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# Summary Eviction Proceedings as a Debt Collection Tool

## HOW LANDLORDS USE SERIAL EVICTION FILINGS TO COLLECT RENT

*“Modern man’s place of retreat for quiet and solace is the home. Whether rented or owned, it is his sanctuary.”<sup>1</sup>*

—Justice William O. Douglas

### INTRODUCTION

In theory, summary eviction proceedings provide every tenant an opportunity to assert their rights. However, in reality, hundreds of eviction proceedings are scheduled each hour and tenants have minutes to defend themselves from being pushed out of their homes.<sup>2</sup> In housing courts across the country, tenants squeeze onto benches in the courtroom alongside other tenants, family members, landlords, and attorneys,<sup>3</sup> awaiting the opportunity to tell a judge their story. Often, they are cut off within minutes, before they have had a chance to make their argument, because a judge determines that they are not providing a legal defense.<sup>4</sup> After this, the tenant is told they will ultimately be evicted.<sup>5</sup> While this process had been adopted in every state as a means to adjudicate landlord and tenant claims, in practice, the summary eviction proceeding is designed to undermine the rights of a tenant who is nonetheless legally

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<sup>1</sup> *Lindsey v. Normet*, 405 U.S. 56, 82 (1972).

<sup>2</sup> See Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 416 (2022).

<sup>3</sup> Daniel W. Bernal, *Ashamed, Judged, and Unsafe: A Qualitative Study of Tenant Justice Perceptions to Inform the Redesign of Housing Court*, 52 N.M. L. REV. 70, 71–72 (2022).

<sup>4</sup> See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 571–72 (1992); see also Bernal, *supra* note 3, at 71.

<sup>5</sup> Mason, *supra* note 2, at 416 (explaining that 70 percent of summary evictions took under a minute); LAWS.’ COMM. BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 1, 7 (2003), <https://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf> [<https://perma.cc/6AQ3-3G48>] (noting that the average summary eviction lasts one minute and forty-five seconds).

entitled to possession.<sup>6</sup> The speed, efficiency, and complexity with which these proceedings operate, paired with a presumption that the premises are the landlord's possession, altogether prevent a tenant from exercising their rights.<sup>7</sup> This includes, for example, procedures that totally bar a tenant from asserting claims against their landlord, as well as courts denying a tenant relief against a landlord's housing violations when they owe back rent.<sup>8</sup>

The modern eviction proceeding, known as the summary proceeding, was created because of a reluctance by courts to allow landlords to dispossess tenants extrajudicially when there was a conflict over possession.<sup>9</sup> While these proceedings vary from state to state, they all generally work in the same manner.<sup>10</sup> Before the creation of these civil proceedings, landlords were able to regain possession of their land on their own, through actions legally defined as self-help.<sup>11</sup> If a tenant owed the landlord rent, the landlord could seize property, for example, by removing a tenant's belongings from the premises or locking a tenant out of the property.<sup>12</sup> This, however, left no room for a tenant to adjudicate their claim to possession of the premises.

Many courts were wary of this method of forcible removal because it circumvented the court's authority, and it was often difficult to define "peaceable self-help."<sup>13</sup> In response, some jurisdictions developed ejectment actions; however, they were often drawn out and procedurally complex.<sup>14</sup> As a compromise, the modern day summary eviction process was created to speed up the judicial process while also preventing landlords from using self-help to bypass the lengthy ejectment actions.<sup>15</sup> Theoretically, this structure provides tenants and landlords an opportunity to resolve a dispute in court; procedurally, however, it disproportionately disadvantages low-income tenants.<sup>16</sup> Additionally, these proceedings give landlords the power of the

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<sup>6</sup> Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

<sup>7</sup> *Id.* at 138.

<sup>8</sup> *See id.* at 137.

<sup>9</sup> *See id.* at 155–56.

<sup>10</sup> Mason, *supra* note 2, at 393.

<sup>11</sup> Spector, *supra* note 6, at 150–51.

<sup>12</sup> *Id.* at 151.

<sup>13</sup> *Id.* at 155–56.

<sup>14</sup> *Id.* at 154; Mason, *supra* note 2, at 398.

<sup>15</sup> Mason, *supra* note 2, at 398.

<sup>16</sup> Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 512 (1982); *see infra* Part I.

court as a means to eject a tenant from the subject premises, directly leading to homelessness and contributing to poverty.<sup>17</sup>

Despite these challenges, the summary eviction proceeding remains the dominant means of resolving tenant landlord disputes across the country today. Notably, the proceedings require landlords to go through the courts to try to remove a tenant. The first step toward an eviction proceeding is sending the tenant a “notice to quit” after the tenant violates a provision of the lease (i.e., for the purpose of this note, not paying their monthly rent).<sup>18</sup> This notice tells the tenant that they can either pay the rent they owe, vacate the premises in a statutorily defined time (usually around five to ten days), or face eviction.<sup>19</sup> A summary eviction process is triggered when the tenant fails to pay or vacate, and the landlord files for eviction with the court and serves the tenant with a summons and a complaint.<sup>20</sup> The summons informs the tenant of when they need to appear in court, while the complaint specifies the reason(s) for eviction. At this point, the landlord has summoned the power of the court in obtaining the rent owed, because if the tenant fails to appear, the court can issue a default judgment against them.<sup>21</sup> When this happens, the landlord is deemed the rightful possessor of the premises and can take steps to reobtain it.<sup>22</sup>

This note argues that the current structure of summary eviction proceedings allows landlords to not only evict tenants, but also to manipulate and co-opt the system to collect debt. As a result, landlords wield the power of the courts to obtain back rent owed by tenants through eviction filings. Filing for eviction is a powerful tool for landlords because the threat of eviction may discourage a tenant from asserting claims against their landlord, and as long as a tenant owes their landlord back rent, housing courts will not recognize their claims. This failure to make successful claims exacerbates an already asymmetrical power dynamic between a landlord and tenant because tenants are ultimately prevented

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<sup>17</sup> Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RSCH 1, 1 (2016).

<sup>18</sup> Daniel W. Bernal, *Pleadings in A Pandemic: The Role, Regulation, and Redesign of Eviction Court Documents*, 73 OKLA. L. REV. 573, 601 (2021).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> NYU FURMAN CTR., TRENDS IN NEW YORK CITY HOUSING COURT EVICTION FILINGS 2 (Nov. 2019); AJ Golio et al., *Eviction Court Outcomes and Access to Procedural Knowledge: Evidence From a Tenant-Focused Intervention in New Orleans*, 33 HOUSING POLY DEBATE 2 (2022); see also HOUS. ACTION ILL. & LAWYS.’ COMM. BETTER HOUSING, PREJUDGED: THE STIGMA OF EVICTION RECORDS 3 (Mar. 2018) (“[M]any tenants did not realize that their very first appearance in eviction court could decide the fate of their housing and leave them with a lasting eviction record.”).

<sup>22</sup> Golio et al., *supra* note 21, at 2.



from exercising their legal rights in proceedings, which is especially pronounced for low-income tenants. This note proposes that one way to mitigate against the use of summary eviction proceedings as a debt collection tool is to apply the Fair Debt Collection Practices Act, which protects consumers from abusive and unfair debt collection practices. Additionally, a clean hands requirement and prefiling alternatives to housing court can ensure that tenants are able to adjudicate claims they have against their landlords. However, in order to fully address these issues, larger reforms by legislatures and courts are needed in order to entirely rethink the summary proceeding.

Recent scholarship on summary eviction proceedings has focused on a right to counsel for tenants in housing court.<sup>23</sup> This note adds to the discussion by examining how specific procedures and aspects of housing court allow it to function as debt collection. Ultimately, while this note demonstrates that a right to counsel is essential for fairer adjudications, counsel alone is not enough, as even tenants with counsel must still operate within the confines of existing procedures. As such, the suggestions in this note should be viewed as suggestions to be paired with, not in lieu of, a civil right to counsel. Given the complexity of these issues, one singular solution will not be a panacea: states must institute all of these suggestions in order to have the greatest impact.

Part I of this note describes how modern housing court works. Part II analyzes how serial eviction filings, failed meritorious claims, and low pleading barriers have allowed landlords to use summary eviction proceedings to their benefit, transforming housing court into a debt collection tool and preventing tenants from adjudicating their rights in these proceedings. Part III proposes applying the Fair Debt Collection Practices Act to eviction filings and summary eviction proceedings in order to prevent landlords from using housing court as their debt collectors. It also proposes additional solutions, like a clean hands requirement, to allow for the actual resolution of tenants' claims in summary proceedings, prefiling alternatives to move cases outside of housing court, and counsel for tenants to allow them to fully adjudicate their claims. It

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<sup>23</sup> See Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020); Vamsi Damerla, *The Right to Counsel in Eviction Proceedings: A Fundamental Rights Approach*, 6 COLUM. HUM. RTS. L. REV. ONLINE 355 (2022); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of A Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2019).

concludes with a call to reimagine these proceedings and reframe the landlord-tenant relationship.

## I. MODERN DAY HOUSING COURT

Today in the United States, rental costs have increased at the highest pace in decades, with median rent at an all-time high across the nation.<sup>24</sup> Rent not only doubled in the last twenty years from \$602 per month in 2000 to \$1,097 in 2019,<sup>25</sup> but it doubled again to \$2,000 per month by August 2022.<sup>26</sup> At the same time, more households are renting, housing prices have skyrocketed, and many cities face a homelessness crisis of unprecedented proportions.<sup>27</sup>

Rising housing costs have resulted in a growing number of renters who are considered “cost burdened.” As defined by the US Department of Housing and Urban Development, a household classifies as cost burdened if it pays more than one-third of its income toward rent and utilities each month.<sup>28</sup> In 2018, close to 50 percent of all renters across the United States were cost burdened.<sup>29</sup> In some US cities, as many as one in four households spend up to 70 percent of their income on rent and other associated housing costs.<sup>30</sup> Notably, families in poverty experience the increased cost of rent more drastically, whereby about 50 percent of all low-income families spend more than half of their incomes on rent.<sup>31</sup>

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<sup>24</sup> María Paula Mijares Torres & Jonnelle Marte, *The Snowballing U.S. Rental Crisis Is Sparing Nowhere and No One*, BLOOMBERG (Aug. 10, 2022, 7:30 PM), <https://www.bloomberg.com/news/features/2022-08-10/us-rental-housing-crisis-spirals-on-inflation-pressure-pandemic-migration?leadSource=uverify%20wall> [<https://perma.cc/QLV2-2AB8>].

<sup>25</sup> ROBERT BONNETTE, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: HOUSING COSTS OF RENTERS: 2000 2 (May 2003) (finding that, in 2000, the nationwide median gross rent per month was \$602); U.S. CENSUS BUREAU, MEDIAN GROSS RENT IN U.S. IS \$1,097 (2019), <https://data.census.gov/all?q=median+rent&y=2019> [<https://perma.cc/L7QU-SEEC>] (citing the US Census Bureau’s 2019 American Community Survey, which is the US Census Bureau’s annual demographic survey program).

<sup>26</sup> Torres & Marte, *supra* note 24.

<sup>27</sup> Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting than at Any Point in 50 Years*, PEW RSCH. CTR., (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/> [<https://perma.cc/YZ9F-NCLU>]; Desmond & Gershenson, *supra* note 17, at 1; see *State of Homelessness: 2023 Edition*, NAT’L ALL. TO END HOMELESSNESS (Sept. 2022), <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/> [<https://perma.cc/8S6J-ZDDJ>].

<sup>28</sup> MARK TRESKON ET AL., URB. INST., EVICTION PREVENTION AND DIVERSION PROGRAMS: EARLY LESSONS FROM THE PANDEMIC 2 (Apr. 2021), <https://www.urban.org/sites/default/files/publication/104148/eviction-prevention-and-diversion-programs-early-lessons-from-the-pandemic.pdf> [<https://perma.cc/YG3U-ZNJ3>].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

For low-income tenants, living under the threat of eviction is not a discrete, defined event in their lifetime, but rather a “drawn-out process.”<sup>32</sup> Because of high housing costs, stagnating wages, and inflation, low-income tenants are always on the edge of eviction.<sup>33</sup> One missed paycheck, health emergency, or higher than anticipated utility bill can lead to homelessness.<sup>34</sup> In this respect, eviction has become “a fundamental aspect of [low-income tenants’] rental experience.”<sup>35</sup> When a low-income tenant falls short on rent, the risk of eviction exacerbates an already asymmetrical power dynamic between landlord and tenant.

Housing court is not designed to provide individuals with due process, but rather its structure is such that individuals are pushed in and out before they have even had the chance to present their rights or exert their demands. Judges in housing court have such large dockets (a result of the large amount of eviction filings that landlords initiate) that housing court is often described as an “eviction assembly line: stamp, stamp, stamp.”<sup>36</sup> As a result of the sheer volume of cases, with judges in some jurisdictions scheduling as many as eighty hearings an hour, the summary proceeding is “designed to be carried out in the absence of tenant-defendants” in order to push cases through quickly.<sup>37</sup> Many jurisdictions do not require any motion by the landlord to enter a default.<sup>38</sup> As described by one housing court judge, “[t]he atmosphere of [housing court] . . . does not encourage deliberate, reasoned, and compassionate justice, although it deals with one of the basic material essentials of life, a roof over one’s head.”<sup>39</sup>

Additionally, summary eviction proceedings can be incredibly adversarial for tenants, especially those who have no experience in housing court. Virtually all tenants proceed

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<sup>32</sup> Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316, 317 (Sept. 2021).

<sup>33</sup> Desmond & Gershenson, *supra* note 17, at 1, 12.

<sup>34</sup> *Id.*

<sup>35</sup> Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 639 (2019).

<sup>36</sup> MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 304 (2016) (emphasis omitted).

<sup>37</sup> Bernal, *supra* note 3, at 71–72; Eric Sirota, *The Rental Crisis Will Not Be Televised: The Case for Protecting Tenant’s Under Consumer Protection Regimes*, 54 U. MICH. J. L. REFORM 667, 719 (2021).

<sup>38</sup> David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 434–35 (2011).

<sup>39</sup> *Id.* at 439 (quoting Fed. Nat’l Mortg. Ass’n v. Wingate, 273 N.W.2d 456, 460–61 (Mich. 1979)).

unrepresented, while almost all landlords have counsel.<sup>40</sup> Landlords and their attorneys are repeat players who understand the workings of housing court and housing law, whereas tenants often lack technical knowledge of both the defenses they can bring as well as the procedures of housing court.<sup>41</sup> Beyond a lack of counsel, the fact that the average summary eviction lasts only one minute and forty-five seconds puts tenants at a huge disadvantage.<sup>42</sup> Therefore, it is not difficult to understand how tenants often leave these proceedings not even knowing if they are ultimately getting evicted.<sup>43</sup>

Furthermore, and importantly, there are huge racial disparities in both eviction rates and the tenants forced into housing court. Studies indicate that the risk of eviction is higher not only for lower-income renters, but also Black renters.<sup>44</sup> Black renters are largely overrepresented in eviction filings as compared to their white counterparts, and even among the same income groups, they are evicted at higher rates than their white counterparts.<sup>45</sup> Eviction filings against Black renters are significantly greater than their share of the overall rental population, whereas the opposite is true for white, Latinx, and Asian renters.<sup>46</sup> Black renters also face the highest rates of eviction judgements, with many living in areas where the eviction rate is more than double the eviction rate for white renters.<sup>47</sup> Black renters are also more likely to be serially filed against.<sup>48</sup> Lastly, female-identifying renters (especially those who are also Black and Latinx) are at a higher risk of eviction compared to male-identifying renters, putting female-identifying Black and Latinx renters at the highest risk of all renters.<sup>49</sup> These statistics are important because eviction filings (and evictions) have real economic consequences for renters.<sup>50</sup>

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<sup>40</sup> Damerla, *supra* note 23, at 359. Ninety percent of tenants were unrepresented, while 90 percent of landlords were represented. DESMOND, *supra* note 36 at 303.

<sup>41</sup> See Bernal, *supra* note 18, at 586.

<sup>42</sup> LAWS' COMM. BETTER HOUSING, *supra* note 5, at 7, 11.

<sup>43</sup> See Bernal, *supra* note 3, at 99–100 (explaining how tenants only learned that they had been evicted from their homes when they reviewed their paperwork with researchers in the article's study).

<sup>44</sup> Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653 (2020).

<sup>45</sup> *Id.*; Nick Graetz et al., *A Comprehensive Demographic Profile of the US Evicted Population*, 120(41) PROC. NAT'L ACAD. SCI. 1, 3 (2023).

<sup>46</sup> Hepburn, Louis & Desmond, *supra* note 44, at 653.

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

<sup>48</sup> *Id.* at 657.

<sup>49</sup> *Id.* at 655.

<sup>50</sup> DESMOND, *supra* note 36, at 296 (showing that the likelihood of being laid off is 15 percent higher for workers who have experienced an eviction).

One study estimated that a single eviction filing increased housing costs twenty percent.<sup>51</sup> The fallout and consequences of eviction are numerous and lead directly to homelessness.

## II. HOW LANDLORDS HAVE CO-OPTED THE SUMMARY EVICTION PROCEEDING

The vast majority of tenants are evicted due to nonpayment of rent.<sup>52</sup> For example, in New York City, nonpayment cases made up around 85 percent of all eviction filings in 2017.<sup>53</sup> An eviction filing is the beginning of the eviction process, whereby the landlord files with the court to either get payment from the tenant or ultimately evict them if the tenant is unable or fails to pay.<sup>54</sup> In contrast, an executed eviction occurs at the end of a housing case, when a judgment has been made by the housing court granting possession of the subject premises to the landlord.<sup>55</sup> This judgment then allows the landlord to use local law enforcement to force the tenant out of the premises.<sup>56</sup> Most literature does not make a distinction between eviction filings and executed evictions when discussing evictions generally, despite the fact that most eviction filings do not result in an eviction.<sup>57</sup> This distinction is important though, because despite the fact that a tenant may not ultimately be evicted from their home, a landlord's filing nonetheless triggers the power of the court. This note shows how that has many implications for and effects on the tenant and their ability to adjudicate their claims in court.

### A. *Serial Evictions Filings*

While the eviction process is usually viewed as a method to regain possession of a property, landlords instead often use

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<sup>51</sup> See Leung, Hepburn & Desmond, *supra* note 32, at 317 (explaining that a study of eight million court records revealed that “each eviction filing translated into \$180 in fines and fees for renter households in the average tract”).

<sup>52</sup> See Desmond & Gershenson, *supra* note 17, at 1; see also Drew Desilver, As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S., PEW RSCH. CTR. (Aug. 2, 2021), <https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/> [https://perma.cc/GZB7-Y9JD] (voicing concerns that the expiration of the COVID-era nationwide eviction moratorium could result in the eviction of “millions of renters” unable to make rent payments).

<sup>53</sup> NYU FURMAN CTR., *supra* note 21, at 4.

<sup>54</sup> See *id.* at 2 (stating that “[t]his is the first of three major steps in the eviction process”).

<sup>55</sup> Golio et al., *supra* note 21, at 7.

<sup>56</sup> *Id.*

<sup>57</sup> Garboden & Rosen, *supra* note 35, at 655.

eviction filing as a first resort to obtain past-due rent rather than actual possession of the premises.<sup>58</sup> This practice is best evidenced by data on serial eviction filings. Serial eviction filings occur when a landlord repeatedly files an eviction against the same household.<sup>59</sup> One study found that among eight million eviction records across twenty-eight states, “[a]lmost half of all eviction filings . . . [were] associated with serial filing.”<sup>60</sup> Among states that had the highest eviction filing rates in the country, most households were filed against three or more times.<sup>61</sup>

Moreover, data comparing the number of eviction filings to the evictions that were ultimately executed in a given municipality highlights how the distinction between these two steps in the procedure is important—it shows that landlords may be using evictions filings for a purpose other than eviction. For example, in Baltimore there are approximately 6,500 executed evictions in a given year.<sup>62</sup> However, this is out of 150,000 evictions filed by landlords.<sup>63</sup> What is especially concerning is that Baltimore is home to only 130,000 rental households.<sup>64</sup> In New York City, comparatively, there were 230,000 eviction filings in 2017, but only twenty thousand evictions executed.<sup>65</sup> These data show that many low-income families live under a constant threat of being evicted—although they may not ultimately be evicted, any financial shock, no matter how big or small, still puts a low-income tenant at risk of being brought into housing court through serial eviction filing.<sup>66</sup>

An executed eviction itself is expensive for a landlord, as it can result in lost rent as well as turnover costs.<sup>67</sup> Therefore, in order to maximize profits, a landlord will try to avoid an executed eviction until absolutely necessary; however, the same

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<sup>58</sup> *Id.* at 639.

<sup>59</sup> Leung, Hepburn, & Desmond, *supra* note 32, at 317.

<sup>60</sup> *Id.* at 316.

<sup>61</sup> *Id.* at 325-26.

<sup>62</sup> PUB. JUST. CTR., JUSTICE DIVERTED: HOW RENTERS IN BALTIMORE ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 57 (2015).

<sup>63</sup> *Id.* at 56.

<sup>64</sup> Garboden & Rosen, *supra* note 35, at 645.

<sup>65</sup> NYC City Council Data Team, *Evictions: NYC Residents Are Affected by Evictions Every Day*, N.Y. CITY COUNCIL, <https://council.nyc.gov/data/evictions/> [<https://perma.cc/F9LX-UNJ5>].

<sup>66</sup> There are two types of evictions—nonpayment and holdover. Nonpayment is when a tenant has failed to pay rent owed, so the landlord is seeking those arrears. In contrast, a holdover is when the landlord is seeking to evict the tenant for a reason other than nonpayment, such as being a nuisance or illegally subletting the apartment. NYU FURMAN CTR., *supra* note 21, at 4.

<sup>67</sup> Garboden & Rosen, *supra* note 35, at 646–47. Lost rent and cleanup costs from an eviction can cost a landlord thousands of dollars. *See id.* at 647–48.

cost-benefit analysis is different for *filing* for an eviction.<sup>68</sup> Unlike the cost of an executed eviction, the cost to file in most jurisdictions is extremely low. In New York City, it is only a twenty-five dollar fee to file for an eviction.<sup>69</sup> The low cost encourages landlords to file evictions, even for low amounts of back rent.<sup>70</sup> As such, for low-income tenants, the threat of eviction is “a fundamental aspect of [their] rental experience.”<sup>71</sup> Evictions are not a singular event in a tenant’s lifetime, but rather the “threat of eviction [is] a routine, drawn-out process . . . not always resulting in displacement, yet nonetheless exacerbating financial precarity.”<sup>72</sup> The debt owed by the tenant reshapes the landlord-tenant relationship, forcing the tenant into the inferior role of debtor to the landlord.

Additionally, the ease with which a landlord may summon the power of the courts in collecting back rent (legally known as arrears) encourages landlords to keep tenants in debt so they can continually leverage the power of the court by serially filing in order to obtain the debt.<sup>73</sup> The threat of eviction alone may prevent a tenant from asserting claims against a landlord, even when they have a legal right to do so.<sup>74</sup> Claims a tenant may bring include violations of their right to a habitable apartment if, for example, a landlord has failed to eradicate a vermin infestation, or claims that their landlord is harassing them by entering the property without permission or illegally changing the locks.<sup>75</sup>

The research on eviction filings as compared to executed evictions further shows that landlords do not use the eviction process solely for repossessing their property, but rather as a method of monetary extraction from tenants.<sup>76</sup> In order for a tenant to stay in their home, they must pay.<sup>77</sup> This includes past-due rent, late fees, and court costs, otherwise they risk being

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<sup>68</sup> *Id.* at 646.

<sup>69</sup> *Court Fees in the New York City Civil Court*, N.Y. STATE UNIFIED CT. SYS., <https://nycourts.gov/COURTS/nyc/civil/fees.shtml> [<https://perma.cc/YN8X-UN7L>].

<sup>70</sup> See BRIAN J. MCCABE & EVA ROSEN, *EVICTON IN WASHINGTON, DC: RACIAL AND GEOGRAPHIC DISPARITIES IN HOUSING INSTABILITY* 2, 28 (2020).

<sup>71</sup> Garboden & Rosen, *supra* note 35, at 639.

<sup>72</sup> Leung, Hepburn & Desmond, *supra* note 32, at 317.

<sup>73</sup> Mason, *supra* note 2, at 426; Garboden & Rosen, *supra* note 35, at 639 (“[F]iling assists in rent collection by leveraging the police power of the state to materially and symbolically support the landlord’s collection efforts.”).

<sup>74</sup> See *infra* Part III.

<sup>75</sup> OFF. N.Y. ATT’Y GEN., *RESIDENTIAL TENANT’S RIGHTS GUIDE: RENTERS RIGHTS AND PROTECTIONS UNDER NEW YORK STATE LAW* 38, [https://ag.ny.gov/sites/default/files/tenants\\_rights.pdf](https://ag.ny.gov/sites/default/files/tenants_rights.pdf) [<https://perma.cc/H8RZ-97VM>].

<sup>76</sup> See MCCABE & ROSEN, *supra* note 70, at 27, 29.

<sup>77</sup> See PUB. JUST. CTR., *supra* note 62, at 6.

evicted.<sup>78</sup> On average, eviction filing increases housing costs for tenants by about 20 percent per eviction filing.<sup>79</sup>

A tenant may choose to pay these costs because an eviction on their record can severely limit their ability to find suitable housing.<sup>80</sup> Most landlords use tenant-screening services that show a tenant's involvement with any eviction or eviction filing.<sup>81</sup> These services screen through housing records in an effort to weed out what a landlord may consider a "risky" tenant. Frequently referred to as the "Tenant Blacklist," these records can often be misleading or flat out inaccurate.<sup>82</sup> This is because they may indicate that a tenant was in housing court, but not show whether any judgment was ultimately made against them.<sup>83</sup> Inaccuracies include vague or misleading judgments, cases that were never even adjudicated but remain in an eviction history, as well as legal evictions that were never actually executed after the proceeding.<sup>84</sup> Presence on this "black list," therefore, makes it harder for a tenant to rent in the future, regardless of the ultimate outcome, as landlords discriminate against prospective tenants who have had any involvement with housing court, despite their other qualifications as a tenant.<sup>85</sup>

Any eviction record, no matter its accuracy, could cause a tenant is to be denied affordable housing.<sup>86</sup> Use of these tenant blacklists further exacerbates the affordable housing crisis because it limits where a tenant can go when they leave an apartment.<sup>87</sup> As explained by a lawyer who has represented tenants in class action lawsuits against tenant-screening companies, "there are a lot of tenants who are terrified of complaining of or withholding rent because they are afraid of getting on these blacklists."<sup>88</sup> Additionally, these records

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<sup>78</sup> See Leung, Hepburn & Desmond, *supra* note 32, at 317.

<sup>79</sup> *Id.*

<sup>80</sup> Adam Porton, Ashley Gromis & Matthew Desmond, *Inaccuracies in Eviction Records: Implications for Renters and Researchers*, 31 HOUS. POL'Y DEBATE 377, 378 (2020). Landlords may categorically deny tenants who have any eviction record, whether the tenant was actually evicted or not.

<sup>81</sup> See Matthew Goldstein, *The Stigma of a Scarlet E*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/business/eviction-stigma-scarlet-e.html> [<https://perma.cc/NMC9-3KUC>] ("[A]n estimated nine out of 10 landlords across the country" use tenant screening services).

<sup>82</sup> *Id.*

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

<sup>84</sup> Porton, Gromis & Desmond, *supra* note 80, at 379.

<sup>85</sup> Kim Barker & Jessica Silver-Greenberg, *On Tenant Blacklist, Errors and Renters With Little Recourse*, N.Y. TIMES (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/nyregion/new-york-housing-tenant-blacklist.html> [<https://perma.cc/6MSU-XH9C>].

<sup>86</sup> Porton, Gromis & Desmond, *supra* note 80, at 379.

<sup>87</sup> Golio et al., *supra* note 21, at 2.

<sup>88</sup> Barker & Silver-Greenberg, *supra* note 85.



disproportionately harm groups of people who have continuous involvement with housing court.<sup>89</sup> Because Black renters, low-income renters, and women are more likely to have evictions filed against them, they are more likely to be harmed by the use of this information.<sup>90</sup>

Since any eviction record has long lasting consequences for a tenant, “repeated [eviction] filings create barriers to future mobility.”<sup>91</sup> Tenants who become the victims of repeat filings but are never actually evicted will continue to face the impacts of having an eviction filing on their record when they look for housing in the future.<sup>92</sup> Ironically, while an eviction is traditionally viewed as a method to remove a tenant, an eviction filing may actually be used to retain a tenant by making them ineligible for other housing.<sup>93</sup> Through an eviction filing, a landlord leverages the power of the court and thus coerces payment from the tenant because an eviction record will bring with it a huge risk when attempting to find housing in the future.<sup>94</sup> Furthermore, eviction carries many economic, social, and emotional effects that may encourage a tenant to pay these costs rather than risk eviction.<sup>95</sup> Some of these effects include being forced into substandard housing, loss of social networks, higher rates of depression and suicide, and ultimately homelessness.<sup>96</sup> Eviction can be devastating for families and these effects can be felt long after the eviction.<sup>97</sup>

It is evident that the threat of an eviction filing can coerce payment from tenants in order to avoid an eviction record and ultimately eviction. This first step in the process is incredibly powerful because the court is now involved in the process of collecting the tenant’s debt. In doing this, landlords use the risk of an eviction and eviction record as a mechanism to coerce debt from tenants, even when a landlord may not be seeking to ultimately evict the tenant.

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<sup>89</sup> Porton, Gromis & Desmond, *supra* note 80, at 379.

<sup>90</sup> See *supra* Section I.B.

<sup>91</sup> Porton, Gromis & Desmond, *supra* note 80, at 388.

<sup>92</sup> *Id.* at 378, 380.

<sup>93</sup> Leung, Hepburn & Desmond, *supra* note 32, at 319.

<sup>94</sup> See Porton, Gromis & Desmond, *supra* note 80, at 379.

<sup>95</sup> See DESMOND, *supra* note 36, at 296–99 (explaining how eviction can lead to job loss, depression, suicidal thoughts, lack of community trust, denial of government benefits, etc.)

<sup>96</sup> *Affordable Housing, Eviction, and Health*, OFF. POL’Y & DEV. (Summer 2021), <https://www.huduser.gov/portal/periodicals/em/Summer21/highlight1.html> [<https://perma.cc/YE78-7P9B>].

<sup>97</sup> *Id.*

*B. The Implied Warranty of Habitability and the Inability to Raise Claims*

A central failure of housing court that allows landlords to co-opt the judicial process for their own financial gain is the court's failure to provide relief for tenants' claims against their landlords.<sup>98</sup> This failure is best exemplified through the implied warranty of habitability, which has been traditionally hailed as a revolution in tenants' rights in legal and academic circles.<sup>99</sup> However, in practice, the implied warranty of habitability has failed to provide a mechanism under which tenants can obtain relief not only for nonpayment, but also in obtaining habitable premises.<sup>100</sup>

The seminal case outlining the implied warranty of habitability is *Javins v. First National Realty Corporation*.<sup>101</sup> There, the court established the doctrine that a tenant's obligation to pay was dependent on the landlord's obligation to maintain the premises.<sup>102</sup> Many law students learn that this means that when a landlord fails to provide a habitable premise, the tenant is under no obligation to pay rent.<sup>103</sup> However, while this doctrine exists as both an affirmative and defensive claim for tenants who do not pay rent, it is rarely successful at either keeping tenants in their premises or ensuring that landlords maintain habitable premises.<sup>104</sup> Research indicates that the warranty has largely been unsuccessful because (1) it is usually only invoked as a defense to nonpayment, (2) even when a tenant has a meritorious breach of warranty claim, there is often leftover rent that they still have to pay, and (3) the damages that a landlord may incur from a failure to comply are often much lower than the expenses of repairing the premises.<sup>105</sup> Because tenants hold such little power in these proceedings, and are almost always unsuccessful, landlords are incentivized to simply file evictions instead of fixing the premises, since they are unlikely to face consequences for a breach of the warranty.<sup>106</sup>

Claims of a breach of the warranty of habitability are virtually always invoked as a defense for nonpayment of rent in a summary eviction proceeding rather than as an affirmative

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<sup>98</sup> Mason, *supra* note 2, at 426.

<sup>99</sup> *Id.* at 402.

<sup>100</sup> Summers, *supra* note 23, at 202.

<sup>101</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072 (D.C. Cir. 1970).

<sup>102</sup> *Id.* at 1082.

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

<sup>104</sup> Summers, *supra* note 23, at 167, 201-202.

<sup>105</sup> Super, *supra* note 38, at 410-12.

<sup>106</sup> Garboden & Rosen, *supra* note 35, at 656; *see also* Super, *supra* note 38, at 410-12.

claim against the landlord.<sup>107</sup> For many low-income tenants, it is a risky gamble to withhold rent in an attempt to get a landlord to repair the premises because they must be willing to partake in an adversarial summary eviction process that is completely stacked against them.<sup>108</sup> Additionally, landlords win around 97 percent of all nonpayment cases, illustrating that the system strongly disfavors any nonpayment on part of the tenant, regardless of the conditions of the apartment.<sup>109</sup>

Furthermore, even when a tenant raises a breach of the warranty of habitability as an affirmative defense or a counterclaim to nonpayment, they may be foreclosed from relief due to stringent escrow requirements or outstanding debt.<sup>110</sup> Escrow requirements, also known as Landlord Protective Orders, require a tenant to deposit money (often some version of the rent owed) to the court while they either pursue a case against their landlord for violation of the warranty of habitability or when they raise it as a defense to nonpayment.<sup>111</sup> While this procedure may be an inconvenience for higher-income tenants, these requirements can become a preventative barrier for low-income tenants who may not have the upfront funds to put toward the claim.<sup>112</sup> For example, in Detroit housing court, where a trial by jury requires compliance with an escrow statute, among the twenty-thousand tenants who appeared, not a single one received a jury trial, indicating that it functions as a total bar to bringing claims.<sup>113</sup>

Escrow statutes impose an additional requirement to a meritorious warranty of habitability claim, one that ignores the realities of most low-income tenants.<sup>114</sup> These escrow requirements therefore hurt the very tenants that the implied warranty of habitability was supposed to benefit, while allowing landlords who fail to maintain a habitable premise to continue to ignore the needs of tenants.<sup>115</sup> Furthermore, these requirements illustrate the primacy of the landlord's claim to possession over the tenant's right to a habitable apartment, since a tenant can only bring their claims, even meritorious ones, if they can guarantee payment of rent to the landlord (in the

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<sup>107</sup> Summers, *supra* note 23, at 178.

<sup>108</sup> Sirota, *supra* note 37, at 717. For example, in most jurisdictions, low-income tenants are not entitled to a lawyer in summary eviction proceedings. *See id.* at 716–18.

<sup>109</sup> Super, *supra* note 38, at 437.

<sup>110</sup> *See id.* at 426, 429–30.

<sup>111</sup> *Id.* at 426.

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

<sup>113</sup> *Id.* at 432.

<sup>114</sup> Summers, *supra* note 23, at 163–64.

<sup>115</sup> Super, *supra* note 38, at 432.

form of an escrow payment). A low-income tenant will have no relief against a landlord's violations simply because they cannot afford the escrow requirements.

Even in a jurisdiction that does not have an escrow requirement, a tenant may still be unable to access relief when they raise a warranty of habitability defense because they owe the landlord back rent. A tenant who has unintentionally fallen behind on rent will be forced out of their apartment if the rent abatement they receive does not cover the total back rent owed to the landlord. A rent abatement is an adjustment in the rent a tenant owes because their landlord failed to maintain habitable premises.<sup>116</sup> This abatement is determined by the court and essentially acts like a reduction in the rent.<sup>117</sup> However, even when tenants had a meritorious habitability claim, only about 2 to 9 percent of those claims even received an abatement.<sup>118</sup> These shameful success rates indicate that judges may not be taking tenants' claims seriously. A study of Baltimore housing courts found that landlords avoided abatements or any damages in 98 percent of cases with a habitability issue, despite evidence of deteriorating housing stock.<sup>119</sup> This indicates that warranty claims are not a defense to nonpayment at all. A separate housing court study, also of Baltimore, found that judges routinely "ignored tenants' allegations and failed to give legal reasoning for their decisions . . . . Instances such as these occurred even when tenants managed to demonstrate blatantly obvious breaches of the warranty."<sup>120</sup> Many judges cut off tenants as soon as they admit that they failed to pay rent.<sup>121</sup> Therefore, in reality, the courts conduct the case for the landlord. As a result, tenants are in the same position whether they raise this meritorious defense or not.

Scholarship on the warranty of habitability posits that this lack of success is due to a general absence of legal representation among tenants in summary proceedings.<sup>122</sup> Data show that around 90 to 95 percent of all tenants in housing court are unrepresented, while most landlords have attorneys.<sup>123</sup>

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<sup>116</sup> See MINN. STAT. ANN. § 504B.425 (1999) (stating that a tenant is entitled to a rent abatement when a landlord fails to remedy violations that affect a tenant's ability to use the premises; the amount is determined by the court).

<sup>117</sup> *Id.*

<sup>118</sup> Summers, *supra* note 100, at 214.

<sup>119</sup> Bezdek, *supra* note 4, at 554, 558–59.

<sup>120</sup> Celia Feldman, *Renting While Poor: How Rent Escrow Violates Tenants' Due Process Rights*, 51 UNIV. BALT. L. REV. 247, 259 (2022).

<sup>121</sup> See Bernal, *supra* note 3, at 94.

<sup>122</sup> See Summers, *supra* note 23, at 171.

<sup>123</sup> Damerla, *supra* note 23, at 359.

While representation in summary proceedings is essential, data on the success rates of warranty of habitability claims—even when a tenant is represented—indicate that representation on its own is insufficient.<sup>124</sup> One study that looked at the effectiveness of counsel found that the warranty of habitability is an unsuccessful defense for all tenants.<sup>125</sup> The study found that even tenants that were represented by an attorney and had a meritorious habitability claim received an abatement only 27 percent of the time.<sup>126</sup> It appears that there may be some larger discomfort or misunderstanding about the application of the warranty by courts, and more research on why courts are so reticent to claims of such a breach is needed.

But it is still clear that the inability of tenants to make successful warranty of habitability claims continues to legitimize landlords' power in the court system, leaving tenants stuck in substandard housing at risk of eviction. Above all, this continues to legitimize landlords' power in the court, as their failure to maintain the premises does not matter when a tenant has not paid. And even when tenants are successful, the court often pushes the tenant out nonetheless.<sup>127</sup>

### C. *Low Filing Fees and Pleading Barriers*

Low fees and pleading requirements encourage landlords to indiscriminately file for eviction, even for small amounts. First, the fees associated with filing for an eviction are frequently very low.<sup>128</sup> In some places, like Maryland and Washington, DC, the fees are as little as fifteen dollars.<sup>129</sup> The highest filing fee is in Minnesota, where it costs a landlord around \$300 to file for eviction.<sup>130</sup> As a result, landlords file evictions for negligible amounts. For example, in Washington, DC, around 12 percent of all eviction filings were for debt less

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<sup>124</sup> See e.g., Mason, *supra* note 2, at 417, 425, 429–30 (explaining that the summary eviction process rests on the assumption that the landlord's remedy for relief should be repossession of the premises).

<sup>125</sup> See Summers, *supra* note 23.

<sup>126</sup> *Id.* at 149–50, 209. This is not to say that attorneys are ineffective at helping tenants win these claims. This same study showed that when a tenant was represented, they were at least nine times more likely to be successful on their claim than tenants who were unrepresented. See generally *id.*

<sup>127</sup> See Super, *supra* note 38, at 432.

<sup>128</sup> MOLLIE SOLOWAY, NETWORK PUB. HEALTH L., DETERRING SERIAL EVICTION FILING 3 (Apr. 2021). On average, it costs a landlord around \$112 to file an eviction. *Id.*

<sup>129</sup> *Id.*

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

than \$600.<sup>131</sup> A higher filing fee would discourage landlords from engaging in this practice.

Nonetheless, even in a jurisdiction like Minnesota, where the filing fees are greater, a landlord may still be incentivized to file for an eviction because they can pass the fees onto the tenant.<sup>132</sup> In order to reobtain possession, a tenant is not only forced to pay their rent in full, but must also pay any court costs the landlord accrues in filing the case.<sup>133</sup> As such, even high filing fees may not always discourage a landlord from filing for eviction when they can simply get reimbursed by the tenant-defendant.

Additionally, studies show that landlords are often not required to plead all of the elements of a *prima facie* case when they file for eviction.<sup>134</sup> In Chicago's housing court, landlords were not required to establish the specific elements of a *prima facie* case, but rather judges appeared to assume they were met.<sup>135</sup> In order to show that they are entitled to possession, a landlord must normally show, for example, that they have a right to the possess the premises and the tenant has violated or breached the lease agreement.<sup>136</sup> However, a study of Chicago eviction court found that judges rarely require evidence from landlords that they have a right to possession and determinations about whether a tenant breached were largely based off the allegations made by the landlord.<sup>137</sup> In contrast, tenants were often rebuffed by judges when they asked for clarification about their legal rights.<sup>138</sup> Because judges often exhibit a clear bias in favor of landlords, landlords are able to initiate a seemingly impartial process that is already in their favor, which contributes to the idea that housing court is really just an eviction mill.<sup>139</sup>

#### D. *Lack of Damages for Tenants*

A core reason that landlords are able to co-opt eviction proceedings for debt collection is that the potential damages a landlord has to pay even when the court rules in favor of the tenant are often less than the costs of an eviction filing and

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<sup>131</sup> MCCABE & ROSEN, *supra* note 70, at 30.

<sup>132</sup> Leung, Hepburn & Desmond, *supra* note 32, at 318.

<sup>133</sup> *Id.* at 317; see SOLOWAY, *supra* note 128, at 1 (explaining that some landlords immediately turn to eviction in order to collect rent and additional fees).

<sup>134</sup> LAWS.' COMM. BETTER HOUSING, *supra* note 5, at 14.

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

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*; Bezdek, *supra* note 4, at 570.

<sup>138</sup> LAWS.' COMM. BETTER HOUSING, *supra* note 5, at 20.

<sup>139</sup> See Bernal, *supra* note 3, at 99–100.

proceeding.<sup>140</sup> With the advent of the implied warranty of habitability, courts have framed the landlord-tenant relationship as a contractual one.<sup>141</sup> While this may occasionally be beneficial, as it forces both tenants and landlords to comply with the lease contract, it has also led courts to restrict the damages a tenant can receive.<sup>142</sup> For instance, in the rare case that a court actually rules in favor of the tenant on a warranty of habitability claim, the tenant is often restricted to the value of the repairs.

Strict adherence to a contracts standard of damages prevents a tenant from receiving punitive damages. For claims like a breach of the warranty of habitability, many jurisdictions simply give the difference between “the rent . . . and the value of the premises during the period of the breach.”<sup>143</sup> This could be money awarded or, when the warranty is used as a counterclaim, a “percentage reduction of the contracted-for rent.”<sup>144</sup> Even if the breach of the warranty occurred over a long period of time, a court may limit the rent abatement only to the months the landlord is seeking rent.<sup>145</sup> Alternatively, courts may not allow the tenant to recover damages beyond the rent amount that is owed.<sup>146</sup> Other jurisdictions may even penalize a tenant for withholding a portion of their rent agreement and award damages to the landlord.<sup>147</sup>

Other claims, such as retaliatory eviction, theoretically allow the tenant to receive a rent abatement, compensatory damages, damages for emotional distress, and attorney’s fees.<sup>148</sup> However, usually, the relief provided to a tenant in such circumstances is only a dismissal of the eviction proceeding.<sup>149</sup> While this is a momentary victory for a tenant, it is not a long-term solution to their problems because a landlord may reinitiate new proceedings against the tenant. Notably, in one case, a court even allowed a retaliatory eviction after the landlord repaired the premises and gave the tenant some time to find other housing.<sup>150</sup> If all the court does when a landlord actively violates the law is stop the eviction from occurring, it does little to deter a landlord

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<sup>140</sup> See Mason, *supra* note 2, at 425–26.

<sup>141</sup> Super, *supra* note 38, at 400.

<sup>142</sup> See Park W. Mgmt. Corp. v. Mitchell, 47 N.Y.2d 316, 329 (1979).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> C. F. Seabrook Co. v. Beck, 417 A.2d 89, 94 (N.J. Super. Ct. App. Div. 1980).

<sup>146</sup> Surratt v. Newton, 393 S.E.2d 554, 559 (N.C. Ct. App. 1990).

<sup>147</sup> TEX. YOUNG LAWS. ASS’N & STATE BAR OF TEX., TENANTS’ RIGHTS HANDBOOK 16 (2019).

<sup>148</sup> 99 Am. Jur. *Trials* § 289 Retaliatory Eviction Claims (2006).

<sup>149</sup> See Spector, *supra* note 6, at 137.

<sup>150</sup> See Bldg. Monitoring Sys., Inc. v. Paxton, 905 P.2d 1215, 1216, 1218 (Utah 1995).

from filing for eviction at some later date. A landlord can easily continue harassing a tenant by filing for eviction in the future, ultimately pushing the tenant to move out of the premises rather than live in substandard housing or face some other form of retaliation from the landlord.<sup>151</sup>

Without meaningful damages awards, a rational landlord will continue filing for eviction to get back rent that is owed, because the only risks they run are dismissal of the proceeding or rent abatements for the specified months of rent. Nonetheless, even the availability of these defenses (i.e., breach of the warranty of habitability and retaliatory eviction) presents little risk for landlords based on the data on case outcomes.<sup>152</sup> Ninety-five to 99 percent of all tenants lose in housing court, highlighting how landlords do not face material risks when filing for an eviction even when viable defenses exist.<sup>153</sup>

Equally as harmful, housing courts are used to facilitate the landlord's collection of rent. When the state collects rent on behalf of the landlord, it is essentially working as the landlord's collection agency. The eviction filing begins this process.<sup>154</sup> The eviction filing "serves to align the financial position of the landlord with a larger apparatus of civil justice, which deprives the tenant of any recourse short of payment."<sup>155</sup> Instead of eviction proceedings being a means to actually adjudicate claims, it is instead a tool for the landlord. Because courts will restrict the damages a tenant may get, a landlord faces little risk of reprimand from the court when they fail to uphold their end of a lease agreement. As such, if a tenant owes rent and the landlord has violated the warranty of habitability, for example, the landlord may nonetheless initiate an eviction proceeding to obtain the rent owed, because they know that it is unlikely that the court will rule against them.

### III. HOW TO MITIGATE AGAINST THE USE OF SUMMARY EVICTION PROCEEDINGS AS DEBT COLLECTION

This note proposes several solutions to mitigate the many issues prevalent in summary eviction proceedings, including the use of the Fair Debt Collection Practices Act to provide

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<sup>151</sup> See Melissa T. Lonegrass, *Eliminating Landlord Retaliation in England and Wales-Lessons from the United States*, 75 LA. L. REV. 1071, 1108 (2015). Even when tenants have sufficient claims of retaliation, like the warranty of habitability, they often fail in court. *Id.*

<sup>152</sup> Bezdek, *supra* note 4, at 559.

<sup>153</sup> Lonegrass, *supra* note 151, at 1108.

<sup>154</sup> Garboden & Rosen, *supra* note 35, at 649.

<sup>155</sup> *Id.*



protections for tenants; a requirement that landlords fulfill the warranty of habitability in order to initiate eviction proceedings; the availability of prefiling alternatives to housing court, such as mediation; and a right to counsel. These changes aim to alleviate the asymmetrical power dynamic present in housing court, although a reimagining of these proceedings and a reframing of the landlord-tenant relationship is needed overall.

A. *Applying the Fair Debt Collection Practices Act to Summary Eviction Proceedings*

One solution to mitigate against the use of housing court as a debt collection tool is to apply the Fair Debt Collections Practices Act (FDCPA) to summary eviction proceedings. As this note has illustrated, the notion that the main objective of a summary eviction proceeding is to evict is false. Frequently, landlords use this proceeding as a mechanism to obtain rental debt instead. This begs the question of whether rental debt should therefore be covered by the FDCPA, such that its protections apply to tenants.

The FDCPA was enacted by Congress to “eliminate abusive debt collection practices by debt collectors . . . and to promote consistent State action to protect consumers against debt collection abuses.”<sup>156</sup> In light of these purposes, protecting tenants from the abusive use of housing court by their landlords would further the same goals. Legislative intent indicates that the FDCPA should be construed liberally so that it can be far reaching.<sup>157</sup>

Because summary eviction proceedings are often used in a manner more analogous to debt collection than to determine possession, collection of back rent should fall under the FDCPA and require compliance.<sup>158</sup> The FDCPA protects against a variety of deceptive actions by debt collectors, which would help mitigate against the use of summary eviction proceedings as debt collection.<sup>159</sup> Specifically, the Act provides a noninclusive list of conduct that constitutes harassment or abuse.<sup>160</sup> The FDCPA could be used to prohibit a landlord from using summary eviction proceedings to collect rent, as it explicitly prohibits debt collectors from threatening actions for which they do not intend the outcome, including prohibitions on

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<sup>156</sup> 15 U.S.C. § 1692(e).

<sup>157</sup> *Id.* § 1692(g).

<sup>158</sup> *See supra* Part III.

<sup>159</sup> 15 U.S.C. § 1692d.

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

threatening to take an action that it either cannot legally take or it is not intending to take.<sup>161</sup> This would be an expansion of tenants' rights by granting tenants legal protections that are more aligned with how landlords manipulate housing court.<sup>162</sup> Furthermore, it would allow tenants who are the victims of abusive, deceptive, or unfair debt collection practices to recover damages because of those actions.<sup>163</sup>

One question that has gone before various courts is whether back rent constitutes a "debt" under the FDCPA. The act itself defines a "debt" as:

any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.<sup>164</sup>

Because summary proceedings are traditionally viewed as dispossession proceedings, courts have not agreed on whether FDCPA compliance is required.<sup>165</sup>

In *Bass v. Stolper*, the Seventh Circuit held that a dishonored check constituted a debt under the FDCPA.<sup>166</sup> There, an individual wrote a check to purchase groceries that subsequently bounced when the grocer attempted to cash it.<sup>167</sup> The Seventh Circuit held that this dishonored check constituted a "debt" under the FDCPA because a debt arises whenever a "transaction creates an obligation to pay," and so it follows that an obligation to pay arises from a bounced check, because the check acted a promise to pay.<sup>168</sup>

In *Romea v. Heiberger*, the Second Circuit built off *Bass* by analogizing the duty to pay back rent to the duty to pay a bounced check, because both stem from an obligation to pay that was breached by the payor.<sup>169</sup> There, the plaintiff was notified that she owed rent and would have to pay within three days or vacate the property in order to avoid a summary eviction

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

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* § 1692(k).

<sup>164</sup> *Id.* § 1692a(5).

<sup>165</sup> See Spector, *supra* note 6, at 188 (explaining that "most states require . . . [a] landlord's claim for possession as a prerequisite to the summary eviction"); see generally, Zimmerman v. HBO Affiliate Grp., 834 F.2d 1163, 1168–69 (3d Cir. 1987) (holding that "debt" under the FDCPA requires an extension of credit); Bass v. Stolper, 111 F.3d 1322, 1325 (7th Cir. 1997) (holding that "debt" under the FDCPA does not require an extension of credit, but rather a "debt" is created whenever a "transaction creates an obligation to pay").

<sup>166</sup> Bass, 111 F.3d at 1325–27.

<sup>167</sup> *Id.* at 1323.

<sup>168</sup> *Id.* at 1325.

<sup>169</sup> Romea v. Heiberger & Assocs., 163 F.3d 111, 115 (2d Cir. 1998).

proceeding, pursuant to New York Real Property Law.<sup>170</sup> This notice was sent from the landlord's attorney, and the plaintiff alleged that the attorney was a "debt collector" obtaining a "debt" under the FDCPA.<sup>171</sup> Accordingly, the plaintiff would be entitled to the thirty day validation period before the defendant could try to retrieve the debt. The *Romea* court held that back rent constituted a "debt" under the FDCPA because it "arises only from the tenant's failure to pay the amount due."<sup>172</sup> *Romea v. Heiberger* was one of the first cases to answer the question of whether back rent constituted a debt under the FDCPA.<sup>173</sup>

Classifying back rent as debt would not only be an important step toward ensuring fair practices by landlords, but also in acknowledging the manner in which summary eviction proceedings are often used. Some state courts have acknowledged how collection of back rent is inherent in summary eviction proceedings.<sup>174</sup> In *Hodges v. Sasil Corp.*, the New Jersey appellate court recognized that whether the remedy sought in a summary eviction was possession or damages was irrelevant, because landlords use these proceedings to obtain owed rent.<sup>175</sup> It explained that "[t]he nature of the threat employed to garner payment does not alter the fundamental fact—the reality—that debt collection is attempted" in any summary proceeding.<sup>176</sup> Furthermore, protection under the FDCPA not only provides a remedy for damages for tenants when landlords and their attorneys fail to comply with the FDCPA, but it also ensures that all consumers, even those who have mismanaged their financial affairs, are "treated in a reasonable and civil manner."<sup>177</sup>

While some state jurisdictions have their own laws to prevent harassment by landlords, many of them are limited to criminal conduct by the landlord, or they are not allowed as a defense even in a nonpayment proceeding.<sup>178</sup> As such, state laws protecting tenants from landlord harassment are insufficient to protect a tenant who owes rent, because serial filing does not

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<sup>170</sup> *Id.* at 113.

<sup>171</sup> *Id.* at 115–18.

<sup>172</sup> *Id.* at 115.

<sup>173</sup> *Id.*

<sup>174</sup> See *Goldman v. Cohen*, 445 F.3d 152, 153 (2d Cir. 2006).

<sup>175</sup> *Hodges v. Sasil Corp.*, 915 A.2d 1, 11 (N.J. 2007).

<sup>176</sup> *Id.*

<sup>177</sup> *Baker v. G.C. Services Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (quoting 123 CONG. REC. 10241 (1977)).

<sup>178</sup> N.Y. PENAL LAW § 241.05 (2020); TEX. PROP. CODE ANN. § 92.0161(d)–(e) (2021); Leung, Hepburn & Desmond, *supra* note 32, at 320; Mason, *supra* note 2, at 397.

constitute harassment when landlords have a claim to the rent they are owed.

A landlord's use of summary eviction proceedings as debt collection is similar to cases where debt collectors harassed a debtor by threatening legal action it did not intend to take, such that the FDCPA should apply. In *Demarais v. Gurstel Chargo*, a law firm initiated a debt collection action against a debtor but had no actual intention of going to trial.<sup>179</sup> The law firm had a practice of regularly filing debt collection actions against alleged debtors, after which it would motion for judgment in their favor if the debtor failed to appear.<sup>180</sup> The firm's lawyers would appear before the court at the time of trial without any witnesses, evidence, or other client representatives.<sup>181</sup> If the debtor did not show, they would seek a judgment in their client's favor based on nonappearance.<sup>182</sup> If the debtor did appear, they would seek a new trial date or dismiss the suit.<sup>183</sup> These actions by the debt collector were sufficient for the debtor to state a claim for a violation of the FDCPA.<sup>184</sup>

False threats of legal action to obtain debt are analogous to landlords filing serial evictions. Often, a landlord filing for eviction does not ultimately wish to obtain an eviction, similar to how the debt collector did not seek to go to trial in *Demarais*. Instead, the debt collector in *Demarais* threatened going to trial in order to obtain an alleged debt from the debtor.<sup>185</sup> Whether the debt collector intended to threaten the debtor is irrelevant. What matters is whether the action would lead an "unsophisticated consumer" to believe such action would likely be taken.<sup>186</sup> In that same vein, a landlord uses summary eviction proceedings as a mechanism of extortion to obtain rental debt rather than to regain control of the premises. However, the average consumer, let alone an unsophisticated consumer, likely believes that their landlord intends to evict them if they initiate summary eviction proceedings against them. By this logic, a false threat to evict a tenant should be a violation of the FDCPA.

Application of the FDCPA to legal action by debt collectors has expanded overtime.<sup>187</sup> Courts have held that congressional amendments to the FDCPA "evidence[] an intent

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<sup>179</sup> *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 690 (8th Cir. 2017).

<sup>180</sup> *Id.* at 689.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 689–90.

<sup>184</sup> *Id.* at 690.

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

<sup>186</sup> *Id.* at 695; *Duffy v. Landberg*, 215 F.3d 871, 874–75 (8th Cir. 2000).

<sup>187</sup> *See Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007).

and an awareness that the FDCPA otherwise encompasses litigation activity.”<sup>188</sup> Additionally, the Supreme Court has held that the FDCPA applies to lawyers seeking debt on behalf of clients through litigation.<sup>189</sup> As such, not only should the FDCPA apply to initial communications between a landlord and a tenant when the landlord initiates filing for eviction, but it should also similarly apply to summary proceedings. A tenant could show a violation of the FDCPA through a similar manner as the debtor in *Demarais*, where they could provide evidence as to the frequency with which the landlord initiates such proceedings without ultimately evicting the tenant. Similarly, a landlord constantly keeping their tenants in rental debt could be used as evidence to indicate that the landlord is not making a good faith claim for possession, but rather is seeking use of housing court for debt collection. This type of harassment (along with other forms) should be prohibited under the FDCPA and allowed as a defense to nonpayment. This would allow tenants to challenge the debt collection nature of summary proceedings and provide them with protections that debtors traditionally get under the FDCPA.

*B. A Clean Hands Requirement to File for Eviction*

Use of the FDCPA is just one step toward curbing landlord use of eviction filings to collect debt. Another procedural change that would allow for adjudication of a tenant’s claims against the landlord would be instituting a burden shift that requires the landlord show no violation of the warranty of habitability exists in order to initiate a summary eviction proceeding, similar to the “clean hands” doctrine of property law.<sup>190</sup> Under the property doctrine, a party is “preclude[d from] recovery” because of their own misconduct relating to the matter.<sup>191</sup> Here, a requirement that landlords have not violated the warranty of habitability would act similarly to this principle, because a violation would preclude them from initiating any summary eviction proceeding.

Such a requirement would put the burden on a landlord to maintain habitable premises for relief in the court. In Philadelphia County, the mayor’s task force proposed something similar, whereby landlords are required to provide, at the time

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<sup>188</sup> *Alger v. Ganick, O’Brien, & Sarin*, 35 F. Supp. 2d 148, 158 n.18 (D. Mass. 1999).

<sup>189</sup> *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995).

<sup>190</sup> *Clean-Hands Doctrine*, LEGAL INFO. INST., CORNELL UNIV. (Sept. 2022), [https://www.law.cornell.edu/wex/clean-hands\\_doctrine](https://www.law.cornell.edu/wex/clean-hands_doctrine) [https://perma.cc/N7E2-YR24].

<sup>191</sup> *Id.*

of filing, their rental license, certificate of rental suitability, lead safe certificate, and proof of delivery of the rent demand to the tenant.<sup>192</sup> There, the court automatically denies any filings where a landlord does not have all of these materials.<sup>193</sup> This, however, is significantly less burdensome than the clean hands requirement proposed here.

While the Philadelphia model is promising, a more aggressive burden shift is essential in order to challenge the very nature of summary eviction proceedings. These proceedings illustrate that the landlord's claim to possession is above all others.<sup>194</sup> When a landlord files for eviction and initiates summary proceedings, the defendant is automatically put in a defensive stance where they are forced to defend their nonpayment of rent in a proceeding that highly favors determining possession over all other claims.<sup>195</sup> As evidenced by the abysmal success rates of warranty of habitability claims, a clean hands requirement would help tenants not only in preventing landlords who have violated the warranty from bringing eviction proceedings in court, but also in forcing landlords to provide habitable premises to their tenants.<sup>196</sup> In order to seek back rent, a landlord would first be required to maintain a habitable apartment.<sup>197</sup>

As it stands, many landlords fail to comply with court orders to repair an apartment. For example, in New York City, landlords did not comply with repair orders in nearly 75 percent of cases.<sup>198</sup> Under a clean hands requirement, a landlord who violates the warranty (either evidenced by violations of the housing code or another manner) would be barred from bringing a claim to court without proof of substantial repairs. This would push eviction filings out of court while still allowing a tenant to get their habitability claims addressed.<sup>199</sup> It would ensure that housing court is not used as a mechanism for debt collection, but rather as a place to adjudicate claims.

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<sup>192</sup> CITY PHILA. MAYOR'S TASKFORCE, MAYOR'S TASKFORCE ON EVICTION PREVENTION AND RESPONSE, 24 (June 2018).

<sup>193</sup> *Id.*

<sup>194</sup> Mason, *supra* note 2, at 397.

<sup>195</sup> Spector, *supra* note 6, at 137.

<sup>196</sup> *Id.*

<sup>197</sup> *See supra* Section II.B.

<sup>198</sup> Summers, *supra* note 23, at 201.

<sup>199</sup> *See infra* Section III.C.

C. *Prefiling Alternatives to Housing Court*

Because of the sheer volume of eviction proceedings and their adversarial nature, some jurisdictions have created prefiling mediations or hearings to prevent court involvement in a given case.<sup>200</sup> These programs, which generally involve a combination of aspects like housing counseling, emergency rental assistance, social services, and legal assistance, intervene before any eviction filing by the landlord, completely diverting it from a formal court proceeding.<sup>201</sup>

Prefiling diversion programs have been successfully implemented in places like Philadelphia County, where a third-party mediator works with both parties to come up with a solution before going to court.<sup>202</sup> Through the Eviction Diversion Program, landlords are required to participate in this mediation prior to any eviction filing with the court.<sup>203</sup> This works as a conflict resolution style meeting, where the landlord and tenant are required to come together in order to reach a fairer outcome.<sup>204</sup> This type of mediation is important because it provides more equal footing between the landlord and tenant, as the power of the court is not being leveraged against a tenant-defendant.<sup>205</sup> Traditional eviction proceedings often lack dignity for the tenant, leaving them without a sense of agency over their case.<sup>206</sup> As one tenant described, “you’re sitting there waiting, case by case by case goes by, you as a person never get to speak on your own behalf. I felt like I should have had a chance to say this is why I didn’t pay and this is a legitimate reason.”<sup>207</sup> Instead, a mediation hearing gives tenants the opportunity to tell their story, in their own words. It helps demystify the legal complexity of the housing courtroom and gives tenants the opportunity to assert their rights outside of legal defenses and

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<sup>200</sup> Rebecca Hare, *Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota*, 38 U. MINN. L. & INEQ. 135, 143–44 (2020); CITY PHILA. MAYOR’S TASKFORCE, *supra* note 192, at 19.

<sup>201</sup> Treskon, *supra* note 28, at 3; REINVESTMENT FUND, WORDS FROM THE FIELD: PRACTITIONER PERSPECTIVES ON EVICTION PROCESS IMPROVEMENTS IN PHILADELPHIA 14 (July 2021), [https://www.reinvestment.com/wp-content/uploads/2022/02/Reinvestment\\_Fund\\_Brief\\_PHL-Eviction-Process-Improvements.pdf](https://www.reinvestment.com/wp-content/uploads/2022/02/Reinvestment_Fund_Brief_PHL-Eviction-Process-Improvements.pdf) [<https://perma.cc/VU5N-T4EC>].

<sup>202</sup> Amy Scott, *Inside Philadelphia’s Eviction Diversion Program*, MARKETPLACE (Oct. 19, 2021), <https://www.marketplace.org/2021/10/19/inside-philadelphia-eviction-diversion-program/> [<https://perma.cc/7QHU-KEMH>]; CITY PHILA. MAYOR’S TASKFORCE, *supra* note 192, at 30.

<sup>203</sup> REINVESTMENT FUND, *supra* note 201, at 14.

<sup>204</sup> CITY PHILA. MAYOR’S TASKFORCE, *supra* note 192, at 30, 58.

<sup>205</sup> Hare, *supra* note 200, at 142.

<sup>206</sup> Bernal, *supra* note 3, at 80.

<sup>207</sup> REINVESTMENT FUND, *supra* note 201, at 11.

general legal procedure.<sup>208</sup> A tenant could negotiate repairs needed on the premises, while also figuring out a payment plan, all with a volunteer lawyer acting as the mediator.<sup>209</sup> This helps to “remove [the] threat” and to give the parties a “chance . . . to sit down and talk to each other like human beings.”<sup>210</sup> The Philadelphia model has proven to be successful, as both landlords and tenants have reported being much more satisfied with this program; among 2,300 mediations, more than 90 percent either ended with an agreement or the parties agreeing to continue negotiating.<sup>211</sup>

Some Minnesota counties have similar programs, where local mediation organizations work with district courts to provide mediation prefiling and throughout the course of an eviction proceeding.<sup>212</sup> Diversion programs, like prefiling eviction mediation, can be effective at challenging landlord primacy by taking cases directly out of housing court.<sup>213</sup> Additionally, diversion programs decrease evictions and allow tenants to negotiate more favorable terms should they leave the premises, such as expunging the eviction from the tenant’s record.<sup>214</sup> In light of the current housing and homelessness crises, meaningful reductions in eviction, like these programs provide, are critical and allow families to stay in their homes.

This type of mediation system directly prevents a landlord from co-opting the power of the court in order to collect back rent, because it instead requires them to come to the table and treat the tenant as a person. Creating prefiling diversion programs can make the whole process “less of a trial and more of a conversation.”<sup>215</sup> If a landlord is attempting to coerce a tenant to pay rent by using the power of the state through an eviction proceeding, a compulsory prefiling eviction mediation would prevent them from doing exactly that.

#### *D. The Dire Need of Counsel for Low-Income Tenants*

All of these solutions must be paired with a right to counsel for tenants who cannot afford one. For example, one

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<sup>208</sup> See Bezdek, *supra* note 4, at 546 (noting that tenants rarely raise meritorious defenses in nonpayment cases).

<sup>209</sup> Scott, *supra* note 202.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Hare, *supra* note 200, at 143–44.

<sup>213</sup> *Id.* at 144 n.71.

<sup>214</sup> See TRESKON, *supra* note 28, at 3 (explaining how the Minnesota diversion program decreased evictions by 18 percent, while increasing expungements by 25 percent).

<sup>215</sup> REINVESTMENT FUND, *supra* note 201, at 15.



study shows that tenants win their cases up to ten times as often when they have an attorney.<sup>216</sup> Another study, looking at evictions in California, found that when a tenant was represented, they won their cases twice as frequently as landlords.<sup>217</sup> In contrast, when a tenant was unrepresented, the landlord won five times as frequently as the unrepresented tenant.<sup>218</sup> The large gap in representation between landlords and tenants allows landlords to win at disproportionate rates and means that low-income tenants have to navigate an incredibly complex legal system on their own. However, these studies show that counsel for tenants can mitigate against this power imbalance. Even in a New York City study, where represented tenants only won about 30 percent of the time when they had a “meritorious warranty of habitability claim[,]” those tenants with an attorney won at least nine times as much as compared to tenants who were unrepresented.<sup>219</sup> As such, it is evident that access to counsel is incredibly important for tenants to fully adjudicate their claims, because they can help a tenant to push back against landlords leveraging the court for their gain.

## CONCLUSION

Reimagining the summary eviction proceeding is essential to combatting this nation’s eviction crisis. Part of this requires reframing the relationship between a landlord and a tenant when the landlord files for eviction in an attempt to collect rental debt. The summary eviction proceeding was created for the very purpose of making an eviction expedient for the landlord.<sup>220</sup> However, this allows landlords to co-opt this judicial process at the expense of all tenants.<sup>221</sup> The speed at which these proceedings operate, the failure of the court to adjudicate tenants’ claims, and the risk of an eviction on a tenant’s record, among other factors, allow landlords to take advantage of tenants in this imbalanced court proceeding. An eviction filing has long-term consequences for the tenant and their families, whether or not the tenant is ultimately evicted.<sup>222</sup>

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<sup>216</sup> Lonegrass, *supra* note 151, at 1111; Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 744 (2015).

<sup>217</sup> Damerla, *supra* note 23, at 358.

<sup>218</sup> Lonegrass, *supra* note 151, at 1111; see Bezdek, *supra* note 4, at 562.

<sup>219</sup> Summers, *supra* note 23, at 151, 205.

<sup>220</sup> Spector, *supra* note 6, at 137.

<sup>221</sup> Garboden & Rosen, *supra* note 35, at 656.

<sup>222</sup> Leung, Hepburn & Desmond, *supra* note 32, at 317.

It also directly contributes to the homelessness and housing crises in the United States.<sup>223</sup>

The proposals provided in this note can help end the superiority of the landlord's claim to possession. This problem is complex and requires a combination of solutions and ideas. First, nonpayment proceedings should be treated as debt collection under the FDCPA such that tenants can receive increased protections against landlords' debt collection actions. Next, a requirement that landlords have clean hands before they are able to initiate a summary eviction proceeding would prevent unscrupulous landlords from using the court for debt collection, while also ensuring that tenants live in habitable premises. Prefiling alternatives would directly take these debt collections out of court. Lastly, providing low-income tenants with counsel is essential in making sure that tenants are able to properly adjudicate their claims.

A system that has such a strong preference toward one party is an illegitimate one. Courts have continually legitimized landlords' interests over those of tenants, and continued indifference toward tenants has devastating consequences. Ultimately, housing justice will only be achieved by challenging how we think about the summary eviction process and dramatically changing it.

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<sup>223</sup> *Id.* at 318.

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