

ARTICLES

Stay at Home: Rethinking Rental Housing Law in an Era of Pandemic

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For more than a decade, scholars across disciplines have documented housing insecurity as a chronic condition of working poverty in the United States. Now, the COVID-19 economic crisis threatens a tsunami of pandemic-induced evictions. Widespread government mandates to “stay at home” ring hollow as eviction filings pile up in local courts, while tenant blacklisting ensures that the consequences of an eviction today will haunt a tenant for years.

By offering an in-depth survey of lease-termination requirements and the role of housing conditions and retaliatory eviction across states, this Article illustrates the practical impact of subtle variations in landlord-tenant law on poor tenants facing eviction. It reviews a sampling of state housing policy responses to the pandemic and proposes concrete reforms to the law designed to mitigate power imbalances between landlords and tenants and slow the cogs of the Eviction Economy.

The COVID-19 pandemic is a tragedy of unprecedented scale. It is also a call to action. The decisions that state and local governments make on housing policy in the coming months will alter the course of thousands of lives. America’s Eviction Economy stands to compound the worst economic effects of the pandemic. It is the sincere hope of the Author that state and local governments do not allow this result.

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I. INTRODUCTION

The coronavirus disease (COVID-19) is ravaging the United States economy. In May 2020, unemployment hit 14.7 %, heralded by the New York Times as “the worst devastation since the Great Depression.”¹ Housing stands at the center of the COVID-19 policy storm. More than thirty states imposed some form of eviction moratorium in the first months of the crisis, while the federal government intervened first through the Coronavirus Aid, Relief, and Economic Security (CARES) Act, then through a Centers for Disease Control (CDC) nation-wide

1. Nelson D. Schwartz, Ben Casselman & Ella Koeze, *How Bad Is Unemployment? ‘Literally Off the Charts,’* N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/interactive/2020/05/08/business/economy/april-jobs-report.html>.

moratorium on nonpayment evictions.² Local governments and courts have also jumped into the fray, with law enforcement offices refusing to execute writs of restitution and judges staying eviction hearings indefinitely.³

Media coverage of these unprecedented measures risks overlooking a crucial fact: unlike the COVID-19 pandemic, America's "Eviction Economy" is nothing new.⁴ For more than a decade, scholars across disciplines have documented housing insecurity and systemic eviction as a chronic condition of working poverty in the United States.⁵ Their warnings of surging rent burdens for poor households and the long-term consequences of forced moves have gone largely unheeded. Eviction is causally linked to homelessness,⁶ mental health problems,⁷ increased material hardship,⁸ future job loss,⁹ and long-term health issues.¹⁰ Nonetheless, this once-rare event is now commonplace. Available data suggests that millions of Americans were evicted each year *pre-COVID 19*.¹¹ As unemployment climbs quite literally "off the charts," this number is sure to rise.¹²

America's Eviction Economy assumes—and in fact relies upon—consistent, forced turnover of severely rent-burdened tenants. At its core lies a chronic

2. Alana Semuels, *Renters are Being Forced From Their Homes Despite Eviction Moratoriums Meant to Protect Them*, TIME (Apr. 15, 2020, 2:47 PM), <https://time.com/5820634/evictions-coronavirus/>; *Federal Register Notice: Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, CTFS. FOR DISEASE CONTROL & PREVENTION (Oct. 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-eviction-declaration.html>.

3. Kristin Boose & Robert McEvoy, *Current Landscape of Eviction and Foreclosure Relief Measures in Response to COVID-19*, JDSUPRA (Apr. 6, 2020), <https://www.jdsupra.com/legalnews/current-landscape-of-eviction-and-51206/>.

4. The term "Eviction Economy" was coined (to this author's knowledge) by David A. Dana in *An Invisible Crisis in Plain Sight: The Emergence of the "Eviction Economy," Its Causes, and the Possibilities for Reform in Legal Regulation and Education*, 115 MICH. L. REV. 935, 935 (2017). Dana defines the Eviction Economy as "an economy in which eviction of the poor is not exceptional, but rather the norm, part of landlords' business models and poor people's way of life," and uses the term to refer to the systematic and cyclical eviction of poor tenants documented in Matthew Desmond's *Evicted*, *infra* note 21. This Article adopts the term "Eviction Economy" in an effort to emphasize the overlapping legal, political, economic, and social forces that feed America's current eviction crisis.

5. *See, e.g.*, Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 SOC. PROBS. 46, 47 (2016).

6. *See* Martha Burt, *Homeless Families, Singles, and Others: Findings from the 1996 National Survey of Homeless Assistance Providers and Clients*, 12 HOUSING. POL'Y. DEBATE 737, 737–80 (2001); Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344 (2007).

7. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 301-02 (2015).

8. *Id.* at 311-12.

9. "We estimate the likelihood of experiencing job loss to be between 11 and 22 percentage points higher for workers who experienced a preceding forced move, compared to observationally identical workers who did not." Desmond & Gershenson, *supra* note 5, at 60.

10. *See* Desmond & Kimbro, *supra* note 7, at 318.

11. Difficulty in calculating the exact number of Americans who are evicted stems from both incomplete documentation of formal evictions and the more-common process of informal evictions. Estimates by Chester Hartman and David Robinson in *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 461 (2003), suggest that in 2013, one in eight poor renting families were unable to make rent. Hartman and Robinson's assertion that the number of Americans evicted each year "is likely in the many millions" has been borne out by subsequent research. *See, e.g.*, Desmond & Gershenson, *supra* note 5, at 48-49.

12. Schwartz et al., *supra* note 1.

shortage of decent housing that is genuinely accessible and affordable for poor households.¹³ In the Eviction Economy, all players are aware that the rent is high and housing stability is low. Tenants will miss rent and build up arrearages.¹⁴ Landlords will “build informal and formal eviction into their business model, into the rents they charge, and into the way they maintain (or do not maintain) their properties.”¹⁵ Evictions are sticky: they appear on a tenant’s records for years as a “stain” that makes “finding decent new housing much, much more difficult.”¹⁶ Landlords know this fact. They leverage it in their dealings with tenants, in and out of court.

Rental housing law is complex and highly variable across states. As a consequence, much of the legal scholarship on housing law and evictions takes one of two tracks. It either focuses on one state, offering a specific account of housing issues there,¹⁷ or it generalizes across states, addressing one housing issue at a broad level.¹⁸ The former approach is useful to tenants and their advocates facing litigation or advocating in the state legislature, but is often inapplicable once the issue crosses state lines. The latter approach helps to shape discourse on housing and evictions at the national level, but it means little to a tenant forced from her home on state-specific legal grounds.¹⁹

This Article merges the two approaches. It offers a survey of three distinct subcategories of rental housing law in several Midwestern states, focusing on the consequences of these laws for poor, unsubsidized tenants faced with eviction.²⁰ Part I provides background on rental housing law in the United States and explains the basic legal framework for each of the rental-housing subcategories discussed in the Article. Parts II through IV survey these subcategories in Wisconsin, Ohio, and Minnesota. By delving into technical issues of lease-termination and housing code enforcement at a state-specific level, this Article illustrates some of the varied and complex ways in which rental housing law disempowers tenants—often regardless of the merits of their case. Part V discusses a range of housing policy responses to COVID-19 and articulates a series of reforms designed to reduce the role of rental housing law as a driving force of America’s Eviction Economy.

13. Dana, *supra* note 4, at 945.

14. See Desmond & Kimbro, *supra* note 7, at 300 .

15. Dana, *supra* note 4, at 937.

16. *Id.*

17. See, e.g., Rebecca Hare, *Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota*, 38 LAW & INEQ. 135 (2020).

18. See, e.g., David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 397-398 (2011).

19. Throughout this Article, I will use female pronouns to refer to tenants and male pronouns to refer to landlords. I do so both for purposes of clarity and to reflect the fact that women—especially low-income mothers—are statistically far more likely to be evicted than men. In Milwaukee, for example, Desmond finds that “women are more than twice as likely to be evicted as men and . . . among tenants who appear in eviction court, the likelihood of receiving an eviction judgment is highest for mothers with children, even after accounting for arrears.” Desmond & Kimbro, *supra* note 7, at 4.

20. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 59 (2016) (noting that “Most poor people in America . . . did not live in public housing or apartments subsidized by vouchers. Three in four families who qualified for assistance received nothing.”) (citing Danilo Pelletiere, Michelle Canizio, Morgan Hargrave, & Sheila Crowley, NAT’L LOW INCOME HOUS. COAL., *HOUSING ASSISTANCE FOR LOW INCOME HOUSEHOLDS: STATES DO NOT FILL THE GAP* (2008), <https://nlihc.org/resource/housing-assistance-low-income-households>).

The COVID-19 pandemic is a tragedy of unprecedented scale. It is also a call to action. The decisions that state and local governments make on housing policy in the coming months will alter the course of thousands of lives. COVID-19 did not create America's Eviction Economy, but the Eviction Economy stands to compound the worst economic effects of the pandemic. It is the sincere hope of the Author that state and local governments do not allow this result.

II. BACKGROUND & LEGAL FRAMEWORK

Modern landlord-tenant law in America is the product of a “tenants’ rights revolution” in the 1960s and 1970s.²¹ Prior to this revolution, state common law (derived from English common law) largely governed the landlord-tenant relationship.²² The stark mismatch between housing laws premised on sharecropping and the realities of urban life in 20th century America prompted cries for reform. Writing in 1969, Thomas Quinn and Earl Phillips scorned existing landlord-tenant law as a “scandal,” a “savage mockery” of tenants acceptable only to the “blind and complacent.”²³

The pièce de résistance of this “tenants’ revolution” was the rise of the landlord’s implied warranty of habitability.²⁴ Stated most famously in *Javins v. First National Realty Corp.*, the warranty of habitability is justified at common law by a contract-approach to the landlord-tenant relationship.²⁵ Just as a car manufacturer warrants his product to be free of defects when delivered to his buyer, so too a landlord warrants that the premises he offers the tenant “will be fit for habitation for the time period for which it is rented.”²⁶ A landlord’s failure to keep this promise relieves the tenant—sometimes fully—of her obligation to pay rent.²⁷ To its political advocates, the warranty of habitability represented many things: a path to “improving the urban physical environment,” a “covert means of achieving broad redistribution,” a mechanism for “empowering tenants to remedy deplorable housing conditions,” or even a harbinger of “social peace.”²⁸ Propelled by *Javins* and the rhetoric of the “urban crisis,” legislatures and courts across the nation embraced the warranty of habitability with remarkable speed.²⁹

Concurrent with the tenants’ revolution, the Uniform Law Commission (ULC) undertook its own efforts to address the “maze of disjointed and contradictory legislation, ordinances, administrative regulations, and court decisions” governing landlord-tenant law.³⁰ In 1972, the ULC published its Uniform Residential

21. Super, *supra* note 18, at 393; *But see* Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) (citing an early (and less pro-tenant) characterization of this “revolution”).

22. *See* Tom G. Guerts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L. J. 356, 356-362 (2004).

23. Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225, 225 (1969).

24. Super, *supra* note 18, at 394.

25. *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071, 1080 (D.C. Cir. 1970).

26. *Id.* at 1079.

27. *Id.* at 1082-83.

28. Super, *supra* note 18, at 397.

29. Rabin, *supra* note 21, at 527.

30. Lawrence R. McDonough, *Then and Now: The Uniform Residential Landlord and Tenant Act and the Revised Residential Landlord and Tenant Act – Still Bold and Relevant?*, 35 U. ARK. LITTLE ROCK

Landlord and Tenant Act (hereinafter URLTA), with the stated intent to “simplify, clarify, modernize, and revise” rental housing law.³¹ URLTA provides a comprehensive statutory framework for landlord-tenant law, laying out the rights and remedies of both landlord and tenant at each stage of the rental agreement.³² Most relevant to this Article, URLTA adopted a statutory warranty of habitability, provided specific tenant remedies when this warranty was violated, and imposed various requirements for notice of lease-termination. Each of these provisions is discussed further below.

Widespread perceptions of tenants as the “ward and darling” of the law persisted across disciplines until the early 21st century.³³ In 2003, evictions were accurately characterized (by those who paid attention to them) as America’s “hidden housing problem.”³⁴ But a recent wave of scholarship, launched by Matthew Desmond and his Pulitzer Prize winning book *Evicted: Poverty and Profit in the American City*, now recognizes eviction as a driving and defining feature of American poverty. Desmond and his colleagues demonstrated that, as scholars and policymakers turned their gaze from housing to issues of employment, public assistance, and criminal justice, rent burdens for poor families soared.³⁵ Forced removal from housing became a “common moment in the life course of poor Americans.”³⁶ For severely rent-burdened households, it does not take a major life event to fall behind on rent; a simple reduction in hours or unexpected expense is enough.³⁷ Those who fall behind find themselves trapped in what David Dana terms the “Eviction Economy”: a system “in which eviction of the poor is not exceptional, but rather the norm, part of landlords’ business models and poor people’s way of life.”³⁸

Any legal analysis of the Eviction Economy must contend with an unwieldy and inconsistent body of law. Nearly half the states adopted URLTA,³⁹ and many more passed specific provisions influenced by it.⁴⁰ But even among URLTA-states, subsequent legislative amendments and divergent court interpretations mean that rental housing law continues to function differently—sometimes *very* differently—across state lines. There is no dominant framework for parsing out “pro-tenant” and “pro-landlord” states, nor do advocates agree that “pro-tenant” and “pro-landlord” are necessarily the right labels to approach eviction policy. To help illustrate the utility and potential pitfalls of such classifications, this Article

L. REV. 975, 977 (2013), *citing* the Residential Landlord and Tenant Act Summary, UNIF. LAW COMM’N., <http://uniformlaws.org/ActSummary.aspx?title=Residential%20Landlord%20and%20Tenant%20Act> (last visited Apr. 17, 2013).

31. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.102 (1972) [hereinafter URLTA], <https://d1unatz8mcf3a5.cloudfront.net/uploads/Uniform-Residential-Landlord-and-Tenant-Act.pdf>.

32. *See* McDonough, *supra* note 30, at 978-986 (discussing URLTA rights and remedies at each stage of the rental agreement).

33. Rabin, *supra* note 21, at 519.

34. Hartman & Robinson, *supra* note 11.

35. Desmond & Kimbro, *supra* note 7, at 2.

36. *Id.*

37. *Id.* at 4.

38. Dana, *supra* note 4, at 935.

39. *See Uniform Law Commission’s Uniform Residential Landlord-Tenant Act*, NAT’L CTR FOR HEALTHY HOUS., <https://nchh.org/resource-library/Uniform%20Law%20Commission%20-%20URLTA.pdf> (last visited May 8, 2020).

40. McDonough, *supra* note 30, at 985.

references Megan E. Hatch's "Statutory Protection for Renters: Classification State Landlord-Tenant Policy Approaches."⁴¹ Hatch uses cluster and discriminant analysis to create a landlord-tenant policy typology that sorts states into one of three categories: protectionist, pro-business, and contradictory.⁴² The states surveyed in this Article span the full spectrum of Hatch's classifications, but not the full universe of landlord-tenant policy approaches.

This Article explores two specific subcategories of state rental housing law with an eye toward the unsubsidized tenant-litigant: 1) lease termination requirements for landlords and penalties for noncompliance; and 2) the warrant of habitability and retaliatory eviction. Both subcategories bear heavily on the rights and remedies available to tenants facing eviction; both vary substantially across states. These subcategories do not match up with Hatch's framework. In fact, they are chosen specifically to illustrate some of the subtle ways in which legal rights and procedures disempower tenants in supposedly "protectionist" states. Technical legal issues of notice, equivocation, and code enforcement seldom make headlines, but they matter deeply to tenant outcomes in eviction cases.

Critics of Desmond's work—including those on the Left—are quick to point to alternative drivers of the Eviction Economy as better policy targets than tenant protection and housing subsidies. Poverty, these critics say, is the real culprit behind enduring housing insecurity and eviction: heightening the legal burden on middle-class landlords seeking to evict non-paying tenants effects no lasting, structural change, and may even raise the overall cost of housing.

There is no question that poverty drives the Eviction Economy. But eviction, in its turn, drives and exacerbates poverty. The narrative of the local, middle-class landlord for whom a missed rent payment means possible mortgage default is, in many cases, simply untrue.⁴³ Especially in the wake of the 2008 recession, private equity plays a dominant role in America's rental housing industry, and tenants are increasingly more likely to send their rent checks to a shell corporation than back into their local community.⁴⁴ Likewise, rising housing costs are more clearly attributable to gentrification and the financialization of the housing market than to landlords' legal fees.⁴⁵

Yet there is a far more pressing reason to spotlight the legal intricacies of housing court: thousands of low-income families in America are evicted, *per day*, in *non-pandemic* times. Of course, it would be better that these families not be living in poverty in the first place. But while policy-makers debate whether housing is an appropriate focus for national action, the wheels of the Eviction

41. Megan E. Hatch, *Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUSING POL'Y DEBATE 1, 108 (2017).

42. *Id.* at 99. Hatch describes her categories as follows: "Protectionist states, the smallest group, tend to adopt policies benefiting renters. Probusiness states adopt laws giving more rights to landlords at the expense of renter rights. These states tend to have fewer landlord-tenant laws overall, and when they do enact this type of law, the majority benefit landlords. The final policy approach, contradictory, is characterized by an environment with some policies benefiting landlords and others aiding renters. This is the largest group of states, which are likely to have more comprehensive landlord-tenant legislation."

43. See e.g., Francesca Mari, *A \$60 Billion Housing Grab by Wall Street*, N.Y. TIMES (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/magazine/wall-street-landlords.html>.

44. *Id.*

45. WALL STREET LANDLORDS TURN AMERICAN DREAM INTO A NIGHTMARE, ACCE INST. ET AL., 18-21 (2020), <https://www.publicadvocates.org/wp-content/uploads/wallstreetlandlordsfinalreport.pdf>.

Economy continue to turn, and housing court is where the action happens. Subtle changes to state housing law will directly impact the outcome of eviction cases the day that they go into effect. A real and pressing need for structural change is no excuse to ignore simple reforms that could change lives now. This Author, for one, would rather not have to explain to her client that the reason she and her children have to sleep in a shelter tonight is because her advocates have bigger plans for tomorrow.

A. Lease-Termination Requirements

The first and most fundamental lease-termination requirement is notice. In most states, a landlord is unable to file for eviction until he provides adequate notice to the tenant of his intention to terminate the lease. Notice requirements typically apply regardless of whether the termination is for a violation of the lease or for lapse of time.⁴⁶ The URLTA, for example, requires fourteen-day notice for a landlord to terminate a lease for nonpayment, and thirty days for other lease violations.⁴⁷ This Article focuses on termination for alleged violations of the lease, including nonpayment of rent and noncompliance with other lease terms and tenant duties.

The function of a termination notice for a tenant is threefold. First, it informs the tenant that—in the eyes of her landlord, at least—she is in violation of the lease and will need to vacate the property. For tenants who do not intend to challenge the eviction, this notice sets the deadline for striking a deal with the landlord or finding a new place to live. A termination notice is typically a private matter between landlord and tenant; it is not filed with the court until official eviction proceedings begin.⁴⁸ As a consequence, a tenant who agrees that she is in violation of the lease has a strong incentive *not* to go to court. If she makes an agreement with the landlord or moves out quietly by the date the lease terminates, there will be no sign in a public records search or credit check that she violated the lease. Harsh penalties await a tenant navigating the rental market with an eviction on her record: “[a] rental applicant’s presence on that list of past landlord-tenant court proceedings will all but assure denial of her rental application.”⁴⁹

Second, notice of termination can sometimes provide a tenant the opportunity to remedy the alleged violation. The tenant’s ability to cure a lease violation depends on several factors, including the type of violation, the state she lives in, and her personal circumstances. For example, a tenant in a right-to-cure state who fails to make her rent payment on time is guaranteed a second chance.⁵⁰ Depending on the length of the cure-period, she might receive another paycheck, or have time to take out a loan. In a no-right-to-cure state, a tenant offering late rent must rely on her landlord’s goodwill. The same disparity applies to other lease violations. A tenant being evicted for noise or mess in a right-to-cure state has time to fix the

46. See e.g., URLTA, *supra* note 31, at § 4.301.

47. *Id.* at § 4.201.

48. See e.g., WIS. STAT. § 704.17 (laying out the requirements for Wisconsin notices-to-quit, which must be issued to tenants before any eviction case is ever filed).

49. Paul A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 669 (2018).

50. See e.g., MINN. STAT. § 504B.291, laying out a Minnesota tenant’s right to cure.

problem; evidence that she *has* fixed the problem usually provides an affirmative defense to the eviction. In a no-right-to-cure state, a tenant who does not contest the initial violation must hope that her landlord is willing to strike a deal—or start packing. The URLTA mandates a fourteen-day cure period, in which a tenant may remedy any alleged breach and preserve the tenancy.⁵¹

Finally, for a tenant who intends to challenge the eviction, notice of termination is the first step in preparing her defense. Some states impose content requirements on termination notices.⁵² A landlord may need to include the precise grounds on which the lease is being terminated, or information about the eviction process, the tenant’s right to cure, or the status of future rent payments. It is common for an eviction trial to occur on the same day a tenant first appears in court, so every piece of information the tenant has to prepare her arguments is vital. Key pieces of evidence will do her no good if left at home. In certain states, a landlord’s failure to disclose a particular ground for eviction in the termination notice precludes the landlord from raising that issue in court.⁵³ Where it exists, this limitation acknowledges a core power disparity between landlords and tenants: tenants rarely have lawyers, while landlords nearly always do.⁵⁴

B. Role of Conditions and Retaliatory Eviction

Housing conditions are tied to eviction in two overarching ways. First, the modern landlord’s duty to maintain a residence in good repair is legally entwined with the tenant’s duty to pay rent: this is the warranty of habitability. In some states, the warranty of habitability means that a tenant may claim housing conditions defects as a defense to an eviction action: she can argue that because of the landlord’s failure to maintain required conditions standards at the premises, reduced or no rent was due.⁵⁵ Assuming that the tenant’s conditions defense has merit, her chances of successfully asserting it depend on her state’s attitude toward the warranty of habitability and the landlord’s duty to make repairs.

The URLTA offered substantially increased protection for tenants by codifying the warrant of habitability and empowering courts to enforce it. The URLTA specifies that a landlord must comply with building and housing codes “materially affecting health and safety.”⁵⁶ When a landlord fails in this obligation, his tenant has a right, with notice, to terminate the lease.⁵⁷ The tenant may also, in some circumstances, deduct from rent the actual and reasonable costs of repairs.⁵⁸ Landlord noncompliance with the duty to maintain conditions can be raised as a

51. URLTA, *supra* note 31 at § 4.201.

52. *See e.g.*, OHIO REV. CODE ANN. § 1923.04(A)(1) (West 2007), discussed *infra* Part III.A.1.

53. *See e.g.*, CONN. GEN. STAT. § 47a-23(a)-(b) (requiring Connecticut landlords to include in a notice to quit one or more of the enumerated, specific grounds for eviction).

54. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 171 (2019). *See also* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, FORDHAM URB. L.J. 37, 47 n. 44 (2010) (citing disparate tenant and landlord representation rates in multiple districts).

55. *See, e.g.*, URLTA, *supra* note 31, § 4.105.

56. *Id.* at § 2.104.

57. *Id.* at § 4.101.

58. *Id.* at § 4.104.

defense to an eviction action, even if the action is for nonpayment of rent.⁵⁹ In that event, the court may order payment of rent in court.⁶⁰

Second, housing conditions are tied to eviction through retaliatory eviction: when the landlord initiates an eviction in an effort to strike back at a tenant who has reported conditions problems. Almost every state has some form of prohibition on retaliatory eviction,⁶¹ but the strength and availability of the retaliatory eviction defense for tenants (like all else in rental housing law) varies. Tight rental markets and complex bureaucratic procedures make reporting conditions violations a risky endeavor, even for tenants who are not in default.⁶² On top of this, some states limit court enforcement of minimum conditions standards and/or retaliatory eviction protection only to residences where the tenant is current on rent. Poor tenants face a one-two punch: an income fluctuation or unexpected expense can easily cause them to fall behind in payments, yet “[t]hese are precisely the tenants who live in premises that are likely to have the most dangerous conditions.”⁶³

Unhealthy and insecure housing can have devastating effects for tenants, and evictions perpetuate the market substandard housing stock.⁶⁴ Tenants who are forcefully displaced from their homes are demonstrably more likely to accept a substandard unit for their next home.⁶⁵ This is obviously not because tenants wish to move from a safer, healthier home into a substandard one. Rather, the blemish of an eviction on a tenant’s record and the accelerated moving timelines forced by eviction turn a landlord’s compliance with health and safety standards into a luxury that tenants cannot afford.⁶⁶ Landlords, in turn, continue to treat code-compliance as a luxury, and to offer substandard units for rent. Why wouldn’t they, when a steady stream of displaced tenants have little choice but to accept such conditions? Landlords who continue to collect rent checks have far less incentive to complete repairs, and chronic shortages of affordable housing ensure that vacancies—even in the most appalling units—do not last long.

59. *Id.* at § 4.105.

60. *Id.*

61. Super, *supra* note 18, at 393; *see also* Janet Portman, *State Laws Prohibiting Landlord Retaliation*, NOLO (Jan. 27, 2020), <https://www.nolo.com/legal-encyclopedia/state-laws-prohibiting-landlord-retaliation.html>.

62. *See, e.g.*, Super, *supra* note 18, at 409.

63. Dana, *supra* note 4, at 10 (“in a tight housing market, tenants of substandard housing may feel they dare not assert the warranty because the likelihood they will end up somewhere worse is high.”).

64. For an excellent discussion of the impact of housing on health and communities, *see* Abraham Gutman, Katie Moran-McCabe & Scott Burris, *Health, Housing, and the Law*, 11 N.E. U. L.R. 251 (2019).

65. Matthew Desmond, Carl Gershenson & Barbara Kiviat, *Forced Relocation and Residential Instability among Urban Renters*, 89 SOC. SERV. REV. 227, 250 (June 2015) (“Our findings suggest that after experiencing a forced move, the chance that a renter will experience housing problems in the next residence increases by at least 20 percentage points to around 70 percent.”).

66. *See infra* Part V. for discussion on tenant blacklisting and substandard housing conditions.

III. WISCONSIN: A “CONTRADICTORY” APPROACH

A. *Eviction in Wisconsin*

According to data from the Eviction Lab, the first nationwide database on evictions, Wisconsin’s eviction rate is 1.89%—just below the United States average.⁶⁷ This rate only reflects evictions that make it through the judicial process. Individuals who leave voluntarily when eviction is threatened are not represented. The eviction filing rate⁶⁸ is relatively low for the region at 3.37%.⁶⁹ Milwaukee, the 30th largest city in the country by population, ranks 60th in eviction rates.⁷⁰ The poverty rate in Wisconsin is 8.63%; the statewide rent burden⁷¹ is 28.9%.⁷²

Rental housing law in Wisconsin is governed by Chapters 704 and 799 of the Wisconsin Statutes. Unlike the other states discussed in this Article, Wisconsin codified its modern landlord-tenant law in 1969, prior to the publication of the URLTA.⁷³ Although subsequent amendments were made in a post-URLTA environment, this initial timeline may account for some of the unique features of Wisconsin law—especially its lack of emphasis on a statutory warranty of habitability.

Hatch classifies Wisconsin as a “contradictory” state, or a state with a “combination of both pro-renter and pro-landlord laws.”⁷⁴ She notes that these states are characterized by “divergent policies” that may result from specific developments in their “political or demographic histories.”⁷⁵ Appropriately enough, recent political developments in Wisconsin may have already rendered Hatch’s 2017 classification out-of-date. Many of the most landlord-friendly characteristics of Wisconsin law are attributable to a series of bills passed by the Wisconsin Legislature beginning in 2011, commonly referred to as the “Landlord Omnibus Laws.”⁷⁶ Most recently, Wisconsin Act 317—effective in 2018—made significant, pro-landlord changes to Wisconsin’s lease-termination requirements

67. *Eviction Rate: Wisconsin*, EVICTION LAB, [https://evictionlab.org/map/#/2016?geography=states& bounds=-134.501,22.209,52.341,54.522&type=er&locations=55,-90.02,44.646](https://evictionlab.org/map/#/2016?geography=states&bounds=-134.501,22.209,52.341,54.522&type=er&locations=55,-90.02,44.646) (last visited Dec. 8, 2020) [hereinafter EVICTION LAB: Wisconsin Eviction Rate].

68. Number of evictions filed per 100 rental homes. *See id. at Eviction Filing Rate*.

69. *Id.*

70. *Top Evicting Large Cities in the United States*, EVICTION LAB, <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en> (last visited Dec. 8, 2020) [hereinafter EVICTION LAB: Top Evicting Large Cities].

71. Percentage of household income spent on rent. *See* EVICTION LAB: Wisconsin Eviction Rate, *supra* note 67.

72. *Id.*

73. *See* Robert F. Boden, *1971 Revision of Eviction Practice in Wisconsin*, 54 MARQ. L. REV. 298, 306 (1971) (asserting that prior to the 1969 legislation, “[t]he action for unlawful detainer has existed in Wisconsin in almost the same form since 1839.”).

74. Hatch, *supra* note 41, at 111.

75. *Id.*

76. Tristan R. Pettit & Jennifer M. Hayden, *Act 317: More Changes to Landlord-Tenant Law*, STATE BAR OF WIS. (Sept. 12, 2018), <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?volume=91&issue=8&articleid=26562>.

and available remedies for conditions defects.⁷⁷ The effects of these changes are discussed further below.

1. Lease-Termination Requirements

Termination notice requirements in Wisconsin vary based on the type of agreement between landlord and tenant and the lease violation(s) alleged. Tenants with a lease lasting more than one year receive the most protection; Wisconsin Statute § 704.17(3) requires thirty-days' notice to these tenants of any lease violation, during which "reasonable steps to remedy the default" are sufficient to preserve the tenancy.⁷⁸

Tenants with a term lease of one year or less receive less protection, but are still entitled to five-day notice and an opportunity to cure for a first-time lease violation.⁷⁹ Notice requirements change for repeat-offenders. If a landlord alleges the same violation twice in one year, she has the option to issue a non-curable fourteen-day notice to quit.⁸⁰ Notably, when the landlord does choose to deny a tenant the opportunity to cure, there is no requirement for her to prove that the first lease-violation actually occurred.⁸¹ Tenants who have received multiple eviction notices thus have little hope of a legal right to cure lease violations, even when past notices were issued incorrectly.

Month-to-month and week-to-week tenants are still entitled to some notice of eviction, but the choice of whether to provide a curable five-day notice or a non-curable fourteen-day notice lies with the landlord.⁸² One late rent payment can consequently result in an eviction, whether or not the tenant offers to pay immediately after receiving his eviction notice. Finally, a tenant who is "holding over" from a previous lease can be evicted without any notice beyond filing of a summons and complaint.⁸³

Wisconsin law imposes very few content or service requirements on termination notices. All termination notices must be in writing.⁸⁴ Notices for curable nonpayment must "require the tenant to pay rent or vacate," while notices of other curable violations must "require the tenant to remedy the default or vacate."⁸⁵ Non-curable notices must simply require the tenant to vacate by an appropriate date.⁸⁶ Before 2018, some Wisconsin courts dismissed nonpayment evictions when a landlord included late fees in the termination notice along with past-due rent.⁸⁷ In response, Act 317 revised the definition of the term "rent" to include both "rent that is past due and any late fees owed."⁸⁸

77. For a summary of the changes made by Act 317, *see id.*

78. WIS. STAT. § 704.17(3) (2017-2018) (In nonpayment cases, rent due must be paid within 30 days).

79. WIS. STAT. § 704.17(2)(a)-(b).

80. *Id.*

81. *Id.*

82. *Id.*

83. WIS. STAT. § 704.25(1); *See also* WIS. STAT. § 704.23.

84. WIS. STAT. § 704.17(4)

85. *See e.g.*, WIS. STAT. § 704.17(2).

86. *Id.*

87. Pettit & Hayden, *supra* note 76.

88. *Id.* *See also* WIS. STAT. § 704.17(1g).

One of the most striking features of Wisconsin rental housing law is the lack of legal consequence for landlords who fail to follow lease-termination requirements. Landlords must comply with the five- or fourteen-day notice period. But because only tenants with long-term leases can claim a right to cure, the defense that a lease violation *has been* cured is limited in practical scope. The landlord's ability to opt in or out of a cure-period grants him additional control over the timing of the eviction. For a tenant in arrears too high for her to realistically pay, the landlord can issue a five-day 'curable' notice: no cure will manifest and the tenant will be out quickly. For a tenant accused of an easily curable violation, like trash left in the common space or an unauthorized pet,⁸⁹ the landlord can issue a fourteen-day non-curable notice: it will take a bit longer, but the tenant will be out nonetheless.

2. Conditions Standards and Retaliatory Eviction

The duties of a Wisconsin landlord with regard to housing conditions are spelled out in § 704.07. He is obligated to keep common areas in a "reasonable state of repair," to make "structural repairs," to keep plumbing, electrical wiring, and other machinery furnished with the property "in reasonable working condition," and to comply with applicable local housing codes.⁹⁰ Before entering into a new rental agreement, a landlord must disclose to prospective tenants violations of local building and housing codes that present a "*significant* threat to the prospective tenant's health or safety."⁹¹

When a residence becomes "untenable," a Wisconsin tenant has two potential remedies; she can leave and stop paying rent, or she can stay and claim "rent abate[ment] to the extent that [she] is deprived of the full normal use of the premises."⁹² But Wisconsin law provides no definition for "untenability," and both remedies are extremely limited in practical use. Granting the tenant the ability to leave begs the question as to why she was living in an untenable residence in the first place—it assumes that the tenant has financial resources to move, and that she is not hindered by an eviction on her record or any other personal circumstance preventing relocation.⁹³ Abatement, on the other hand, is available only for conditions that "*materially affect* the health and safety or the tenant or *substantially affect* the use and occupancy of the premises."⁹⁴ The law provides little guidance for what conditions or problems rise to this level, and local governments are explicitly prohibited from enacting ordinances that permit abatement for less-

89. The author, for example, has previously helped to counsel a client who was being evicted exclusively on the basis that she had dog-sat for her sister's pit bull. The dog lived in her apartment for just a few days, but that didn't stop the landlord from issuing a non-curable lease-termination notice weeks later.

90. WIS. STAT. § 704.07(2)(a).

91. WIS. STAT. § 704.07(2)(b) (emphasis added).

92. WIS. STAT. § 704.07(4).

93. *E.g.*, having children, or having a criminal record.

94. WIS. STAT. § 704.07(4) (emphasis added) (the restriction of rent abatement as a remedy for conditions problems to conditions materially affecting health and safety is, unsurprisingly, another product of Act 317); *See* Pettit & Hayden, *supra* note 76.

severe conditions problems.⁹⁵ So long as the tenant remains in possession, rent may not be withheld in full.⁹⁶

There is no statewide legal procedure for rent withholding in Wisconsin, which leaves a tenant facing conditions problems with a battery of difficult questions. How much rent should she withhold for each type of problem? Is she required to give a certain type of notice to her landlord prior to withholding? Is she required to call a local housing code enforcement agency, if it exists? Should the tenant pay for repairs herself, or wait for the landlord to do so?⁹⁷ Withholding too much rent or failing to give proper notice can easily lead to eviction. As the Tenant Resource Center, a Wisconsin tenants' rights organization, states on its website: "***Withholding rent is very risky!***"⁹⁸ Tenants with a previous eviction or with children are at higher risk of eviction, as both factors will make locating new housing more difficult in the event that the rent withholding goes south.

Retaliatory eviction is prohibited in Wisconsin under § 704.45, but like Wisconsin's untenantability protections, this prohibition is limited. When a tenant can show by a preponderance of the evidence that a landlord's rent increase, decrease in services, refusal to renew a lease, or eviction action "would not [have] occur[ed] *but for* the landlord's retaliation" against the tenant's protected act, the tenant cannot be evicted.⁹⁹ Protected acts include: "(a) Making a good faith complaint about a defect in the premises to an elected public official or a local housing code enforcement agency; (b) Complaining to the landlord about a violation of § 704.07 or a local housing code applicable to the premises; (c) Exercising a legal right relating to residential tenancies."¹⁰⁰ However, notwithstanding any retaliatory motive, landlords are entitled to evict a tenant for nonpayment of rent.¹⁰¹ A tenant who withholds rent based on conditions problems has no protection against retaliation. Moreover, the shield against retaliatory eviction does not apply to a tenant's complaints "made about defects in the premises caused by the negligence or improper use of the tenant."¹⁰² The question of who really caused the conditions problem—the tenant or the landlord—has to be hashed out in court.

In *Evicted*, Desmond offers a powerful example of how Wisconsin law on housing conditions and evictions disenfranchises poor families. The Hinkstons, an African American family living in Milwaukee, spent seven years in the same five-bedroom house in a fairly stable neighborhood.¹⁰³ Unexpected expenses related to Hurricane Katrina caused the Hinkstons to fall behind on rent and, eventually, they were evicted.¹⁰⁴ Pressed to find a new apartment with a landlord who would

95. WIS. STAT. § 704.07(5) (2017-18).

96. *Id.* at § 704.07(4).

97. These questions are raised by the Tenant Resource Center, a Wisconsin tenants-rights non-profit, in their page describing rent abatement. Some municipalities, including Madison, Fitchburg, Milwaukee, Kenosha and Wausau, have municipal ordinances governing rent abatement or withholding. Most do not. *Rent Abatement*, TENANT RES. CTR (Aug. 31, 2015), https://www.tenantresourcecenter.org/rent_abatement [hereinafter Tenant Resource Center].

98. *Id.* (emphasis added).

99. WIS. STAT. § 704.45(1) (2017-18).

100. *Id.*

101. WIS. STAT. § 704.45(2).

102. WIS. STAT. § 704.45(3).

103. Desmond, *supra* note 20, at 66; *see also* Desmond et al., *supra* note 65, at 232.

104. Desmond, *supra* note 20, at 68.

overlook a recent eviction, the Hinkstons ended up in an infested unit with a sagging and leaking ceiling, cracked windows, and broken doors.¹⁰⁵ The landlord later acknowledged that the Hinkstons “moved in on top of roaches.”¹⁰⁶ Still, calling an inspector was not an option: the Hinkstons were technically violating their lease by allowing an adult daughter to live in the apartment, and asking for code enforcement was a quick path to another eviction.¹⁰⁷

IV. OHIO: A “PRO-BUSINESS” APPROACH

A. Eviction in Ohio

Ohio’s eviction rate is 3.49%, which is well above the United States average.¹⁰⁸ Its eviction filing rate is also high: 6.91%.¹⁰⁹ The poverty rate is 11.54%, on par with neighboring Indiana but substantially higher than Wisconsin and Minnesota.¹¹⁰ Statewide rent burden is 29.5%, which is typical for the region.¹¹¹

Ohio has five major cities that rank in the Eviction Lab’s “Top Evicting Large Cities in the United States”: Akron (24th), Dayton (26th), Toledo (30th), Cincinnati (46th), Columbus (52nd), and Cleveland (53rd).¹¹² On a list ranking one hundred cities, this is a perverse kind of honor—one that no other Midwestern state can match.¹¹³

Ohio enacted its Landlord-Tenant Act in 1974, and the subsections of Ohio landlord-tenant law discussed in this Article have changed very little since.¹¹⁴ The 1974 Act at first signaled a substantial increase in legal protection for tenants.¹¹⁵ At common law, for example, an Ohio landlord made no warranty of habitability beyond that for latent defects and nuisance.¹¹⁶ The 1974 Act set a statewide minimum for housing conditions and prohibited—for the first time in Ohio—retaliatory eviction.¹¹⁷ But although the 1974 Act was modeled after URLTA, it provided far weaker tenant protections than URLTA envisioned.¹¹⁸ Today, Hatch classifies Ohio as a pro-business state,¹¹⁹ and that classification holds up under further analysis.

105. *Id.* at 65-66.

106. *Id.* at 66.

107. *Id.* at 75.

108. *Eviction Rate: Wisconsin*, Eviction Lab,

<https://evictionlab.org/map/#/2016?geography=states&bounds=-86.759,38.074,-78.58,42.289&type=er&locations=39,-83.034,40.191> (last visited Dec. 8, 2020) [hereinafter Eviction Lab: Ohio Eviction Rate].

109. *Id.*

110. *Id.*

111. *Id.*

112. EVICTION LAB: Top Evicting Large Cities, *supra* note 70.

113. *Id.*

114. BALDWIN’S OHIO HANDBOOK SERIES, OH. LANDLORD TENANT L. § 1:1 (2019-2020 ed.).

115. John E. Campion, *The Ohio Landlord and Tenant Reform Act of 1974*, 25 CASE W. RES. L. REV. 876, 877 (1975).

116. BALDWIN’S OHIO HANDBOOK SERIES, OH. LANDLORD TENANT L. § 3:7 (2019-2020 ed.), *citing* Goodall v. Deters, 121 Ohio St. 432, 435 (1929). *See also* Campion, *supra* note 115, at 879.

117. Campion, *supra* note 115.

118. *Id.* at 876-877.

119. Hatch, *supra* note 41 at 110.

1. Lease-Termination Requirements

In most cases, an Ohio landlord need only provide three days of termination notice to a tenant before beginning nonpayment or lease violation eviction proceedings.¹²⁰ A tenant who wishes to stay out of the court system must make her decision quickly: she can move to whatever residence she can find within three days (perhaps a shelter or a family member's spare room), or she can agree to whatever terms her landlord requires to stay. Late fees, attorneys' fees, and rent hikes are all on the table. The landlord's already-strong bargaining position is bolstered by the fact that Ohio tenants have no right to remedy an alleged lease violation. If a tenant offers full payment of rent the day after notice was given, the landlord has a right to refuse.

The three-day timeline for a termination notice also limits a tenant's ability to prepare her defense. If she wants a lawyer, she'll have to find one quickly—her trial in an eviction proceeding could be scheduled within the next two weeks.¹²¹ Ohio termination notices have minimal content requirements, and a tenant may not know the precise reason that she is being evicted.¹²² Ohio Statute § 1923.04 requires only that a termination notice must contain the following, “printed or written in conspicuous language: You are being asked to leave the premises. If you do not leave, an eviction action may be initiated against you. If you are in doubt regarding your legal rights and obligations as a tenant, it is recommended that you seek legal assistance.”¹²³

Just how conspicuous this language must be varies across Ohio jurisdictions. The Housing Division of Cleveland offers a form eviction notice with the disclaimer printed twice as large as the other text, and in bold.¹²⁴ Other courts have been satisfied where the language is printed in capital letters.¹²⁵ Presumably, a tenant who has missed her rent payment will be aware of that fact—but a tenant accused of other lease violations may be totally unaware of an impending lease termination.

2. Conditions Standards and Retaliatory Eviction

An Ohio landlord is obligated to comply with “applicable building, housing, health, and safety codes *that materially affect health and safety*,” as well as to make repairs “reasonably necessary to put and keep the premises in a fit and habitable

120. OHIO REV. CODE ANN. §1923.04(A) (West 2012).

121. Per OHIO REV. CODE ANN. § 1923.06 (West 2007), the summons in an eviction case must be served at least seven days before trial. So, if a landlord files for eviction the first day after the required, three-day notice period has expired, a tenant could face trial in her eviction case within two weeks of receiving initial notice.

122. BALDWIN'S OHIO HANDBOOK SERIES, OH. LANDLORD TENANT L. § 13:7 (2019-2020 ed.). See also *Manifold v. Schuster*, 586 N.E.2d 1142 (Ohio Ct. App. 1990) (holding that oral notice is not sufficient, but a written notice containing the required language is sufficient).

123. OHIO REV. CODE ANN. § 1923.04(A)(1) (West 2007).

124. *NOTICE TO LEAVE PREMISES*, CLEV. MUN. CT, available at https://clevelandmunicipalcourt.org/docs/default-source/housing-court-documents/housing-court-forms/30daynotice.pdf?sfvrsn=c5c4a3d_0 (last visited Dec. 8, 2020).

125. *Adm'r of Veterans Affairs. v. Jackson*, 535 N.E.2d 369, 372 (Ohio Ct. App. 1987).

condition.”¹²⁶ When a tenant reasonably believes that her landlord has failed to fulfill these obligations, or when a government agency has found code violations that “*could* materially affect the health and safety of an occupant,” the tenant is entitled to provide notice to the landlord, in writing, of the alleged noncompliance.¹²⁷ If the landlord fails to remedy the conditions problems within 30 days, “*and* if the tenant is current in rent,” the tenant may pay rent into court.¹²⁸

Ohio’s payment-into-court scheme erects substantial barriers for certain types of tenants. A tenant who is not current in her rent has no affirmative remedy for conditions violations. She can call the city inspector, if there is one, but she cannot initiate a conditions case.¹²⁹ Those who are able to pay rent into court still face a daunting road ahead. Under § 5321.09, when a landlord seeks to recover rent paid to the court, he files an action against the tenant in which she becomes the defendant. The tenant then faces the prospect of a judgment that the conditions she complained of resulted from her own acts or omissions, in which case she is liable to the landlord for damages and court costs.¹³⁰ Regardless of the outcome, the court may choose during the pendency of a conditions case to release the tenant’s rent for payment of a landlord’s mortgage, insurance premiums, utilities, repairs, or “other customary and usual costs of operating the premises as a rental unit.”¹³¹

A tenant’s ability to leverage conditions issues against her landlord in an Ohio eviction proceeding is close to nonexistent. In fact, when “compliance with the applicable building, housing, health, or safety code would require alteration [or] remodeling . . . of the premises,” a landlord is specifically authorized to proceed with an eviction.¹³² If a tenant admits that she is not current in rent—paid either to her landlord or to the court in escrow—the trial court may exclude relevant evidence offered toward her defense. In *Martins Ferry Jaycee Housing, Inc. v. Pawlaczyk*, for example, the Court of Appeals of Ohio affirmed a trial court’s decision to exclude evidence of conditions in the tenants’ apartment because the tenants failed to pay their \$79 subsidized share of rent into court.¹³³ The tenants retained their right to counterclaim for damages but could not use the alleged violation of the landlord’s § 5321.04 duties as an eviction defense.¹³⁴

Finally, Ohio tenants who report a violation of building, housing, health, or safety codes to a government agency are protected from retaliatory eviction only when “the violation materially affects health and safety.”¹³⁵ This limitation creates a clear disincentive for tenants to report all but the most severe conditions problems, because the burden of demonstrating that a report ought to qualify for retaliatory eviction protection (and that the landlord is, in fact, retaliating) lies with the tenant.¹³⁶ Even qualifying reports of conditions problems provide no shield

126. OHIO REV. CODE ANN. § 5321.04 (West 2012) (emphasis added).

127. OHIO REV. CODE ANN. § 5321.07(A) (West 1994).

128. OHIO REV. CODE ANN. § 5321.07(B) (West 1994) (emphasis added).

129. *Id.*

130. OHIO REV. CODE ANN. § 5321.09(D) (West 1990).

131. OHIO REV. CODE ANN. § 5321.10(A) (West 1974).

132. OHIO REV. CODE ANN. § 5321.03(A)(3) (West 2003).

133. 448 N.E.2d 512, 514 (Ohio Ct. App. 1982).

134. *Id.*

135. OHIO REV. CODE ANN. § 5321.02 (West 1974).

136. BALDWIN’S OHIO HANDBOOK SERIES, OH. LANDLORD TENANT L. § 13:13 (2019-2020 ed.); see also *Howard v. Simon*, 480 N.E.2d 99, 101 (Ohio Ct. App. 1984).

against a nonpayment eviction.¹³⁷ Moreover, a landlord is explicitly permitted to increase rent to “reflect the cost of improvements installed” after a conditions complaint—whether or not the improvements were necessary to bring the residence into compliance with health and safety codes.¹³⁸ Consequently, an Ohio tenant’s report of severe conditions can plausibly lead to rent hikes and/or eviction—with the full blessing of Ohio law.

V. MINNESOTA: A “PROTECTIONIST” APPROACH

A. Eviction in Minnesota

The Eviction Lab calculates Minnesota’s eviction rate to be 0.59% in 2016, with a poverty rate of 7.29% and statewide rent burden of 29.2%.¹³⁹ Other studies suggest that this rate is now higher.¹⁴⁰ Nearly half of the evictions in Minnesota are filed in Hennepin and Ramsey counties, which contain, respectively, Minneapolis and St. Paul—Minnesota’s two largest cities.¹⁴¹

Recent studies by HOME Line, a Minnesota tenant advocacy organization, reveal significant disparities in eviction filing rates and outcomes between metro area counties and greater Minnesota.¹⁴² Adjusted for the number of rental units in each area, eviction rates in Minneapolis are more than double those of greater Minnesota.¹⁴³ Landlords in greater Minnesota move more slowly to evict, waiting three months on average before filing a nonpayment action.¹⁴⁴ Metropolitan area landlords file faster—when tenants are between 1.75 and 2.25 months behind—but also agree to more in-court settlements.¹⁴⁵

The Minnesota Legislature undertook a major re-codification of the state’s landlord-tenant statutes in 1998 and 1999.¹⁴⁶ Most of these changes still stand today, and eviction in Minnesota is governed by Chapter 504B. Hatch classifies Minnesota as one of only thirteen “protectionist” states, or states that “generally adopt pro-renter policies,”¹⁴⁷ and this categorization squares with Eviction Lab’s

137. OHIO REV. CODE ANN. § 5321.03(A)(1) (West 2003).

138. OHIO REV. CODE ANN. § 5321.02(C) (West 1974).

139. *Eviction Rate: Minnesota*, Eviction Lab, <https://evictionlab.org/map/#/2016?geography=states&bounds=-100.836,42.941,-85.892,49.881&type=er&locations=27,-94.657,46.811> (last visited Dec. 8, 2020) [hereinafter *Eviction Lab: Minnesota Eviction Rate*].

140. *See e.g.*, SAMUEL SPAID, HOME LINE, *EVICTIONS IN GREATER MINNESOTA* (May 2018), <https://homelinemn.org/wp-content/uploads/2018/06/Evictions-in-Greater-Minnesota-Report-with-Appendix.pdf>.

141. Hare, *supra* note 17, at 140.

142. *See id.* at 139-141 (citing MINNEAPOLIS INNOVATION TEAM, *EVICTIONS IN MINNEAPOLIS* (2016)); SAMUEL SPAID & REBECCA HARE, HOME LINE, *EVICTIONS IN BROOKLYN PARK* (Aug. 2018), <https://conservancy.umn.edu/bitstream/handle/11299/200081/Hare%20Final.pdf?sequence=1&isAllowed=y>; REBECCA HARE & SAMUEL SPAID, HOME LINE, *EVICTIONS IN SAINT PAUL* (Sept. 2018), <https://conservancy.umn.edu/bitstream/handle/11299/201646/Final%20Report%201442.pdf?sequence=1&isAllowed=y>.

143. SPAID, *supra* note 140, at 6.

144. Hare, *supra* note 17, at 141.

145. *Id.* at 140.

146. Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense is Much More than “Did You Pay the Rent?”*, 28 WM. MITCHELL L. REV. 65, 66-67 (2001).

147. Hatch, *supra* note 41, at 110.

data ranking Minnesota as having one of the lowest eviction rates in the country.¹⁴⁸ However, as explored further below, Minnesota's embrace of *some* pro-renter policies still leaves substantial landlord-friendly gaps in the law, and falls far short of a genuine equalization of landlord-tenant bargaining power.

1. Lease-Termination Requirements

Despite its reputation as a relatively pro-tenant state, Minnesota imposes no notice requirements on a landlord seeking to file an eviction for breach of lease.¹⁴⁹ If a tenant fails to make rent, a landlord can generally file for eviction the next day.¹⁵⁰ The same is true for an alleged lease violation, like keeping a dog in a no-pets property or hosting unauthorized guests.¹⁵¹ The first paperwork that Minnesota law requires a tenant to receive in an eviction is her court summons, which must be delivered at least seven, but no more than fourteen days before her court date.¹⁵²

The Minnesota tenant who receives this summons finds herself in an unenviable position. The eviction is already filed and on her record, which will be revealed by a prospective landlord's tenant screening. Skipping the pre-filing notice period means robbing the tenant of the opportunity to vacate without the black mark of an eviction on her next rental application. Regardless of the merit of the landlord's allegations, an unlawful detainer on a tenant's record can pose "a nearly insurmountable barrier to future housing."¹⁵³ The landlord also has "little incentive to negotiate outside of court."¹⁵⁴ Having already paid the filing fee, his only risk in appearing before the court is losing the case and having to start over. Minnesota tenants, in contrast, typically lack both representation and leverage.¹⁵⁵ A courtroom defeat can mean homelessness in less than a week.¹⁵⁶ The tenant's incentive to settle is therefore incredibly high, even in the context of unproven allegations and unfavorable repayment terms.

The lack of pre-filing termination notice in Minnesota is somewhat counterbalanced by a strong right to cure. Under Minnesota Statute § 504B.291, a tenant-defendant in a nonpayment eviction can "redeem the tenancy and be restored to possession by paying to the landlord or bringing to court the amount of the rent that is in arrears, with interest, costs of the action, and an attorney's fee not to exceed \$5."¹⁵⁷ This right to cure persists up until "possession has been

148. EVICTION LAB: Top Evicting Large Cities, *supra* note 70.

149. See OFF. MINN. ATT'Y GEN., LANDLORDS AND TENANTS: RIGHTS AND RESPONSIBILITIES 22 (2017), <https://www.ag.state.mn.us/brochures/pubLandlordTenants.pdf> ("In general, if a tenant does not pay rent on the day it is due, the landlord may immediately bring an Eviction Action unless the lease provides otherwise."); see also MINN. STAT. § 504B.291(2010); *But see* MINN. STAT. § 504B.135 (2010); MINN. STAT. § 504B.101 (2010) (expressing that exceptions apply for tenancies at will, in which the lease term has no fixed end-date); MINN. STAT. § 504B.135; MINN. STAT. § 504B.101—but these tenancies are rare by comparison to fixed term or periodic tenancies (e.g. year-to-year, month-to-month, week-to-week)).

150. MINN. STAT. § 504B.291(2010).

151. *Id.*

152. MINN. STAT. § 504B.321 (2007); MINN. R. CIV. P. § 5.02.

153. Hare, *supra* note 17, at 150.

154. *Id.* at 149.

155. *Id.*

156. See MINN. STAT. ANN. § 504B.345.1(d) (West 2014).

157. *Id.* at § 504B.291.1(a).

delivered,” which includes the gap between entry of judgment for the landlord and issuance of the order to vacate.¹⁵⁸ For tenants, this means the right to cure is independent of the court outcome. Unlike in Wisconsin, where the right to cure expires before the eviction case commences,¹⁵⁹ a Minnesota tenant can have her day in court, lose her case, and maintain the right to preserve her tenancy.

2. Conditions Standards and Retaliatory Eviction

Minnesota residential leases contain four covenants implied by the landlord: 1) that the premises and common areas are “fit for the use intended by the parties”; 2) that the landlord will keep premises in “reasonable repair,” except where disrepair has been caused by “willful, malicious, or irresponsible conduct of the tenant”; 3) that the landlord will “make the premises reasonably energy efficient”; and 4) that the landlord will “maintain the premises in compliance with the applicable health and safety laws of the state, and of the local units of government... .”¹⁶⁰

Several provisions in § 504B.161 give the statute extra teeth as compared to other states’ landlord-duties statutes. First, § 504B.161, subdiv. 3 mandates that the section “be liberally construed, and the opportunity to inspect the premises before concluding a lease or license shall not defeat the covenants established in this section.”¹⁶¹ The requirement that the premises must be “fit for the *use intended*” implies a higher standard than the “habitable condition” language in Ohio Statute § 5321.04, or the “untenability” language in Wisconsin Statute § 704.07(4). The landlord’s obligation to make the premises energy efficient is a new development from 2007 that appears to have been motivated by environmental rather than tenants-rights concerns.¹⁶² Still, in the winter in Minnesota, a genuinely weatherproof dwelling can save a tenant hundreds of dollars in heating costs. These savings can be used to help stave off a nonpayment eviction, not to mention the fact that a properly heated dwelling is essential for a tenant’s health and comfort.

Conditions defects at a residence are relevant to eviction in Minnesota in two contexts. First, a tenant-defendant in an eviction action may raise the landlord’s violation of the covenants in § 504B.161 as a defense.¹⁶³ The defense is not contingent on prior notice to the landlord of conditions defects.¹⁶⁴ However, in a nonpayment case, the court may require the tenant to pay rent into court pending trial on the conditions defense—and may refuse to hear the conditions defense if the rent is not paid.¹⁶⁵ If the court allows a conditions defense, the burden to prove

158. *Id.*

159. WIS. STAT. § 704.17.

160. MINN. STAT. § 504B.161.

161. *Id.* at § 504B.161.3.

162. See ENERGY—GREENHOUSE GAS EMISSIONS—REDUCTION, 2007 Minn. Sess. Law Serv., ch. 136, art. 3 (West).

163. McDonough, *supra* note 146, at 87 (citing *Fritz v. Warthen*, 298 Minn. 54, 57-58 (1973)).

164. *Id.* at 89 (citing *Gerald Snyder Rental Ass’n v. Bello*, No. UD-1950117553, at 1 (Minn. Dist. Ct. 4th Dist. Mar. 15, 1995); *McNair v. Doub*, No. UD-1960708524, at 5 (Minn. Dist. Ct. 4th Dist. Aug. 12, 1996); *Larson v. Bonacci*, No. UD-970506542, at 5 (Minn. Dist. Ct. 4th Dist. Jun. 18, 1997)); see MINN. STAT. § 504B.395.

165. McDonough, *supra* note 146, at 89 (citing *Swartwood v. Rouleau*, No. C8-98-1691 (Minn. Ct. App. May 11, 1998)).

a violation of the landlord's § 504B.161 duties lies with the tenant.¹⁶⁶ Once the tenant demonstrates a violation, damages awarded can be applied to any existing arrearage, reducing or eliminating the amount of rent necessary to cure a nonpayment violation.¹⁶⁷

Second, a Minnesota tenant or housing-related neighborhood organization may affirmatively sue a landlord in a rent escrow action under § 504B.385. Before bringing a rent escrow action, a tenant must provide fourteen-day written notice to her landlord specifying the alleged violations of his duties under § 504B.161.¹⁶⁸ If the violation remains uncorrected when the fourteen-day notice period expires, the tenant can deposit rent with the court, but “may not withhold rent to remedy a violation” as long as the proceedings are pending.¹⁶⁹ Potential tenant remedies include retroactive and future rent abatement, release of rent in escrow to remedy the violation, and fines to the landlord.¹⁷⁰ A concurrent eviction action against the tenant does not foreclose a rent-escrow action. In fact, § 504B.385, subdiv. 8 provides that the eviction action and rent escrow action will be combined and heard together, and § 504B.385, subdiv. 9(b) explicitly preserves the tenant's right to cure if the landlord prevails in the consolidated case.¹⁷¹

A Minnesota tenant is protected from retaliatory eviction if she can show, by a preponderance of the evidence, that termination of her tenancy was motivated “in whole *or in part*” as penalty for either: 1) her good-faith attempt to enforce her rights under the lease or law, or 2) her good-faith report of a violation of health, safety, housing, or building codes to a governmental authority.¹⁷² If the eviction is initiated within 90 days after the tenant's protected action, Minnesota law presumes that the eviction *is* retaliatory, and places the burden on the landlord to demonstrate a substantial, non-retaliatory reason for eviction.¹⁷³

VI. THEMES, TRENDS, AND COVID-19 RESPONSES

A. Choices Made and Paths Not Taken

Half a century after the so-called “tenants’ revolution,” the story of landlord-tenant law in the United States is one of unfulfilled promise. Years before COVID-19, “[p]oor renting families [were] facing the worst affordable housing crisis in generations.”¹⁷⁴ The majority of poor renting families devoted more than half of their income to housing costs,¹⁷⁵ and millions of tenants ended up evicted and blacklisted each year.¹⁷⁶

166. *Id.* at 89.

167. *Id.* at 90.

168. MINN. STAT. § 504B.385(c).

169. MINN. STAT. § 504B.385(d).

170. MINN. STAT. § 504B.385, subdiv. 9.

171. *Id.*

172. MINN. STAT. § 504B.285, subdiv. 2.

173. *Id.*; see also McDonough, *supra* note 146, at 112 (citing *Parkin v. Fitzgerald*, 307 Minn. 423, 430-31 (1976)).

174. Desmond & Kimbro, *supra* note 7, at 1.

175. *Id.* at 2.

176. See Hartman & Robinson, *supra* note 11, at 461-65.

Nowhere is the dissolution of the tenants' rights movement more apparent than in the decline of the warranty of habitability. In 2020 article *The Limits of Good Law: A Study of Outcomes in Housing Court*, Nicole Summers presents the first large-scale empirical study of what she calls "the warranty of habitability operationalization gap—a gap between the number of tenants with meritorious [conditions] claims and the number of tenants who receive some benefit from the claim."¹⁷⁷ Summers identifies three types of limiting rules that decrease the practical availability of the warranty of habitability to tenants, all of which have become more popular across jurisdictions in recent years.¹⁷⁸ First, "good faith" laws require a tenant to show that her primary (or even exclusive) motive for rent-withholding was the existence of conditions problems.¹⁷⁹ A tenant whose rent-withholding coincides with a missed paycheck or other life event will struggle to make the good-faith showing—even when housing conditions are clearly appalling.¹⁸⁰ Second, "rent escrow" laws require tenants, at the time of withholding or filing, to pay rent into court to maintain a housing conditions claim.¹⁸¹ Tenants who are simply unaware of their payment-into-court responsibility can end up waiving meritorious claims by accident; others must choose between asserting a claim and spending the rent money on immediately-needed repairs.¹⁸² Finally, onerous notice requirements in some jurisdictions condition a tenant's claim on her timely, official report of conditions defects.¹⁸³ Tenants who report problems directly to their landlords, rather than to a housing code enforcement agency, end up with no conditions claim.¹⁸⁴ A tenant's decision to make a phone call rather than send a written letter can instantly torpedo an otherwise meritorious case.

But even in New York, a state that imposes none of these limiting rules, Summers finds that "the overwhelming majority of tenants who were entitled to [conditions-based] rent abatements did not receive them."¹⁸⁵ This result still holds when the analysis is limited to tenants who properly asserted open, verifiable housing code violations in court.¹⁸⁶ Tenants fared better with legal representation, but an immense operationalization gap remained, unattributable to either lack of representation or common limiting rules.¹⁸⁷ As one alternative explanation for the gap, Summers cites restrictive or non-existent cure-periods for tenants applying rent abatement to an existing arrearage.¹⁸⁸ Restrictive cure-periods, discussed further in Part V.C., substantially increase a tenant's risk in taking a case to trial.¹⁸⁹ Non-doctrinal factors, such as court culture surrounding the warrant of habitability and systematic power imbalances between landlords and tenants, likely play a role

177. Summers, *supra* note 54, at 149.

178. *Id.* at 162.

179. *Id.*

180. *Id.* at 162-163 (in practice, the good-faith requirement asks a tenant to show that, *but for* conditions problems in her apartment, she would not have withheld the rent).

181. *Id.*

182. *Id.* at 163-64.

183. *Id.* at 164.

184. *Id.*

185. *Id.* at 191.

186. *Id.*

187. *Id.* at 210.

188. *Id.* at 215-16.

189. *Id.* at 216.

as well.¹⁹⁰ No matter the cause, one result is clear: the warranty of habitability, as it currently exists, is an ineffective and underenforced means of maintaining minimum housing-condition standards.¹⁹¹

B. Housing Policy Responses to COVID-19

Efforts to stem a tidal wave of COVID-19 evictions are proceeding at every level of the United States government. On the federal level, the CARES Act initially imposed a 120-day moratorium on the eviction of tenants in federal public housing programs and properties secured by federally-backed mortgages.¹⁹² But roughly three in four rental properties were not covered by the CARES Act eviction moratorium—which meant that the majority of renters were protected from COVID-19 eviction only to the extent that their state or local government chose to protect them.¹⁹³

The CARES Act moratorium expired on July 24, 2020, leaving policy on COVID-19 evictions entirely up to the states.¹⁹⁴ In turn, state approaches varied widely—from months-long moratoria at each step of the eviction process¹⁹⁵ to utter inaction.¹⁹⁶ Reports from tenants' rights groups and attorneys indicated that, even in tenant-protective states, some landlords were responding to restrictions on statutory eviction by turning to self-help eviction, changing locks, or shutting off utilities to force tenants out.¹⁹⁷ Finally, effective September 4, 2020, the Centers for Disease Control (CDC) issued a nation-wide moratorium on certain residential evictions for nonpayment of rent.¹⁹⁸

The CDC's eviction moratorium provides critical protection to many of the tenants hit hardest by the pandemic. It does not apply automatically; to be eligible for protection, a tenant must submit a declaration, under penalty of perjury, that she meets certain eligibility requirements.¹⁹⁹ A "covered person" must certify that:

- 1) She has used best efforts to obtain all available assistance for rent or housing;

190. *Id.* at 217.

191. *Id.* at 210-214.

192. See Semuels, *supra* note 2.

193. See Laurie Goodman, Karan Kaul, & Michael Neal, *The CARES Act Eviction Moratorium Covers All Federally Financed Rentals—That's One in Four US Rental Units*, URB. INST. (Apr. 2, 2020), <https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units>.

194. Sarah Hansen, *Eviction Bans, \$600 Unemployment Payments, and Student Loan Forbearance: Here's When The Benefits Of the CARES Act Expire*, FORBES (July 24, 2020, 9:54 AM), <https://www.forbes.com/sites/sarahhansen/2020/07/24/eviction-bans-600-unemployment-payments-and-student-loan-forbearance-heres-when-the-key-benefits-of-the-cares-act-expire/?sh=54bc1d784ccd>

195. As in Connecticut. See Semuels, *supra* note 2.

196. As in Arkansas, where judges are allowed to conduct and rule on eviction hearings remotely. *Id.*

197. *Id.*

198. *Temporary Halt in Residential Evictions To Prevent the Further Spread of COVID-19*, FED. REG. (Sept. 4, 2020), <https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19>.

199. *Id.*

- 2) She expects to earn less than \$99,000 in 2020 income, was not required to report any 2019 income to the IRS, or received a stimulus check under the CARES Act;
- 3) She is unable to pay the full rent due to substantial loss of income or extraordinary out-of-pocket medical expenses;
- 4) She is “using best efforts to make timely partial payments,” and;
- 5) Eviction would likely leave her homeless or force her to move into a shared living setting.²⁰⁰

Once a tenant submits this declaration to her landlord, she is protected from eviction on nonpayment grounds (but not for other lease violations) until December 31, 2020.²⁰¹ Notably, a landlord can continue to charge late fees while the CDC moratorium is in effect.²⁰² A tenant’s arrearage is due, in full, the moment the moratorium expires; there is no mandatory grace period or obligation for the landlord to consider a settlement.²⁰³

State protections for renters remain vital, despite the CDC’s eviction moratorium, for a number of reasons. First, the CDC’s moratorium does not apply in any state where an existing moratorium provides “the same or greater level of public health protection.”²⁰⁴ An existing state moratorium on late fees, for example, remains in effect, as does any mandatory grace period for repayment of an arrearage. Second, the CDC moratorium’s restricted eligibility and declaration requirements limit both its legal and practical applicability. Some vulnerable tenants—like those who were teetering on the edge of eviction before the pandemic—are simply ineligible.²⁰⁵ Others, particularly those who are representing themselves pro se, may be unaware of the need for a declaration or may file it improperly.²⁰⁶ Finally, and perhaps most importantly, the CDC eviction moratorium is time-limited. It did not apply to tenants evicted in the first six months of the COVID-19 crisis, and it will not apply to evictions after December 31, 2020. As a consequence, underlying state policies and rental-housing law regimes will ultimately determine who gets evicted and who gets to stay, the ability of tenants to enforce housing-condition standards throughout the pandemic, and the long-term consequences of tenant blacklisting for pandemic-induced evictions.

The three states surveyed in this Article illustrate three very different approaches to COVID-19 and evictions. Predictably, Minnesota has adopted the strongest tenant-protections, and ranks in the top five states for COVID-19 housing policy in the Eviction Lab’s COVID-19 Policy Scorecards.²⁰⁷ To score and rank

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. Tenants who did not experience a substantial *loss* in income or *extraordinary* medical expenses are ineligible for protection. As a consequence, those who were simply too poor to pay rent before the pandemic hit, and did not lose additional income because of it, will struggle to qualify.

206. This problem has already been noted in Milwaukee housing court. See Cary Spivak, *Wisconsin eviction rates have slowed during the CDC’s moratorium, but landlords are continuing to toss tenants*, MILWAUKEE J. SENTINEL (Sept. 25, 2020, 10:02 AM), <https://www.jsonline.com/story/news/investigations/2020/09/24/tenants-milwaukee-and-wisconsin-continuing-get-evicted-despite-ban/3496608001/>.

207. *COVID-19 Housing Policy Scorecard Methodology*, EVICTION LAB (Apr. 20, 2020), <https://evictionlab.org/covid-housing-scorecard-methods/>.

the states, the Eviction Lab examined five policy categories: initiation of eviction, court process, enforcement of eviction order, short-term supports, and tenancy preservation measures.²⁰⁸ Control of these policies can fall to the courts, governors, or legislatures depending on the state and manner of enactment.²⁰⁹ In the early months of COVID-19 in Minnesota, Governor Tim Walz (D) and the Minnesota Supreme Court took charge.²¹⁰ On March 23, 2020, Governor Walz issued Executive Order 20-14 suspending all new eviction filings except in cases of emergency.²¹¹ Minnesota's eviction moratorium runs through at least December 14, 2020, and could be continued in tandem with the CDC moratorium.²¹² Most ongoing eviction proceedings are stayed, and writs of restitution will not be executed except in priority cases.²¹³ Violation of Executive Order 20-14 is a misdemeanor, and soon after the moratorium was put in place, Minnesota Attorney General Keith Ellison filed an enforcement action against at least one landlord who attempted self-help eviction.²¹⁴ In Attorney General Ellison's words, "let this case serve as a warning . . . if you take illegal actions to force your tenants to vacate their property during this emergency, my office will take swift and strong action against you."²¹⁵

Wisconsin initially took significant steps to prevent COVID-19 evictions. Pursuant to Emergency Order #15, issued by Wisconsin Governor Tony Evers (D) on March 27, 2020, no lease-termination notices could be issued for nonpayment of rent in Wisconsin until May 26, 2020.²¹⁶ Moreover, on April 25, 2020, the Wisconsin Department of Agriculture, Trade, and Consumer Protection published Emergency Rule 2002, which prohibited landlords from charging late fees or penalties for nonpayment until September 21, 2020.²¹⁷ But Wisconsin's eviction moratorium was allowed to expire—and predictably enough, eviction filings in Milwaukee spiked immediately.²¹⁸ Now, except for prohibitions on utility shutoffs

208. EVICTION LAB, COVID-19 HOUSING POLICY SCORECARD METHODOLOGY, <https://evictionlab.org/covid-housing-scorecard-methods/> (last visited May 11, 2020).

209. *Id.*

210. *COVID-19 Housing Policy Scoreboard: Minnesota*, EVICTION LAB (Nov. 13, 2020), <https://evictionlab.org/covid-policy-scorecard/mn/>.

211. MINN. EXEC. ORDER No. 20-14 (Mar. 23, 2020), https://mn.gov/governor/assets/EO%2020-14%20Filed_tcm1055-424508.pdf.

212. See MINN. EXEC. ORDER NO. 20-97 (Nov. 12, 2020), https://mn.gov/governor/assets/EO%2020-97%20Final_tcm1055-453622.pdf.

213. *Id.* See also HOME LINE LEGAL STAFF, *Executive Order on Evictions & COVID-19 Information*, HOME LINE (Nov. 13, 2020), <https://homelinemn.org/6356/executive-order-on-evictions-covid-19-information/>.

214. Press Release, OFF. MINN. ATT'Y GEN., *Attorney General Ellison enforces Executive Order Against Forcing Tenants to Vacate During COVID-19 Pandemic*, (Apr. 3, 2020), https://www.ag.state.mn.us/Office/Communications/2020/04/03_Mostad.asp.

215. *Id.*

216. WIS. EMER. ORDER #15: TEMPORARY BAN ON EVICTIONS AND FORECLOSURES (Mar. 27, 2020), <https://evers.wi.gov/Documents/COVID19/EO15BanonEviictionsandForeclosures.pdf>.

217. *Wisconsin Prohibits Residential Landlords from Charging Fees and Penalties for Late Rent Payment During the COVID-19 Pandemic*, THE NAT'L L. REV. (May 6, 2020), <https://www.natlawreview.com/article/wisconsin-prohibits-residential-landlords-charging-fees-and-penalties-late-rent>; See also WIS. ADMIN. CODE § ATCP 134.09 (8)(d) (2020).

218. *Eviction Tracking: Milwaukee, Wisconsin*, EVICTION LAB, <https://evictionlab.org/eviction-tracking/milwaukee-wi/> (last visited Dec. 8, 2020) [hereinafter Eviction Lab Tracking: Milwaukee].

and late fees, the only COVID-19 eviction protections in Wisconsin stem from the CDC's moratorium.²¹⁹

Ohio, in the meantime, lived up to its pro-business reputation, enacting no statewide measures restricting eviction at any point of the pandemic.²²⁰ On April 1, 2020 Ohio Governor Mike DeWine (R) issued an Executive Order requesting that commercial landlords suspend rent payments for small business commercial tenants and lenders offer to forbear the mortgage for commercial mortgage loans.²²¹ But the Governor took no action on behalf of residential tenants, which means—according to Nick DiNardo, a managing attorney in the housing division of the Legal Aid Society of Southwest Ohio—that while “you can’t evict a business . . . you can still evict families.”²²² The Ohio Supreme Court issued guidance to local courts in late March recommending temporary continuance of “eviction filings, pending eviction proceedings, scheduled move-outs, and the execution of foreclosure judgements.”²²³ The ultimate decision of whether and under what circumstances eviction hearings should be suspended lay with local courts, and approaches varied widely across the state.²²⁴ The CDC's eviction moratorium consequently provides Ohio tenants with more protection than they have received at any other point of the pandemic—but, of course, does nothing for those who were evicted in the first six months.

Correlation between a state's pre-COVID attitude toward tenant legal protections and its current, COVID-19 housing policies can be interpreted in multiple ways. On the one hand, emergency responses to COVID-19 are certainly a product of politics, and the political leanings of a state's current Governor, Legislature, and Supreme Court will influence—and sometimes dictate—the parameters of its housing policy. Wisconsin provides a good example. The Wisconsin Legislature, which passed the Landlord Omnibus Laws, has been Republican-dominated since 2011.²²⁵ Between 2011 and the present, Wisconsin landlord-tenant law became decidedly more landlord-friendly.²²⁶ Wisconsin's housing policy response to COVID-19 initially included some of the most tenant-protective policies in the country, and was led by a Democratic Governor who temporarily infused a landlord-friendly legal framework with a tenant-protective

219. *COVID-19 Housing Policy Scorecard: Wisconsin*, EVICTION LAB (Sept. 21, 2020), <https://evictionlab.org/covid-policy-scorecard/wi/>.

220. *COVID-19 Housing Policy Scorecard: Ohio*, EVICTION LAB (Nov. 13, 2020), <https://evictionlab.org/covid-policy-scorecard/oh/>.

221. Boose & McEvoy, *supra* note 3; see also *Governor of Ohio*, EXEC. ORDER 2020-08D (2020).

222. Lucy May, *Eviction Fears Easing for Some Tri-State Renters During COVID-19 Crisis, Intensifying for Others*, WCPO CINCINNATI (Apr. 30, 2020, 5:48 PM), <https://www.wcpo.com/rebound/eviction-fears-easing-for-some-tri-state-renters-during-covid-19-crisis-intensifying-for-others>.

223. GUIDANCE TO LOCAL COURTS: COVID-19 PUBLIC HEALTH EMERGENCY, SUP. CT. OF OHIO (Mar. 30, 2020), <http://www.sc.ohio.gov/coronavirus/resources/localCourtGuidance03.20.20.pdf>.

224. Boose & McEvoy, *supra* note 3; See *Eviction Tracking: Cincinnati, Ohio*, EVICTION LAB, <https://evictionlab.org/eviction-tracking/cincinnati-oh/> (last visited Dec. 8, 2020); See also *Eviction Tracking: Cleveland, Ohio*, EVICTION LAB, [HTTPS://EVICTIONLAB.ORG/EVICTION-TRACKING/CLEVELAND-OH/](https://evictionlab.org/eviction-tracking/cleveland-oh/) (last visited Dec. 8, 2020).

225. *Party Control of Wisconsin State Government*, BALLOTPEdia, https://ballotpedia.org/Party_control_of_Wisconsin_state_government (last visited Dec. 8, 2020).

226. See *supra* Part II.

policy agenda.²²⁷ But the state's eviction moratorium is now defunct; once the CDC's moratorium expires, Wisconsin landlord-tenant law will return (barring legislative action) to its pre-pandemic state.

On the other hand, the current form and lasting impact of COVID-19 housing policies is undoubtedly shaped by each state's pre-COVID landlord-tenant law, developed over decades and across political administrations. Here, a closer look at Minnesota's COVID-19 response is enlightening. The Eviction Lab highlights Minnesota law on expungement as a key component of the state's positive COVID-19 Scorecard.²²⁸ The fact that this law was in place long before COVID-19 hit makes it no less beneficial to tenants impacted by the pandemic. However, it suggests that Minnesota's strong COVID-19 Scorecard has more to do with its pre-existing legal framework for tenant protections than with current politics. Likewise, when Minnesota's and the CDC's eviction moratoria expire, Minnesota tenants who fell behind on rent during the pandemic will be better situated to defend their housing than peers in Wisconsin and Ohio.

As more and more states revert to their pre-pandemic landlord-tenant law frameworks, the importance of both procedural and substantive tenant-protections will increase. Particularly in states that do not enact a grace period for the repayment of arrearages accumulated during the pandemic, January 2021 could see a belated flood of pandemic-induced evictions. Assuming that current law stands when emergency measures are lifted, the next Section recommends a series of reforms designed to address the most blatant landlord-tenant inequities in housing court.

C. Feasible Reforms

1. Extended Termination Notice & A Strong Right to Cure

Two reforms to lease-termination requirements could help reduce the trauma of forced relocations: 1) extending pre-filing notice periods; and 2) mandating a pre- and post-judgment right-to-cure.²²⁹ Cramped notice periods and limited cure-opportunities drive informal evictions, tenant blacklisting, and chronic housing conditions problems—all defining features of the Eviction Economy. Slowing the clock between notice of lease-termination and actual eviction has little impact on the landlord's substantive right to reclaim the property, but it can be life-changing for a tenant experiencing a forced move.

First, longer pre-filing notice periods make it far more realistic for a tenant to leave on her own terms. A semi-voluntary departure is beneficial for both landlord and tenant.²³⁰ The tenant is much more likely to find decent replacement housing pre-filing, for she has not yet been blacklisted. She can use the pre-filing notice

227. Eviction Lab Tracking: Milwaukee, *supra* note 218.

228. *Id.*

229. A "post-judgement" right to cure would extend, as it currently does in Minnesota, up until the writ of restitution is issued. *See* MINN. STAT. § 504B.291.

230. The greatest benefit to the landlord from a semi-voluntary tenant departure is that he will not have to pay filing and attorneys' fees in an eviction action. The trouble is that, by the time that a pro bono lawyer gets involved in a low-income tenant's case, the case has usually proceeded past the filing stage—which means that the landlord has sunk costs.

period to search for adequate housing,²³¹ haggle with landlords over a security deposit, or even just pack up her possessions.²³² “Rushers,” like the Hinkstons in *Evicted*, can face a choice between acceptance of poor housing conditions in discommoding locations or rapid homelessness. Short pre-filing notice periods create more rushers and more forced relocations, which in turn increases the long-term, negative consequences of eviction—not just for evicted tenants, but also for whole communities.²³³

Next, a strong right-to-cure helps to equalize bargaining power between landlords and tenants. Victory for a tenant in an impending eviction does not always mean winning the case, or even staying in the apartment. Not only are evictions and conditions problems closely tied, but the tenant’s relationship with the landlord may well be damaged by the interactions leading up to the termination notice. Instead, victory can mean something like getting out of a too-expensive lease without a formal eviction record, negotiating the price of an extra few weeks to move possessions, or bargaining for a partial return of the tenant’s security deposit. Narratives of high settlement rates often leave out a key determinant of tenant outcomes: the settlement terms. A settlement plan that imposes high fees and unrealistic deadlines on a tenant is very different from, for example, a structured, achievable repayment plan with the possibility of later expungement.

A strong right-to-cure also helps protect tenants from short-term fluctuations in income and retaliation for conditions-related rent withholding. The former danger is particularly pressing in the wake of COVID-19, as more and more individuals will be relying on lower, fixed incomes like unemployment checks. In a right-to-cure state with a two-week termination notice, a tenant who experiences an unexpected expense just before the rent comes due might be able to hold out until her next check arrives. Local media in Ohio has already identified staggered rent payments as a game-changer for tenants affected by COVID-19, but right now, the decision of whether to allow a tenant to make staggered payments lies entirely with the landlord.²³⁴ Without a strong right-to-cure, a landlord who would rather not deal with income-insecure tenants has full discretion to proceed with immediate eviction.

Finally, a post-judgment right to cure would provide a critical procedural safeguard against retaliation for conditions-related rent withholding. The law on damages in housing conditions suits is murky at best.²³⁵ A tenant who wins her rent-withholding or payment-into-court suit still faces a substantial risk that the court will award damages less than the amount that she withheld. Without a right to cure, a landlord can refuse the tenant’s offer to pay any remaining arrearage in retaliation for her conditions complaint, then evict the tenant on nonpayment grounds.²³⁶

231. Two weeks, after all, is a reasonable timeline to sign a new lease and move. Three days is not.

232. A forced relocation can often result in loss of a tenant’s possessions, which contributes to long-term declines in material wealth. See Desmond & Kimbro, *supra* note 7, at 16-17, 22.

233. See Gutman et al., *supra* note 64.

234. See May, *supra* note 222 (discussing some Ohio landlords who are working with tenants to allow half-rent payments at the beginning and in the middle of the month).

235. See *supra* Part V.A.

236. This is another reason in favor of applying retaliatory eviction protections to nonpayment cases. See *infra* Part VI.C.3.

Of the states surveyed here, Minnesota comes closest to the recommended policy regime because of its strong right to cure. But Minnesota has no pre-filing notice requirement whatsoever in nonpayment or lease violation evictions.²³⁷ A tenant can end up blacklisted before she even knows she is being evicted, which takes one of the most important potential terms in a settlement agreement—a clean rental record for the tenant—off the table. In her 2020 article, *Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota*, Rebecca Hare points out the importance of termination-notice periods in promoting out-of-court settlement, preventing needless tenant blacklisting, and increasing a tenant's leverage to negotiate achievable repayment terms.²³⁸ Her emphasis on the role of lease-termination notice in an already tenant-protective state highlights the interlocking nature of notice and the right-to-cure. Each protection is seriously diminished by the absence of the other, and policymakers looking to slow the cogs of the Eviction Economy ought to embrace both.

2. Reducing the Impact of Tenant Blacklisting through Record Sealing and Expungement

Most evictions in the United States are informal evictions.²³⁹ But the fact that tenants and landlords are not meeting in court does not diminish the significance of landlord-tenant law. Informal eviction occurs in the shadow of formal eviction, particularly in the shadow of tenant blacklisting. So long as a tenant's ability to vindicate her legal rights in court comes at the cost of being blacklisted, the balance of power between landlords and tenants will remain fundamentally skewed at each step of the eviction process. Accordingly, this Article recommends three key reforms to target tenant blacklisting: 1) mandatory expungement of an eviction action upon a showing by a tenant-defendant that the landlord-plaintiff's case fails on the merits; 2) automatic sealing of any eviction action that does not result in execution of a writ of restitution; and 3) automatic sealing of any eviction action after an appropriate number of years expire (e.g. three to five years).

The long-term, detrimental effects of an unfavorable tenant-screening report provide a ripe avenue for landlord abuse of the eviction process.²⁴⁰ Threats of blacklisting can be used to keep tenants quiet about conditions problems, or to circumvent statutory notice timelines for eviction. Examples of this behavior are already cropping up in the context of COVID-19 evictions. *Time Magazine* has reported instances of landlords persuading tenants that they must vacate immediately despite COVID-19 eviction moratoria,²⁴¹ while *FOX6 News* has recounted tenants' fear and confusion in response to notices requesting (though not ordering, per Wisconsin Emergency Order #15) them to vacate.²⁴² Tenants faced

237. See *supra* Part IV.

238. Hare, *supra* note 17, at 153-157.

239. See Desmond et al., *supra* note 65, at 244. The authors find that just 27% of forced moves in their study occurred because of formal eviction. Informal evictions, in contrast, accounted for 44% of forced moves.

240. Kleysteuber, *supra* note 6, at 1361-1362.

241. Semuels, *supra* note 2.

242. Bryan Polcyn, 'Not Fair:' Letter Informing Milwaukee Tenants to 'Vacate ASAP' Caused Confusion Amid COVID-19, FOX 6 NOW (Apr. 9, 2020) <https://fox6now.com/2020/04/08/not-fair-letter-informing-milwaukee-tenants-to-vacate-asap-caused-confusion-amid-covid-19/>.

with the prospect of eviction are afraid of being trapped in substandard housing for years to come—and rightfully so.²⁴³ As the law on tenant blacklisting stands in most states, even a clearly-frivolous eviction action can remain on a tenant's screening report and guarantee rejection of most of her future rental applications.

Mandatory expungement of eviction actions where the landlord loses or will lose his case on the merits could help curb the worst of these landlord-abuses. Expungement imposes no penalty on the landlord-plaintiff, whether he filed the eviction in good faith or in bad. But to a tenant, expungement offers one of the most valuable prizes available in housing court: a clean rental record. Currently, tenants faced with clearly frivolous or illegal eviction actions remain incentivized to do all they can to keep the action out of court. Even if a tenant is confident that her landlord has no legitimate grounds for eviction, allowing the matter to proceed to the filing stage means gambling her ability to find new housing in the future, and relying at best on the discretion of the trial judge to expunge the eviction if he or she so chooses.²⁴⁴ Mandatory expungement where a tenant prevails or would prevail tilts the scales in the tenant's favor, specifically in cases where the landlord's claim lacks legal merit—exactly the cases where courts ought to be most suspicious of baseless or retaliatory eviction.²⁴⁵

Expungement of cases actually litigated, however, is not enough to balance the scales between landlord and tenant in pre-trial negotiations. Record sealing of evictions that do not result in execution of writ of restitution is still necessary to address the role of the courts in contributing “dirty” information to tenant screening reports. “Dirty” information, defined by Rudy Kleysteuber in *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, is information in a tenant-screening report “contaminated by data points that do not in fact indicate whether a tenant is likely to pay or to create problems.”²⁴⁶ Examples of such “dirty” data points include evictions filed without proper notice to the tenant, evictions filed in retaliation for conditions reporting, or evictions settled by a tenant's full repayment of her arrearage. In each of these examples, the same “case-by-case considerations” that prevent execution of the writ of restitution (if it is even issued) render records of the action “virtually useless as a proxy for potential [future] evictions.”²⁴⁷ But tenant-defendants in these cases still end up needlessly blacklisted.²⁴⁸ Measures designed to improve the accuracy of tenant-screening reports provide some help, but tenant screening agencies “have little or no incentive to avoid accurate but misleading items” like amicably settled eviction actions.²⁴⁹ Limiting access to eviction records based on actual outcomes stems the flow of “dirty” information at its source, without impeding public (and primarily

243. *Id.*

244. See Franzese, *supra* note 49, at 691-693, for discussion of the most tenant-favorable state legal regimes on tenant blacklisting. California and Minnesota provide some of the strongest tenant protections, but expungement is dependent on variable like length of litigation (in California) and discretion of the trial judge (in Minnesota).

245. Cases in which the tenant would prevail are those where she can demonstrate that, but for landlord withdrawal or settlement of the case, she would have prevailed on the merits. A landlord could stipulate to this fact as part of a settlement agreement.

246. Kleysteuber, *supra* note 6, at 1375.

247. *Id.* at 1377.

248. Franzese, *supra* note 49, at 673.

249. Kleysteuber, *supra* note 6, at 1366.

landlord) interest in access to the records most likely to bear on a tenant's current risk profile (like a nonpayment eviction in which the writ is executed).

Finally, automatic sealing of eviction records after a designated number of years provides protection to an especially vulnerable group of tenants: those who *are* formally evicted. Countless tenants are evicted each day on perfectly legitimate grounds. They miss rent or violate the lease and are forced by the courts to find a new home. But while immediately subsequent landlords have a fair claim that a recent eviction signals an insolvent or otherwise high-risk tenant, the force of this rationale erodes considerably over time. Tenants thrown into sudden unemployment by COVID-19 are already facing nonpayment eviction in some states. When eviction moratoria are lifted, many more will join them. If records of these cases remain unsealed, a present COVID-19 eviction will haunt a tenant until 2025, 2030—even beyond. Eviction is a civil offense. It can result from a single, isolated instance of nonpayment. There is no reason that courts and legislatures should allow a single eviction, legitimate or not, to dictate a tenant's housing prospects for a decade.

3. Removing Legal Obstacles to Housing Conditions Litigation and Preventing Retaliatory Eviction

The warranty of habitability was once viewed as the crowning jewel of the tenants' revolution. Fifty years later, it is both underutilized and ineffective.²⁵⁰ The states surveyed in this Article take two, non-exclusive approaches to housing conditions litigation: 1) tenant rent withholding, available to some degree in all three states, and 2) payment-into-court systems, available in Ohio and Minnesota. Commentators disagree on which approach is inherently more tenant-protective.²⁵¹ But in either system, action on the right-to-cure and tenant blacklisting is essential to protect tenants who assert their legal right to habitable, code-compliant housing. Moreover, so long as both systems of conditions litigation remain unavailable to tenants unable to pay rent, neither can be expected to function as an effective tenant-enforcement mechanism of minimum housing conditions.

Absent strong protections against blacklisting and a post-judgment right-to-cure, a rent withholding approach is incredibly risky for poor tenants. If the matter is litigated, it will likely be in the context of a nonpayment eviction, where stakes for the tenant-defendant are already high.²⁵² At best, she could receive damages and a court order for repairs. At worst, she could end up homeless. Without a post-judgment right-to-cure, a tenant who prevails on her conditions claim can be

250. See, e.g. Summers, *supra* note 54, at 165-166.

251. Summers, for example, characterizes payment-into-court systems as inherently landlord-friendly. See Summers, *supra* note 54, at 163-164. As the Wisconsin Tenant Resource Center notes, however, rent-withholding is incredibly risky for tenants. See Tenant Resource Center, *supra* note 97. A payment-into-court can provide a more secure alternative to rent-withholding, allowing a tenant to enforce housing conditions standards with the knowledge that, as long as she continues to pay rent into court, she cannot be evicted.

252. Super, *supra* note 18, at 405 ("Under the new landlord-tenant regime, tenants can bring repair disputes to court either offensively or defensively . . . In practice, however, most tenants remaining in bad housing lack the legal or economic resources to sue affirmatively. As a result, the best chance for repairs to be adjudicated is in connection with an affirmative defense or counterclaim to the landlord's action for possession for nonpayment of rent."). See also Summers, *supra* note 54, at 149, n. 22.

evicted anyways in retaliation for the litigation.²⁵³ Even if a tenant retains her lease at present, records of the eviction action will likely leave her blacklisted, unable to move on from her current unit because of her earlier decision to withhold.²⁵⁴

Similar obstacles arise in the context of payment-into-court schemes, compounded by the financial and procedural hurdles that such schemes impose. Enforcement of a judgment ordering the landlord to make repairs can take months—if they happen at all.²⁵⁵ Affirmative litigation can still land a tenant on the blacklist.²⁵⁶ Protections against retaliatory eviction may be limited, as in Ohio, to conditions issues “materially affecting health and safety”—a tenant cannot be sure that she will qualify until after her case is decided.²⁵⁷ It is no wonder that tenants in a tight housing market will often wait until conditions are truly desperate to withhold. As David Super, a leading scholar on the warranty of habitability, explains: “the likelihood they will end up somewhere worse is high.”²⁵⁸

Neither rent withholding nor payment-into-court systems can expect to make a meaningful difference in low-income housing conditions when access to courts and protections against retaliatory eviction are restricted to tenants who are current on, and can continue paying, rent. Poor, heavily rent-burdened households are those most likely to encounter substandard housing; they are also the most likely to build up arrearages. Payment-into-court programs and rent escrow conditions on the habitability eviction defense are both landlord-protective measures designed to preserve the landlord’s ultimate claim on the rent.²⁵⁹ But this logic flies in the face of the core justification for the warranty of habitability, namely, that a tenant is not *obligated* to pay rent unless the landlord is complying with his warranty of habitability. In practice, limiting the remedies for breach of the warranty of habitability to cases where the tenant is able and willing to pay rent robs the poorest tenants of their ability to assert the claim.²⁶⁰

Landlords are sure to protest that enforcing retaliatory eviction protections in nonpayment cases will infringe on their ability to collect past-due rent. Perhaps so. But a landlord’s diminished rent-collection capacity is not itself enough reason to deny basic protections to tenants. Original justifications for the warranty of habitability reflected a quid pro quo between landlords and courts: “in exchange for [the courts’] extraordinary help” of enforcing evictions, landlords could be fairly required to “comply with the laws on health and safety.”²⁶¹ The popularity of this rationale has waned over the years, but the force of its logic remains. So far as a landlord asks the courts to enforce a tenant’s responsibilities under the lease,

253. See *supra* Part VI.C.1. explaining how even a victorious tenant in a housing conditions suit can end up evicted on nonpayment grounds.

254. See Franzese, *supra* note 49, at 673 (recounting stories of tenant blacklisting in response to both rent withholding and affirmative housing conditions litigation).

255. See, e.g. Summers, *supra* note 54, at 147-148.

256. See Franzese, *supra* note 49, at 681.

257. See *supra* Part III.A.3.

258. Super, *supra* note 18, at 409.

259. Summers, *supra* note 54, at 163.

260. A tenant may reasonably be unwilling to continue paying to live in an uninhabitable apartment while conditions problems persist. Money paid into court could otherwise be spend on repairs, food, clothes, and other household essentials. It could also be saved up for a security deposit at a new apartment. The problem with this approach for tenants, of course, is that it ends in blacklisting—a tenant ready to move on to a new and better apartment may find that no better apartment will accept her.

261. Super, *supra* note 18, at 401.

the courts are justified in requiring that the landlord *himself* is not in breach of the lease. Extending protections against retaliatory eviction to nonpayment cases creates incentives that favor code compliance. When a landlord knowingly rents substandard housing to his tenants, he takes on the additional risk that he will not be able to collect—which should caution him against allowing his properties to fall into disrepair in the first place.

For better or worse, United States municipalities rely primarily on private action by tenants to uphold housing, health, and safety codes in rental properties. Assuming that this practice will continue, lawmakers serious about tackling substandard housing conditions must acknowledge the absurdity of pinning enforcement responsibility for the worst code violations on the individuals least able to bear it. Early landlord prophecies of a flood of frivolous warranty-of-habitability suits never came to pass, but neither have poor tenants' hopes of a genuinely mutual covenant to pay rent and provide safe and sanitary housing. So far as future legislatures may err, this Article hopes that they will do so on the side of better housing conditions and fewer retaliatory evictions.

VII. CONCLUSION

The law is only one, small piece of the housing puzzle, just as housing is only one component of American poverty. Nonetheless, America's Eviction Economy has raged unchecked for far too long, and evictions pose an imminent threat to millions of renters facing unemployment and heightened rent burdens due to COVID-19. State and local governments are implementing unprecedented housing policy measures as this crisis unfolds, but the steps they will take to prevent a flood of evictions when emergency measures are lifted remain undecided.

By offering an in-depth survey of lease-termination requirements and the role of housing conditions and retaliatory eviction across states, this Article hopes to illustrate the practical impact of subtle variations in landlord-tenant law on poor tenants facing eviction. It proposes concrete reforms to the law designed to mitigate power imbalances between landlords and tenants and slow the cogs of the Eviction Economy. In the wake of COVID-19, state and local governments face a critical choice: to return to the same rental housing law regimes that fed the rise of the Eviction Economy, or to take affirmative steps combatting the same. For decades, scholars and advocates have pointed to eviction as a driving force of working poverty in America. Now, in an era of pandemic, it is time for courts and policymakers to listen.