenants Than Accept Federal Aid*, HUFFPOST (Sept. 17, 2021, 5:45 AM), [https://www.huffpost.com/entry/emergency-rental-assistance-program-landlords\\_n\\_61439bdce4b0d808bf26967e](https://www.huffpost.com/entry/emergency-rental-assistance-program-landlords_n_61439bdce4b0d808bf26967e); Ben Sessoms, *160 Tenants Behind on Rent Applied for Aid. Their Landlord Won’t Accept the Money*, NEWS & OBSERVER (Oct. 2, 2021, 9:49 AM), <https://www.newsobserver.com/article254471218.html#storylink=cpy>; see also NAT’L

ardless of whether a landlord is a “mom-and-pop” seeking to cover the expenses of maintenance,<sup>113</sup> or multinational investment firm seeking to maximize profits without even fulfilling its basic responsibilities under the local housing code,<sup>114</sup> making the owner financially whole has been treated as a first principle.

A handful of jurisdictions have increased substantive protections for tenants.<sup>115</sup> Here, local officials have thrown support behind measures to prevent evictions, and their collateral consequences, both in the pandemic and beyond.<sup>116</sup> These have included “just cause” laws that require landlords to state a reason for refusing to renew a lease, records-sealing measures that mitigate some of the damage done by the collection and distribution of court records of eviction filings and judgments, right-to-counsel initiatives, and others.<sup>117</sup>

At the same time, courts have continued with evictions. The U.S. Supreme Court invited<sup>118</sup> and then embraced constitutional and statutory challenges to the eviction moratoria,<sup>119</sup> while some lower courts simply defied

HOUS. L. PROJECT, EVICTIONS SURVEY: WHAT’S HAPPENING ON THE GROUND 2–3 (2021), <https://www.nhlp.org/wp-content/uploads/NHLP-evictions-survey-2021.pdf> (describing landlord refusal of funds, misrepresentations regarding receipt of funds, and pursuit of evictions even after funds collected).

113. See Jerusalem Demas, *The Pandemic Was Hard for Everyone — Except Maybe Landlords*, VOX (Nov. 4, 2021, 9:30 AM), <https://www.vox.com/2021/11/4/22759224/landlords-rent-relief-eviction-moratorium-cash-balance-covid-19> (describing “the narrative about the plight of the small landlord”).

114. See, e.g., Marisa Peñaloza, *Housing Conditions in This Low-Income Neighborhood Pushed Tenants to Sue the Landlord*, NPR (July 22, 2021, 8:16 AM), <https://www.npr.org/2021/07/22/1018018025/housing-low-income-neighborhood-tenants-landlord-lawsuit> (describing business model of investment firm seeking to maximize profits, while tenants live in squalor due to landlords’ negligence of basic maintenance duties).

115. Will Parker, *New Local Laws Aim to Stop Rising Evictions*, WALL ST. J. (Dec. 25, 2021, 5:30 AM), <https://www.wsj.com/articles/new-local-laws-aim-to-stop-rising-evictions-11640428202>.

116. Amanda Holpuch, *Tenant Organizers Poised to Secure Significant Protections for US Renters*, GUARDIAN (Oct. 8, 2021, 5:00 AM), <https://www.theguardian.com/us-news/2021/oct/08/tenant-organizers-protections-renters>.

117. *Id.*; Cortlynn Stark, ‘A Win for Kansas City’: Council Passes Tenant’s Right to Counsel. Here’s Why It Matters, KAN. CITY STAR (Dec. 9, 2021), <https://www.msn.com/en-us/news/us/a-win-for-kansas-city-council-passes-tenants-right-to-counsel-heres-why-it-matters/ar-AARFjQc>;

Conor Morris, *Cleveland Right to Counsel Shows Promising Early Results for Tenants and Some Landlords*, WKSU (July 2, 2021, 5:00 AM), <https://www.wksu.org/government-politics/2021-07-02/cleveland-right-to-counsel-shows-promising-early-results-for-tenants-and-some-landlords>; Allison Dikanovic, *Tenants’ ‘Right to Counsel’ Expands Citywide. Here’s Why that’s a Big Deal*, THE CITY (May 20, 2021, 5:44 PM), <https://www.thecity.nyc/2021/5/20/22444023/right-to-counsel-expands-citywide-why-thats-a-big-deal-tenants-nyc>.

118. In Kavanaugh’s concurrence with the majority’s June 2021 decision not to strike down the eviction moratorium at that time, he encouraged the challengers to return later that summer: “I vote at this time to deny the application to vacate the District Court’s stay of its order. In my view, clear and specific congressional authorization (via new legislation) would be necessary for the CDC to extend the moratorium past July 31.” *Alabama Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2320, 2321 (2021) (citations omitted).

119. *Id.* at 2486.

them.<sup>120</sup> Courts have prioritized owners' entitlement to evict over tenants' entitlement to shelter.<sup>121</sup> These judges have made it crystal clear that the moratoria contravened what they understand as a core function of the courts—to protect owners' control over property above all else.<sup>122</sup>

The law of eviction courts reflects this priority. As Part II.A will show, governing laws structure eviction courts to promote landlords' ability to obtain quick judgments. The design of eviction courts emphasizes speed, while it deemphasizes testing the landlord's capacity to meet the burden of proof.<sup>123</sup> The courts' design features do not lend themselves to careful parsing of claims and defenses. As will be discussed in Part II.B, the design of eviction courts helps to explain the courts' failure reliably to implement the eviction moratoria.<sup>124</sup>

### A. Eviction Court Design

The structure of eviction courts depends in part on their jurisdiction, as designed by state and local statutes.<sup>125</sup> Depending on the state and locality, an eviction case can be heard in the first instance in a lower-level court that handles a mix of matters, housing cases only, or evictions only.<sup>126</sup> For purposes of clarity, I will refer to all courts handling eviction cases as eviction courts.

120. See, e.g., Megan Kimble, *The CDC Halted Evictions. Texas Judges Are Proceeding Anyway.*, TEX. OBSERVER (Aug. 16, 2021, 9:10 AM), <https://www.texasobserver.org/the-cdc-halted-evictions-texas-judges-are-proceeding-anyway>.

121. See, e.g., *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (“The equities do not justify depriving the [landlords] of the District Court’s judgment in their favor. The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery. . . . [P]reventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.”). Incidentally, evicted tenants will not likely pay any back rent, so the Court’s decision to permit eviction out of concern for landlords’ right to collect rent must rest on an assumption that the market will provide new tenants to pay future rents. Even if that assumption is correct, eviction will not make landlords whole for any past due rent, whereas what could make them whole would be to halt evictions and instead to accept the approximately 50 billion dollars of rental assistance approved by Congress.

122. *Id.*; see *infra* Part III (analyzing the social function of eviction courts).

123. See also Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 80 AM. SOCIO. REV. 909, 925 (2015) (summarizing literature showing “average time consumed by each case often two minutes or less” and “judges often shortcut the law: they do not hold landlords to statutory burdens of proof”).

124. See, e.g., Kristian Hernández & Cristian ArguetaSoto, *Local Judges Decide Fate of Many Renters Facing Eviction*, PEW (Aug. 13, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/13/local-judges-decide-fate-of-many-renters-facing-eviction> (describing local variation in applicability of federal moratorium).

125. Federal law largely avoided the subject of eviction prior to the pandemic, but the federal moratoria also impacted the courts’ subject matter jurisdiction, as they carved out a class of cases in which the courts could not issue the relief previously available.

126. See *LSC Eviction Laws Database*, *supra* note 81 (Question 16 shows the range of courts hearing evictions).

In a surprising number of jurisdictions, eviction courts are fora designed to resolve disputes over small amounts of money: small claims courts.<sup>127</sup> It is telling that the business of permanently ordering people out of their homes, which is a form of fairly significant injunctive relief, is assigned to these courts otherwise entrusted only with small matters. Query whether one forum is appropriate for both types of cases. Do they share something in common, either in legal complexity or in social importance?<sup>128</sup>

Even in those states that do not explicitly identify evictions as small matters, that portrayal of them is evident in the rules that govern their adjudication. Across the United States, despite some variation, eviction courts possess certain shared design features.<sup>129</sup> Here are ten key design features that shape their culture and outcomes.

### 1. *Low Filing Fees*

The laws governing filing fees make it less expensive to file a civil lawsuit in eviction court than in other courts.<sup>130</sup> Eviction filing fees range from \$35 to \$285, with most states' fees at around \$50.<sup>131</sup> Filing other types of state court cases tends to cost roughly twice as much as filing a civil action for eviction.<sup>132</sup> Nationally, the typical eviction filing fee of approximately \$50 is seven times smaller than the fee for filing in federal court.<sup>133</sup> Low filing fees contribute to making it cheaper to evict a tenant from a home than to obtain most other forms of civil relief.

127. See, e.g., Ajax Wooley, *Eviction in Durham Isn't a "Small Claim" Anymore*, DATAWORKS, (Mar. 11, 2022) <https://dataworks-nc.org/2022/eviction-in-durham-isnt-a-small-claim-anymore/>; see also *LSC Eviction Laws Database*, *supra* note 81 (Question 16) (identifying various courts that hear eviction cases).

128. See Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 302 (2018) [hereinafter "*Simplicity*"] (critiquing the perception that poor people's legal issues are simple); Kathryn A. Sabbeth, *Market-Based Law Development*, LPE PROJECT (July 21, 2021) [hereinafter "*Market-Based Law*"], <https://lpeproject.org/blog/market-based-law-development> (arguing that treating poor people's legal issues as simple, and funding poor people's courts accordingly, reflects political choices).

129. See *LSC Eviction Laws Database*, *supra* note 81.

130. See SARAH ABDELHADI & RANYA AHMED, *FAST & CHEAP: THE SPEED AND COST OF EVICTING TENANTS FOR NONPAYMENT OF RENT 8* (2021), <https://storymaps.arcgis.com/stories/f644d5b4deb04a158f6929d928035af9> ("As of January 2021, 22 states/territories have eviction filing fees below \$100, 13 of which are below \$50. Because they can be considered operating expenses, landlords may be able to deduct filing fees and other legal costs associated with eviction from their federal income taxes, making eviction an even cheaper option.").

131. See *LSC Eviction Laws Database*, *supra* note 81.

132. See e.g., N.C.G.S. § 7A-305 (charging \$180 to file a superior court action, \$150 to file a district court action, and \$96 to file in the small claims courts that hear evictions).

133. See *FAQS: Filing a Case*, U.S. CTS., <https://www.uscourts.gov/faqs-filing-case> ("The current fee [for filing a civil action in district court] is \$350.").

## 2. Shortened Timeframe

State statutes generally refer to eviction cases as “summary” proceedings, which reflects that they are designed and expected to move quickly.<sup>134</sup> After service of a summons and complaint, civil litigation typically allows the defendant twenty to thirty days to file an answer.<sup>135</sup> Tenants facing eviction from their homes, however, are typically required to answer—and also to prepare fully for trial—within three to fourteen days after service of the complaint.<sup>136</sup> The U.S. Supreme Court approved these short timeframes, upholding as constitutional an Oregon statute that allowed six days to answer and prepare for trial, on the basis that tenants’ defenses are too simple to deserve more time.<sup>137</sup>

Importantly, in the same decision as it approved these short timeframes, the Court also approved Oregon’s substantive restrictions on the defenses tenants may raise. The Court concluded that “the simplicity of the issues in the typical [eviction] action will not usually require extended trial preparation and litigation,” at the same time it ruled in favor of restricting those issues.<sup>138</sup> The ruling thereby relies on a circular logic or at least creates a self-fulfilling prophecy.<sup>139</sup> Given the Court’s role in creating precedent, its treatment of eviction as simple simultaneously justifies and perpetuates the speed of the process.<sup>140</sup>

Speedy processes not only sacrifice careful analyses and accurate outcomes,<sup>141</sup> but also they increase the bargaining power of plaintiffs.<sup>142</sup> Designing eviction courts to process cases quickly carries implications for the

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134. Spector, *supra* note 5, at 137 (“A summary proceeding for eviction exists in every state. Despite its different labels—summary process, summary dispossession, or forcible entry and detainer—a basic feature of the proceeding is its limited nature.”).

135. *See, e.g.*, FED. R. CIV. P. 12; N.C. R. CIV. P. 12.

136. *See LSC Eviction Laws Database, supra* note 81.

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

138. *Id.*; *see id.* at 64–69 (approving Oregon provision that forbid consideration of any issue other than whether rent was paid, excluding consideration of the landlord’s breach of the warranty of habitability); *infra* Part II.B.6 (discussing eviction courts’ limits on counterclaims and defenses that tenants may raise).

139. *See Sabbeth, Simplicity supra* note 128, at 302 (arguing that “the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop” whereby the Supreme Court denies the right to counsel to litigants with purportedly “simple” claims, thereby decreasing the availability of lawyers who could develop the common law governing those claims); Sabbeth, *supra* note 44, at 135–37 (arguing that courts “underdevelop” tenants’ rights through “snowballing underenforcement”).

140. *See Sabbeth, Market-Based Law, supra* note 128 (“Assumptions about whose cases are worthy of attention legitimize the simplification of entire bodies of law and de-legalization of lower status courts.”).

141. *See Sabbeth, Simplicity, supra* note 128, at 294.

142. *See id.* at 295–96 (describing how delay can benefit tenant-defendants); *see also* Sabbeth, *supra* note 5, at 110 (describing how plaintiffs’ control over timing of litigation can be used to pressure defendants).

out-of-court relationships between the parties.<sup>143</sup> It also underscores the role that the state plays in those relationships; the state could serve to restrain uses of force or, instead, to bolster and legitimize them.<sup>144</sup> Short timeframes that rush cases to judgment make the courts less like fora for application of the rule of law and more like asset collection devices or means for forcible removal.<sup>145</sup>

### 3. *Limited Discovery*

In ordinary civil litigation, discovery is a significant part of the process and determines outcomes.<sup>146</sup> Civil Procedure Rules 26 through 37, and Rule 45, together provide discovery tools, through which the parties exchange information and evidence to unearth facts in advance of trial. The purposes of the discovery rules include promoting accurate outcomes and fairness, as well as efficient evaluation of settlement alternatives.<sup>147</sup> Yet eviction court rules often do not permit discovery or else require a special request and judicial permission for it.<sup>148</sup> Even when statutes technically permit it, the short timeline between service and trial can make discovery impractical or impossible to complete.

### 4. *Substandard Service Method*

Aside from the shortened timeframe that follows service of the complaint, another aspect of the service of process is also distinct. The majority of states allow landlords to notify tenants of the lawsuits by posting legal papers on the front door of the home and then putting the papers in the *regular* mail, without certification, confirmation, return receipt requested, or

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143. See Sabbeth, *Simplicity*, *supra* note 128, at 295–96 (describing how delay can sometimes provide the only restraint on the exertion of force).

144. *Id.* at 296–98 (describing procedural rules that “erect obstacles between the individual and the force of the state” and noting the violent role of the state that removes evicted tenants by force).

145. See *id.*; Tonya Brito, Kathryn Sabbeth, Jessica Steinberg, & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. (forthcoming 2022) (manuscript at 27–31) (describing how lower civil courts facilitate the transfer of assets from people of color to majority-white corporations or the state itself); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1743 (2022) (describing lower civil courts “as a site for private companies to petition the state for permission to redistribute others’ assets to themselves—permission which appears to be granted frequently without much, if any, scrutiny”).

146. See, e.g., Diego Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. (forthcoming 2022) (on file with author) (manuscript at 1) (describing discovery as “the most distinctive feature of American civil procedure” and as the “backbone” or “central axis” of civil litigation).

147. See *id.* (manuscript at 25) (describing discovery values of “fairness, accuracy, settlement, and regulation”).

148. See *id.* (manuscript at 18–21); *LSC Eviction Laws Database*, *supra* note 81.

other measures to ensure delivery of the papers.<sup>149</sup> In no comparable lawsuit of which I am aware is this a permissible form of service.<sup>150</sup> Service by posting on property might be standard for in rem and quasi in rem cases on the theory that a property's occupant must be a good steward of the property and keep alert for notices posted on it. While the history and motivations behind that legal innovation are beyond the scope of this article,<sup>151</sup> the practical implications today, when so many live in urban spaces, are concerning. Even the U.S. Supreme Court at one point acknowledged that service by posting in an apartment building may not satisfy minimal standards of due process, because removal of postings by children and neighbors can prevent notice from reaching the defendant.<sup>152</sup>

### 5. *Default Judgments*

Perhaps in part because of the last-minute and lower-standard notice requirements for eviction proceedings, a high number of defendants do not appear on their scheduled court dates.<sup>153</sup> Civil procedure rules allow cases to be decided against tenants in their absence; the courts in those cases issue default judgments.<sup>154</sup> We lack full data on the subject, but the most recent study indicates that, in the twenty largest cities in the country, 15 to 50 percent of eviction cases result in eviction by default.<sup>155</sup> Other studies of particular jurisdictions have found the default rate to be closer to 70 or 80 percent.<sup>156</sup>

These defaults are a significant part of how the courts function. Not only is the proportion of eviction cases resolved through default relatively high but, moreover, the issuance of default judgments—which require no merits hearing at all—allows each judge to process hundreds of eviction

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149. See *LSC Eviction Laws Database*, *supra* note 81; see, e.g., JOAN BRANNON, NORTH CAROLINA SMALL CLAIMS LAW 149–50 (2009) (comparing North Carolina's service of process requirements for eviction and those in suits for small sums of money).

150. See FED. R. CIV. P. 4.

151. See Park, *supra* note 68 (describing how innovations in property law reflect agendas of racial capitalism).

152. *Greene v. Lindsey*, 456 U.S. 444, 454–55 (1982).

153. See Judith Fox, *The High Cost of Eviction: Struggling to Contain a Growing Problem*, 41 MITCHELL HAMLINE J. OF PUB. POL'Y & PRAC. 167, 191 (2020) (“Whenever I ask a tenant why he or she failed to appear at their eviction hearing, I get one of two answers: (1) I did not know about it, or (2) it would not matter because everyone gets evicted.”).

154. Civil Procedure Rule 55 governs default judgments, while Rule 54 governs judgments in general.

155. See David Hoffman & Anton Strezhnev, *Evicted by Default* (data table on file with author).

156. See *Evictions in the Courts*, KANSAS CITY EVICTION PROJECT 1, 2 (Jan. 24, 2018), <https://static1.squarespace.com/static/59ba0bd359cc68f015b7ff8a/t/5a68e811e4966bee3fb5d6cd/1516824594549/KC+Eviction+Project+-+Courts+Analysis.pdf> (70% default rate in Jackson County, Missouri); WILLIAM E. MORRIS INST. FOR JUSTICE, INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 1, 8 n.22 (2005), <https://morrisinstituteforjustice.org/helpful-information/landlord-and-tenant/4-final-eviction-report/file> (80% default rate in Maricopa County, Arizona).

cases in a single morning. The smooth functioning of eviction court dockets depends on disposing of many tenants' homes through default.

### 6. *Limits on Defenses and Counterclaims*

When tenants do appear, the defenses and counterclaims they raise are typically restricted by statute. State laws formally circumscribe the defenses that tenants may raise. For example, although every state in the nation (except Arkansas) requires landlords of residential property to provide premises fit for human habitation, and a breach of that duty entitles a tenant to a rent abatement,<sup>157</sup> a number of states explicitly forbid the defense of the warranty of habitability in eviction cases. They instead require tenants to raise the claim affirmatively in a separate suit. In *Lindsey v. Normet*, the same case in which the U.S. Supreme Court deemed eviction cases too simple to require more than six days' notice,<sup>158</sup> the Court also approved this limitation on eviction courts' jurisdiction.<sup>159</sup> There the majority ruled that Oregon could forbid eviction courts' consideration of all issues other than whether rent was paid.<sup>160</sup>

### 7. *Rent Bonds*

Even in those states that permit eviction courts to hear additional defenses, many statutes nonetheless require the tenant to pay a rent bond to the court, on behalf of the landlord, as a condition of asserting them.<sup>161</sup> If a tenant cannot pay the rent bond on time, the tenant automatically loses all rights to the home, although the court has not ruled on the merits of the case. Rent bond statutes vary widely from state to state, and some apply at the first appearance, while others apply only to postponements or appeals.<sup>162</sup> Florida, for example, is among the most drastic: It requires payment of a rent bond to raise any defenses at all. Failure to pay the bond "is deemed an absolute waiver of the tenant's defenses and entitles the landlord to an immediate default for possession without further notice or hearing."<sup>163</sup> In North Carolina, tenants must pay the rent bond to remain in the home during the appeal from small claims court (where the magistrate judges are not lawyers).<sup>164</sup> Even in those states that do not require payment of a rent

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157. Sabbeth, *supra* note 44, at 121–22.

158. See *Lindsey v. Normet*, 405 U.S. 56 (1972); *supra* notes 137–140 and accompanying text (describing *Lindsey*).

159. *Lindsey*, 405 U.S. at 64–65.

160. *Id.*

161. See *LSC Eviction Laws Database*, *supra* note 81; Rent Bond Data by State Chart, on file with author.

162. See *LSC Eviction Laws Database*, *supra* note 81; Rent Bond Data by State Chart, on file with author.

163. F.S.A. § 83.232(2)(b)(5) (1995).

164. N.C. GEN. STAT. § 42-34(b) (2019) (describing rent bonds); see *infra* note 174 and accompanying text (highlighting absence of legally trained judges).



bond upfront, almost all require ongoing payments of rent to maintain possession of the home during the case.<sup>165</sup> For tenants who are paying the majority of their incomes toward their rent,<sup>166</sup> the rent bond requirement can foreclose the opportunity to raise defenses at all.

### 8. *Laws Governing Legal Services*

The ability to articulate defenses and counterclaims depends on some familiarity with the guiding legal principles, which most tenants lack.<sup>167</sup> Yet the governing law in most jurisdictions provides lawyers only to those parties who can afford to pay them.<sup>168</sup> As a result, roughly 90 to 97 percent of tenants do not enjoy representation by counsel, in contrast to the 80 to 90 percent of landlords that do.<sup>169</sup> This decreases tenants' ability to identify defenses, let alone present them in a way that courts will hear.<sup>170</sup>

The underrepresentation of tenants and overrepresentation of landlords not only determines individual outcomes,<sup>171</sup> but also it influences the culture and development of the law of eviction courts.<sup>172</sup> Importantly, tenants and landlords are not only differently situated with respect to representation but also paired against one another in the adversary system, so that pro se parties are regularly matched up against lawyers. As I have described in

165. See Rent Bond Data by State Chart, on file with author.

166. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., MILLIONS OF AMERICANS BURDENED BY HOUSING COSTS IN 2015 (2015), <https://www.jchs.harvard.edu/son2017-housing-cost-burdenstable> (showing percentage of households that are "severely cost-burdened," which means they pay more than 50 percent of their incomes toward rent).

167. See, e.g., Marisa Wojcik, *Wisconsin's Evictions Roller Coaster*, PBS WISC. (Aug. 12, 2021), <https://pbswisconsin.org/news-item/wisconsins-evictions-roller-coaster> ("I ask them if they have a legal defense and they'll say, 'Yes, I lost my job. I've lived here for two years and I've always paid my rent and I lost my job. That's why I haven't been able.' They think that's a perfectly valid defense and it's certainly understandable," explained Burke. "They're very surprised when I tell them that that's not.").

168. See Sabbeth, *Market-Based Law*, *supra* note 128 (explaining how "an intersecting web of regulation governs the market that distributes legal services . . . so that the more capital a party has, the more service the party can use, while the majority of people have none"); NAT'L COAL. FOR CIV. RIGHT TO COUNSEL, Status Map, <http://civilrighttocounsel.org/map> (showing jurisdictions that appoint eviction defense attorneys for tenants unable to purchase legal services in the market); see also Sabbeth, *supra* note 5 (analyzing new right to eviction defense counsel).

169. *Eviction Representation Statistics For Landlords and Tenants Absent Special Intervention*, NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL (2021), [http://civilrighttocounsel.org/uploaded\\_files/280/Landlord\\_and\\_tenant\\_eviction\\_rep\\_stats\\_NCCRC\\_.pdf](http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_.pdf).

170. See Sandefur, *supra* note 123, at 910; Bezdek, *supra* note 5, at 578–79 (describing silencing of tenants who attempt to raise defenses on their own).

171. See Dave DeNatale, *Report: 93% Of Evictions in Cleveland Were Prevented During First Six Months of Right to Counsel Program*, WKYC (Feb. 10, 2021), <https://www.wkyc.com/article/news/health/coronavirus/evictions-prevented-cleveland-right-to-counsel-program/95-599c2644-9682-4387-a977-eef20d0769c2>; Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, CMTY. SERV. SOC'Y (Mar. 25, 2019), <https://www.cssny.org/news/entry/nyc-right-to-counsel>; Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed*, 37 *FORDHAM URB. L. J.* 37, 46–48 (2010) (collecting earlier literature on same subject).

172. Sabbeth, *supra* note 5, at 78–79.

prior work, such routine mismatching—specifically the systemic absence of lawyers for particular classes of people in particular classes of cases, and the presence of lawyers for others—over time, in the aggregate, distorts the development of law in favor of those with representation and against those without.<sup>173</sup> While the statutory laws governing evictions in most parts of the country are stingy with tenants' rights, the underdevelopment, or distorted development, of common law in the eviction courts also warps the doctrine.

### 9. *Qualifications of Adjudicators*

Individuals' ability to raise defenses and the potential for law development are further limited because a surprising number of states do not require judges to possess legal training. In at least seventeen states, judges may hear eviction cases without having attended law school.<sup>174</sup> Limited legal training does not necessarily mean that a person cannot do good work, but that depends what their work is. If the work of eviction courts is simply to process claims for rent,<sup>175</sup> legal training may be irrelevant. If, however, the function of eviction courts is to interpret law—particularly complex, novel law like that of the federal eviction moratoria—the adjudicators' lack of legal knowledge could be quite significant. Like the other features of eviction court design, the qualifications for judges suggest that the intended function of eviction courts is not primarily to interpret and apply legal principles but something else.<sup>176</sup>

### 10. *Obstacles to Appeals*

While eviction cases are heard initially by adjudicators who are not necessarily positioned to engage in sophisticated interpretations of law, the possibility of taking up such interpretation on appeal encounters other obstacles.<sup>177</sup> As noted above, in most states, tenants are required to pay a rent bond as a condition of appealing, and this requirement is largely cost-prohibitive for the relevant class of people, as the majority are individuals who

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173. See Sabbeth, *supra* note 44, at 135–36 (describing how the absence of counsel for tenants stunts the development of doctrines of importance to them); Sabbeth & Steinberg, *supra* note 67 (describing how the absence of a right to counsel stymies law development); Sabbeth, *supra* note 5, at 88 (hypothesizing that the new right to counsel for tenants in NYC might influence the shape of law development a field that had for decades been dominated by lawyers for landlords); Sabbeth, *Market-Based Law*, *supra* note 128 (describing how legal system that allots lawyers based on ability to pay under develops poor people's law).

174. See Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. (forthcoming 2022) (on file with author) (manuscript at 51); see, e.g., N.C. GEN. STAT. § 7A-171.2 (2003) (defining qualifications required for magistrates); see also Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 968 (2021) (critiquing criminal courts in which judges are not lawyers).

175. See *supra* note 145.

176. See *infra* Part III (analyzing social function of eviction courts).

177. See Sabbeth, *Market-Based Law*, *supra* note 128 (noting that appeals courts disproportionately handle the claims of those with the resources to pursue them).

struggle to pay their rent. Even if a tenant is able to pay the bond to appeal, the courts with original jurisdiction over eviction cases are largely courts of no record. That means there is no transcript, nor even so much as a sound recorder, to commit to the public record what witnesses have said or what documentary evidence was considered. Similarly, there is often no written opinion to explain the judgment, beyond completion of the judgment form. The absence of a fuller record opens the door for arbitrary decisions that never receive scrutiny.

### 11. Eviction Court Design Summary

Even where law formally provides protections for tenants, those protections are often illusive because of the design features of eviction courts, as described above. Empirical evidence shows that judges routinely disregard the law, to tenants' disadvantage.<sup>178</sup> Judges regularly issue judgments for landlords without requiring them to establish their prima facie case, even where the laws are clear that the landlord has the burden of proof.<sup>179</sup> Frequently judges do not require landlords to support their arguments with evidence of any kind, let alone admissible evidence.<sup>180</sup> Whether due to unfamiliarity or hostility, judges do not apply tenants' rights, even those etched into the plain language of statutes.<sup>181</sup> Evidence today suggests that even if landlords are not represented, some judges still engage in these behaviors; representation by counsel makes a bigger difference for tenants than for landlords.<sup>182</sup> Even when tenants are represented, judges resist enforcing laws that protect tenants while nonetheless enforcing those that justify judgments for landlords.<sup>183</sup> In this environment, it is not surprising that tenants often waive the rights they possess.<sup>184</sup>

To be clear, this environment is not necessarily due to malevolence by the social actors in the courts, but rather it reflects the legal architecture of eviction. The procedural laws of eviction are designed to make eviction quick and cheap, through relatively small filing fees,<sup>185</sup> short timetables between complaints and trials, and the minimal role of discovery and other

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178. Sandefur, *supra* note 123, at 910–12 (collecting literature); Engler, *supra* note 171, at 47 (same); Sabbeth, *supra* note 5, at 79–80 (same).

179. Sabbeth, *supra* note 5, at 79.

180. Sabbeth, *supra* note 5, at 79.

181. Sabbeth, *supra* note 5, at 79.

182. Engler, *supra* note 171, at 81–82. This may be due to judges' hostility, tenants' relative unfamiliarity with the process, or the racialized and gendered power relationship between landlords and tenants.

183. Summers, *Good Law*, *supra* note 5, at 149 (highlighting failure to apply warranty of habitability).

184. See Summers, *Civil Probation*, *supra* note 5 (describing settlements that leave tenants with fewer legal protections).

185. See *supra* Part II.A.1.

more expensive features of ordinary civil litigation.<sup>186</sup> Even before the pandemic, this approach to eviction litigation was inadequate for the faithful interpretation of law—which can actually be an extremely complex web of state and federal regulation<sup>187</sup>—but in the pandemic the problems became more publicly visible.

### *B. Eviction Court Interrupted*

The COVID-19 pandemic, and the eviction moratoria that it spurred, created a partial interruption in the eviction court process. The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act of 2020 provided the first federal moratorium. The September 4, 2020 Order of the Centers for Disease Control and Prevention (“CDC”) and extensions of that order then provided others. Additionally, federal agencies supplemented these authorities with their own regulations, and states and localities issued further legislation and executive orders. For purposes of this Article, I will focus on the federal moratoria, and even those will be covered only in the most basic terms. This Part will briefly describe certain provisions of the CARES Act and the CDC Order and then turn to how the courts responded to these interruptions in service.

#### *I. CARES Act*

The CARES Act was broad-sweeping legislation that approved significant expenditures to pump money into the economy, while offering protective regulation for a wide swath of industries and people. Among other things, it included special protections for property owners so they would not default on their mortgages.<sup>188</sup> This included an option to request temporary forbearance on loans, alongside a prohibition on the eviction of tenants living in the relevant property during such forbearance and for a limited time thereafter, if the eviction was based on nonpayment of rent, fees, or penalties.<sup>189</sup> This provision also prohibited charging any fees or penalties for late payment of rent and required that a thirty-day notice to vacate be given before requiring the tenant to vacate.<sup>190</sup> The part of the CARES Act eviction protections that received the most attention, however, was a moratorium independent of the protections for property owners.

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186. *See supra* Part II.A.1–10; *see also* Wilf-Townsend, *supra* note 145, at 1718–22 (describing the low costs for corporate plaintiffs who take advantage of the economies of scale in bringing numerous similar lawsuits and of litigating against defendants who lack counsel or simply lose by default for failure to appear).

187. *See* Spector, *supra* note 5 (arguing that substantive gains in tenants’ rights have been unmatched and undermined by the law of procedure).

188. *See* CARES Act, 15 U.S.C.A. § 9057 (2020) (forbearance of residential mortgage loan payments for multifamily properties with federally backed loans).

189. *Id.* § 9057(d).

190. *Id.* § 9057(e).

The CARES Act included a moratorium on all evictions from “covered properties.”<sup>191</sup> Coverage depended on whether the home was “on or in” a property with a federally backed mortgage or other specific federal subsidies.<sup>192</sup> The “covered properties” included approximately one-third to approximately 45 percent of rental properties in the United States.<sup>193</sup> For 120 days, the CARES moratorium prohibited the “lessor of [a] covered dwelling” from “filing” any court action “to recover possession of the covered dwelling from the tenant for nonpayment of rent or other fees or charges.”<sup>194</sup> For this same time period, the CARES Act forbid lessors of covered properties from charging any fees or penalties associated with nonpayment.<sup>195</sup> The legislation also imposed a new notice requirement, whereby the lessor of a covered property was henceforth required to issue a notice to vacate thirty days prior to requiring any tenant to vacate and prohibited from issuing such a notice until after expiration of the initial 120-day period.<sup>196</sup> The original 120-day period expired on July 24, 2020, and the thirty-day notice requirement extended the protection to late August of that year.

## 2. CDC Order

On September 4, 2020, the CDC issued its order halting evictions, the Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19 (“the Order” or “the CDC Order”).<sup>197</sup> Aside from specified exceptions, for the effective period,<sup>198</sup> the Order provided as follows: A

191. *Id.* § 9058(a).

192. *Id.* § 9058(a).

193. Jeff Ernsthansen, Ellis Simani & Al Shaw, *Can You Be Evicted During Coronavirus? Here's How to Find Out.*, PROPUBLICA (May 18, 2020, 11:00 AM), <https://www.propublica.org/article/can-you-be-evicted-during-coronavirus-heres-how-to-find-out> (providing database to look up some, but not all, covered properties); Laurie Goodman, Karan Kaul & Michael Neal, *The CARES Act Eviction Moratorium Covers All Federally Financed Rentals—That's One in Four US Rental Units*, URBAN WIRE (Apr. 2, 2020), <https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units>. The available databases undercount the total number of covered units because they do not capture all subsidy programs, leaving out the sizeable Low-Income Tax Credit program administered by the Treasury Department and the Section 8 Housing Choice Voucher program administered by the U.S. Department of Housing and Urban Development.

194. 15 U.S.C.A. § 9058(b)(1) (2020).

195. *Id.* § 9058(b)(2).

196. *Id.* § 9058(c).

197. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292 (Sept. 4, 2020).

198. The Order ran until the end of December 2020. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55292, 55297. Subsequent orders then extended its protections until the U.S. Supreme Court's August 2021 decision in *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021). The subsequent CDC orders adopted the language of the original, with very minor and relatively inconsequential revisions. The final version added that a covered person must declare that they live in an area “experiencing high or substantial levels of community transmission” of COVID-19. Temporary

“landlord, owner . . . or other person with a legal right to pursue eviction . . . shall not evict any covered person from any residential property.”<sup>199</sup> The Order defined “evict” and “eviction” as “any action by a landlord . . . to remove or cause the removal of a covered person from a residential property.”<sup>200</sup>

To be covered, a person was required to provide to her landlord a signed declaration attesting to five criteria.<sup>201</sup> The last version of the Order added a criterion related to whether the jurisdiction is facing high COVID-19 rates, but that was not present earlier. The core five criteria were: (1) meeting certain income limits; (2) an inability to make full rental payments due to a loss of income or an extraordinary medical expense; (3) making best efforts to obtain government rental assistance; (4) making best efforts to make partial payments, taking into account other necessities; and (5) eviction would render the person homeless or force them to relocate to crowded quarters.<sup>202</sup>

The CDC Order differed from the CARES Act moratorium in several ways, three of which I will mention here. First, the CDC Order applied more broadly. It reached all types of housing, regardless of any connection to a federally backed mortgage or federal subsidy.<sup>203</sup> Instead of using property-specific criteria, the coverage of the CDC Order was dependent on the

Halt in Residential Evictions in Communities with Substantial or High Levels of Community Transmission of COVID-19 to Prevent the Further Spread of COVID-19 (Aug. 3, 2021).

199. The Order including the following “Summary”:

Notice and Order; and subject to the limitations under “Applicability”: Under 42 CFR 70.2, a landlord, owner of a residential property, or other person with a legal right to pursue eviction or possessory action, shall not evict any covered person from any residential property in any jurisdiction to which this Order applies during the effective period of the Order.

Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. at 55292, 55293.

200. *Id.*

201. *Id.*

202. The full language defining a “covered person” was as follows: “*Covered person*” means any tenant, lessee, or resident of a residential property who provides to their landlord, the owner of the residential property, or other person with a legal right to pursue eviction or a possessory action, a declaration under penalty of perjury indicating that: (1) the individual has used best efforts to obtain all available government assistance for rent or housing; (2) the individual [meets certain income requirements]; (3) the individual is unable to pay the full rent or make a full housing payment due to substantial loss of household income, loss of compensable hours of work or wages, a lay-off, or extraordinary out-of-pocket medical expenses; (4) the individual is using best efforts to make timely partial payments that are as close to the full payment as the individual’s circumstances may permit, taking into account other nondiscretionary expenses; and (5) eviction would likely render the individual homeless—or force the individual to move into and live in close quarters in a new congregate or shared living setting—because the individual has no other available housing options.. 85 Fed. Reg. 55292, 55293

203. The only original limit on place was jurisdictional. 85 Fed. Reg. 55292, 55293 (“This Order does not apply in any State, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order.”).

circumstances of the “person” claiming its protections.<sup>204</sup> Because the goal of the CDC was to stop the spread of communicable disease,<sup>205</sup> and the virus spread through neighborhoods and across state lines without recognizing distinctions based on the financing of the properties where people live, the CDC’s protection also applied regardless of the financial status of the property.

Second, unlike the CARES Act, the CDC Order did not stop or slow the duty to pay rent or fees.<sup>206</sup> It did not stop or slow landlords from collecting rent, making reports to credit agencies, nor even initiating small claims or other collection actions to recover rent.<sup>207</sup> This approach focused on the CDC’s mission of protecting public health and left economic policy to other government actors. Whereas the CARES Act sought to stabilize the pandemic economy, the CDC Order aimed specifically at slowing the spread of disease. Directly regulating tenants’ financial obligations exceeded the scope of this objective.

Third, following this different emphasis—protecting public health—the types of eviction cases halted by the CDC were different than those prohibited by the CARES Act. The CARES Act focused on economic issues and, accordingly, instituted a moratorium on evictions for nonpayment of rent, whereas the CDC Order created a moratorium on a broader category of eviction cases<sup>208</sup> to prevent evictions of people whose displacement would jeopardize health or safety.<sup>209</sup>

These differences in the goals behind the CDC Order and the CARES Act have been largely glossed over by the courts and the public. Prominent media outlets and government officials have spread the mistaken idea that both the CARES Act and the CDC moratorium prohibited only nonpayment cases, although, as will be discussed below, the plain language of the CDC Order also prohibited evictions on the basis of lease expiration (known as “holdovers”). This error may be due partly to misinterpreting the goals of the CDC as economic, as opposed to focused on public health. But it is also attributable to the common conception that rent payment is all that eviction courts should address.<sup>210</sup>

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204. *Id.* (defining “covered person”).

205. *See id.* (“Statement of Intent”).

206. *Id.* at 55294 (“This Order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation. . . . Nothing in this Order precludes the charging or collecting of fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis.”).

207. *Id.*

208. *See infra* Part II.B.3.b (describing applicability of the Order).

209. 85 Fed. Reg. 55292, 55293-96 (describing goals of the Order).

210. *See supra* notes 137, 139, 159 and accompanying text (discussing courts’ perception of eviction cases as simple proceedings focused solely on nonpayment of rent and statutory restrictions that prohibit eviction judges from considering other issues). To be clear, the vast majority of eviction proceedings are based on allegations of nonpayment of rent; that is correct. But my point is that there is a common perception of eviction courts as primarily rent collections agencies,

### 3. Court Response

The eviction moratoria contained in the CARES Act and the CDC Order did prevent enormous numbers of evictions that would otherwise have occurred.<sup>211</sup> They also failed to prevent many others.<sup>212</sup> Those failures result in part from the design of eviction courts.<sup>213</sup> Eviction courts are not fertile ground for the flourishing of legal interpretation, let alone a place for carefully teasing out the subtleties of novel regulations. That is both a cause of and a result of our societal hostility to centering tenants' rights and our expectation of privileging owners' entitlements.<sup>214</sup> This approach is visible in the design of eviction courts<sup>215</sup> and is the product of the system thus designed.

The values animating that system also found expression in other fora. The National Association of Realtors and their supporters launched multiple lawsuits challenging the constitutionality of eviction moratoria.<sup>216</sup> Setting aside the debate as to the scope of the CDC's regulatory authority, the many constitutional attacks on the CDC Order reflect something else: a deeper discomfort with the social priorities recognized in the Order.<sup>217</sup> The moratoria unsettled expectations because, as the U.S. Supreme Court explained in *Alabama Association of Realtors*, the potential profit of the property

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rather than civil courts designed to apply and interpret law, and this may have contributed to the cramped interpretation of the CDC Order. *See infra* Part II.B.3.b (describing interpretation of the CDC Order); Part III (analyzing function of eviction courts).

211. *See* Rangel, Hasa, Lemmerman, Rish & Hepburn, *supra* note 19; *see also* Leifheit, Linton, Raifman, Schwartz, Benfer, Zimmerman & Pollack, *supra* note 96, at 2568; Kay Jowers, Christopher Timmins, Nrupen Bhavsar, Qihui Hu & Julia Marshall, *Housing Precarity & The Covid-19 Pandemic: Impacts of Utility Disconnection And Eviction Moratoria On Infections And Deaths Across Us Counties* 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28394, 2021).

212. *See* sources *supra* note 20.

213. *See supra* Part II.A (describing eviction courts' design features). Another reason involuntary relocations continued in spite of the moratoria was that large numbers of landlords circumvented the courts and instituted informal, or extralegal, evictions. *See also supra* note 25 (noting prevalence of informal evictions before the pandemic).

214. *See supra* notes 64, 76–79 and accompanying text; *infra* notes 268–271 and accompanying text.

215. *See supra* Part II.A.

216. Ron Lieber, *Realtors Want to Sell You a Home. Their Trade Group Backs Evicting Others.*, N.Y. TIMES (Apr. 17, 2021), <https://www.nytimes.com/2021/04/17/your-money/realtors-pandemic-eviction-ban.html?smid=TW-share>; Andrew Perez & David Sirota, *Charles Koch Funded Eviction Push While Investing in Real Estate Companies*, GUARDIAN (May 21, 2021, 12:59 PM), [https://www.theguardian.com/us-news/2021/may/21/charles-koch-foundation-eviction-real-estate?utm\\_term=Autofeed&CMP=tw\\_t\\_b-gdnnews&utm\\_medium=Social&utm\\_source=Twitter#Echobox=1621617438](https://www.theguardian.com/us-news/2021/may/21/charles-koch-foundation-eviction-real-estate?utm_term=Autofeed&CMP=tw_t_b-gdnnews&utm_medium=Social&utm_source=Twitter#Echobox=1621617438).

217. *See* Laurence H. Tribe, *Protecting Public Health from Judicial Arrogance*, BOS. GLOBE (Aug. 6, 2021, 4:41 PM), <https://www.bostonglobe.com/2021/08/06/opinion/protecting-public-health-judicial-arrogance>; Peter M. Shane, *No, the CDC Eviction Moratorium Does Not Raise Constitutional Issues*, WASH. MONTHLY (Aug. 10, 2021), [https://washingtonmonthly.com/2021/08/10/no-the-cdc-eviction-moratorium-does-not-raise-constitutional-issues/#.YRL\\_vhRI3I4.twitter](https://washingtonmonthly.com/2021/08/10/no-the-cdc-eviction-moratorium-does-not-raise-constitutional-issues/#.YRL_vhRI3I4.twitter); *see also* Jack Goldsmith, *The Anatomy of a Screw Up: The Biden Eviction Moratorium Saga*, LAWFARE BLOG (Aug. 9, 2021, 9:43 AM), <https://www.lawfareblog.com/anatomy-screw-biden-eviction-moratorium-saga>.



owners was recognized as worthy of fierce protection.<sup>218</sup> Indeed, the owners' right to profit ultimately mattered more to the Court than the human lives at stake.<sup>219</sup>

But, even before the Supreme Court put its foot down firmly on the side of the owners and brought the CDC moratorium to a screeching halt, the lowly eviction courts were where the rubber met the road. And here the courts' design features—the mismatch of representation for the parties, the absence of time expected to be allotted to each case, the lack of discovery in many jurisdictions, along with other aspects discussed above—together weakened the power of the moratoria.

### a. CARES Act Interpretation

As might be expected, the new federal legislation and orders required some interpretation. As one example, the CARES Act's eviction moratorium turned on the issue of whether the tenant's home was a "covered dwelling." The legal complexity is apparent from the Act's lengthy definitions, which include as one of several criteria for "covered dwelling" that it is "on or in a covered property," while "covered property" is then defined by reference to citations for two unrelated statutory provisions (the Violence Against Women Act of 1994 and the Housing Act of 1949), as well as the use of the terms "federally backed mortgage loan" and "federally backed multifamily mortgage loan," each of which is then defined in later sections that themselves have two subparts each.<sup>220</sup> It is doubtful that a

218. See *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021).

219. *Id.* at 2489.

220. The full definition section is as follows.

#### SEC. 4024. TEMPORARY MORATORIUM ON EVICTION FILINGS.

(a) DEFINITIONS.—In this section:

COVERED DWELLING.—The term "covered dwelling" means a dwelling that—

(A) is occupied by a tenant—pursuant to a residential lease; or without a lease or with a lease terminable under State law; and

(B) is on or in a covered property.

COVERED PROPERTY.—The term "covered property" means any property that—participates in—

a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12 12491(a))); or the rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r); or has a—Federally backed mortgage loan; or Federally backed multifamily mortgage loan.

DWELLING.—The term "dwelling"—

(A) has the meaning given the term in section 802 of the Fair Housing Act (42 U.S.C. 3602); and (B) includes houses and dwellings described in section 803(b) of such Act (42 U.S.C. 3603(b)).

FEDERALLY BACKED MORTGAGE LOAN.—The term "Federally backed mortgage loan" includes any loan (other than temporary financing such as a construction loan) that—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1 to 4 families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

tenant without an attorney could make sense of this language, if she knew where to find it.

Even if a tenant were one of the roughly 3 percent who did have a lawyer, and even if that lawyer understood the intricacies of the federal subsidies and mortgage arrangements sufficiently to apply the relevant provision, assessing the relevant facts was still an uphill battle, because, as noted earlier, eviction courts restrict discovery.<sup>221</sup> CARES Act protections for the tenant depended on the property's subsidy arrangements, tax status, and mortgage agreements, but the landlord controlled all the relevant information. Without discovery, how could the tenant know, let alone prove, that the property was covered?

In North Carolina, the Chief Justice of the Supreme Court ultimately required that landlords file and serve a form affidavit providing certain information about the property's coverage status and dictated that courts were not to order evictions absent a finding that the relevant property was not covered by the CARES Act,<sup>222</sup> but North Carolina was an outlier. Further, anecdotal evidence indicates that judges granted evictions to landlords who failed to complete the affidavits or to provide any evidence to support such a finding.<sup>223</sup> This matches prior empirical evidence demonstrating that, routinely in eviction courts, landlords' bald allegations suffice to achieve out-

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(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

**FEDERALLY BACKED MULTIFAMILY MORTGAGE LOAN.**—The term “Federally backed multifamily mortgage loan” includes any loan (other than temporary financing such as a construction loan) that—

(A) is secured by a first or subordinate lien on residential multifamily real property designed principally for the occupancy of 5 or more families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

221. *See supra* Part II.A.3.

222. Emergency Directive 18, Order of Chief Justice, N.C. Supreme Court (May 30, 2020), <https://www.nccourts.gov/assets/news-uploads/30%20May%202020%207A-39%28b%29%282%29%20Order.pdf?v6tK3XJVqgOY0Ps80nAcS6s5ghD2XLLeU>.

223. Legal Aid attorneys reported to me that judges seemed unfamiliar with the requirement of making such a “finding,” and instead judges regularly handed landlords the form affidavit to complete at the time of hearing before the court issued judgment in their favor. *See also* NAT'L HOUS. L. PROJECT, STOPPING COVID-19 EVICTION SURVEY RESULTS (2020) (reporting that landlords “falsely certified that their properties were not covered by moratoria”), <https://www.nhlp.org/wp-content/uploads/Evictions-Survey-Results-2020.pdf>.

comes in their favor.<sup>224</sup> With respect to coverage under the CARES Act, there was little interest in testing landlords' assertions, such as by demanding judicial review of the underlying documents, let alone disclosure of such documents to tenants through a discovery process.

The coverage issue in the CARES Act is just one example of a set of complex questions that tenants were unequipped to answer, while landlords controlled the relevant information, and judges often appeared unconcerned with getting to the truth.

Even with its complexity, the CARES Act moratorium was far simpler, as a matter of law and fact, than the moratorium of the CDC Order.

### *b. CDC Order Interpretation*

As others have documented, landlords have found loophole after loophole through the CDC moratorium.<sup>225</sup> But there is also a more basic problem: Judges have openly rejected it. Even where landlords have not raised challenges, some lower court judges have taken it upon themselves *sua sponte* to refuse to apply the moratorium on the basis that it conflicts with their understanding of constitutional values.<sup>226</sup>

Equally revealing is the distortion of the plain language and clear intent of the regulation. One "loophole" that has been repeatedly observed is landlords who respond to tenants behind on rent by refusing to renew the tenants' leases. The landlords then file for eviction on the basis of the lease expiration and the absence of any renewal. Instead of alleging that the tenant failed to pay rent, the landlord claims that the tenant was "holding over" after the tenancy ended. The landlord then asserts that the CDC Order did not apply because the case was not one based on nonpayment.

Landlords have had ample opportunity to take this approach. Given that millions of tenants across the country are on month-to-month leases, leases expire frequently, making refusing to renew an easy option. Even tenants who once had annual leases have likely watched those annual lease periods expire since the pandemic arrived in the United States in the spring of 2020, and their landlords, too, have refused to renew the leases with tenants who have struggled to pay. While precise data is not available, reports indicate that landlords have done just that—refused to renew leases

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224. See Sandefur, *supra* note 123, at 925 (collecting literature). Cf. *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021) (ruling that New York eviction moratorium "precluded a landlord from contesting [tenant's financial hardship] certification and . . . [therefore] violate[d] the Court's long-standing teaching that ordinarily 'no man can be a judge in his own case' consistent with the Due Process Clause.").

225. Stern & Bryant, *supra* note 20.

226. Kimble, *supra* note 120.

and then filed eviction actions, naming them as holdovers when they are based on nonpayment.<sup>227</sup>

Courts have accepted these claims and issued judgments for eviction for various reasons. Some judges never learned the underlying facts and true reason for the cases. Others followed the logic of the legal “loophole,” refusing to recognize the CDC Order’s applicability beyond nonpayment actions. But it is actually somewhat inaccurate to portray this as a loophole: this is a direct violation of the regulation’s plain language.

The CDC Order states that landlords may not evict “subject to the applicability section below,” and that applicability section contains five enumerated exceptions.<sup>228</sup> The Order’s “Applicability” section states in full:

This Order does not apply in any state, local, territorial, or tribal area with a moratorium on residential evictions that provides the same or greater level of public-health protection than the requirements listed in this Order. In accordance with 42 U.S.C. 264(e), this Order does not preclude state, local, territorial, and tribal authorities from imposing additional requirements that provide greater public-health protection and are more restrictive than the requirements in this Order.

This Order is a temporary eviction moratorium to prevent the further spread of COVID-19. This Order does not relieve any individual of any obligation to pay rent, make a housing payment, or comply with any other obligation that the individual may have under a tenancy, lease, or similar contract. Nothing in this Order precludes the charging or collecting of fees, penalties, or interest as a result of the failure to pay rent or other housing payment on a timely basis, under the terms of any applicable contract.

Nothing in this Order precludes evictions based on a tenant, lessee, or resident: (1) Engaging in criminal activity while on the premises; (2) threatening the health or safety of other residents; (3) damaging or posing an immediate and significant risk of damage to property; (4) violating any applicable building code, health ordinance, or similar regulation relating to health and safety; or (5) violating any other contractual obligation, other than the timely payment of rent or similar housing-related payment (including non-payment or late payment of fees, penalties, or interest).<sup>229</sup>

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227. See, e.g., Yanqi Xu, *As Landlords Find Loopholes to Evict Tenants, A Concurrent Push for Gentrification in Communities of Color*, N.C. POL’Y WATCH (Apr. 19, 2021), <https://ncpolicywatch.com/2021/04/19/as-landlords-find-loopholes-to-evict-tenants-a-concurrent-push-for-gentrification-in-communities-of-color>.

228. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, 55294 (Sept. 4, 2020).

229. *Id.*

All five exceptions involve the tenant breaching the lease (in a way unrelated to nonpayment) or threatening public safety.

Notably, expiration of a lease is not listed as an exception to the applicability of the CDC Order.<sup>230</sup> This fits with the goals of the CDC as an agency focused on promoting public health by preventing displacement and homelessness during a pandemic. The agency had to allow some exceptions, such as for landlords to remove persons who posed dangers to others. And it is not surprising that the CDC also in the fifth exception shows deference to the landlord's property rights if the tenant in any way fails to meet obligations other than paying rent. But the main goal is to prevent the displacement of people whose presence in public spaces is seen as a health threat to themselves and others, unless some countervailing reason justifies the risk to public health. People whose leases have expired do not provide such countervailing reasons. The text of the CDC Order did not limit its protections to nonpayment cases, and it did not identify lease expiration holdovers as exceptions.

Yet courts across the country acted as if it did.<sup>231</sup> To include lease expiration cases or holdovers in the moratorium struck some as encroachment on the freedom of contract, on the theory that it forced landlords to extend contracts when they might prefer not to do so. A reasonable interpretation of the Order, which avoids this potential constitutional conflict, however, is that the Order did not require landlords or tenants to renew or extend leases though it did temporarily limit the remedies available when the lease expired: For the relevant period, the tenant could not be forced to vacate if the moratorium covered the person. But this distinction did not carry the day.

Ultimately, the CDC followed the original Order with issuance of a "non-binding FAQ" document that suggested the Order was limited to nonpayment cases. Reversing course is not unusual in the face of political opposition, and some within the CDC may have believed that the agency had unduly burdened landlords. The chronology of developments also suggests that the CDC may have folded under the pressure of litigation. The agency issued its new FAQ on the same day as it settled a particular case regarding the Order's constitutionality, and the stipulation of settlement lays out the procedural history.<sup>232</sup> In a conference call between the DOJ lawyers, the

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230. *Id.*

231. See Joel Burgess, *The Eviction Moratorium Still Stands, But New Loopholes Mean More People Can Lose Housing*, ASHEVILLE CITIZEN TIMES (July 5, 2021, 4:11 PM), <https://www.citizen-times.com/story/news/2021/07/05/nc-eviction-moratorium-extended-but-fewer-protections/7841573002>; Xu, *supra* note 227.

232. The FAQ were posted immediately after the CDC entered into a stipulation resolving *KBW Investment Properties v. Azar*. The procedural history recited in the KBW stipulation lays it out quite plainly. A DOJ attorney attempting to defend the constitutionality of the CDC Order took a defensive position in a telephone conference, and the plaintiffs seized on that position and exploited it. The stipulation then memorialized it, and the CDC then put out the FAQ the same day

landlords' lawyers, and the federal judge, the DOJ attorney apparently got backed into the position that the CDC Order did not extend beyond nonpayment cases, and then that concession stuck.<sup>233</sup> As a matter of administrative law, an agency's position taken in this defensive litigation posture ought not to receive deference,<sup>234</sup> but that well-settled principle lost relevance in this context. Over time, the insistence that the CDC Order blocked only nonpayment actions allowed many landlords to circumvent the moratorium; they refused to renew leases and filed eviction actions on the basis of holdover.

The pandemic's interruption of eviction courts was never a complete stop. The moratoria did not cover all cases, and the interpretations of them broadened their exceptions beyond their language. Though the stream of cases slowed significantly for a while, the eviction courts continued to operate throughout the pandemic. Their operations during this unusual period reflect many of the same realities as their operations before and after.

### III. REVISITING THE ROLE OF EVICTION COURTS

The snapshot of the eviction courts during the pandemic offers insights into how well these courts are functioning and what they are functioning to do. One might think that the eviction courts described in Part II.A—with limited procedures and inadequate time to engage with law or ferret out facts—are pure chaos,<sup>235</sup> but arguably these courts are quite orderly in their own way. They process hundreds of cases daily, like smooth machines, with quick dispositions of large dockets.<sup>236</sup> Perhaps eviction courts are not dysfunctional but instead function quite well to meet certain social purposes; perhaps they function as designed.

This Part will argue that eviction courts serve a particular regulatory function for a society in which contests between landlords and tenants over property rights reflect longstanding political struggles over access to resources. Ultimately, the law of eviction courts serves to maintain the existing social order, one in which some people are denied access to housing (as a place to live) while others profit from it.

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as the stipulation. The CDC FAQ is undated on its face, and a screenshot of the CDC website (on file with author) shows the date it was released.

233. *Id.*

234. *See* *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (no deference due to “convenient litigating position” nor to post hoc rationalizations to defend an agency against attack).

235. *See* Emily A. Benfer, Antonia K. Fasanelli, Rasheedah Phillips & Kathryn Sabbeth, *Opinion: The Eviction Moratorium Limbo Laid Bare the System's Extreme Dysfunction*, WASH. POST (Aug. 12, 2021, 9:15 AM) (hereinafter “Moratorium Limbo”), <https://www.washingtonpost.com/opinions/2021/08/12/eviction-moratorium-court-cdc-congress> (describing “structural dysfunction” of eviction courts”).

236. John Whitlow, *Lawyer Calls Court an Eviction Machine*, ALBUQUERQUE J. (July 9, 2019, 12:02 AM), <https://www.abqjournal.com/1342272/lawyer-calls-court-an-eviction-machine.html>.

### A. *Kangaroo Courts*

Do eviction courts serve legitimate purposes in adjudicating property disputes in accordance with law, or are results virtually guaranteed?<sup>237</sup> In *Kangaroo Courts*, Shaun Ossei-Owusu reviews Alexandra Natapoff's devastating critique of criminal municipal courts and, based on her description of them, he asks whether such courts "could conceivably be understood as kangaroo courts."<sup>238</sup> After his examination of the definition of the term, he determines that the descriptor is an appropriate one for that forum. Using the framework of his thoughtful analysis, although taking heed of his warning that "dropping the 'k-bomb' is no light matter,"<sup>239</sup> it is hard to reach a conclusion any different for eviction courts.

Professor Ossei-Owusu defines kangaroo courts as those that are "inferior, informal, and inequitable."<sup>240</sup> He explains these criteria as follows:

The *inferiority* of kangaroo courts refers to the issue of structure and quality. These courts are considered to be structurally subordinate to traditional courts and likely to generate substandard adjudicative outcomes.

The *informal* nature of kangaroo courts refers to the fact that they sometimes operate unofficially (that is, outside the purview of the traditional legal system) or in a manner that is quite casual (that is, with less intention or deliberation).

Finally, and relatedly, kangaroo courts are *inequitable*. Their reduced procedural protections and generally degraded nature lead to strong likelihoods that they produce unfair legal decisions.<sup>241</sup>

The ways in which eviction courts meet these standards as inferior, informal, and inequitable may be obvious from the earlier description of eviction courts' basic design features,<sup>242</sup> but a brief refresher could be helpful.

We begin with inferiority. Eviction courts are "structurally subordinate to traditional courts," and they are not only "likely to generate substandard adjudicative outcomes" but have been proven empirically to do so. In the eviction courts, as a result of the lower notice requirements, restrictions on consideration of defenses, scarcity of discovery processes, and distortions created by the systemic mismatching of unrepresented individuals against attorneys, the outcomes are anything but likely to be accurate reflections of

237. One might also argue that the two are not mutually exclusive: if the laws are written to subordinate, the application of law itself may lead to predetermined conclusions.

238. Ossei-Owusu, *supra* note 22, at 200.

239. Ossei-Owusu, *supra* note 22, at 201 (quoting Parker B. Potter Jr., *Dropping the K-Bomb: A Compendium of Kangaroo Tales from American Judicial Opinions*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 9, 9 (2006)).

240. Ossei-Owusu, *supra* note 22, at 202.

241. Ossei-Owusu, *supra* note 22, at 202 (emphasis in original).

242. See *supra* Part II.A.

the application of governing law to true facts. Indeed, the eviction courts share particular features of inferiority with the criminal municipal courts. The judges are not guaranteed to be lawyers. The courts are not courts of record, and the courts are largely shielded from appellate scrutiny and so judges can continually misapply the law.<sup>243</sup>

The informality of eviction courts is a bit more ambiguous, because there are certain formalities that judges maintain.<sup>244</sup> Judges have been shown to punish tenants for failing to understand or apply formal rules.<sup>245</sup> And eviction courts regularly issue default judgments, swiftly deciding the cases based on the tenants' technical failures.<sup>246</sup> Yet, when dealing with landlords' evidentiary burdens, judges are regularly quite "casual . . . with less intention or deliberation." Moreover, Professor Ossei-Owusu's definition from West's Encyclopedia of American Law is spot on: courts are "guided less by concern for justice than by the desire to wrap up as many trials as the day allowed."<sup>247</sup> The statutory prohibitions on the raising of defenses and counterclaims, the shortened timeframe between the complaint and trial, and the limits on discovery, all suggest a "jurisprudential 'embrace of informality.'"<sup>248</sup>

While the informality of eviction courts does bring them closer to Professor Ossei-Owusu's kangaroo court model, it is worth recognizing that at various points in history advocates have introduced informal procedures as a way of making courts more democratic and accessible to people not well-served by a formal, adversary process.<sup>249</sup> Juvenile courts, for example, were initially introduced as an informal alternative to criminal courts, to better serve children's needs.<sup>250</sup> Advocates ultimately concluded, however, that the potential for arbitrariness allowed for abuse, and they traded discretion for due process rights.<sup>251</sup> When the U.S. Supreme Court recognized a right to counsel for juveniles, it explicitly rejected what it viewed as the "kangaroo court" to which children had been subjected.<sup>252</sup>

243. Ossei-Owusu, *supra* note 22, at 208.

244. See Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 802–03 (2015).

245. Bezdek, *supra* note 5, at 572–89; see also Anna Carpenter et al., *Judges in Lawyerless Courts* (forthcoming 2022) (examining "informal" domestic violence courts in which judges fail to explain, and take pro se parties to task for failing to understand, formalities of law).

246. Hoffman, *supra* note 155. But see Sudeall & Pasciutti, *supra* note 5, at 1384 (observing rural courts in which judges attempted to schedule hearings when both parties could appear).

247. Ossei-Owusu, *supra* note 22, at 103 (quoting 6 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 103 (Jeffrey Lehman & Shirelle Phelps eds., 2d ed. 2005)).

248. Ossei-Owusu, *supra* note 22, at 209 (quoting Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1014 (2021)).

249. See, e.g., RICHARD L. ABEL, *Introduction*, in THE POLITICS OF INFORMAL JUSTICE 1 (1982) (analyzing the opportunities and limitations of informal justice systems).

250. Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 777–81 (2010).

251. *Id.* at 779.

252. *Id.* at 780 (quoting *In re Gault*, 387 U.S. 1, 28 (1967)).



Today, many access to justice advocates favor simplifying the courts, given the number of pro se litigants unable to navigate them.<sup>253</sup> As I have argued elsewhere, streamlining processes might increase speed and decrease costs, but neither of those is guaranteed to serve the interests of the individuals before the courts.<sup>254</sup> In fact, were evictions slower and more expensive for landlords to pursue, perhaps they would be less frequent.<sup>255</sup> Moreover, prioritizing fast and cheap processes risks substantive losses.<sup>256</sup> Even if individual case outcomes were demonstrated to be accurate in a streamlined process, it is worth considering whether courts in a democracy ought to serve purposes beyond accurate resolution of individual disputes.<sup>257</sup> If we believe our federal and appellate courts serve additional social functions, why should poor people's courts be any different?<sup>258</sup>

Reasonable people may disagree about the tradeoffs of streamlined procedures, but, returning to Professor Ossei-Owusu's analysis of kangaroo courts, eviction courts meet his third criterion: eviction courts are inequitable. "Their reduced procedural protections and generally degraded nature lead to strong likelihoods that they produce unfair legal decisions."<sup>259</sup> As Professor Ossei-Owusu notes, Jeff Stempel defines kangaroo courts as a "forum in which either the outcome is largely shaped in advance because of the bias of the decision-maker' or . . . 'in which the structure and operation of the forum result in an inferior brand of adjudication even if not determined by intentional bias."<sup>260</sup> In precisely these ways, eviction courts are inequitable.

Overt and implicit biases in favor of landlords might be part of the story. Tenants are disproportionately poor women of color,<sup>261</sup> while judges

253. See Sabbeth, *Simplicity*, *supra* note 128, at 287–88.

254. Sabbeth, *Simplicity*, *supra* note 128, at 289–300.

255. See ABDELHADI & AHMED, *supra* note 130, at 9 ("The convenience and affordability of filing eviction cases has had the adverse effect of encouraging landlords to use eviction as a standard rent collection tool.")

256. See Sabbeth, *Simplicity*, *supra* note 128, at 294–95 (quoting Engler, *supra* note 171, at 76, 87).

257. See Sabbeth, *Simplicity*, *supra* note 128, at 301–02 ("The drive to simplify proceedings and distill them to a one-size-fits-all approach suggests poverty law is static, or at least that it is incapable of revision on behalf of the less powerful through litigation. . . . Simplification, with its de-emphasis on law and reliance on unrepresented parties to serve themselves, leaves little room for public interest law as an agent of change.")

258. Sabbeth, *Market-Based Law*, *supra* note 128 (arguing that disinvestment in the courts occupied disproportionately by poor women of color is a political choice that underdevelops the law in areas of importance to them).

259. Ossei-Owusu, *supra* note 22, at 202.

260. Ossei-Owusu, *supra* note 22, at 204 (quoting Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 256 (2007)).

261. Hepburn, Louis & Desmond, *supra* note 65, at 657–59; Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.–C.L. L. REV. 115, 120–21 (2016); Desmond, *Urban Poverty*, *supra* note 25, at 102; Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. 1, 2 (2014), <https://www.macfound.org/media/files/>

tend to be middle or upper-middle-class and are more likely white property owners. The lawyers representing landlords are also more likely than the tenants to be middle or upper-middle class white men, creating powerful dynamics of race, gender, and class when they directly oppose tenants unrepresented by counsel.<sup>262</sup>

Even if judges were not biased, the architecture of eviction courts heavily favors landlords and nearly ensures they will obtain swift judgments of possession.<sup>263</sup> Even if informality could, in theory, operate to the advantage of the individuals before it, the backdrop of inequity makes this all but impossible. It is difficult to escape the conclusion that eviction courts are indeed kangaroo courts whose results are largely predetermined.

### B. Courts in Crisis

To understand the significance of the eviction courts' operations, it is helpful to reflect back on the substance of the issues these courts purportedly address: contests over access to homes. The pandemic brought increased attention to eviction courts because the threatened rise in displaced families became an apparent threat to public health. While the emphasis on the "eviction crisis"<sup>264</sup> has been helpful in capturing the urgency and gravity of the situation, the narrative of this "crisis" could potentially obscure the fact that housing resources and rights are and have long been contested.

The same year that Matthew Desmond published *Evicted*,<sup>265</sup> by coincidence and without reference to Desmond's work, David Madden and Peter Marcuse published *In Defense of Housing: The Politics of Crisis*, where they argued against the notion of a "housing crisis."<sup>266</sup> The terminology of "crisis," they explained, suggests that the system is currently broken and needs a technical fix. In their view, however, this is not a time-specific problem, and it does not call for technical policy solutions.

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HHM\_Research\_Brief\_-\_Poor\_Black\_Women\_Are\_Evicted\_at\_Alarming\_Rates.pdf; Bezdek, *supra* note 5, at 535.

262. For more on judicial bias in favor of landlords, see Sabbeth, *supra* note 5, at 79.

263. See Sandefur, *supra* note 123, at 925 (collecting literature).

264. See Sophie Kasakove, *With Cases Piling Up, an Eviction Crisis Unfolds Step by Step*, N.Y. TIMES (Nov. 8, 2021), <https://www.nytimes.com/2021/11/07/us/evictions-crisis-us.html>; Joe Pinsker, *The Coming Wave of Evictions is More than a Housing Crisis*, THE ATL. (Sept 3, 2021), <https://www.theatlantic.com/family/archive/2021/09/cdc-eviction-ban-housing-crisis/619960/>; see also Terry Gross, *First-Ever Evictions Database Shows: 'We're in the Middle of A Housing Crisis'*, NPR (Apr. 12, 2018, 1:07 PM), <https://www.npr.org/2018/04/12/601783346/first-ever-evictions-database-shows-were-in-the-middle-of-a-housing-crisis>; Eve Claxton, Jon Hanrahan & Katherine Simon, *The Scarlet E: Unmasking America's Eviction Crisis*, WNYC (June 6, 2019), <https://www.wnycstudios.org/podcasts/otm/scarlet-e-unmasking-americas-eviction-crisis>; Virginia Prescott & La'Raven Taylor, *The New Scarlet Letter, E: NPR's 'On the Media' Investigates America's Eviction Crisis*, GEO. PUB. BROAD. (June 7, 2019), <https://www.gpbnews.org/post/new-scarlet-letter-e-nprs-media-investigates-americas-eviction-crisis>.

265. DESMOND, *supra* note 2.

266. MADDEN & MARCUSE, *supra* note 60.

First, the housing shortage is not a technical glitch in the system, but rather it is a deep, complex social issue embedded in our political economy. The challenges of homelessness are evidence of a global conflict over whether housing is a home or is real estate. It is, they say, evidence of a class struggle. Building on Madden and Marcuse's critique, while folding in race and gender, helps us to interpret the scene of eviction courts in the pandemic and beyond.

These are sites of social struggle. The disputes of eviction court are tensions between divergent societal values. Which should take priority: stabilizing shelter for tenants and their families,<sup>267</sup> or, instead, maximizing the profit of property owners?<sup>268</sup>

In the U.S. Supreme Court case that ultimately struck the death knell for the CDC moratorium, the majority did so at least in part based on the rather incredible conclusion that the balance of the "equities" required it to prioritize profit over human life:

The equities do not justify depriving the applicants of the District Court's judgment in their favor. *The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery.*<sup>269</sup>

As Justice Breyer's dissent pointed out, the owners claimed they were waiting on "'thousands of dollars' in rental income," which they were likely to recoup due to Congressional allocation of 46.5 billion dollars, and yet the majority determined that even a delay in collecting the rent outweighed the potential for massive spread of disease, which would likely cause increases in illness and morbidity.<sup>270</sup> The tenants' capacity to live, and the public health at large, were ranked second to the owners' "fundamental" right to exclude.<sup>271</sup>

The second important aspect of Madden and Marcuse's critique of the "crisis" terminology is the reminder that none of this is a temporary circumstance. The housing crisis is not abnormal. It is not a bug but a feature. The

267. Matthew Desmond, Weihua An, Richelle Winkler & Thomas Ferriss, *Evicting Children*, 92 SOC. FORCES 303, 303–04 (2013).

268. The largest number of evictions are by the largest landlords conducting serial evictions. In one Boston study, corporate landlords were shown to be two to three times more likely than non-corporate landlords to file for evictions. Henry Gomory, *The Social and Institutional Contexts Underlying Landlords' Eviction Practices*, SOC. FORCES 1, 2 (2021), <https://doi.org/10.1093/sf/soab063>. In another, a small number of large landlords were found to be responsible for a significant percentage of all evictions in 17 cities. Devin Q. Rutan & Matthew Desmond, *The Concentrated Geography of Eviction*, 693 ANNALS AM. ACAD. 64, 65 (2021).

269. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (emphasis added).

270. *Id.* at 2492 (Breyer, J., dissenting).

271. *Id.* at 2489 (majority opinion) ("[P]reventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.").

term “housing crisis” has been used for over a century.<sup>272</sup> Throughout history, certain populations have struggled with inadequate access to safe and stable housing. While Madden and Marcuse focus on the “working-class and poor,” our history and present-day circumstances prod us also to see the racialized and gendered dimension of how housing is distributed.

“Whose crisis?”<sup>273</sup> As Destin Jenkins and Justin Leroy note in their introduction to *Histories of Racial Capitalism*, “[T]he notion of a ‘crisis’ suggests that communities of color had not been trapped in cycles of debt and dispossession long before 2008—in other words, a crisis for whom?”<sup>274</sup> Madden and Marcuse assert that the “housing crisis” in the headlines in the papers in 2016 reflected “the experiences of middle-class homeowners and investors” following the 2008 market collapse.<sup>275</sup> Today, the upheaval of tenants, not only home-owners, has influenced investors and garnered attention.

By providing an historical perspective on the COVID-19 pandemic, Professor Witt offers us observations about public health that parallel these insights about the housing market. Epidemics are extraordinary but they are not unique in time. How a virus travels and how we respond reveals more about our society than about the virus. Like the pandemic, the housing shortage is socially constructed. How the courts respond to the shortage is too.

### C. *What Do Eviction Courts Do?*

Eviction courts operate in a social context where housing is a scarce and unstable resource for subordinated people, and such scarcity generates profit for those who benefit.<sup>276</sup> Eviction courts do not merely operate against this social backdrop; they help to create it.<sup>277</sup> Multiple social factors facilitate courts serving this role, and legal doctrine plays a significant part.<sup>278</sup>

A traditional understanding of eviction courts is that landlords use them to seize possession of real property, but recent empirical studies suggest that landlords initiate eviction proceedings to extract rental payments and fees,<sup>279</sup> sometimes with no intention of actually obtaining possession of

272. MADDEN & MARCUSE, *supra* note 60, at 9.

273. MADDEN & MARCUSE, *supra* note 60, at 9.

274. DESTIN JENKINS & JUSTIN LEROY, *Introduction*, in *HISTORIES OF RACIAL CAPITALISM* 1, 21 n.3 (2021).

275. MADDEN & MARCUSE, *supra* note 60, at 10.

276. *See supra* Part I.A (noting social construction of scarcity and profitable market conditions).

277. *See* Brito, Sabbeth, Steinberg, & Sudeall, *supra* note 145 (describing how eviction courts perpetuate and legitimize racial capitalism).

278. *See supra* Part I.B & II.A.

279. *See, e.g.*, Sudeall & Pasciutti, *supra* note 5, at 1419–20.

the property.<sup>280</sup> Large corporate landlords in particular bring serial eviction actions against the same tenants, over and over, as a model for collecting rent and generating additional fees.<sup>281</sup> In this way, the courts operate as a device for routine asset collection<sup>282</sup> and extraction of wealth.<sup>283</sup>

A small number of thinkers have suggested that landlords also use eviction courts as a forum for tenant discipline.<sup>284</sup> Landlords bring eviction actions to instill fear and maintain control.<sup>285</sup> This allows them to squeeze tenants for amounts they may not owe, and it discourages tenants from complaining about landlord misconduct ranging from violations of the warranty of habitability to sexual harassment.<sup>286</sup>

Building on these social scientists' observations, in combination with my analysis of eviction court design, I interpret eviction court operations as bolstering and legitimizing the objectives of extracting wealth and imposing control. More broadly, however, I would also suggest that eviction courts enforce the existing social order, specifically the hierarchical relations between landlords and tenants.

Procedural doctrines like those described in this Article contribute to this dynamic.<sup>287</sup> The legal architecture of eviction courts leads these fora to function at the level of "kangaroo courts"<sup>288</sup> with outcomes all but predetermined. Those outcomes involve swift judgments for landlords and settlements that increase landlords' control over tenants' lives.<sup>289</sup>

280. *Id.*

281. Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 *SOC. FORCES* 316, 337 (2020); Phillip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 *CITY & CmTY* 638, 656 (2019). *See also* Maya Abood, *Wall Street Landlords Turn American Dream into a Nightmare*, *PUB. ADVOC.* 5, 23 n.37 (2018), <https://www.publicadvocates.org/wp-content/uploads/wallstreetlandlordsfinalreport.pdf> (referencing a Colony Starwood transcript of a 4th Quarter earnings call in which one of the CEOs describes seeking every charge they "legitimately" can under the lease) (citing Fred Tuomi, Chief Executive Officer, Colony Starwood Homes, Q4 2016 Results – Earnings Call (Feb. 28, 2017) (transcript available at <https://seekingalpha.com/article/4050611-colony-starwood-homes-sfr-ceo-fred-tuomi-on-q4-2016-results-earnings-call-transcript>)).

282. *See* Wilf-Townsend, *supra* note 145, at 1706.

283. *See* Brito, Sabbeth, Steinberg, & Sudeall, *supra* note 145 (manuscript at 30–33) (describing courts as legitimizing and enforcing extraction of wealth from communities of color and transferring seized assets to white corporations and the state).

284. *See, e.g.*, Gomory, *supra* note 268, at 5.

285. *See* Summers, *Civil Probation*, *supra* note 5.

286. *See* Garboden & Rosen, *supra* note 281, at 640–41 ("The daily *threat* of eviction subjugates poor tenants, stripping them of their consumer rights. . . . Landlords understand that tenants who are behind on their rent are less likely to advocate for their legal rights regarding housing quality and code enforcement.") (emphasis in original); Sabbeth, *supra* note 5, at 93–94, 104–06.

287. *See supra* Part II.A.

288. *See supra* Part III.A.

289. *See* Summers, *Civil Probation*, *supra* note 5 (describing frequent settlement agreements that put tenants on probation, with behavioral rules that exceed the requirements of their leases and build in harsher consequences for violations).

Yet the evictions take on special significance because of the political and economic context, which is the product of other laws.<sup>290</sup> Eviction is a terrifying possibility not only because involuntary displacement from one's home is a traumatic loss, but also because of the obstacles to finding a new one.<sup>291</sup> The fear that an eviction threat instills, and the control that those who wield it can maintain, stems in part from the scarcity of safe, affordable housing in our society.<sup>292</sup> That scarcity is the product of legal structures.<sup>293</sup> Among the most important are the laws that promote housing as a commodity for profit rather than treat it as shelter to be made available for all who need it.<sup>294</sup>

### CONCLUSION

Eviction courts purportedly resolve disputes over access to housing. In a society in which unavailability of housing threatens a significant portion of the population, one might ask if the courts are equipped to resolve this fundamental social problem.<sup>295</sup> Or, to approach it from another perspective, if eviction courts determine, in Professor Witt's words, "access to basic needs,"<sup>296</sup> the burdens of that social role ought to reshape the design of the fora. If not, the courts serve simply to legitimize property owners' use of force.<sup>297</sup>

The pandemic has brought more of these tensions out in the open and added strength to demands for something different. The social conditions created by COVID-19 have encouraged elected officials to support activist

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290. See *supra* Part I.B. Note also that under federal law an eviction can result in the loss of a Section 8 Housing Choice Voucher; for tenants without stability of tenure because they live in jurisdictions without just cause laws or rent regulation, the loss of that subsidy (which can be transferred to another private property), may be an even scarier prospect than loss of the right to occupy the current home.

291. See *supra* notes 56–59 (describing gap between incomes and housing costs); notes 60–65, 68–75 (referencing laws that create dearth of affordable housing, including laws excluding people of color from wealth-building opportunities); Sabbeth, *supra* note 44, at 107 (identifying additional obstacles of "segregation and discrimination, damaged credit, a criminal record, a prior eviction, undocumented status and the absence of a social security number").

292. See *supra* Part I.A.

293. See *supra* Part I.B.

294. See *supra* Part I.B.

295. See Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DAEDALUS 128, 130 (Winter 2019) ("But are state civil courts the appropriate institution to address individual socioeconomic needs . . . that manifest in a society with stagnant wages and rising inequality?").

296. WITT, *supra* note 7, at 129.

297. See *Lindsey v. Normet*, 405 U.S. 56, 71–72 (1972) (describing summary judgment process as alternative to historical "self-help and violence"); Shirin Sinnar, *Civil Procedure in the Shadow of Violence*, in A CRITICAL GUIDE TO CIVIL PROCEDURE (forthcoming 2022) (manuscript at 5) ("Eviction procedures still operate in the shadow of violence, although it is now the state that is solely authorized to inflict it."); Sabbeth, *Simplicity*, *supra* note 128, at 297 ("If a landlord wins an eviction case, an agent of the state will forcibly remove any tenant who remains in possession. . .").

efforts that, ever so slightly, tilt the balance of power towards a more even grade.<sup>298</sup> Some ideas that were previously laughable are now on the table.<sup>299</sup>

Law can be violent and oppressive, but it can also offer a buffer against violence and oppression.<sup>300</sup> While many landlords and judges may view eviction courts as rent collection devices, or legitimate avenues for removing families from the homes in which they live, that remains contested. Let the end of the eviction moratoria be a time to grapple seriously with the social purposes our courts can and should serve, and then let us ask ourselves what legal changes will move us in that direction.

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298. See, e.g., Annie Nova, *After Hard Times for Renters, Cities and States Pass Dozens of New Protections*, CNBC (Nov. 23, 2021, 10:45 AM), <https://www.cnbc.com/2021/11/23/after-a-hard-time-for-renters-cities-and-states-pass-new-protections-.html>; Jaboa Lake & Leni Tupper, *Eviction Record Expungement Can Remove Barriers to Stable Housing*, CTR. FOR AM. PROGRESS (Sep. 30, 2021), <https://www.americanprogress.org/article/eviction-record-expungement-can-re-move-barriers-stable-housing>.

299. See, e.g., Rebecca C. Lewis, *Good Cause Eviction Has Momentum Leading Into 2022*, CITY & STATE N.Y. (Dec. 7, 2021), <https://www.cityandstateny.com/policy/2021/12/good-cause-eviction-has-momentum-leading-2022/187324>.

300. See, e.g., Sabbeth, *Simplicity*, *supra* note 128, at 299–300 (highlighting how procedural doctrines can sometimes be the only tool protecting tenants from swift eviction).