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A typical fast-food restaurant can serve a meal in 3 minutes and 9 seconds.[1] Not to be outdone by the fast food chains, the average time of a trial in Chicago's eviction courts is 1 minute and 44 seconds.[2] This is one of a number of disturbing findings in a recent study by Chicago Lawyers' Committee for Better Housing (LCBH), entitled *No Time for Justice: A Study of Chicago's Eviction Court.*

Not only are the hearings extremely brief, but they also flaunt a number of the principles considered fundamental to our legal system. For example, in all residential landlord-tenant relationships proper notice of termination of the tenancy is an essential element to the landlord's claim. However, the study found that judges failed to examine the notice of termination in 35% of the cases.[3] In other words, eviction court judges are not requiring landlords to prove all the elements of their prima facie case in over one-third of cases before them. Further, despite the importance of testimony in eviction proceedings, parties were only sworn to tell the truth in 8% of the cases monitored.[4]

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According to the authors of the study, the most striking aspect of their observations was the lack of dignity shown to tenants in the administration of the eviction process.[5] Eviction proceedings were originally instituted to provide a more equitable and peaceful resolution of landlord-tenant disputes than the common law practice of self-help. However, when fundamental procedural aspects are ignored by the court, the system becomes "dangerously similar to self-help, if not more egregious, given the participation of the state."[6]

This article will first focus on the LCBH study, *No Time for Justice.* Then we will focus on the Supreme Court's decision in *Lindsey v. Normet,*[7] which failed to comprehend the evolving nature of America's residential landlord-tenant law and has had, therefore, a disastrous impact on the rights of tenants.

I. *No Time For Justice*: Methodology

The study was conducted over an eleven-week period in the fall of 2002, where monitors observed 26 calls and 763 cases.[8] Students from the Chicago-Kent College of Law Class of 2004 Honors Scholars program were trained in landlord-tenant law, and then served as courtroom monitors, recording the data they observed on standardized forms as each case was called.[9] If supplemental data was required, the monitors obtained this information from the court file.[10]

The study is not comprehensive. In 2002, there were 35,799 eviction actions filed in Chicago.[11] The 763 cases observed by the monitors only constitute 2.13% of the total cases filed in 2002.[12] Further, 92 of the cases observed were heard before substitute judges.[13] Finally, conclusions in the study regarding the effect of counsel where the tenant had obtained legal representation are problematic for two reasons. First, the data group is small: tenants were only represented in only 5% of the cases in which they appeared.[14] Second, the majority of these cases ended with agreed orders, which cannot be adequately monitored.[15]

II. *No Time for Justice:* The Findings

Despite these limitations, the study does provide a window into the eviction process in Chicago, and the view is often shocking. A clear pattern of procedural abuse and presumptive bias in favor of landlords emerges from these observations, and the victim is always the tenant, her right to due process under law, and the sense of dignity that ought naturally to attach to a situation where a person is facing potential homelessness.

The eviction process demonstrates its bias in favor of landlords in a number of ways. As previously

noted, landlords are often not required to prove all of the elements of their claim. The bias, however, is apparent before the proceeding even reaches the merits. If a landlord, either acting *pro se* or with counsel, fails to appear at the initial hearing, the case should be dismissed for a want of prosecution. This is a clear procedural rule with no ambiguity. However, a dismissal was ordered in only 60% the cases where the landlord failed to appear.[16] Further, while a tenants appearance should have no bearing on the court's issuance of a dismissal for want of prosecution, the study found that judges were even more reluctant to order the dismissal if the tenant did appear. In such instances, a dismissal for want of prosecution was ordered in only 41% of the cases observed.[17] When neither party appeared, a dismissal was ordered in 74% of the cases.[18] Therefore, a tenant's appearance in court has a distinctly adverse effect on her rights, when it should have no effect at all. This result defies legal explanation, and can only be understood as part of the favored status landlords receive in eviction court.

The study also revealed disparate treatment when it came to the merits of the case. While judges frequently helped landlords establish the elements of their case, judges did not extend this same degree of assistance to tenants.[20] Judges only asked tenants if they had a defense in 27% of the cases monitored.[21] When tenants were asked if they had a defense, they presented one in 55% of the cases.[22] If the tenant was not asked, a defense was presented in only 9% of the cases. These numbers indicate the critical role the judge plays in ensuring that all of the issues of a case are presented, especially in *pro se* proceedings where the tenant does not have the benefit of legal counsel.

Taken together, the findings of *No Time for Justice* clearly demonstrate that landlords and tenants do not stand on even ground within the eviction process in Chicago. Through their courtroom observations, the authors of the study found that "landlords are presumed to be in the right and tenants to be in the wrong." This type of presumptive bias runs counter to the fundamental rights of due process and tramples the basic dignity owed to the tenants.

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III. *Lindsey v. Normet*

Historically, the concepts underlying residential landlord-tenant law are grounded in common law practices that gave the landlord an unimpeded right to oust a tenant from the landlord's property for any reason, or no reason at all.[23] The spectacle of "families, in any kind of weather, and at any time of day or night, be[ing] forcibly ejected from their homes with all their effects"[24] and left standing by the side of the road due to these self-help evictions eventually resulted in the development of the Forcible Entry and Detainer Act.[25] The Forcible Entry and Detainer Act details the process whereby a landlord may terminate a tenancy by proper notice and then obtain an expedited court case and trial to determine both possession and recovery of rent.[26]

While the Forcible Entry and Detainer Act has helped to end self-help evictions it is still based upon the archaic common law principal that a landlord-tenant relationship was an independent covenant.[28] Under the independent covenant theory, the tenant, not the landlord, was responsible for repairs and maintenance to the property and the tenant owed an absolute duty to pay rent regardless of the condition of the property.[28]

Since the Forcible Entry and Detainer Act arises out of the common law principal of independent covenants between the parties the Act itself prohibits the tenant from raising as a defense or counterclaim any matter not "germane" to the action for possession and back rent.[29] In Illinois the courts have held that only a limited number of issues are germane, including: a claim asserting a paramount right of possession[30]; a claim challenging the validity of the agreement upon which the landlord is basing his right to possession[31]; and, a claim questioning the motivation of the landlord for brining the action.[32]

In general, a party to a lawsuit must bring any and all relevant claims against their opponent in a single lawsuit. However, the common law roots of an eviction action have only limited the rights of tenants to raise issues regarding their tenancy. It was the case of *Lindsey v. Normet* that has allowed this anachronistic rule to survive and impede the rights of tenants to a full and fair trial on the merits of their claims arising out of a tenancy.

In *Lindsey*, the appellants, Donald and Edna Lindsey, were month-to-month tenants of Dorothea Normet in a single family house located in the city of Portland, Oregon.[33] The Portland Bureau of Buildings conducted an inspection of the house, found it to be unfit for habitation and issued a notice requiring the dwelling to be vacated within

30 days unless it was repaired or otherwise shown to be habitable.[34] The tenants, who were otherwise current on their rent, requested that the landlord make the necessary repairs.[35] When the landlord failed to do so, the tenants withheld their rent.[36] The landlord's attorney then wrote a letter threatening to bring an eviction action unless the withheld rent was paid.[37] Prior to any eviction action commencing, the tenants brought a lawsuit in federal court seeking a declaratory judgment that the Oregon Forcible Entry and Detainer Statue was unconstitutional.[38] A three-judge panel temporarily stayed enforcement of any eviction action, but eventually granted the landlord's motion to dismiss the tenants' complaint after concluding that the Oregon statute did not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.[39]

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The Supreme Court, in a 5-2 decision written by Justice White, affirmed the District Court's holdings.[40] The key issues on appeal were the requirement that an eviction trial be held no sooner then two days and no later then six days after service; the statute's limitations allowing only consideration of the issue of outstanding rent and prohibiting any defense based upon the landlord's breach of the implied warranty of habitability; and the requirement that a tenant post a bond of twice the amount of rent in order to appeal an adverse decision.[41]

The Court held that the limitations on issues to be heard and the early-trial provision of the Oregon statute did not violate Due Process because the "[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 have received a proper notice to quit . . . [and] the simplicity of the issues in the typical FED action will usually not require extended trial preparation and litigation."[42] Further, the Court held that this limitation on the tenants' rights is justified because the landlord, whose expenses continue to accrue, was entitled to a "[s]peedy adjudication . . . to prevent subjecting the landlord to undeserved economic loss."[43] The Court concluded that the statute could grant the landlord this speedy and unfettered trial because the relationship was one of independent covenants and not a contractual relationship.[45]

IV. *Lindsey*: an Anachronism in a Modern World.

The development of landlord-tenant law since *Lindsey* clearly shows how the reliance upon the independent covenant theory of residential landlord-tenant law as a basis for summary evictions cannot mesh with our modern understanding of tenants as consumers in a mutual contract with their landlords.

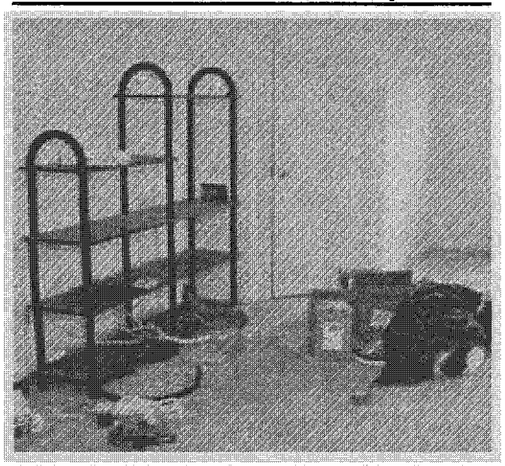
The development of the implied warranty of habitability theory has created a situation where a landlord owes a clear duty of maintenance and repair to a tenant. In Illinois the case of *Jack Spring, Inc. v. Little* established that tenancies have an implied warranty of habitability and that a landlord's failure to repair any substantial code violations results in a deduction in the charged rental rate of the premises.[45] The basic premise of the implied warranty of habitability is that in our mobile, cosmopolitan society a tenant is not interested in the land. Since tenants are largely transitory, they have little to gain by investing any effort in fixing the unit. Further, most tenants are employed in fields unrelated to maintenance work, and therefore are unable to perform the type of maintenance and repairs that modern buildings require.[46]

Since the independent covenant theory rested upon the landlord's ability to do nothing regarding maintenance and yet still expect full payment of rent, the implied warranty of habitability has effectively ended any reliance, such as that used in Lindsey, upon the independent covenant theory as a basis for a summary eviction proceeding. Indeed, outside of the eviction courtroom, the modern tenant is considered a consumer of a product who is entitled to all the legal protections available in their tenancy. For example tenants can sue under the Illinois Consumer Fraud and Deceptive Business Practices Act for a landlord's violations of a lease agreement to maintain and repair an apartment.[47] Further, a tenant can also bring a claim under the Fair Credit Reporting Act if a credit report incorrectly details the previous rental history of the tenant or her spouse.[48] Thus, for a contemporary tenant the treatment they will receive in Chicago's eviction court does not come close to mirroring any other court case they may experience.

The impact these fast-food trials have on tenants is devastating.

Of the cases observed in *No Time for Justice*, the tenants always lost on the merits.[49] However, the impact goes beyond even that dreadful result and shows how the courts' systemic failure can further harm the tenants it allegedly serves, and even those tenants who will never step before the bench.

In an earlier study on Chicago's eviction courts, the research found that the majority of the tenants are minorities, women and poor.[50] In order to even appear in court, "many low-income women of color must overcome fear, guilt, and a heightened sense of destruction. In their eyes,



such a decision often amounts to nothing less intimidating then taking on conventional power with relatively little likelihood of meaningful success . . . . And it seems inevitably to entail making your life entirely vulnerable to the law - with its powers to unravel the little you've got going for yourself and your family."[51] With Chicago's eviction court promising only the chance of defeat-infused with the sense that the court is not listening to their story-it is little wonder that nearly 44% of the tenants did not bother to attend their 'trial.'[52]

In addition to the psychological and spiritual destruction that Chicago's eviction courts heap onto these tenant, the actual eviction itself has far reaching repercussions. Not only is there the traumatic loss of their home and possessions during the eviction, but an eviction also forces children to switch schools mid-year with harmful results on their education,[53] and it increases homelessness,[54] which in turn results in a strain on shelters and hospitals.[55]

As if the demoralizing court process, combined with the stress caused by the eventual eviction, was not enough punishment, the resulting eviction judgment then effects a tenant's future ability to find a new rental unit. With credit reporting bureaus operating divisions that exclusively focus on reporting tenants' rental histories, landlords have a greater amount of access to a potential tenant's history, including any prior eviction actions.[56] Yet, these reports do not explain the failure of the courts to uphold the rights of due process or to adequately evaluate the merits of each eviction claim. Nor will these reports be solely based upon the individual's own rental history, as many of these credit bureaus generate a prospective tenant's report by computer programs that use not only an individual tenant's record but also "the records of thousands of previous tenants" to predict whether an applicant will be a 'good' tenant.'[57] Thus, the failure of Chicago's eviction courts to fairly and properly adjudicate cases will have a perverse impact on the lives of tenants who will never even enter the courtroom.

While there is a need for a system that can peacefully remove a tenant who is failing to pay rent and restore the rental premise to the landlord, it is clear that the current system does not treat the tenants fairly. As Justice Thurgood Marshall stated, "[a] landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice is done before a man is evicted from his home."[58]

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1. Paul Gereffi, *The Best Drive-Thru In America*, '03, QSR Magazine, October, 2003 at 37.
2. Lawyers' Committee for Better Housing and prepared by Chicago-Kent College of Law Class of 2004 Honors Scholars *No Time for Justice: A Study of Chicago's Eviction Court*, December, 2003, at 11, available at www.lcbh.org.
3. Id. at 15.
4. Id. at 14.
5. Id. at 6.
6. Id.
7. *Lindsey v. Normet*, 405 U.S. 56, 58 (1972).
8. Id. at 4.
9. Id.
10. Id.
11. Id. at 4.
12. Id. at 10.
13. Id. at 11.
14. Id. at 4.
15. Id. at 10. We would like to note a third reason, not contained in *No Time for Justice*, for the difficulty in ascertaining the effect of legal counsel: most cases involving represented tenants are transferred to the jury eviction courtroom, a venue not observed by the monitors in the study.
16. Id. at 4.
17. Id.

18. Id.
19. Id.
20. Id. at 16
21. Id.
22. Id.
23. *French v. Willer*, 126 Ill. 618 (1888) (discussing the historical development of the eviction action as arising out of the common law self-help remedy and the earlier English ejectment civil action and the English criminal forcible entry and detainer action). This article will focus primarily on Illinois statutory and case law developments. It is important to note that Illinois shares much the same historical development in residential landlord-tenant law as other states. See generally, Robert S. Schoshinski, *American Law of Landlord and Tenant* (1980).
24. *Burns v. Nash*, 23 Ill. App. 552, 557 (1st Dist., 1887)
25. Now codified at 735 ILCS 5/9-101 et seq.
26. 735 ILCS 5/9-109/5 (possession) and 735 ILCS 5/9-209(rent claims).
27. *Phelps v. Randolph*, 147 Ill. 335 (1893) (allowing a tenant to bring a FED action for possession when the landlord has forcible entered and removed the tenant's belongings without a court order).
28. Robert S. Schoshinski, *American Law of Landlord and Tenant* §§ 3.10-3.13 (1980).
29. 735 ILCS 5/9-106.
30. *Allensworth v. First Galesburg National Bank and Trust Co.*, 7. Ill. App.2d 1 (2nd Dist. 1955)(a tenant's claim for quiet title can defeat an eviction action).
31. *Rosewood Corp. v. Fisher*, 46 Ill.2d 249(1970)(holding that a buyer who defaults on an installment contract can challenge the validity of the contract in an eviction action).
32. *Marine Park Associates v. Johnson*, 1 Ill. App.3d 464 (1st Dist. 1971) (a tenant's claim of race discrimination can defeat an eviction action); and, Clore v. Fredman, 59 Ill.2d 20, 319 N.E.2d 18 (1974)(holding that a landlord's eviction action brought in response to the tenant's bona fide complaints to local government about potential building code violations raises the defense of retaliatory eviction), *and see* 765 ILCS 720/1 et seq, (Retaliatory Eviction Act) and 5-12-150 Chicago Municipal Code (*Chicago's Residential Landlord and Tenant Ordinance*) both prohibiting retaliatory evictions.
33. *Lindsey*, 405 U.S. at 58.
34. Id.
35. Id.
36. Id.
37. Id. at 59.
38. Id. at 59-60.
39. Id. at 60-62.
40. Id. at 63-64.
41. Id. at 64. The Court went on to hold that the double appeal bond was a violation of the tenants' equal protection since no other litigation in Oregon was required to post a similar bond in order to appeal a case. Id. at 74-79.
42. Id. at 65.
43. Id. at 73.
44. Id. at 68.
45. *Jack Spring v. Little*, 50 Ill.2d 351 (1972). In *Pole Realty Co. v. Sorrells*, 84 Ill.2d 178 (1981) the Illinois Supreme Court applied the implied warranty of habitability to single family homes as well as the multi-unit buildings covered by Jack Spring.
46. *Jack Spring*, 50 Ill.2d at 363 (citing to *Javins v. First National Realty Corp.* 428 F.2d 1071, 1074 (D.C.Cir 1970)).
47. *Carter v. Mueller*, 120 Ill. App.3d 314, 324 (1st Dist. 1983)(holding that a tenant can sue under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 et seq.).
48. *Conley v. TRW Credit Data*, 381 F. Supp. 473, 474 (N.D. Ill. 1974) (holding that a wife has a cause of action under the Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. against both the former landlord and the credit bureau due to an incorrect report of her husband's rental history)
49. *No Time for Justice* at 16 ("In all cases, the defense raised [by the tenant] made no difference to the outcome: the tenant always lost.")
50. Lisa Parson Chadha, *Time to Move: the Denial of Tenants' Rights in Chicago's Eviction Court*, LCBH, 1996 at 10-11 ("*Time to Move*") (finding that 72% of all the tenants in that study were African-Americans, 62% were women and that 70% of the tenants interviewed had incomes of less then $1,200 per month); see also Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra Law Review 533, 540 (1992) ("Bezdek") (finding that 87% of the tenants in a Baltimore Rent Court study were African-American and 71% were women)
51. Gerald P. Lopez, *The Work We Know So Little About*, Stanford Law Review, Vol. 42, Issue 1, 8 (1989)
52. Id. at 13.
53. Chester Hartman & David Robinson, *Evictions: the Hidden Hosing Problem*, Housing Policy Debate, Vol. 14, Issue 4, 461, 469.
54. Id. at 468 (citing to studies that show that in a 2000-2001 Columbus, Ohio study 35% of the families in emergency shelters reported evictions as a reason contributing to their plight and that in a 2001 New York City study 17% of the families using emergency shelter services arrived 'straight from their evictions".)
55. Id. at 469. (A 2002 San Francisco study showed that on an average night more then a quarter of all available beds at one hospital were filed by the homeless.)
56. *First Advantage in search of public support*, St. Petersburg Times, June 6, 2003 (reporting how First Advantage Corp-a tenant screening business- merged with First American Corp.- which already had screening divisions for employment and driving records).
57. Motoko Rich, *Tenant Evaluation Gets a Make Over*, Wall Street Journal, Guide to Property, July/August, 2003.
58. *Pernell v. Southall Realty*, 416 U.S. 363, 385 (1974).