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THE HANDS OF THE STATE: THE FAILURE TO VACATE STATUTE AND RESIDENTIAL TENANTS' RIGHTS IN ARKANSAS

Lynn Foster[*]

"A healthy society depends on fair and balanced laws."[1]

Two recent independent reports have revealed that Arkansas's residential landlord-tenant law is significantly out of balance with that of other states and, moreover, is arguably unconstitutional in part. How did this come about, and why is Arkansas so different?

I. INTRODUCTION AND BACKGROUND

A lease is both a conveyance of a property interest and a contract. The tenant receives a leasehold in return for adhering to the lease covenants. Under common law, all of the parties' lease covenants (except the implied covenant of quiet enjoyment) were independent.[2] This meant that, in theory, if a tenant breached the covenant to pay rent, a landlord could not terminate the lease and eject the tenant, but instead had to sue in court to recover rent as it was due.[3] Similarly, if a landlord had covenanted to make repairs and

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1. NON-LEGISLATIVE COMMISSION FOR THE STUDY OF LANDLORD-TENANT LAWS REPORT (2012), *reprinted in* 35 U. ARK. LITTLE ROCK L. REV. 739 (2013) [hereinafter COMMISSION REPORT], *available at* http://www.arkansasjustice.org/sites/default/files/file%20attachments/Landlord-Tenant%20Commission%20Report.pdf (last visited Jul. 23, 2013).

2. *See generally* 4 THOMPSON ON REAL PROPERTY § 39.02(a) (2d Thomas ed. 2004); Tom G. Guerts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L.J. 356, 356; Thomas M. Quinn & Earl Phillips, *Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future,* 38 FORDHAM L. REV. 225, 229 n.6 (1969–70).

3. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 6.10 (3d ed. 2000); Quinn & Phillips, *supra* note 2, at 228 n.4. Landlords also used self-help eviction, but

did not, the tenant could not terminate the lease, but had to continue to pay rent and instead enforce the repair covenant in court.[4]

As a result of the unwieldiness of the independent covenants, in the nineteenth century states enacted "summary eviction" statutes, allowing landlords to evict tenants who failed to pay rent.[5] Essentially these statutes are an exception to the common-law rule that parties cannot rescind a lease.[6] Further, in the twentieth century, states enacted or judicially adopted implied warranties of habitability, allowing residential tenants to withhold rent and even terminate leases if landlords breached their new, implied duty to provide and maintain fit and habitable premises.[7] Thus, by the end of the twentieth century, a rough symmetry in landlord-tenant law once again prevailed. Landlords could terminate leases and evict tenants who breached the most important lease covenant from a landlord's point of view, and residential tenants who did not have safe and sanitary premises due to a landlord's action or inaction could terminate their leases or withhold rent, to pay for either small repairs or essential services, and remain on the premises.

Arkansas followed the national trend with respect to summary eviction, enacting its first unlawful detainer statute in 1875.[8] In 1901, however, by the slimmest of majorities in the Senate, the Arkansas General Assembly enacted an additional "criminal eviction" statute[9] that remains on the books today and results in thousands of cases each year in Arkansas.[10] No other state has such a statute; indeed, Arkansas is the only state that criminalizes a tenant's failure to pay rent while occupying the premises during the lease term. The

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their rights to that remedy were slowly restricted until today it is probable that most jurisdictions do not allow self-help by landlords against residential tenants. STOEBUCK & WHITMAN § 6.80; 5 THOMPSON ON REAL PROPERTY, *supra* note 2, § 40.09(b)(1) (2d Thomas ed. 2007).

4. 4 THOMPSON ON REAL PROPERTY, *supra* note 2, § 39.02(a); Quinn & Phillips, *supra* note 2, at 233–34.

5. Quinn & Phillips, *supra* note 2, at 228 n.4. The authors note that most statutes allow a landlord to terminate a lease for nonpayment even if the lease does not contain a clause compelling termination if the rent is not paid. *Id.*; Arkansas's statute is of this type. ARK. CODE ANN. § 18-60-304 (Repl. 2003 & Supp. 2013).

6. STOEBUCK & WHITMAN, *supra* note 3, § 6.79.

7. See *infra* notes 217 through 220 for a list of state statutes and cases adopting the implied warranty of habitability.

8. ARK. CODE ANN. § 18-60-301(a) (Repl. 2003). The current unlawful detainer statute was enacted in 1981. *Id.*

9. ARK. CODE ANN. § 18-16-101 (Repl. 2003) (referred to throughout this article as the "failure to vacate" statute). See *infra* text accompanying notes 30 through 35 for an account of the Act's passage.

10. See *infra* Appendix A for a table showing a breakdown of the enforcement of the failure to vacate statute by district court.

statute, believed by Professor Carol Goforth and others to be unconstitutional,[11] is enforced unevenly—and in some places not at all—across the state.

Arkansas further differs from the rest of the states in that it has no implied warranty of habitability. Although there have been repeated attempts to introduce the warranty, either by arguing for it in court or introducing it in bill form in the legislature, such attempts have been repeatedly rebuffed by both the courts and the legislature.

Two unrelated developments occurred in 2012 and 2013 that focused attention on Arkansas residential landlord-tenant law. The first of these was the report of the Non-Legislative Commission on the Study of Landlord-Tenant Law. The Commission was authorized by statute in 2011.[12] Its members were appointed by the Governor, legislators, the two Arkansas law schools, the Arkansas Bar Association, and various pro-landlord entities.[13] Its charge was to "study, review, and report on the landlord-tenant laws in Arkansas and other states."[14] After meeting regularly over an eight-month period in 2012, the Commission issued its 36-page report at the end of the year. The report contrasted Arkansas law with that of other states in several different areas of residential landlord-tenant law and concluded that Arkansas law was significantly out of balance with that of other states.[15] Of the thirteen unanimous recommendations,[16] those relevant here were to repeal

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11. *See generally*, Carol R. Goforth, *Arkansas Code § 18-16-101: A Challenge to the Constitutionality and Desirability of Arkansas' Criminal Eviction Statute*, 2003 ARK. L. NOTES 21 (2003); NORTHEASTERN UNIVERSITY SCHOOL OF LAW LEGAL SKILLS IN SOCIAL CONTEXT SOCIAL JUSTICE PROGRAM, RENTERS BEWARE: HOSTILE LANDLORD-TENANT LAW IN ARKANSAS (March 2013) (unpublished manuscript) (on file with author). The 2001 amendments to the statute were briefly referenced in Amy J. Dunn, *Title 18 Survey of Legislation: 2001 General Assembly*, 24 U. ARK. LITTLE ROCK L. REV. 549, 553–54 (2002).

12. To Create the Non-Legislative Commission for the Study of Landlord-Tenant Laws; and for Other Purposes, 2011-5 Ark. Adv. Legis. Serv. 613 (LexisNexis).

13. The Arkansas Realtors' Association, Arkansas Bankers' Association, Landlords' Association of Arkansas, and Arkansas Affordable Housing Association each appointed one Commission member. The author was the Vice Chair of the Commission and the drafter of the report.

14. 2011-5 Ark. Adv. Legis. Serv. 613 (LexisNexis), *supra* note 12.

15. COMMISSION REPORT, *supra* note 1, at 2.

16. Interestingly, despite the frank, candid discussions throughout the eight months that the Commission met, the circulation of every draft to all Commissioners, the unanimous votes of all Commissioners for every recommendation (proposals garnering less than unanimous agreement were not included as recommendations), and unanimous approval of the final draft after numerous changes at the request of several Commission members (emails on file with the author), after the approval and delivery of the final report and unbeknownst to the rest of the Commissioners, the five Commissioners who represented landlord and banking groups signed their own two-page letter of "clarification" two weeks later and presented it to the Governor, Speaker, and President Pro Tem of the Senate (letter on file with the author). This letter, however, is not a product of the Commission and its deliberations, as the final

the criminal failure to vacate statute after civil eviction procedures were reformed, and to enact a statutory implied warranty of habitability.[17]

The timing of the Commission's formation and report was too late for bill drafting prior to the 2013 legislative session. Nevertheless, in March, four bills (two of which were "shell bills"[18]) based on the Commission's work were introduced.[19] None made it out of their respective judiciary committee, not even reaching the stage of testimony before the committees, despite widespread media coverage of the Commission Report.[20] The second development was the Human Rights Watch investigation of the failure to vacate statute. The Human Rights Watch, a nonprofit, nongovernmental, international human rights organization, sent a researcher to Arkansas in 2012 who visited courts and interviewed landlords, tenants, attorneys, legal experts, and a judge as part of investigating the failure to vacate statute.[21]

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report is. In fact, it was written without the knowledge of the other five Commission members.

17. COMMISSION REPORT, *supra* note 1, at 3–5. Other Commission recommendations were to 1) streamline the unlawful detainer statute and allow landlords to initiate suit in district court; 2) repeal the "civil eviction statute," ARK. CODE ANN. §§ 18-17-701 through 707 and 901 through 913; 3) codify the already-existing law on landlord self-help evictions; 4) enact a statute prohibiting retaliatory eviction; 5) prohibit unconscionable lease provisions; 6) enact legislation prohibiting certain provisions in leases that unfairly limit tenants' rights; 7) amend statutes concerning landlords' access to premises; 8) provide remedies to tenants denied of possession of premises at the beginning of the lease term; 9) review unenacted sections of the Uniform Residential Landlord Tenant Act for applicability in Arkansas; 10) allow early termination of leases to endangered victims of domestic violence; and 11) add a protected category of sexual orientation to Arkansas's fair housing statute. *Id.* at 3–6. The commissioners were evenly divided as to whether to repeal Ark. Code Ann. section 18-16-110, which limits tort liability of landlords, and whether to amend the law with respect to security deposits, and thus made no recommendations as to those topics. *Id.* at 3–6, 25–26.

18. A shell bill contains "only a portion of the full bill or merely a short description of the bill." Typically, it is filed close to the deadline for introducing bills. ARKANSAS BUREAU OF LEGISLATIVE RESEARCH, LEGISLATIVE DRAFTING MANUAL 8 (2010).

19. House Bill 1740, a shell bill to reform landlord-tenant law and implement the findings of the Commission, was introduced on March 6. Senate Bills 947, 950, and 951 were introduced on March 11 and March 18. They would have enacted some of the recommendations of the Commission and created a legislative task force to carry on the work of the Commission and draft legislation.

20. *See, e.g.*, Arkansas Blog, *Commission Recommends Changes in Landlord-Tenant Law*, ARK. TIMES (Jan. 14, 2013), http://www.arktimes.com/ArkansasBlog/archives/2013/01/14/commission-recommends-changes-in-landlord-tenant-law (last visited Jul. 23, 2013); *Commission Says Landlord-Tenant Laws* "Out of Balance," THV11 (Jan. 14, 2013) http://www.thv11.com/news/local/story.aspx?storyid=243264 (visited Jul. 23, 2013); *There Oughta Be a Law: Renter Rights*, KATV, Feb. 22, 2013, updated Mar. 24, 2013, http://www.katv.com/story/21313099/there-oughta-be-a-law-renter-rights (last visited Jul. 23, 2013).

21. HUMAN RIGHTS WATCH, PAY THE RENT OR FACE ARREST: ABUSIVE IMPACTS OF ARKANSAS'S DRACONIAN EVICTIONS LAW 1 (2013), *available at* http://www.hrw.org/sites

The subsequent report, issued in 2013, criticized the statute for, among other reasons, 1) criminalizing tenants on the allegations of landlords without any independent investigation; 2) imposing fines, jail time, and criminal records on tenants; 3) denying tenants due process; and 4) turning prosecutors and city attorneys into "personal attorneys" of landlords.[22]

The report noted that unscrupulous landlords could file false affidavits with no consequences and use the failure to vacate statute to circumvent other statutes designed to protect tenants' rights, such as laws protecting tenants who are serving in the armed forces.[23] The report discussed the uneven enforcement of the statute across the state, ranging from courts that simply refuse to hear failure to vacate cases, to courts that order tenants to leave despite no statutory authority to do so, to courts that do not impose the harshest penalties of the statute, to courts that may jail tenants.[24]

The report contended that the statute violates the obligations of the United States under the International Covenant on Civil and Political Rights[25] in several different ways: 1) by interfering with the protection of the home through the risk of arbitrary eviction, 2) by the denying due process and abusing of criminal law, 3) by risking arbitrary detention, and 4) by risking imprisonment through failure to fulfill a contractual obligation.[26] These violations are cold comfort to tenants, however, because the United States Senate's consent to the Covenant was subject to its declaration that Articles 1 through 27, which includes the articles argued to be violated by Arkansas law, were not self-executing.[27] In other words, they cannot be grounds for litigation in United States courts without implementing legislation—which has not been enacted.[28]

This article will first discuss the history of the failure to vacate statute, its treatment by commentators and courts, and its current very uneven enforcement across Arkansas. The article concurs with Professor Goforth's

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/default/files/reports/us0113arkansas_reportcover_web.pdf (last visited July 23, 2012) [hereinafter PAY THE RENT].

22. *Id.* at 1–2.

23. *Id.* at 3.

24. *Id.* at 3–4.

25. The International Covenant on Civil and Political Rights is a multilateral treaty, adopted by the United Nations General Assembly in 1966, that went into force in 1976. Parties agree to respect individuals' civil and political rights, including among others the right to life, freedom from torture and slavery, freedom of religion, freedom of speech, freedom of assembly, electoral rights, and rights to due process and a fair trial. International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

26. PAY THE RENT, *supra* note 21, at 35–39.

27. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker,* 89 AM. J. INT'L L. 341, 347–48 (1995).

28. U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed., Apr. 2, 1992).

verdict of the unconstitutionality of the statute, argues additional grounds on which it is unconstitutional, and recommends its repeal. It also recommends amendment of either the unlawful detainer statute or the recently enacted "civil eviction" statute to improve summary eviction procedures, and recommends approval of district court jurisdiction over such procedures by the Arkansas Supreme Court.

Next, the article will briefly consider the current state of the implied warranty of habitability nationwide, review the attempts to introduce it here, propose a statutory implied warranty for Arkansas, and in the alternative of legislative adoption, argue for judicial adoption of a warranty by the Supreme Court.

II. THE FAILURE TO VACATE STATUTE—ARKANSAS'S "LOAN OF ITS HANDS" TO LANDLORDS[29]

A. History

The statute that is currently codified as section 18-16-101 of the Arkansas Code, Annotated, was enacted in 1901. Its sponsor was Senator Jacob King, from Stone County. The bill was not without controversy. It was referred out of the Senate Judiciary Committee with a "Do Not Pass" recommendation.[30] It passed the Senate by only one vote, 14 to 13,[31] although it passed more comfortably in the House, 48 to 27.[32] Governor Jeff Davis signed the act on April 24. No official legislative history is available, although the *Arkansas Gazette* printed remarks from the floor debate in the Senate.[33]

> Senator King (Jacob) spoke in favor of the bill. He said it simply sought to give relief to landlords who were unable to eject tenants who would not pay their rent.
>
> Senator Dowdy opposed the bill. He said it was entirely one-sided. In his judgment, all in favor of the landlord, and amounted to nothing more nor less than to give the landlord the right to throw his tenant in jail if he

29. "In the present case the state has simply lent her hands to landlords by enacting this 1901 statute." Duhon v. State, 299 Ark. 503, 513, 774 S.W.2d 830, 837 (1989) (Purtle, J., dissenting).

30. ARK. S. JOURNAL, 33d Gen. Assemb., Reg. Sess., at 77 (1901). At that time, legislative procedure differed from that of today, and a "Do Not Pass" recommendation would not kill a bill.

31. *Id.* at 181.

32. ARK. H. JOURNAL, 33d Gen. Assemb., Reg. Sess., at 398 (1901).

33. *South Carolina Dispensary Law - Similar Bill Introduced in the House; Thirty-Four New Bills In*, ARK. GAZETTE, Mar. 15, 1901, at 3.

> failed to pay the rent. He was opposed to criminal measures for settling matters already covered by civil statutes.
>
> Senator Short said the bill sought only to see that justice was done the landlord. The bill provided that if a tenant failed to carry out a contract, then the landlord was to give him ten days' notice to vacate, and if the tenant continued to hold possession after notice to vacate was served he would be subject to fine from $1 to $25 and $10 per day for every day so holding possession thereafter. He did not think the act would work a hardship upon the tenant, but it would make him do right and act honest.
>
> Senator Dowdy said a case might occur when the tenant actually had a right to continue on the premises. He might have complied with his contract which, in many cases, were verbal, and the landlord might insist that he had not so complied, serve notice on him to get out, and if he failed slap him in jail. If a poor man, to pay his fine and get back his liberty the best way he could.
>
> Senator Lawrence also opposed the bill. He said it was simple class legislation in favor of the landlord, no more, no less, and ought to be defeated.
>
> Senator Jacob King–The bill only provides for a fine and nothing is said about putting anybody in jail.
>
> Senator Lawrence–That is true, but we all know what is done to a poor man in this state who cannot pay his fine. He is sent to jail and compelled to work it out.
>
> Senator Kirby also opposed the bill. He thought the county was coming to a great pass when a man could be arrested and put in jail for debt. He could not see that the bill amounted to anything else. It gave the landlord absolute power over his tenant in many instances, and he thought the bill ought to be defeated.
>
> Senator Jacob King closed the debate. He said that the act was needed in the country as well as in the towns. It was intended to compel men to come up to their contracts and prevent dishonesty along that line. He thought it a good law and he hoped the senate would pass the bill.[34]

The reference to "working it out" by Senator Lawrence refers to the practice, endemic throughout the South during this period (and abolished in Arkansas in 1909), of convict leasing, whereby convicts were "leased" to private parties who would use them as virtual slaves in agricultural and in-

34. *Id.*

dustrial capacities.[35] Other than for that abolished practice, the same points could be argued against the statute today.

Time has effected some changes, however. Today, at least in Pulaski County, the county that hears the most failure to vacate suits each year, it is no longer "poor men" who are most harmed by the statute, but black women.[36] In 2012, 62% of failure to vacate affidavits filed in the Little Rock Criminal Court were against tenants who were black women.[37] In fact, women comprised 71% of all defendant tenants in Little Rock, and 57% in Springdale.[38] Also, today, instead of "working it out," criminal offenders may be victimized by the imposition of "legal financial obligations" that can have serious and lasting effects on their functioning in society.[39]

B. Other States—A Single Florida Precedent

As noted above, no other state has such a law today. Even examining state law during the late nineteenth and early twentieth centuries, online searching has revealed no similar law in other southern states in force during the time period in which Arkansas enacted the failure to vacate statute.[40]

Florida enacted a statute in 1933[41] (later repealed) that criminalized the act of holding over by a tenant. A holdover is a different act than that criminalized by the Arkansas statute; in a holdover, the tenant remains on the premises after the natural termination of the lease.[42] In 1935, the Florida Supreme Court rendered the only appellate decision on this statute.[43] A Dade County tenant had held over, and after being arrested, sued for a writ of ha-

35. Arkansas ended the practice in 1909. Carl H. Moneyhon, *Convict Lease System*, ENCYCLOPEDIA OF ARKANSAS HISTORY & CULTURE , http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=4153 (last updated Sept. 12, 2012); *see generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008).

36. *See infra* App. B.

37. See *infra* Appendix B for more statistics on failure to vacate defendants, affiants, and property owners. Throughout this article, tenants will be referred to in the female gender, and landlords in the male gender.

38. *Infra* App. B.

39. See *infra* text accompanying notes 134 through 140 for further discussion of negative consequences of LFOs.

40. Available statutory codes were searched on HeinOnline Session Laws (which also contains selected superseded statutory codes) between 1870 and 1940 for the states of Alabama, Florida, Georgia, Louisiana, Mississippi, and Missouri.

41. 1933 Fla. Laws ch. 16066, 422 (repealed by 1973 Fla. Laws ch. 73-330, 770).

42. "It shall be unlawful to hold possession of lands or houses by any lessee whose lease has expired . . . . Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than One Hundred Dollars or by imprisonment not exceeding three months . . . ." 1933 Fla. Laws ch. 16066, 422.

43. Coleman v. State *ex rel.* Carver, 161 So. 89 (Fla. 1935).

beas corpus, alleging that the statute was unconstitutional.[44] The trial court agreed but failed to cite a specific section of the Florida or United States Constitution.[45]

On appeal, the supreme court reversed the trial court, holding the statute constitutional.[46] The court acknowledged the legislature's power to criminalize acts which formerly were merely civil wrongs.[47] It noted that the statute applied only to tenants at sufferance, who had no contractual rights as their lease terms had already ended.[48] The court responded to an argument that the statute benefitted landlords, rather than the public, by comparing holding over to trespass, stating that "[a]ll statutes against trespass are primarily for the protection of the individual property owner, but they are also for the purpose of protecting society against breaches of the peace which might occur if the owner of the property is required to protect his rights by force of arms."[49] The reasoning as to the preference of a criminal statute to self-help would not be persuasive today in Arkansas, because Arkansas prohibits self-help by landlords.[50]

Justice Brown dissented, agreeing with the trial court that the statute was unconstitutional.[51] He quoted from the trial court's opinion that the act required no intent to commit a trespass or any other offense as a prerequisite for conviction.[52] The trial judge believed the "real purpose, intent and effect of the Act is to assist lessors, at public expense, in regaining possession of premises under indentures of lease . . . ."[53] The judge believed the law broke the "line of demarcation between civil wrongs or torts, and crimes."[54] The trial court's opinion contained a quotation from Blackstone's *Commentaries* that is still relevant to Arkansas today:

> [P]rivate wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity. As, if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is

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44. *Id.* at 90.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 91.
49. *Coleman*, 161 So. at 92.
50. *E.g.*, Gorman v. Ratliff, 289 Ark. 332, 712 S.W.2d 888 (1986).
51. *Coleman*, 161 So. at 92 (Brown, J., dissenting).
52. *Id.*
53. *Id.*
54. *Id.*

> concerned, and it is immaterial to the public which of us is in possession of the land.[55]

Just as with Arkansas's Senate's debate in 1901 over the failure to vacate bill, these arguments against a similar statute are just as cogent today when applied to Arkansas. Meanwhile, landlord-tenant law nationally has moved significantly in the direction of increased rights for tenants, causing Arkansas to lag even further behind. The following section will explain the current failure to vacate law in Arkansas—what is on the books versus what actually happens in courts throughout the state.

C. Current Law and Enforcement

Serving on the Landlord-Tenant Study Commission and hearing Commissioners' comments about the unequal enforcement of the failure to vacate statute piqued the author's interest in the enforcement of the failure to vacate statute across Arkansas. From December 2012 to January 2013, several of the author's students visited district courts in some of Arkansas's most populous cities and towns and asked for statistics on how failure to vacate cases were handled. This narrow investigation revealed that enforcement was wildly uneven.

In the summer of 2013, the author and her research assistants contacted each Arkansas district court with several questions: the approximate number of failure to vacate cases each year, the typical outcome of such cases, and whether tenants were ever fined, jailed, ordered to pay restitution, or ordered to leave the premises. The author was able to obtain a year's worth of failure to vacate affidavits from both the Springdale District Court and the Little Rock District Court,[56] as well as examine several from a few other district courts. Additionally, the author met and corresponded with Legal Services attorneys, the attorneys who most often represent those few tenants who obtain counsel, to discuss how enforcement of the failure to vacate statute actually plays out in court. The results of this research confirm extremely uneven enforcement of the statute statewide, occasionally even within particular counties, and general overall deviation from the text of the statute.

1. No Enforcement

To begin with, not all district courts hear failure to vacate cases. The total number of courts called was 233. Of those, sixty-seven courts (29%) refuse to hear failure to vacate cases.[57] In eighteen counties (24%), this is a

55. *Id.* at 92 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *5).
56. Affidavits on file with author.
57. *Infra* App. A.

county-wide ban. In ten counties, district courts seem to have reached independent, opposing decisions about whether to hear such cases. A total of forty district courts do not hear failure to vacate cases because they refer them to other, typically larger, courts within the same county.[58] Eight courts responded that they heard traffic cases only. The decision not to hear failure to vacate cases may be made by the judge, the prosecutor, or both.

2. Some Background Statistics

Using the most conservative number estimates provided, over 2,000 failure to vacate cases are filed in Arkansas each year.[59] Per county, the number of annual cases in those counties that hear such cases ranged from fewer than one, in eight courts, to almost 500 in Little Rock.[60] The courts hearing the most cases, in descending order, are Little Rock, Texarkana, Hot Springs, North Little Rock, and Springdale.[61]

As noted in Appendix B, the statute impacts women (and presumably children) more so than men, as they are the majority sex prosecuted, both in Little Rock and in Springdale, but more so in Little Rock (71%) than in Springdale (57%).[62] Only twenty-four of the 396 Little Rock affidavits were filed against cohabiting tenants who had cosigned their leases; the others were filed against tenants signing singly.

A tally of landlords using the failure to vacate statute in Little Rock revealed that the 396 affidavits filed during 2012 were filed by individuals representing only 168 real estate owners. Some have theorized that only "mom and pop" landlords, those operating on a thin margin and unable to afford an attorney, are the chief users of the statute, but the addresses of the tenants and these statistics reveal that many landlords of multiple-unit rental housing regularly rely on the statute. One LLC filed failure to vacate charges against sixteen tenants during a one-year period. Several filed more than ten affidavits in the one-year period.

3. Notice and Arraignment

Section 18-16-101 of the Arkansas Code, Annotated, was last amended in 2001.[63] In its current form, the statute first states that a tenant who fails to

58. These were counted as courts that heard failure to vacate cases.

59. See *infra* Appendix A, containing a conservative estimate, from figures provided, of approximately 2,150 failure to vacate cases every year.

60. Little Rock heard 475 cases in 2012. Three hundred and ninety-six affidavits were filed (affidavits on file with author).

61. *See infra* App. A.

62. *Infra* App. B.

63. The statute's current form is as follows:

pay rent when it is due forfeits all right to occupy the premises.[64] Some states allow for the late payment of rent under some circumstances.[65] Arkansas, under the failure to vacate statute, does not. Therefore, once rent has not been paid, the landlord (or landlord's agent or attorney) can give written notice, and if the tenant is still on the premises later than ten days following the giving of notice, the tenant is "guilty of a misdemeanor"[66] and may be fined $25 per day.[67] Prior to the last amendments in 2001, the amount of the

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> (a) Any person who shall rent any dwelling house or other building or any land situated in the State of Arkansas and who shall refuse or fail to pay the rent therefor when due according to contract shall at once forfeit all right to longer occupy the dwelling house or other building or land.
> (b)(1) If, after ten (10) days' notice in writing shall have been given by the landlord or the landlord's agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall willfully refuse to vacate and surrender the possession of the premises to the landlord or the landlord's agent or attorney, the tenant shall be guilty of a misdemeanor.
> (2) Upon conviction before any justice of the peace or other court of competent jurisdiction in the county where the premises are situated, the tenant shall be fined twenty-five dollars ($25.00) per day for each day that the tenant fails to vacate the premises.
> (c)(1) Any tenant charged with refusal to vacate upon notice who enters a plea of not guilty to the charge of refusal to vacate upon notice and who continues to inhabit the premises after notice to vacate pursuant to subsection (b) of this section shall be required to deposit into the registry of the court a sum equal to the amount of rent due on the premises. The rental payments shall continue to be paid into the registry of the court during the pendency of the proceedings in accordance with the rental agreement between the landlord and the tenant, whether the agreement is written or oral.
> (2)(A) If the tenant is found not guilty of refusal to vacate upon notice, the rental payments shall be returned to the tenant.
> (B) If the tenant is found guilty of refusal to vacate upon notice, the rental payment paid into the registry of the court shall be paid over to the landlord by the court clerk.
> (3) Any tenant who pleads guilty or nolo contendere to or is found guilty of refusal to vacate upon notice and has not paid the required rental payments into the registry of the court shall be guilty of a Class B misdemeanor.

ARK. CODE ANN. § 18-16-101 (Repl. 2003).

64. ARK. CODE ANN. § 18-16-101(a) (Repl. 2003).

65. *See, e.g.,* ALA. CODE § 35-9A-461 (LexisNexis Supp. 2013); ALASKA STAT. § 09.45.090 (2012); KY. REV. STAT. ANN. § 383.660(2) (LexisNexis 2002) (tenant has within seven days of receiving nonpayment and intent to terminate notice from landlord to pay the rent). Seven days is a common period, as is three days. *See, e.g.*, IOWA CODE ANN. § 562A.27(2) (West 1992 & Supp. 2013). In fact, in Oregon, a landlord may not even deliver a notice of nonpayment and intent to terminate until the rent is five days late. OR. REV. STAT. ANN. § 90.394(2)(b) (West 2010).

66. ARK. CODE ANN. § 18-16-101(b)(1) (Repl. 2003).

67. *Id.* § 18-16-101(b)(2) (Repl. 2003).

daily fine was discretionary, between $1 and $25 per day.[68] The 2001 amendments raised it to a flat $25 per day.

Thus, even if the rent is one day late, by law the tenant has forfeited the remainder of the leasehold term, no matter how long, and on that day the landlord can post the notice and begin the failure to vacate procedure. Some landlords allegedly refuse to accept timely rent payments from tenants so they can use the failure to vacate statute to evict them.[69] In a documented abuse of the procedure, one landlord crossed out the "10" in the ten-day notice, wrote in "3," and proceeded to the arraignment stage.[70]

If at the end of the ten days the tenant has not vacated, the landlord typically files the ten-day notice and an affidavit (some courts also require a copy of the lease) with the appropriate authority—the police, sheriff, prosecuting attorney, or city attorney. Some of the courts handling large volumes of failure to vacate cases have form failure to vacate affidavits, setting out statutory elements, so that the landlord need only sign. Other, smaller courts are more likely to use generalized forms. It is questionable as to how many failure to vacate cases are investigated and not merely "rubber stamped" by prosecutors or city attorneys before being presented for the judge's signature on the warrant or summons.

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68. The statute was greatly expanded in 2001. Prior to that year, Ark. Code Ann. section 18-16-101 read as follows:

> (a) Any person who shall rent any dwelling house or other building or any land situated in the State of Arkansas and who shall refuse or fail to pay the rent therefor when due according to contract shall at once forfeit all right to longer occupy the dwelling house or other building or land.
>
> (b) If, after ten (10) days' notice in writing shall have been given by the landlord or his agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall willfully refuse to vacate and surrender the possession of the premises to the landlord or his agent or his attorney, the tenant shall be guilty of a misdemeanor. Upon conviction before any justice of the peace or other court of competent jurisdiction in the county where the premises are situated, the tenant shall be fined in any sum not less than one dollar ($1.00) nor more than twenty-five dollars ($25.00) for each offense. Each day the tenant shall willfully and unnecessarily hold the dwelling house or other building or land after the expiration of notice to vacate shall constitute a separate offense.

Id. § 18-16-101. The 2001 amendments changed the fine, required the restitutionary payment of alleged rent due to the court and subsequently the landlord, and made a conviction without the restitutionary payment a Class B misdemeanor.

69. Interview with Dustin Duke, Managing Attorney, Ctr. for Ark. Legal Services, and Stacy Fletcher, Staff Attorney, Ctr. for Ark. Legal Services, (Aug. 12, 2013) [hereinafter Duke & Fletcher Interview]. Their advice to tenants in this situation is to take a witness when attempting to pay the rent, so that the witness can later testify in court. *Id.*

70. *Id.* The judge dismissed the case at the arraignment. Email from Dustin Duke, Managing Attorney, Ctr. for Ark. Legal Services, to Lynn Foster, Ark. Bar Foundation Professor, UALR William H. Bowen School of Law (Aug. 15, 2013, 00:00 CST) (on file with author). See also PAY THE RENT, *supra* note 21, at 33, for an account of the incident.

The U.S. Department of Housing and Urban Development (HUD) does not permit public housing or Section 8 landlords[71] to use the failure to vacate statute.[72] One of the Arkansas district courts hearing the most failure to vacate cases requires the landlord or agent to swear that the landlord is not receiving any rental assistance from an agency such as HUD on behalf of the tenant. Affidavits from a few other courts around the state that were examined did not contain such a provision, raising the question of whether HUD's directive may freely be ignored without enforcement in some quarters.[73]

The court handling the largest volume of failure to vacate cases requires a witness both to view the posting of the ten-day notice and to sign the notice. The affidavit the landlord must file asks for a witness's name and signature, yet of hundreds of affidavits from that court examined by the author not a single one was signed by a witness.[74] In other courts, on the other hand, no witness is necessary. One affidavit examined by the author stated as facts constituting reasonable cause "failure to vacate" and no more.[75]

Certainly most landlords fill out the affidavits truthfully. However, there is often no independent check at this stage if a landlord does not. The Human Rights Watch report documented one case where the "tenant" was actually a purchaser, but nonetheless, the "landlord" repeatedly filed affidavits, which were repeatedly sent on to law enforcement officials, resulting in the tenant being required to appear in court.[76] In 2013, a similar case arose in northeast Arkansas in which a seller filed a failure to vacate charge against a purchaser under a contract for deed.[77] A tenant personally observed by the author in the Little Rock Criminal Court Clerk's Office stated that she paid her rent promptly but had reported her landlord to Code Enforcement because her ceiling fell in and damaged her personal property. She alleged that he was retaliating by posting a ten-day notice. Anecdotal evidence indicates that a number of rent payment disputes arise over repairs, which is not surprising because Arkansas has no implied warranty of habitability. Landlords who have not covenanted to do so need not make any repairs, unless the premises are in such bad condition that the covenant of quiet enjoyment is breached, in which case a tenant must move out in order to sue, and the only

71. Section 8 landlords are those that rent to tenants who find their own housing and receive payment assistance by voucher from the federal government. *Landlords*, HUD.GOV, http://portal.hud.gov/hudportal/HUD?src=/groups/landlords (last visited Oct. 27, 2013).

72. See *infra* text accompanying notes 141 through 145 for a discussion of HUD's directive.

73. Affidavits on file with author.

74. Affidavits on file with author.

75. Affidavits on file with author.

76. PAY THE RENT, *supra* note 21, at 3, 25–26.

77. *Suit Against Blackman Dropped*, JONESBORO SUN, Oct. 22, 2013. The judge dismissed the case.

remedy is termination of the lease and not repair. A common sequence of events is that a tenant and a landlord will disagree over repairs, and the landlord will force the tenant out, often using the failure to vacate statute, and rent to someone else. In at least a few district courts, it seems landlords' allegations are taken as fact without investigation, much less application of the presumption that the tenant is innocent of a crime.

On approval of a warrant or summons by a district court judge, tenants are served by the police or sheriff, and may be arrested if there are other outstanding warrants. Some courts require tenants to make bond prior to any arraignment, and tenants may be jailed if they cannot make bond.[78] Tenants must appear for a criminal arraignment.[79] Most persons would agree that this procedure creates more of a stigma for the tenant than notice of a civil lawsuit, even if served by a process server.[80] Often, tenants do not understand the full legal implications of a ten-day notice. Many are frightened and ashamed when served with a warrant or summons. The mere fact of criminal prosecution no doubt discourages some innocent tenants and causes them to leave the premises, rather than face the ordeal of posting bond or appearing for arraignment, especially if they have already been in the criminal justice system or are in it during their tenancy.

The "willfulness" requirement of the statute has been interpreted by the Arkansas Supreme Court as "willfully refusing to remove therefrom with the necessary criminal intent to deprive the rightful owner of his property."[81] But typically the questions the judge asks the tenant are simply whether the tenant is on the premises and whether the tenant paid the rent on time.[82] And so the tenant who is late because of a personal crisis or a good-faith misunderstanding with the landlord is just as guilty under the law as one who deliberately does not pay.[83] As the dissenting judge in *Coleman* argued with respect to the Florida statute, a tenant could remain on the premises because of the illness of himself or a family member, or because of an "honest mistake."[84]

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78. *See* Duke & Fletcher Interview, *supra* note 69.

79. Arkansas district court have jurisdiction to hear misdemeanors concurrent with circuit courts. ARK. CONST. amend. 80, § 7. It is conceivable that a circuit court could conduct the procedure but the author was unable to find any such instances.

80. See PAY THE RENT, *supra* note 21, at 22, for the account of a tenant who was served a criminal summons at her job as a cashier.

81. Polk v. State, 28 Ark. App. 282, 285, 772 S.W.2d 368, 370 (1989) (quoting Poole v. State, 244 Ark. 1222, 1226, 428 S.W.2d 628, 630 (1968)).

82. *See* Interview with Alice Lightle, Little Rock Criminal Court Judge (Dec. 5, 2012); PAY THE RENT, *supra* note 21, at 20–21; Duke & Fletcher Interview, *supra* note 69.

83. PAY THE RENT, *supra* note 21, at 2.

84. Coleman v. State *ex rel.* Carver, 161 So. 89, 93–94 (Fla. 1935) (Brown, J., dissenting).

4. *Payment of Alleged Rent Due*

If a tenant pleads not guilty and remains on the premises, the 2001 amendments to the statute require the tenant to deposit the sum the landlord alleges is due for rent.[85] In other words, in this criminal proceeding, a defendant who pleads not guilty must pay a sum alleged due by a third party, without any investigation of the veracity of the allegation, *prior* to any trial. During the pendency of the proceedings, the tenant must continue to pay rent "into the registry of the court."[86] The statute does not expressly state that if the tenant fails to pay there will be no trial, but that is the clear implication—"[a]ny tenant charged with refusal to vacate upon notice *who enters a plea of not guilty* to the charge of refusal to vacate upon notice and who continues to inhabit the premises after notice to vacate pursuant to subsection (b) of this section *shall be required* to deposit into the registry of the court a sum equal to the amount of rent due on the premises."[87]

If the tenant pleads guilty or nolo contendere, the tenant is guilty of a Class B misdemeanor, punishable by a fine up to $1,000 or ninety days in jail, unless the tenant pays over to the landlord the amount the landlord stated was due on the affidavit, including any accrued rent.[88] Requiring a criminal defendant who pleads "not guilty" to pay a sum into court is unheard of in criminal law and is tantamount to a presumption that the defendant is guilty. This is the most egregious feature of the statute.[89]

Professor Goforth likened this "up front" requirement to pay rent allegedly owed to the bond required when a court sets bail.[90] However, as she noted, this analogy fails because bail is a discretionary amount not imposed in all circumstances, and only imposed to protect society.[91] Additionally, the court, and not the victim, retains forfeited bail.[92] Finally, a criminal defendant does not lose the right to trial through failure to make bail.[93] She cites a

85. ARK. CODE ANN. § 18-16-101(c)(1) (Repl. 2003). This seems to be a weird borrowing of the bond required in some states if a tenant, in an eviction proceeding, wishes to stay on the premises pending a full hearing. *See, e.g.*, IDAHO CODE ANN. § 6-311 (2010) (tenant who asks for continuance of more than two days in unlawful detainer proceeding must give sufficient security); WASH. REV. CODE ANN. § 59.12.100 (West 2010 & Supp. 2014) (tenant to pay bond in order to stay enforcement of writ of restitution); WIS. STAT. ANN. § 799.44 (West 1981) (tenant may be required to pay bond in order to stay enforcement of writ of restitution).

86. ARK. CODE ANN. § 18-16-101(c)(1) (Repl. 2003).

87. *Id.* (emphasis added).

88. *Id.* § 18-16-101(c)(3).

89. See *infra* text accompanying notes 146 through 149 for analysis of the constitutionality of this requirement.

90. Goforth, *supra* note 11, at 28.

91. *Id.*

92. *Id.*

93. *Id.*

2002 Springdale case in which the tenant defendant was jailed after pleading not guilty because he could not pay the "bond" of $425.

> The potential consequences of this would have been staggering if this had been a civil proceeding, as we would normally expect both parties to have equal access to the courts rather than conditioning a defendant's access to a pre-hearing deposit. In this case, the process was even more outrageous, as the defendant's right to defend against a criminal prosecution appears to have been conditioned on his payment into court amounts that had not at that time been proven to be owing, but were merely claimed to be due.[94]

The foregoing scenario described is still possible in several courts across the state, some of which handle significant numbers of cases. However, most district courts do not follow this provision of the statute. Most courts (58%) do not ever require tenants to pay back rent, either before or after sentencing. Court after court stated that if landlords wanted rent, they must sue in small claims court. A comment repeatedly heard was that the failure to vacate statute is "just to get tenants out." The civil unlawful detainer statute addresses these problems of the landlord—both the need to evict the tenant and the right to back rent. However, many residential landlords simply do not avail themselves of the unlawful detainer statute.[95]

In some courts, the alleged rent payment and fine operate as a lever to get tenants out. Tenants are told that if they move out, they will not have to pay either a fine or the amount the landlord is requesting. The innocent or good-faith tenant, who may have little money or who may be tired of asking unsuccessfully for repairs over several months, and who probably is not represented by an attorney, will move out rather than try to defend herself. Often in breach of the lease in the first place because of an economic setback, tenants must pay even more for a trial. This aspect of the statute effectively reverses any presumption of innocence; in essence, tenants are presumed guilty.

A feature of the statute more akin to civil than to criminal proceedings is the ultimate disposition of the payment of alleged rent, which a few courts do collect. In a typical criminal trial, the fine paid goes to the state. The failure to vacate statute, however, characterizes the payment not as a fine but as the "sum equal to the amount of rent due."[96] The court does not keep this sum. If the tenant is found not guilty, the tenant receives it back from the

94. *Id.* at 29 (emphasis omitted).

95. See *infra* text accompanying note 201 for landlords' objections to the unlawful detainer statute.

96. ARK. CODE ANN. § 18-16-101(c)(1) (Repl. 2003).

court. Otherwise, the court pays it to the landlord, like damages in an eviction or tort proceeding.[97]

One can argue that the alleged rent is restitution. Restitution is not an aspect of classic criminal law sentencing,[98] but recent trends in the last several decades have popularized it as a form of "restorative justice."[99] Various federal and state statutes now authorize restitution in certain contexts. Section 5-4-205 of the Arkansas Code, Annotated, authorizes the payment of restitution by a defendant convicted of an offense. However, under this statute restitution is not mandatory; its imposition rests in the discretion of the court.[100] If restitution is to be ordered for an offense not causing bodily harm to the victim, the amount of restitution is "a factual question to be decided by the preponderance of the evidence presented to the sentencing authority during the sentencing phase of a trial."[101] The failure to vacate statute, however, requires restitution in all cases except where the defendant is found not guilty.[102] Further, failure to deposit the alleged restitutionary amount results in a step-up in the crime classification, from an unclassified to a Class B misdemeanor, which raises the possibility of a sentence of a fine up to $1,000 and imprisonment up to ninety days.[103]

Section 5-4-205 of the Arkansas Code, Annotated, allows a defendant to pay restitution, if it is ordered, within a period of time, or in specified installments. The statute lists factors for the court to take into account when considering whether to allow restitution payment to be delayed: 1) the defendant's financial resources and the burden restitution will impose; 2) the ability of the defendant to pay by installment; and 3) the rehabilitative effect payment will have on the defendant.[104] Again, the failure to vacate statute is not so finely nuanced. The defendant, who has just lost her place of residence, in many cases because she has suffered a drop in income or encountered unexpected expenses of another type, *must* pay the alleged amount of rent due or risk jail or a substantial fine, regardless of any of these factors. The failure to vacate statute seems to contradict section 5-4-205.

Another problem with the requirement of payment of this sum into "the registry of the court" is that district courts do not have registries. Thus, in a recent case involving a tenant who pled not guilty, the tenant was unable to

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97. *Id.* at § 18-16-101(c)(2)(B).

98. *See* WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 1.3(b) (2d ed. 2003).

99. *Id.* § 1.5(a)(7).

100. "A defendant who is found guilty or who enters a plea of guilty or nolo contendere to an offense *may* be ordered to pay restitution." ARK. CODE ANN. § 5-4-205(a)(1) (Repl. 2013) (emphasis added).

101. *Id.* § 5-4-205(b)(4)(A).

102. *Id.* § 18-16-101(c)(2)(A) (Repl. 2003).

103. *See id.* § 18-16-101(c)(3).

104. *Id.* § 5-4-205(e)(2).

pay into the nonexistent registry. Yet nonpayment means a stiffer sentence and worse offense, so the Legal Services attorneys explained their dilemma to the prosecutor, who advised them to give him notice of the payments, but to pay them to the landlord.[105]

5. Outcomes

Under the statute, if the tenant is found not guilty, the deposited funds are returned to the tenant, and the lease term carries on as before. If the tenant pleads guilty or nolo contendere or is found guilty, the tenant is guilty of an unclassified misdemeanor,[106] with a potential penalty of $25 per day of violation.[107] On the other hand, if the tenant has not paid the alleged rent due, the classification of the crime is increased to a Class B misdemeanor, with a sentence of a fine up to $1,000 and imprisonment for ninety days.[108]

Real-life outcomes in the courts are more varied. Some district courts do impose the $25 per day fine.[109] Others impose a flat fine, regardless of how many days over the tenant has stayed.[110] Some do not impose a fine, as long as the tenant moves out within a reasonable time.[111] As Appendix A indicates, one notable deviation from the statute is the practice of at least seven courts to order tenants to leave, even though the statute does not authorize such a power.[112]

In 2004 the Arkansas Attorney General was asked whether under the failure to vacate statute a judge could force tenants to leave. The answer was no.[113] Either ejectment or the unlawful detainer statute must be used to force tenants out, and the legal mechanism is a writ of possession.[114] Nonetheless, research reveals that some district courts do order tenants to leave premises in failure to vacate arraignments and trials.

Although researchers were told that at least one court threatens tenants with jail if the tenant does not move out, Appendix A seems to reveal that in practice, actually jailing tenants for failure to vacate rarely happens. However, a tenant who stays beyond the ten days (and tenants convinced of their innocence are more likely to stay) risks a fine, depending on the court and

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105. *Id.*
106. ARK. CODE ANN. § 5-1-107(c)(2) (Repl. 2013).
107. *Id.* § 18-16-101(c)(3) (Repl. 2003).
108. *Id.* § 18-16-101(c)(3); *id.* § 5-4-201; *id.* § 5-4-401 (Supp. 2010).
109. *See infra* App. A.
110. *See infra* App. A.
111. *See infra* App. A.
112. *See infra* App. A.
113. Ark. Op. Att'y Gen. No. 2004-148 (June 14, 2004).
114. ARK. CODE ANN. § 18-60-208 (Repl. 2003); *id.* § 18-60-309 (Repl. 2003 & Supp. 2013).

the judge. Tenants who are fined and cannot pay the fine risk jail time, in all courts. No doubt this is a powerful impetus to force innocent tenants out.

Landlords told Commissioners that most tenants in unlawful detainer actions simply fail to reply to the complaint, and thus the landlord can simply obtain a writ of possession at the initial hearing stage.[115] Landlords may decide to pursue a judgment as well, for unpaid rent, fees, and costs, and any damages.[116] The landlord then becomes a judgment creditor of the tenant.

The same behavior in a criminal proceeding is far more serious, however. A tenant who does not appear at arraignment will probably be charged with failure to appear. Courts differed in their practice here as well, with some courts dismissing charges if the tenant had vacated the premises prior to the arraignment, and others requiring the tenant to appear even if she had already moved out. In cases where the tenant is required to appear and does not, failure to appear is a crime, and typically the judge will issue a bench warrant. Sooner or later the defendant will be stopped by the police, the failure to appear warrant will appear in the police data base, and the tenant will be arrested and possibly jailed.

D. Failure to Vacate Criminalization and Public Policy

An Arkansas landlord whose tenant is in possession of the premises without paying rent may sue in court under one or more of the civil claims of unlawful detainer or ejectment. However, many residential landlords in Arkansas do not file a civil action to remove a tenant. Why should they? There is little incentive for a landlord to retain an attorney, pay filing fees, and use a civil statute when for no charge at all he can file an affidavit with a prosecutor or city attorney, use that prosecutor in lieu of an attorney, avoid any counterclaims against himself, and much less expensively remove a tenant from his premises. Does public policy support such a unique and unbalanced approach to landlord tenant law?

Again and again, researchers heard the opinion expressed by court personnel that the failure to vacate statute is the "only way" to remove a tenant from the premises, and that to obtain back rent landlords "must" sue in small claims court, as though the unlawful detainer statute simply did not exist. Is there something special about Arkansas that justifies criminalizing nonpayment of rent while occupying the rental premises, and "lending the government hands" to landlords? To attempt to answer this question it is useful to examine why certain behavior is made criminal by the government. A crime is behavior, comprised of contemporaneous intent and act, that 1) causes harm, 2) is forbidden by statute, and 3) is subject to predictable, statutory

115. *Id.* § 18-60-307 (Repl. 2003 & Supp. 2013).
116. *Id.* § 18-60-309 (Repl. 2003 & Supp. 2013).

punishment.[117] The purpose of the criminal law is to prevent harm to the public.[118] Harm to the public, and not to individuals, is the hallmark of a crime. "[T]he state itself brings criminal proceedings to protect the public interest but not to compensate the victim . . . ."[119] Certain acts are crimes, rather than private wrongs, because they harm "the unity and the security of the community that we share."[120] The criminal law punishes the offender for his harm to society, not to the victim.[121]

Criminal law uses different evidentiary standards than civil law because "it puts a higher value on certainty before imposing sanctions."[122] Commission of a crime results in different consequences than commission of a civil wrong such as the breach of a contract. Whereas a civil wrongdoer may be sued by a private plaintiff and be enjoined or have to pay damages and face some moral opprobrium, a criminal wrongdoer may be arrested, jailed, prosecuted by the government, and be fined, imprisoned, or even executed. In general, criminal law imposes more drastic penalties than does civil law.[123] In general, society morally condemns the criminal more strongly than it does the civil wrongdoer.[124] Crimes embody the concept of being morally worse than civil wrongs, involving "real evil" rather than mere carelessness.[125]

Analyzing the failure to vacate statute with respect to the underlying policy of the criminal law, harm to the public, it is difficult to see how the unity and security of the community is threatened more by tenants remaining on premises and not paying rent than by some other comparable groups, such as homeowners defaulting on promissory notes secured by mortgages. In general, state law criminalizes neither the breach of a contract between two private parties, the breach of covenants connected with the transfer of an interest in real property, nor the failure to pay a debt.

Imagine for a moment a statute that criminalizes the mother who buys a refrigerator at Sears on credit, cannot make all the payments, and doesn't return the appliance. Imagine another statute that criminalizes a subdivision resident who installs a clothesline in the back yard, in violation of a restrictive covenant. Imagine a third statute that criminalizes the husband and wife

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117. LAFAVE, *supra* note 98, § 1.2(b).

118. *Id.* § 1.2(e).

119. *Id.* § 1.3(b).

120. Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 426 (2008).

121. *Id.*; *see also* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1809 (1992).

122. Mann, *supra* note 121, at 1811.

123. LAFAVE, *supra* note 98, § 1.3(a).

124. *Id.*

125. William J. Stuntz, *Substance, Process and the Civil-Criminal Line,* 7 J. CONTEMP. LEGAL ISSUES 1, 19 (1996).

who default on their mortgage payment and remain in occupation of the premises. How much easier it would be for the creditor holding a security interest in the property to simply give the couple ten days to leave, after they have been in default for several months! The creditor could forego the services of an attorney and head to the prosecutor's office to fill out an affidavit once the ten days had passed. Instead of nervously checking the mail for notices, defaulting homeowners could instead wait for the knock of the police at their doors. No statute in any state criminalizes such defaults. Civil courts exist to remedy private wrongs, such as breach of contracts or covenants or default on a note secured by a mortgage, which are the closest legal analogies to default on a lease.

"Victim compensation" or "restitution" to the landlord (payment of the alleged rent owed) is virtually mandatory under the Arkansas statute, as though it is a strange hybrid of civil and criminal law. Although few if any courts interpret it this way, it reads as though failure to pay the alleged amount of rent due into the court deprives the tenant of a trial, because payment is a prerequisite. More courts do follow the portion of the statute that convicts the tenant of a more serious crime (a Class B misdemeanor as opposed to an unclassified misdemeanor) if the alleged amount of rent due has not been deposited. Nonetheless, as Appendix A shows, few courts require the deposits.

As Professor Goforth pointed out ten years ago, the failure to vacate statute unfairly "single[s] out landlords for the special and unique privilege to having debts which they claim as due and owing enforced at the expense of taxpayers through the criminal justice system."[126] No other state places landlords in this category, and no other Arkansas statute allows creditors to use the criminal justice system to collect their debts. The closest analogy in Arkansas law was struck down as unconstitutional in 1991.[127]

What justifies giving landlords this powerful and arguably unfair advantage? The Arkansas Supreme Court was sympathetic to the landlord's arguments in support of the failure to vacate statute in *Poole v. State*, decided in 1968, declaring that the tenant in that case "does not base her continued possession upon any claim of right whatever, except a right to force the owner to the expense of bond, attorney's fees, and irrecoverable court costs in civil litigation."[128] The court viewed tenants occupying the premises during their lease term but late with the rent as "criminal trespassers."[129] Under common law, however, as noted above, a tenant late with the rent during the

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126. Goforth, *supra* note 11, at 29.

127. State v. Riggs, 305 Ark. 217, 220, 807 S.W.2d 32, 33 (1991). See *infra* text accompanying notes 168 through 181 for more discussion of this case.

128. Poole v. State, 244 Ark. 1222, 1226, 428 S.W.2d 628, 630 (1968).

129. *Id.*, 428 S.W.2d at 630.

lease term was not viewed as a trespasser because of the doctrine of independent covenants; a landlord was limited to the remedy of suing for the rent.[130] If a lease is still in force, it is legally impossible for a tenant to be a trespasser. Prior to the enactment of the failure to vacate statute, a landlord would have to sue in unlawful detainer or ejectment to evict a tenant who stopped paying rent during the term of the lease. In fact, the Arkansas Supreme Court later clarified that a tenant prosecuted under Arkansas Code, Annotated, section 18-16-101 could not be prosecuted for criminal trespass.[131] One feature of section 18-16-101 that changes the common law, however, is the provision that causes forfeiture of the tenant's interest upon nonpayment of the rent.[132] In other words, once the day on which rent is due ends, under section 18-16-101, the tenant who has not paid no longer possesses a leasehold; it has been forfeited by operation of law.

In 1976, the United States Court of Appeals for the Eighth Circuit, in *Munson v. Gilliam*, stated as dictum that the conclusion "[t]hat a tenant who fails, without justification, to pay rent is in effect stealing property from the landlord and should be criminally punished, is a conclusion available to a state under the Constitution."[133] No other state, however, has reached this conclusion.

Another public policy to consider is whether this law unfairly burdens the poor. Unpaid rent, court costs, and fines fall within the category of unpaid criminal justice debt, or "legal financial obligations" (LFOs): "all fines, fees and costs associated with a criminal sentence."[134] LFOs may have the effect of injuring defendants' incomes, credit ratings, prospects for employ-

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130. See *supra* text accompanying notes 2 through 4 for this discussion.

131. Polk v. State, 28 Ark. App. 282, 772 S.W.2d 368 (1989); Williams v. City of Pine Bluff, 284 Ark. 551, 683 S.W.2d 923 (1985).

132. *See* ARK. CODE ANN. § 18-16-101 (Repl. 2003).

133. Munson v. Gilliam, 543 F.2d 48 (8th Cir. 1976) (holding that evidence was insufficient to justify a federal district court injunction against the Pulaski County prosecutor from prosecuting tenants under the failure to vacate statute). The case was a § 1983 class action, and the Eighth Circuit's decision was an interlocutory appeal. The validity of the statute was not directly considered, and the Eighth Circuit determined that the standard for an injunction that would halt "an existing state criminal prosecution" was "the threat of irreparable injury 'both great and immediate'" which was not present. *Id.*

134. For general background on LFOs, see Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CTR. FOR JUSTICE (2010), *available at* http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (last visited Aug. 31, 2013); AMERICAN CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010), *available at* http://www.aclu.org/files/assets/InForAPenny_web.pdf (last visited Aug. 8, 2013) [hereinafter IN FOR A PENNY]; Nicholas M. McLean, *Livelihood, Liability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L. Q. 833 (2013); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt,* 117 PENN. ST. L. REV. 349 (2012).

ment and housing, and even freedom, if they are jailed. LFOs may "ensnare" defendants in the criminal justice system.[135] They have a disproportionate effect on the poor. LFOs are a modern type of debtors' prison, and arguably the failure to vacate statute contributes to a host of factors that may capsize a poor tenant's life.[136]

High LFOs may violate the United States Constitution, as the United States Supreme Court ruled in 1983 in *Bearden v. Georgia*.[137] In that case, Bearden pled guilty to burglary and theft by receiving, and was sentenced to probation and a $750 fine.[138] He borrowed money to pay the first installments, but lost his job and was sentenced to imprisonment for the remainder of his probationary sentence, despite the fact that he had engaged in a good-faith effort to find a job.[139] The Court held that if probationers could not pay their fines, despite bona fide efforts to do so, courts must consider alternate means of punishment, other than prison.[140]

Somewhat ironically, the poorest of the poor Arkansans, who are most likely living in public or Section 8 housing, are not subject to Arkansas Code, Annotated, section 18-16-101, because HUD has prohibited housing authorities and Section 8 landlords from using it.[141] Federal regulations require such landlords to evict tenants only by "judicial action pursuant to State or local law."[142] In 1978, a Pine Bluff Legal Aid attorney raised the issue of whether the failure to vacate statute complied with this regulation. HUD opined that the failure to vacate statute was not "judicial action for eviction."[143] Instead, it was "merely a criminal statute that is utilized to force a tenant to vacate property under threat of fine. No reference at any point in the statute is made to eviction."[144]A 1981 letter from HUD to landlords listed the programs to which this directive applied: low-rent public housing, Section 8 existing housing, Section 8 new and substantial rehabilitation

135. IN FOR A PENNY, *supra* note 134, at 6.

136. For examples of tenants' lives adversely affected over the long term by landlords' misconduct and the failure to vacate statute, see PAY THE RENT, *supra* note 21, at 33–34.

137. 461 U.S. 660 (1983).

138. *Id.* at 662.

139. *Id.*

140. *Id.* at 672.

141. 24 C.F.R. § 247.6 (2013).

142. *Id.*

143. Memo from Robert E. Moore to Sterling Cockrill, HUD Area Director, Roger N. Zachritz, Deputy Area Director, and Andy L. Watts, Director, Housing Management, May 24, 1978 (on file with author).

144. *Id.*

housing, Sections 202, 221(d)(3) or (5) below market interest rate housing, Section 236 interest reduction, and rent supplement housing.[145]

The policy still stands; HUD has not since granted permission to federally subsidized landlords and housing authorities to use the failure to vacate statute to evict tenants. A question worth asking, however, is whether it is being enforced. During the writing of this article, the author was informed that a housing authority in northeast Arkansas is using the failure to vacate statute to evict tenants. If prosecutors do not inquire and tenants are unrepresented by counsel, there may well be violation of the federal regulations.

E. Unconstitutionality

As one commenter has pointed out, the failure to vacate statute violates constitutional due process, but that is not where the constitutional concerns ends.[146] This section outlines the statute's other constitutional deficiencies, including arguable violation of the prohibition of imprisonment for debt, disproportional punishment, and lack of the presumption of innocence.

1. Due Process

Federal and state constitutions limit legislatures' powers to create crimes. Professor Goforth ably detailed several constitutional deficiencies of the failure to vacate statute in her article. Briefly, she argued first a violation of due process because the United States Supreme Court has ruled that debtors must receive a hearing prior to depriving the debtor of property and the Arkansas statute requires tenants overstaying the ten-day notice period to "post bond" in an amount alleged by a third party, prior to a hearing.[147] In other words, a criminal procedure mandates a pre-hearing payment that is similar to an illegal civil pre-hearing attachment by a creditor.

Second, she argued that there is a second violation of due process because of the requirement that a tenant "who wishes to enter a 'not guilty' plea to the criminal charge of 'failure to vacate' must pay the full amount of allegedly due rent into court."[148] This payment requirement, obviously, interferes with the due process right to a fair trial. In essence, the tenant must pay to plead not guilty. Both of these statutory provisions remain in effect today.

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145. Special Letter 81-4d from Roger N. Zachritz, HUD Deputy Area Director, to "All Public Housing Authorities and Owners of HUD Subsidized Projects," April 16, 1981 (on file with author).

146. Goforth, *supra* note 11, at 23.

147. *Id.* at 24–25.

148. *Id.* at 25–26.

The Arkansas Constitution states that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase; completely, and without denial; promptly and without delay; conformably to the laws."[149] Those tenants unjustly accused under the failure to vacate statute must "purchase their justice" in some courts by posting the alleged rent due in order to either plead not guilty or to prevent being convicted of a more serious offense.

Because most tenants are unrepresented by counsel, and most cases never go beyond the arraignment, the statute has been cited by only ten appellate decisions since 1968, all but one in state courts. No court has ruled on its constitutionality since the 2001 amendment requiring the payment of alleged rent due, and thus the second due process issue mentioned above has not been litigated.

As Professor Goforth noted, the statute in its pre-2001 form was found to be constitutional in *Duhon v. State*.[150] In *Duhon*, Jacksonville tenant Bridget Duhon first argued that Arkansas's statute was unconstitutional, citing as authority *Matthews v Eldridge*, a case wherein the United States Supreme Court held that the denial of social security benefits without an evidentiary hearing did not violate due process.[151] The Arkansas Supreme Court distinguished *Matthews* on the ground that Arkansas Code, Annotated, section 18-16-101 required a hearing to determine whether the tenant has willfully refused to vacate.[152] As Professor Goforth stated, "[s]ince the existence of the right to a hearing was central to the *Duhon* court's conclusion that the Arkansas criminal eviction statute was constitutional, it seems relatively clear that the [2001] amendment will have placed the statute as currently written outside the result and rationale of that opinion."[153]

Duhon's second argument, citing *Shelton v. Tucker*, a United States Supreme Court decision,[154] was that the statute was not the least restrictive means available to advance the purpose of the act because it stifled a fundamental liberty, and that there was a civil remedy (unlawful detainer)

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149. ARK. CONST., art. 2, § 13.

150. Goforth, *supra* note 11, at 27; *see* Duhon v. State, 299 Ark. 503, 508–09, 774 S.W.2d 830, 834 (1989).

151. *Duhon*, 299 Ark. at 508–09, 774 S.W.2d at 834 (citing Matthews v. Eldridge, 424 U.S. 319 (1976)).

152. *Id.*, 774 S.W.2d at 834.

153. Goforth, *supra* note 11, at 27.

154. Shelton v. Tucker, 364 U.S. 479, 488 (1960) (holding Arkansas statute compelling teachers to file an annual affidavit stating every organization to which they belonged during past five years, as condition of reappointment, to be unconstitutional).

available as a better alternative.[155] The Arkansas Supreme Court responded that no fundamental right was at stake in Duhon's case.[156]

Duhon's third argument was that the statute was not a valid exercise of the state's police power, and that *Poole v. State*, which held the statute constitutional on that ground,[157] should be overruled.[158] *Poole*, discussed briefly above, validated the statute on the grounds that 1) statutes are presumed to be constitutional, especially if they have been in force for a long time; 2) in Arkansas, the right to acquire, possess, and protect property is "inherent and inalienable and declared higher than any constitutional sanction"; and 3) under Arkansas Code, Annotated, section 18-16-101 tenants are criminal trespassers, and it is within the police power to protect the "public" from such harm.[159]

Addressing these reasons, it certainly is a rule of constitutional law that statutes are presumed to be constitutional. As another Arkansas Supreme Court decision has noted, however, "while these rules [the presumption of constitutionality] generally govern constitutional challenges, that is not so when the safeguards of personal liberties are at issue."[160] The court used this language while striking down a statute, discussed in detail below, that criminalized the failure to pay a supplier or subcontractor for materials.[161] Similarly, the right not to be subjected to criminal penalties for breach of a lease is an important personal liberty.

With respect to the *Poole* court's second argument, concerning the right to acquire, possess, and protect property, the phrase "higher than any constitutional sanction"[162] apparently comes from the Kentucky Constitution of 1850, and was used in conjunction with the right to own slaves.[163] In the Arkansas Constitution, it precedes a sentence about eminent domain and is only rarely construed outside of that context.[164] In any case, as a section in the "Declaration of Rights" article of the Constitution, the section should be construed as limiting the state's right to *interfere* with property interests and

155. *Duhon*, 299 Ark. at 509, 774 S.W.2d at 834 (citing Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

156. *Id.*, 774 S.W.2d at 834.

157. Poole v. State, 244 Ark. 1222, 428 S.W.2d 628 (1968).

158. *Duhon*, 299 Ark. at 509–10, 774 S.W.2d at 835.

159. *Poole*, 244 Ark. at 1225, 428 S.W.2d at 630.

160. State v. Riggs, 305 Ark. 217, 220, 807 S.W.2d 32, 33 (1991).

161. *Id.*, 807 S.W.2d at 33.

162. ARK. CONST. art. II, § 22. The full text of the section reads "[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." *Id.*

163. "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave, and its increase, is the same, and as inviolable as the right of the owner of any property whatever." KY. CONST. of 1850, art. XIII, § 3.

164. *See* ARK. CONST. art. II, § 23.

not, as the Supreme Court in *Poole* seems to intimate, to justify state action such as the failure to vacate statute *protecting* landlords' property interests. Additionally, since the *Poole* decision, the United States Supreme Court has stated that "the right [of tenants being sued in forcible entry and detainer] to continued residence in their homes" is "a significant interest in property."[165] Tenants as well as landlords have property rights, but the failure to vacate statute does not balance them fairly.

With respect to the *Poole* court's concluding argument, as discussed above, the common law does not make such tenants criminal trespassers; the allegedly unconstitutional failure to vacate law, in effect does.

2. Imprisonment for Debt

A tenant who does not pay the alleged amount of rent due into court, if convicted, is guilty of a Class B misdemeanor.[166] Imprisonment of up to ninety days is one sanction for a Class B misdemeanor. The survey revealed that some courts do jail tenants who refuse to move off of the premises and who have not paid the alleged amount of rent due. Jail under such circumstances, either pre-trial or post-conviction, violates article II, section 16 of the Arkansas Constitution, which states "[n]o person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud."[167]

Arkansas Supreme Court precedent invalidating a similar statute already exists. In 1989, the legislature enacted a statute that criminalized the knowing or willful failure of a principal contractor or subcontractor to pay a supplier or subcontractor for goods furnished to a project within thirty days of final receipt of payment under a contract.[168] Gary Riggs was arrested on two misdemeanor counts of violating the statute, convicted in municipal court, and fined almost $4,000.[169] He appealed to the Independence County Circuit Court, which dismissed the conviction, agreeing with Riggs that the statute violated article II, section 16 of the Arkansas Constitution.[170] The state appealed, arguing that the trial court erred by holding the statute unconstitutional.[171]

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165. Greene v. Lindsey, 456 U.S. 444, 451 (1982). In fact, one could actually invert the reasoning in *Poole* and contend that the failure to vacate statute is unconstitutional because it deprives tenants of a valuable property interest—the leasehold—without due process.

166. ARK. CODE ANN. § 18-16-101 (Repl. 2003).

167. ARK. CONST. art II., § 16.

168. 1989 Ark. Acts 303 (codified at ARK. CODE ANN. § 5-37-525) (quoted in State v. Riggs, 305 Ark. 217, 218, 807 S.W.2d 32, 32 (1991)).

169. State v. Riggs, 305 Ark. 217, 218, 807 S.W.2d 32, 32 (1991).

170. *Id.*, 807 S.W.2d at 32.

171. *Id.*, 807 S.W.2d at 32.

The Arkansas Supreme Court affirmed the ruling of unconstitutionality.[172] In its analysis, it relied on its decision in an earlier case, *Peairs v. State*.[173] *Peairs* also involved a statute that made it a felony for a contractor who, having been paid all or a portion of the contract price, failed or refused to discharge the lien.[174] The Supreme Court held the statute unconstitutional because it did not make "fraud or fraudulent intent a part or prerequisite of the criminal offense. It is the absence of such language in the statutes which makes it violative of that portion of the constitution above quoted."[175] The court noted that the statute criminalized failing to discharge a lien, which is failure to pay a debt.[176] It reasoned that "[i]t is not difficult to imagine many situations in which a contractor might be prevented from paying the subcontractor . . . even though he may have acted in . . . good faith and without any intent to defraud anyone, yet, under the wording of the statute, he could be convicted of a felony."[177] Exactly the same could be said about the failure to vacate statute, except that it is a misdemeanor and not a felony.

By the time of the *Riggs* case, the legislature had modified the statute to add a "knowingly or willfully" requirement.[178] The state claimed this was enough to distinguish *Peairs* and withstand Riggs's constitutionality challenge.[179] It cited California precedent, with a similar constitutional provision and statute.[180] The court was not impressed, however, and relied on opposing Colorado precedent.[181]

Acknowledging the state's argument that statutes are presumed to be constitutional, and citing *Duhon*[182] for the proposition, the court nevertheless stated "[a]s in the case of all constitutional provisions designed to protect the liberties of the individual, every doubt must be resolved in favor of the

172. *Id.*, 807 S.W.2d at 32.
173. 227 Ark. 230, 297 S.W.2d 775 (1957).
174. *Id.* at 231, 297 S.W.2d at 775.
175. *Id.* at 232, 297 S.W.2d at 776.
176. *Id.*, 297 S.W.2d at 776.
177. *Id.*, 297 S.W.2d at 776.
178. State v. Riggs, 305 Ark. 217, 219, 807 S.W.2d 32, 33 (1991).
179. *Id.*, 807 S.W.2d at 33.
180. *Id.*, 807 S.W.2d at 33 (citing People v. Howard, 451 P.2d 401, 403 (Cal. 1969)).
181. *Id.*, 807 S.W.2d at 33. The court also cited an A.L.R. annotation that cited cases from several jurisdictions as authority for the proposition that such statutes are unconstitutional if they do not require the element of intent to defraud. *See* Wade R. Habeeb, *Validity and Construction of Statute Providing Criminal Penalties for Failure of Contractor Who has Received Payment from Owner to Pay Laborers or Materialmen,* 78 A.L.R.3d 563, § 3[b] (1977).
182. Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989). See *supra* text accompanying notes 150 through 159 for a discussion of *Duhon*. Bridget Duhon could not have raised the *Riggs* case in her defense because the legislature did not insert the possibility of jail as a sanction until 2001.

citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt."[183]

One is hard put to find a meaningful distinction between *Riggs* and the current failure to vacate law, which requires only "willful" intent and failure to pay the deposit of alleged rent due for violation of a Class B misdemeanor. The failure to vacate statute is a misdemeanor; *Riggs* was charged with a misdemeanor. The intent to defraud was not an element of the *Riggs* statute; it is not an element of the failure to vacate statute. The *Peairs* court noted that without the element of intent to defraud, contractors innocent of bad faith could be found guilty and deprived of personal liberty.[184] The same possibility was present in *Riggs* and is also present under the failure to vacate statute. The constitutionality of the current iteration of the failure to vacate statute has not yet been litigated. If and when it is, distinguishing *Riggs* will be difficult.

3. *Proportionality and Unusual Punishment*

Both the Eighth Amendment of the United States and the Declaration of Rights of the Arkansas Constitution prohibit excessive bail, excessive fines, and cruel and unusual punishment.[185] These provisions reflect a codification of the "proportionality" principle of criminal procedure, that the penalty be proportional to the crime. The United States Supreme Court has stated that punishment for a crime should be graduated and proportionate to the offense.[186] "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[187] Indeed, part of the Court's proportionality analysis is "to compare the sentences imposed for commission of the same crime in other jurisdictions."[188] The Court has not yet ruled on the proportionality of the sentence for a crime that is not a crime in any other jurisdiction.

Consider the hypothetical case of an innocent tenant with an unscrupulous landlord. Rent is due January 1 but the tenant has not paid, perhaps because of a misunderstanding with the landlord. On January 2 the tenant forfeits the rest of her lease term, no matter its length. If the landlord serves the written notice on her on the second, she has ten days to remove herself and her property from the premises. If she fails to do so, she can be fined for each day she stays. If, because she cannot find another place to live within ten days, she is served with a summons or a warrant, she may be required to

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183. *Riggs*, 305 Ark. at 220, 807 S.W.2d at 33.
184. Peairs v. State, 227 Ark. 230, 235, 297 S.W.2d 775, 777 (1957).
185. U.S. CONST. amend VIII; ARK. CONST. art II, § 8.
186. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008).
187. Robinson v. California, 370 U.S. 660, 667 (1962).
188. Solem v. Helm, 463 U.S. 277, 291 (1983).

travel to the courthouse to post bond, or face jail. In most courts, fortunately, she will not have that problem, but then if she attempts to plead not guilty some courts will require her to pay the amount of rent the landlord alleges is due, in order to have a trial. If for some reason she misses her court date, instead of a default judgment against her a warrant will be issued for her arrest. If she appears at trial, most likely she will not have legal representation, and her opponent will be not her landlord, but the state, in essence representing her landlord free of charge. If she is found guilty and cannot pay the resulting fine levied, again she may face jail. Forfeiture of a lease term, fines, costs, payment of rent to the landlord, the possibility of criminal conviction—all for one day's late rent, where a tenant is acting in good faith—arguably this is cruel and unusual punishment.

4. *The Presumption of Innocence*

An axiom of criminal law in the United States is that the defendant is presumed innocent. In other words, the defendant need not prove her innocence. Yet that axiom does not hold true in failure to vacate cases. It is true that many tenants who are charged with failure to vacate are simply attempting to occupy the premises before not paying the rent catches up with them. But in a state where there is no duty of the landlord to keep premises habitable, it is understandable that tenants' unhappiness with repairs never made eventually may reach the point where they pay for repairs or withhold the rent in protest until repairs are made. And the unscrupulous landlord knows that at that point he can evict the tenant, and find someone new to begin the cycle again. Repairs aside, there are some instances where the rare landlord simply lies to the court about the tenant, yet in the world of the failure to vacate statute those landlords do not exist.

For the tenant who is honestly late with the rent, whose landlord is falsely accusing her, or who is tired of repeated broken promises by the landlord and who feels she has no other options—the deck is stacked against the tenant.[189] There often seems to be no presumption of innocence in some courts. The landlord's word is taken as fact, and the tenant's is not. The tenant may be required to pay a bond to be released prior to arraignment, or pay the alleged rent due just to tell her story to the court. Few tenants are represented by counsel. For many with no previous contact with the criminal justice system the experience is frightening and shameful. The landlord has no "skin in the game." He can file a false affidavit; there will be no consequences. He pays no money to retain an attorney; the prosecutor will do his

189. There are numerous examples in *Pay the Rent*, and this author was confronted with two egregious examples of real-life landlord misconduct just during the period while researching this article.

work at no charge to him. The failure to vacate statute is the underlying cause of this imbalance.

F. Current Alternate Eviction Methods

Like an irresistible force, landlords all over Arkansas are seeking to evict tenants by the least expensive ways possible: these include illegal self-help, the failure to vacate statute, and an invalid civil eviction statute. A significant number of residential landlords are unhappy with the unlawful detainer statute.[190] There is an alternative eviction statute already on the books: a "civil eviction" statute, enacted as part of the Arkansas Residential Landlord Tenant Act of 2007, that would allow landlords to sue in district court to evict tenants.[191] There are two issues with this statute. First, it is biased against tenants, as Marshall Prettyman noted in his article.[192] To summarize his arguments: 1) the service provisions are unclear and possibly deficient; 2) tenants' due process rights are inadequately protected; and 3) if a tenant contests an eviction, the statute is unacceptably vague about the procedure to be followed.[193] The second issue with the statute is jurisdictional, whether district courts have jurisdiction to hear these "civil eviction" cases. Prettyman ably discussed this issue as well, but this article will add a few new points to the debate.

Amendment 80, section 7(B) of the Arkansas Constitution states that the "subject matter" of civil cases heard by district courts will be determined by Supreme Court rule.[194] Under the Supreme Court's Administrative Order No. 18, "local" district courts (including small claims courts) have concurrent jurisdiction with circuit courts to hear matters in contract not exceeding $5,000.[195] State district courts have concurrent jurisdiction with circuit courts to hear matters in contract not exceeding $25,000.[196] However, district courts do not have the independent power to issue eviction orders.

Jurisdiction over district courts is not limited to the Arkansas Supreme Court, however. Amendment 80, section 9 states that any court rule promulgated under sections 5, 6(B), 7(B), 7(D), or 8 "may be annulled or amended,

190. See *infra* text accompanying note 201 for this discussion.

191. ARK. CODE ANN. §§ 18-17-901 to -911 (Supp. 2013).

192. Marshall Prettyman, *Landlord Protection Law Revisited: the Amendments to the Arkansas Residential Landlord–Tenant Act of 2007, A.C.A. 18-17-101 through 913*, 35 U. ARK. LITTLE ROCK L. REV. 1031 (2013) [hereinafter Prettyman, *Revisited*]; *see also* Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 Et Seq.*, 2008 ARK. L. NOTES 71 [hereinafter Prettyman, *Landlord Protection*].

193. Prettyman, *Revisited*, *supra* note 192.

194. ARK. CONST. amend 80, § 7(B).

195. ARK. SUP. CT. ADMIN. ORDER NO. 18 (last amended Dec. 13, 2012).

196. Thus, pro se landlords can sue tenants for unpaid rent in small claims court, as many a court responded to the researchers.

in whole or in part, by a two-thirds (2/3) vote of the membership of each house of the General Assembly."[197]

The Residential Landlord Tenant Act of 2007 placed jurisdiction over "civil eviction" cases in the district court.[198] It passed the House of Representatives twice, the second time to concur with a Senate amendment. That final vote of the House was ninety-three yeas, two nays, and five not voting. However, the Senate vote was twenty-two yeas, zero nays, twelve not voting and one excused. A two-thirds vote of the Senate is twenty-four votes.[199] Thus, the Residential Landlord Tenant Act did not place jurisdiction over civil evictions in district courts, and district courts are without authority to hear those types of evictions.

In 2009, the legislature made numerous minor amendments to the civil eviction statute. One was to insert a phrase that eviction could be commenced "in a district court having jurisdiction over the eviction proceeding."[200] This wording, however, does not place jurisdiction in district courts. It is clear, then, that district courts do not currently have jurisdiction to hear civil eviction cases. Nonetheless, as Appendix A reveals, one of the most surprising findings of the research for this article was that at least several district courts are hearing such cases, and at least one district court is hearing significant numbers of them. Courts that do so seem to be switching from failure to vacate to civil eviction, if they heard failure to vacate cases before.

The Commission was told that illegal landlord self-help evictions take place in certain counties, and in the course of this research the author heard of additional locations where they occur. It is the author's belief that self-help evictions are much more widespread and frequent than most people would suspect.

It is clear that unlawful detainer in its present form is not working. The Commission spent more time discussing eviction than any other single issue. Landlords criticized the unlawful detainer statute for the filing fee ($165), the waiting time before a hearing (weeks, at least) and the need for an attorney to file the action. Landlords said that in a few sparsely populated counties attorneys were simply not available. Another complaint was the perceived high fees that attorneys would charge.[201]

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197. ARK. CONST. amend 80, § 9.

198. "The district court or appropriate court of this state shall exercise jurisdiction over any landlord with respect to any conduct in this state governed by this chapter or with respect to any claim arising from a transaction subject to this chapter." ARK. CODE ANN. § 18-17-203 (Supp. 2013).

199. PARLIAMENTARY MANUAL OF THE SENATE, 89TH GENERAL ASSEMBLY, Rule 23.02 (2013), http://arkansas.gov/senate/docs/2013-SenateRules.pdf (last visited Sept. 22, 2013).

200. ARK. CODE ANN. § 18-17-901(a) (Supp. 2013).

201. COMMISSION REPORT, *supra* note 1, at 9.

The Arkansas Supreme Court has made possible a procedure whereby an unlawful detainer action filed in circuit court could then be referred to a state district court if all parties consented.[202] However, this does not address the cost and attorney issues, and may not speed the process significantly. Both the Commission and the author have sought to determine whether any unlawful detainer cases are being referred. None of the sources asked were aware of the existence of any such referrals.

G. A Better Statutory Framework

What should a workable summary eviction statute look like? It would apply only to residential landlords and tenants. It would combine the strengths of both the unlawful detainer and the civil eviction statutes, and eschew the weaknesses. The current statutes' strengths and weaknesses may be represented graphically.

Statute	**Strengths**	**Weaknesses**
Unlawful Detainer	Fair to both sides	Slow
	Clear procedure	Relatively expensive
		Necessitates an attorney
		Tenant cannot cure
Civil Eviction	Fast	Service provisions are unclear
	Relatively inexpensive	Deficient due process for tenants
	Can be filed pro se (if small claims rules used most entity landlords can file)	Lack of any procedure if tenant contests
	Tenant has opportunity to cure[203]	

A new statute should have the strengths of both unlawful detainer and civil eviction and the weaknesses of neither. It should amend one of the two already-existing statutes. If the unlawful detainer statute is amended, the civil eviction statute should be repealed. As recommended by the Commission, the new law should anticipate pro se landlord and tenant representa-

202. ARK. SUP. CT. ADMIN. ORDER NO. 18 (last amended Dec. 13, 2012).

203. Ark. Code Ann. section 18-17-701 allows a tenant to pay rent five days late, and allows a landlord to give a tenant a two-week period to cure any other type of lease violation. This provision would be meaningless, however, because the current failure to vacate statute allows a landlord to file failure to vacate the moment the rent is late. ARK. CODE ANN. § 18-17-701 (Supp. 2013).

tion, by providing forms, either statutory or issued by the Arkansas Supreme Court and available on the Internet.[204] It should enable entity landlords such as LLCs to appear through a designated non-attorney representative. Yet, the statute should allow attorneys if the parties wish them. The first stage of the hearing should take place in district court; almost all cases will end at this first stage. However, tenants must be allowed to introduce evidence on their own behalf, and to counterclaim. Either party should be able to appeal to circuit court, for a de novo hearing with the right to a jury. This eviction statute would cure perceived problems with the existing civil statutes, and would more than justify repeal of the failure to vacate statute.

III. THE IMPLIED WARRANTY OF HABITABILITY

Not only are tenants' rights affected by the anomaly of Arkansas's failure to vacate statute, but the impact is compounded because Arkansas does not have an implied warranty of habitability. This section will outline the history of the warranty, explain its scope, discuss current Arkansas law, and recommend a warranty appropriate for the state.

A. History

In the latter half of the twentieth century, courts and legislatures awakened to the reality of the relationship between the urban residential landlord and tenant. The object of the tenant's bargain was not, as in medieval times, an unimproved tract of land that the tenant could farm or improve, but a functioning, safe, sanitary living space, with working utilities and appliances. Tenants were no longer farmers, but individuals with full-time jobs away from their living premises. Many landlords now routinely covenanted to provide repairs. The recognition of these changes resulted in the creation of the implied warranty of habitability.

Without the implied warranty, what is the common law with respect to repairs? Absent a covenant to the contrary, landlords have no duty to repair.[205] Tenants, as the occupants of the premises, have a duty not to commit waste, which imposes a limited duty of repair.[206] Failure to repair is viewed as permissive waste.[207] Tenants are responsible to return the premises in the same condition in which they found them, with some exceptions.[208] This would require repair of damage they or persons on the premises with their permission have caused. Typically, tenants are held to make the type of re-

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204. COMMISSION REPORT, *supra* note 1, at 3.
205. 1 TIFFANY REAL PROP. § 103 (2012 ed.).
206. *Id.* § 102.
207. *Id.*
208. *Id.*

pairs that will keep the premises "wind and water tight."[209] But typically, a tenant is not responsible for a major structural repair,[210] such as a roof that needs replacing, or repair of total casualty loss, such as a house destroyed by a tornado or hurricane. Nor is a tenant responsible for ordinary wear and tear.[211]

Arkansas courts follow the common law; the rule expressed in numerous cases is simply that absent a covenant to the contrary in the lease, a landlord is not liable for any repair.[212]

Javins v. First National Realty Corp.[213] is usually credited with being the first decision to recognize the implied warranty.[214] "[A]dequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance" were described as part of the "package" that a modern tenant expected when entering into a lease.[215] Hot on the heels of *Javins*, in 1972 the Uniform Law Commission adopted the Uniform Residential Landlord Tenant Act (URLTA),[216] providing a statutory version of an implied warranty, as well as a comprehensive, balanced framework of landlord-tenant law addressing creation and termination of leases as well as rights and duties of landlords and tenants. Twenty-one states enacted the URLTA.[217] Most of the rest of the states enacted statutory

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209. *Id.*; 8 POWELL ON REAL PROPERTY § 56.05[c][2].

210. TIFFANY, *supra* note 205, § 102.

211. POWELL, *supra* note 209, § 56.05[c][2].

212. "At common law the lessor owed no duty of repair of the premises to the lessee. Arkansas law follows this rule." Thomas v. Stewart, 347 Ark. 33, 38, 60 S.W.3d 415, 418 (2001). *See also* Huber Rental Properties, LLC v. Allen, 2012 Ark. App. 642, 8, ___ S.W.3d ___; Miller v. Centerpoint Energy Res. Corp., 98 Ark. App. 102, 110, 250 S.W.3d 574, 580 (2007).

213. 428 F.2d 1071 (D.C. Cir. 1970).

214. *Id.*

215. *Id.* at 1074.

216. For the text of the act see UNIF. RESIDENTIAL LANDLORD AND TENANT ACT, 7B U.L.A. 289 (2006). The text is also available on the website of the Uniform Law Commission at http://www.uniformlaws.org/shared/docs/residential%20landlord%20and%20tenant/urlta%201974.pdf (last visited Sept. 22, 2013).

217. ALA. CODE § 35-9A-204 (LexisNexis Supp. 2013); ALASKA STAT. § 34.03.100 (2012); ARIZ. REV. STAT. ANN. § 33-1324 (2007 & Supp. 2013); CONN. GEN. STAT. ANN. § 47a-7 (West 2006); FLA. STAT. ANN. § 83.51 (West 2004 & Supp. 2014); HAW. REV. STAT. § 521-42 (West 2014); IOWA CODE ANN. § 562A.15 (West 1992); KAN. STAT. ANN. § 58-2553 (West 2005); KY. REV. STAT. ANN. § 383.595 (LexisNexis 2002); MISS. CODE ANN. § 89-8-23 (2011); MONT. CODE ANN. § 70-24-303 (2013); NEB. REV. STAT. ANN. § 76-1419 (LexisNexis 2013); N.M. STAT. ANN. 1978 § 47-8-20 (West 2013); OKLA. STAT. ANN. tit. 41, § 118 (1999 & Supp. 2014); OR. REV. STAT. ANN. § 90.320 (West 2010); R.I. GEN. LAWS ANN. § 34-18-22 (2011); S.C. CODE ANN. § 27-40-440 (2007); TENN. CODE ANN. § 66-28-304 (2004); VA. CODE ANN. § 55-248.13 (2012); W. VA. CODE ANN. § 37-6-30 (LexisNexis 2005).

warranties, some of which are modeled on the URLTA[218] and some of which are not.[219] Georgia, for example, simply states that "[t]he landlord must keep the premises in repair."[220] Illinois and New Jersey still rely on a judicial implied warranty of habitability.[221]

B. What the Warranty Covers

The original statutory warranty in the URLTA is fairly short in length. It requires landlords to do the following:

1. Comply with building and housing code provisions that materially affect health and safety;
2. Do what is necessary to keep premises in a fit and habitable condition;
3. Keep common areas clean and safe;
4. Maintain electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, that are supplied or required to be supplied by the landlord;
5. Provide receptacles for garbage and arrange for its removal; and
6. Provide running water, hot water, and heat, unless these are under the control of the tenant.[222]

The URLTA provides that a lease may not include a tenant's waiver of the implied warranty.[223]

Notable variations to this list include disclosing prior methamphetamine manufacture on the premises;[224] maintaining structural components,

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218. COLO. REV. STAT. ANN. § 38-12-505 (2013); DEL. CODE ANN. tit. 25, § 5305 (2009); IND. CODE ANN. § 32-31-8-5 (LexisNexis 2002); NEV. REV. STAT. ANN. § 118A.290 (West 2013); N.C. GEN. STAT. ANN. § 42-42 (West 2013); N.D. CENT. CODE § 47-16-13.1 (1999); OHIO REV. CODE ANN. § 5321.04 (2004 & Supp. 2013); WASH. REV. CODE ANN. § 59.18.060 (West 2004 & Supp. 2014).

219. CAL. CIV. CODE § 1941 (2010); IDAHO CODE ANN. § 6-320 (2010); LA. CIV. CODE ANN. art. 2696 (2005); ME. REV. STAT. ANN. tit. 14, § 6021 (2003 & Supp. 2013); MD. CODE ANN., REAL PROP. § 8-211 (West 2002); MASS. GEN. LAWS ANN. ch. 186, § 14 (West 2003); MICH. COMP. LAWS ANN. § 554.139 (West 2005); MINN. STAT. ANN. § 504B.161 (West 2002 & Supp. 2014); MO. ANN. STAT. § 441.234 (West 2000); N.H. REV. STAT. ANN. § 48-A:14 (LexisNexis 2009 & Supp. 2013); N.Y. REAL PROP. LAW § 235-b (McKinney 2006); 35 PA. CONS. STAT. ANN. § 1700-1 (West 2012); S.D. CODIFIED. LAWS § 43-32-8 (2004); TEX. PROP. CODE ANN. § 92.052 (West 2002 & Supp. 2013); UTAH CODE ANN. § 57-22-3 (LexisNexis 2010); VT. STAT. ANN. tit. 9 § 4457 (2006); WIS. STAT. ANN. § 704.07 (West 2001 & Supp. 2013); WYO. STAT. ANN. § 1-21-1201 (2013).

220. GA. CODE ANN. § 44-7-13 (2010).

221. Glasoe v. Trinkle, 479 N.E.2d 915 (Ill. 1985); Berzito v. Gambino, 308 A.2d 17 (N.J. 1973).

222. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 2.104, 7B U.L.A. 326 (2006).

223. *Id.* § 1.403, 7B U.L.A. 313.

224. OKLA. STAT. ANN. tit. 41, § 118(D) (1999 & Supp. 2014).

such as doors, walls, and ceilings;[225] controlling infestation by rodents and insects, unless caused by the tenant;[226] providing adequate locks and keys and maintaining the security of master and duplicate keys; [227] providing smoke detection devices[228] and carbon monoxide detectors;[229] eliminating conditions contributing to mosquito infestation and mold caused by plumbing leaks or inadequate drainage;[230] and not allowing falling or fallen plaster from walls and ceilings.[231]

In a country of such climatic diversity and weather extremes as the United States, one would expect to see, and there is to some extent, habitability contingent on climate. For example, Minnesota requires weather proofing against cold if the cost will be realized by savings.[232] New Hampshire requires an average heat of sixty-five degrees to be obtainable.[233] Florida, on the other hand, requires screens.[234]

In 2011, the Uniform Law Commission's Drafting Committee on the Revised Uniform Residential Landlord Tenant Act (RURLTA) began work on revisions to the original uniform law, which at that point was almost forty years old. At the time of this writing, the RURLTA was read for the first time at the 2013 annual meeting of the Uniform Law Commission. It will continue to be revised during the next one or two years, but at present, it modifies the original implied warranty of habitability in the following ways:

1. Landlords must provide effective waterproofing and weather protection;
2. Plumbing facilities must be connected to an approved sewage disposal method;
3. Premises must be free of rodents, bedbugs and other vermin, mold, radon, asbestos and other hazardous substances;
4. Exterior doors and windows must be secure, with working locks or other security devices; and
5. If required by law landlords must provide other safety devices (such as smoke detectors).[235]

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225. WASH. REV. CODE ANN. § 59.18.060(2) (West 2004 & Supp. 2014).

226. WASH. REV. CODE ANN. § 59.18.060(4).

227. WASH. REV. CODE ANN. § 59.18.060(6), (7).

228. FLA. STAT. ANN. § 83.51(2)(b) (West 2004 & Supp. 2014); MONT. CODE ANN. § 70-24-303(h) (2013); N.C. GEN. STAT. ANN. § 42-42(5) (West 2013); WASH. REV. CODE ANN. § 59.18.060(12).

229. N.C. GEN. STAT. ANN. § 42-42(7); MONT. CODE ANN. § 70-24-303.

230. N.C. GEN. STAT. ANN. § 42-42(8)(l).

231. N.H. REV. STAT. ANN. § 48-A:14(V) (LexisNexis 2009 & Supp. 2013).

232. MINN. STAT. ANN. § 504B.161(a)(3) (West 2002 & Supp. 2014).

233. N.H. REV. STAT. ANN. § 48-A:14(XI).

234. FLA. STAT. ANN. § 83.51(1)(b) (West 2004 & Supp. 2014).

235. REVISED UNIFORM RESIDENTIAL LANDLORD TENANT ACT § 303 (May 30, 2013 draft), *available at* http://www.uniformlaws.org/shared/docs/Residential%20Landlord%20

Thus, new additions to the warranty add to safety (locks, smoke detectors, etc.), sanitation (sewage disposal and freedom from vermin), and structural soundness.

C. Limits on the Warranty

1. Enforcement

The URLTA divides breaches of the implied warranty into three types. For willful or negligent lack of "essential services," such as heat or water, tenants may after giving reasonable notice obtain such services or obtain substitute housing and deduct the cost from their rent, recover diminution of value damages, or terminate the lease.[236] If the breach is one "materially affecting health and safety," after the landlord has had fourteen days in which to repair the problem if no repair is affected the landlord can terminate the lease.[237] If the breach is remediable by repair or damages and the landlord remedies the breach by the date in the notice, the tenant cannot terminate the lease.[238]

The URLTA also permits tenants to receive injunctive relief and actual damages, and, in a significant change from the common law, allows tenants to use self-help to repair if the cost of repair is low and the landlord has failed to repair, deducting the amount from their rent, again with the exception for damage caused by the tenant.[239] However, in none of these instances will any liability be imposed on the landlord if the condition was caused by the tenant, her family, or invitees or licensees.[240]

States have limited the implied warranty in different ways. Following are just a few examples. Kansas exempts the landlord from his duties if he is prevented by "an act of God, the failure of public utility services or other conditions beyond the landlord's control."[241] Pennsylvania restricts the warranty to cities of the first through third classes, but has a bright-line remedy—a landlord whose property is certified "unfit for human habitation" can no longer collect rent from his tenants, until the property is either recertified as fit or the lease is terminated for reasons other than nonpayment of rent.[242] The tenant who continues occupation must deposit rent in a government-

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and%20Tenant/2013AM_RURLTA_Draft.pdf (last visited Sept. 22, 2013).

236. URLTA § 4.101, 7B U.L.A. 375; § 4.104, 7B U.L.A. 383.

237. URLTA § 4.101, 7B U.L.A. 375; § 4.104, 7B U.L.A. 383.

238. URLTA § 4.101, 7B U.L.A. 375.

239. URLTA § 4.101, 7B U.L.A. 375; § 4.103, 7B U.L.A. 382.

240. URLTA § 4.101, 7B U.L.A. 375; § 4.104, 7B U.L.A. 383.

241. KAN. STAT. ANN. § 58-2553 (2005).

242. 35 PA. CONS. STAT. ANN. § 1700-1 (2012).

approved escrow account during the interval.[243] Virginia limits the landlord's liability to "actual damages" proximately caused by the landlord's failure to exercise ordinary care.[244] It does not impose tort liability on landlords[245] except for damages caused by negligent repair.[246]

2. Liability for Damage or Injury to the Tenant's Property or Person

One non-uniform area of landlord-tenant law is whether tenants or their invitees may recover for such harms as personal injury, emotional distress, or damage to personal property damage caused by a landlord's breach of a lease. In theory, there could be two legal theories justifying damages: contract law, under the theory of consequential damages, and tort law.[247]

a. Breach of Contract

Consequential, or indirect, damages are damages that flow indirectly from an act, rather than directly.[248] American courts generally follow *Hadley v. Baxendale*, an 1854 English decision holding that lost profits (consequential damages) are not recoverable under a contract unless specifically contemplated by the parties at the time of the execution of the contract.[249] Arkansas defines consequential damages as the "damage, loss or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act."[250] Consequential damages are usually economic in nature, such as lost profits, but a few residential tenants have attempted to obtain them for damage or injury to their persons or personal property caused by the landlord's alleged breach of the lease. In such a case, the Indiana Supreme Court commented:

> [R]ecovery for personal injury on a contract claim is allowable only when the particular injury was within the parties' contemplation during contract formation. Thus, to claim consequential damages the tenant must show the parties intended to compensate for personal injury losses caused by the apartment's unfitness. The tenant may prove the promise

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243. *Id.*

244. VA. CODE ANN. § 55-248.13(B) (2012).

245. Isbell v. Commercial Inv. Assocs., Inc., 644 S.E.2d 72, 78 (Va. 2007).

246. Sales v. Kecoughtan Hous. Co., 690 S.E.2d 91, 93–94 (Va. 2010).

247. For an excellent discussion comparing and contrasting the two theories of liability, and also contrasting common law with civil law, see Melissa T. Lonegrass, *Convergence in Contort: Landlord Liability for Defective Premises in Comparative Perspective,* 85 TULANE L. REV. 413 (2010).

248. BLACK'S LAW DICTIONARY (9th ed. 2009).

249. Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

250. Optical Partners, Inc. v. Dang, 2011 Ark. 156, *15, 381 S.W.3d 46, 55 (quoting Smith v. Walt Bennett Ford, Inc., 314 Ark. 591, 604–05, 864 S.W.2d 817, 825 (1993)).

> to compensate personal injury by showing its expression as a contract term or by pointing to evidence showing it to be implied in the agreement.[251]

As Lonegrass notes, few American courts have awarded claims for personal injury or personal property damage brought by residential tenants under a consequential damages theory.[252] Only a handful of Arkansas cases have considered consequential damages under a lease. In these cases, the leases were commercial or agricultural. The types of consequential damages claimed were lost profits,[253] destroyed merchandise,[254] and destroyed crops.[255]

b. Tort

Traditionally, landlords were not liable for tort damages, such as personal injury or damages to personal property of a tenant or her invitees, caused by defective premises.[256] This rule is often expressed as "caveat lessee." The common law recognized only a few exceptions. Those typically listed are injuries caused by common areas, undisclosed latent defects present at the beginning of the term, breaches of a covenant to repair, negligent repairs, and defective areas used by the public.[257] Arkansas recognizes only two exceptions: failure to reasonably perform an agreement to repair that is supported by consideration, and failure to reasonably repair under an assumed obligation.[258]

An extended discussion of tort liability of landlords is outside of the scope of this article, but the issue is raised here to clarify that enactment of an implied warranty of habitability does not automatically result in expand-

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251. Johnson v. Scandia Associates, Inc., 717 N.E.2d 24, 31 (Ind. 1999) (internal citations omitted) (refusing to award consequential damages for personal injury under an implied warranty of habitability).

252. Lonegrass, *supra* note 247, at 427.

253. *See, e.g.*, *Optical Partners, Inc.*, 2011 Ark. at *1, 381 S.W.3d at 49 (awarding lost profits for an unenforceable covenant not to compete).

254. *See* Shelton v. Albertson, No. CA 92-109, 1992 WL 79537, at *1 (Ark. Ct. App. Apr. 15, 1992) (finding no proof that the appellee agreed to be responsible for more than ordinary damages).

255. Bowling v. Carroll, 122 Ark. 23, 182 S.W. 514, 514–15 (1916) (denying damages for the tenant's crops destroyed by cattle when landlord did not repair fence).

256. Tort liability for tenants' injuries caused by criminal acts of third persons is outside the scope of this article.

257. STOEBUCK & WHITMAN, *supra* note 3, § 6.46.

258. ARK. CODE ANN. § 18-16-110 (Repl. 2003 & Supp. 2013). See Kathryn Hake, Comment, *Is Home Where Arkansas's Heart Is? State Adopts Unique Statutory Approach to Landlord Tort Liability and Maintains Common Law "Caveat Lessee,"* 59 ARK. L. REV. 737 (2006), for a discussion on the adoption of this statute.

ed tort liability for landlords, although many persons erroneously assume that it does. The URLTA does not expressly impose such liability, although the comment to section 1.105 states that "[w]hether tort action, specific performance or equitable relief is available is determined not by this section but by specific provisions and supplementary principles"[259] and refers the reader to Section 1.103, which provides that the act is supplemented by other principles of law and equity[260] (interestingly, although a number of areas of law such as bankruptcy and contract are mentioned, torts is not).

Even though the URLTA does not expressly impose tort liability on landlords for tenant or third-party injury caused by breach of the implied warranty, a significant number of states have done so, reasoning that the implied warranty of habitability imposes a duty which, if breached, causes tort liability.[261] Other states have refused to impose liability in tort under the implied warranty.[262]

D. Current Arkansas Law

Arkansas currently follows the common law rule that a landlord has no duty to repair unless he covenants to do so,[263] subject to the two codified exceptions noted above. If the landlord covenants to repair, property damages for defective premises typically take the form of the difference in value between the defective premises and premises without defects, or the cost of repair. Many, if not most, of the cases citing this rule are suits in tort for personal injury to the tenant or her family members or invitees, or for dam-

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259. URLTA § 1.105 cmt., 7B U.L.A. 295.

260. URLTA § 1.103, 7B U.L.A. 294.

261. *See, e.g.*, Newton v. Magill, 872 P.2d 1213, 1213 (Alaska 1994); Scott v. Garfield, 912 N.E.2d 1000, 1005 (Mass. 2009) (holding a tenant's invitee may recover for personal injury caused by landlord's breach of the implied warranty of habitability); Joiner v. Haley, 777 So.2d 50, 52 (Miss. Ct. App. 2000) (conceding that a tenant may pursue tort remedies for breach of implied warranty of habitability); Shorter v. Neapolitan, 902 N.E.2d 1061, 1067 (Oh. Ct. App. 2008) (holding that URLTA implied warranty of habitability expanded landlord tort liability from already-existing common law liability); Merrill v. Jansma, 86 P.3d 270, 289 ¶ 48 (Wyo. 2004) (holding landlord has a duty of reasonable care under the circumstances).

262. *See, e.g.*, Schuman v. Kobets, 760 N.E.2d 682, 686 (Ind. Ct. App. 2002); Steward *ex rel.* Steward v. Holland Family Props., LLC, 726 S.E.2d 251, 255 (Va. 2012) (holding the implied warranty of habitability imposes duty in contract, not in tort); Favreau v. Miller, 591 A.2d 68, 73 (Vt. 1991); Lian v. Stalick, 25 P.3d 467, 473 (Wash. Ct. App. 2001). Alabama enacted the URLTA in 2007, but as amended to create no duties or causes of action in tort. ALA. CODE ANN. § 35-9A-102(c) (Supp. 2013).

263. Thomas v. Stewart, 347 Ark. 33, 38, 60 S.W.3d 415, 418 (2001); Propst v. McNeill, 326 Ark. 623, 624, 932 S.W.2d 766, 767 (1996); Hurst v. Feild, 281 Ark. 106, 108, 661 S.W.2d 393, 394 (1983).

age to personal property.[264] Few of them deal with defective premises preventing occupation or requiring repair. Of those that do, most involve commercial tenants. The warranty in these cases is often referred to as a warranty of habitability, but if the tenant is commercial, it is more accurately characterized as a warranty of fitness for a particular purpose.

A recent case concerning the duty to repair is *Huber Rental Properties, LLC v. Allen*.[265] A landlord sued tenants, who had sought to terminate their lease and had moved out, under a rent acceleration clause.[266] The landlord also sought late fees and costs.[267] The lease contained instructions for requesting repairs and maintenance.[268] The dispute involved a carpet that had not been cleaned at the beginning of the lease term, a garbage disposal with insects living in it, a large tree limb that had fallen in a storm that blocked the front door for weeks, and lack of keys to the side door, requiring the tenants to leave the only usable door unlocked at all times.[269] The trial court found that the landlord materially breached the lease.[270] On appeal, the Court of Appeals affirmed that the landlord breached the duty of repair.[271] Although the lease did not specifically state that the landlord promised to repair the premises, the lease did include a procedure for tenants to request repairs and maintenance.[272] The problem with the lack of an implied warranty of habitability, however, is that landlords like the one in this case will simply remove all mention of repair from their leases.[273] One way in which repair could be facilitated without an implied warranty would be to prohibit landlords who have outstanding citations for code violations from bringing failure to vacate prosecutions. This would not work in an area with no housing codes, however.

One of most important decisions discussing the implied warranty of habitability in recent years has been *Propst v. McNeill*.[274] In this case, Propst, the owner of a plane, executed a lease with the Walnut Ridge Airport

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264. *Thomas*, 347 Ark. at 38, 60 S.W.3d at 418; Stalter v. Akers, 303 Ark. 603, 798 S.W.2d 428 (1990).

265. 2012 Ark. App. 642, ___ S.W.3d ___.

266. *Id.* at 1, ___ S.W.3d at ___.

267. *Id.*, ___ S.W.3d at ___.

268. *Id.* at 2, ___ S.W.3d at ___.

269. *Id.* at 3–6, ___ S.W.3d at ___.

270. *Id.* at 6, ___ S.W.3d at ___.

271. *Huber Rental Props.*, 2012 Ark. App. 642, at 7, ___ S.W.3d at ___.

272. *Id.* at 8, ___ S.W.3d at ___.

273. Legal Services attorneys report that they are seeing fewer leases with landlord repair clauses. Duke & Fletcher Interview, *supra* note 69.

274. 326 Ark. 623, 932 S.W.2d 766 (1996); *see also* Stephen J. Maddox, Case Note, Propst v. McNeill*: Arkansas Landlord-Tenant Law, a Time for Change*, 51 ARK. L. REV. 575 (1998).

Commission.[275] He stored his plane in a hangar at the airport.[276] After a storm damaged the hangar and his plane, Propst sued various parties, but lost at the trial court level.[277] On appeal, he first argued that Arkansas should require landlords to exercise reasonable care with respect to the condition of rental premises and repeal caveat lessee.[278] Propst was arguing for tort liability to be imposed here so that he could recover the damages to his personal property. One of the arguments the Commission made in response was that the legislature and not the court should make such a momentous change in the law.[279] It pointed to the enactment of the URLTA as the means by which legislatures were achieving this end.[280] This was wrong on two points. First, as discussed above, the URLTA does not expressly impose tort liability on landlords. Second, the URLTA only applies to residential leases. It would not have affected the airport lease even if Arkansas had enacted it.

The court noted the age of the rule of caveat lessee and stated its often-cited rule that it will uphold prior precedent unless "great injury or injustice" would result.[281] The court stated that even if it were inclined to overrule caveat lessee, the facts in *Propst* were not appealing—Propst was an experienced businessman.[282]

In a second very significant case, *Thomas v. Stewart*,[283] the tenant plaintiff again invited the court to overrule caveat lessee. In this case, Katherine Thomas's child fell two stories when a balcony railing he was leaning on collapsed.[284] Thomas cited *Propst*, and in the court's decision, denying summary judgment in favor of the landlord, the court again noted its preference that the legislature take up the issue.[285] The court stated that because Thomas had not provided it with any information as to whether the legislature was taking action, it was hesitant to address the issue.[286]

In a concurring opinion, Justice Brown noted that it had been almost thirty years since the URLTA was adopted and "undoubtedly" it had been

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275. *Propst*, 326 Ark. at 624, 923 S.W.2d at 767.

276. *Id.*, 923 S.W.2d at 767.

277. *Id.*, 923 S.W.2d at 767.

278. *Id.* at 625, 932 S.W.2d at 767.

279. *Id.* at 625, 932 S.W.2d at 768.

280. *Id.* at 626, 932 S.W.2d at 768.

281. *Propst*, 326 Ark. At 626, 923 S.W.2d at 768. See Miller v. Enders, 2013 Ark. 23, ___ S.W.3d ___; McCutchen v. City of Fort Smith, 2012 Ark. 452, ___ S.W.3d ___ ; and Independence Federal Bank v. Paine Webber, 302 Ark. 324, 789 S.W.2d 725 (1990) for the latest expressions of the rule. The court almost always uses this phrase when declining to overrule past precedent. It can be found in fifty-six decisions.

282. *Propst*, 326 Ark. at 627, 932 S.W.2d at 768.

283. 347 Ark. 33, 60 S.W.3d 415 (2001).

284. *Id.* at 36, 60 S.W.3d at 416.

285. *Id.* at 41, 60 S.W.3d at 421.

286. *Id.*, 60 S.W.3d at 421.

proposed to the General Assembly on several occasions during that time but the legislature had never enacted it.[287] In the three legislative sessions between *Propst* and *Thomas*, the legislature had taken no action.[288] Justice Brown opined that it would be appropriate for the court to address the issue of landlord tort liability the next time it was presented with the issue.[289] He listed other areas of law where the court had acted, after unsuccessfully asking the legislature to take up the issue: abolishing tort immunity for political subdivisions,[290] abolishing the absolute rule of nonliability for vendors who sell alcohol to minors,[291] and imposing dramshop liability.[292]

The Supreme Court has recognized that it "has a duty to change the common law when it is no longer reflective of economic and social needs of society."[293] "Precedent governs until it gives a result so patently wrong, so manifestly unjust, that a break becomes unavoidable. Any rule of law not leading to the right result calls for rethinking and perhaps redoing."[294] In all three of the cases, the court looked to other states and noted that Arkansas was in the minority, and that the common law had evolved, or that statutes had reversed the old common law rules. The same can be argued with respect to the implied warranty of habitability.

The URLTA was adopted in 1972. Looking only as far back as 1991, it was introduced as one or more bills in the legislative sessions in 1991, 1993, and 2001.[295] The half favorable to landlords was enacted in 2007, after all pro-tenant provisions were removed.[296] Has the law in other states changed? Yes. Arkansas stands alone as the only state without an implied warranty of habitability.

One argument made by landlords against an implied warranty of habitability is that Arkansas's rents are the lowest of any state, according to 2012 statistics released by the National Low Income Housing Coalition. In the words of the Commission Report,

> In the spring of 2012, the National Low Income Housing Coalition released its report on the state of rental housing availability for low income renters, *Out of Reach 2012*. This report indicated that Arkansas had the

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287. *Id.* at 43, 60 S.W.3d at 421 (Brown, J., concurring).
288. *Id.*, 60 S.W.3d at 421.
289. *Thomas*, 347 Ark. at 43, 60 S.W.3d at 421.
290. Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968).
291. Shannon v. Wilson, 329 Ark. 143, 947 S.W.2d 349 (1997).
292. Jackson v. Cadillac Cowboy, Inc., 337 Ark. 24, 986 S.W.2d 410 (1999).
293. *Shannon*, 329 Ark. at 151, 947 S.W.2d at 353.
294. *Parish*, 244 Ark. at 1252, 429 S.W.2d at 52.
295. It was introduced as House Bills 426, 1621, and 1851 in 1991; and as Senate Bill 373 in 2001.
296. The pro-landlord half of the URLTA is codified at Ark. Code Ann. §§ 18-17-101 through 18-17-802. *See also generally* Prettyman, *Landlord Protection*, *supra* note 192.

> lowest fair market rent ("FMR") for a two-bedroom dwelling unit ($593 per month) of all fifty states. However, Arkansas was not drastically below all other states. West Virginia's FMR was $598, South Dakota's $599, Kentucky's $616, Mississippi's $622, Iowa's $637 and North Dakota's $639. Lest the reader think that this means housing is a terrific bargain in Arkansas, it should also be pointed out that Arkansas's annual median income ("AMI"), at $51,900, was the third lowest of the states. Lower than Arkansas are Mississippi, at $48,871, and West Virginia, at $51,549. All of these states have an implied warranty of habitability, two of them (Iowa and Kentucky) have enacted the URLTA, and all but North Dakota prohibit retaliatory eviction.[297]

Updating these statistics, the author discovered that despite Arkansas's extreme lack of tenant rights, it no longer has the lowest rent. That state is now North Dakota, with a two-bedroom fair market rent of $627. Kentucky, at $661, is in second place. Arkansas's rent is $663.[298] No longer can the inference be made that Arkansas's rent is lowest because, unlike all other states, it has no implied warranty of habitability. Marshall Prettyman has also pointed out some factors having a causal effect on low rents, such as low property taxes.[299] Very few studies have been made of the effect of an implied warranty on rent rates. The most recent is a student comment published in 2011. The author states that "[t]o the extent that this Comment attempts to determine whether or not the implied warranty is related to higher rent rates, the conclusion *appears* affirmative."[300] However, there is another way to think of the warranty besides aggregate rental statistics, and that is its effect on individual landlords and tenants, where it will allow a tenant in unlivable conditions to compel a change that she could not before, or where a landlord will have clear guidance as to the minimum quality of premises to be supplied to tenants.

Another argument against implied warranties of habitability is that they are not needed because tenants can simply report deficiencies in housing to code enforcement agencies. First, not all areas of the state are covered by housing codes. Most rural areas and many smaller cities and towns are not. Second, the tenant who reports her landlord to code enforcement will, like the tenant observed by the author at the Little Rock Criminal Court clerk's office, be the object of retaliation by the landlord. If the tenant is month-to-month, the landlord can simply terminate the lease in less than two months. If not, and the landlord is unscrupulous enough, the landlord can simply

297. COMMISSION REPORT, *supra* note 1, at 22.

298. NATIONAL LOW INCOME HOUSING COALITION, OUT OF REACH 2013, *available at* http://nlihc.org/oor/2013 (last visited Sept. 22, 2013).

299. Prettyman, *Revisited*, *supra* note 192.

300. Michael A. Brower, Comment, *The "Backlash" of the Implied Warranty of Habitability: Theory v. Analysis*, 60 DEPAUL L. REV. 849, 889 (2011) (emphasis added).

refuse to accept the rent, or otherwise misrepresent the facts on the failure to vacate affidavit. It is for this reason that an implied warranty of habitability must be accompanied by a prohibition against retaliatory eviction, which most states have.

As the plaintiff in *Stewart* recognized, probably the most analogous case to an implied warranty of habitability for tenants is *Wawak v. Stewart*, which judicially adopted an implied warranty of quality for new home construction in Arkansas.[301] As modified by subsequent decisions, the warranty applies to material latent defects in construction.[302] It lasts for five years from substantial completion of construction.[303] The measure of damages is either the cost of repair, or the difference in value between the promised structure and the defective structure.[304] The implied warranty does not impose a duty of care, and does not sound in tort. However, negligence has traditionally been available as a cause of action against negligent workmanship by contractors.[305]

The *Wawak* case was well briefed on appeal. The court invited amicus curiae briefs, and at least two were filed, by the Arkansas Attorney General and by the Arkansas Homebuilders Association.[306] The court was eager to join the minority, but modern trend of decisions adopting the warranty—it refers to six states having adopted it in the previous decade.[307] The decision is full of citations to secondary authority and quotations from the decisions of other states. In support of its decision the court mentioned the lack of bargaining power between the home builder and buyer, and the modern need for such a warranty. The court stated "[a]s might be expected, we have been presented with the timeworn, threadbare argument that a court is legislating whenever it modifies common-law rules to achieve justice in the light of modern economic and technological advances."[308]

E. A Warranty for Arkansas

If the author could fashion an implied warranty for Arkansas, what form would it take? First, the warranty should be statutory. It should contain the requirements of the RURLTA warranty with the qualification, adopted by some states, that plumbing and electrical work be in compliance with

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301. Wawak v. Stewart, 247 Ark. 1093, 1094, 449 S.W.2d 922, 923 (1970).

302. Curry v. Thornsberry, 354 Ark. 631, 642, 128 S.W.3d 438, 443 (2003).

303. ARK. CODE ANN. § 16-56-112(a) (Repl. 2005); Rogers v. Mallory, 328 Ark. 116, 119–20, 941 S.W.2d 421, 423 (1997).

304. Daniel v. Quick, 270 Ark. 528, 533, 606 S.W.2d 81, 84 (1980).

305. *See, e.g.*, Marshall v. Turman Const. Corp., 2012 Ark. App. 686, ___ S.W.3d ___.

306. *Wawak*, 247 Ark. at 1094, 1099, 449 S.W.2d at 923, 925.

307. *Id.* at 1095, 449 S.W.2d at 923.

308. *Id.* at 1099, 449 S.W.2d at 925.

codes in force at the time they were installed. It should have a provision requiring a quicker response for emergency repairs, recognizing that repair response time is sometimes out of the control of the landlord, and a reasonable repair and deduct provision, especially if a landlord refuses to make a qualifying repair.

Second, tenants should be able to sue under the warranty as easily as landlords should be able to sue for eviction. Tenants should be able to bring suit in district or small claims court, using official forms, such as the Commission recommended for eviction suits.[309] They should be able to bring suits pro se. Most importantly, they should be able to raise the issue of the breach of the implied warranty as a defense to a landlord's eviction action.

Third, tenants must not be able to waive their right to the warranty, and must not be subject to retaliatory eviction. An implied warranty is of little good if tenants are forced to sign leases giving up their rights to repairs, and can easily be evicted if they complain to code enforcement.

In lieu of a statutory warranty, the way is clear, given Supreme Court statements in previous cases, for the court to find a judicial warranty, on condition that the right case comes along. With respect to tort liability, the clear trend is for some type of tort liability of landlords for personal injury or property damage caused by a landlord's breach of the implied warranty. The Supreme Court has indicated its willingness to take up the issue, in an appropriate case. At a minimum, Arkansas should impose the duty to keep common areas clean and safe, and impose tort liability for failure to do so.

IV. CONCLUSION

Arkansas is seriously out of step with the rest of the United States in two important areas of landlord-tenant law: its crime of failure to vacate, and the lack of an implied warranty of habitability. The last enactments of the legislature in this area, in 2001 and 2007, produced a criminal statute with grave constitutional deficiencies and a lopsided civil statute containing mostly landlord rights and tenant obligations. Landlord-tenant legislation should be drafted by representatives of both landlords and tenants. The Landlord-Tenant Study Commission was a first step in this direction, but it had no time to draft legislation. Hopefully, it will not be the last step.

Evictions and lack of repairs are often linked. Tenants, frustrated by the unwillingness of some landlords to make repairs, stop paying rent and are evicted. Landlords have no incentive to use the unlawful detainer statute if in their county they can use a prosecutor to lever a tenant off the premises, if

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309. *See, e.g.*, Hennepin County, Minnesota's form for a tenant's petition for emergency relief, http://www.mncourts.gov/default.aspx?page=513&item=295&itemType=formDetails (last visited Oct. 31, 2013).

the tenant is late with the rent or has stopped paying rent in protest. The failure to vacate statute is enforced—or not—unevenly across the state with respect to whether it can even be filed and what sanctions judges' order. Every day judges exceed their authority under the statute by ordering tenants off of the rental premises. Judges also ignore mandatory provisions of the statute, often in an attempt to try to fairly enforce a contradictory statute.

Landlords have legitimate criticisms of the unlawful detainer statute. It should be amended to provide a quicker, less expensive procedure that landlords can file pro se, in district court, with the opportunity for appeal to circuit court. The Commission has recommended that once the civil eviction statutes are reformed the failure to vacate statute should be repealed. Legal reform of both the criminal eviction law and the duty to repair is long overdue and will produce a net benefit for the state of Arkansas and its citizens.

APPENDIX A

TREATMENT OF FAILURE TO VACATE CASES IN ARKANSAS COURTS

An "N/A" in the third column means that after repeated tries, researchers were unable to contact court personnel qualified to answer the questions. Contacts were asked whether the district court handled failure to vacate cases. If the answer was yes, then they were asked approximately how many per year. A "U" in the Yes/No column meant the respondent was unsure as to the court's jurisdiction, and no cases had been heard there in years. An asterisked number is an actual number, either of affidavits filed in a year or handled during a year. Contacts were asked whether there was a typical disposition. "D" means dismissed (typically if the tenant has moved out or in the judge's discretion); "N" means nolle prossed (again, typically the tenant has moved out); "F" means fined. "V" with a number means the tenant is given a certain number of days to vacate, usually without being fined. The next three columns concern whether the penalties listed could ever be a possible outcome in that particular court. The "Jail, Ever" column answers the question whether a tenant could ever be jailed as a sentence. Of course, tenants can be jailed for failure to appear or failure to pay a fine. Those situations are not covered by the question. Under the "Comments" column, "SC" means landlords must sue in small claims court to recover rent owed. Courts that do not hear FTV cases are highlighted. Some courts are listed "no" but not highlighted because they refer their FTV cases to another court that does hear them, or because they don't have jurisdiction to hear FTV cases. "R" in the "Comments" column indicates a response that FTV cases are referred to another court. The citation "18-17-901" in the "Comments" column means it was either clear or appeared from answers that the court was hearing "civil eviction" cases.

County	City/Town	Yes/ No	N/Year	Typical Disposi-tion	Fine	Back Rent	Jail, ever?	Comments
Arkansas	DeWitt	No						
	Gillett	No						
	St. Charles	No						
	Stuttgart	Yes	5	D or N	$25/day	No	No	SC
Ashley	Crossett	Yes	12	D or F	$25/day	Yes, paid from fines	No	
	Hamburg	Yes	1 or 2	V or F	$220	Yes	No	Ordered to vacate, then removed
Baxter	Briarcliff	No						R Mtn Home
	Cotter	No						R Mtn Home
	Gassville	No						R Mtn Home
	Lakeview	No						R Mtn Home
	Mountain Home	Yes	<6	D	$25/day discretion-ary	No	No	Ordered to vacate
	Norfork	No						R Mtn Home
	Salesville	No						R Mtn Home
Benton	Bentonville	No						
	Bethel Heights	No						
	Cave Springs	No						
	Centerton	No						
	Decatur	No						
	Gentry	No						
	Gravette	No						
	Little Flock	No						
	Lowell	No						
	Pea Ridge	No						
	Rogers	No						
	Siloam Springs	No						
	Sulphur Springs	No						
Boone	Alpena	No						
	Harrison	No						
Bradley	Warren	Yes	1 or 2	F	Yes	Yes	No	
Calhoun	Hampton	Yes	6	D or N	$175	No	No	
Carroll	Berryville	No						
	Eureka Springs	No						
	Green Forest	No						
Chicot	Dermott	Yes	<1		Yes	No	No	SC
	Eudora	Yes	1 or 2	F	Yes	Yes	No	Must appear even if they have moved out
	Lake Village	Yes	1 or 2	F	$300	Yes	No	
Clark	Amity	No						R Arkadel-phia
	Arkadelphia	Yes	9*	D or F	$140	Yes	No	Court may

								arrange to garnish tenant's wages, assigning a civil number at criminal hearing
	Caddo Valley	Yes	9	D or F	Yes	Some-times	Yes	
	Gurdon	Yes		D or F	$140	Yes	No	Counted with Arkadelphia
Clay	Corning	Yes	4	F	Yes	Yes	No	
	Piggott	Yes	6	F	Yes	Yes	No	
	Rector	Yes						R Piggott
Cleburne	Concord	No						R Heber Spgs
	Greers Ferry	No						R Heber Spgs
	Heber Springs	Yes	6	F	Per day	Some-times	No	
	Quitman	Yes		F	$215 plus $45 per day	Not recently	No	None lately City failure to vacate ordinance
Cleveland	Rison	No						
Columbia	Magnolia	Yes	<1	N				
	Waldo	No						R Magnolia
Conway	Mennifee	No						R Morrilton
	Morrilton	Yes	12	F	Yes	No	No	SC
	Oppelo	No						R Morrilton
	Plummerville	Yes	< 1	D or F	Per day	No	No	
Craighead	Jonesboro	Yes	35*	N	$205	No	No	
	Lake City	Yes	3		$205	No	No	
Crawford	Alma	No						
	Mountainberg	No						
	Mulberry	No						
	Van Buren	No						18-17-901
Crittenden	Earle	Yes	2		$195	No	No	SC
	Gilmore	No						R Marion
	Jericho	No						R elsewhere
	Marion	Yes	4		$25/day	No	Rarely	SC
	Turrell	No						R elsewhere
	W. Memphis	Yes	71*		$25/day	Yes, post if plead NG	Not recently	If T pleads guilty and pays fine, SC for rent
Cross	Cherry Valley	N/A						
	Parkin	No						
	Wynne	No						
Dallas	Fordyce	No						
	Sparkman	No						
Desha	Dumas	Yes	25	D or F	$265	No	No	SC
	McGehee	Yes	4 to 6	D	Seldom	No	Possibly	SC
Drew	Monticello	No						Seem to be using 18-17-901
Faulkner	Conway	Yes	1 or 2		$150	Yes		
	Damascus	No						
	Greenbrier	Yes	4	D or F	$175	Yes	No	
	Guy	No						

	Mayflower	No						
	Mount Vernon	N/A						
	Vilonia	No						
Franklin	Altus	No						
	Charleston	Yes	<1		$350	Yes	Yes	Special case, T would not leave
	Ozark	No						
Fulton	Mammoth Springs	No						R Salem
	Salem	Yes	20	D	Rarely	No	No	
Garland	Hot Springs (city)	Yes	147*	N	Rarely	No	No	
	Hot Springs (cty)	Yes	158*	N	Rarely	No	No	
Grant	Sheridan	Yes	1 or 2	D or N		No	No	SC
Greene	Marmaduke	No						Seem to be using 18-17-901
	Paragould	Yes	10	D or F	$25/day	Some-times	No	SC, usually
Hempstead	Hope	Yes	30	D	No	No	No	
Hot Spring	Donaldson	No						R Malvern
	Malvern	Yes	7*	F and V	Flat fee	No	No	SC
	Rockport	No						R Malvern
Howard	Nashville	Yes	6		$250	No	No	
Independ-ence	Batesville	Yes	18		$220	Some-times	Yes, suspend-ed if vacate	SC
Izard	Horseshoe Bend	Yes	1	D	Rarely	No	No	SC
	Melbourne	No						
Jackson	Diaz	No						R Newport
	Newport	Yes	<1			Yes, in one case where T would not leave	No	SC
	Swifton	No						R Newport
	Tuckerman	No						
Jefferson	Altheimer	No						Traffic only
	Humphrey	No						
	Pine Bluff	No						18-17-901
	Redfield	No						
	Wabbaseka	No						
	White Hall	No						Traffic only
Johnson	Clarksville	Yes	10	D or F	Yes			
	Coal Hill	Yes	0					Would hear if filed
	Lamar	Yes	3		$145	No	No	
Lafayette	Bradley	No						R Lewis-ville
	Lewisville	Yes	3	F	$25/day	No	No	
	Stamps	No						R Lewis-ville
Lawrence	Black Rock	Yes		D or F	$250	No	Yes	
	Hoxie	Yes		D or F	$250	No	Yes	
	Walnut Ridge	Yes	2 (whole county)	D or N	$250	No	Yes	SC
Lee	Marianna	Yes	4		$25/day	No	No	

Lincoln	Gould	No						R Star City
	Grady	No						Traffic only
	Star City–city and county	Yes	<5	D or F	$175 or $25/day	Possible	No	SC
Little River	Ashdown	Yes	4 or 5	V=30	$230	No	No	SC, ordered to vacate
	Winthrop	No						
Logan	Booneville	Yes	2 or 3	F	Yes	Yes	No	
	Magazine	No						None since 2009
	Paris	Yes	5 or 6	F	Yes	Yes	No	
Lonoke	Cabot	Yes	N/A	D	Yes	No	No	
	Carlisle	Yes	0 to 2	D				
	England	Yes	4	D				
	Lonoke	Yes	5 or 6	D				
	Ward	Yes	4 or 5		$205	No	Yes	SC
Madison	Huntsville	No						
Marion	Bull Shoals	No						
	Flippin	No						
	Yellville	No						
Miller	Texarkana	Yes	360	N or F	$265 plus $25/day	No	No	
Mississip-pi	Blytheville	Yes	10		$25/day	No	No	SC
	Dell	Yes						Hear criminal cases but never an FTV
	Gosnell	No						R Blythe-ville
	Leachville	Yes	0 to 2	N			No	
	Manila	Yes	2	V=30	No	No	No	Moved to Blytheville if T doesn't vacate in time
	Osceola	Yes	10	D or F	$25/day	No	No	SC
Monroe	Brinkley	No						18-17-901 is used
	Clarendon	Yes	3 or 4	D or F	$25/day	No	No	
	Holly Grove	No						R Claren-don
Montgom-ery	Mount Ida	Yes	3 or 4	D	No	No	No	
Nevada	Prescott	Yes	6	V		No	No	
Newton	Jasper	No						
Ouachita	Bearden	U						Hear criminal cases but never an FTV
	Camden	Yes	30	D	$100/day, suspended if T vacates	No	No	SC
	Chidester	Yes	< 1	D				
	East Camden	No						Traffic only
	Stephens	Yes	<1	D				
Perry	Perryville	No						
Phillips	Elaine	No						R Helena
	Helena	Yes	60	F	Varies	No	No	SC

	Lake View	N/A						
	Marvell	Yes	5	F	$5 to $50 per day	No	No	
	W. Helena	Yes						Counted with Helena
Pike	Glenwood	No						R Murfrees-Murfreesboro
	Murfreesboro	Yes	6	F and V	Yes	If asked for	No	Ordered to vacate, sheriff may enforce
Poinsett	Harrisburg	Yes	2		Varies	No	No	SC
	Lepanto	Yes	1	D or F	$25/day	No	No	SC
	Marked Tree	Yes	12	D		Maybe	Yes	SC
	Truman	Yes	2	N	$25/day	No	No	SC
	Tyronza	Yes	12	D or F	$25/day	No	No	SC
	Weiner	Yes	0					Have not handled any
Polk	Mena	Yes	12	N	No	No	No	Must post bond if plead NG
Pope	Atkins	Yes	2	D or F	Yes	Yes	No	
	Dover	No						
	London	Yes						R Russellville
	Pottsville	No						R Russellville
	Russellville	Yes	16*	D or F	Yes	No	Yes	
Prairie	Biscoe	Yes	1	D	No	No	No	
	Des Arc	Yes	1	D	No	No	No	SC
	Devalls Bluff	Yes	6	D	$75/day	No	No	SC
	Hazen	Yes	3	D	$25/day	No	No	SC
Pulaski	Cammack	No						Traffic only
	Jacksonville	Yes	41*	D or F	Yes	Sometimes	Yes	
	Little Rock	Yes	475*	V and D	No	No	No	Ordered to vacate
	Little Rock-2	No						Traffic only
	Little Rock-3	No						Environmental only
	Maumelle	Yes	35-40	D	$225	Sometimes	No	
	No. Little Rock-1	Yes	104*	D or F	$25/day	No	No	Ordered to vacate
	No. Little Rock-2	No						Traffic and environmental only
	Pulaski County	Yes	22*	N	Rarely	No	No	
	Sherwood	Yes	14*	D	$200-300	Sometimes	No	
	Wrightsville	No						Traffic only
Randolph	Pocahontas	N/A						
Saline	Alexander	Yes	10	D or F	Yes	No	No	
	Bauxite	N/A						
	Benton	Yes	2	D	No	No	No	
	Bryant	No						R Benton
	Haskell	No						R Benton
	Shannon Hills	N/A						
Scott	Waldron	Yes	15	F	Yes	Yes	No	
Searcy	Marshall	No						
Sebastian	Barling	N/A						

	Central City	No						
	Fort Smith–all depts	Yes	27*	D or F	$25/day	No	No	
	Greenwood	Yes	24	D	$25/day, discretion-ary	No	No	SC
Sevier	DeQueen	Yes	3 or 4	F and V	Yes	Yes	No	Ordered to vacate
Sharp	Ash Flat	No						Use 18-17-901
	Cherokee Village	No						
Stone	Mountain View	Yes	< 1	N	$145, only if T doesn't leave	No	No	
St. Francis	Forrest City	Yes	30 to 40	F	$240	Rarely	No	SC, most of the time
	Madison	No						R Forrest City
Union	El Dorado	No						18-17-901
Van Buren	Clinton	No						
Washing-ton	Elkins	No						SC
	Elm Springs	Yes						No cases for last few years
	Farmington	No						
	Fayetteville	Yes	1 or 2	F	$100	No	No	SC
	Greenland	No						
	Johnson	No						SC
	Lincoln	No						
	Prairie Grove	No						SC
	Springdale	Yes	100	D, F		Yes, if ordered	No	
	West Fork	No						
White	Bald Knob	No						
	Beebe	Yes	1 to 3	D, F	Yes	Yes	No	
	Bradford	No						R Searcy
	Judsonia	No						R Searcy
	Kensett	No						R Searcy
	McRae	No						R Searcy
	Pangburn	No						R Searcy
	Rosebud	No						R Searcy
	Searcy	Yes	12*	D, F	Yes		No	
Woodruff	Augusta	Yes	24	F		Some-times	No	
	Cotton Plant	Yes						Counted under Augusta
	McCrory	Yes	12	D or F	$200	No	No	SC
	Patterson	Yes						Counted under Augusta
Yell	Dardanelle-both districts	Yes	6	N or F	$25/day, discretion-ary	Some-times	No	

APPENDIX B

FAILURE TO VACATE DEFENDANTS BY RACE AND SEX

Race and Sex	**Little Rock**	**Springdale**
Asian or Pacific Is. Females	1 (.3%)	4 (3%)
Asian or Pacific Is. Males	0	1 (1%)
Black Females	248 (63%)	7 (6%)
Black Males	96 (24%)	5 (4%)
Hispanic Females	2 (.5%)	3 (3%)
Hispanic Males	2 (.5%)	5 (4%)
Marshallese Females	0	6 (5%)
Marshallese Males	0	6 (5%)
White Females	30 (8%)	36 (31%)
White Males	17 (4%)	25 (22%)
N/A Females	0	11 (9%)
N/A Males	0	7 (6%)
Total	396	116
Total Percent Female	72%	57%