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Disaster Discordance: Local Court Implementation of State and Federal Eviction Prevention Policies During the COVID-19 Pandemic

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Abstract

Eviction sits at the nexus of property rights and the basic human need for shelter—the former benefits from a strong framework of legal protection while the latter does not. In most eviction courts across the country, therefore, the right to housing is unrecognized, while landlords' economic interests in property are consistently vindicated.

The public health crisis unleashed by COVID-19 temporarily upended that (im)balance. Emergency federal and state eviction prevention policies issued in response to COVID-19 prioritized public health—and the need for shelter to prevent the spread of disease—over typically dominant property rights. In doing so, they presented courts with an unusual dilemma: how to implement policy directives that run counter to existing legal, historical, and procedural frameworks.

While most studies of eviction during the COVID-19 pandemic have explored eviction trends over the period or the impact of these policies, this Article delves more deeply into the question of local implementation—which varied widely across jurisdictions—and asks when and why such policies may not have their full intended impact. Relying on a series of interviews conducted with judges, clerks, and lawyers working in eviction courts, the Article suggests that the phenomenon of discordance can help explain how and when policy implementation is most likely to be effective. Where accordance—functional and norm-based alignment—existed between judges' understanding of the eviction process and COVID-19 policy directives, they were more likely to be proactive and focused on implementation. However, where judges experienced discordance—misalignment between the aims of these directives and those of the underlying legal structure

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and process—they were more likely to cast themselves as passive and highly restricted in their ability to act outside of the normal order of operations.

Although set against the backdrop of the COVID-19 pandemic, the findings and conclusions set forth in this Article are not unique to that context. The insights presented here regarding the implementation of state and federal policy at the local court level provide critical guidance to policymakers in all areas about the need to consider local dynamics in crafting policy—particularly in times of crisis—and how to structure policies so that local motivations can be used to spur innovation rather than obstruction.

I. Introduction

Eviction sits at the nexus of property rights and the basic human need for shelter[1]—the former benefits from a strong framework of legal protection while

1. *See* Hugo Vásquez-Vera et al., *The Threat of Home Eviction and Its Effects on Health Through the Equity Lens: A Systematic Review*, 175 Soc. Sci. & Med. 199, 199 (2017); Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond* Lindsey v. Normet, 74 Okla. L. Rev. 391, 394–95 (2022).

the latter does not.[2] In the normal course of events, therefore, owners' property rights trump others' need for housing, with tenant interests remaining subordinate to those of landlords in the vast majority of eviction cases.[3]

The public health emergency presented by COVID-19 appeared, briefly, to interrupt the usual priority structure dictated by law and subsequently implemented by courts. Given the urgent need for people to have a place to shelter and to isolate, to protect themselves and others from a raging pandemic, state and federal governments issued a set of emergency measures designed to prevent or at least postpone evictions. Because public health directives prioritized the need for shelter over the immediate vindication of property rights, these policies ran counter to the typical nature and function of the legal eviction process.

Federally promulgated measures like the Centers for Disease Control and Prevention (CDC) Order[4] and the Coronavirus Aid, Relief, & Economic Security (CARES) Act[5] set forth national mandates aimed at slowing a public health emergency. Yet the ultimate implementation of these acts would take place in thousands of state courts across the country, all with their own unique governing law and procedure, geography, structure, and culture. Similarly, state supreme courts and governors scrambled to dictate parameters for how state and local courts should continue to function during a worldwide pandemic. Ultimately, they generated their own set of state-level COVID-related policies—in some cases, halting or at least slowing the eviction process. Another important development was the infusion of federal funding intended for emergency rental assistance,[6] which made its way through state and local governments to impact the eviction process in other unexpected ways.

This Article is based on a mixed-method study of how courts in two states, Florida and Georgia, responded to state and federal eviction interventions imposed during the COVID-19 pandemic. This Article focuses primarily on our interviews with courts—judges and clerks—and legal aid attorneys familiar with and practicing in those courts. Through a series of interviews conducted from late 2021 to early 2022, our goal was to understand their perspective on the state and federal eviction prevention measures discussed herein and how they responded to

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2. *See infra* Part II.A.1.

3. *See* Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 PENN. L. REV. __ (forthcoming 2023) (describing a number of doctrinal strands, including property and land use law, treating the interests of tenants as lesser than those of homeowners); *see also* Kathryn A. Sabbeth, *Eviction Courts*, 18 UNIV. ST. THOMAS L.J. 359, 370 (2022) ("It is . . . no coincidence that the rights of property owners, particularly the right to exclude, have been defined so robustly, while tenants' rights have been paltry."); *see also infra* note 185 and accompanying text.

4. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID19, 85 Fed. Reg. 55292 (Sept. 4, 2020).

5. CARES Act, Pub. L. No. 116-136, § 4024, 134 Stat. 281, 493–94 (2020) (codified at 15 U.S.C. § 9058).

6. *Id.*; Coronavirus Response & Relief Supplemental Appropriations Act, 2021, Pub. L. No. 116-260, Div. N, Title V, § 501 (2020) (codified at 15 U.S.C. § 9058a); American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 3201, 3202 (2021) (codified at 15 U.S.C. § 9058c, 42 U.S.C. 1437f).

them. This qualitative data provides a critical complement to other data that we and others have collected about evictions during the COVID-19 pandemic.[7] It helps us to understand *why* key actors implemented local, state, and federal directives as they did and, as a result, inform future policy implementation.[8]

While local courts responded to urgent logistical concerns, adjusting their hearing schedules, implementing safety procedures and social distancing and, in some cases, holding remote proceedings, their response to efforts to alter the legal process was more complex. We found that where federal and state eviction prevention policies aligned with metrics and values inherent in the typical eviction court structure—for example, facilitating quick case resolution and protecting property rights—courts were more willing to implement changes and, in some cases, even demonstrate exceptional creativity and flexibility. This was most true in the case of rental assistance, where additional funds injected into the eviction process helped courts to move cases through more efficiently and satisfy landlords' needs; as a result, courts created new programs and mechanisms to help facilitate the distribution of rental assistance funds and were more flexible with respect to traditional procedural tools, like continuances. In contrast, where state or federal policy pushed back against courts' usual case processing concerns, specifically speed and volume—as was the case with moratoria—courts were more likely to interpret such measures narrowly and implement as little as possible. For example, many courts interpreted such mandates as directed solely to the parties and not requiring the courts to affirmatively intervene or independently enforce them.

A similar contrast can be seen in how judges viewed the court's role under these circumstances. Across the board, judges stated that their sole responsibility was to "apply the law"—yet we observed that the handling of cases varied widely across courts; thus "the law" appeared to have no universally clear application. In addition, where accordance—functional and norm-based alignment—existed between their conception of the eviction process and COVID-19 policy directives, they were more likely to be proactive and focused on implementation. For example, where the policies facilitated judges' perceived need to keep dockets moving and caseloads low, they were more likely to embrace them. Where judges experienced discordance—misalignment between court- or law-based norms and the

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7. *See, e.g.*, Emily A. Benfer et al., *COVID-19 Housing Policy: State and Federal Eviction Moratoria and Supportive Measures in the United States During the Pandemic*, HOUS. POL'Y DEBATE 8 (June 10, 2022), https://www.tandfonline.com/doi/pdf/10.1080/10511482.2022.2076713; Kathryn M. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality*, 190 AM. J. EPIDEMIOLOGY 2563, 2568 (2021); *see also* Jacob Haas et al., *Preliminary Analysis: Eviction Filing Trends After the CDC Moratorium Expiration*, EVICTION LAB (Dec. 9, 2021), https://evictionlab.org/updates/research/eviction-filing-trends-after-cdc-moratorium/; Peter Hepburn, *Preliminary Analysis: Eviction Filing Patterns in 2021*, EVICTION LAB (Mar. 8, 2022), https://evictionlab.org/us-eviction-filing-patterns-2021/.

8. *See generally, e.g.*, JAMES P. SPRADLEY, THE ETHNOGRAPHIC INTERVIEW (2016); ROBERT S. WEISS, LEARNING FROM STRANGERS: THE ART AND METHODS OF QUALITATIVE INTERVIEW STUDIES (1995). *See also* Philip M.E. Garboden & Eva Rosen, *Talking to Landlords*, 20 CITYSCAPE 281, 289 (2018) (explaining the importance of qualitative interviewing and interviewing respondents in a range of different roles).

new directives—they were more likely to cast themselves as passive and circumscribed in their ability to act, ultimately frustrating the policies' objectives.

In Part II, we provide an overview of the foundations and existing legal framework governing eviction law in the United States and, more specifically, in the two study states, Florida and Georgia. We also describe the tension created between federal and state eviction prevention policy directives implemented during the COVID-19 pandemic to address a public health crisis and normal eviction court operating procedures. In concluding Part II, we provide a theoretical framework to explain why these interventions may not have been as effective as otherwise expected, suggesting that ineffectiveness was likely a result of discordance between these policy interventions and the normal processes and underlying norms of eviction court. In Part III, we describe the structure and methodology of the study that generated the data from which our findings emerged. In Part IV, we delve into a more detailed discussion of the findings from the court stakeholders interviewed as part of this study, highlighting key themes and providing the empirical basis for our discordance argument. Finally, in Part V, we offer recommendations informed by these findings to suggest how future interventions aimed at the courts or legal process might better account for the motivations and mechanisms of local courts and thus more effectively address the crisis at hand.

Although our observations of eviction prevention policy implementation provide just one example of court behavior at one point in time, our findings are not unique to the COVID-19 context. Our conclusions speak to broader questions about how local courts respond to emergent federal and state-wide mandates that run counter to existing legal structures, and the way in which courts subsequently interpret and apply them. A deeper understanding of how courts process and respond to these measures is critical to ensure that they operate as intended and will be instructive when state and federal governments face the next public health crisis.

II. Eviction and Covid-19: Dispossession + Disaster = Discordance

In this section, we describe the cultural-legal understandings that typically inform eviction court structure—most prominently a strong basis in property rights and capitalist theory—as well as the manner in which eviction courts typically manage dockets and process cases. We then contrast this with a brief overview of the motivations behind eviction prevention policies at the state and federal levels. These policies were driven not by a fundamentally different understanding of eviction, but rather superseding public health and economic concerns generated by the COVID-19 pandemic that did not align with typical eviction court operations. Last, we draw on literature from other sociological contexts to provide a framework for understanding how courts responded to this tension and that serves as a useful lens for evaluating the findings discussed in Part III.

A. Eviction Courts and Law

Substantive landlord-tenant law draws from property law, contract law, commercial law, and state regulation. In addition to a core of landlord rights, these legal

underpinnings establish a variety of tenants' rights and potential legal defenses in the event of an eviction. Rooted in feudal English property law and recapitulated by the highest of U.S. courts,[9] the typical eviction court process prioritizes speed, linking swift resolution to the landlords' rightful economic recovery.

Although summary eviction meets the needs of the real estate industry in its pursuit of profit, it simultaneously denies tenants procedural justice. Even before the COVID-19 pandemic, the manner in which courts managed dockets and processed landlord-tenant cases routinely frustrated tenants' rights.[10] In this section, we describe the legal framework civil court judges operated within prior to the COVID-19 pandemic. We outline eviction court structure, beginning with the competing interests that underlie it, relevant areas of substantive law, and key features of the summary eviction process.

1. Legal Principles

Housing is essential for tenants' health and wellbeing; it meets a fundamental need for shelter from the elements, and provides access to food, healthcare, and community supports.[11] Even in normal times, the loss of one's housing through eviction is associated with mental illness, stress-related illness such as heart attacks, suicide, and emergency room visits.[12] Eviction is particularly vexing for the health and wellbeing of vulnerable household members like infants and pregnant women. Eviction during pregnancy is associated with premature birth and higher rates of low birth weight.[13] During the COVID-19 pandemic, the threat of eviction posed intensified risks to health and wellbeing. Linked to overcrowding, homelessness spells, and sequential forced moves, eviction was associated with higher COVID-19 incidence and mortality rates.[14]

Despite tenants' vulnerability and material need for shelter, commodified housing systems emphasize clarity of possession and speedy resolution over the

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9. *See, e.g.*, the Supreme Court's decision in Lindsey v. Normet, 405 U.S. 56 (1972).

10. *See* Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 77–80 (2018); Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1597–1600 (2018); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 538–39 (1991).

11. *See* Sabbeth, *supra* note 10, at 64–65 (describing housing as a primary need and its centrality to human life).

12. Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households*, UNIV. NOTRE DAME DEP'T ECON. 25–26 (2018), https://economics.nd.edu/assets/303258/jmp_rcollinson_1_.pdf; Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 299–301 (2015).

13. Alexa A. Freedman et al., *Living in a Block Group with a Higher Eviction Rate is Associated with Increased Odds of Preterm Delivery*, 76 J. EPIDEMIOLOGY & CMTY. HEALTH 398, 401 (2022); Gracie Himmelstein & Matthew Desmond, *Association of Eviction with Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, 175 JAMA PEDIATRICS 494, 497–98 (2021); Corey Hazekamp et al., *Eviction and Pediatric Health Outcomes in Chicago*, 45 J. CMTY. HEALTH 891, 894–97 (2020).

14. Leifheit et al., *supra* note 7, at 2568; Sebastian Sandoval-Olascoaga et al., *Eviction Moratoria Expiration and COVID-19 Infection Risk Across Strata of Health and Socioeconomic Status in the United States*, 4 JAMA NETWORK OPEN 8 (Aug. 30, 2021), https://jamanetwork.com/journals/jamanetworkopen/articlepdf/2783612/sandovalolascoaga_2021_oi_210853_1629727457.82321.pdf.

careful weighing of tenants' interests.[15] These swift processes come at the detriment of due process, and in the case of eviction, to the well-being of tenants whose health and safety is at stake.[16] Due process requires adequate notice, and the ability and opportunity to introduce evidence, to raise legal defenses, to have ones' position heard, and to understand and meaningfully consent to any settlement.[17] Yet, practically speaking, tenants' ability to introduce evidence, raise legal defenses, and understand settlements are often contingent on having legal representation. These attributes of procedural justice can be slow, costly, and introduce uncertainty to the outcome of an eviction[18]—all factors which reduce real estate profits, which are a driving force in the procedural and substantive law governing eviction cases.[19]

Legal precedents for eviction first emerged in English common law, but eviction law accrued its modern characteristics during the 19th and 20th centuries. Under the 'ancient law of real property,' only freeholders had possession. Tenants lacked legal status to own land or acquire a possessory interest through a lease.[20] Tenants' obligation to pay rent was not conditioned by any performance of obligations on the landlords' part and, in the event of a conflict, the legal process of summary eviction was created to swiftly return possession to landlords.[21] The industrial revolution led to shifts in the interpretation of landlord-tenant law. By the 18th century, Blackstone had classified leases as a transfer of real property, and tenants were represented as having a property interest.[22] Additionally, Blackstone recognized the hardships faced by tenants, weighing these factors against landlords' interests. For instance, he noted that judges typically restricted landlords' ability to evict tenants at the end of a lease due to the disruption this posed to tenants.[23]

Rising concerns about the habitability of tenement housing during the urban crisis of the 19th century led to continued shifts in the "technical foundations" of landlord-tenant law, particularly eviction.[24] Residential leases began to look less like transactions of real property and more like contracts, with enumerated rights

15. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 597 (1988); Brenna Bhandar, *Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony*, 42 J.L. & SOC. 253, 279 (2015).

16. Bhandar, *supra* note 15, at 279.

17. Ramsey Mason, *supra* note 1, at 415–16.

18. *See* Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WISC. L. REV. 287, 294–300 (2018) (explaining the benefits that can accrue to poor defendants from pre-judgment procedural requirements and the value of delay).

19. Tonya L. Brito et al., *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1248 n.20, 1268 (2022).

20. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 141 (2000).

21. Ramsey Mason, *supra* note 1, at 397.

22. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 506 (1982).

23. *Id.* at 507.

24. *Id.* at 505, 512.

and obligations of the two counterparties.[25] Reframing the landlord-tenant relationship as a contract reduced landlords' overriding power as property owners by "imposing the more equitable frame of contract law."[26] Contract law introduced the idea of mutuality into eviction cases, as both parties to the contract had rights and obligations, and an implied warranty of habitability, in which a tenants' duty to pay rent was conditional on the landlords' provision of habitable premises.[27]

During the 20th century, and with the emergence of the administrative state and the civil rights movement of the 1960s, landlords assumed responsibilities related to the broader state of urban housing. Encompassing modern issues of neighborhood stability, affordability, habitability, and housing instability, landlord-tenant law shifted from "private ordering to public regulation."[28] State-by-state, the passage of building codes and expanded landlord-tenant statutes enumerated tenants' rights and landlord obligations.[29] Landlord-tenant law, and the legal practice of eviction stretched to incorporate "habitability, expansion of rent control measures, security of tenancy at the expiration of a lease, and limitations on a landlord's ability to retaliate against a tenant for asserting her rights under the law, among others."[30]

In the aftermath of the reforms of the 1960s, the Supreme Court's 1972 decision in *Lindsey v. Normet* reasserted feudal notions of possession and summary eviction, repositioning both concepts in the context of contemporary landlord-tenant relations.[31] In that case, the Court wrote:

> There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord, continue to accrue

25. Ramsey Mason, *supra* note 1, at 399.

26. *Id.* at 401; Spector, *supra* note 20, at 138.

27. Ramsey Mason, *supra* note 1, at 401–02; Philip M.E. Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 643, 653 (2019). While the technical foundations of contract law may have expanded tenants' rights and landlords' obligations, they have also created new platforms for the conversion of the landlord-tenant relationship to one of creditor-debtor, and expropriation under financialized landlords. *See id.* at 640; Nicole Summers, *How Civil Probation is Rewriting Eviction Law*, L. & POL. ECON. PROJECT (2022), https://lpeproject.org/blog/how-civil-probation-is-rewriting-eviction-law/.

28. Glendon, *supra* note 22, at 505.

29. Housing codes were also passed, in large part, to address fears of disease and resulting threats to public health (and public costs). *See* DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 122–24 (2016).

30. Ramsey Mason, *supra* note 1, at 400.

31. *Id*. at 411–12.

> whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss."[32]

This decision and the accompanying legal era emphasized the saliency of property law over more modern legal foundations.[33] The ensuing period deemphasized tenants' contractual and statutory rights as well as the need for due process to mount a legal defense. Instead, it elevated the propertied interests of landlords and firmly enshrined a swift summary eviction process, justified by the need to avoid landlords' "economic loss."[34]

2. Legal Process

While *Lindsey v. Normet* did not invalidate the substantive areas of law brought to bear on eviction cases, the decision reinforced the summary nature of the eviction process. Fifty years later, the manner in which eviction courts manage dockets and process cases still frustrate due process and prevent tenants from taking advantage of even minimal legal rights. Some of the key features leading to this state are a lack of legal representation; the high volume of cases processed in urban courts; and the inability of tenants with statutory protections and legal representation to advance these legal defenses to their benefit.[35] Although some advocates have argued for increased judicial discretion and more active judging styles to address this gap,[36] judges have often adhered to a relatively passive role.[37]

Since the 1990s, the volume of cases, and the number of *pro se* litigants increased dramatically.[38] Courts have been become 'lawyerless': in the majority of cases, one or both parties lack legal representation.[39] In many lower-level state courts, the judges presiding over such cases also lack formal legal training.[40] Without lawyers, the adversarial process, in which both parties introduce

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32. Lindsey v. Normet, 405 U.S. 56, 72–73 (1972).

33. *See* Karl Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 WIS. L. REV. 925, 982 (1989) ("The Court has clearly ascribed greater significance to possessory interests in property than nonpossessory interests.").

34. Sabbeth, *supra* note 3, at 376 ("Courts have prioritized owners' entitlement to evict over tenants' entitlement to shelter.").

35. Other features of eviction court design, such as low filing fees, a short timeline, limited discovery, limits on defenses and counterclaims, and the widespread use of default judgments, also contribute to tenant vulnerability. *See* Sabbeth, *supra* note 3, at 377–84.

36. *See, e.g.*, Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 649–50 (2017) (identifying various calls for more active judging in court reform).

37. *Id*. at 685 (describing the passive approach as the "traditional . . . conception of the judicial role").

38. Anna E. Carpenter et al., *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 511–12 (2022).

39. *Id.* at 511; Diego A. Zambrano, *Missing Discovery in Lawyerless Courts*, 122 COLUM. L. REV. 1423, 1425 (2022).

40. *See* Sara Sternberg Greene & Kristen Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1289–90 (2022).

evidence and invoke relevant legal defenses, has largely disappeared in eviction court.[41]

Alongside the decline of lawyers and the adversarial process, many eviction courts are characterized by "mass adjudication, speed, and a lack of procedural protection," particularly those encountered by low-income communities racialized as non-white.[42] Although there is some variation across jurisdictions,[43] as a general matter—driven by both state landlord-tenant law and judicial prerogative—eviction courts are fast-paced and structured to facilitate a high volume of cases.[44] Most states provide for expedited processing to quickly establish a landlord's right to repossess their property[45] and many eviction cases settle without a hearing, resolved through the issuance of default judgments.[46] Even when there is a hearing, the speed with which most eviction courts adjudicate cases leaves little time for procedural justice. On the plaintiff side, we see the rise of "assembly line plaintiffs"—large corporations that often account for as much as one third of private claims, which use the above aspects of eviction court to their advantage in filing evictions *en masse*.[47] These automated processes have pushed state courts towards becoming "near-automatic claims processors" that transfer property rights from tenants to landlords without due process.[48]

Where landlord claims lack merit, or tenant legal rights and defenses exist—as established by lease, statute, or common law—tenants often lack the time, knowledge, and resources to use these to their advantage in court.[49] Thus, even where vehicles exist to right systemic imbalances, tenants often cannot use them effectively. In addition, the summary aspect of the eviction court process—for example, the absence of procedures for discovery—forestalls tenants' ability to exercise these rights.[50] Nicole Summers has found that warranty of habitability

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41. *See* Jessica K Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, B.Y.U. L. REV. 899, 901 (2016).

42. *See* Brito et al., *supra* note 19, at 1246, 1248.

43. *See generally LSC Eviction Laws Database*, LEGAL SERVS. CORP. (2021), https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database.

44. *See* Zambrano, *supra* note 39, at 1442–43; Sabbeth, *supra* note 3, at 377–84.

45. Zambrano, *supra* note 39, at 1443. *See also* Lindsey v. Normet, 405 U.S. 56, 72–73 (1972).

46. David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions*, PNAS, Nov. 28, 2022, at 1 (finding as part of the "first large-scale account of defaults rates in eviction court across time in a large urban center" that, in Philadelphia's landlord tenant court, default judgments are "common though in decline, from almost half of unsubsidized housing cases in 2005 to a bit over 30% today"); Sabbeth, *supra* note 3, at 380 (citing studies showing that in the nation's 20 largest cities, default rates in eviction cases range from 15 to 50 percent and, in other jurisdictions, have been as high as 70 or 80 percent); Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1368 (2021); Kyle Nelson et al., *Evictions: The Comparative Analysis Problem*, 31 HOUS. POL'Y DEBATE 696, 705 (2020); Bezdek, *supra* note 10, at 555–56.

47. Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1708–09 (2022).

48. *Id.* at 1706.

49. *See* Zambrano, *supra* note 39, at 1442–43 (explaining that warrants of habitability sometimes fail to produce beneficial outcomes for tenants with meritorious claims because tenants lack the necessary knowledge or legal representation to assert such a claim).

50. *Id.* at 1444.

protections failed to secure beneficial outcomes for tenants even in cases in which requirements were met and tenants had legal representation.[51] In a summary eviction process, it can be difficult to translate tenant legal protections into better living conditions, slower court processes, or the right to remain in place for tenants.

The lopsided nature of eviction hearings and legal representation (often present for landlords but not tenants) layer onto other power and material imbalances between landlords and tenants, and compromise substantive justice.[52] In this way, eviction courts are manifestly different from the media's portrayal of courts as earnest pursuers of truth and justice. They exist primarily to process the paperwork necessary for landlords to collect back rents or, when desired, replace a delinquent tenant.[53]

During the COVID-19 pandemic, the expansion of tenants' right to stay in place, either through the CARES Act's restriction on evictions, the CDC moratoria, or various state and local orders, was clearly an intended policy outcome. However, judges translated these legal orders into court procedure in unpredictable ways. In Parts II.B. and II.C., we outline the concerns underlying COVID-19 eviction prevention measures and describe how they were discordant with both the summary eviction process and the priorities laid out by existing eviction law foundations.

3. Landlord-Tenant Law in Florida and Georgia

As in the more generalized model described above, both Florida and Georgia have exceedingly fast summary eviction processes, with limited opportunities for tenants to raise a defense. An eviction in Georgia—referred to in the Georgia Code as a "dispossessory" action[54]—involves several distinct steps. Once the landlord files an affidavit seeking possession and any past-due monetary amounts,[55] the tenant has seven days from the date of service to file an answer.[56] In Georgia, unlike in some other jurisdictions, the landlord's failure to make needed repairs is not a defense to non-payment of rent.[57] If the tenant files a timely answer, the court will schedule a hearing date.[58] If the tenant does not appear or, in some courts, if the answer is deemed legally insufficient (i.e., does not raise a potentially valid defense), the court will issue a default judgment for

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51. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 214 (2020).

52. *See* Zambrano, *supra* note 39, at 1428.

53. *See* Garboden & Rosen, *supra* note 27, at 642–43.

54. *See* GA. CODE ANN. § 44-7-51 (2006).

55. *See id.*

56. *Id.* § 44-7-51(b) (2006).

57. If a landlord fails to repair the property after notification, the tenant cannot stop making rent payments but can pay for the repair and then deduct the reasonable cost of the repair from rent paid. *See* Lewis & Co. v. Chisolm, 68 Ga. 40, 46–47 (1881); Borochoff Props., Inc. v. Creative Printing Enters., Inc., 233 Ga. 279, 279 (1974). If the tenant does not want to go through that process, they can continue to inhabit the unrepaired premises and sue the landlord for damages. *Borochoff Props., Inc.*, 233 Ga. at 279.

58. GA. CODE ANN. § 44-7-53(b) (2007).

the landlord.[59] If a hearing is held and the court ultimately issues a writ of possession, the tenant must vacate the property in seven days.[60] If the tenant fails to vacate within that window, the landlord can request that law enforcement officers remove any remaining possessions from the property.[61] The court may also issue a monetary judgment, requiring the tenant to pay the landlord any past-due amounts and accompanying fees.[62] The eviction court process in Georgia is relatively fast—in some cases not much longer than a week—and faster in Georgia than in most other states.[63]

In Florida, there are varying notice requirements provided for by statute depending on the reason for eviction—i.e., failure to pay rent, curable noncompliance with the rental contract, "uncurable" noncompliance, or termination without cause.[64] If the tenant fails to pay, cure, or vacate within the relevant time period, the landlord may file a complaint.[65] Tenants may contest the dispossessory action and avoid a default judgment for the landlord by filing an answer within five days, and this is their only opportunity to state a defense.[66] If the tenant wishes to raise any defense other than payment, s/he has to deposit the amount owed into a court registry.[67] Should the case progress to trial and the tenant lose, or the court otherwise enter judgment for the landlord, the court will issue a writ and the landlord can retake possession after twenty-four hours.[68]

In both Georgia and Florida, as in many other states, tenants are highly unlikely to have legal representation.[69] As a result, they may be unaware of the few procedural or notice-based protections available to them by statute—for example, in Georgia, that the landlord must make a demand before filing for eviction. In contrast, many landlords have counsel and/or operate as repeat players in a system with which they have far greater familiarity.

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59. *See* Sudeall & Pasciuti, *supra* note 46, at 1377.

60. *Id. See also* GA. CODE ANN. §§ 44-7-50(a) (2018), 44-7-51(a) (2006), 44-7-55(a) (2019), 44-7-55(c) (2019).

61. Sudeall & Pasciuti, *supra* note 46, at 1378; *see also* GA. CODE ANN. § 44-7-55(c) (2019).

62. Sudeall & Pasciuti, *supra* note 46, at 1378; *see also* GA. CODE ANN. § 44-7-55(a) (2019). Note that no monetary judgment is available for the landlord if the tenant was served by tack and mail and doesn't file an answer. GA. CODE ANN. § 44-7-51(c) (2006).

63. Sudeall & Pasciuti, *supra* note 46, at 1378.

64. FLA. STAT. ANN. § 83.56 (2013). In Florida, unlike Georgia, tenants are permitted to withhold rent in the case of a landlord's noncompliance with his obligations. *Id.* § 83.201.

65. *Id.* § 83.59 (2013).

66. *Id.* § 51.011(1) (1995).

67. *Id.* § 83.60(2) (2013).

68. *Id.* § 83.62(1) (2013).

69. *See generally Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention*, NAT'L COAL. CIV. RIGHT COUNS., http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf (last modified July 2022); Lauren Sudeall, *We Must Help Fix Justice Gap in Georgia's Legal Deserts*, LAW360 (Oct. 31, 2021, 8:02 PM), https://www.law360.com/articles/1432094/we-must-help-fix-justice-gap-in-georgia-s-legal-deserts; Ann M. Picard, *Residential Evictions in Florida: When Rent is Due, Where is the Process?*, 36 STETSON L. REV. 149, 151 (2006). *See also* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743–44 (2015).

B. COVID-19 and Eviction Prevention Interventions

In contrast to many of the property-based underpinnings of eviction law, the eviction prevention measures implemented in response to COVID-19 did not seek to protect property interests, but instead to guard against economic and public health risks created by the pandemic. With some exceptions, the CDC Order temporarily prevented landlords from evicting covered tenants.[70] The CDC Order was issued primarily to mitigate the public health effects of housing displacement.[71] This included both the public health risks that would result from shared living settings or increased numbers of unhoused as well as concerns about the inability to social distance in crowded courtrooms and other aspects of the eviction process.[72] The Order stated explicitly that it should "be interpreted and implemented" so as to achieve the following objectives:

> Mitigating the spread of COVID-19 within congregate or shared living settings, or through unsheltered homelessness; mitigating the further spread of COVID-19 from one U.S. State or U.S. territory into any other U.S. State or U.S. territory; and supporting response efforts to COVID-19 at the Federal, State, local, territorial, and tribal levels."[73]

Among many other measures intended to stimulate the economy and provide financial protection, the CARES Act imposed a moratorium on evictions from properties with federally backed mortgage loans or other specified federal subsidies.[74] Because the CARES Act was primarily intended to address COVID-19's impact, and its economic effects in particular, it focused not on preventative public health measures,[75] but instead on providing relief where COVID-19 had derailed the normal order of affairs: "This bill responds to the COVID-19 (i.e., coronavirus disease 2019) outbreak and its impact on the economy, public health, state and local governments, individuals, and businesses."[76]

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70. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID19, 85 Fed. Reg. 55292, 55292 (Sept. 4, 2020). To qualify as a "covered person" under the Order, tenants had to declare that they (1) had made "best efforts" to obtain government rental assistance; (2) fell below certain minimum income limits; (3) were unable to make full rental payments due to a loss of income or "extraordinary" medical expenses; (4) had made "best efforts" to make partial payments; and (5) had no other housing options. *Id*. at 55293.

71. Benfer et al., *supra* note 7, at 8.

72. *Id.*

73. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID19, 85 Fed. Reg. 55292, 55293 (Sept. 4, 2020) (Statement of Intent).

74. CARES Act, Pub. L. No. 116-136 § 4024 (a)(2), 134 Stat. 281 (2020) (codified at 15 U.S.C. § 9058).

75. The CARES Act was also driven by economic concerns, as evidenced by its focus on staying cases involving nonpayment of rent, rather than the broader range of cases halted by the CDC Order (to protect health and safety). Sabbeth, *supra* note 3, at 388.

76. *Summary: H.R.748 — 116th Congress (2019-2020)*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/748/ (last visited May 7, 2023).

Many state moratoria were also motivated by public health concerns. In some states, economic concerns—and a desire to prevent residents from losing their homes during a pandemic that resulted in widespread job and wage losses—also provided a rationale for action.[77] The Florida Governor's Executive Order followed this same pattern, citing both public health and economic concerns.[78] The Georgia Supreme Court issued an emergency order focused on stemming the "continued transmission of Coronavirus/COVID-19 throughout the State and the potential infection of those who work in or are required to appear in our courts."[79] The Georgia court's order does not reference eviction or eviction courts specifically, instead instructing courts, to the "extent feasible," to remain open to "address essential functions," giving priority to those "matters necessary to protect health, safety, and liberty of individuals."[80]

Yet, even with such a widespread response, the actual effects of these interventions are unclear. For example, in thirteen states, courts required landlords to provide tenants with notice of their rights under the CDC Order and the declaration required to trigger its protections or to file an affidavit attesting to their compliance with the CDC moratorium; other states, including Georgia and Florida, did not.[81] Preliminary analysis suggests that there are wide discrepancies in the effectiveness of federal moratoria in different states. For example, in Philadelphia and Pittsburgh, Pennsylvania, eviction filings were down 29% and 37% respectively from historical average rates during the CDC moratorium. By contrast, in Jacksonville and Tampa, Florida, eviction filings during the CDC moratorium remained at roughly 80% of the historical average.[82]

Figure 1 below displays eviction filing volumes in our study areas, Georgia and Florida, throughout the pandemic.[83] Because many tenants leave once served with an eviction notice,[84] and because of differences in how Florida and Georgia courts record eviction case outcomes, we have selected eviction filings as a measure that represents eviction activity in a way that is comparable between the two states. Apart from the judicial state of emergency imposed in Georgia and the state level moratorium in Florida, other eviction prevention measures appeared to slightly reduce, but not halt, eviction filings in either state.

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77. Benfer et al., *supra* note 7, at 8.

78. Fla. Exec. Order No. 20-94 (2020) (referring to the nature of COVID as a severe respiratory illness, to the current "Public Health Emergency," and the lessened ability of Floridians to make mortgage and rent payments during the COVID pandemic).

79. Order Declaring Statewide Judicial Emergency (Amended), GA. SUP. CT. (Mar. 14, 2020), https://www.gasupreme.us/wp-content/uploads/2020/03/CJ-Melton-amended-Statewide-Jud-Emergency-order.pdf.

80. *Id.*

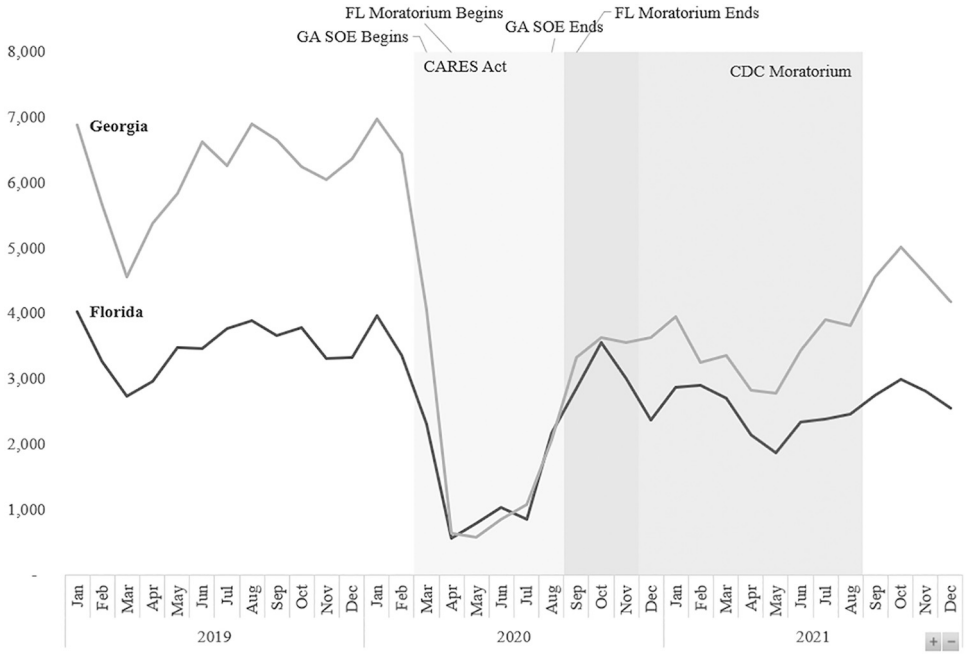
81. Benfer et al., *supra* note 7, at 13.

82. *Id.*; *Preliminary Analysis: 11 months of the CDC Moratorium*, EVICTION LAB (Aug. 21, 2021), https://evictionlab.org/eleven-months-cdc/.

83. The study area is comprised of eight counties spread across four metropolitan regions, two in Florida and two in Georgia.

84. Peter Hepburn et al., *U.S. Eviction Filing Patterns in 2020*, 7 SOCIUS: SOCIO. RSCH. DYNAMIC WORLD 6 (2021).

FIGURE 1. Eviction Filing Volumes in Georgia and Florida[85]



Although there are many factors that may have contributed to the dulled impact of federal interventions like the CARES Act and CDC Order, we hypothesize that one cause is variation in local implementation, as conducted by state court judges and other court personnel. It is that relationship, therefore, that we have explored in this study.

As a result of the COVID-19 pandemic, court procedures have changed dramatically over the last two years. In response to the pandemic, and pandemic policies, state court judges made decisions about how to triage between essential and non-essential cases, and how and whether to halt the progress of some cases.[86] Others installed measures for social distancing, including physical barriers, and created new procedures for how court staff met and worked.[87] Hearings shifted to new locations: larger spaces, outdoor venues, and virtual spaces.[88] Judges embraced or avoided technology at each stage of litigation, evaluating increased

85. Elora Lee Raymond et al., *Southeastern Evictions Data Collective Database: Version 1.0.*, GA. INST. TECH. SCH. CTY. & REG'L PLAN. (2020), http://evictions.design.gatech.edu/; *Florida Housing Data Clearinghouse Evictions & Foreclosures (data set)*, UNIV. OF FLA. SHIMBERG CTR. FOR HOUS. STUD. (2022), http://flhousingdata.shimberg.ufl.edu/eviction-foreclosure.

86. David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246, 250 (2020).

87. *Id.*

88. *Id.*

use of e-filing technologies and remote hearings or 'zoom courts.'[89] In response to directives from state and federal entities to halt or prevent evictions, judges decided whether and how to incorporate processes to establish plaintiffs and defendant status with regard to CARES Act and CDC moratorium. Judges decided whether to work closely with eviction diversion, and rental assistance programs. In a study of criminal courts, the shift to Zoom created opportunities for defendants to meaningfully participate in the legal process, while relaxing some punitive aspects of court control.[90]

The disruption to court processes during the COVID-19 pandemic presents an important juncture at which to study judicial discretion around procedure. Due to the wide array of changes to court processes, including CARES Act restrictions on landlords; the CFPB's ruling that any rent debt proceedings involve disclosure of the CDC order; the CDC's eviction moratorium, and a variety of state and local orders regarding safety protocols and pandemic mitigation measures, judges faced a multiplicity of decisions regarding procedure. Their decisions about how to respond and implement those measures are—and will continue to be critical—to questions of equality. Much research has examined the way in which eviction courts contribute to inequality, through a lack of access to justice and outcomes that disparately impact marginalized tenants. In this research we focus on institutional factors: how judicial discretion shaped procedure during the pandemic, and how changes to procedure influenced substantive justice.

C. Discordance

As Ryken Grattet and Valerie Jenness have explained, "research on the implementation of law is scattered across the research literatures in sociolegal studies, sociology, criminology, organizational behavior, social work, political science, and public policy."[91] Moreover, existing research is situated across many different legal contexts, all of which are substantively and structurally distinct. Thus, we do not attempt to provide a comprehensive review of that literature here; instead, we focus on literature that provides a more specific theoretical frame for how courts interpret and implement policy mandates issued from above as part of a larger organizational structure.

Law is not a static concept, but fluid and subject to interpretation in highly variable ways across different settings.[92] Legal rules, similarly, are not self-enforcing, but depend on those implementing them to determine "what constitutes

89. Julie Marie Baldwin et al., *Court Operations During the COVID-19 Pandemic*, 45 AM. J. CRIM. JUST. 743, 747 (2020).

90. Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1471 (2022).

91. Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC. REV. 893, 897 (2005).

92. Kevin Dahaghi, *Uneven Access to Justice: Social Context and Eligibility for the Right to Counsel*, SOC. PROBS., May 25, 2022, at 3.

compliance and what actions they will take to constitute compliance."[93] Faced with federal and state mandates, local entities often respond differently: some embrace change while others resist.[94] The degree to which those entities are receptive to change may turn on several factors, including alignment of the new policy with existing organizational culture and practices.[95] All of those factors help to explain the evolution from law-on-the-books, through the process of operationalization (referred to by Jenness and Grattet as the "law-in-between"), and ultimately translation into law-in-action.[96] It is in this final phase that we observe "street-level" enforcement of the law, which can be influenced by a range of other dynamics—personal, situational, and structural.[97]

Given their positioning, judges in eviction proceedings operate in ways highly reminiscent of Michael Lipsky's canonical 'street level' bureaucrats for whom discretion and innovation are leveraged selectively to pursue institutional incentives often detached from the goals of public policy.[98] Lipsky's work elucidates how the intended goals of policymakers are mediated through the more pragmatic goals of those tasked with implementation. A welfare office, for example, that is theoretically tasked with fairly adjudicating eligibility, may see this nominal goal relegated behind issues of caseload management, reporting requirements, and institutional risk reduction.[99] Although few judges would embrace the mantle of "government bureaucrat," it is clear that many of these same phenomena operate within the context of civil courts.[100]

But the literature on bureaucratic decision making is complex,[101] particularly insofar as institutional pressures towards efficiency are often balanced with a genuine commitment to the wellbeing of those served by the institution and

93. Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 409–10 (1999).

94. Dahaghi, *supra* note 92.

95. Valerie Jenness & Ryken Grattet, *The Law-In-Between: The Effects of Organizational Perviousness on the Policing of Hate Crime*, 52 SOC. PROBS. 337, 344 (2005).

96. *Id.* at 340–41.

97. *Id*. at 341.

98. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE xiii (2010).

99. *See generally id.*

100. Carpenter et al., *supra* note 38, at 514–15; Anna E. Carpenter et al., *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 279–80 (2018); Wilf-Townsend, *supra* note 47, at 1715–16.

101. Here we note that there are ways in which some courts might be considered less bureaucratic than other institutions. *See* Maria Hawilo et al., *How Culture Impacts Courtrooms: An Empirical Study of Alienation and Detachment in the Cook County Court System*, 112 J. CRIM. L. & CRIMINOLOGY 171, 178 (2022); MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 16–19 (2d ed. 1992) (describing how *criminal* courts are not "bureaucracies organized to pursue goals" or "characterized by routine application of clearly established rules"). We would argue that distinctive features of eviction court—in contrast to criminal court, where lawyers, and thus an adversarial process, are typically present—might lead to a different conclusion. In any event, this debate within the literature supports the broader argument that more research is necessary to understand how lower-level state civil courts operate in practice.

professional solidarities.[102] Efficiency and automation are certainly influential, but bureaucratic ethnographies consistently identify processes through which front line staff exercise discretion in situations where they feel there are important normative or relational reasons to do so.[103]

It is hardly surprising that these various motivations often come into conflict for judges,[104] particularly those tasked with adjudicating civil claims within the context of racial capitalism's relentless structural inequalities.[105] In theory, an eviction judge would confront similar conflicts between pressures to process cases quickly and the careful adjudication of individual cases, including consideration of procedural requirements, the landlord's duties and the tenant's claims, as well as the landlord's loss of rental income. In practice, however, such courts rarely engage in deliberation and spend little time trying to reconcile competing factual accounts.[106] Existing literature strongly suggests that judges streamline the process by focusing their decision-making process on the narrow question of rent paid, with significant negative consequences for low-income and racialized defendants.[107] During the pandemic, however, the prioritization of protecting public health (and the subsequent need to reduce residential turnover) fundamentally disrupted, even if only temporarily, the procedural equilibrium established in these courts. The nearly automatic process of issuing judgments on behalf of landlords was now at odds not only with any potential empathy the judge might feel toward low-income renters but also with the perceived threat to public safety.

This dynamic created what Talia Shiff refers to as *discordance*—a phenomenon by which decision makers struggle to resolve competing moral and legal considerations.[108] Shiff documents discordance in the context of asylum determinations, exploring how asylum officers respond when a claimant's eligibility or

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102. *See generally* BERNARDO ZACKA, WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY (2017); John D. DiIulio, Jr., *Principled Agents: The Cultural Bases of Behavior in a Federal Government Bureaucracy*, 4 J. PUB. ADMIN. RSCH. & THEORY 277 (1994).

103. *See* Talia Shiff, *A Sociology of Discordance: Negotiating Schemas of Deservingness and Codified Law in U.S. Asylum Status Determinations*, 126 AM. J. SOCIOLOGY 337, 339 (2021); ZACKA, *supra* note 102, at 35.

104. Peter Hupe & Michael Hill, *Street-Level Bureaucracy and Public Accountability*, 85 PUB. ADMIN. 279, 280–81 (2007).

105. Brito et al., *supra* note 19, at 1246 (defining "racial capitalism" as "a system of racialized 'dispossession, extraction, accumulation, and exploitation' for power and profit in which human elements are both commodified and devalued"); *cf.* Matthew Clair & Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 353–54 (2016) (describing how judges attempt to negotiate racial disparities in their decision-making processes).

106. Pamela K. Bookman & Colleen F. Shanahan, *A Tale of Two Civil Procedures*, 122 COLUM. L. REV. 1183, 1202–03 (2022); *cf.* Kathryn A. Sabbeth, *Market-Based Law Development*, LPE PROJECT (July 21, 2021), https://lpeproject.org/blog/market-based-law-development/ (observing that judges in lower-level civil cases "do not genuinely engage in the process of interpreting, let alone developing, legal doctrine").

107. *See, e.g.*, Bezdek, *supra* note 10, at 579 ("The very fact that tenants have not paid the rent claimed due is perhaps sufficient to predispose the sitting judge to a view of the case: the tenant has "failed" to pay and the landlord is "entitled" to be paid."); Sudeall & Pasciuti, *supra* note 46, at 1429.

108. Shiff, *supra* note 103, at 339, 344.

ineligibility for asylum under codified law does or does not accord with the officer's moral inclination about whether the claimant is deserving of asylum. When the moral determination regarding asylum does not align with the legal eligibility determination, discordance—either ordinary or extraordinary—results.[109]

In this Article, we adopt Shiff's terminology to address how judges managed a similar discordance phenomenon, disrupting the process-oriented equilibrium that typically governs their normal operating procedure. The discordance we describe here is informed not by moral categorizations, as in Shiff's work, but by the relationship between exigent policy interventions and underlying cultural and process-based eviction court norms. Ostrom, Ostrom, Hanson, and Kleiman describe court culture as the beliefs and behaviors that shape "the way things get done" by judges and other court personnel responsible for resolving cases.[110] The law not only dictates what courts can do in particular cases and the outer boundaries of their jurisdiction, but also informs court culture. As described in Part II.A., landlord-tenant law is typically driven by property rights and the primacy of the owner's rights in particular. In many states, including Florida and Georgia, property rights pervade state statutory eviction law, creating a scheme in which the interests of landlords predominate. In these settings, the judge typically plays a more passive role, directing quick repossession of property by the landlord when the tenant fails to fulfill their legal obligations. This stands in contrast to a contract-based model, where the judge might more actively adjudicate between two parties, both with their own interests and arguments or defenses.

Rather than attempting to reconcile legal eligibility for asylum and culturally embedded understandings of deservingness, as Shiff describes, court actors in the context of eviction and COVID-19 were left to resolve culturally and legally embedded understandings of the normal eviction court process (rooted in property rights) with short-term superseding policy directives imposing a different value-based construct (driven by public health concerns). In this context, discordance occurred when COVID-based policy directives did not accord with the underlying state-based legal structure and judges' understanding of their role in that structure. For example, the imposition of a moratorium on evictions to ensure that tenants can remain in place regardless of their ability to pay rent runs directly contrary to the legal schemes present in the study jurisdictions, which prioritize quickly returning property to landlords when tenants have failed to meet their obligations.[111] Similarly, such measures potentially require judges to step away from their normal role as passive facilitators, allowing landlords to drive the legal process, and instead actively block landlords from vindicating their property

109. *Id.* at 346–47.

110. *See* BRIAN J. OSTROM ET AL., TRIAL COURTS AS ORGANIZATIONS 22–23 (2007).

111. Although not the focus of this study, we hypothesize that in jurisdictions that are more contract-based, where there are additional tenant defenses available (e.g., stronger defenses around habitability) and judges play a more active role in managing disputes between two parties on more equal footing, there would be lesser levels of discordance produced by the COVID-era eviction prevention policy directives.

interests. In the face of discordance, judges may be hesitant to implement such directives or, in more extreme situations, act to undermine them.[112]

In contrast, accordance may occur when policy mandates do not require such a dramatic shift, but instead align with the existing, property-driven legal structure and judges' understanding of their attendant role.[113] For example, the infusion of rental assistance funds from the federal government during the COVID-19 pandemic provided a means for courts to continue to prioritize the issue of paid rent and resolve cases to landlords' financial benefit.[114] And where courts could, through more proactive management, design new mechanisms or processes to streamline and speed up that process, they appeared motivated to do so. Unlike discordance, therefore, accordance is unlikely to create any resistance and may instead prompt unexpected innovation.

Other strands of institutional and regulation-based scholarship provide a similar lens through which to think about the way in which organizations, including courts, might respond to legal mandates. In this Article, our interest is less in how judges' temperaments or their personal, political, and moral motivations influence judicial decision-making,[115] and more in how judges operate as implementors of policy in a larger organizational structure. Sociolegal scholars Jeb Barnes and Thomas Burke describe three variables that define organizational response: *commitment* (the "degree to which personnel . . . responsible for interpreting and implementing the relevant law embrace its underlying social goals"); *professionalization* (the degree to which the organization develops formal policies, procedures, and internal structures to guide implementation of the law); and *routinization* (the degree to which the underlying goals and purposes of the law permeate the organization's daily practices and operation).[116] Here, we might think about *commitment* in the same spirit as accordance—both relate to the extent to which laws align with the norms of implementing parties and, therefore, the degree to which they are likely to embrace them. *Professionalization* and *routinization* might be seen as manifestations of commitment and a willingness to adhere to the mandate at issue, or as a reflection of legal mobilization and the threat of external enforcement.[117]

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112. *See* Shiff, *supra* note 103, at 357 ("When law failed to provide a basis for a deserving claim, they took the liberty to stretch, manipulate, and even undermine fixed codifications.").

113. *See, e.g.*, Sudeall & Pasciuti, *supra* note 46, at 1388–89 (describing perception of judicial role in eviction cases as focused on whether the tenant has paid rent and not on otherwise litigating the case).

114. *See* Sabbeth, *supra* note 3, at 373–75 (highlighting relationship between rental assistance and priority of "making the owner financially whole").

115. *Cf., e.g.*, Andrew J. Wistrich et al., *Heart vs. Head: Do Judges Follow the Law or Follow Their Feelings*, 93 TEX. L. REV. 855 (2015); Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANN. REV. POL. SCI. 11 (2013); Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012); RICHARD A. POSNER, HOW JUDGES THINK (2008).

116. Jeb Barnes & Thomas F. Burke, *Making Way: Legal Mobilization, Organizational Response, and Wheelchair Access*, 46 LAW & SOC. REV. 167, 170–71 (2012).

117. It is noteworthy that, in Barnes and Burke's study of these variables in the disability law context, they found that commitment and professionalization were highly correlated (while routinization

Throughout this examination, it is essential to remember that the prior procedural equilibrium, the nature of the COVID-19 disruption, and the subsequent resolutions occurring in courtrooms are not the accident of idiosyncratic personality traits nor the necessary response to a shared body of law and regulation. Instead, the accordance and discordance we observe are fundamentally shaped not only by law, but also by social and economic structures and the role courts play in the extraction of rents from economically vulnerable populations.[118]

III. Data and Methods

Data for this project consisted of semi-structured interviews with nine judges,[119] two clerks, and six legal advocates across eight counties in Georgia and Florida collected between October 2021 and January 2022.

Counties were selected as part of a larger project examining the impact of the eviction moratorium (and other related housing interventions) on low-income families. As such, the eight counties vary in their COVID-19 responses at both the state and county level. Following best practices of qualitative inference, we endeavor to understand judicial perspectives across a range of heterogeneous contexts rather than striving for quantifiable generalizability.[120] Because we limited our investigation to Georgia and Florida—two highly understudied areas in both the civil court and housing literatures—we assume our findings to be mostly relevant in areas with strongly pro-business eviction policy regimes; research suggests that tenant rights are far more limited (and proceedings far more rapid) in Georgia and Florida than in comparable rust belt and coastal contexts.[121]

We chose to interview both judges and legal aid staff in order to triangulate information on court proceedings. While both parties have direct and immediate access to information on court processes before and during the pandemic, it is important to recognize that their alternative positionalities can produce complementary, or even contradictory, data on a single process. Because the primary concern of this Article is on judicial discordance, we quote more extensively from those interviews, utilizing the advocate data to provide nuance when appropriate.

Interviews lasted approximately one hour and were conducted over Zoom. In each case, the first author led the interview—generally conducted with a single respondent, although in one case, two judges from the same county were interviewed together. The judges interviewed were either the primary judge handling

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varied) and that routinization was a "necessary condition for tangible results" but the greatest effects occurred when commitment, professionalization, and routinization were all at high levels. *Id.* at 191.

118. Garboden & Rosen, *supra* note 27, at 642–43; Brito et al., *supra* note 19, at 1246.

119. Two of the judges were "interviewed" by questionnaire as they were unwilling or unable to sit for a live interview.

120. Mario Luis Small, *"How Many Cases Do I Need?" On Science and the Logic of Case Selection in Field-based Research*, 10 Ethnography 5, 5–38 (2009); Stefanie DeLuca et al., Russell Sage Found., Coming of age in the other America 205–22 (2016).

121. Megan E. Hatch, *Statutory protection for renters: Classification of State Landlord–tenant Policy Approaches,* 27 Hous. Pol'y Debate 98, 98–119 (2017).

eviction cases in their jurisdiction or the chief judge of the court that handles eviction cases. In two cases, the judge or judges were joined by a court clerk with knowledge about how eviction cases were handled during the COVID-19 pandemic. All of the legal aid attorneys interviewed represent tenants in eviction cases in the relevant study jurisdictions. The interviews followed an interview guide that outlined substantive issues related to operating the court, implementing state and federal mandates, as well as managing other judges and court officials. Questions were also posed related to how judges determined the best course of action in a time of substantial uncertainty and, most broadly, their subjective and normative opinions regarding the federal, state, and local policy responses. While the guide ensured consistency across the data, the interviews were semi-structured, allowing the interviewer to explore unexpected lines of inquiry.

Because the first author is faculty at a law school within one of the two study states, she unavoidably had a pre-existing relationship with some of the respondents prior to data collection (particularly those in Georgia). We believe that the primary impact of this professional familiarity was to generate more candid responses due to pre-existing rapport. It is plausible that respondents avoided discussing some issues that might have come up with a more anonymous interviewer, but we believe these biases to be minimal.

All interviews were transcribed verbatim and coded for substantive themes in NVivo. Research themes were identified inductively[122] based on the coded segments and triangulated across interviews and with archival data collected on court processes in each county during the pandemic.

All respondent and county names have been redacted to protect confidentiality. Details that would increase the risk of disclosure but are not relevant to the conclusions of the research have also been changed. Respondents were not paid for participation in the study.

IV. Findings

Our findings reveal a complex interaction between typical court procedures and COVID-era eviction policies. When asked to describe their goals, judges tended to focus on efficiency, procedural passivity, and their role in supporting the property rights of landlords. When the public health goals of COVID-19 policies ran counter to these goals, judges responded to this discordance by refusing to implement any changes that were not explicitly required and to interpret superseding policy mandates narrowly. On the other hand, when COVID-19 policies increased the speed and efficiency of court processes (such as the distribution of rent assistance and remote proceedings), judges were far more likely to implement them in ways that were both creative and flexible. Throughout our findings underscore the importance of designing emergency responses that account for—

122. Juliet Corbin & Anselm Strauss, *Grounded Theory Research: Procedures, Canons, and Evaluative Criteria*, 13 Qualitative Soc. 1, 3–21 (1990).

but are not necessarily premised on or limited to—implementers' own definitions of success, rather than only on those that might be assumed by policymakers.

A. COVID-era Policies Across the Sample

Before proceeding to mechanisms, it is necessary to examine, as an initial matter, the sampled courts' eviction-related COVID-19 responses. None of the courts studied stopped eviction filings altogether. Most also did not shut down completely with regard to eviction cases; the few that did completely stop processing eviction cases did so very briefly (i.e., for a matter of weeks)—the one county court that was most unlikely to process evictions is one whose county had imposed its own local eviction ban.[123] Even during periods when courts were not holding physical hearings, almost all of the courts in our study—with only one exception—implemented remote proceedings in eviction cases, or at least provided a remote option where needed.

Few courts made the declaration form necessary to trigger CDC Order protection readily available, and none proactively promoted it, although many would direct litigants to the form if asked or upon request. Most courts would halt proceedings once tenants submitted a declaration form, but several continued to process cases, adopting a narrower interpretation of the Order (as preventing only actual eviction, or execution of the writ).[124] Only about half of the courts interviewed as part of the study required landlords to certify whether the federally-backed provision of the CARES eviction moratorium applied.[125] In contrast, half of the courts studied implemented new programs, systems, or partnerships to facilitate the distribution of rental assistance funds.[126] Courts also displayed remarkable ingenuity in finding ways to efficiently process eviction cases despite prolonged disruptions to court operations and the increased complexity of cases. Almost every court (with one exception) stated at the time of the interview (in late 2021) that it had no remaining court case backlog.

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123. This county issued its own local moratorium—effective for 60 days following expiration of the CDC moratorium—due in part to a cyberattack on court systems relating to its rental assistance program. *See* Order Declaring a Local Judicial Emergency, [redacted] Judicial Circuit (Jul. 27, 2021); Sean Keenan, *City's Eviction Ban Protects Nearly 30,000 Renters, But Most Atlantans Aren't Covered*, Atlanta Civic Circle, Jan. 13, 2022; Stephanie Stokes, [redacted] *County Halts Evictions for 60 Days Following End of Federal Eviction Moratorium*, WABE (Aug. 1, 2021).

124. *See* Interview with Legal Aid Atty., Cnty. G3 (Nov. 18, 2021) (noting that their county kept processes going all the way to issuance of a writ and kept holding hearings, only stopping short of actual eviction). County names have been anonymized, with the Georgia counties labeled G1–G4, and the Florida Counties labeled F1–F4.

125. Although some courts did, with the application of great pressure from local legal aid providers, eventually change their policy on this topic, later requiring landlords to provide such verification. *See* Interview with Legal Aid Atty., Cnty. F1 (Nov. 10, 2021); Interview with Legal Aid Atty., Cnty. F3 (Nov. 17, 2021). *See also* Administrative Order, *Restrictions on Residential Evictions during COVID-19*, F3 Judicial Circuit (Feb. 12, 2021) (on file with author).

126. One legal aid attorney noted that, even though there is typically a great deal of variation among counties and even individual judges as to how they interpret and apply the law, judges were far more consistent in referring parties to the mediation program created to facilitate the distribution of rental assistance funds. *See* Interview with Legal Aid Atty, Cnty. F1 (Nov. 10, 2021).

B. Efficiency: Speed and Volume

In talking about how they conceive of success, either explicitly or implicitly, judges emphasized the importance of reducing case backlogs and moving cases through quickly. Speed and volume are used by courts to gauge their own effectiveness and also within larger court systems as a means for reporting progress.[127] One judge made the representative observation: "[W]e were asked . . . how many cases we had that were like a year old or something like that and we had two. So we are getting through the cases, we are handling them as quickly as we can."[128]

Although judges spoke about the broader importance of treating parties fairly and ensuring they are heard, their primary quantitative metric for success is the number of cases they are able to process. One judge stated: "Success is interesting in how you measure it. . . . There are different ways to look at it. As a chief judge, I don't have a backlog. We're efficient in how we move cases."[129] A drop in eviction filings does not negatively impact this metric—it actually helps by reducing backlog. However, this metric is adversely impacted by cases being filed when they cannot be processed—as was the case under COVID-19 measures that prevented hearings from occurring or writs from being issued. Another judge reflected on why they viewed their court's adjustments as successful:

> What matters to me . . . is that no evictions were filed as a result of [allowing applications for rental assistance pre-filing]. . . . [A]s a fully open, no-backlog court, I'm still operating at a 40% deficit. I should be back up to my 25,000. I'm still targeted, when I pulled it last, to be around 15,000 this year, so that tells me [that with respect to cases where tenants are in default on rent but no eviction has been filed], we're scooping those up and we're getting ahead of the problem . . . We are so far ahead of everything I even expected, because of the processes. We kept the law moving. We kept the processes going.[130]

The desire to process cases quickly also informed the allocation of resources within courts, dictating necessary structural and process changes:

> [W]e really ratcheted up and created more virtual courtrooms because we're trying to increase the numbers. We've trained additional judges, I've hired additional judges, probably need to hire some more just to

127. *Cf., e.g.*, Caroline Cournoyer, *Measuring the Efficiency of Courts*, GOVERNING (Jul. 26, 2011), https://www.governing.com/archive/measuring-the-efficiency-of-courts.html (describing court metrics employed in 15 states, focused primarily on efficiency and speed and factors such as case backlogs and case processing times).

128. Interview with Judge 2, Cnty. G2 (Nov. 3, 2021).

129. Interview with Judge, Cnty. G3 (Oct. 7, 2021).

130. *Id.*

> deal with the magistrate court backlog, not just in dispossessories but in other areas as well.[131]

Several courts emphasized the need to "get backlogs moving" and expressed pride in never shutting their courts down. Even when it was necessary to transition to remote hearings, courts were proud to report that they "kept having hearings."[132] At the time we conducted interviews, over a year into the pandemic, the dominant message in one state, if not both, was that it was time to return to business as usual.[133] One judge marked success in the wake of the CDC Order as the anomalous lack of any remaining case backlog: "[T]he day the CDC declaration expired the first time, because we were fully open, no backlog, it looked like any other day."[134]

Legal aid attorneys interviewed emphasized the courts' focus on speed and efficiency. One attorney explained: "I think their role is to get through as many cases as efficiently and quickly as possible, since they have 40 to 50 on a calendar. . . . [E]fficiency is definitely the name of the game."[135] Another spoke to the extent to which the same goal dictated court structure: "[T]o keep things fast, we don't have a designated eviction court. There are 20 county court judges, any of the 20 county court judges, they all hear eviction cases."[136] The attorney added that, in their view, eviction court is "designed for speed, designed to move the case very quickly."[137]

Many COVID-19 policy directives from the government and state authorities ran counter to this basic metric for success, pushing courts to slow their processes or pause them altogether. One Georgia judge spoke directly to the importance of resisting moratoria and other mechanisms that result in delay.[138] They explained that the judicial emergency allowed for deviation from traditional landlord-tenant law rules—for example, that the hearing must occur within 14 days of the answer being filed—but did not personally support deviation from the rule.[139] In their view, delaying the hearing put off the opportunity for the landlord and tenant to come together and provide a mechanism for getting money owed by the tenant to the landlord. As will be discussed in more detail below, they contrasted moratoria with rental assistance which, in their view, allowed the system to function far better than it might otherwise. Another judge was similarly skeptical of moratoria's potential to address the current state of emergency: "[A]ny jurisdiction that

131. Interview with Judge 1, Cnty. G2 (Nov. 3, 2021).
132. Questionnaire from Judge, Cnty. F4 (Dec. 13, 2021).
133. *See, e.g.*, Notes from call with Chief Judge, Cnty. F2 (Nov. 20, 2021).
134. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
135. Interview with Legal Aid Atty., Cnty. G3 (Nov. 18, 2021).
136. Interview with Legal Aid Atty., Cnty. F1 (Nov. 10, 2021).
137. *Id.*
138. Interview with Judge, Cnty. G4 (Jan. 31, 2022) ("Yes, yes. I mean I think that's been the one thing and I would take from our own experience is don't. . . resist, the moratoriums, resist delaying things.").
139. *Id.*

decided to do nothing, to just not process evictions, was going to create their own emergency because the flood of evictions, they're going to sit there. The bucket is going to get heavier, and heavier, and heavier."[140]

C. Passivity and "the Law"

Judges universally described their primary mission as application of "the law" as though it was a unitary concept free from interpretive complexities or implementation flexibility. As described in this section, however, the wide variety of court responses to the COVID-era eviction policies suggests that this is not the case. Instead of serving as passive arbiters of the law, our data suggest that judges generally favored processes that avoided what they viewed as proactive interference in landlord-tenant cases. Judges emphasized the value of passivity, insisting that it was not their role to inform landlords or tenants of COVID-era policies even when providing such information would have placed them in closer compliance with state and federal regulation.

Judges described their role as tightly circumscribed by statutory law, without much room for interpretation or creativity. All of the judges interviewed consistently conveyed the same impression:

> "The role of the Court is set by statute."[141]
> "I've got to do it, because that's the law."[142]
> "We follow the law (laughs), you know? The law sets forth what we have to do, and that's what I do and that's my understanding what the judges in this courthouse do. I take each case into consideration and the totality of the circumstances in that particular case, but at the end of the day, I have to follow the law."[143]
> "I'm going to stay in my lane and we're going to handle these cases as the law requires us to do."[144]
> "We are a court of limited jurisdiction and if there's not a statute that gives us jurisdiction to do something then we can't do it."[145]

In carrying out this role, judges painted themselves as fairly disempowered, unable to point tenants to potential defenses in their eviction case or otherwise act affirmatively without explicit guidance.[146] One judge placed special emphasis on

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140. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
141. Questionnaire from Judge, Cnty. F3 (Jan. 10. 2022).
142. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
143. Interview with Judge, Cnty. F2 (Dec. 6, 2021).
144. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
145. Interview with Judge, Cnty. G4 (Jan. 31, 2022).
146. In a few instances, this same phenomenon played out differently than expected. One Florida judge stated that they had asked for garnishments to "be suspended indefinitely because of the economic hardship [they] put on people." noting that "there is no state law" that prevents reduction of the amount or percentage being garnished. Correspondence from Judge, Cnty. F3 (Mar. 18, 2020). The same judge

the law's ability to instruct judges how to act, with little need for personal intervention: "We all try to follow the law, that's the guiding force, what the law is. And that's always going to tell us what we need to do and how we handle our cases."[147] Judges portrayed the law as objective and comprehensive, with the court (and judges) serving more as a passive facilitator than an active intermediary. Accordingly, they seemed to rely on the parties before them to undertake the work of presenting relevant facts and forms.

Although the judges seemed to view the task of "applying the law" as fairly objective and straightforward, and the same state and federal law applied across all courts in any one state, both judges and the attorneys practicing before them acknowledged differences in implementation across judges (as well as across courts).[148] The intention of the CDC Order was to provide a powerful defense against eviction for tenants who invoked it. There were several clear policy directives associated with the Order: courts could not evict a tenant if the Order applied; to invoke the Order, a tenant had to provide an executed declaration form to the landlord, owner, or other person with the right to evict; and tenants were still required to ultimately pay rent and follow other rules—they could still be evicted for reasons other than nonpayment.[149] Although certain points were fairly clear, the process and procedure left room for interpretation and, as a result, "the law" functioned differently in different courtrooms, even within the same state or county. For example, in response to a tenant submitting a declaration form under the CDC Order, one legal aid attorney explained that "every judge was doing it differently": some would grant a stay instantly; others would set a hearing to see if the landlord had any objection; yet others would scrutinize the forms substantively and, in some cases determine that the tenant had the ability to pay or to work and would not grant a stay at all.[150]

One judge described similar variation in how judges responded to a valid declaration form: because the CDC Order was not explicit as to what should be

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stated that they had "recommended that [the county] stop allowing eviction filings . . . [but that] it was determined that we could not stop the filing process." Questionnaire from Judge, Cnty. F3 (Jan. 10. 2022). Thus, there was at least one instance when a judge attempted to be more proactive but was constrained by state law or others' interpretation of it.

147. Interview with Judge, Cnty. G1 (Oct. 11, 2021).

148. This was true outside of the COVID-19 eviction prevention policy context as well. For example, in the context of the requirement that, if their defense is anything other than payment, renters must post the rent owed when filing their answer, *see* FLA. STAT. ANN. § 83.60, one attorney explained: "In [this county] they're all different. And we actually keep kind of a notebook on 'Judge Smith, this is how she handles eviction cases', because they all do it differently. And just for the posting requirement, for instance, I'd say maybe a third of the judges if you don't with your answer pay all the rent money into the court's bank, they just grant the eviction. Another third of the judges probably, if you answer without the money sign an order saying you have five days to put the money in. And then, maybe another third of the judges actually do a hearing where they listen to how much the landlord says is owed, what the tenant thinks is owed, and then issue an order." Interview with Legal Aid Atty., Cnty. F1 (Nov. 10, 2021).

149. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID19, 85 Fed. Reg. 55292 (Sept. 4, 2020).

150. Interview with Legal Aid Atty., Cnty. F1 (Nov. 10, 2021).

stayed (i.e., the judgment or the writ of possession), some judges stayed the judgment while others stayed the action altogether.[151] And, they explained, there were also varying views across the state about whether courts should make the declaration form available to tenants: some did not feel it was appropriate to raise the issue with or provide the form to individual litigants, while others saw that as "part of their job."[152] In both Georgia and Florida, individual judges have a fair amount of flexibility as to how to handle cases within their courtroom. This led, in several cases, not only to variation across counties, but within counties as well. One legal aid attorney in Georgia explained that in their court: "The judges had different views on the [declaration form]. Some judges, it was the landlord's burden to prove that the person didn't qualify, but a couple of the judges put the burden on the person applying to show that they really were trying to pay.[153]

Even though each Florida county has an administrative judge responsible for coordinating certain matters, "[e]ach judge decides how to handle eviction cases assigned to their division."[154] Outside of the COVID-19 context, therefore, respondents observed variation in other applications of landlord-tenant law. For example, in Florida, tenants have to deposit rent owed into a registry in order to have a hearing or maintain any defense to an eviction;[155] yet judges did not apply this requirement consistently. One legal aid attorney explained: "It's semi-pay to play, to move it forward you have to be able to pay something into the registry in some respects, some judges will be a stickler and want the funds deposited before you to go mediation. But it really is case by case."[156] One judge noted that even though the statute specifically requires that a tenant pay the rent accrued into the registry, that she was willing to allow the hearing as long as a substantial amount had been paid: "I will say that, personally, if there's substantial compliance, if it's off by a few dollars or . . . they've paid us a big chunk . . . It's kind of just what I do. I will at least set a hearing; I will give them a hearing."[157]

Despite this variation in implementation, the broader pattern suggests that judges seemed disinclined to implement additional procedures not specifically mandated by statute—particularly those that would aid tenants in invoking or exercising their legal rights—even where those procedures would ensure that "the law" was being followed. A report issued by the Center for Access to Justice at Georgia State University in August 2021 on the implementation of eviction prevention policies in Georgia courts found that "most courts [surveyed] (61%) did

151. Interview with Judge, Cnty. F1 (Dec. 1, 2021); *see* Interview with Judge, Cnty. F2 (Dec. 6, 2021) ("The court issues the judgment for possession, and then the clerk would issue the writ. The judgment allows for the writ. So yes, we would not issue a judgment for possession."). *See also* Interview with Clerk, Cnty. G2 (Nov. 3, 2021) ("I think one thing that was confusing to some people is that the CDC moratorium didn't stop court from happening, it meant that the writ would be held.").

152. Interview with Judge, Cnty. F1 (Dec. 1, 2021).

153. Interview with Legal Aid Atty., Cnty. G3 (Nov. 18, 2021).

154. Questionnaire from Judge, Cnty. F3 (Jan. 10. 2022).

155. FLA. STAT. ANN. § 83.232 (1995).

156. Interview with Legal Aid Atty., Cnty. F3 (Nov. 17, 2021).

157. Interview with Judge, Cnty. F2 (Dec. 6, 2021).

not direct litigants to the CDC declaration form or provide information about the moratorium to tenants facing eviction."[158]

For another example, as discussed in Part II.B., Section 4024 of the CARES Act imposed a temporary moratorium on properties financed by federally backed mortgage loans.[159] The statute did not specify how or whether courts should identify such properties; instead, it seems to presume landlords will self-identify and self-regulate.[160] One judge explained, regarding the possibility of requiring an affidavit from landlords affirming that this provision of the Act did not apply: "[I]t's not a requirement of the statute, so we didn't see fit to require landlords to take an extra step that was not statutorily required."[161] In at least one instance, a court issued an order requiring such an affidavit due to pressure from the local legal services provider; unfortunately, the order was issued just two weeks before the Act expired.[162] This mode of response suggests courts may be unlikely to implement additional measures to ensure the intent of the law is fulfilled but are instead inclined to read the law more narrowly, doing only what they are explicitly instructed to do.

Some judges were reluctant to affirmatively impose additional procedural requirements on landlords even when required by state supreme court order. On April 30, 2020, the Georgia Supreme Court issued an order specifically requiring that landlords seeking possession submit verification (when filing for eviction) that their property was exempt from the CARES Act moratorium.[163] Although the order may be seen as speaking directly to parties and not necessarily to the court, a message to the court seems implied, in part because the order includes an affidavit form that magistrate courts can use for verification purposes.[164] Yet, one judge interviewed reported that they did not require landlords to file an affidavit, because it was not legally required and because the court had no independent responsibility to verify landlord status, any such statement by a landlord would be meaningless.[165] In contrast, other courts did require landlords to file the affidavit,

158. Daniel Pasciuti et al., Courts in Crisis Part III: The Rising Tide of the Rental Housing Crisis in Georgia 7 (Aug. 2021), https://law.gsu.edu/document/courts-in-crisis-part-iii-the-rising-tide-of-the-rental-housing-crisis-in-georgia/?wpdmdl=210223.

159. CARES Act, Pub. L. No. 116-136 § 4024, 134 Stat. 281 (2020) (codified at 15 U.S.C. § 9058).

160. *Id.* § 4024(b)(1) (stating simply that a "lessor of a covered dwelling" may not file for eviction or seek related fees during the relevant time period). *See also* Interview with Judge, Cnty. G3 (Oct. 7, 2021) ("Everything that was put out about dispossessories put the onus on the landlord.").

161. Interview with Judge, Cnty. F2 (Dec. 6, 2021). *See also* Interview with Judge, Cnty. F1 (Dec. 1, 2021) (noting that no affidavit was required).

162. Interview with Legal Aid Atty, Cnty. F1 (Nov. 10, 2021) ("[W]e finally got the court to issue an administrative order requiring the CARES Act affidavit literally like two weeks before it expired.")

163. In re: Magistrate Court Rule 46, Ga. Sup. Ct. (Apr. 30, 2020), https://www.gasupreme.us/wp-content/uploads/2020/04/Dispossessory-rule-final-magistrate.pdf.

164. *Id*.

165. Interview with Judge, Cnty. G3 (Oct. 7, 2021). In contrast, however, the legal aid attorney from the same county reported that, in practice, most judges would only schedule a hearing once they had received an affidavit from the landlord stating they were not subject to the CARES Act. Interview with Legal Aid Atty, Cnty. G3 (Nov. 24, 2021).

stating specifically that it was required by law.[166] One judge explained that if landlords failed to file the affidavit, their cases would be held.[167] In Florida, there was a similar range of responses—one judge explained that even though the local legal aid agency requested that the court require an affidavit, the court initially took a different approach: "It didn't seem appropriate, so we did not require any kind of affidavit."[168] One court did require, upon prompting from the local legal aid office, that landlords certify their federal status pursuant to the CARES Act.[169] Another judge noted that there appeared to be local variation—although their court did not require landlord certification, they did hear other counties had taken a different approach.[170]

Thus, the key term in "passively following the law" appears to be "passive": courts were unwilling to take action that did not accord with their normally contemplated role as eviction courts unless explicitly required—even if that action would clearly fall within the spirit of the law or ensure that the ultimate goal of the policy directive would be advanced. For example, assume a federally financed landlord was attempting to unlawfully evict a tenant during the relevant time period; as discussed above, some of the courts included in the study would not have required the landlord to certify that the CARES Act did not apply, nor would they have inquired of the landlord whether the Act applied. Similarly, the CDC Order put the onus on tenants to avail themselves of the Order's protections by submitting a declaration form to their landlord, yet also stated that landlords "shall not evict" anyone where the Order applied.[171] To prevent a violation of the Order, courts would have to ensure it did not apply before processing an eviction case, yet many did not see it as their place to inquire about the declaration form. One judge stated:

> We did the cases as the law requires us to do . . . I took very seriously the fact that there was nothing that legally enjoined us from doing what we were required to do [under the normally applicable law]. All the other stuff was protocols we put in place to allow both the landlords and the tenants to assist themselves . . . .[172]

166. Interview with Judge, Cnty. G1 (Oct. 11, 2021); Interview with Judge 2, Cnty. G2 (Nov. 3, 2021) (required filing and that it be served on the other party); *see also* Interview with Judge, Cnty. G4 (required filing of an affidavit).

167. Interview with Judge 2, Cnty. G2 (Nov. 3, 2021).

168. Interview with Judge, Cnty. F2 (Dec. 6, 2021). *See also* Interview with Judge, Cnty. F1 (Dec. 1, 2021) (affidavit not required).

169. Interview with Legal Aid Atty., Cnty. F3 (Nov. 17, 2021).

170. Interview with Judge, Cnty. F1 (Dec. 1, 2021) ("I did kind of get the impression some places did require that.").

171. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID19, 85 Fed. Reg. 55292, 55292 (Sept. 4, 2020).

172. Interview with Judge, Cnty. G3 (Oct. 7, 2021).

Courts' unwillingness to act, and their desire to minimize their own agency in ensuring that the COVID-19 policy mandates applied where intended, demonstrates a preference for passivity over compliance. Policymakers may have intended to halt evictions by providing tenants with a critical tool to stop the court process. However, in practice, tenants often lack the time, information, and expertise to invoke available defenses. Many courts do not interpret their mandate as assisting tenants in their own legal defense, even if that assistance would be in the spirit of the law.

Thus, there is an important step between how judges understand their role (to enforce the law) and how what they do relates to that understanding (to avoid proactive intervention). Our observations suggest that the missing link is that judges have internalized their own interpretation and internal procedures as "the law" rather than attempting to hew as closely as possible to what the law actually states or to what those writing the law intended. In other words, "the law" exists most meaningfully at the intersection of their personal view of justice and the daily work of implementing court procedures expeditiously. The latter leads them to be highly anti-interventionist and the former to an abundance of concern for the preservation of property rights even when confronted with the discordant goal of protecting public health.

D. Protecting Landlord Property Rights

One theme present throughout the interviews was the extent to which courts feel obligated to account for landlords' expectations and motivations. The understanding that landlords drive the eviction process clearly factored into judges' implementation of COVID-19 eviction prevention policies. Their assumption was that for any solution to be successful, landlord buy-in would be critical. Similarly, solutions that inverted the typical power dynamics of eviction court—where landlords hold much of the power and tenants typically have little agency—were less likely to be seen as having promise.

Judges spoke about the importance of catering to landlord expectations and the need to get landlord engagement through a shared understanding that the court process would keep moving: "You have to get them to trust that you're going to keep their cases moving to get them to want to keep those tenants, because there was a lot of emotion about it, too."[173] Even in implementing new processes, judges expressed heightened sensitivity to how landlords would respond: "[M]y judges were very well versed on how to keep those cases moving in a way that didn't scare off the landlord, for lack of a more lawyerly to say it."[174]

The need to get landlords paid—consistent with their own expectations of the process—is consistent with common understandings of the eviction process, which often emphasize the importance of rent collection over the adjudication of

173. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
174. *Id.*

legal issues.[175] Given that the primary role of eviction court is to bolster landlord rent collection efforts with state authority, it is not surprising that judges envisioned landlords as something akin to a client for whom they were tailoring the implementation of public policy.[176]

Even where courts were more innovative in their approach (including in ways that were ultimately beneficial to tenants) there was a specific awareness of needing to entice landlords for the program to be successful. One judge stated:

> Look, these are the things we know that we need to do if we're going to stop evictions. We need to pay the landlords. . . . We knew, if we could hook the landlords, that they would come to us and apply on behalf of their tenants [for rent assistance] before they filed the eviction, and . . . it worked like a charm.[177]

While it seems logical that encouraging landlords to accept rental assistance would involve some appeal to their economic interest, it is perhaps more surprising that judges expressed a desire to produce positive outcomes for them regarding rent collection. This mentality informed judges' willingness to enforce or encourage elements of the COVID-19 policy directives that could, under governing law, help tenants in delaying their rent payment obligations. One judge eschewed the notion that they could offer tenants information about the declaration form and its role in the CDC moratorium, asking how they could reconcile providing tenants with such information with maintaining their reputation among landlords: "It's not my job to say, 'Hey, if you want to stop this, you can file this.' How do I have credibility with my landlords?"[178] In conveying the concern in this way, the judge seemed to weigh more heavily the need to retain their stature among landlords in their court than instituting mandates from a more distant authority.

As for tenants, many of the judges were skeptical of their intentions and felt like they needed systemic encouragement to comply with their financial obligations. One Georgia judge was convinced that a moratorium would cause tenants to "lose their sense of urgency and not make applications for [rental assistance] funds."[179] Similarly, even though the federal mandates and Florida's moratorium made clear that tenants' rental payment obligations would not be eliminated (only postponed), judges were concerned that allowing for such delay would encourage non-payment—even though that was the explicit goal of such policy directives

175. Garboden & Rosen, *supra* note 27, at 638–61; Sudeall & Pasciuti, *supra* note 46, at 1365.

176. *Cf*. Brito et al., *supra* note 19, at 1268–77 (detailing ways in which courts facilitate dispossession and the extraction and accumulation of wealth to benefit landlords and uphold the existing social and economic order).

177. Interview with Judge, Cnty. G3 (Oct. 7, 2021).

178. *Id.*

179. Interview with Judge, Cnty. G4 (Jan. 31, 2022). The judge also argued that a moratorium "creates more problems than it would solve." *Id*.

during the relevant period. One Florida judge expressed skepticism in describing their experience with tenants' actions under the CDC Order: "Even though they would sign and file the CDC declaration indicating that they were making best efforts to pay toward their rent, the number was generally zero. I remember maybe one or two cases where a person had made efforts to pay toward their rent, but I think it really encouraged nonpayment of rent."[180] The same skepticism was reflected in views about where rental assistance should be directed, given questions about tenant incentives to pay: "[A] lot of people had a terrible plan when it came to rental assistance. Here's why: (Laughs) the terrible plan was paying the tenants."[181] One legal aid attorney described the dominant mindset in their county, both before and during the pandemic, as "predisposed against the tenants, seeing them as deadbeats," and a subsequent instinct to focus on "protect[ing] the landlords' rights."[182]

It is important to note that judges also viewed the prioritization of landlords' property rights as a core tenet of state law that they were therefore responsible for enforcing. One Florida judge explained the special emphasis on keeping eviction cases moving, given the property interests at stake.[183] This was in contrast, they noted, to other civil cases, where only financial interests were at issue: "[L]andlord tenant because of the way the legislature has focused it was considered a priority matter as opposed to small claims and other general civil disputes where you're suing for money. Those were not. So, if you were suing for possession of property, they considered that to be something we needed to figure out a system to move along."[184] Furthermore, though state law categorizes property rights as high priority for swift resolution, legal regimes often do not construe leases as having conveyed an interest in property; thus, tenants, despite being at risk of losing their home, are not considered to have a property interest at stake in the eviction case.[185]

E. Selective Creativity

In contrast to their resistance to altering standard operating norms in response to other eviction prevention measures, courts were very willing to find new

180. Interview with Judge, Cnty. F2 (Dec. 6, 2021).
181. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
182. Interview with Legal Aid Atty., Cnty. G3 (Nov. 18, 2021).
183. Interview with Judge, Cnty. F1 (Dec. 1, 2021).
184. *Id.*
185. Although the lease arguably provides tenants with a property interest, the property interests at stake (and to be protected by the court process) are typically viewed as those of the landlord. This aligns with racial capitalism arguments that subject positions and property are co-constitutive: *who* can own is established at the same time as *what* is owned. *See* Cheryl I. Harris, *Reflections on* Whiteness as Property, 134 HARV. L. REV. F. 1, 8–9 (2020); Anne Bonds, *Race and Ethnicity I: Property, Race, and the Carceral State*, 43 PROGRESS HUM. GEOGRAPHY 574, 575 (2019); Satnam Virdee, *Racialized Capitalism: An Account of Its Contested Origins and Consolidation*, 67 SOC. REV. 3, 7–19 (2019). *See also supra* note 3 and accompanying text. *See generally* BRENNA BHANDAR, COLONIAL LIVES OF PROPERTY: LAW, LAND, AND RACIAL REGIMES OF OWNERSHIP (2018).

avenues to distribute and advertise rental assistance funding.[186] Indeed, many courts demonstrated unusual levels of creativity in altering their procedures to make such funds available—allowing other personnel into the court process, making information available during court proceedings,[187] and in some cases, even creating novel processes or vehicles for distributing such funds.

Some aspects of the court process—such as court forms—can be extremely difficult to change, particularly given the court machinery and bureaucracy that can be required to do so (and in some cases, statutory restrictions). Yet, as one legal aid attorney explained, one court amended the summons used for eviction proceedings to include information about rental assistance.[188] Buoyed by newly available CARES Act funds, the same county enacted a new eviction court mediation program in partnership with legal aid organizations.[189]

In the face of pressure to reduce backlogs and clear cases quickly, courts demonstrated flexibility and creativity with regard to process elements, such as scheduling:[190] as is often the case, necessity (or a need for speed) breeds creativity. In late 2021, one Georgia county developed a special calendar to process individual attorney backlog cases *en masse*.[191] In commenting on the need to generate more attorney motivation to resolve cases, they explained:

> I'll just say they weren't as motivated to move those cases along as we were. So I said, 'Look, let's just specially set them with one attorney in all 75 cases that they're sitting on, it's their time, let's move these cases.' And so sometimes you have to be a little, we've been very creative to do what we can to move matters."[192]

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186. This may also have been due, in part, to political pressure from government actors to use funds that had been issued. *See, e.g.*, Katy O'Donnell, *Treasury Puts Pressure on States, Localities to Speed Up Rental Aid*, POLITICO (Oct. 7, 2021), https://www.politico.com/news/2021/10/07/treasury-puts-pressure-on-states-localities-to-speed-up-rental-aid-515577.

187. "[T]he court actually had fliers and cards on hand that they would give to the public should a non-payment of rent case come up, which I think was very helpful and instrumental in at least getting a lot of landlords and tenants to know about the program and apply for assistance. Part of the reason I think a lot of that has occurred, that promotion from the court has occurred is because around July of this year, there was a presenter that came and presented weekly topics of the rental assistance program." Interview with Legal Aid Atty., Cnty. G1 (Dec. 21, 2021).

188. Interview with Legal Aid Atty., Cnty. F3 (Nov. 17, 2021).

189. *Id.* ("I think it was more the resources in one place, knowing that the county had a lot of rental assistance funds through the CARES Act, through December."). *See also* Questionnaire from Judge, Cnty. F3 (Jan. 10. 2022) ("Our Circuit implemented an Eviction Court program for landlords and tenants [a]ffected by Covid in residential eviction cases. We began this program in September 2020, and held three such Courts. It mostly involved mediation and the disbursement of CARES Act funds by Legal Aid and Florida Rural."). These Eviction Courts ended once the Supreme Court struck down the CDC Order. *See id.*

190. *See, e.g.*, Interview with Judge, Cnty. G1 (Oct. 11, 2021) (staggered court).

191. Interview with Judge 1, Cnty. G2 (Nov. 3, 2021).

192. *Id.*

Courts were also more likely to temporarily continue cases, with the assurance that rental assistance funds would soon be available to resolve the case.[193] One Georgia court developed a new procedure whereby writs were no longer automatically generated—because many of them were never executed, they remained listed as pending—and cases in which no action was taken post-filing (i.e., no request for a writ) for 60 days would be automatically administratively closed.[194] Some courts continued having hearings through the entire COVID period by transitioning to remote platforms.[195] Several courts developed partnerships with nonprofits or broader coalitions to streamline the distribution of funding.[196]

In a particularly striking example, one county created an entirely new program for processing cases, designed to efficiently distribute rental assistance funds, move existing cases, and decrease new filings where possible.[197] While other instances of creativity served to grease the usual wheels of operation—keeping cases moving and getting landlords paid—this example was particularly interesting in that it extended beyond business as usual to capture cases not yet within the court's domain. In contrast to its handling of the CDC Order declaration form, which the court did not affirmatively make available to tenants ("It's not my job to say, 'Hey, if you want to stop this, you can file this.'"), the court was very proactive with its marketing of the new program—focused on funneling funds as quickly as possible to landlords,[198] including landlords contemplating filing, but who had not yet filed, cases.[199] This included the chief judge attending various eviction calendars to market the program directly.[200] In at least one case, the program enabled direct transfer from the rental assistance program to a major corporate landlord who filed on behalf of dozens of tenants, cutting the landlord a check upwards of $200,000 to resolve forty to fifty pre-filing situations.[201] The

193. *See* Interview with Judge, Cnty. G1 (Oct. 11, 2021) ("We especially sent [sic] that had the CDC declaration and I probably got 40, 45 cases with continuances because they're waiting for the money to come . . . I have those cases that have been continued and been continued maybe two or three times and they're being considerate to wait to see what's going to happen.").

194. Interview with Judge, Cnty. G3 (Oct. 7, 2021) ("[I]f no answer is filed and no writ is requested after 60 days, I just created a rule where we administratively close the case.").

195. *See* Questionnaire from Judge, Cnty. F4 (Dec. 13, 2021) ("kept having hearings").

196. *See* Interview with Judge, Cnty. G1 (Oct. 11, 2021); Interview with Clerk, Cnty. G2 (Nov. 3, 2021); Interview with Judge, Cnty. G4 (Jan. 31, 2022).

197. Interview with Judge, Cnty. G3 (Oct. 7, 2021).

198. Interview with Judge, Cnty. G3 (Oct. 7, 2021) ("Look, these are the things we know that we need to do if we're going to stop evictions. We need to pay the landlords. We need to pay the landlords.").

199. *Id.* ("[W]e set it up to pay the landlords directly. We knew, if we could hook the landlords, that they would come to us and apply on behalf of their tenants before they filed the eviction, and . . . it worked like a charm.").

200. *Id.* ("The judges I had trained on how to talk about. . . I would go to each calendar still and talk about [our rental assistance program], and we'd have the tenants signed up. Then we'd have the landlords could sign up on behalf of the tenants. That's what we said: "The landlord can sign up," so we would talk to them.").

201. *Id.*

judge remarked that the move kept many families in their homes (and allowed tenants to avoid an eviction filing, or "Scarlet E,"[202] on their rental history) but also allowed the court to keep its numbers down: "What matters to me, and I know you understand, is that no evictions were filed as a result of getting ahead of it."[203]

In describing the program and their attitude toward it, the chief judge suggested that "this ain't about the law. It's about solutions."[204] In talking about the program in more detail, they seemed to suggest that one reason for the deviation in approach is that the new program was in some sense not "law" and therefore not subject to the same limitations that the court might apply elsewhere, but instead afforded a different degree of freedom: "I'm going to apply the law. I'm going to handle these cases, but where . . . they really need a solution that's not based in a piece of paper with my name on it, I want to connect those people."[205]

F. Public Health in Place and Process Only

Although judges clearly recognized the public health concerns stemming from the pandemic, their application of those concerns was limited to their physical surroundings and did not appear to translate into their interpretation or implementation of policy mandates from above. The judges who were interviewed identified many benefits of remote proceedings, particularly with respect to their ability to keep court processes moving. This, in combination with obvious concerns for their staff's health and safety, led to substantial creativity in workplace reconfigurations. Courts engaged seriously with health concerns in relation to their operating spaces—whether they would be open or closed, issues of social distancing, implementing plexiglass shields and plastic sheeting, necessary shutdowns and sanitizing, and whether proceedings would be held remotely—while focusing less on the broader public health concerns raised by evicting tenants during a pandemic. Many courts did what they viewed as necessary to keep the courthouse open and keep cases moving, even if that meant creating additional calendars (including in the evening) and staggering hearings. Other courts chose to move proceedings online in an attempt to keep filed cases processing at a regular pace. In all of these discussions, however, public health concerns were universally seen as a means to an end—issues that had to be negotiated out of necessity to allow court to go on as needed.[206] As one judge explained: "[W]e did transition for safety reasons first and foremost, but also because we had to continue on handling these matters."[207] Courts did not seem to adopt or internalize the message

202. Matthew Goldstein, *The Stigma of a Scarlet E*, N.Y. TIMES, Aug. 10, 2021, at B1 (describing the negative effects eviction filings can have on a tenant's rental history).

203. Interview with Judge, Cnty. G3 (Oct. 7, 2021).

204. *Id.*

205. *Id.*

206. *See* Interview with Judge 1, Cnty. G2 (Nov. 3, 2021) ("[W]hen the pandemic hit, we had to totally transform the way we handled dispossessory cases, obviously you couldn't have 50 to 75 people in a courtroom at a time. And we could no longer handle three calendars a day.").

207. *See* Interview with Judge 2, Cnty. G2 (Nov. 3, 2021).

coming from federal and state authorities that public health concerns were in and of themselves sufficient justification for non-traditional eviction case outcomes. Threats to health provided sufficient justification for courts to reshape their operating procedures to protect the safety of personnel, but not necessarily to disturb the normal trajectory of eviction proceedings.

Courts were quick to shut down when COVID-19 had a tangible and direct impact on their own staff and operations. One Georgia judge explained: "We just couldn't proceed with court and COVID and we had a couple of scares in our office, where we had to shut down for a couple of days . . . [S]afety was the first order of business, making sure that we were safe."[208] In another Georgia county, two court personnel died from COVID-related illness early in the pandemic, prompting a particularly cautious approach:

> I think people may look at [our county] and say, 'Oh they're too cautious, they didn't have to go 100% virtual, they could have come back into the courthouse in June face to face like we did.' We have not done that, nor will we do that. It's different when it hits home twice.[209]

The COVID-related change that judges in both states suggested was most likely to remain beyond the pandemic was the use of remote technology to hold hearings.[210] Once immediate safety concerns have subsided, this development will still allow courts to hear cases at a higher volume than otherwise possible.[211] Another county, which had implemented a new status calendar (in addition to the traditional hearing calendar) also suggested its possible retention, explaining that between adoption of the status calendar and new uses of technology, "we made this process much more efficient than when we first started."[212]

V. Recommendations

The above findings make clear that, for the judges interviewed as part of this study, there was discordance between their understanding of the eviction process and its purpose, as well as the court's role in that process, and the intended effect of the federal eviction prevention policies. In many instances, that led to misunderstanding, hesitance, or resistance toward implementing those policy directives. Specifically, where federal directives expanded the tools available to tenants to slow the court process, as with the CDC moratorium; or removed the ability of

208. *See* Interview with Judge, Cnty. G1 (Oct. 11, 2021).

209. *See* Interview with Judge 1, Cnty. G2 (Nov. 3, 2021).

210. For discussion of how remote proceedings adopted during the pandemic should proceed on a longer-term basis, *see generally* Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw. U. L. Rev. 1875 (2021).

211. Interview with Judge 2, Cnty. G2 (Nov. 3, 2021) ("[M]agistrate court is space challenged . . . [H]aving a virtual platform has allowed me to create as many courtrooms as I need. So that's why we're probably always going to be in this hybrid because it's just so we can better serve the community.").

212. *Id.*

landlords to evict, as with the CARES Act, many judges did not view it to be the court's role to actively intervene or assist in implementing such policies. Judges and judicial systems also placed high importance on the property rights of landlords and maintaining the pace of eviction case resolution, which placed them at odds with the goal of federal eviction prevention policies.

In contrast, where interventions aligned with judges' understanding of how the process should operate or furthered what they viewed as the goals of the court process, they were more willing to not only apply the intervention, but also adapt their own processes to allow that intervention to be as effective as possible. In this Part, we glean what can be learned from the above example and reflect forward on how future interventions might take these findings into account.

State and federal policy directives intended to apply to local courts should be as explicit as possible with respect to their intended purpose and outcomes; general mandates supported by underlying expressions of intent are unlikely to translate into actual policy implementation. Particularly in the midst of a pandemic, local courts will likely be overwhelmed by a range of needs and requests; where governing orders are not specific as to what must change, courts will likely default to the normal order and/or cater to the more powerful parties dominating their processes. Yet, many local courts are sensitive to issues of authority and hierarchy; where something is specifically mandated by statute or ordered by a higher court, they will typically view compliance as necessary.[213]

As a related matter, in being more explicit with respect to what must change, policies should be constructed and written in a manner that acknowledges local variation and local custom. Although policymakers cannot issue directives that account for the specifics of every local jurisdiction, they should be mindful of how state and local law might affect interpretation and, ultimately, the effectiveness of the policy directive. Where differences in implementation might lead to different outcomes, policymakers should describe the ultimate goal with sufficient substance that their translation at the local level is as accurate as possible. In doing so, they should use universal concepts that can translate to locally applicable language and provisions—rather than terminology that may only apply in certain jurisdictions or may have a different meaning under different statutory regimes. For example, the CDC Order simply states that landlords "shall not evict" covered persons but does not specify at which part of the eviction process events should cease—leading to different understandings across jurisdictions (and, therefore, a wide range of possible outcomes). One judge described some confusion with regard to the language used in the CDC Order:

> [U]ltimately, it's each judge's own decision as to whether you think because the CDC order was talking in the context of a nationwide regime. And we don't necessarily use that language locally. We have our

213. *See, e.g.*, Interview with Judge 2, Cnty. G2 (Nov. 3, 2021) ("[W]e prioritized the emergency matters that were delineated in that judicial emergency that basically had to continue immediately.").

> own landlord tenant statutes that we've had since time immemorial. And so, we say stay writs is what we say, they don't use that, I don't think the word writ is anywhere in the CDC order. So that was part of the discussion, what exactly is this staying? Is it staying anything at all? Is it staying mediation? Can you make someone go to mediation, even if they don't want to? Those are some of the discussions that we had.[214]

A guidance document later issued by several federal agencies acknowledged that state and local laws may vary and clarified that the Order was intended only to prevent "actual physical removal" through the execution of a writ, not halt court processes.[215] While helpful in interpretation, this clarification also reveals the limitations inherent in the CDC Order's approach.[216] Ultimately, the CDC Order's lack of specificity may have been a lesser obstacle than judges' (un)willingness to enforce it.[217] As Kathryn Sabbeth has explained, for many judges, "the moratoria contravened what they understand as a core function of the courts—to protect owners' control over property above all else."[218] This demonstration of discordance explains our recommendations below regarding policies that are more likely to generate court accordance.

When new policy directives do attempt to shift courts and the legal process from their typical mode of application, however, keeping the realities of local implementation in mind is critical. In those instances, relying on judges or courts to follow the spirit of the directive—without explicit guidance about what is required *of courts* (in contrast to the parties) to that end—is unlikely to result in successful implementation. The clearest example of this phenomenon from our findings was the verification of covered properties under the CARES Act.

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214. Interview with Judge, Cnty. F1 (Dec. 1, 2021).

215. In the guidance document published to address frequently asked questions about the CDC Order, the issuing federal agencies clarified that:

> 'Eviction' means any action to remove or cause the removal of a covered person from a residential property. State and local laws with respect to tenant-landlord relations vary, as do the eviction processes used to implement those laws. The judicial process will be carried out according to state and local laws and rules. Eviction does not include foreclosure on a home mortgage. The Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual physical removal of a covered person for non-payment of rent does NOT take place during the period of the Order. A landlord or residential property owner would, however, violate this Order, for example, if it executed or caused to be executed a writ of eviction or possession (or had an agent or attorney execute or cause to be executed such a writ) that led to the actual physical removal of a covered person during the period of the Order.

HHS/CDC Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, Frequently Asked Questions 1, https://www.nixonpeabody.com/-/media/files/pdf-others/hhs-cdc-hud-doj-eviction-moratoriam-faqs-updated-april-2021.pdf?la=en&sc_lang=en&hash=C6ACF32F8D1192CC18866CF8FC01B5C4 (last updated Apr. 2021).

216. For additional discussion of the CDC Order's shortcomings, *see* Sabbeth, *supra* note 3, at 392–95.

217. *See id.* at 363 n.20, 376 n.120.

218. *Id.* at 376.

Although federal law made clear that landlords of federally backed properties could not evict tenants during the relevant time period, courts did not, for the most part, require landlords to verify whether or not they were covered by the Act to ensure compliance. But where a higher court—here, the Georgia Supreme Court—specifically required landlords to submit verification,[219] courts were much more likely to put such requirements in place, increasing the likelihood that tenants would not be wrongfully evicted under the Act.

Many of the eviction prevention policy directives issued as a result of the COVID-19 pandemic were directed toward party action; to trigger or avail themselves of the newly-created protections—or prohibitions—against eviction, individual parties had to engage in some affirmative action. Separation of powers and federalism concerns likely explain why the directives were structured as such, rather than directly requiring courts to engage in specific action, treat parties, or resolve cases in a particular way. Yet, in adopting such a design, even if out of necessity, the directives ignore the reality of how most people obtain information about the process. Placing the onus on the parties, who are likely unrepresented by counsel and may not fully understand what is required or how to execute specific requirements, makes it less likely that policy solutions will be implemented as intended. A party-centered design also relies on a network of other government and non-governmental organizations outside of the court structure to ensure that parties are well-situated to avail themselves of the directives' protections. In some areas, that network may not exist or be inadequately funded. Thus, another recommendation is that similarly structured directives come with additional funding for those organizations to engage in necessary outreach and party assistance or incentives for courts to develop such programs themselves.[220]

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219. In re: Magistrate Court Rule 46, *supra* note 163.

220. Some of the measures passed with regard to COVID-19 did allow states to spend authorized funds on implementation; some of these funds could be directed toward necessary litigant assistance. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201(d)(C-D), 135 Stat. 4 (2021) (codified at 15 U.S.C. § 9058c); Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong., Div. N, Title V, § 501(c)(5)(A) (2021) (codified at 15 U.S.C. § 9058a); Notice of Program Rules, Waivers, and Alternative Requirements Under the CARES Act for Community Development Block Grant Program Coronavirus Response Grants, Fiscal Year 2019 and 2020 Community Development Block Grants, and for Other Formula Programs, 85 Fed. Reg. 51457 (Aug. 20, 2020); Coronavirus State and Local Fiscal Recovery Funds, 87 Fed. Reg. 4338 (Jan. 27, 2022) (to be codified at 31 C.F.R. pt. 35). For examples of federal funds used to fund state courts during COVID-19, *see* Erika Rickard & Casey Chiappetta, *State Courts Seek Resources to Support Operations During COVID-19 Pandemic,* PEW CHARITABLE TRS. (Aug. 26, 2020), https://www.pewtrusts.org/en/research-and-analysis/articles/2020/08/26/state-courts-seek-resources-to-support-operations-during-covid-19-pandemic; Associated Press, *Georgia Governor Allocates COVID Relief Funds to Help Courts*, U.S. NEWS & WORLD REP. (Oct. 28, 2021, 5:36 PM), https://www.usnews.com/news/best-states/georgia/articles/2021-10-28/georgia-governor-allocates-covid-relief-funds-to-help-courts; *see generally* JUD. COUNCIL GA. ADMIN. OFF. CTS., JUDICIAL COUNCIL OF GEORGIA AMERICAN RESCUE PLAN ACT GRANT FUNDING OVERVIEW AND INSTRUCTIONS (2022), https://jcaoc.georgiacourts.gov/wp-content/uploads/sites/6/2021/11/ARPA-Funding-Overview-and-Instructions-Final-Approved-v.5.pdf.

Because separation of powers concerns prevent executives and legislatures from directly ordering court action,[221] a more effective means of altering the legal process may be to incentivize court action through mechanisms like rental assistance.[222] Not only do mechanisms like rental assistance provide a carrot in terms of money that can incentivize party action, but they also cater to property-based legal norms that the courts view themselves as responsible for enforcing and court-based values of speed, volume, and efficiency. In our study, the availability of rental assistance funds seemed to generate more flexibility than was usually present in the court process—evidenced, for example, by judges freely allowing continuances in anticipation of delayed rental assistance funds. The presence of money that could encourage efficient case resolution also seemed to foster a higher degree of creativity in terms of new court processes. In some cases, rental assistance funds appeared to have potential not only to prevent eviction, but also preempt court filings; future rental assistance programs might also incorporate requirements or incentives to ensure that housing is safe and affordable.[223]

Our observations regarding rental assistance seem attributable, in large part, to its accordance with norms underlying the eviction court process; while courts had to be willing to deviate from the normal course, they were not forced to disrupt the key legal and cultural underpinnings of that process. Where the federal government took a different approach—pushing back on fundamentals of eviction court and state law structure—policy directives seemed less likely to move the needle in a longer-term or structural way. One of the primary takeaways from our study was that, if policy solutions are reliant on courts to be successful, they cannot expect courts to be pushed outside of their typical role purely by suggestion; if courts cannot be ordered directly, entities seeking to enlist courts in reform will need tools that can incentivize courts and account for their mindset, priorities, norms, and values.

VI. Conclusion

Assessing policy implementation involves more than just looking at outcomes—the case of eviction prevention during COVID-19 presents no exception.

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221. Interview with Judge, Cnty. G3 (Oct. 7, 2021) ("The FAQs, appropriately, said, 'Hey, we aren't allowed, as the CDC, to tell a court to stop what you're doing.' The focus of the CDC declaration was largely misunderstood. It really put the onus on the landlord not to do anything, right? It said, 'The landlord can't do anything, but it can't stop the court process.' So, when I saw that, I was like, 'I'm going to open back up. Here's why: I'm going to process these dispossessories,' because any jurisdiction that decided to do nothing, to just not process evictions, was going to create their own emergency because the flood of evictions, they're going to sit there.").

222. *See, e.g.*, Emily A. Benfer, *U.S. Eviction Policy Is Harming Children: The Case for Sustainable Eviction Prevention to Promote Health Equity*, Bill of Health, Harv. L. Petrie-Flom Ctr. (Nov. 2, 2022), https://blog.petrieflom.law.harvard.edu/2022/11/02/pandemic-eviction-policy-children/ (advocating for a permanent emergency rental assistance program and additional resources to support pre-filing eviction diversion programs).

223. Sabbeth, *supra* note 3, at 374 ("Imagine a program that . . . required landlords to apply and show need, quality of conditions, and long-term commitment to maintaining decent and affordable housing.").

Knowing whether and how state and federal policies affected the number of eviction filings and actual evictions is important,[224] as is understanding why those policies had different effects across the country. It is also important to understand the reasons for that variation and why certain aspects of those policy directives may have been more effective than others.

Our findings demonstrate that courts were more likely to implement policy directives as intended when they aligned with courts' values, metrics for success, and common understandings of landlord-tenant law and the eviction process. Of course, the nature of emergencies—including those based in public health—may mean that the normal priority structure must be upended. In that case, it is still possible to consider what types of measures may be more likely to get courts to move beyond their default mode of operation and even exercise innovation and creativity. In this case, those considerations likely explain the difference between court responses to moratoria and rental assistance. In the midst of crisis, it might be difficult to get courts and judges to rethink or act contrary to their usual norms, but incentives can be an effective means of changing behavior in the short-term. The importance of accordance—or commitment in the context of organizational response, as discussed in Part II.C.—may also suggest the need to see courts as policymaking partners and secure their buy-in early in the policymaking process.

During the next emergency, regardless of context, principles of accordance and discordance will likely continue to govern. If policymakers at the state and federal level hope to promulgate effective policy solutions—and for courts to implement them as intended—these findings matter. Deepening our understanding of courts can help them function as necessary partners rather than adversaries in the contexts of disaster response and relief. These findings also raise broader questions about the role of the courts in adjudicating and implementing housing policy: If courts' implementation of policy is defined and limited by certain institutional norms, such as efficiency, one might question whether certain social ends can be achieved through legal channels or whether courts are the best vehicle to target for reform.[225] We do not attempt to address those larger questions in this Article but hope that the findings here contribute to that important conversation.

One interpretation of these findings is that they present a unique opportunity to sync motivation and innovation. Court-based norms, such as the desire to keep caseloads down, need not always push in a regressive direction when it comes to accessing justice. Where necessity breeds creativity—particularly in moments of

224. *See* Nicole Summers, *Eviction Court Displacement Rates*, 117 NW. U. L. REV. 287 (2022) (introducing the concept of "displacement rates"—the percentage of eviction filings that actually result in displacement—and emphasizing the need for empirical analysis to better understand the factors underlying variation in such rates across jurisdictions).

225. *Cf.* Larisa Bowman, *Eviction Abolition* (forthcoming) (on file with author); Sophie House & Krystle Okafor, *Under One Roof: Building an Abolitionist Approach to Housing Justice*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (2020); Zohra Ahmed & Rachel Foran, *No More Courts*, INQUEST (Aug. 2, 2022), https://inquest.org/no-more-courts/ (arguing, in the criminal context, that courts are beyond reform and proposing abolition of the current system).

crisis when the well-being of all parties is at stake—there is the opportunity for positive reform that all sides can embrace.

And, perhaps, from crisis comes the opportunity to highlight systemic problems that could benefit from a similar approach. For example, one judge who used rental assistance funds not only to address eviction cases that had been filed but to stave off future filings explained:

> "What we've always focused on is you've got to get to them when they're a [pre-filing] case. Or, when they get dispossessed, you've got to go with some wraparound services so they don't get back in that situation. We've been focusing on so many different ways to handle dispossessory cases by legal intervention that we forget that that's not really why we're here. They're here because they can't pay their rent. . . . Fancy lawyering isn't going to change that."[226]

Vehicles like rental assistance need not be limited to moments of crisis. Should demonstrated success of rental assistance programs create the will to apply such programs more expansively—and preventatively—it could radically change our approach to housing,[227] and courts may be surprisingly willing partners in that process.

226. Interview with Judge, Cnty. G3 (Oct. 7, 2021).
227. *See, e.g.*, *supra* note 223 and accompanying text.