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Mary Spector

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TENANT STORIES: OBSTACLES AND CHALLENGES FACING TENANTS TODAY

MARY SPECTOR*

Nearly forty years after the courts first recognized a warranty of habitability in residential leases, the notion that a tenant may have "rights" in a residential tenancy is no longer a novelty. Rather, tenants' rights are firmly embedded in residential landlord-tenant codes in most states, with more stringent tenant protection available in some urban areas. Unfortunately, widespread codification of tenant protection does not always mean the effective exercise of that protection. At the beginning of the 21st century, tenants and their advocates still face many of the same challenges they faced forty years ago in the fight for safe, habitable, affordable housing. Yet they also face new challenges, in many cases as a direct result of an increasingly complex legal climate in an ever-changing social environment.

This Article tells the stories of two tenants to illustrate some of the obstacles and challenges facing tenants and their advocates today. The stories of Teresa Marshall[1] and Maria[2] were selected to highlight a persistent problem area: the limitations that a summary eviction scheme can place on the tenant who attempts to protect her rights. Though the stories differ in many regards, they

* Assistant Professor of Law and Co-Director SMU Civil Clinic, SMU Dedman School of Law; B.A. 1979, Simmons College; J.D. 1986, Benjamin N. Cardozo School of Law. I would like to thank Professor Celeste Hammond for inviting me to participate in The John Marshall Law School's conference entitled, "What King Wrought?: The Impact of the Summer of 1966 on Housing Rights, A Forty Year Retrospective and Prospective," and for her encouragement in the preparation of this paper, which is an expansion of the comments I made at the conference. Thanks also go to co-panelists Kathleen Clark, Executive Director of the Lawyers' Committee for Better Housing; Michael Pensack, Executive Director of the Illinois Tenants Union; Professors Lloyd T. Wilson of the Indiana University Indianapolis School of Law; and Mary Zulack of Columbia Law School for their contributions to the conference which, in turn, contributed to this article. Finally, I would like to thank James Hunnicutt, SMU Dedman School of Law, class of 2007, for his indispensable research assistance.

1. Marshall v. Housing Authority, 198 S.W.3d 782 (Tex. 2006).

2. Maria is a pseudonym for a client of the SMU Dedman School of Law Civil Clinic during the months between January 2004 and November 2005. Records relating to her case are on file with the SMU Dedman School of Law Civil Clinic.

both illustrate the serious collateral consequences that a tenant may suffer after the conclusion of the landlord-tenant relationship.

The stories share another important feature: both tell the stories of female heads of households. As a subset of all renters, the female head of household faces special challenges in today's housing market that tenants' advocates cannot ignore. Thus, before examining the stories of Teresa Marshall and Maria in more detail in Parts II and III, Part I will provide some of the context in which their stories occur. Finally, Part IV will identify some strategies for minimizing the obstacles that tenants continue to face.

I. THE PRACTICAL AND LEGAL LANDSCAPE OF THE LANDLORD TENANT RELATIONSHIP

A. The Realities of Women and the Housing Market

By 2000, the number of households headed by women was nearly triple the size of households headed by men only.[3] Though the last twenty-five years have seen an increase in women's earning power, the median income for a full-time wage-earning woman is still just eighty-one percent of a full-time male wage-earner, or roughly $10,000 less a year.[4] The median income of families with no male present is less than half of the income of families where males are present.[5] The annual incomes of Hispanic and Black women are even less than the average of all women, meaning that a higher percentage of their disposable income must be spent for shelter.

On one end of the economic and residential spectrum, women have gained power as financial decision-makers, particularly in connection with the purchase of single-family homes, as the number of single women buying homes is more than double the number of single men buying homes.[6] However, on the other end of that same spectrum, households headed by females account for approximately eighty percent of all federally subsidized households.[7]

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3. RENEÉ E. SPRAGGINS, WE THE PEOPLE: WOMEN AND MEN IN THE UNITED STATES 8 (2005), *available at* http://www.census.gov/prod/2005pubs/censr-20.pdf.

4. *Id.* at 12; *see also* Mickey Meece, *What do Women Want? Just Ask*, N.Y. TIMES, Oct. 29, 2006, § 3, at 1 (restating the female to male wage discrepancy, but acknowledging the growing power of women as consumers).

5. SPRAGGINS, *supra* note 3, at 13.

6. Meece, *supra* note 4.

7. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A PICTURE OF SUBSIDIZED HOUSEHOLDS — 2000, http://www.huduser.org/picture2000/index.htm (click on "Click Here to Start a Query," select "U.S. Total," and then "total for all HUD Programs." Select the variable "pct_female_head" and press "Next Screen." Finally, select "View Data On Screen" and results will appear).

At the same time, rates for rental housing have risen by approximately fifty percent since 1970 from approximately $416 to $608. In 1970, rent accounted for approximately twenty-one percent of a household's income; today it accounts for approximately twenty-five percent. Among Blacks and Hispanics, slightly higher percentages of income are spent on shelter.[8] In some areas of the country, especially those with tight housing markets, female heads of household may spend upwards of fifty percent of their income on housing.[9]

One picture these figures paint is of female renters, scraping to earn a living, paying a larger portion of their income on rent each year. In 1992, Professor Barbara Bezdek explored the fate of such women in Baltimore housing courts.[10] Tenants facing eviction, she reported, were overwhelmingly female, Black, and poor. More importantly, she found them facing significant barriers to the exercise of their rights and powerless to assert their rights in legal proceedings designed to provide landlords efficient means to regain possession. Obstacles such as culture, language, and power stood in the way of presenting valid defenses that in some cases would have changed the outcome of the eviction process.[11]

Ten years later, in the fall of 2002, similar results were observed in a study of 763 eviction cases conducted by the Lawyers' Committee for Better Housing, a Chicago public interest law firm.[12] Although the study did not comment on the gender or race of the tenants, the court monitors on the project noted widespread "lack of respect for the human dignity of tenants."[13] Their observation is hardly surprising given that the average hearing lasted just one minute and forty-four seconds, rarely giving tenants the opportunity to present defenses to the landlords' claims.[14]

The statutory bases for the summary procedures observed in Baltimore and Chicago are not unique. Indeed, they are widely used in every state in the nation as described more fully below.

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8. ROBERT BONNETTE, HOUSING COSTS OF RENTERS: 2000 8 (2003), *available at* http://www.cuensus.gov/prod/2003pubs/c2kbr-21.pdf.

9. CITY OF AUSTIN NEIGHBORHOOD HOUS. & CMTY. DEV. DEP'T. (NHCD), COMMUNITY ACTION NETWORK: FREQUENTLY ASKED QUESTIONS ABOUT HOUSING 1 (2004), *available at* http://www.co.travis.tx.us/health_human_services/research_planning/documents/housing_2004_12.doc.

10. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

11. *See id.* at 593-96.

12. LAWYER'S COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT (2003), *available at* http://www.lcbh.org/ pdf/full_report.pdf.

13. *Id.* at 6.

14. *Id.*

B. Limitations of the Summary Proceeding[15]

Summary eviction procedures exist in every state.[16] Though details may differ, in general, the summary eviction proceeding is one that provides an alternative to the landlord's exercise of self-help by providing the landlord with a fast, effective way to regain possession of the premises after the tenant has breached a lease. Procedures may provide that trial must occur in as little as two days after the defendant is served.[17] Defenses may be limited to those that would fully defeat the landlord's claim for possession[18] and counterclaims, if permitted at all, may be required to be "based on facts which excuse [the] tenant's breach."[19] The difficulty of determining which facts might excuse the tenant's breach often leads to confusion; in some jurisdictions it may lead to inconsistent application of the law. For example, while Ohio tenants *may* assert counterclaims when landlords join a claim for back rent with the claim for possession,[20] it is not clear which counterclaims a tenant *must* assert.[21] Similarly, Oregon tenants

15. This section is drawn from Mary Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135 (2000).

16. *See* ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 6:10 (1980) (discussing the summary eviction processes enacted throughout the country); RESTATEMENT (SECOND) OF PROPERTY: LANDLORD & TENANT § 14.1 n. 7 (1977) (listing statutes by state).

17. *E.g.*, ARIZ. REV. STAT. ANN. §§ 12-1175(c), 12-1177(c) (2003) (service two days before trial with continuance for 3 days available upon showing of good cause); CAL. CIV. PROC. CODE § 1167.3 (West 2006) (five days). *See generally* SCHOSHINSKI, *supra* note 16, at § 6:14 (providing a representative sample of times available under various states' law).

18. *See* Green v. Superior Court, 517 P.2d 1168, 1179 (Cal. 1974) (holding that tenant could raise habitability defense in summary eviction); *see also* CAL. CIV. PROC. CODE § 1174.2 (West 2006) (codifying the rule in *Green*).

19. Munden v. Hazelrigg, 711 P.2d 295, 298 (Wash. 1985) (en banc) (quoting First Union Mgmt. v. Slack, 679 P.2d 936, 939 (Wash. Ct. App. 1984)). In *Munden*, the court held that although the tenants' claim for damages to their car on the premises was not based on facts excusing breach, the tenants' termination of possession prior to trial converted the action to an ordinary civil proceeding in which damage to the car could be litigated. *Id.* at 299.

20. *Compare* Sherman v. Pearson, 673 N.E.2d 643 (Ohio Ct. App. 1996) (barring tenant's suit against landlord for personal injury on the ground that claims should have been raised as compulsory counterclaims in prior eviction proceeding in which landlord joined claim for back rent), *with* Haney v. Roberts, 720 N.E.2d 101 (Ohio Ct. App. 1998) (holding that tenant's claims against landlord not barred by prior eviction suit where landlord did not join action for rent). *See generally,* Kimberly O'Leary, *The Inadvisability of Applying Preclusive Doctrines to Summary Evictions*, 30 U. TOL. L. REV. 49 (1998) (critiquing Ohio courts' approach to counterclaims within the summary eviction).

21. *See* O'Leary, *supra* note 20, at 58 (discussing difficulties associated with applying preclusive doctrines to counterclaims within the summary eviction).

may assert counterclaims for economic damages arising under the state's Residential Landlord and Tenant Act, but they may not assert tort claims for mental distress arising from the same facts.[22]

Despite the problems that restrictions on time and triable issues may pose for tenants, those restrictions are the basis for the view that the summary eviction proceeding is a convenient, safe, and relatively speedy alternative to self-help.[23] Indeed, the *Restatement* takes the position that unless self-help is expressly preserved by statute, remedies available through a summary proceeding are the sole remedies available to a landlord to regain possession of the premises.[24] Likewise, the *Uniform Residential Landlord Tenant Act* provides that a landlord may regain possession of a dwelling only by court order or when the "tenant has abandoned or surrendered the premises."[25]

Some scholars have questioned the underlying fairness of the proceedings and have suggested alternatives to keep pace with the changes in the substantive law.[26] But in large measure, there has

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22. *See* Ficker v. Diefenbach, 578 P.2d 467, 470 (Or. Ct. App. 1978); *see also* Mead, Samuel & Co. v. Dyar, 622 P.2d 512, 516 (Ariz. Ct. App. 1980) (counterclaims must arise under rental agreement or under residential tenant statute). *See generally* SCHOSHINSKI, *supra* note 16, § 6:17, at 422 & n.5.

23. *See* MODEL RESIDENTIAL LANDLORD-TENANT CODE, Art. III, part 2 (Tentative Draft 1969). Some apartment industry representatives would argue that the process is not efficient enough. *See, e.g.*, CAL. APARTMENT LAW INFO. FOUND., UNLAWFUL DETAINER STUDY 5 (1991) (expressing landlords' perception of "increasingly lengthy and complicated eviction process"); *see also* Randy Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 850-58 (1994) (suggesting reforms needed to protect the interests of "small landlords").

24. RESTATEMENT (SECOND) OF PROP.: 2 LANDLORD & TENANT § 14.2(2) (1977). While most courts have not gone as far as the Restatement, they have nevertheless continued to restrict self-help in favor of summary proceedings. *E.g.*, Helgesen v. City of Fort Atkinson, 291 N.W.2d 660 (1980) (landlord's actions in sending armed security guard to evict tenant without legal process were "sufficient to arouse terror or alarm" and although they did not result in violence they nevertheless constituted forcible, not peaceable, entry). Among the states abrogating self-help evictions by statute are Alaska, ALASKA STAT. § 09.45.060 (2006); Montana, MONT. CODE ANN. § 70-24-428 (2006); New Mexico, N.M. STAT. ANN. § 47-8-36 (Michie 1999); North Carolina, N.C. GEN. STAT. § 42-25.6 (2005). Numerous courts have interpreted state statutes to be the sole remedy for landlords as well. *E.g.*, Mendes v. Johnson, 389 A.2d 781 (D.C. 1978) (holding that availability of summary proceeding abrogated landlord's common law right of self-help); Stanley v. Moore, 454 S.E.2d 225 (N.C. 1995) (holding that statutory summary ejectment proceeding was sole remedy available to dispossess tenants). *But see* Day v. Lacchia, 437 N.W.2d 400 (Mich. Ct. App. 1989) (seller of land under land contract may engage in self-help for peaceable repossession of vacant land).

25. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103(d)(3) (1972).

26. *See, e.g.*, James H. Backman, *The Tenant as a Consumer? A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 42 (1980) (suggesting alternative dispute resolution);

been little change to the proceeding itself.[27] Indeed, in the few jurisdictions where alternative procedures for resolving landlord-tenant disputes have been made available, their effectiveness has been criticized.[28] The stories of Teresa Marshall and Maria, described more fully below, provide evidence that many of the obstacles to effective exercise of tenants' rights observed in Baltimore and Chicago housing courts are not confined to those areas.

II. CHALLENGES FOR TENANTS FACING EVICTION

A. Teresa Marshall's Story

Teresa Marshall received a notice to vacate after a shooting took place in her federally subsidized apartment. She wasn't the shooter, nor was she the victim. She was merely a bystander after a dispute among friends turned ugly.

The trial court awarded possession to the landlord, giving her fourteen days to move before a writ of possession would issue. Seven days after the judgment for the landlord, she filed papers with the court indicating her intent to appeal although she did not file the $8000 supersedeas bond the trial judge had imposed to suspend enforcement of the judgment. Then she moved out. About four months later, while the case was pending on appeal, her lease expired, resulting in the appellate court's determination

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Richard Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385, 1387 (1979) (suggesting that the 19th-century model for equitable relief might protect tenants rights during eviction proceedings); Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 527 (1991) (arguing that tenants facing eviction have a constitutional right to counsel); O'Leary, *supra* note 20, at 91 (advocating changes to preclusive policies in summary evictions); Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 557 (1988) (suggesting additional arguments to support the establishment of a right to counsel). Some of these alternatives will be discussed *infra* Part IV.

27. *See* Chused, *supra* note 26, at 1396 (noting that efforts to reform procedures in the 19th and 20th centuries did not disturb summary proceedings for eviction); *see also* Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 536 (1982) (commenting that "the very basis of traditional summary process law has been undermined"); Stephen Kirschbaum, *Prosecuting and Defending Forcible Entry and Detainer Actions*, J. KAN. B. ASS'N, Sept. 1996, at 20 (noting that substantive law had changed "dramatically" during the previous thirty years with little change to procedural requirements under stated FED statute).

28. *See, e.g.*, Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 86 (1996) (critiquing the mediation model used in Boston Housing Court); *see also* Barbara Bezdek, *supra* note 10, at 540 (analyzing the Baltimore housing court).

that her appeal was moot, leaving the trial court judgment in place.

On appeal to the Texas Supreme Court, Teresa's lawyer argued that even if the appeal was moot, the court should nevertheless consider the merits because of the severe, adverse, collateral consequences that could result from a judgment of possession for the landlord, not the least of which was the potential five-year loss of federal housing benefits.[29] As a preliminary matter, the court first decided that Teresa's failure to post a supersedeas bond in the amount of $8000 did not destroy her ability to perfect her appeal of the underlying judgment. However, the court also found that once Teresa's lease expired, any right she may have had to continuing possession also expired. And because possession was the sole issue to be decided in the eviction, the Texas Supreme Court held the appeal was moot. Although the court was sympathetic to Teresa and her lawyer, and vacated the underlying judgment, it nevertheless denied her appeal on the merits. The Texas Supreme Court also rejected the collateral consequence argument, reasoning that the record — developed in the summary proceeding in justice court and through a trial de novo in a county court — did not sufficiently contain evidence of this possibility.

B. Collateral Consequences of Eviction for Tenants Receiving Federal Subsidies

The Texas Supreme Court's decision in Teresa's case demonstrates how both the restrictive time limits and narrow scope of the proceeding can limit the tenant's exercise of rights within that process. First, because most residential leases are short-term — six or twelve months[30] — a residential lease will almost always expire before final exhaustion of appeals in litigation relating to the lease, foreclosing the tenant from litigating the underlying issues.

Though Teresa's trial necessarily occurred no more than ten days from the date she was served with process,[31] her appeal lingered in the appellate courts for nearly four years,[32] long after

29. *Id.* at 785; *see also* 24 C.F.R. § 982.552(b)(2) (2006) (stating that the PHA must terminate a family from program assistance after eviction for "serious violation" of lease); 24 C.F.R. § 982.552(c)(1)(ii) (2006) (providing that a family may be terminated from program assistance if any family member has been evicted from federally assisted housing in previous five years).

30. Federal law requires twelve-month leases be used in the case of subsidized housing. *See* 42 U.S.C. § 1437d(l)(1) (2000).

31. See TEX. R. CIV. P. 739.

32. The shooting in Teresa's apartment occurred on July 2, 2002. Brief of the Petitioner-Appellant at 1, Marshall v. Housing Authority, 198 S.W.3d 782 (Tex. 2006) (No. 04-0147). The trial occurred in 2002 the county court entering final judgment on November 1, 2002. Petition for Review at Tab 3,

the expiration of most residential leases.[33] Technically, an unfavorable result in the eviction case does not prevent litigation of the wrongfulness of the eviction in a separate proceeding.[34] However, the practical obstacles, including filing fees and time, to filing a new lawsuit make the legal right almost illusory.

Second, the scope of the eviction proceeding is limited to questions related to "actual possession."[35] Thus, facts relating to an alleged breach of lease are the only ones that are relevant[36] and evidence of the negative consequences the tenant might suffer *after* an eviction occurs are irrelevant. By declining to consider what might happen to Teresa in the event of an eviction for purposes of determining mootness, the supreme court required Teresa to come forward with evidence that was outside the scope of the summary procedure.[37]

Had such evidence been permitted, it likely would have shown that because Teresa's lease was federally subsidized, it contained a lease provision required under federal law mandating eviction for drug-related criminal activity, or other criminal activity of the tenant or the tenant's guests "that threatens the

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Marshall v. Housing Authority, 198 S.W.3d 782 (2006) (No. 04-0147). More than a year later, on November 26, 2003, the court of appeals issued its decision. Petition for Review at Tab 2, *supra*. The Petition for Review was filed in the Texas Supreme Court on February 18, 2004, *id.*, and the case was finally decided nearly two years later on March 3, 2006, *Marshall*, 198 S.W.3d 782.

33. Leases of longer terms are common in the commercial sector. Indeed, one commonly used commercial lease form provides for an initial term of five years with the option to renew for another five-year term. *See* MARK A. SENN, COMMERCIAL REAL ESTATE LEASES: FORMS § 5.15 (2d ed. 1990) ("Tenant will have the option to extend the initial five (5) year term of this lease for an additional period of five (5) years (the "option period") on the same terms . . . ."); *see also,* AllBusiness.com, *What's the Ideal Length for a Commercial Lease?*, http://www.allbusiness.com/business-finance/leasing-office-leasing/879-1.html (last visited Nov. 19, 2006) (advising that leases for retail tenants may exceed twenty-five years, while office and warehouse lease terms average five to ten years).

34. *See* TEX. PROP. CODE ANN. § 24.008 (Vernon 2006) (providing that an eviction suit is not a bar to a suit for damages); Johnson v. Highland Hills Drive Apartments, 552 S.W.2d 493, 496 (Tex. Civ. App. 1977) *writ ref'd n.r.e.* 568 S.W.2d 661 (Tex. 1978) (holding tenant's suit for wrongful eviction not barred by previous judgment of possession for landlord).

35. TEX. R. CIV. P. 746.

36. FED. R. EVID. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

37. At least one court came to a contrary result. *See, e.g.*, Housing Authority v. Lamothe, 627 A.2d 367, 371 (Conn. 1993) (reversing judgment of possession for landlord because of "potentially prejudicial collateral consequences" and finding negative effect on tenant's eligibility for subsidy in the future sufficient to overcome landlord's claim of mootness).

health, safety or right to peaceful enjoyment of the premises by other tenants."[38] Designed to protect tenants in public and federally subsidized multi-family housing from their neighbors, the Supreme Court, in *HUD v. Rucker*,[39] upheld the validity of such clauses and the evictions of four "innocent" California tenants for unlawful behavior of nonresident relatives or visitors. Although these clauses have been criticized for their inflexible application,[40] eviction can be just the beginning: once an eviction under these circumstances occurs, federal law mandates that the tenant "shall not be eligible for federally assisted housing" for three to five years after the date of such eviction.[41] Because federal housing subsidies are designed to be assistance of the last resort, the loss of such benefits can be devastating for families securing alternative housing.[42] Accordingly, full and fair litigation of the underlying grounds for eviction is essential to the continued availability of affordable housing.

C. Other Collateral Consequences of Eviction

Suspension of housing benefits and the possibility of homelessness may be the most severe consequence for a tenant following an eviction. However, tenants in private housing may also suffer serious collateral consequences. Among them is the

38. *See* 42 U.S.C. § 1437(d)(l)(6) (2000) (requiring public housing agencies to use leases containing provisions prohibiting termination unless "serious violations," drug use, or other good cause exists, and clauses making certain criminal activity and illegal drug use grounds for eviction).

39. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (holding that public housing authorities had discretion to evict tenants for criminal activity about which they had no knowledge).

40. *See, e.g.*, Michael A. Cavanagh & M. Jason Williams, *Low-Income Grandparents as the Newest Draftees in the Government's War on Drugs: A Legal and Rhetorical Analysis of Department of Housing and Urban Development v. Rucker,* 10 GEO. J. ON POVERTY L. & POL'Y 157 (2003); Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-related Evictions from Public Housing*, 14 YALE J.L. & FEMINISIM 273 (2002); Nelson H. Mock, *Punishing the Innocent: No-fault Eviction of Public Housing Tenants for the Actions of Third Parties,* 76 TEX. L. REV. 1495 (1998); *see also* NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 2.6.2 (3d ed. 2004) (suggesting strategies for tenants' advocates seeking to avoid eviction or loss of benefits because of criminal conduct or drug use); Mary Spector, *Crossing the Threshold: Examining the Abatement of Public Nuisances Within the Home*, 31 CONN. L. REV. 547, 547-48 (1999) (critiquing the effects of nuisance theory on innocent occupants of residential premises).

41. 42 U.S.C. § 13661(a) (2000); *see also* 24 C.F.R. § 982.552(b)(2) (2006) ("The PHA must terminate program assistance for a family evited from housing assisted under the program for serious violation of the lease."); 24 C.F.R. § 982.552(c)(1)(ii) (2006) ("The PHA may at any time deny program assistance for an applicant . . . [i]f any member of the family has been evicted from federally assisted housing in the last five years.").

42. NATIONAL HOUSING LAW PROJECT, *supra* note 40, at 1/13.

reporting of information relating to eviction proceedings in the context of a consumer report.[43] A report containing negative information not only can make securing replacement housing difficult, but also can adversely affect the tenant's ability to secure employment, insurance, or other business opportunities.[44] Consumer reports used for the purpose of determining eligibility for rental housing are widely used by landlords in connection with the selection of tenants[45] and may contain information relating to the timeliness of the tenant's rental history as well as the tenant's prior involvement in eviction proceedings.[46] For example, a consumer reporting agency[47] may routinely report that tenants are "not adjudicated as the prevailing party" unless they obtain a summary judgment in their favor or a judgment after trial.[48] Or, the agency may fail to report the outcome of the actions, even in cases that were voluntarily dismissed by the landlords.[49] Because landlords generally are free to use reports of a prior eviction to avoid selection of tenants with poor rental histories or costs

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43. *See* 15 U.S.C. 1681a(d)(1) (2000). "Consumer report" is defined as:

> [A]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used . . . as a factor in establishing . . . eligibility for credit or insurance . . . [or] employment purposes.

Id.

44. *See, e.g.,* Feldman v. Comprehensive Info. Servs., Inc., No. X01CV010170630S, 2003 WL 22413484, at *6 (Conn. Super. Ct., Oct. 6, 2003) (denying summary judgment for defendant on plaintiff's claims that misleading reports of criminal background led to loss of employment); Reynolds v. Hartford Fin. Servs. Group, Inc., 435 F.3d 1081, 1100-01 (9th Cir. 2006), *cert. granted,* GEICO Gen. Ins. Co. v. Edo, 127 S. Ct. 36 (2006) (holding that consumers were entitled to notice of adverse action by insurers on basis of consumer reports at time of initial placement of insurance).

45. *See* Wilson v. Rental Research Serv., Inc., 165 F.3d 642, 643 (8th Cir. 1999), *vacated and reh'g en banc granted,* 191 F.3d 911 (8th Cir. 1999), *aff'd en banc*, 206 F.3d 810 (8th Cir. 2000) (noting that in Minnesota alone, one such service has subscribers owning more than 200,000 rental units); Conley v. TRW Credit Data, 381 F.Supp. 473, 474 (N.D. Ill. 1974) (holding wife entitled to cause of action against agency for erroneous report of husband's rental history in connection with leasing of apartment).

46. *See Wilson,* 165 F.3d at 643; *see also* Cotto v. Jenney, 721 F.Supp. 5, 6 (D. Mass. 1989) (explaining that landlords use these agencies to evaluate prospective tenants).

47. *See, e.g.*, 15 U.S.C. § 1681(a)(f) (2000) (defining "consumer reporting agency" as "any person which . . . regularly engages in whole or in part in the practice of assembling or obtaining consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.").

48. Cisneros v. U.D. Registry, Inc., 46 Cal. Rptr. 2d 233, 239 (2d Dist. 1995).

49. *Id.*

associated with evictions,[50] the integrity of the summary eviction proceeding is essential.

As Teresa's story illustrates some of the challenges to tenants facing eviction in summary proceedings, Maria's story highlights challenges arising from another feature of the summary eviction proceeding: its exception.

III. CHALLENGES FACING TENANTS OUTSIDE OF THE EVICTION PROCESS

A. Maria's Story

Maria's form lease — six legal-sized pages front and back — required her to give thirty days written notice to the landlord if she planned to move out at the end of the term. Otherwise, the terms of the lease would remain in force on a month to month basis.

In early May, prior to the expiration of Maria's lease, she went into the manager's office to obtain a "move-out" form the management provided. She signed and dated the form, indicating her intent to move out when her lease term expired — May 31. On May 17, the manager informed Maria that her check for the May rent had been returned for insufficient funds and they agreed that the May rent could be paid upon move-out.

Over the Memorial Day weekend, Maria and her three children began to move their belongings to their new home in a nearby suburb. Leaving the big pieces for last, Maria hired a moving company to remove them on May 27, four days before the expiration of the lease, leaving her plenty of time to clean the apartment before returning the key. However, when she went back to the apartment on May 27 to meet the movers, her key didn't work. When she confronted one of the managers, she was told that because the last month's rent was unpaid, the landlord believed she had abandoned the premises and disposed of the furniture and other items remaining in the apartment. When

50. One screening agency reports that a landlord's costs associated with an eviction can amount to $1500 per eviction. Such costs may also include lost rental income suffered during the time that may elapse between filing a complaint and the execution of the judgment. For example, during 1990, in the District of Columbia, the average time between filing the complaint and executing the eviction was approximately four months. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO THE VICE-CHAIRMAN, COMMITTEE ON THE DISTRICT OF COLUMBIA, HOUSE OF REPRESENTATIVES, INFORMATION ON COURT-ORDERED TENANT EVICTIONS 4 (1990).

A 1991 study conducted by the California Apartment Law Information Foundation estimated "conservatively" that California landlords lost nearly $4.5 million each day that elapsed between the date of filing suit and final judicial disposition of unlawful detainer suits. CAL. APARTMENT LAW INFO. FOUND., *supra* note 23, at 20.

Maria reminded the manager of her intended move-out date and the agreement she had reached with the assistant manager, a second agreement was reached: they would call it even by using Maria's security deposit to cover the last month's rent in exchange for Maria waiving her right to seek remedies for the unlawful lockout. Neither this agreement, nor Maria's original agreement with the assistant manager, was reduced to writing.

All seemed to be fine, until a couple of months later, when Maria started receiving written notices that she owed the landlord more than $2000. Knowing that she had come to an agreement with the manager, she ignored the notices. Then a debt collection firm started harassing her. Maria eventually learned that the "debt" attempting to be collected arose from the apartment complex's charge of an "early termination fee" that the lease identified as liquidated damages owed upon breach of the lease, moving charges attributed to the moving of Maria's furniture out of the apartment, and cleaning and re-letting fees. Maria disputed the debt and requested the debt collection firm cease all contact with her, but the firm ignored her request.

Eventually, Maria filed suit against the apartment complex and its manager for the unlawful lockout, breach of contract, and fraud, and against the collection agency for violations of state and federal debt collection laws as well as deceptive trade practices. Two and a half years later, all claims were resolved.

B. The Exception Swallows the Rule

In many states, "abandonment" of the premises permits a landlord to obtain possession of a unit without court process.[51] Some states provide a statutory definition of the term, such as "[t]otal absence from the premises without notice to landlord for one full rental period or thirty days, whichever is less";[52] others,

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51. *See, e.g.*, UNIF. RESIDENTIAL LANDLORD & TENANT ACT §§ 4.203(c), 4.207 (1972); *accord* ALASKA STAT. §§ 34.03.230(b), 34.03.280 (2006); ARIZ. REV. STAT. ANN. § 33-1370 (2000); CONN. GEN. STAT. § 47a-11b(b)-(c) (2006); FLA. STAT. § 83.59(3)(c) (2004); IOWA CODE §§ 562A.29(3), 562A.33 (2005); KAN. STAT. ANN. §§ 58-2565(b)-(c), -2569 (2005); KY. REV. STAT. ANN. § 383.690 (West 2005); MICH. COMP. LAWS § 600.2918(3)(c) (2000); MONT. CODE ANN. §§ 70-24-426, -428 (2005); NEB. REV. STAT. § 76-1432 (2004); N.M. STAT. ANN. §§ 47-8-34(c), 47-8-36(A) (2001); OR. REV. STAT. §§ 90.410(c), 90.435 (2003); R.I. GEN. LAWS §§ 34-18-40, 34-18-44 (1995); S.C. CODE ANN. §§ 27-40-730(a)-(c), 27-40-760 (2005); TENN. CODE ANN. § 66-28-405 (2004); VA. CODE ANN. § 55-248.33 (2003).

While the Texas statute does not explicitly provide for *repossession* upon abandonment without court process, it does allow a landlord to "intentionally prevent a tenant from entering the leased premises [where] the exclusion results from . . . removing the contents or premises abandoned by a tenant." TEX. PROP. CODE ANN. § 92.0081(b)(2) (Vernon 2006).

52. NEB. REV. STAT. § 76-1432(3) (2004); *accord* ALASKA STAT. §§ 34.03.360(1), 34.03.280 (2006); ARIZ. REV. STAT. ANN. § 33-1370(H) (2001);

such as Texas, do not.[53]

But even in those states that have a broad — and more subjective — statutory definition of "abandonment," common-law definitions may still apply, as in, for example, Connecticut, Kansas, and Nebraska.[54] An unreported Connecticut case indicated that the statutory element of a tenant's intent not to return "may be proven either under the broader common law standards or by resort to the indicia specified in the statute."[55] Therefore, a landlord may be able to infer that the tenant has abandoned by circumstances *not* found in the statute.[56] Likewise, while the Nebraska statute states that "total absence from the premises without notice to landlord for one full rental period or thirty days, whichever is less, shall constitute abandonment,"[57] the Nebraska Supreme Court held that abandonment may *also* be "circumstantially evidenced by conduct inconsistent with continued control over the leased premises."[58] The Kansas statute assumes abandonment has occurred where "the tenant is 10 days in default for nonpayment of rent and has removed a substantial portion of such tenant's belongings from the dwelling unit."[59] But the state supreme court stated that this merely "provides some insight" into what constitutes abandonment, and that the well-

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CONN. GEN. STAT. § 47a-11b(a) (2006); FLA. STAT. § 83.59(3)(c) (2004); KAN. STAT. ANN. § 58-2565(b) (2005); N.M. STAT. ANN. § 47-8-36(A) (2001); R.I. GEN. LAWS § 34-18-11(1) (2005); TENN. CODE ANN. § 66-28-405(a)-(b)(1) (2004); UTAH CODE ANN. § 78-36-12.3(3) (2003). *Cf.* MICH. COMP. LAWS § 600.2918(3)(c) (2000) (treating a good faith belief the tenant had abandoned as one of three elements, along with reason to believe tenant intends to not return and current rent is not paid, as a defense to liability for interfering with a tenant's possession of premises); S.C. CODE ANN. § 27-40-730(a) ("The unexplained absence of a tenant from a dwelling unit for a period of fifteen days after default in the payment of rent must be construed as abandonment of the dwelling unit."); VA. CODE ANN. § 55-248.33 (2003) (providing a rebuttable presumption of abandonment after seven days of notice by landlord requiring tenant to give notice of intent to remain in occupancy).

53. *See* TEX. PROP. CODE ANN. § 92.0081(b)(2) (Vernon 2006); *accord* UNIF. RESIDENTIAL LANDLORD AND TENANT ACT §§ 4.203(c), 4.207 (1972); IOWA CODE §§ 562A.29(3), 562A.33; KY. REV. STAT. ANN. § 383.690; MICH. COMP. LAWS § 600.2918(3)(c); MONT. CODE ANN. §§ 70-24-426, -428; S.C. CODE ANN. §§ 27-40-730(a)-(c), -760; VA. CODE ANN. § 55-248.33.

54. *See* Forbotnik v. Kalinowski, CVH 5967, H-1186, 2000 Conn. Super. LEXIS 363, at *19 (Conn. Super. Ct., Jan. 11, 2000); Gnandt v. DaCruz, NO. CVBR-9403-02236, 1994 WL 197699, at *2 (Conn. Super. Ct., April 27, 1994); Mason v. Schumacher, 439 N.W.2d 61, 67-69 (Neb. 1989); Davis v. Odell, 729 P.2d 1117, 1123-25 (Kan. 1986).

55. *Gnandt*, 1994 WL 197699 at *2; *see also Forbotnik*, 2000 Conn. Super. LEXIS 363 at *19.

56. *See Gnandt*, 1994 WL 197699 at *2.

57. NEB. REV. STAT. ANN. § 76-1432(3).

58. *Mason*, 439 N.W.2d at 68-69.

59. KAN. STAT. ANN. § 58-2565(b).

established common-law definition of abandonment "logically should be applied."[60]

"Abandonment" was, however, defined in Maria's six-page lease as occurring when: (1) everybody appears to have moved out in our reasonable judgment; (2) clothes, furniture and personal belongings are substantially removed from the apartment; and (3) no one has been in the apartment for 5 consecutive days while the rent is due and unpaid.

By leaving the definition as a matter of contract, statutes effectively offer an end-run around the summary eviction proceeding by permitting the landlord to obtain possession without resort to legal process by claiming that a tenant has abandoned the premises. Although Maria had reached not one, but two agreements with management regarding the termination of her tenancy, neither agreement was in writing, a requirement for an enforceable modification of the lease terms. Accordingly, the terms of the written lease supplied by the landlord controlled, enabling the landlord to determine, unilaterally, that Maria abandoned the premises and to regain possession without resort to court process.

C. Post-tenancy Effects of Abandonment

Once the landlord determined that Maria had breached the lease by abandonment, the landlord could, in addition to regaining possession, seek other contractual remedies for breach. Such remedies included a termination fee amounting to approximately seventy-five percent of the rental amount, retention of the security deposit, damages for removal of property, and the costs of cleaning.

When the landlord placed a dollar amount on the remedies he maintained he was entitled to receive, reducing his remedies to an alleged "debt," and furnished it to a consumer reporting agency, he unleashed a ripple effect with a devastating potential to adversely affect Maria's ability to seek replacement housing. Morever, while federal law requires most financial institutions to notify consumers when it furnishes such information to a consumer reporting agency,[61] no such requirement exists for other creditors, including landlords. Thus, for many tenants, it may be many months before they become aware that their credit reports contain adverse information.

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60. *Davis*, 729 P.2d at 1123.

61. *See* 15 U.S.C. § 1681s-2(a)(7)(A)(I) (2000) (requiring financial institutions that extend credit and regularly furnish information to consumer reporting agencies to provide notice, in writing, to the consumer of furnishing negative information).

As if the adverse effects resulting from the reporting of negative information were not enough,[62] the landlord also referred the alleged debt resulting from Maria's so-called abandonment for collection. For Maria, that meant repeated and harassing phone calls, precisely the kinds of abusive practices Congress intended to eliminate with the Federal Debt Collection Practices Act.[63]

Maria, unlike Teresa, eventually resolved the claims arising from her failed landlord-tenant relationship. Yet, doing so required legal counsel and the commencement of litigation against her former landlord as well as the debt collection agency. It also required time: final resolution did not come until two and a half years after the expiration of her lease. During that period, Maria lived with the stress and uncertainty that accompanies pending litigation, as well as the stigma of an adverse credit report and the indignity associated with the harassing conduct of debt collection activities.

IV. CONCLUDING THOUGHTS

The stories of Teresa and Maria illustrate some of the obstacles facing tenants long after the promulgation of comprehensive codes designed to protect their rights. Indeed, some of the obstacles arise from the complex nature of statutes that embody those rights and the procedures that exist for asserting them.

What is the tenant or advocate to do? Experts have suggested a variety of tools and options to support tenants. They include a right to legal counsel in such cases, sometimes called "housing Gideon,"[64] effective tenant and judicial education, as well as legislation and advocacy to account for the diversity of the tenant population.

Housing Gideon: In August 2006, the American Bar Association joined tenants' and civil rights advocates to urge federal, state and territorial authorities to provide legal counsel as "a matter of right at public expense" in cases involving "shelter, sustenance, safety, health or child custody."[65] By doing so, the ABA put its weight behind what tenants' advocates have argued for years: access to justice can only become a reality with effective legal representation.

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62. *See supra* Part II.C.

63. *See* 15 U.S.C. § 1692(e) (2000) (stating the purpose of the Act is "to eliminate abusive debt collection practices by debt collectors").

64. *See* Rachel Kleinman, Comment, *Housing Gideon: the Right to Counsel in Eviction Cases,* 31 FORDHAM URB. L.J. 1507 (2004); Karas, *supra note 26*; Sherer, *supra note 26*.

65. AMERICAN BAR ASSOCIATION, TASK FORCE ON ACCESS TO CIVIL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 1 (2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

Tenant education: In many communities around the country, tenants' unions or other forms of tenants' advocacy groups provide regular, free advice to tenants in need.[66] Yet, there are many more tenants than there are advocates and effective education is time-consuming, expensive, and logistically difficult. Indeed, in some, mostly urban areas, such groups have been effective in securing more substantial rights for tenants than may be otherwise available to tenants in other parts of the state.[67] In Chicago, for example, landlords must provide new and renewing tenants with a written summary of their rights, and failure to do so is grounds for termination of the lease.[68]

Judicial education: In the predatory lending context, law school legal clinics have been effective in working with local bar associations to educate judges about predatory lending and the fact that defenses other than payment may exist in a judicial foreclosure action.[69] Some of their strategies can translate well into the landlord-tenant area as tenants' advocates work with local bar associations and the courts to educate housing court judges about important realities facing tenants in their courts.[70]

Accounting for diversity of tenant population: Another important challenge for tenants and their advocates is accounting for the diversity of tenant population (e.g., language, culture,

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66. The Illinois Tenants Union is one such organization. First organized in 1976, it serves approximately 8000 tenants in the metropolitan Chicago area. *See* Illinois Tenants Union, About Us, http://www.tenant.org/about.htm (last visited Apr. 8, 2007) (noting the number of service calls received each year). In Dallas, the Housing Crisis Center, founded in 1978 as the Dallas Tenants Union, provides a range of services to tenants and their families. With a staff of twenty and more than 250 volunteers, it is contacted by more than 20,000 people a year. *See* Housing Crisis Center: Making our Community a Better Home for Everyone, http://www.hccdallas.org/index1.html (last visited Apr. 8, 2007).

67. *See* Illinois Tenants Union, *supra note 66*. *Compare* CHICAGO, ILL., RESIDENTIAL LANDLORD & TENANT ORDINANCE §§ 5-12-010 to -200 (1986) (specifying detailed regulations for certain residential dwelling units regarding landlord and tenant responsibilities and remedies), *with* 735 ILL. COMP. STAT. 5/9-101 to -218 (2004) (providing some, but far fewer, regulations regarding the landlord-tenant relationship) *and* 765 ILL. COMP. STAT. 705/0.01 to /5, 710/0.01 to /2, 715/0.01 to /3 (2004) (providing additional regulations regarding the landlord-tenant relationship concerning eviction, security deposits, and liability exemptions).

68. CHICAGO, ILL., RESIDENTIAL LANDLORD & TENANT ORDINANCE § 5-12-170.

69. *See* Allyn M. O'Connor, *Business Law Pro Bono: Surveying the Opportunities to Volunteer*, 10 DIALOGUE 21 (Summer 2006), *available at* http://www.abanet.org/legalservices/dialogue/downloads/dialogue2006sum.pdf (last visited Apr. 8, 2007).

70. A simple recommendation made by The Lawyers' Committee for Better Housing suggests and urges housing court judges to take time to explain the process to tenants and "rigorously" adhere to procedural requirements. *See* LAWYERS' COMMITTEE FOR BETTER HOUSING, *supra* note 12, at 5.

gender, etc.). Calls for simplicity of court and contract forms in plain English, plain Spanish or other languages commonly used in the jurisdiction are not new.[71] Although there is much resistance in the current political climate,[72] some small strides are being made as legislatures begin to recognize that not all tenants are alike. For example, a recent amendment in Texas permits victims of domestic violence to be released from the obligations of a lease prior to the lease term upon the production of a temporary injunction or valid protective order.[73] Similarly, federal housing law protects victims of domestic violence from eviction when members of their households engage in unlawful conduct.[74]

These are just a few of the approaches that tenants and their advocates have taken. They can be complex, requiring careful attention to court rules, statutes, and regulations and there are not enough lawyers to meet demand. The procedures can be time-consuming, and tenants want immediate relief; they want to go on with their lives, to rent another apartment, stop the debt collectors, and receive uninterrupted benefits. Advocates for tenants fortunate enough to have representation must be mindful not only of the terms of the landlord-tenant relationship, but also of the procedures for deciding its continuity and the collateral consequences that may linger long after the relationship is over.

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71. Outside the landlord-tenant context, it is argued that plain language court forms may be a matter of due process. Todd b. Hilsee et al., *Do You Really Want Me To Know My Rights? The Ethics Behind Due Process in Class Action Notice Is More Than Just Plain Language: A Desire to Actually Inform*, 18 GEO. J. LEGAL ETHICS 1359, 1360 (2005) (discussing "the communications underpinnings of due process in class action notice").

72. *See* Stephanie Sandoval, *Groups Decry FB Law. Apartment Association, Others Weigh Action; Some Migrants Fearful*, DALLAS MORNING NEWS, Nov. 15, 2006, at 1A (reporting that suburban Dallas community passed two ordinances, one English-only, the other requiring landlords of multi-family housing to require prospective tenants to provide proof of citizenship or legal residency before leasing an apartment).

73. *See* TEX. PROP. CODE ANN. § 92.016(b)-(g) (Vernon 2006); *see also* 42 U.S.C. 1437d(l)(5) (protecting victims of domestic violence against eviction on grounds of serious criminal activity in the household).

74. *See* 42 U.S.C. § 1437d(l)(6)(A) (providing exception to mandatory eviction where tenant is victim of domestic violence).