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Property Law—Beyond Repair: The Persistent Unconstitutionality of the Failure to Vacate Statute

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PROPERTY LAW—BEYOND REPAIR: THE PERSISTENT
UNCONSTITUTIONALITY OF THE FAILURE TO VACATE STATUTE

I. INTRODUCTION

The COVID-19 pandemic¹ exacerbated many precarities of American life. Projections in July 2020 indicated that forty-three percent (43%) of Arkansas's renting households faced the possible inability to pay rent and, consequently, eviction in the near future.² While public debate on the necessity and feasibility of eviction moratoriums and rental assistance rages on, one is left wondering: even in the best of times, is Arkansas's eviction process balanced, efficient, and constitutional? Perhaps it takes the worst of times to bring deserved scrutiny to one of the most glaring shortcomings in Arkansas's landlord-tenant laws.

Depending on where in Arkansas the rental property is located, landlords pursuing an eviction may have several processes from which to choose. Three statutes provide judicial eviction procedures to eject tenants and restore full possession to landlords.³ This Note disputes the constitutionality of one of these procedures: the failure to vacate statute.⁴

1. COVID-19, the contagious disease caused by the novel coronavirus SARS-CoV-2, was first reported in December 2019. The global pandemic has continued to the date of this Note's authorship. See CENTERS FOR DISEASE CONTROL AND PREVENTION, BASICS OF COVID-19 (updated Nov. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/about-covid-19/basics-covid-19.html>.

2. Annie Nova, *The Pandemic May Cause 40 Million Americans to Lose Their Homes*, CNBC (July 30, 2020), <https://www.cnbc.com/2020/07/30/what-its-like-to-be-evicted-during-the-coivd-19-pandemic.html>.

3. ARK. CODE ANN. § 18-16-101 (West 2020); *id.* § 18-60-301 (West 2020); *id.* § 18-17-901 (West 2020).

4. For ease of reference, this Note refers to the eviction procedure codified at ARK. CODE ANN. § 18-16-101 as the "failure to vacate statute." Another one of Arkansas's eviction statutes has generated critical scholarship: the so-called "civil eviction" statute implemented as part of Arkansas's limited enactment of the Residential Landlord-Tenant Act in 2007. Professor Marshall Prettyman's work on this statute's shortcomings is instructive. See Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 Et Seq.*, 2008 ARK. L. NOTES 71 (2008) (arguing the Residential Landlord-Tenant Act, like the failure to vacate statute, operated too much to the advantage of landlords); Marshall Prettyman, *Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007*, *Ark. Code Ann. §§ 18-17-101 Et. seq.*, 35 U. ARK. LITTLE ROCK L. REV. 1031 (2013) (arguing that 2009 revisions to the Residential Landlord-Tenant Act were insufficient).

In light of its severity and novelty, the failure to vacate statute has generated no shortage of local and national attention.⁵ The scholarship of Professors Lynn Foster and Carol Goforth aptly analyzed the constitutional deficiencies of the version in force between 2001 and 2017.⁶ However, the failure to vacate statute has yet to undergo similar scrutiny following its 2017 revision.⁷

Section II of this Note provides an overview of the historical development of judicial and nonjudicial eviction procedures, from the self-help regime of feudalism to the current debate regarding Arkansas's unique failure to vacate statute.⁸ Section III recounts the key legal challenges against the failure to vacate statute and traces the history of its amendments by the General Assembly.⁹ Section IV discusses the failure to vacate statute's design and actual effects.¹⁰ Section V illustrates the constitutional deficiencies of the statute on three key grounds: (1) cruel and unusual punishment, (2) due process, and (3) preeminence of property rights.¹¹ Section VI concludes this Note by making the case that, in light of its persistent deficiencies both in theory and in practice, the failure to vacate statute ought to be repealed.¹²

II. FROM FEUDALISM TO FAILURE TO VACATE

The practice of landowners temporarily renting out the right to occupy their property stretches back beyond well-recorded history.¹³ Relatively

5. See Maya Miller & Ellis Simani, *When Falling Behind on Rent Leads to Jail Time*, PROPUBLICA (Oct. 26, 2020, 11:30 AM EDT) [hereinafter *Falling Behind on Rent*], <https://www.propublica.org/article/when-falling-behind-on-rent-leads-to-jail-time>; CHRIS ALBIN-LACKEY, HUMAN RIGHTS WATCH, PAY THE RENT OR FACE ARREST: ABUSIVE IMPACTS OF ARKANSAS'S DRACONIAN EVICTIONS LAW (Arvind Ganesan et al. eds., 2013), https://www.hrw.org/sites/default/files/reports/us0113arkansas_reportcover_web.pdf.

6. See Lynn Foster, *The Hands of the State: The Failure to Vacate Statute and Residential Tenants' Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1 (2013) (discussing the history, inconsistent enforcement, and practical and constitutional issues posed by the failure to vacate statute's amended form); 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).

7. The statute has, however, been examined from the perspective of penal philosophy. See Bryan Foster, *The Purpose of Criminal Evictions: Applying the Theories of Punishment to Arkansas' Criminal Eviction Statute*, 2018 ARK. L. NOTES 1993 (2018).

8. See *infra* Section II.

9. See *infra* Section III.

10. See *infra* Section IV.

11. See *infra* Section V.

12. See *infra* Section VI.

13. The Code of Hammurabi, among human civilization's earliest forms of written law, contains a provision on the "payment of rent" for agricultural property. See David G. Lyon, *The Structure of the Hammurabi Code*, 25 J. AM. ORIENTAL SOC'Y 248, 256 (1904); see also Luke 20:9 (the "Parable of the Tenants").

speaking, the law governing the removal of breaching tenants is considerably younger.¹⁴ This Section cursorily traces the history of eviction procedures from feudal self-help to the American tradition of summary eviction and Arkansas's partial departure from that tradition in 1901.

A. Self-Help Eviction

For much of English history, the social hierarchy pervading the feudal system colored the landlord-tenant relationship—as the term “landlord” suggests.¹⁵ That social hierarchy informed the legal view of the tenant as a “servant to the landlord”¹⁶ and in the landlord’s ability to remove tenants through any means, including extrajudicial violence.¹⁷ Though the English government eventually introduced limitations and alternatives in an effort to discourage outright violence, forceful self-help evictions persisted.¹⁸

In the early United States, most jurisdictions permitted self-help eviction.¹⁹ Though the majority of states,²⁰ including Arkansas,²¹ have since prohibited self-help eviction through either legislative act or judicial decision, the old habit persists even where it is no longer welcome.²²

14. See, e.g., Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process A Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 773 (1994).

15. See generally Tom G. Geurts, *The Historical Development of the Lease in Residential Real Estate*, 32 REAL EST. L.J. 356 (2004) (providing an overview of the residential leasehold in the common law, from the Middle Ages to the Uniform Residential Landlord Tenant Act).

16. *Id.* at 356.

17. Gerchick, *supra* note 14, at 773–74.

18. *Id.* at 774–75.

19. *Id.* at 776.

20. *Id.* at 777–78.

21. See *Gorman v. Ratliff*, 289 Ark. 332, 337, 712 S.W.2d 888, 890 (1986) (forbidding self-help evictions).

22. In 2020, a Conway, Arkansas, tenant complained that his landlord attempted to covertly move his property into storage in order to effectuate a self-help eviction. See Marine Glisovic, *Conway Landlord Accused of ‘Self-Help Eviction’ Caught Removing Tenant’s Belongings*, KATV (May 20, 2020), <https://katv.com/news/local/conway-landlord-accused-of-self-help-eviction-caught-removing-tenants-belongings>; David Ramsey & Benjamin Hardy, *No Shelter in Place: Conway Renter Says Landlord Tried to Illegally Force Him Out of His Home*, ARK. TIMES (May 19, 2020, 9:58 PM), <https://arktimes.com/arkansas-blog/2020/05/19/no-shelter-in-place-conway-renter-says-landlord-tried-to-illegally-force-him-out-of-his-home>.

B. Ejectment

The states, like the English monarchy before them, sought to discourage violent self-help evictions through a more structured legal process.²³ However, the first proffered alternative, ejectment, proved unattractive.²⁴ Through ejectment, the landlord was required to demonstrate superior title to the rental property.²⁵ However, ejectment required that the landlord prove their claim superior not only to the tenant's, but to all others as well.²⁶ Ejectment entailed complex legal actions with long delays; therefore, some landlords preferred the simpler and more direct option of self-help.²⁷

C. Summary Eviction

As states sought a process that avoided the irregularity of self-help and the inefficiency of ejectment, forcible entry and detainer statutes emerged.²⁸ These statutes aimed to provide landlords with speedy recourse in civil court while also affording defenses and remedies for unlawfully dispossessed tenants.²⁹ The process, sometimes called summary eviction, attempted to strike a balance between expeditiousness for the landlord and due process for the tenant.³⁰ Summary eviction proved to be a relative success, as all states enacted versions of this approach.³¹ Arkansas was no exception and enacted its unlawful detainer statute in 1875.³²

D. Failure to Vacate

Despite joining the majority trend regarding summary eviction and, eventually, self-help evictions,³³ Arkansas blazed its own trail by enacting a criminal eviction process in 1901.³⁴ The proposal was controversial and divisive in Arkansas's General Assembly, as it provoked a spirited debate

23. Gerchick, *supra* note 14, at 776.

24. *Id.*

25. *Id.*

26. *Id.*

27. Robert F. Fitzpatrick, Jr., *The Development of Massachusetts Law Governing the Disposition of Evicted Tenants' Property*, 25 SUFFOLK U. L. REV. 1109, 1115 (1991).

28. Gerchick, *supra* note 14, at 776.

29. *Id.*

30. *Id.* at 777.

31. *Id.*

32. Foster, *supra* note 6, at 2; *see* ARK. CODE ANN. § 18-60-301 (West 2020).

33. Arkansas's prohibition of self-help eviction came over a century after its enactment of a summary eviction statute. *Gorman v. Ratliff*, 289 Ark. 332, 338, 712 S.W.2d 888, 891 (1986).

34. Foster, *supra* note 6, at 6–7.

before passing the Senate by only one vote.³⁵ The Senate's floor debate, reproduced in the *Arkansas Gazette*, demonstrates the key concerns of the failure to vacate statute's first proponents and critics:³⁶

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 failed to pay the rent. He was opposed to criminal measures for settling matters already covered by civil statutes. . . .

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. . . .

Senator Jacob King closed the debate. He said 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.³⁷

As the reproduced floor debate illustrates, the senators drew stark battle lines on the proposed failure to vacate statute, prioritizing landowner rights on one side and balking at the potential consequences of criminalizing non-payment of rent on the other side.³⁸ This is specifically demonstrated by Senator King's initial defense of the Act insisting that it simply provided landlords with an additional tool to remove non-paying tenants, and Senator Lawrence's concern that indebted tenants would be "sent to jail and com-

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

36. *South Carolina Dispensary Law - Similar Bill Introduced in the House; Thirty-Four New Bills In*, *supra* note 35, at 3.

37. *Id.*

38. *See id.*

pelled to work [their fines] out.”³⁹ Senator Lawrence was likely referring to the practice of convict leasing.⁴⁰ Even with the concerns of convict leasing and jail time for indebtedness expressed, the bill passed the Senate fourteen to thirteen.⁴¹

Though the unusual⁴² and maligned⁴³ failure to vacate statute remains in effect today, the statute’s path through the last century was marked by frequent challenges in court and two overhauls.

III. LITIGATING, AMENDING, AND RESTORING THE FAILURE TO VACATE STATUTE

The Supreme Court of Arkansas first considered the criminal eviction statute’s constitutionality when it issued its short opinion in *Poole v. State*.⁴⁴ Patricia Poole faced conviction and fines under the criminal eviction statute.⁴⁵ In her appeal to the court Poole argued the criminal eviction statute ought to be declared facially unconstitutional as an unreasonable exercise of the State’s police power.⁴⁶ Poole asserted that residential evictions were beyond “the scope of the public health, safety[,] and general welfare and interest.”⁴⁷

The court disagreed. First, it deferred to the General Assembly, noting that the criminal eviction statute had been in effect since 1901.⁴⁸ The court treated the statute’s longevity as evidence of constitutionality.⁴⁹ The court held that the criminal eviction statute is a valid exercise of police power primarily because “public health, safety[,] and welfare is always threatened when a person wrongfully trespasses upon another person’s property in Arkansas.”⁵⁰ According to the court, the criminal eviction statute punishes only

39. *Id.*

40. The convict leasing system was an economic arrangement throughout the Reconstruction South wherein cash-strapped state governments leased convicts to private interests as cheap labor. Like other Jim Crow institutions, convict leasing sported highly racialized implementation and dragged one aspect of the social and economic regime of chattel slavery into the twentieth century. See Calvin R. Ledbetter, Jr., *The Long Struggle to End Convict Leasing in Arkansas*, 52 ARK. HIST. Q. 1, 2 (1993).

41. *South Carolina Dispensary Law - Similar Bill Introduced in the House; Thirty-Four New Bills In*, *supra* note 35, at 3.

42. See Foster, *supra* note 6, at 8 (commenting on a repealed 1933 Florida statute that criminalized holding over after the end of a lease’s term).

43. See generally ALBIN-LACKEY, *supra* note 5.

44. 244 Ark. 1222, 428 S.W.2d 628 (1968).

45. *Id.* at 1223–24, 428 S.W.2d at 629.

46. *Id.*, 428 S.W.2d at 629.

47. *Id.* at 1224, 428 S.W.2d at 629.

48. *Id.* at 1225, 428 S.W.2d at 630.

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

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

one, the “one who has become a trespasser,” and his or her refusal to vacate exhibits criminal intent to infringe on the landlord’s property interest.⁵¹ The court held that failing to vacate after withholding rent constitutes trespass and “[n]o one can seriously argue that wrongful trespass does not come within the police power of the state.”⁵²

The failure to vacate statute underwent its next round of constitutional scrutiny in federal court, coalescing in the Eighth Circuit’s holding in *Munson v. Gilliam*.⁵³ In their suit against a state prosecutor, Gilliam and four plaintiffs alleged that failure to vacate charges were being brought “arbitrarily . . . to assist landlords in evicting tenants who fail to pay rent” rather than law enforcement purposes.⁵⁴ Gilliam argued the failure to vacate statute unduly circumvented Arkansas’s civil eviction procedures because it, “puts a ‘chilling effect’ on the tenant’s right to assert defenses, and forces the tenant to risk criminal conviction and fine as a result of what he may have considered to be a justified refusal to pay rent.”⁵⁵

While the Eighth Circuit decided the case primarily on procedural grounds, it briefly cited the *Poole* holding with some approval.⁵⁶ While not expressly siding one way or the other, the Eighth Circuit held that the *Poole* court’s characterization of breaching tenants as trespassers is “a conclusion available to a state under the Constitution.”⁵⁷

The Supreme Court of Arkansas revisited the failure to vacate statute in *Duhon v. State*.⁵⁸ Brigiette Duhon was convicted under the criminal eviction statute and sentenced to a striking \$1,625.00 fine.⁵⁹ Like Poole, Duhon challenged the failure to vacate statute’s constitutionality on two relevant grounds: (1) “it denies her due process of law under the authority of *Mathews v. Eldridge*,” and (2) “it does not bear a substantial relationship to an end which promotes the public health, safety[,] or welfare.”⁶⁰ Duhon pointed to the Supreme Court of the United States case *Greene v. Lindsey*⁶¹ and Arkansas’s self-help eviction case, *Gorman v. Ratliff*, to demonstrate that

51. *Id.* at 1226, 428 S.W.2d at 630.

52. *Id.* at 1226, 428 S.W.2d at 630–31.

53. 543 F.2d 48 (8th Cir. 1976).

54. *Id.* at 50.

55. *Id.*

56. *Id.* at 53.

57. *Id.*

58. 299 Ark. 503, 774 S.W.2d 830 (1989).

59. *Id.* at 506, 774 S.W.2d at 833.

60. *Id.* at 508, 774 S.W.2d at 834.

61. *Greene v. Lindsey*, 456 U.S. 444, 450–51 (1982) (“In this case, appellees have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes.”).

“property rights of a tenant have changed” such that “*Poole* . . . should be overturned.”⁶²

On Duhon’s police power argument, the court simply stated that “we do not . . . feel [*Greene* and *Gorman*] overcome the presumption of constitutionality.”⁶³ *Poole*’s holding that the criminal eviction statute was a valid exercise of police power survived (albeit for reasons that the *Duhon* court failed to clearly explain).⁶⁴

Justice Purtle authored a spirited dissent to the majority’s holding in *Duhon*.⁶⁵ Purtle insisted that, in light of *Gorman*, the failure to vacate statute’s constitutionality was “ripe for adjudication.”⁶⁶ Purtle argued that *Gorman* and *Greene* both warranted the recognition that a tenant’s interest in continued possession warrants additional protection during the eviction process.⁶⁷ Purtle lamented that *Gorman*’s one step forward was countered by *Duhon*’s two steps backward, remarking that “[t]he majority has, with all the speed of a crawfish, backed into the 19th century.”⁶⁸

In 2001, the General Assembly amended the failure to vacate statute by adding a requirement that tenants pay the disputed rent into the court’s registry in order to present a defense, as well as escalating the penalty for those found guilty.⁶⁹ After the statute was amended, the failure to vacate statute’s opponents scored their first victory in *State v. Smith*.⁷⁰ Artoria Smith challenged her conviction for failure to vacate under both the United States and Arkansas Constitutions, arguing that the statute violated equal protection and due process, chilled the tenant-defendant’s right to trial, resulted in imprisonment for debt, and constituted cruel and unusual punishment.⁷¹ At trial, even the State expressed uncertainty regarding the statute’s constitutionality in light of the new registry requirement’s potential to “expose a defendant to different levels of punishment based on the defendant’s ability to pay into the district court registry.”⁷²

62. *Duhon*, 299 Ark. at 510, 774 S.W.2d at 835.

63. *Id.*, 774 S.W.2d at 835.

64. *Id.* at 511, 774 S.W.2d at 836.

65. *Id.* at 512–13, 774 S.W.2d at 836–37 (Purtle, J., dissenting).

66. *Id.* at 512, 774 S.W.2d at 836 (Purtle, J., dissenting).

67. *Id.* at 512–13, 774 S.W.2d at 836–37 (Purtle, J., dissenting).

68. *Duhon*, 299 Ark. at 512, 774 S.W.2d at 836. Colorful language in a dissent was not out of the ordinary for Justice Purtle. For more on his life and jurisprudence, see Samuel A. Perroni, *Setting the Record Straight on State v. John Ingram Purtle: Reflections on the Great Dissenter*, 34 U. ARK. LITTLE ROCK L. REV. 135 (2011).

69. See Foster, *supra* note 6, at 11–12, 16.

70. No. CR 2014-2707, 2015 WL 991180, at *7 (Ark. Cir. Ct. Jan. 20, 2015), *superseded by statute*, Act of Feb. 13, 2017, No. 159, 2017 Ark. Acts 159 (S.B. 25) (codified at ARK. CODE ANN. § 18-16-101 (West 2020)).

71. *Id.* at *1.

72. *Id.*

The court found that the 2001 version of the criminal eviction statute violated due process, chilled the defendant's right to trial, was not narrowly tailored to advance the landlord's property rights, and potentially implicated prohibitions against the criminalization of debt.⁷³ The court was uncertain whether the punishment imposed by the criminal eviction statute was cruel, but found the law was *sui generis* and so "by definition—an 'unusual' punishment."⁷⁴

After the *Smith* court found the failure to vacate statute's 2001 form unconstitutional,⁷⁵ the General Assembly reverted the statute back to its original form.⁷⁶ After a brief departure from 2001 to 2017, the statute has returned to where it started, reviving the century-old debate between Senators King and Lawrence.⁷⁷ The failure to vacate statute currently reads 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)(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)(A) 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.

73. *Id.* at *2–7.

74. *Id.* at *7.

75. Professors Foster and Goforth ably analyzed the more extreme 2001–2017 version's many deficiencies. *See supra* text accompanying note 6.

76. The 2017 amendment justified the criminal eviction statute's survival, despite the *State v. Smith* decision, by stating, "It is in the best interests of the people of the State of Arkansas for property owners to continue to have remedies against tenants who fail to pay for a dwelling house or other building but refuse to surrender possession" *See* Act of Feb. 13, 2017, No. 159, sec. 1, 2017 Ark. Acts 159 (S.B. 25) (codified at ARK. CODE ANN. § 18-16-101 (West 2020)).

77. *Compare* ARK. CODE ANN. § 18-16-101 (West 2020) with ARK. CODE ANN. § 18-16-101 (Repl. 2003).

(B) 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.⁷⁸

IV. ARKANSAS'S FAILURE TO VACATE STATUTE IN THEORY AND IN PRACTICE

If the property is in a municipality where the failure to vacate statute is enforced, the landlord may invoke the State's power and seek a criminal proceeding against the non-paying tenant. This option is more limited in scope than the State's unlawful detainer statute, as the tenant is only guilty of failure to vacate if he or she does not leave the rental property after ten days' notice of her alleged delinquency on rent.⁷⁹ There is no minimum amount in controversy; therefore, a landlord could allege that he or she is the victim of a tenant's failure to vacate the property even if the tenant falls only one dollar short or one day behind on rent.

At first glance, the landlord's initiating the process by serving the tenant with a notice to vacate for the tenant's alleged nonpayment of rent appears to be the statute's initial effect.⁸⁰ However, one should note that the statute also provides that the tenant "forfeit[s]" his or her right to occupy the premises when rent is first owed.⁸¹ Should the tenant fail to comply with the landlord's notice to vacate within ten days, the statute provides that he or she "shall be guilty of a misdemeanor."⁸² If then convicted, the tenant faces a fine of one to twenty-five dollars per day that the tenant held over after the notice to vacate expired.⁸³

The failure to vacate statute is messy and irregular in practice. To start, it is enforced inconsistently, as the district courts of most counties and even some local prosecutors simply do not follow it.⁸⁴ Once the landlord presses charges, those prosecutors who do enforce the statute rarely investigate the individual claims, instead taking the landlord's affidavit for granted.⁸⁵ The

78. *Id.* § 18-16-101.

79. *Id.* § 18-16-101(b)(1).

80. *Id.*

81. *Id.* § 18-16-101(a).

82. *Id.* § 18-16-101(b)(1).

83. ARK. CODE ANN. § 18-16-101(b)(2).

84. Foster, *supra* note 6, at 10–11; *Falling Behind on Rent*, *supra* note 5; see also Maya Miller & Ellis Simani, *A Deputy Prosecutor Was Fired for Speaking Out Against Jail Time for People Who Fall Behind on Rent*, PROPUBLICA (Nov. 27, 2020, 6:00 AM EST), <https://www.propublica.org/article/a-state-prosecutor-was-fired-for-speaking-out-against-jail-time-for-people-who-fall-behind-on-rent>.

85. "The landlord files an affidavit to initiate the process. Prosecutors typically do not investigate landlords' claims, and thus it is possible for landlords to make false representations, simply to evict the tenant, even though to do so would be a crime." NON-LEGISLATIVE

statute's consequences are unpredictable and often harsh, as tenants may face arrest warrants and even jail sentences for failing to appear at their hearings.⁸⁶ Those with no experience in the criminal process or advance knowledge of the obscure statute may be shocked to see that seemingly pedestrian rent disputes beget warrants and criminal records.⁸⁷

The reality Arkansas tenants face demonstrates that the consequences of the current failure to vacate statute are not so different from those held to be unconstitutional by *State v. Smith*. While imprisonment and flat fines are no longer facial punishments under the failure to vacate statute, evictions nevertheless “snowball from charges to warrants to arrests to jail time.”⁸⁸ Arrests for mere failure to vacate persist.⁸⁹ Regardless of whether the General Assembly anticipated this outcome, the failure to vacate statute operates today in much the same way as the 2001–2017 form.

V. THE CASE AGAINST THE FAILURE TO VACATE STATUTE

The failure to vacate statute is vulnerable to a constitutional challenge from numerous angles. This Section demonstrates the statute's unconstitutionality on three grounds. First, the statute is facially unusual and prescribes a disproportionate punishment.⁹⁰ Second, the statute undermines the tenant's due process rights and overreaches the State's police power because it mischaracterizes occupying a rental property after a breach as a trespass.⁹¹ Third, the statute's lack of regard for the tenant's interest in rental property runs afoul of the Arkansas Constitution's emphasis on property rights.⁹²

A. The Failure to Vacate Statute Imposes Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution prohibits excessive bail, excessive fines, and cruel and unusual punishment.⁹³ The Supreme Court of Arkansas has held that statutory punishments are unconstitutional if they are “barbarous or unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the com-

COMMISSION ON THE STUDY OF LANDLORD-TENANT LAWS 758 (U. Ark. Little Rock L. Rev. ed., 2013).

86. *Falling Behind on Rent*, *supra* note 5.

87. *See id.*

88. *Id.*

89. *Id.*

90. *See infra* Section V.A.

91. *See infra* Section V.B.

92. *See infra* Section V.C.

93. U.S. CONST. amend VIII.

munity.”⁹⁴ Proportionality is a fluid consideration based on “evolving standards of decency that mark the progress of a maturing society.”⁹⁵

Proponents of the failure to vacate statute might argue that the General Assembly rescued the statute’s constitutionality when it reverted the statute to its pre-2001 form. Indeed, *Smith v. State* afforded the statute’s original form the dubious praise of being the “less draconian” of the two versions.⁹⁶ However, the failure to vacate statute remains unconstitutional because it prescribes a demonstrably unusual punishment. The two key reasons for this, which the restoration of the statute’s original form did not remedy, are the failure to vacate statute’s novelty and the disproportionality of the punishment contained within its first provision.

1. *Prosecuting Landlord-Tenant Disputes is a Criminal Practice Unknown to Law*

When the General Assembly struck the amendments to the failure to vacate statute’s penalties, it could not remedy the statute’s most unusual feature: its existence. At that time, and today, Arkansas stands alone in its criminalization of nonpayment of rent.⁹⁷ The *Smith* court held “[t]he fact that Arkansas remains alone here counsels in favor of the failure to vacate statute being a cruel and unusual punishment[.]”⁹⁸ and this remains the case regardless of the statute’s exact terms. The General Assembly can revise the statute’s wording in an attempt to alleviate its most glaring defects, but the General Assembly cannot force other jurisdictions to join Arkansas in criminalizing failure to vacate, nor can the General Assembly force the federal government to permit the application of the statute to HUD-backed housing. There is simply no remedy to the failure to vacate statute’s exceptionality. Therefore, the failure to vacate statute’s punishment is “by definition” unusual, the very sort which should be considered unknown to law.⁹⁹

Another Arkansas law ran afoul of the Eighth Amendment in *Jackson v. Bishop*, where the Eighth Circuit Court of Appeals held that striking prisoners with a strap was cruel and unusual punishment.¹⁰⁰ The Court held the practice was cruel and unusual, in part because, “Public opinion is obviously adverse. Counsel concede [sic] that only two states still permit the use of the

94. *Davis v. State*, 246 Ark. 838, 846, 440 S.W.2d 244, 249 (1969).

95. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

96. *State v. Smith*, No. CR 2014-2707, 2015 WL 991180, at *6 (Ark. Cir. Ct. Jan. 20, 2015), *superseded by statute*, Act of Feb. 13, 2017, No. 159, 2017 Ark. Acts 159 (S.B. 25) (codified at ARK. CODE ANN. § 18-16-101 (West 2020)).

97. *Id.* at *6; *Falling Behind on Rent*, *supra* note 5.

98. *Smith*, 2015 WL 991180, at *6.

99. *Id.* at *7.

100. *See Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968).

strap. Thus almost uniformly has it been abolished. It has been expressly outlawed by statute in a number of states.”¹⁰¹

Arkansas stands alone in prosecuting landlord-tenant disputes; therefore, *Jackson’s* reasoning would indicate that the failure to vacate statute should go the way of the strap. Arkansas prisons are not so uniquely unruly as to necessitate a mode of punishment that went extinct in virtually every other state. Similarly, it seems unlikely that the General Assembly could demonstrate that Arkansas’s tenants are so prone to occupying rental properties after a breach that the failure to vacate statute’s novelty is sensible.

2. *The Failure to Vacate Statute Imposes Punishments Wholly Disproportionate to the Nonpayment of Rent*

The failure to vacate statute’s uniqueness, as described in the preceding Section, makes it somewhat difficult to analyze its proportionality under the usual factors provided by the Supreme Court of the United States.¹⁰² However, this want for a point of comparison does not foreclose on proportionality analysis, because the clear trend against the statute’s use demonstrates that its operation shocks “the moral sense of the community.”¹⁰³ The failure to vacate statute faces ongoing challenges from lawmakers, activists, scholars, and even some prosecutors.¹⁰⁴ Counties and district courts remain split on whether to enforce the statute and, if so, which of its provisions to actually enforce.¹⁰⁵ The United States Department of Housing and Urban Development prohibits federally-backed housing authorities and Section 8 landlords from using the failure to vacate statute, limiting evictions only to “judicial action[s].”¹⁰⁶ The failure to vacate statute’s notoriety and inconsistent use throughout Arkansas demonstrates what seems intuitive: criminal prosecution is a response disproportionate to a tenant’s remaining in his or her home after falling one day behind on rent.

101. *Id.*

102. *Solem v. Helm*, 463 U.S. 277, 292 (1983) (“[P]roportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminal in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.”).

103. *Davis v. State*, 246 Ark. 838, 846, 440 S.W.2d 244, 249 (1969).

104. *Falling Behind on Rent*, *supra* note 5; *Miller & Simani*, *supra* note 84.

105. See NON-LEGISLATIVE COMMISSION ON THE STUDY OF LANDLORD-TENANT LAWS, *supra* note 85, at 760.

106. See 24 C.F.R. § 247.6 (2021); see also *Foster*, *supra* note 6, at 24 (noting that the Department of Housing and Urban Development “opined that the failure to vacate statute was not ‘judicial action for eviction’”).

B. The Failure to Vacate Statute Violates the Tenant's Due Process Rights and Overreaches the State's Police Power

This Section scrutinizes how the failure to vacate statute affects individual renters' relationships with the State. The statute implicates due process concerns by purporting to extinguish a tenant's interest in his or her rental property without prior hearing¹⁰⁷ and overreaches the State's police power because the Supreme Court of Arkansas's attempt to analogize failure to vacate with trespassing lacks reason or supporting authority.¹⁰⁸

1. *The Failure to Vacate Statute Deprives Tenants of a Possessory Property Interest Without Prior Hearing*

Where property rights are at issue, due process requires "at a minimum, that one be given a meaningful opportunity for a hearing"¹⁰⁹ Determining what exactly constitutes a meaningful opportunity is a case-sensitive question.¹¹⁰ However, when it comes to the failure to vacate statute's forfeiture provision,¹¹¹ it is clear that a tenant is afforded no such opportunity.

The statute purports to extinguish the tenant's possessory interest in the property if the tenant fails to pay rent "when due."¹¹² Though the statute specifies "due according to the contract," it fails to define "due," leaving a question as to whether tenants' rights are forfeited when rent is past-due or actually late.¹¹³ Regardless, the forfeiture described in this provision appears to occur automatically, preliminary to the rest of the statute. The statute contemplates no hearing or other proceeding to determine the fate of the tenant's property interest; rather, that interest seemingly perishes by operation of law when the statute allows the landlord to file the notice to vacate.

107. See *infra* Section V.B.1.

108. See *infra* Section V.B.2.

109. *Davis v. Schimmel*, 252 Ark. 1201, 1207, 482 S.W.2d 785, 789 (1972).

110. See *id.*, 482 S.W.2d at 789.

111. The provision states:

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.

ARK. CODE ANN. § 18-16-101(a) (West 2020).

112. *Id.*

113. *Id.* Residential leases commonly provide a "grace period" during which rent is technically due but the landlord covenants not to take adverse action for a period of days. See Marcia Stewart, *Grace Periods and Rent Due Dates*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter3-4.html> (last visited Nov. 21, 2021).

2. *The Failure to Vacate Statute is an Inappropriate Exercise of the State's Police Power*

In the debate regarding the failure to vacate statute's constitutionality, all roads lead to *Poole v. State*'s holding that the statute is a valid exercise of the State's police power. *Duhon v. State* and *Munson v. Gilliam* both cited *Poole* with approval on questions of police power and public interest; therefore, *Poole* is a lynchpin for the failure to vacate statute's legitimacy.¹¹⁴

The *Poole* court rested its defense of the failure to vacate statute on two principal points. First, the court noted, "[t]he right of an individual to acquire and possess and protect property is inherent and inalienable and declared higher than any constitutional sanction in Arkansas."¹¹⁵ Second, "the public health, safety[,] and welfare is always threatened when a person wrongfully trespasses upon another person's property in Arkansas."¹¹⁶

As the following Sections demonstrate, the *Poole* court's characterization of breaching tenants as trespassers is hasty and unsupported by prior or even subsequent precedent. Furthermore, assuming *arguendo* that evictions are a matter of public health, safety, or welfare, the statute fails to adequately address those concerns.

a. The breach of a residential lease is not a criminal trespass

According to the *Poole* court, "no one can seriously argue that wrongful trespass does not come within the police power of the state" and trespass poses an enlarged threat to public health, safety, and welfare "when the trespasser persists in the trespass and defies the owner's right to possession."¹¹⁷ The court seemed to take for granted, however, that a tenant immediately becomes a trespasser by breaching a lease.

The court couched its conflation of breach and trespass in a limited reading of the failure to vacate statute. The court claimed the statute regulates trespassers because it "relates only to one who 'shall refuse or fail to pay the rent therefor, when due, according to contract' and after ten days [sic] notice to vacate, 'shall wilfully [sic] refuse' to do so."¹¹⁸ This seems to misunderstand the true extent of the statute's effect. The statute, by its very first provision, does not merely punish those who refuse to vacate after notice. The statute's first provision terminates, through the operation of law,

114. See *Poole v. State*, 244 Ark. 1222, 1226, 428 S.W.2d 628, 631 (1968); *Duhon v. State*, 299 Ark. 503, 510, 774 S.W.2d 830, 835 (1985); see also *Munson v. Gilliam*, 543 F.2d 48, 53 (8th Cir. 1976).

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

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

117. *Id.* at 1225–26, 428 S.W.2d at 630–31.

118. *Id.* at 1226, 428 S.W.2d at 630.

the tenant's property interest at the moment rent is due and unpaid.¹¹⁹ Therefore, despite the court's suggestion that the statute concerns only those who refuse to pay rent and defy notice for over a week, the reality is starker. The statute only proscribes trespass if falling one day short on rent is properly construed as a trespass.

The *Poole* court cites no authority to support its characterization of breaching tenants as trespassers. What could seem, at first glance, like an elegant way to pull evictions into the scope of police power further unravels in light of subsequent case law. The Supreme Court of Arkansas has held that the criminal trespass statute does not apply in residential landlord-tenant disputes.¹²⁰ Furthermore, the "criminal trespass statute [requires] an illegal entry" and the General Assembly has "historically treated the two types of illegal occupancy [criminal trespass and holdover tenancy] in different ways."¹²¹ When the *Poole* court held that criminalizing nonpayment of rent was a valid exercise of police power, it apparently embraced the following contradiction: by breaching a lease, the tenant has committed a trespass sufficiently severe to permit criminalization but not sufficiently severe to actually meet the statutory definition of criminal trespass.

Neither common law nor the Supreme Court of Arkansas's jurisprudence provides solid support for the *Poole* court's analogy of breach to trespass. Therefore, the court's conclusion that the failure to vacate statute is a valid exercise of police power rests on, at best, a shaky assumption.

- b. If it is a valid exercise of police power, the failure to vacate statute is both overbroad and underinclusive

Though the preceding subsection argued that the criminalization of non-payment of rent is not a valid exercise of police power, this subsection grants that premise for the sake of argument. This subsection asks whether, in the *Poole* court's formulation of the applicable level of scrutiny, the failure to vacate statute "bears a real and substantial relationship" to the end of safeguarding society from tenants' so-called "trespassing."¹²²

If breaching tenants are, as the *Poole* court says, essentially trespassing, then the failure to vacate statute seems woefully underinclusive. After all, there are many ways one can breach a residential lease. The failure to vacate statute purports, therefore, to protect society from the threat to public welfare posed by nonpayment of rent. This leaves the public unguarded from the surely equivalent or greater threats posed by unpermitted sublet-

119. ARK. CODE ANN. § 18-16-101(a) (West 2020).

120. See *Williams v. City of Pine Bluff*, 284 Ark. 551, 555, 683 S.W.2d 923, 925-26 (1985).

121. *Id.*, 683 S.W.2d at 925.

122. *Poole*, 244 Ark. at 1226, 428 S.W.2d at 631.

ting, abandonment, early termination, and unauthorized pets.¹²³ The purpose of this irrational specificity remains a mystery.

However, the failure to vacate statute is also overbroad because it prohibits and punishes all nonpayment of rent, regardless of the amount owed or tardiness. Does terminating a tenant's property interest for becoming one day delinquent on rent have any relation whatsoever to the State's goal of preventing trespassing? This absurd overreach follows from the statute's treatment of all degrees of nonpayment as equally undesirable, and yet, as discussed above, the statute inexplicably singles out only one category of breach for criminalization.

C. The Failure to Vacate Statute Undermines Property Rights

Article II of the Constitution of the State of Arkansas provides that “[t]he right of property is before and higher than any constitutional sanction.”¹²⁴ While this provision refers principally to takings and compensation, the Supreme Court of Arkansas echoed this language in *Poole v. State*.¹²⁵

Despite the reverence for individual property rights apparent from Arkansas's Constitution and jurisprudence, cases on the failure to vacate statute seem to ignore the tenant's possessory interest¹²⁶ in his or her rental property. If the tenant's interest is, like all property rights in Arkansas, “higher than any constitutional sanction,”¹²⁷ it should not be so unceremoniously dissolved by the operation of a mere statute.

VI. CONCLUSION

Arkansas has yet to decide whether it will be a jurisdiction “where the weak and the strong stand on equal terms.”¹²⁸ The Supreme Court of Arkansas, in *Poole v. State*, wrote with spirit on the supposed preeminence of in-

123. The author's own residential lease served as the inspiration for this parade of horrors.

124. ARK. CONST. art. II, § 22.

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

126. Geurts states:

Under the traditional common law view this is considered to be a conveyance. However, over time the tenant was seen more and more as a separate owner of an estate in land and thus it was recognized by common law courts that the landlord conveyed a bigger bundle of property rights, in particular the right to exclusive possession, to the tenant.

Geurts, *supra* note 15.

127. ARK. CONST. art. II, § 22.

128. *Gorman v. Ratliff*, 289 Ark. 332, 337, 712 S.W. 2d 888, 890 (1986) (internal quotations omitted).

dividual property rights.¹²⁹ Nevertheless, in apparent contradiction of this ideal, the Supreme Court of Arkansas continues to prop up an eviction statute that fails to acknowledge the property interests of those on the other side of eviction hearings. In increasingly dire times for the state, as both sides of the eviction process face an uncertain future, the wisdom and necessity of repeal become all the more apparent. Persistent inconsistency and undesirable outcomes, despite revision and reversion, have proven that Arkansas's failure to vacate statute is broken beyond repair.

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

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