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Procedural Due Process Challenges to Evictions during the Covid-19 Pandemic

On March 27, 2020, the federal CARES Act took effect, imposing a 120-day moratorium on nonpayment evictions from properties with federal mortgage loans or that participate in federal programs.[1] In addition to the CARES Act, many state and local officials have imposed their own moratoria reaching different phases of the eviction process.[2] Unfortunately, the federal moratorium leaves behind many tenants—such as those who live in properties that do not participate in any federal housing programs or have federally-backed financing. The patchwork of state and local moratoria catches only some of those who fall through the cracks, and many of the state and local measures have begun to lapse or be withdrawn as states look to re-open (even though the pandemic persists). Where evictions continue, advocates must look for other tools to help vulnerable tenants remain in their homes and protect their own health and that of their community as well. One important tool that may assist advocates in this work is the Fourteenth Amendment Due Process Clause, which assures at least a baseline level of fairness in state summary eviction proceedings.[3]

At least under "normal" (i.e., non-pandemic) conditions, the basic model of summary eviction proceedings has long been held permissible under the Due Process Clause.[4] This is true even though the procedure, which prioritizes speed and simplicity over traditional judicial objectives such as factual accuracy and legal correctness, tilts the balance heavily in the landlord's favor. That imbalance is inherent to the design; historically, landlords often resorted to extrajudicial self-help for removing tenants—a practice "fraught with 'violence and quarrels and bloodshed'"—and summary eviction proceedings were a response to this disorder.[5] States prohibited self-help, but placated landlords by providing in its place a legal mechanism that was not only fast and inexpensive, but which reliably delivered possession to the landlord.[6]

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[1] See Pub.L. 116-136, § 4024(b).

[2] For a map showing which states have adopted eviction moratoria, see https://www.rhls.org/evictionmoratoriums/; for detailed information about specific orders, see https://docs.google.com/spreadsheets/u/1/d/e/2PACX-1vTH8dUIbfnt3X52TrY3dEHQCAm60e5nqo0Rn1rNCf15dPGeXxM9QN9UdxUfEjxwvfTKzbCbZxJMdR7X/pubhtml

[3] See *Lindsey v. Normet,* 405 U.S. 56, 69 (1972).

[4] See *Lindsey,* 405 U.S. at 64.

[5] *Lindsey,* 405 U.S. at 57, quoting *Entelman v. Hagood,* 95 Ga. 390, 392; 22 S.E. 545 (1895).

[6] Indeed, this history of summary eviction proceedings dates back to 1166 A.D., when Henry II of England created a mechanism in the Assize of Clarendon that enabled "any freeholder, who had been recently dispossessed of his land, to obtain a writ from the king which would put the matter before a sworn inquest of his neighbors [who] could give a verdict on this issue instantly[.]" G.O. Sayles, *The Medieval Foundations of England* at 339 (1967). According to historians, the "assize of novel desseisin" proved quite popular with medieval landlords for the first

In many jurisdictions, modern summary eviction proceedings remain true to these origins as a capitulation to landlord violence that prioritizes economy over justice. Such proceedings afford notice and a hearing—even though in practice that procedure often "mean[s] in actuality no opportunity to be heard."[7] So while such proceedings may be sufficient to hover over the surface of minimal procedural due process requirements, they do so only slightly. Pandemic conditions place the normal pegs that balance a state summary eviction procedure safely above that constitutional limit under stress, and threaten to tip the structure over entirely.

A. Minimum procedural safeguards required for summary eviction proceedings

The basic constitutional components of procedural due process are notice and a meaningful opportunity for a hearing appropriate to the nature of the case.[8] Whether specific procedures satisfy these requirements in connection with a particular type of deprivation comes from the test set forth in *Mathews v. Eldridge,* 424 U.S. 319 (1976), which balances (i) the nature and importance of the interest at stake, (ii) the risk of erroneous deprivation through the procedures employed, (iii) the probable value of additional safeguards, and (iv) the governmental interest and burdens the additional process would entail.

Mathews came a few years after the 1972 decision in *Lindsey v. Normet* that upheld the basic parameters of state summary eviction proceedings against a facial due process challenge, but the *Lindsey* majority's reasoning largely tracked the same considerations. A tenant could generally be forced to defend at trial on as little as four days' notice did not offend due process, *Lindsey* held, because "[t]enants would appear to have as much access to relevant facts as their landlord, and they can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary."[9] This was further mitigated by the ability to obtain a continuance upon posting security for rent coming due before trial—a procedure the court noted "could be applied so as to deprive a tenant of a proper hearing in specific situations," but could not support a facial challenge.[10]

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couple hundred years, until they eventually abandoned the assize and returned to force and violence once tenant defenses began to slow and complicate the procedure.

[7] See *Lindsey*, 405 U.S. at 85 ("Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words. It is, indeed, a meaningless notice and opportunity to defend. The trial is likely to be held in the presence of only the judge and the landlord and the landlord's attorney.").

[8] See *Boddie v. Connecticut,* 401 U.S. 371, 378 (1971).

[9] See *Lindsey*, 405 U.S. at 65.

[10] See *Lindsey*, 405 U.S. at 65. Note further that the *Lindsey* majority also appeared to have been influenced by a landlord's interest in a simple and speedy adjudication, even though discussion of that factor largely pertained to the court's equal protection analysis. See *Id*. at 72-73 ("There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the

The rudimentary eviction procedure at issue in *Lindsey* at least allowed tenants to have counsel (at their own expense), afforded written—albeit short—notice of the grounds for the eviction (requiring service of a pre-suit notice and a judicial complaint), and provided an opportunity to appear and assert any available defenses[11] before an impartial decisionmaker ("[t]he suit may be tried to either a judge or a jury").

Similar to those core procedural safeguards identified in *Lindsey* are those set forth in the most recent iteration of HUD's regulatory "elements of due process" (that a state eviction procedure must have for a PHA within that state to exclude certain criminal activity-related evictions from the public housing grievance process), though HUD further requires that a tenant be allowed to present "any affirmative or equitable defense which the tenant may have:"

> (c) Elements of due process shall mean an eviction action or a termination of tenancy in a State or local court in which the following procedural safeguards are required:
>
> (1) Adequate notice to the tenant of the grounds for terminating the tenancy and for eviction;
>
> (2) Right of the tenant to be represented by counsel;
>
> (3) Opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have;
>
> (4) A decision on the merits.

24 C.F.R. § 966.53(c).[12] While this regulatory standard applies to public housing, together with *Lindsey* it supplies a useful proxy for estimating the core due process safeguards due in any residential eviction proceeding.

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landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute.").

[11] *Lindsey* also affirmed the ability of states to deny certain defenses and counterclaims in unlawful detainer proceedings. See *Lindsey*, 450 U.S. at 69. In reaching this holding, however, the court did not conduct a *Mathews*-style analysis but frustratingly relied exclusively on stare decisis. *Id* at 67-68, citing *Grant Timber & Mfg. Co. v. Gray,* 236 U. S. 133 (1915) ("It would be a surprising extension of the Fourteenth Amendment if it were held to prohibit the continuance of one of the most universal and best known distinctions of the mediaeval law.") and *Bianchi v. Morales,* 262 U. S. 170 (1923) (dismissing due process challenge to summary possession procedure as "simply another form of the objection to the separation between possessory and petitory suits familiar to countries that inherit Roman law").

[12] C.F. *Lindsey*, 405 U.S. at 68 (counterclaims and affirmative defenses are not "available" for due process purposes of required to be litigated separately from eviction proceedings under state law). Note further that HUD's original regulatory definition for "elements of due process" also included an "[o]pportunity for the tenant to ex amine all relevant documents, records and regulations of the PHA prior to the trial for the purpose of preparing a defense." See 24 C.F.R. § 966.53(c) (1974). HUD removed this provision as an "element of due process" in 1991, though retaining it for administrative grievance hearings. See 56 Fed. Reg. 51560, 51573 (Oct. 11, 1991).

B. Possible effects of pandemic conditions on ability to fulfill due process requirements

Numerous circumstances related to the COVID-19 pandemic may impede a court from fulfilling all of the essential procedural due process requirements, whether systematically or in particular cases. Certainly, tenants who become infected or hospitalized themselves may be unable to respond to new complaints, seek legal assistance, appear in court, or otherwise participate in their defense. But tenants who are elderly or otherwise at high risk of death were they to be infected with COVID-19 might face similar difficulties. Tenants or advocates may have trouble investigating claims or obtaining documents if government offices, businesses, or other services are closed or not functioning.

Many courts have adopted rules and policies limiting court access to persons who have or have been suspected of having COVID-19 (e.g., such as by being asked to isolate or self-quarantine, or displaying certain symptoms such as fever or cough), or who have engaged in certain activities associated with a high risk of transmission (e.g., international or air travel), or who live with or have had contact with such persons. Naturally, limitations on court entry such as these can directly prevent tenants and witnesses from appearing for their hearings, or otherwise entering the courthouse to file documents or conduct other business related to their cases. Many courts have not taken steps to notify court users or the general public of these limitations, of alternatives available to persons who cannot access the court, or how to take advantage of such alternatives (even assuming such alternatives exist and are practical for the tenant to utilize).

Some courts have adopted policies requiring those entering to wear masks, others have made masks optional, and others have no policies regarding masks. Courts have also adopted limits on the numbers of persons who may enter at a time, distancing requirements within the courthouse and in security lines outside, and other such policies. Again, policies of this nature can deprive a tenant of the ability to be meaningfully heard—for instance, a tenant or witness may not be able to appear for a hearing if denied entry for not having a mask, or because the maximum number of persons had previously been admitted to the courthouse.

On the other hand, a court that has not adopted and sufficiently publicized policies to limit court access by persons who are known or at higher-likelihood of infection, or to require masks and observe other social distancing procedure, may likewise infringe upon tenants' due process rights. This is because many tenants witnesses, and others—and especially those with pre-existing conditions that make COVID-19 especially dangerous to them—would likely be chilled from appearing in court unless they are assured that appropriate precautions were being taken to protect their health and safety. And while many courts may adopt such rules and policies, the quality or efficacy of such policies and the degree to which social distancing practices are actually observed and enforced may vary considerably.

Of course, any court-adopted rules or procedures exist in addition to background conditions and generally-applicable laws and policies that might otherwise deter parties and witnesses from appearing at hearings due to infection or fear of exposure to COVID-19. For example

tenants or witnesses who rely on public transportation may be reluctant to ride on buses or light rail, even if they perceive the courthouse itself as a sufficiently safe environment. Serving subpoenas may be difficult or impossible when apartment buildings and residential facilities are closed to the public to control the spread of COVID-19.

Unlike in a more localized epidemic, these impediments cannot be avoided simply by moving the trial to a different location.[13] Technological solutions that courts may adopt to hear cases remotely, such as telephonic or video-conference hearings, may not be accessible for low-income clients or may not be appropriate for a particular type of hearing (such as a jury trial or a hearing that requires interpretation). This is to say nothing of the deleterious effect that excluding the public may have on the quality or integrity of judicial proceedings held during pandemic conditions

C. Procedural due process considerations for individual cases

Even assuming a court's decision to proceed with summary eviction proceedings during the Covid-19 emergency would not generally violate the Due Process Clause, pandemic-related circumstances could prevent individual tenants from having a full and fair opportunity to defend against eviction. Affording due process may require courts to adequately accommodate such circumstances.

Notice to tenant.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[14] Circumstances related to the Covid-19 pandemic could potentially operate to deny tenants adequate notice of eviction proceedings in several distinct ways.

Perhaps the most significant is that, due to emergency closures and social distancing orders, many courts are not open for operations as they normally are and have adopted various procedures for limiting access to facilities, hearing cases by telephone or videoconference, and so on. Tenants, especially those who may need to appear pro se and on very short notice, can scarcely be expected to have experience with such policies or hearing procedures. Worse, summons forms or other materials that may have been served to the tenant or that may appear on court websites or similar resources may be written for "normal" (i.e., non-pandemic) circumstances, and may further confuse or mislead a tenant about the alternatives and methods for responding and presenting a defense.

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[13] See Abbot, Earnest B., "Law, Federalism, the Constitution, and Control of Pandemic Flu," 9 Asian Pacific Law & Policy Journal 186, 204 (2008) ("The basic model of emergency management is that people and resources from outside the affected area flood into the disaster area to provide assistance. Help arrives from the places where the disaster is not… However, this model will be strained in a pandemic event; in a true pandemic, the emergency conditions caused by communicable disease are experienced everywhere.").

[14] *Greene v. Lindsey,* 456 U.S. 444, 449–50 (1982), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

A tenant who is not notified of unexpected Covid-19 policies or procedures could be hindered in responding to an eviction suit, appearing for a hearing, or presenting evidence to the court. For example, a tenant who intends to offer a paper copy of a lease or handwritten note from the landlord into evidence might ordinarily bring the document with him or her to court—but may be at a loss for how to present such document in a telephonic hearing. Or a court that limits the number of persons who may enter or requires visitors to wear masks or meet other requirements may interfere with the tenant's ability to appear or have witnesses at a hearing.

Constitutional notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[15] In some circumstances, this requires notice be given of important rules and deadlines for responding or contesting the deprivation.[16] Hence, a tenant whose ability to respond or defend an eviction lawsuit was prejudiced by lack of notice about court policies or procedures adopted in response to the Covid-19 emergency ought to be granted a continuance or other accommodation to avoid such prejudice. Otherwise, eviction through such a proceeding could violate the Due Process Clause.

Many tenants could be hospitalized, quarantined, away from home to provide care for others, unable to return home due to disruptions in transportation, or otherwise not present in the rental premises to receive service of process for reasons directly or indirectly related to the Covid-19 emergency. Particularly where the landlord knows or has the ability to find out where the tenant is, due process likely requires that notice be served to the tenant at that location—as a person "actually desirous" of reaching the tenant would certainly send notice there.[17] Even if the landlord knows only that the tenant is not at home, due process likely requires at least some additional effort to provide actual notice to the tenant.[18]

Even where a tenant has notice of the eviction suit, a tenant may fail to appear in court due to being denied entry for a Covid-19 related limitation (e.g., having recently had a fever or traveled by air, or due to an occupancy-limit adopted for social distancing purposes) of which the tenant had not been notified. Others may have chosen not to bear the health and safety risks of attending in-person, without having been notified of alternatives for appearing remotely or seeking a delay or continuance (or how to utilize such alternatives). Rather than

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[15] *Mullane v. Cent. Hanover Bank & Tr. Co.,* 339 U.S. 306, 314 (1950).

[16] See *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 14–15 (1978) (notice "does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified.").

[17] See *Jones v. Flowers,* 547 U.S. 220, 230, (2006) ("In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case."), discussing *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972) (notice of vehicle forfeiture proceeding sent to owner's home address was inadequate when State knew owner was in prison).

[18] See *Jones*, 547 U.S. at 230 (knowledge that notice pursuant to normal procedure is ineffective triggers obligation to take additional steps to effect notice.).

simply enter judgment against such tenants by default, the significant likelihood that tenants may have failed to appear for reasons related to the pandemic suggests that due process requires a court to make first further efforts to reach such tenants and confirm their lack of intent to defend.

The Covid-19 crisis could also impact a tenant's ability to receive constitutionally adequate notice of an eviction action through effects on the manner of service. Due to social distancing protocols, many high-rise buildings and other multifamily communities have adopted restrictions on access by non-residents, which may interfere with efforts by private process servers to conduct personal service or post notices on the rental premises. Often, when efforts at serving a tenant personally prove unsuccessful, landlords may obtain orders authorizing alternative methods of service. A method of serving unlawful detainer process that fails to provide actual notice to the tenants in a "significant number of instances" does not satisfy due process requirements,[19] and some alternative service methods—including certain types of mail that may be delayed or not delivered to the residence,[20] or publication—may not be sufficiently reliable under this standard. Moreover, as landlords are under control of their own social distancing policies and have the ability to make exceptions for process servers, courts should not permit such policies to interfere with a tenant's ability to receive service through the most reliable methods.[21]

Opportunity for the tenant to refute the landlord's evidence and present a defense.
Perhaps the most significant manner in which the Covid-19 pandemic could implicate a tenant's procedural due process rights in the eviction context relates to the problems a tenant might face in appearing and participating in a hearing, confronting and cross-examining adverse witnesses, and presenting the tenant's own affirmative evidence. Though most, if not all, of these potential problems can be overcome through diligence, planning, creativity, and smart use of technology, courts and judicial systems may differ in assuring these requirements—especially courts that may have adopted new procedures or technologies in haste once the Covid-19 pandemic arrived.

- *Investigation and preparation*

[19] *Greene v. Lindsey,* 456 U.S. 444, 453-54 (1982) ("In a significant number of instances, reliance on posting . . . results in a failure to provide actual notice to the tenant concerned . . . [a]s the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were 'not infrequently' removed by children or other tenants before they could have their intended effect. Under these conditions, notice by posting on the apartment door cannot be considered a 'reliable means of acquainting interested parties of the fact that their rights are before the courts.'").

[20] See *Flowers*, 547 U.S. at 235 ("the use of certified mail might make actual notice less likely in some cases—the letter cannot be left like regular mail to be examined at the end of the day, and it can only be retrieved from the post office for a specified period of time").

[21] See generally *Deitrick v. Greaney,* 309 U.S. 190, 196 (1940) ("It is a principle of the widest application that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to … defeat a remedy which except for his misconduct would not be available.").

Especially because formal discovery mechanisms are often either expressly disallowed or simply impractical (due to incompatible deadlines and procedural requirements) in summary eviction proceedings, a tenant's ability to investigate facts and prepare for an eviction trial often depends largely on the ability to undertake informal discovery. This commonly entails visiting or ordering documents from government offices (such as police departments, PHAs, or housing finance agencies), inspecting or causing experts to inspect rental premises (e.g., to document habitability defects), or obtaining various types of privately-held documents (such as medical records, mortgage documents, receipts, bank records, or other financial materials).

The conditions surrounding the Covid-19 pandemic may frustrate tenants or their advocates in carrying out such informal investigations. Government offices and private businesses may be closed to the public, closed altogether, or open but providing limited services (that may not include supplying documents to the public or inspecting private residences). Social distancing requirements may limit the ability to interview witnesses in person, or obtain declarations or other documents (particularly those requiring notarization). Social distancing may also interfere with the ability to have experts inspect tenant premises, conduct medical or psychological examinations, or otherwise assist in a tenant's defense. Even where these services are available, disruptions in staffing or relevant supply chains may produce delays incompatible with eviction case timelines.

- *Attending and participating in hearings*

Numerous Covid-19 circumstances may also directly affect a tenant's ability to have a hearing. As discussed above, some tenants may simply be denied entry altogether, while others may simply be deterred from entering such facilities by fear of infection. This is especially true for tenants of advanced age or who with pre-existing conditions that render them more vulnerable to the worse effects of the coronavirus if infected, and at courthouses that may have long lines at security or clerks offices, or that fail to adequately limit admission or enforce social distancing rules. Tenants who rely on public transportation, taxis or carshare services, or other forms of transportation that may expose them to high infection risks in transit may similarly be deterred from appearing for in-person court hearings.

Rather than continue holding in-person hearings, of course, many courts have begun hearing cases telephonically or through videoconferencing technology. Naturally, the use of such methods threatens to deny access to anyone who lacks either the necessary equipment (e.g., computer or mobile device with functioning camera and microphone, internet access) or the ability to utilize it. These can pose significant barriers for low-income tenants, many of whom may be using outdated or damaged mobile devices, lack consistent internet access, rely on pay-as-you-go mobile plans or face tight data limits, and endure shut-offs or account closures for non-payment. Many low-income individuals also rely on public resources, such as library computers or free wifi provided by cafeterias or coffee shops, to access the internet—and those resources may be unavailable during the pandemic. Often courts supply rooms and videoconference terminals for litigants to use—but this approach fails to avoid the problem of requiring tenants to visit the courthouse in the first place.

Even in a remote hearing, a tenant would presumably have the ability to cross-examine adverse witnesses. However, federal courts have recognized in the immigration law context that the use of remote video hearings may afford diminished procedural protection to those facing removal—especially as related to the ability to see adverse witnesses and assess their credibility based on demeanor or non-verbal cues.[22] One federal court has established a rule that "[w]hether a particular video-conference hearing violates due process must be determined on a case-by-case basis, depending on the degree of interference with the full and fair presentation of petitioner's case caused by the video conference, and on the degree of prejudice[.]"[23] A tenants whose ability to effectively defend in an eviction hearing was diminished by some aspect of the remote hearing infrastructure could potentially assert a compelling argument under an analogous standard. Note that similar concerns could potentially apply even to in-person hearings if witnesses testified while wearing masks.

Another potential barrier for tenants in obtaining a fair hearing through remote conferencing is that the procedure may affect a tenant's ability to present documents or other exhibits. A best practice for holding hearings through remote conferencing, for instance, is to file exhibits in an electronic folder that may be shared with the parties.[24] Utilizing such an electronic folder may not be practical for tenants who lack facility with computer use, or those who may wish to admit materials such as leases, contracts, or other lengthy documents without access to document scanners.

Remote hearings also raise particular challenges for tenants with language barriers, whether related to disability or limited English proficiency. While these challenges could presumably be overcome at the hearing stage by including interpreters in the conference and ensuring the technology is configured to enable the appropriate translations to the relevant participants, additional challenges may arise in making sure language barriers do not prevent tenants from being able to access or utilize the relevant technology or even communicate their need for language access services to the court. Note that U.S. courts had been less-than-perfect in delivering adequate language access services even prior to the Covid-19 pandemic,[25] hence the likelihood that all courts will adequately ensure language access services through remote conferencing seems low.

Additional complicating factors related to language access may arise from the use of masks, gloves, or other coverings (which may interfere with ASL interpretation or make oral language interpretation more difficult to hear or understand). And at in-person hearings, social distancing rules may raise particular challenges for ESL hearing participants (e.g., maintaining a

[22] *Rapheal v. Mukasey,* 533 F.3d 521, 532–34 (7th Cir. 2008).

[23] *Vilchez v. Holder,* 682 F.3d 1195, 1199–200 (9th Cir. 2012).

[24] Center for Legal & Court Technology, "Best Practices For Using Video Teleconferencing For Hearings And Related Proceedings," p. 60 (Nov. 6, 2014).

[25] See, e.g., U.S. Dept. of Justice, Civil Rights Div., "Language Access in State Courts," (Sept. 2016) (describing violations and Title VI enforcement actions against state courts for failing to afford language access services).

six-foot distance between a hearing participant and an interpreter may not be feasible without disrupting court proceedings, especially if masks are worn).

Tenants who intend to admit favorable evidence through witnesses face additional challenges. Just as concerns about infection either in public building or en route to court may deter tenants from appearing for hearings, witnesses face similar deterrents—and have less, if any, personal stake in the outcome. Process servers may struggle to effect service of subpoenas to witnesses because of building closures and social distancing policies. Procuring witness testimony for remote hearings presents all of the same technical challenges as for tenants, again potentially compounded by a witness's relative lack of incentive to participate. Additional difficulties may arise in cases where prior witness testimony has the potential to influence other witnesses, making sequestration potentially appropriate.[26]

Whether held in-person or through remote means, judicial hearings under pandemic conditions further suffer from diminished public access and oversight. The U.S. Supreme Court has recognized in the context of criminal trials that "public access [is] essential to the proper functioning of the proceedings in the overall criminal justice process,"[27] and many federal courts have recognized a qualified right of public access to civil court proceedings rooted in the First Amendment and in English common law.[28] Whether proceedings are criminal or civil in nature, "[o]penness in judicial proceedings 'enhances both the basic fairness of the proceeding and the appearance of fairness so essential to public confidence in the system.'"[29]

On a related note, a study of remote adjudication methods in immigration court found patterns of decreased engagement with the hearing process among persons in immigration detention, finding that "[t]elevideo litigants were less likely to retain counsel, pursue an application for permission to remain lawfully in the United States (known as relief), or seek the right to return voluntarily (known as voluntary departure)."[30] As the author of that study remarked, "[v]ideo

[26] *U.S. v. Jackson,* 60 F.3d 128, 135 (2d Cir. 1995) (Common factors that inform court's discretion as to sequestration of witnesses include: "1) how critical the testimony in question is, that is, whether it will involve controverted and material facts; 2) whether the information is ordinarily subject to tailoring, such that cross-examination or other evidence, could bring to light any deficiencies; 3) to what extent the testimony of the witness in question is likely to encompass the same issues as that of other witnesses; 4) the order in which the witnesses will testify; 5) any potential for bias that might motivate the witness to tailor his testimony; and 6) whether the witness's presence is "essential" rather than simply desirable.") (internal citations omitted).

[27] *Press-Enter. Co. v. Superior Court,* 478 U.S. 1, 12 (1986); see also *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980).

[28] See *Courthouse News Serv. v. Planet,* 947 F.3d 581, 589 (9th Cir. 2020) ("The Supreme Court has yet to explicitly rule on whether the First Amendment right of access to information reaches civil judicial proceedings and records, but the federal courts of appeals widely agree that it does.").

[29] *Courthouse News,* 947 F.3d at 589, quoting *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501, 508 (1984).

[30] Ingrid v. Eagly, "Remote Adjudication in Immigration," 109 Northwestern U. Law Rev. 933, 937-38 (2015) ("Moreover, these televideo versus in-person differences in litigant engagement remained statistically significant even when controlling for numerous factors that could influence case outcomes, including prosecutorial charge type, proceeding type, judge assignment, representation by counsel, nationality, and fiscal year of decision. When compared to similarly situated detained televideo respondents, detained in-person respondents were a

thus separates the litigant from the comfort that a courtroom audience can provide. If prior social science research is any guide, it would be no wonder if family and community members perceive the remote courtroom setup as fundamentally unfair."[31]

Right of tenant to be represented by counsel.

The federal Due Process Clause has not been held generally to require the appointment of publicly-funded counsel in an eviction case, only that a tenant may not be denied the benefit of counsel he or she may be able to obtain on his or her own.[32] Nonetheless, even the more limited right to obtain counsel on one's own necessarily implies at least some minimal time in which to seek and obtain counsel—even if, as a practical matter, the amount of time is often insufficient to satisfactorily investigate the facts, research the law, and prepare a strong defense. See *Lindsey v. Normet,* 450 U.S. 56, 85 (1972) ("Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words.") (Douglas, J., dissenting).

Circumstances associated with the Covid-19 emergency may further frustrate or impede tenants in obtaining legal representation. Legal aid programs or eviction defense clinics may be operating at reduced capacity for both safety and funding reasons,[33] or have experienced uncommon increases in demands for service.[34] Intake and case screening procedures may have changed. In-person appointments may not be available, potentially increasing the time or complexity of providing documents and evidentiary materials to attorneys for review, or for clients to review or sign attorney-generated items such as court pleadings, declarations, or retainer agreements.

Accordingly, due process requirements strongly suggest that a court should grant a continuance for a tenant who was unable to secure legal representation for reasons such as these. Yet rules and court procedures applicable to unlawful detainer cases in standard conditions often require

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remarkable 90% more likely to apply for relief, 35% more likely to obtain counsel, and 6% more likely to apply only for voluntary departure.").

[31] *Id.* at 999.

[32] Two of the only cases to address the issue on the merits are *Tyson v. NYCHA,* 369 F. Supp. 513, 521 (S.D.N.Y. 1974) (stating that "As long as a tenant is afforded the opportunity to be heard either pro se or by a retained attorney, due process is satisfied") and *Worthy Apartments Co. v. Doe*, No. 16-SP-3216 (Mass. Cmwlth. Ct. 2017) (relying on *Lassiter v. Dept of Social Services,* 452 U.S. 18 (1981) and *Turner v. Rogers*, 564 U.S. 431 (2011) to find that tenant was entitled to appointed counsel given his disability, "significant private interest in his subsidized housing", and "risk of self-incrimination in the related criminal case")..

[33] Debra Cassens Weiss, *Legal air programs likely to be hit hard by drop in IOLTA funds, group warns*, ABA Journal (Apr. 3., 2020), *available at* https://www.abajournal.com/news/article/legal-aid-programs-likely-to-be-hard-hit-by-drop-in-iolta-funds-group-warns; Jack Karp, *'Not Our Best Days': The Fiscal Crisis Coming for Legal Aid*, Law360 (Apr. 12, 2020), *available at* https://www.law360.com/articles/1262255.

[34] Lincoln Caplan, *Op-Ed: How the COVID-19 pandemic has created dire legal problems for the poor*, Los Angeles Times (May 19, 2020), *available at* https://www.latimes.com/opinion/story/2020-05-19/legal-services-coronavirus-low-income-clients.

eviction cases to be heard within a certain number of days after filing, or may otherwise limit a court's ability to accommodate pandemic-related difficulties in securing representation. Robotic adherence to such ordinary rules and procedures could violate a tenant's due process rights if the result is to deny a tenant a reasonable opportunity to obtain counsel.[35]

Indeed, due process may require the appointment of counsel in an eviction case during the pandemic. Whether or not courts might recognize such a right under in *Mathews v. Eldridge*[36] during ordinary conditions,, the heightened complexity of eviction proceedings during the Covid-19 crisis, together with the government's interest in avoiding displacements during a time of social distancing and economic upheaval, lend additional force to an argument that the appointment of counsel is necessary to ensure due process under pandemic conditions.

In a bit of an understatement, the U.S. Supreme Court has acknowledged that the right to continued residence in a home is a "significant interest in property."[37] Of course, the loss of housing tends to be a devastating circumstance, frequently leading to homelessness, which in turn can cause incarceration, health issues, job loss, and threats to child custody. Even those who do not experience homelessness may still suffer from some of these secondary consequences (such as employment or child custody issues) due to having to relocate further from their community and support networks. But the significance of housing as a property interest is enhanced even greater during a pandemic, in which the ability to socially distance from others and maintain elevated hygiene may be a matter of life or death. As housing is also necessary to comply with "stay at home" orders that may be in effect in many states or localities, eviction during a pandemic may implicates serious liberty interests as well.

Even before Covid-19, landlord/tenant law was a "'patchwork' of legislation that has responded to decades of social, economic and political pressure" and [amounted to] an 'impenetrable thicket confusing not only to laymen but to lawyers.'"[38] Against the backdrop that virtually all

[35] See generally *Mathews v. Eldridge,* 424 U.S. 319, 344 (1976) ("procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions").
[36] 424 U.S. 319, 344 (1976).
[37] *Greene v. Lindsey*, 456 U.S. 444, 450-451 (1982) (finding notice to tenants of eviction was invalid as matter of due process).

[38] *La Guardia v. Cavanaugh*, 423 N.E.2d 9, 10 (N.Y. 1981). See also Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 Harvard C.R-C.L. L. Rev. 557 (1988) ("In the last several decades, a vast array of remedial legislation has been enacted at federal, state and local levels to enable tenants to obtain decent housing and to avoid arbitrary treatment by the administrative and judicial system. Through these new laws, legislatures have created housing and building codes to protect the life, health and safety of tenants; have established a variety of forms of rent control, rent subsidy and government ownership to assure the affordability of housing; and have provided legislation to regulate the procedures and grounds for eviction. Mastery of, or at least familiarity with, the relevant legislation is a prerequisite to effective defense of an eviction proceeding. Moreover, eviction cases involve adversarial court proceedings where rules of evidence and a host of other legal 'niceties' apply. And because eviction proceedings are generally summary proceedings, they move much more swiftly toward judgment than do ordinary civil cases.")

tenants are pro se while most landlords have counsel,[39] a representational imbalance that is relevant to the risk of error.[40] However, the the dizzying array of federal, state, and local court procedures, emergency laws, and related new developments related to Covid-19 era, greatly amplifies this disparity..

At the federal level, perhaps the clearest manifestation of how the lack of legal representation may lead to erroneous evictions is the difficulty unrepresented tenants will have in effectively raising or asserting protection under the federal CARES Act eviction moratorium.[41] Not appointing counsel to assist unrepresented tenants in identifying and raising these defenses raises an especially high likelihood of erroneous deprivation. This is so for three key reasons.

First, the federal eviction moratorium applies to a large amount of rental housing: by one estimate, approximately 12.3 million rental housing units (28% of the 43.8 million overall U.S. units) are covered properties by virtue of having federally-backed mortgage loans.[42] The U.S. has about seven million rental units assisted by housing vouchers or other federal subsidies that are covered through VAWA or the rural voucher program (though some of these units would overlap with federally-backed financing). More than 3.1 million low-income housing tax credit units are also covered via VAWA, though again some of those units could overlap with coverage through financing or other federal programs. In addition to those units, non-participating housing units can be covered dwellings if located in properties where some units have vouchers or participate VAWA-covered programs. See CARES Act, § 4024(a)(2)(A).

Second, determining which housing is covered under the CARES Act moratorium is difficult and may not even be possible by tenants alone. Federal agencies and private organizations have created some resources that may be used to find out whether a property has a federally-backed multifamily mortgage loan or participates in certain site-based subsidy programs covered by VAWA. But many tenants live in small (1-4 unit) rental properties, and the Freddie Mac and Fannie Mae on-line lookup tools for finding out whether those small properties have federally-backed mortgage loans may only be used by borrowers—not tenants, tenant advocates, or

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[39] In New York City, tenant representation was at 1% in 2013. As the result of the City enacting a right to counsel in 2017, representation has risen to 38%. https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf. In Michigan, 83% of landlords are represented compared to fewer than 5% of tenants. https://poverty.umich.edu/news-events/news/eviction-case-filed-for-1-in-6-rental-units-in-michigan-u-m-study-finds/. And in Delaware, only 2% of tenants are represented in Delaware, compared to 86% of landlords represented either by an attorney or an agent. http://udspace.udel.edu/handle/19716/26352#files-area.

[40] See e.g. *Turner v. Rogers*, 564 U.S. 431 (2011) (declining to recognize federal due process right to counsel for noncustodial parent-defendant in child support proceeding because custodial parent, who was plaintiff, was unrepresented by counsel, and "A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would 'alter significantly the nature of the proceeding'"; Court clarifies that it is not addressing situation where State is the plaintiff and "The government is likely to have counsel or some other competent representative").

[41] See Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub.L. 116-136,1 § 4024(b)(1).

[42] See Urban Institute, "The CARES Act Eviction Moratorium Covers All Federally Financed Rentals—That's One in Four US Rental Units," UrbanWire (Apr. 2, 2020), on-line at: https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units

courts. And there are no such tools for finding out whether housing vouchers are present in a multifamily property—indeed, privacy protections would likely restrict voucher administrators from disclosing the locations of their tenants. See 5 U.S.C.A. § 552a(b) (2014).

For this reason, a number of state supreme courts (including Arkansas, Georgia, Idaho, Michigan, Oklahoma, South Carolina, and Texas) have adopted rules requiring unlawful detainer plaintiffs to submit declarations or otherwise affirmatively verify that the landlord has made a diligent inquiry and confirmed that the disputed premises are not in a covered property. But many states have not adopted any such procedures, and local courts may not have done so either. Even where such procedures exist, assistance of counsel may still be needed to effectively verify that the landlord accessed the tools and resources necessary to confirm the absence of coverage and does not participate in any of the myriad federal programs that could extend the CARES Act moratorium to the tenancy.

Third, the CARES Act's restriction on evictions for nonpayment of rent or other fees and charges likely covers at least some evictions that might not be formally based on nonpayment. For example, the moratorium likely applies to "no cause" eviction where a tenant's lease expires during the moratorium period and is not renewed if the nonpayment of rent or charges is a motivating factor in the landlord's decision not to renew the lease. Without counsel, however, tenants would be unlikely to understand this dynamic and unequipped to elicit or present the evidence necessary to demonstrate the landlord's motivation for nonrenewal (e.g., either an admission by the landlord, or the fact of a rent arrearage coupled with the lack of other apparent reason for nonrenewal).

Not only does the lack of legal pose an increased risk of erroneous eviction during the pandemic, but the government's interest during such conditions also tilts less toward speed and efficiency and more toward caution and public health interests. As the widespread existence of stay-at-home orders indicates, state governments want and need individuals and families to stay in their homes for both their safety as well as the safety of other state and city residents. Evictions that deprive families of their homes and put them at risk of homelessness run counter to that governmental imperative.

In addition to the CARES Act, the lack of representation could undoubtedly disadvantage or prevent tenants from identifying, raising, or effectively asserting pandemic-specific defenses available under state or local law as well, such as state eviction moratoria.[43] Keeping track of the bewildering array state and local emergency orders, eviction moratoria, and new court policies and procedures—many of which change weekly or even more often—can be difficult for attorneys and courts; for unrepresented tenants to be aware of or discern the latest laws pertaining to their tenancies and determine how the law applies to them is not realistic in the large majority of cases. Additionally, state or local moratoria may require tenants to assert or

[43] See Eviction Lab, *COVID-19 Housing Policy Scorecard* (last accessed May 22, 2020), *available at* https://evictionlab.org/covid-policy-scorecard/ (outlining complex array of state moratoria). There are also moratoria operating at the city/county level that are not included in the Eviction Lab scorecard.

document that a failure to pay rent or other charges was connected to a COVID-19 economic loss in order to receive protection; obtaining such proof and admitting it as evidence can be difficult or impossible without counsel.[44]

Given the extensive number of units subject to the federal and state moratoria, the challenges of determining which rental properties are covered and which are not, and the added difficulty of discerning which types of eviction cases are prohibited and which may be allowed, it is highly probable that landlords will file eviction and prosecute eviction cases prohibited by law (indeed, this has already happened in many locations).[45] Relying on unrepresented tenants to assert these defenses to eviction proceedings is not a reliable way for courts to assure their own compliance with the law—and is further exacerbated by the other possible impediments to notice and court access discussed above. Requiring landlords to self-disclose the absence of CARES Act coverage is an improvement, but arguably still does not afford constitutionally adequate process under pandemic conditions.

A decision on the merits.
Probably the aspect of procedural due process in eviction proceedings that is least threatened by the pandemic conditions is the tenant's right to a decision on the merits. Granted, the quality of any such decision could well be impaired for some of the same reasons that might affect tenants in defending—such as technical barriers to receiving exhibits, or the diminished ability to observe witnesses and assess their credibility based on non-verbal indicators. But it could seemingly be presumed that, irrespective of the background conditions, a court would at least endeavor to render the best possible decision on the evidence and legal arguments it was able to hear.

Nonetheless, in many courts the practice of presenting orders for review and signature by a court can be fraught with pitfalls and hazards—especially for unrepresented persons—even under typical conditions. Trial court orders are commonly drafted by attorneys, usually replete with jargon, legalese, and citations, and may be only cursorily reviewed by judges before being

[44] In fact, requiring such proof transforms evictions into "ability-to-pay" hearings quite similar to the child support context, where many courts have recognized a right to counsel based in part of the complexity of such proceedings. See e.g. *Pasqua v. Council*, 892 A.2d 663 (N.J. 2006) (recognizing right to counsel for child support contempt proceedings, and observing that "When an indigent litigant is forced to proceed at an ability-to-pay hearing without counsel, there is a high risk of an erroneous determination ... However seemingly simple support enforcement proceedings may be for a judge or lawyer, gathering documentary evidence, presenting testimony, marshalling legal arguments, and articulating a defense are probably awesome and perhaps insuperable undertakings to the uninitiated layperson.")

[45] See e.g. Rebecca Burns, *Landlords Illegally Evicting Tenants, Despite Federal Restrictions*, The American Prospect (Apr. 23, 2020), *available at https://prospect.org/coronavirus/landlords-illegal-evictions-tenants-cares-act/;* CBS Chicago, *Protesters Fight Against Illegal Evictions, Want Pritzker To Protect Tenants* (May 21, 2020), *available at* https://chicago.cbslocal.com/2020/05/21/protesters-fight-against-illegal-evictions-want-pritzker-to-do-more-to-protect-tenants/; Danny McDonald, *In Mass., dozens of illegal evictions attempted, despite pandemic moratoriums, Healey says*, Boston Globe (May 14, 2020), *available at* https://www.bostonglobe.com/2020/05/14/nation/mass-dozens-illegal-evictions-attempted-despite-pandemic-moratoriums-healey-says/.

signed into effect. Some attorneys attempt to present orders that diverge from a court's oral ruling, and tenants may either fail to understand what is happening, be intimidated from objecting, or find themselves forced to re-litigate their case after a favorable decision. In a remote hearing regime, the risks of such abuses could abound—particularly where courts rely on parties to draft and transmit proposed orders electronically rather than employ court forms or write their own orders from scratch.

D. Systemic procedural due process considerations

[coming soon NO SERIOUSLY]