

# JUST DIVERSION: DESIGNING EVICTION MEDIATION TO ADDRESS INCENTIVES AND INEQUITIES

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## INTRODUCTION

The hope of housing stability in the United States has been strangled by stagnating wages,<sup>1</sup> dwindling affordable housing stock,<sup>2</sup> and widening job loss and insecurity.<sup>3</sup> Eviction and subsequent homelessness are among their most traumatic consequences.<sup>4</sup> Between 2000 and 2016, 61 million eviction

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1. *See generally* ELISE GOULD, STATE OF WORKING AMERICA WAGES 2019, ECON. POL. INST. (2020).

2. No state currently has adequate supply of affordable rental housing for the lowest income renters. *See* ANDREW AURAND ET AL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES, NAT'L INCOME HOUSING COALITION 2, 16 (2021).

3. "Black and Hispanic or Latino unemployment rates are consistently higher than white rates, gaps that widen quickly in recessions and narrow much more slowly after an economic recovery begins." *See* CHAD STONE, ROBUST UNEMPLOYMENT INSURANCE, OTHER RELIEF NEEDED TO MITIGATE RACIAL AND ETHNIC UNEMPLOYMENT DISPARITIES, CTR. ON BUDGET AND POL'Y PRIORITIES 1 (2021).

4. *See generally* ANDREW AURAND ET AL., OUT OF REACH 2021, NAT'L INCOME HOUSING COALITION (2021) (describing how low wages and high rent prices contribute to housing instability and homelessness across the country); *see also* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 299 (2016) (arguing that "eviction is a cause, not just a condition, of poverty"). Eviction disproportionately affects Black and Latinx households, with Black and Latinx women facing higher rates of eviction than men in these groups. *See* REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2019-MAY 2020, FED. RSRV. (2020). Moreover, renters living with disabilities expect to face eviction at rates as high as twice as much compared with all renters. *See* NANETTE GOODMAN ET AL., FINANCIAL INEQUALITY: DISABILITY, RACE AND POVERTY IN AMERICA, NAT'L DISABILITY INST. (2017). This data does not capture informal or illegal evictions, which are estimated to occur at double the rate of legal filings.

cases were filed in the United States, averaging 3.6 million evictions annually.<sup>5</sup> In 2016, seven evictions were filed every minute.<sup>6</sup> On the eve of the COVID-19 pandemic, approximately one-third of American households were renter-occupied,<sup>7</sup> and of those, almost half were burdened by rental cost.<sup>8</sup> The COVID-19 pandemic threatened to gravely exacerbate this existing housing crisis,<sup>9</sup> saddling jurisdictions across the country with the added question of how to respond with urgency to the possibility of an “eviction cliff.”<sup>10</sup>

Federal, state, and local governments enacted eviction moratoria as a strategy for mitigating the spread of COVID-19, as well as ensuring renters remained housed. Such measures temporarily slowed eviction filings; between March 15 and December 31 of 2021, eviction filings were 65% below the historical average.<sup>11</sup> However, at the time of this writing, the majority of these moratoria have expired, been lifted, or terminated due to

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5. Ashley Gromis, *Eviction: Intersection of Poverty, Inequality, and Housing*, EVICTION LAB: PRINCETON U. (2019), [https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/05/GROMIS\\_Ashley\\_Paper.pdf](https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/05/GROMIS_Ashley_Paper.pdf) [<https://perma.cc/54F2-BC6P>].

6. *On the Brink of Homelessness: How the Affordable Housing Crisis and the Gentrification of America Is Leaving Families Vulnerable*, Hearing Before the H. Comm. On Fin. Services, 11th Cong. 3 (2020) (statement of Matthew Desmond, Professor Sociology, Princeton Univ.).

7. The Census Bureau reported a home ownership rate of 67.9% for the second quarter of 2020. See U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, SECOND QUARTER 2021, 5 (2021).

8. Moderately cost-burdened households pay more than 30% of income for housing, including utilities; severely cost-burdened households pay more than 50%. See Whitney Airgood-Obrycki, *The Impact of COVID-19 on Renters and Rental Markets*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD U. 1, 6 (2020) (available at [https://www.jchs.harvard.edu/sites/default/files/JCHS\\_covid19\\_researchseminar\\_final.pdf](https://www.jchs.harvard.edu/sites/default/files/JCHS_covid19_researchseminar_final.pdf)). See also JOINT CENTER FOR HOUSING STUDIES OF HARVARD U., AMERICA’S RENTAL HOUSING 2020, 1, 4, 26 (2020) (available at [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_Americas\\_Rental\\_Housing\\_2020.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf)).

9. The COVID-19 pandemic precipitated devastating job loss, unprecedented unemployment rates, and severe economic hardship, with heightened rates among Black and Latinx renters. As of October 2020, researchers at Columbia University estimated that an additional 8 million U.S. residents had fallen into poverty on top of the 38.1 million people living in poverty in 2018. See Zachary Parolin et al., *Monthly Poverty Rates in the United States during the COVID-19 Pandemic*, (Ctr. Poverty Soc. Pol’y, Working Paper No. 20409, 2020); see also U.S. CENSUS BUREAU, P60-266(RV), CURRENT POPULATION REPORTS: INCOME AND POVERTY IN THE UNITED STATES: 2018 (2019).

10. MARY K. CUNNINGHAM ET AL., THE LOOMING EVICTION CLIFF, URBAN INST. 1–3 (2021). See generally *Eviction Innovations*, STANFORD U. DESIGN LAB, <https://evictioninnovation.org/> [<https://perma.cc/7JCV-2DEY>].

11. Peter Hepburn et al., *U.S. Eviction Filing Patterns in 2020*, 7 SOCIOUS 1, 5–6 (2021).

a Supreme Court ruling.<sup>12</sup> The systemic challenges to housing stability that preceded the pandemic remain. Absent further federal intervention, state and local governments have implemented an array of eviction diversion programs to help slow the eviction rate.<sup>13</sup> Among them, mediation has emerged as a popular approach.

Eviction mediation employs a third-party neutral to facilitate direct communication between a renter and a landlord or other decision-maker with the authority to pursue an alternative to eviction. A recent survey of eviction diversion programs jointly published by the American Bar Association and the Harvard Negotiation and Mediation Clinical Program (hereinafter “the ABA/HNMCP study”) found that over 64% of respondents reported offering parties either pre- or post-filing mediation, making it the most common approach among those surveyed.<sup>14</sup> Per Resolution Systems Institute, twenty-six eviction mediation programs are currently operational; of these, fifteen were established in response to the COVID-19 pandemic.<sup>15</sup> Only three programs—in Maine (statewide), Michigan (Jackson County), and Minnesota (Ramsey County)—are known to have been established prior to the COVID-19 pandemic.<sup>16</sup> Though all these programs use mediation as a site for eviction diversion, they are otherwise non-uniform, shaped by the state legislation and court rules relevant to each jurisdiction. Their recent and sudden emergence was made possible by and likely related

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12. *Alabama Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (overturning a stay imposed on a District Court judgment that vacated the CDC eviction moratorium).

13. *See generally Eviction Diversion*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program/promising-practices/eviction-diversion> [<https://perma.cc/SBK3-QTP8>] (outlining court and community-based eviction diversion efforts led by Treasury Department grantees); *see also* TRESKON ET AL., *EVICTION PREVENTION AND DIVERSION PROGRAMS: EARLY LESSONS FROM THE PANDEMIC* (2021) (describing the diversity of court-based and court-adjacent eviction prevention and diversion programs that have been created or adapted to prevent evictions during the COVID-19 pandemic).

14. Of the eviction prevention and/or diversion programs surveyed, the most common programmatic features across 168 survey participants included: rental or cash assistance; access to legal representation; mediation; and self-help resources and supportive services. *See* Deanna Pantín Parrish, *Designing for Housing Stability*, AM. BAR ASS’N 3, 26 (2021) [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-covid19-dpp-best-practices.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-covid19-dpp-best-practices.pdf) [<https://perma.cc/9KJZ-2LVS>].

15. *Eviction Programs Across the U.S.*, RESOLUTION SYSTEMS INST., [https://docs.google.com/spreadsheets/d/1\\_hrJVO1CBWgOL1CYIfqXYYtypc4pL\\_JEH7qedKnpZvg/edit#gid=0](https://docs.google.com/spreadsheets/d/1_hrJVO1CBWgOL1CYIfqXYYtypc4pL_JEH7qedKnpZvg/edit#gid=0) [<https://perma.cc/6EA7-JGCM>] (last updated Dec. 22, 2021).

16. *Id.*

to the blueprint laid out by mediation programs launched in response to the mortgage foreclosure crisis.<sup>17</sup> Some jurisdictions sought to “replicate” the success of past foreclosure mediation programs, using them as a “model” for how to resolve a major influx of eviction disputes.<sup>18</sup>

The mortgage foreclosure crisis of The Great Recession ushered in interventions designed to shrink foreclosure rates and help homeowners remain in their homes.<sup>19</sup> Chief among them was mediation, meant “to enhance opportunities for lenders and homeowners to reach mutually agreeable and beneficial alternatives to foreclosure.”<sup>20</sup> In the period from mid-2008 to 2009, over twenty-five new foreclosure mediation programs were launched in at least fourteen states.<sup>21</sup> Within two years, foreclosure mediation programs had been implemented across twenty-four states and the District of Columbia.<sup>22</sup> These programs were celebrated as “one of the

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17. Between 2007 and 2010, there were estimated 3.8 million foreclosures in the United States. This Article focuses on the foreclosure mediation programs that were deployed during that period. See Sharada Dharmasankar & Bhashkar Mazumder, *Have Borrowers Recovered from Foreclosures during the Great Recession?*, 370 FED. RES. BANK OF CHI., CHI. FED. LETTER NO. 370 (2016), <https://www.chicagofed.org/publications/chicago-fed-letter/2016/370#fn1> [<https://perma.cc/DB8M-ALA4>]. See also BEN BERNANKE, THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS (2012), <https://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf> [<https://perma.cc/7K2P-B2PJ>].

18. IRA GOLDSTEIN ET AL., RESOLVING LANDLORD-TENANT DISPUTES: AN ANALYSIS OF JUDGMENTS BY AGREEMENT IN PHILADELPHIA’S EVICTION PROCESS, REINVESTMENT FUND 4 (2020) (available at [https://www.reinvestment.com/wp-content/uploads/2020/05/ReinvestmentFund\\_Report-2020\\_PHL-Evictions-Judgments-by-Agreement-Landlord-Court.pdf](https://www.reinvestment.com/wp-content/uploads/2020/05/ReinvestmentFund_Report-2020_PHL-Evictions-Judgments-by-Agreement-Landlord-Court.pdf)) (describing Philadelphia’s post-filing eviction diversion program as “modeled on Philadelphia’s award-winning Residential Mortgage Foreclosure Diversion Program”).

19. See generally *Foreclosures Publications and Resources*, NAT’L CONF. OF ST. LEGISLATURES, <https://www.ncsl.org/research/financial-services-and-commerce/foreclosures-publications-and-resources.aspx> [<https://perma.cc/B8E6-EUE9>].

20. MELANCA CLARK & DANIEL OLMOS, U.S. DEP’T JUST., FORECLOSURE MEDIATION: EMERGING RSCH. AND EVALUATION PRACTICES 6 (2011), <https://www.justice.gov/sites/default/files/atj/legacy/2012/01/05/foreclosure-mediation.pdf> [<https://perma.cc/B8HX-PQU9>].

21. Fifteen states have required by statute or court rule some type of mediation/conference requirement to consider loan modification before foreclosure. Those required by state statute include Connecticut, New York, Indiana, Nevada, Maine, Maryland, Vermont, and D.C. Those required by State Supreme Court plan include Florida, Ohio, New Jersey, and Delaware. Those required by local court initiative include Pennsylvania (Philadelphia & Pittsburgh), New Mexico (Santa Fe), Kentucky (Louisville), Illinois (Cook County), and Wisconsin (Milwaukee). Programs facilitating phone conferences between the parties were launched in California, Michigan, Oregon, and Washington State. See GEOFFREY WALSH, NAT’L CONSUMER L. CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? (2009).

22. Robert Clifford, *The Role of Mediation in Foreclosures*, COMMUNITIES & BANKING 21, 21 (Fall 2012), <https://www.bostonfed.org/publications/communities-and-banking/2012/fall/the-role-of-mediation-in-foreclosures.aspx> [<https://perma.cc/2YSW-FCNK>].

most effective foreclosure-prevention tools available to states and municipalities.<sup>23</sup> Though many foreclosure mediation programs did not track the same data, outcomes from several programs suggested settlement rates of over 70%, with approximately 60% of cases reaching settlements that allowed borrowers to remain in their homes.<sup>24</sup> In fact, studies comparing foreclosure cases with and without mediation also suggested that mediation improved outcomes overall.<sup>25</sup>

The design and outcomes of foreclosure mediation programs were shaped by the federal government's involvement in the mortgage foreclosure crisis, which rewarded mortgage servicers for reducing or mitigating foreclosure sales.<sup>26</sup> Financial institutions were incentivized to modify loans through the U.S. Department of Treasury's Home Affordable Modification Program (HAMP)<sup>27</sup> as a condition for receiving funds via the

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23. *Id.* at 22. *But see* Dan Immergluck, *Too Little, Too Late, and Too Timid: The Federal Response to the Foreclosure Crisis at the Five-Year Mark*, 23 HOUSING POL'Y DEBATE 199, 199 (2013); GEOFFREY WALSH, NAT'L CONSUMER L. CTR., REBUILDING AMERICA: HOW STATES CAN SAVE MILLIONS OF HOMES THROUGH FORECLOSURE MEDIATION 14 (2012), [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/mediation/report-foreclosure-meditation.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-foreclosure-meditation.pdf) [<https://perma.cc/RTR5-YRZ2>] (“[h]undreds of thousands of borrowers whose trial plans were approved during the fall of 2009 simply had their plans canceled during the spring of 2010”). *See also* Natalie Sherman, *State's Foreclosure Mediation Lacks Teeth, Advocate Say*, BALTIMORE SUN (Dec. 20, 2013), <https://www.baltimoresun.com/bs-bz-foreclosure-20131219-story.htm> (interviewing advocates who call foreclosure mediation “a waste of court resources” and describe it as “more of a status conference than an actual negotiation or substantive discussion about ways in which a home can be saved”).

24. CLARK & OLMOS, *supra* note 20, at 6. *See also* Stacey L. Tutt, *Foreclosure Mediation as An Enforcement Mechanism*, 4 IND. J.L. & SOC. EQUAL. 249 (2016).

25. Alan M. White, *Foreclosure Diversion and Mediation in the States*, 33 GA. STATE UNIV. L. REV. 411, 422 (2017).

26. Notably, state laws were passed between 2007 and 2013 to further modify the foreclosure process. These included encouraging negotiated alternatives to foreclosure sales; reducing redemption periods; and protecting tenants in foreclosed homes, among other issues. *See* Alan White, *State Foreclosure Mediation Laws: Examples and Research for a Uniform Statute* (May 11, 2012), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=251992dd-7c8d-af55-75c7-e9134a344c4d&forceDialog=0> [<https://perma.cc/663H-XRLC>].

27. The Making Home Affordable (MHA) Program was introduced by the U.S. Department of the Treasury in 2009 in an effort to help stabilize the housing market and provide relief for homeowners facing foreclosure. It had two components: the Home Affordable Refinance Program (HARP) and the Home Affordable Modification Program (HAMP). The Home Affordable Modification Program (HAMP) was a loan modification intended to assist those who paid more than 31% of their gross income toward mortgage payments. HAMP offered incentives to financial institutions that facilitated loan servicers to negotiate loan reductions with at-risk homeowners. *See* 12 U.S.C. § 5219(a) (2018); *see also* Edmund L. Andrews, *How Banks Undermined Federal Foreclosure Assistance*, STAN. BUS. (Oct. 16, 2017), <https://www.gsb.stanford.edu/insights/how-banks-undermined-federal-foreclosure-assistance>

Troubled Asset Relief Program (TARP).<sup>28</sup> In many jurisdictions mediation, often buttressed by services provided by housing counselors, legal services providers, or both, served as the site for “loan modification conferences” in which loan servicers and mortgagors spoke directly and committed to possible alternatives to foreclosure.<sup>29</sup> Moreover, financial institutions were compelled to “identify and coordinate with non-profit organizations operating national or statewide toll-free foreclosure prevention hotlines, including those that . . . facilitate or offer free assistance to help homeowners to understand their options, negotiate solutions, and find the best resolution for their particular circumstances.”<sup>30</sup> The Federal Housing Finance Agency (FHFA) served as the federal enforcement mechanism for these conditions, as they had authority to direct mortgagors Fannie Mae and Freddie Mac to rewrite or modify loans.<sup>31</sup>

Eviction mediation programs benefit from no equivalent federal scheme driving parties to the table. Landlords are far more numerous than lenders, and their relationship with their tenants is typically subject to federal

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[<https://perma.cc/CDZ6-VB9S>]. A Stanford study found that HAMP produced one million additional permanent loan modifications and prevented about 600,000 foreclosures that otherwise would have occurred. Borrowers’ monthly payments were reduced by an average of about 25%, or \$400 a month. Homeowners who received the modifications were on average 12% less likely to go into foreclosure. See Sumit Agarwal et al., *Policy Intervention in Debt Renegotiation: Evidence from the Home Affordable Modification Program*, 125 J. POL. ECON. 654, 658, 670, 676, 692–93 (2017).

28. The Troubled Asset Relief Program (TARP) was a collection of programs intended to “help stabilize the U.S. financial system, restart economic growth, and prevent avoidable foreclosures,” introduced by the U.S. Department of the Treasury in 2009. See *Troubled Assets Relief Program (TARP)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/data/troubled-assets-relief-program> [<https://perma.cc/YG87-CKR9>]. TARP funds were offered as incentives to both large and small lenders in exchange for their participation in HAMP loan modification conferences. In December 2016, the Making Home Affordable (MHA) program, through which TARP was available, expired. See 12 U.S.C. §§ 5211, 5225 (2008); see also *About TARP*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/data/troubled-assets-relief-program/about-tarp> [<https://perma.cc/6F5C-MQ6F>]; and *Bank Investment Programs*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/data/troubled-assets-relief-program/bank-investment-programs> [<https://perma.cc/UGV9-F4FX>].

29. See Lydia Nussbaum, *ADR’s Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1912–13 (2013) (available at <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1907&context=facpub>) (“In creating foreclosure ADR programs, state and local governments also tried to create a mechanism to oversee loan servicers’ compliance with federal loan modification programs [HAMP and TARP] and to ensure that loan servicers indeed have the legal right to foreclose on the property. . . . State and local governments also rely on foreclosure ADR programs to educate homeowners about the foreclosure and loan modification process.”)

30. Housing and Economic Recovery Act Of 2008, Pub. L. No. 110–289, §2402, 122 Stat. 2654, 2855.

31. See SHEILA BAIR, *BULL BY THE HORNS: FIGHTING TO SAVE MAIN STREET FROM WALL STREET AND WALL STREET FROM ITSELF* 147–50 (2012).

financial regulation only when it involves a federally regulated loan.<sup>32</sup> A unique opportunity to incentivize eviction diversion presented itself in the federal Emergency Rental Assistance (ERA) Program, which provides funds directly to states, U.S. territories, local governments, and, in some instances, tribal governments, who in turn administer rental assistance to eligible households through rental assistance programs.<sup>33</sup> Up to 10% of the funds received by grantees are “allow[ed]” to be used for “certain housing stability services,” including “eviction prevention and eviction diversion programs; mediation between landlords and tenants.”<sup>34</sup> However, the ERA program does not state debt reduction as a goal, nor does it enumerate incentives for landlords or tenants to participate in dispute resolution.<sup>35</sup> Without a federal carrot or stick to help create buy-in, eviction mediation programs are burdened with designing their offerings in such a way that address a range of complex stakeholder concerns.

Scholars of alternative dispute resolution (“ADR”) have explored the potential challenges and benefits of using mediation as part of a comprehensive plan to disrupt the eviction crisis.<sup>36</sup> However, few have

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32. Notably, the FHFA “encourage[d] landlords of properties backed by Fannie Mae or Freddie Mac (the Enterprises) to apply for Emergency Rental Assistance before starting the process of evicting a tenant for non-payment of rent.” See Press Release, Fed. Hous. Fin. Agency, FHFA Encourages Landlords of Enterprise-Backed Properties to Apply for Emergency Rental Assistance Before Evicting Tenants (July 30, 2021), <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Encourages-Landlords-of-Enterprise-Backed-Properties-to-Apply-for-Emergency-Rental-Assistance-Before-Evicting-Tenants.aspx> [<https://perma.cc/B9NB-NQB4>].

33. The Emergency Rental Assistance (ERA) Plan was established in two rounds via the Consolidated Appropriations Act and the American Rescue Plan Act of 2021. See Consolidated Appropriations Act, Pub. L. No. 116-260, § 501, 134 Stat. 1182 (2020); see also American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 3201, 135 Stat. 4 (2021). For an overview of the over five hundred emergency rental assistance programs funded through Treasury’s ERA program, see *Treasury Emergency Rental Assistance (ERA) Programs*, NAT’L LOW INCOME HOUS. COAL. (Aug. 2021), <https://nlihc.org/rental-assistance> [<https://perma.cc/7H3T-AH6Q>].

34. *Emergency Rental Assistance Frequently Asked Questions*, U.S. DEP’T OF THE TREASURY 1, 12 (Aug. 25, 2021), <https://home.treasury.gov/system/files/136/ERA-FAQ-8-25-2021.pdf> [<https://perma.cc/8P6V-4AXW>].

35. *Id.* at 17. (“[A] grantee may, at the tenant’s request, provide assistance for rental or utility arrears after an otherwise eligible tenant has vacated a unit. . . . [A]s a condition to receiving payment, Treasury strongly encourages grantees to require the landlord or utility provider to agree not to pursue any further collection efforts against the household and ensure that any reports to credit agencies will confirm the matter’s resolution.”) (emphasis added)

36. See, e.g., Deborah T. Eisenberg & Noam Ebner, *Disrupting the Eviction Crisis with Conflict Resolution Strategies*, 41 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 125 (2020); Karen Tokarz et al., *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 WASH. U.J.L. &

made design recommendations for eviction mediation programs rooted in dispute system design (“DSD”). DSD is “the applied art and science of designing the means to prevent, manage, and resolve streams of disputes or conflict.”<sup>37</sup> Theorists of DSD prioritize interest-based and rights-based options and stakeholders’ ability to choose and move between them. The overarching goal of DSD is to “deliver justice.”<sup>38</sup> This Article endeavors to help policymakers and communities do just that.

This Article does not engage the question of *whether* mediation or other ADR processes should be used generally or specifically for eviction cases.<sup>39</sup> Instead, it makes recommendations for *how*. If used, eviction mediation programs must shoulder the burdens a vacuum of federal incentives creates, and thus be intentionally designed to increase buy-in for landlords, lower risks for tenants, and calibrate the power dynamics between the two.

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POL’Y 243 (2020); Rebecca Hare, *Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota*, 38 MINN. J.L. & INEQ. 135 (2020); Colleen Ebinger & Elizabeth Clysdale, *Justice Served, Housing Preserved: The Ramsey County Housing Court Model*, 41 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 57 (2020); James T. Radatz, *Mediation’s Role in Reducing the Caseload of the Charleston Pilot Housing Court and a Staggering Eviction Rate*, 8 RESOLVED: J. ALT. DISP. RESOL. 118 (2020).

37. LISA BLOMGREN AMSLER, JANET K. MARTINEZ & STEPHANIE E. SMITH, DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 14-21 (1st ed. 2020) (defining “justice” whether participants of a dispute system experience the process of dispute resolution, the substantive outcomes reached, and their interpersonal interactions with others in the system as fair).

38. *Id.* at 14. Dispute system design brings together conflict theory, organizational behavior, and alternative dispute resolution. In practice, the researcher identifies a variety of stakeholders relevant to the question presented; employs both quantitative and qualitative research methods to identify the needs, goals, and challenges of stakeholders; analyzes the collected data for key themes and findings; and prepares a report with design recommendations for how the issue motivating the assessment may be addressed at a systemic level. *See generally* WILLIAM URY ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 40–64 (1988) (arguing that workplace disputes are best resolved by using interests, then relying on rights, then moving to assertions of power); CATHY A. COSTANTINO & CHRISTINA SICKLES-MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS (1996) (examining how interest-based dispute systems have been developed within organizations).

39. There exists a robust decades-long debate about whether and when mediation should be employed. Advocates for marginalized groups argue that mediation harms these groups by asking them to exchange a rights-based court process for an interest-based mediated process where power imbalances may go unchecked. *See, e.g.*, Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1391–92 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1567 (1991). Echoes of this debate reverberate today, particularly in the eviction mediation setting where the power inequity between landlords and tenants is particularly pronounced. *See generally* Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & COMMUNITY 638, 639 (2019).



Part I of this Article describes the impact federal programs had on the design of mortgage foreclosure mediation programs and suggests that without equivalent federal intervention in the eviction context, eviction mediation programs risk being less effective than their foreclosure predecessors. Parts II-IV provide recommendations for how to design eviction mediation programs in order to account for this difference. Part II recommends ways of building incentives for landlords to participate in the process; Part III recommends how to minimize risks and improve alternatives for tenants; and Part IV recommends how to limit, to the extent possible, the gross power imbalances between parties to an eviction dispute. This Article concludes by calling for an in-depth assessment of the impact of eviction mediation on long-term housing stability.

#### I. MORTGAGE FORECLOSURE MEDIATION: A TALE OF FEDERAL INTERVENTION

*“Often, eviction is a proxy for gentrification; it can be a proxy for retaliation; it can be a proxy for relationship disrepair. That was not true in the foreclosure crisis. There was no existing interpersonal relationship between the bank and the homeowner. Because the bank is not a person, the incentives were totally different. Foreclosing on a home was a function of the lender’s policy. And the drive to modify loans was a function of federal policy.”*

– Legal Aid Attorney<sup>40</sup>

Though all foreclosure mediation programs benefitted from the incentives scheme set out by HAMP and TARP, these programs were not designed uniformly across jurisdictions. This is, in large part, because the legal process for foreclosure varies based on whether a state engages foreclosures judicially<sup>41</sup> or non-judicially; the former requiring the plaintiff

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40. Interview with author (notes on file with author). The names and positions of interviewees have been omitted to preserve confidentiality throughout this Article.

41. See *Judicial Foreclosure*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/judicial\\_foreclosure](https://www.law.cornell.edu/wex/judicial_foreclosure) [<https://perma.cc/W69U-NC7H>]. For a helpful visualization of the foreclosure diversion program situated in the judicial foreclosure process in Philadelphia, Pennsylvania, see Ira Goldstein, *Methods for Studying Residential Mortgage Foreclosure*

go to court to get a judgment to foreclose, and the latter enabling them to file a foreclosure directly with state land records.<sup>42</sup> In one example of a foreclosure mediation program in a judicial foreclosure state, mediators described how the dynamics of the mediation was shaped by federal programs:

Many of the sessions consisted of exhaustive review of the homeowner's financial package and a detailed explanation of why the homeowner's particular situation qualifies (or does not qualify) for a HAMP (Home Affordable Modification Program) modification. Should the homeowner not qualify under HAMP, the servicer then walks them through an analysis of any in-house modification programs that apply. If no such modification programs are available, the servicer takes the time to explain why such programs are not an option. . . . [R]egardless of outcome, homeowners prefer[red] the opportunity to attempt any solution with the servicer, rather than rely on the courts' solutions or trying to work something out with the servicers on their own.<sup>43</sup>

In a non-judicial foreclosure state, we can imagine a similar process being engaged voluntarily at the pre-filing stage. Of foreclosure mediation, one mediator said, "I don't care what state you were in. You can call it loan modification, you can call it loss mitigation, you can call it negotiation. But ultimately, the parties were coming to a settlement."<sup>44</sup>

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*Diversion Processes – a Philadelphia Case Study*, THE REINVESTMENT FUND 1, 24 (Mar. 22, 2011), [https://www.nclc.org/images/pdf/conferences\\_and\\_webinars/other\\_webinars/2011/presentations/final\\_philadelphia\\_foreclosure\\_diversion\\_program\\_webinar.pdf](https://www.nclc.org/images/pdf/conferences_and_webinars/other_webinars/2011/presentations/final_philadelphia_foreclosure_diversion_program_webinar.pdf) [https://perma.cc/JKX8-PE4D].

42. See *Non-Judicial Foreclosure* CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/non-judicial\\_foreclosure](https://www.law.cornell.edu/wex/non-judicial_foreclosure) [https://perma.cc/LH8D-JQJ9]. See also Darryl E. Getter et al., Cong. Research Serv., R1 34232, *The Process, Data, And Costs of Mortgage Foreclosure 2* (2008).

43. Andrea Kupfer Schneider & Natalie C. Fleury, *There's No Place Like Home: Applying Dispute Systems Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368, 384 (2011).

44. Interview with author (notes on file with author).

The decision about whether to “settle” rests in the hands of the loan servicer acting on behalf of investor interests.<sup>45</sup> They initiate foreclosure proceedings using the formal instruments of contract law to determine when a party has defaulted. Therefore, getting buy-in, or requiring participation, from financial institutions was key to foreclosure mediation programs’ success. Federal intervention did just that.

The mortgage foreclosure crisis had several touchpoints at the federal level: the U.S. Department of the Treasury instituted both the Troubled Asset Relief Program (TARP)<sup>46</sup> and the Home Affordable Modification Program (HAMP)<sup>47</sup> to help relieve pressure from unstable financial institutions and at-risk homeowners. In practice, a mortgage servicer was paid between \$400 and \$1,600 for each modified loan that completed a three-month trial period.<sup>48</sup> “If the borrower remain[s] in the program and the borrower’s monthly mortgage payment was reduced by 6% or more, the servicer received up to \$1,000 each year for up to three years.”<sup>49</sup> Because mortgage servicers are federally regulated, it was possible to design sweeping incentives for financial institutions to participate meaningfully in mediation. The Federal Housing Finance Agency (FHFA) helped ensure that these federal programs worked in tandem as designed, directing federal mortgagors to modify loans.<sup>50</sup>

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45. Notably, incentives for loan servicers and investors were not aligned, thus leading to different assessments about whether to foreclose upon a home or engage in loss mitigation. “Servicers will favor options that are less labor intensive and require little cost upfront, such as foreclosure, even if a more labor-intensive option, such as modification, better preserves investors’ interests. Whether or not a specific loan servicer is incentivized to foreclose or not depends on the servicing agreement between the loan servicer and the investor.” See Nussbaum, *supra* note 29, at 1900.

46. *Troubled Assets Relief Program (TARP)*, *supra* note 28.

47. *Home Affordable Modification Program (HAMP)*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/data/troubled-assets-relief-program/housing/mha/hamp> [<https://perma.cc/3RB6-L7WA>].

48. *HAMP Summary for Judges*, NAT’L CONSUMER LAW CENTER 1, 7 (August 2013) (available at [https://www.nclc.org/images/pdf/foreclosure\\_mortgage/loan\\_mod/hamp-summary-for-judges.pdf](https://www.nclc.org/images/pdf/foreclosure_mortgage/loan_mod/hamp-summary-for-judges.pdf)).

49. *Id.* at 7.

50. The FHFA oversees, as regulator, federal mortgagors Fannie Mae and Freddie Mac. Pursuant to the Financial Agency Agreement entered into by Fannie Mae and Freddie Mac with the Treasury Department: “Fannie Mae administer[ed] the implementation of HAMP programs, policies, and procedures, and Freddie Mac ensures that HAMP participants compl[ie]d with applicable policies and procedures.” See Federal Housing Finance Agency Office of Inspector General, *Evaluation of FHFA’s Role in Negotiating Fannie Mae’s and Freddie Mac’s Responsibilities in Treasury’s Making Home Affordable Program* 1, 5 (2011) <https://www.fhfa.ig.gov/Content/Files/EVL-2011-003.pdf> [<https://perma.cc/8JZB-DXST>].

Borrowers were also incentivized to participate in mediation via federal policy. As long as they remained current on the terms of the modified mortgage, they would receive \$1,000 each year for up to five years towards reducing the principal balance on the mortgage, paid directly to the servicer.<sup>51</sup> As such, foreclosure mediation served as a loss mitigation option for both parties: financial institutions sought to recoup as much value as possible in order to satisfy a fiduciary interest to investors, and homeowners sought to either stay in their homes under a modified loan or voluntarily leave their homes without a foreclosure judgment negatively affecting their credit.

Beyond these incentives set by federal policy, parties were also independently motivated to settle their cases. Regardless of a state's legal procedure for foreclosure, loan servicers' alternatives to mediation included possible repossession and sale of the home, as well as renting it to new tenants. These alternatives provided financial institutions with options for making up lost earnings, though losses would vary depending on foreclosure debt.<sup>52</sup> Notably, these remedies were made less attractive due to the unstable financial market in which they took place. One housing counselor shared, "the foreclosure [mediation] program progressed because the banks and borrowers were on the same page. The banks knew they had to do something because they were bleeding money; it costs a fortune to foreclose on a home."<sup>53</sup> In fact, loan servicers often stood more to gain by modifying a loan, recapitalizing a borrower's arrears, and collecting payments over a new, longer term. Investors, driven by a fear of being left with a worthless asset, encouraged their representatives to negotiate to maximize its value as much as possible.

Borrowers were perhaps more obviously motivated to settle these disputes. Mediation empowered the homeowner with the right to negotiate a modification of the loan or the opportunity to retain occupancy of the home as a tenant, and in either case, avoid displacement. Where the homeowner did not stay in the home, mediation may have afforded them

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51. *HAMP Summary for Judges*, *supra* note 48, at 7.

52. In cases where loss severity was greater than 100%, it may have cost some investors more to repossess homes and then sell them than it would have cost to give the homes away. See Michael Olenick, *How Banks Can Avoid a Repeat of the 2008 Foreclosure Crisis*, HARV. BUS. REV. (July 9, 2020), <https://hbr.org/2020/07/how-banks-can-avoid-a-repeat-of-the-2008-foreclosure-crisis> [<https://perma.cc/Q4DK-P66T>].

53. Interview with author (note on file with author).

the opportunity to negotiate a “graceful exit,” with agreements including providing additional time before moving out; enabling a borrower to sell their home for less than the amount owed; “cash for keys,” granting the homeowner financial assistance in transitioning to a new home; and a negotiated departure date.<sup>54</sup>

Foreclosure generates an indelibly negative impact on a borrower’s financial future by plaguing their credit report for seven years.<sup>55</sup> However, mediated alternatives to a foreclosure judgment can help soften the impact of a foreclosure filing on a borrower’s record. For example, a loan modified after a foreclosure filing appears as dismissed on a borrower’s record. Similarly, agreeing upon a deed-in-lieu-of-foreclosure allows a borrower to voluntarily turn over title to their home, and thus avoids any judgment from appearing on the borrower’s record. This, in effect, allowed borrowers to use mediation to “walk away from a financial mistake without the consequences of foreclosure.”<sup>56</sup> While lenders communicate loan modifications to credit reporting agencies, any resulting decline in credit score is not nearly as punitive as a foreclosure judgment or bankruptcy filing would have been.<sup>57</sup>

Federal policy also supported homeowners in the mediation process by designing these negotiations to serve as a check on the loan servicers’ power. Mediations were used to oversee compliance with federal loan modification programs, ensure the bank had a legal right to pursue foreclosure, and facilitate good faith negotiation between the parties.<sup>58</sup> One housing counselor commented, “With foreclosure, the rules were all set. There were more than just a few times when I would escalate a dispute directly to HUD (Department of Housing and Urban Development)—when I thought the servicer was not acting in the spirit of what they were supposed to do. I would open a case with the FHA (Federal Housing

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54. Alon Cohen, *Clearing the Foreclosure Crisis: Foreclosure Mediation Can Reduce Uncertainty*, CTR. AM. PROGRESS (Oct. 20, 2010), <https://www.americanprogress.org/issues/economy/news/2010/10/25/8565/clearing-the-foreclosure-crisis-foreclosure-mediation-can-reduce-uncertainty/> [<https://perma.cc/5XUX-MMAM>].

55. *See generally*, Wei Li, Laurie Goodman & Denise Bonsu, *The Lasting Impact of Foreclosures and Negative Public Records*, URBAN INST. (Nov. 2016) [https://www.urban.org/sites/default/files/publication/85356/the-lasting-impact-of-foreclosures-and-negative-public-records\\_0.pdf](https://www.urban.org/sites/default/files/publication/85356/the-lasting-impact-of-foreclosures-and-negative-public-records_0.pdf) [<https://perma.cc/G7QC-5TVT>].

56. Interview with author, *supra* note 53.

57. *Id.*

58. Nussbaum, *supra* note 29, at 1910.

Administration)—they were the ultimate loser.”<sup>59</sup> Foreclosure mediation provided a built-in check on the good faith of the parties; this was particularly important for borrowers who, across the country, reported that banks were resistant to negotiating and provided inconsistent information regarding their mortgage.<sup>60</sup>

Most of the foreclosure mediation programs closed or became optional after TARP funding was no longer available. When HAMP ended in 2016, no mechanism remained to “twist the loan service officers’ arms” into modifying loans, and thus use mediation.<sup>61</sup> This suggests that absent federal requirements, both the incentives and range of options from which both parties may benefit are considerably narrowed. Eviction mediation programs should take note. Eviction does not create in the parties a shared concern about lost value in an asset. Thus, the parties’ incentives to participate in mediation, their respective alternatives, and the power dynamics between them are fundamentally different. Without federal force supporting them, eviction mediation programs must be designed to address these challenges.

The following sections discuss and provide design recommendations for increasing incentives for landlords, lowering risks for tenants, and flattening power dynamics between the parties to an eviction mediation. However, “one size fits none.”<sup>62</sup> The design considerations discussed below should be adapted to local contexts and driven by each community’s unique needs, housing conditions, and power asymmetries.

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59. Interview with author, housing attorney (notes on file with author).

60. Nussbaum, *supra* note 29, at 1910.

61. Interview with author (notes on file with author).

62. See generally Kathryn L. Howell et al., *One Size Fits None: Local Context and Planning for the Preservation of Affordable Housing*, 29 HOUSING POL’Y DEBATE 148 (2019) (available at <https://www.tandfonline.com/doi/full/10.1080/10511482.2018.1476896>).

## II. EVICTION MEDIATION: BUILDING INCENTIVES FOR LANDLORDS

*“When I first heard that the mortgage crisis was being used as a template for the design of this eviction prevention program, I shuddered a bit. They’re not the same problem. People grappling to pay a mortgage are in an entirely different socioeconomic situation than people who are renters. Most mortgages are held by banks or large financial institutions; much of landlord-tenant [disputes] happens between smaller companies or even individual landlords. At first, it seemed to me an easy breezy solution. But then, I saw that . . . there are differences. And these differences are deep and profound. Uncle Sam doesn’t care about a single landlord the way he cares about a big bank.”*

– Former Judge<sup>63</sup>

Landlords are more numerous and heterogenous than financial institutions, making designing broad incentives for their participation in mediation a tricky feat.<sup>64</sup> Roughly 51% of the 48.2 million rental units in the United States are owned by “business entity” landlords, while the remainder are owned by individual landlords.<sup>65</sup> Of the former, fewer than an estimated one million own an “average of more than 20 units, with many managing hundreds of units.”<sup>66</sup> While there are innumerable “mom-and-

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63. Interview with author (notes on file with author).

64. Despite the persuasive role played by federal incentives, building buy-in among Plaintiffs was necessary in the foreclosure context as well. “[W]e do not believe that we would have the very high acceptance rate for this voluntary mediation program if we did not have the design buy-in of lenders’ counsel.” Andrea Kupfer Schneider & Natalie C. Fleury, *There’s No Place Like Home: Applying Dispute Systems Design Theory to Create a Foreclosure Mediation System*, 11 NEV. L.J. 368, 380 (2011).

65. *Survey Finds Nearly Half of Rental Units are in Rental Properties with Four or Fewer Units*, U.S. DEP’T HOUS. URBAN DEV. (June 3, 2020), [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_20\\_071](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_071) [<https://perma.cc/FSA6-Q824>].

66. Todd M. Richardson, *Message From PD&R Senior Leadership*, POL’Y DEV. & RSCH. EDGE MAG. (June 11, 2018), <https://www.huduser.gov/portal/pdredge/pdr-edge-frn-asst-sec-061118.html> [<https://perma.cc/JZ72-RWHV>].

pop” landlords, they tend to own units in small buildings, with 73% of them owning rental properties located in buildings of one to four units.<sup>67</sup>

Ownership looks different for these landlord groups, as does financial resiliency. More than 33% of individual landlords have a mortgage or similar debt,<sup>68</sup> and 58% do not have access to a line of credit that would help address delinquent rental payments.<sup>69</sup> In 2020, individual landlords were most likely to have tenants deeply behind on rental payments,<sup>70</sup> and among this group, individual landlords of color were disproportionately affected by missed rental income.<sup>71</sup> Thus, although corporate landlords have suffered the most missed rental payments during the COVID-19 pandemic, they also have greater access to capital and can therefore adapt their business to missed payments more easily. According to one study, sixty-one “billionaire landlords” with very large portfolios saw their wealth collectively increase \$24.4 billion during the COVID-19 pandemic.<sup>72</sup>

These differences shape the range of resources, motivations, and acceptable outcomes for landlords in mediation. Absent federal intervention driving landlords to the table, designers of eviction mediation programs must think creatively about how to incentivize this diverse group of stakeholders. Three possibilities are discussed below: compelling

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67. Press Release, U.S. Dep’t Hous. Urban Dev., HUD and Census Bureau Release Findings of Rental Housing Finance Survey (June 3, 2020) [https://www.hud.gov/press/press\\_releases\\_media\\_advisories/HUD\\_No\\_20\\_071](https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_071) [<https://perma.cc/FSA6-Q824>] (finding “nearly half of rental units are in rental properties with four or fewer units”).

68. *Id.*

69. Letter from Patricia Lee Refo, President Am. Bar Ass’n, to Nancy Pelosi, Mitch McConnell, Kevin McCarthy, Chuck Schumer, *re: ABA Support for Emergency Rental Assistance to End the COVID-19 Eviction Crisis* (Sept. 5, 2020) (available at [https://www.americanbar.org/content/dam/aba/administrative/government\\_affairs\\_office/eviction-crisis-letter-september.pdf](https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/eviction-crisis-letter-september.pdf)) [<https://perma.cc/S395-LVAM>].

70. Elijah de la Campa et al., *How Are Landlords Faring During the COVID-19 Pandemic?*, JOINT CTR. HOUSING STUD. HARV. UNIV. (Aug. 2021), [https://www.jchs.harvard.edu/sites/default/files/research/files/harvard\\_jchs\\_covid\\_impact\\_landlords\\_survey\\_de\\_la\\_campa\\_2021.pdf](https://www.jchs.harvard.edu/sites/default/files/research/files/harvard_jchs_covid_impact_landlords_survey_de_la_campa_2021.pdf) [<https://perma.cc/U6WL-LJJA>].

71. Laurie Goodman & Jung Hyun Choi, *Black and Hispanic Landlords Are Facing Great Financial Struggles Because of the COVID-19 Pandemic. They Also Support Their Tenants at Higher Rates.*, URBAN INST. (Sept. 4, 2020), <https://www.urban.org/urban-wire/black-and-hispanic-landlords-are-facing-great-financial-struggles-because-covid-19-pandemic-they-also-support-their-tenants-higher-rates> [<https://perma.cc/2KB2-4GNB>].

72. Sara Myklebust et al., *Cashing in on our Homes*, INST. POL’Y RSCH. 1, 3 (Mar. 2021), <https://ips-dc.org/wp-content/uploads/2021/03/Cashing-in-on-Our-Homes-FINAL-revised.pdf> [<https://perma.cc/ZWR7-VF9S>].



participation through legislation, utilizing court orders, or by building buy-in with landlords through consultative program design.

### A. Legislation

Legislative force can be applied to compel parties to participate in eviction diversion. This might include an obligation requiring landlords to participate in mediation before filing an eviction; an obligation to give a tenant notice of a proposed eviction before filing; and/or an obligation to submit this notice to a government agency or community mediation center for tracking purposes. For example, Hawai'i's Act 57 extends the eviction notice period to fifteen days and requires landlords to engage in mediation and delay filing if a tenant schedules or attempts to schedule a mediation within the notice period.<sup>73</sup> Moreover, this legislation requires landlords to provide specific information and documentation of delinquency to tenants, as well as the mediation center that provides the parties mediation services at no cost.<sup>74</sup> Legislative force compels corporate and individual landlords equally, helping to curb the disparate impact of missed rental payments on individual landlords by connecting them with rental assistance programs via mediation.

### B. Court Orders

A majority of court administrators interviewed for the ABA/HNMCP study identified a “judicial champion” as “essential” to any eviction diversion program’s longevity and use by parties.<sup>75</sup> As such, court orders may also incentivize participation in pre-filing eviction mediation. The U.S. Department of Justice suggested, among other strategies based in the judiciary, that courts may choose to pass temporary administrative orders requiring landlords to apply for rental assistance prior to filing for eviction for nonpayment of rent; postpone pending eviction cases in order to allow litigants time to apply for rental assistance; or modify summons documents,

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73. A Bill for An Act Relating to the Landlord-Tenant Code, 2021 HI Laws 57 (H.B. 1376) (2021).

74. *Id.*

75. Parrish, *supra* note 14, at 24.

court notices, and form filings to alert litigants to the availability of eviction diversion programs, including mediation.<sup>76</sup>

Exemplifying some of these recommendations, the Philadelphia Municipal Court passed an administrative order requiring landlords to attend mediation, seek rental assistance, and wait forty-five days before filing an eviction action for nonpayment of rent.<sup>77</sup> This court order was passed in coordination with other laws and policies designed to incentivize participation in a city-wide eviction diversion program. Before this order, a survey of Philadelphia landlords found that most did not know the program existed, with “small landlords” having the least contact with or awareness of the program.<sup>78</sup> In June 2021—roughly nine months into the program overall, and three months after participation had been made mandatory via court order—about 2,300 pairs of landlords and tenants had met with mediators and housing counselors, 57% of which either reached agreements or agreed to keep negotiating.<sup>79</sup> This suggests that court orders can result in increased awareness and use of eviction mediation programs.

Moreover, an eviction mediation program instated by court order permits judicial champions to account for the unique features of its jurisdiction. For example, Philadelphia has an “elderly” housing stock, where the median age of a house is ninety-three years,<sup>80</sup> and 73% of all landlords are “small landlords” and only own one or two units.<sup>81</sup> As such,

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76. Letter from Vanita Gupta, Assoc. Att’y Gen. to Chief Justs. and State Ct. Adm’rs. (June 24, 2021), <https://www.justice.gov/asg/page/file/1405886/download> [https://perma.cc/7X8X-HZCY].

77. Philadelphia Mun. Ct. President Judge Admin. Ord., Residential Eviction Moratorium and Exceptions. Serv. Of Writs and Alias Writs of Possession, Amended No. 15 (Apr. 1, 2021), <https://www.courts.phila.gov/pdf/regs/2021/15-of-2021-PJ-ORDER.pdf> [https://perma.cc/ZQS4-2CFD].

79. Vincent Reina et al., *Residential Rental Property Owner Perspectives and Practices in Philadelphia: Evaluating Challenges during the COVID-19 Pandemic*, THE REINVESTMENT FUND 1,7 (Dec. 2020) [https://www.reinvestment.com/wp-content/uploads/2022/02/HIP\\_Reinvestment\\_Fund\\_Rental\\_Housing\\_Brief\\_final.pdf](https://www.reinvestment.com/wp-content/uploads/2022/02/HIP_Reinvestment_Fund_Rental_Housing_Brief_final.pdf) [https://perma.cc/M545-S79K].

79. Michaele Bond, *Before Filing For Eviction, Philly Landlords Must Continue to Attend Mediation Until Aug. 31*, PHILADELPHIA INQUIRER (July 1, 2021), <https://www.inquirer.com/real-estate/housing/rental-assistance-eviction-diversion-philadelphia-court-20210701.html> [https://perma.cc/A6XG-9NTQ].

80. Anna Kramer, *Old Homes, High Poverty Make Philadelphia Housing Less Than Affordable For Some*, PLANPHILLY (July 25, 2018), <https://whyy.org/articles/old-homes-high-poverty-make-philadelphia-housing-less-than-affordable-for-some/> [https://perma.cc/PAY7-QUCE].

81. Elinor Haider & Octavia Howell, *Who are Philadelphia’s Landlords?*, PEW CHARITABLE TRUSTS (Feb. 24, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/02/24/who-are-philadelphias-landlords> [https://perma.cc/3XAH-BY47].

an eviction diversion program in this community was rightly designed to build awareness with and incentivize the participation of “small landlords.” An eviction mediation program born of a court order allows judicial champions to design the program in consideration of local factors, supporting a program’s longevity and use by parties.

### C. *Building Buy-In*

Even if participation in mediation has been mandated via legislation or court order, building awareness of and buy-in for the process of mediation early in the program’s design is essential for successful implementation. A central tenet of DSD is engaging stakeholders, including users, in the design of any dispute resolution mechanism or process.<sup>82</sup> Consulting landlords early in the program’s design—as well as tenants and other stakeholders from the courts, government agencies, community organizations, and other public entities—is critical to building buy-in for the program and ensuring it will be used in good faith. This is particularly true of voluntary pre-filing programs where no other mechanism drives parties to the table.

One mediator stressed, “tenants will want to work with a landlord who wants to work with them. If you don’t get landlords on board, then what’s the point?”<sup>83</sup> The results of ABA/HNMCP study suggest this might be possible: over 70% of the landlords surveyed shared they would be inclined to address issues of tenant non-payment or late payment outside of court.<sup>84</sup> “Though very few had participated in mediation as a means for settling an eviction, a majority of participants believed it was preferable to pursuing legal action: over 69% believed that mediation is more time and cost efficient than filing an eviction because it saves them attorney’s fees, filing fees, sheriff’s fees, and transition costs.”<sup>85</sup> “In fact, over 76% of landlords surveyed estimated that evicting a tenant cost them between \$1,000-\$5,000, not including arrearages or cutoffs in rental income.”<sup>86</sup> These results suggest that landlords may be open to participating not only in the mediation process, but also in the design process of a mediation program. Engaging

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82. LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEM DESIGN PREVENTING, MANAGING, AND RESOLVING CONFLICT 13 (2020).

83. Interview with author (notes on file with author).

84. Parrish, *supra* note 14, at 17.

85. *Id.*

86. *Id.*

stakeholders, and especially landlords, early in a program's design is essential to identifying their interests and appropriately addressing them via incentives.

Unfortunately, stakeholder consultation of any kind seems to be rare in the eviction diversion context. The ABA/HNMCP study suggests that very few eviction diversion programs tailor the operation of their program(s) to the demographics of the communities they serve.<sup>87</sup> One exception, the Jackson County, Michigan Eviction Diversion Program, initiated its design process by conducting a stakeholder assessment of community needs, developing a set of best practices based on comparative programs, and holding regular meetings to discuss the program's efficacy in ameliorating tenant/landlord relationships.<sup>88</sup> This program provides a model for the iterative design of an eviction diversion program that is shaped by extensive consultation of a wide variety of stakeholders, including possible users of the program. Though it has been operational since 2014, the program expanded its services in 2020, in consultation with the courts and community, to meet the urgent needs presented by the COVID-19 pandemic.<sup>89</sup> This sustainability and adaptability are likely in part due to the strength of its design process. When the "people and organizations that create, host, use, and are affected by" a program are involved in its "design and continuous improvement, [it is] more likely . . . to be sustainable in the long term."<sup>90</sup>

### III. EVICTION MEDIATION: LOWERING STAKES FOR TENANTS

*"The most effective diversion programs don't wait until the landlord and tenant are in court; at that point, the tenant's increased vulnerability and the landlord's financial investment in the eviction impair an effective resolution. . . ."*

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87. *Id.* at 22.

88. *Eviction Diversion Program in Jackson County, MI*, EVICTION INNOVATIONS (May 27, 2020), <https://evictioninnovation.org/2020/05/27/diversion-jackson-co/> [<https://perma.cc/S3AY-4GVE>].

89. *Id.*

90. Janet K. Martinez, *Designing Online Dispute Resolution*, 2020 J. DISP. RESOL. 135, 141 (2020).

*In order to secure long-term housing stability and prevent unnecessary costs or uncertainty to either side, a diversion program should have . . . early intervention at the pre-filing stage.”*

– *Legal Aid Attorney*<sup>91</sup>

The stakes for tenants facing eviction are extremely high in both the short and long-term. Tenants may only be entitled to between three and thirty days to remedy late rent before a landlord can file to evict them.<sup>92</sup> One Chicago-based study found eviction trials can take less than two minutes.<sup>93</sup> Barring presenting a legal defense that disposes of the case, a tenant’s short-term alternative to a mediated agreement is, at best, being evicted and finding alternate housing and at worst, homelessness.<sup>94</sup> In fact, eviction has been found to be a top driver of homelessness.<sup>95</sup> Overcrowding, doubling up, and homelessness all contribute to “severe and long-term poor health outcomes and economic costs.”<sup>96</sup> For this reason, eviction has been

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91. Interview with author (notes on file with author).

92. See *LSC Eviction Laws Database*, LEGAL SERVICES CORP. (Jan. 1, 2021), <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions/lsc-eviction-laws-database> [<https://perma.cc/5RYX-HAQC>].

93. LAWYERS’ COMM. FOR BETTER HOUSING, NO TIME FOR JUST.: A STUDY OF CHI. EVICTION CT. 11–12 (Dec. 2003), <https://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf>.

94. In states with greater tenant protections, this power dynamic may shift. While tenants are still left with fewer and relatively worse alternatives to mediation, they may not be incentivized to mediate in the first place. For example, in California, the state eviction moratorium exceeded the federal moratorium. As such, tenants had a defense in court if their landlord evicted them over nonpayment of rent as well as no-fault reasons, nuisance, denying entry to a landlord, or unauthorized occupants or pets, if related to COVID-19. For tenants who were aware of their legal rights, there was very little to no incentive to settle pre-termination of moratorium. See AB 3088, ch. 37, 2019–2020 Leg. (Cal. 2020); SB 91, ch. 2, 2021–2022 Leg. (Cal. 2021); AB 832, ch. 27, 2021–2022 Leg. (Cal. 2021). Said one scholar, “Tenants in California have had no incentive to settle claims, and only incentive to squat.” Interview with author (notes on file with author).

95. Jarret Murphy, *Evictions are Top Driver of Homelessness*, CITY LIMITS (Nov. 13, 2014), <https://citylimits.org/2014/11/13/evictions-are-top-driver-of-homelessness/> [<https://perma.cc/E5ME-NUWM>] (citing *The Rising Number of Homeless Families in NYC, 2002–2012: A Look at Why Families Were Granted Shelter, the Housing They Had Lived in & Where They Came From* 1, 7 N.Y. City Independent Budget Office (2014), <https://ibo.nyc.ny.us/iboreports/2014dhs.pdf>).

96. Emily Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URBAN HEALTH 1, 2 (2021) (available at <https://link.springer.com/content/pdf/10.1007/s11524-020-00502-1.pdf>).

described as “the civil equivalent of capital punishment,” a metaphor made only more apt under the heightened stakes of the COVID-19 pandemic.<sup>97</sup>

A single eviction also has the long-term effect of compromising tenants’ long-term financial security and housing stability, pushing them further into “economic precarity.”<sup>98</sup> Eviction filings are publicly available court records, which can be reported by tenant screening companies for up to seven years.<sup>99</sup> This “scarlet E” compromises a tenant’s ability to locate a stable housing alternative, as most landlords perform tenant screening to identify past evictions, with some having outright bans against leasing to tenants with eviction filings on their records.<sup>100</sup> Most landlords also run credit checks for prospective tenants; thus, a tenant with a lower credit score—driven down by past due rental payments—will have fewer housing options, thwarting their negotiating power not only in the present mediation, but also in future negotiations.

Absent federal intervention protecting tenants against these risks, designers of eviction mediation programs must address how to lower the stakes for mediation so that tenants may enter the process voluntarily and un-coerced. Two design ideas are discussed below: pre-filing mediation and automatic record sealing/expungement.

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97. Brian Gilmore, *Give Tenants Lawyers*, N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/opinion/evictions-homelessness-legal-aid.html> [<https://perma.cc/33MS-3CVX>].

98. Precarity is defined as resilience to economic and environmental shocks. See Pendall et al., *Vulnerable people, precarious housing, and regional resilience: an exploratory analysis*, 21 HOUSING POL’Y DEBATE 271, 296 (2012). See also *Buzzword: the precariat*, MACMILLAN DICTIONARY, <https://www.macmillandictionary.com/us/buzzword/entries/precariat.html> (last visited Feb. 2, 2022). Furthermore, this economic precarity—as marked by unpredictability of employment or housing—can, in turn, affect tenants’ psychological welfare, further disadvantaging them at the bargaining table and beyond. See Kathryn M. Leifheit et al., *Variation in State-Level Eviction Moratorium Protections and Mental Health Among US Adults During the COVID-19 Pandemic*, 4 JAMA NETWORK OPEN 1, 2 (2021) (available at <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2787245>) (“During the COVID-19 pandemic, mass reductions in wages and unprecedented job loss exacerbated eviction risk for millions of renter households, and inability to pay rent was strongly associated with suicidal ideation in a study conducted during the COVID-19 pandemic.”).

99. 15 U.S.C. § 1681c(c)(1) (2021).

100. Samuel Spaid, *A Home is a Good Thing: An Argument for Changing the Eviction Process*, 41 MITCHELL HAMLIN L.J. PUB. POL’Y & PRAC. 231, 233 (2020).

### A. *Pre-filing Mediation*

Pre-filing mediation occurs before a landlord files an eviction action in court. These programs may be court-affiliated or based in government agencies or community mediation centers. The limited data available on pre-filing mediation suggests strong positive outcomes: where landlords were required to preemptively consent to mediation and include a brochure describing a pre-filing mediation program with any eviction summons, the Kalamazoo Eviction Diversion program saw a 50% decrease in evictions and a 9% decline in homelessness in its community in the first five years.<sup>101</sup> While more empirical research is required to track the impact of eviction diversion programs generally, and eviction mediation in particular, this data suggests that pre-filing mediation may provide a pragmatic approach for curbing both the immediate threat of homelessness and the long-term impact of a “scarlet E” on tenant’s records.

Notably, unless required by legislation or court order, pre-filing mediation programs often rely on voluntary participation by the parties. In turn, this may affect the level of buy-in and engagement such a program receives, particularly from landlords. Of those surveyed in the ABA/HNMCP study, roughly 46% of landlords expressed a preference for pre-filing interventions, and 71% supported eviction diversion programs that occurred post-filing, but pre-hearing.<sup>102</sup>

### B. *Mandatory Expungement or Record Sealing*

Where pre-filing eviction mediation programs are not mandated by legislation or court order, or would not otherwise enjoy buy-in from necessary decision-makers, programs should consider conditioning post-filing mediation services on expungement.

Expungement removes a court record from public view.<sup>103</sup> In effect, this prevents future landlords from being able to locate any record of a tenant’s

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101. Deborah Thompson Eisenberg et al., *The Role of Mediation in an Integrated System of Eviction Prevention*, 2 MD. B. J. 112, 113 (2020).

102. Parrish, *supra* note 14, at 17.

103. “In general, when an eviction record is expunged, its *existence* is not available to the public; in contrast, when a record is sealed, its contents (*but not its existence*) are not publicly available.” See Susan Fleurant & Collen Healy Boufides, *Eviction Expungement: A Civil Legal Tool to Improve*

past eviction filings or judgments. Once an eviction filing or judgment has been expunged from a tenant's record, they may truthfully answer "no" when a future landlord asks if they have ever been evicted: a search of court records would show no history of eviction.<sup>104</sup> However, the administrative burden of expunging a record currently falls on tenants: they must file an expungement petition with the court and serve their current landlord with notice, who may, in turn, object.<sup>105</sup> Judges then individually determine whether to grant an expungement, considering factors that vary by jurisdiction, including whether any rental debt is owed to the landlord at the time of the petition.<sup>106</sup>

To address this burden, as well as the severe impact of an eviction filing or judgment on a tenant's record, some states have introduced laws to prevent landlords from accessing eviction history in rental application screenings. For example, in 2016, California passed AB 2819, which limits access to court case records and automatically and permanently seals all evictions, unless the current landlord responds with a trial within sixty days of when the complaint was filed.<sup>107</sup> The automatic nature of this eviction-sealing law reduces the burden on tenants to file an additional action and removes the ad-hoc nature of expungement determinations from the judiciary. However, of the eviction prevention and/or diversion programs surveyed by the ABA/HNMCP study, only 37% include expungement and/or record sealing.<sup>108</sup> Expungement thus appears to be an underutilized strategy in lowering the stakes for tenants in the eviction process, and thus, eviction mediation.

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*Housing Stability and Health*, NETWORK FOR PUB. HEALTH L. (Feb. 27, 2020), <https://www.networkforphl.org/news-insights/eviction-expungement-a-civil-legal-tool-to-improve-housing-stability-and-health/> (emphasis added).

104. Jaboa Lake & Leni Tupper, *Eviction Record Expungement Can Remove Barriers to Stable Housing*, CTR. AM. PROGRESS (Sept. 30, 2021), <https://www.americanprogress.org/article/eviction-record-expungement-can-remove-barriers-stable-housing/> [<https://perma.cc/JDQ7-HWR9>]. See also *Expunging an Eviction Case*, EDUC. FOR JUST. (2019), <https://www.wadvocates.org/wp-content/uploads/2019/12/Expunging-Evictions-Fact-Sheet.pdf> [<https://perma.cc/LN8S-3XX3>].

105. *Id.*

106. *Id.*

107. See CAL. CIV. PROC. CODE §§ 1161.2, 1167.1 (West).

108. Parrish, *supra* note 14, at 17.



IV. EVICTION MEDIATION:  
FLATTENING POWER INEQUITY THROUGH PROCESS

*“As mediators, [we need to] understand that the power differential in this relationship is important. Landlords have the power of law and contract behind them. Tenants are often powerless, especially if the law is not supporting their interests. Predatory housing providers often take advantage of these differences, and profit from evictions, [saying about tenants] ‘they are crazy’, ‘they are the problem’, ‘I just want them out.’ . . . Sometimes there are practices that are not legal.”*

– Mediator<sup>109</sup>

Eviction has been criticized as an “expedited, state sanctioned collection process for landlords.”<sup>110</sup> The design of this legal process exacerbates the inherent power disparity between the parties. Mediation occurs in the shadow of this legal process; whether mediation occurs pre-filing or post-filing, the “enormity of the stakes and lopsided bargaining power present in eviction mediations strain . . . party self-determination.”<sup>111</sup>

Relative power in a negotiation can come from many sources, including having access to resources, skills and knowledge, or an attractive alternative.<sup>112</sup> Tenants’ power at-the-table is constrained on all accounts. First, tenants tend to be younger and lower income than homeowners.<sup>113</sup> These factors disadvantage them in mediation. With less access to capital and fewer assets, tenants are not well positioned to counter offers presented

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109. Interview with author (notes on file with author).

110. Eisenberg & Ebner, *supra* note 36, at 129. For more on the legal process of eviction see Spaid, *supra* note 100, at 235.

111. Eisenberg & Ebner, *supra* note 36, at 137.

112. See Roger Fisher, *Negotiating Power*, 27 AM. BEHAV. SCIENTIST 149, 156 (1983).

113. Young adults under thirty-five tend to be the most likely of all age groups to rent. About two-thirds of renters (65%) report renting “as a result of circumstances,” citing financial reasons. College graduates are the *least* likely demographic group to be renters. See Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households are Renting Than at Any Point in 50 years*, PEW RSCH. CTR. (July 19, 2017), <https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/> [<https://perma.cc/8V55-DN54>].

by landlords and are often left with no recourse other than to accept a landlord's proposed settlements terms.

Moreover, tenants tend to complete lower levels of education than landlords<sup>114</sup> and are less likely to be represented by legal counsel. An estimated 81% of landlords have access to counsel, empowering them with information about their legal rights, along with the ability to make “free and informed” choices in mediation.<sup>115</sup> Less than 3% of tenants are estimated to appear represented in court and often lack information about their rights or the legal process.<sup>116</sup> With less access to relevant “skills and knowledge,” tenants are not primed to navigate the complex eviction process as nimbly or strategically as landlords.

Further, tenants tend to be less white than homeowners.<sup>117</sup> Racial discrimination against tenants of color narrows their ability to develop attractive alternatives to eviction such as moving into different stable housing. Some studies show high levels of discrimination against Black and low-income renters; notably, discrimination worsens across races if applicants report wanting to use a Section 8 housing voucher.<sup>118</sup> With financial constraints on completing payment plans unassisted, and limited ability to move out quickly, tenants—and especially tenants of color—come to the mediation table with fewer alternatives and less negotiation power than their landlord counterparts.

For eviction mediation to be a fully voluntary and uncoerced process, power disparities between the parties should be addressed. Otherwise, the process risks becoming a miscarriage of justice. Two possibilities for improving tenant negotiating power, and thus helping to flatten power

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114. *Id.*

115. See EVICTION REPRESENTATION STATISTICS FOR LANDLORDS AND TENANTS ABSENT SPECIAL INTERVENTION, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (Nov. 2, 2021), [http://civilrighttocounsel.org/uploaded\\_files/280/Landlord\\_and\\_tenant\\_eviction\\_rep\\_stats\\_\\_NCCRC\\_.pdf](http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats__NCCRC_.pdf) [https://perma.cc/9ZT9-2YM2]; see also AM. ARB. ASS'N, AM. BAR ASS'N & ASS'N FOR CONFLICT RESOL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD I (Sept. 2005).

116. EVICTION REPRESENTATION STATISTICS, *supra* note 115.

117. According to 2019 Census data, 58% of Black American households are rented. Fifty-three% of Hispanic households are rented. Less than 31% of white households are rented. See U.S. CENSUS BUREAU, DEMOGRAPHIC CHARACTERISTICS FOR OCCUPIED HOUSING UNITS (2018), <https://data.census.gov/cedsci/table?q=homeownership&tid=ACSS1Y2018.S2502&vintage=2018>.

118. Jamie Langowski et al., *Qualified Renters Need Not Apply*, THE BOSTON FOUNDATION (July 2020), [https://www.suffolk.edu/-/media/suffolk/documents/news/2020/law-news/rental\\_housing\\_study\\_july2020.pdf?la=en&hash=B0FFF5916ECA23DFD054170DA223780EDA571241](https://www.suffolk.edu/-/media/suffolk/documents/news/2020/law-news/rental_housing_study_july2020.pdf?la=en&hash=B0FFF5916ECA23DFD054170DA223780EDA571241) [https://perma.cc/F5EZ-KLEJ].

inequities at-the-table, are discussed below: providing tenants with access to holistic services and locating these services on-site at courts.

### A. *Holistic Services*

Studies have found “a complex combination of financial, social, relational and health factors contributes to the inability to pay rent.”<sup>119</sup> However, when nonpayment of rent is the only factual issue, courts, society’s triers of fact, have “limited remedial imagination.”<sup>120</sup> Buttressing mediation with a holistic set of services designed to promote housing stability and financial security may help balance the power asymmetries between the parties in mediation and effectively address some of the underlying causes of the dispute.

Holistic eviction diversion programs offer mechanisms for resourcing traditionally disempowered parties during the eviction process, often in advance of mediation. In the ABA/HNMCP study, interviewees likened the most successful of these holistic programs to “a three-legged stool” made up of service providers who, working in concert, could “holistically address each party’s human needs, legal needs, and financial needs.”<sup>121</sup> For example, a mediation program may require tenants to consult with a housing counselor, legal services provider, and/or emergency rental assistance program in advance of engaging in the mediation process. In Chicago, the Cook County Early Resolution Program embodies this approach by employing a voluntary pre-trial process that connects parties to rental assistance, legal aid, mediation, case management services, and community partners.<sup>122</sup>

More results from the ABA/HNMCP study suggest that landlords may also be more incentivized to participate in mediation when it is part of a holistic program. Over 81% of landlords surveyed reported being less likely

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119. Marleke Holl et al., *Interventions to Prevent Tenant Evictions: A Systematic Review*, 24 HEALTH & SOC. CARE CMTY. 532, 533 (2016).

120. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or the Law of ADR*, 19 FLA. ST. U.L. REV. 1, 7 (1991).

121. Parrish, *supra* note 14, at 2.

122. Hon. Timothy C. Evans, Chief Judge of Circuit Court of Cook County, IL, General Administrative Order 2020-09, Residential Eviction and Consumer Debt Early Resolution Program (Apr. 22, 2021), [https://www.cookcountycourt.org/Portals/0/Chief%20Judge/General%20Administrative%20Orders/4.22.21%20GAO%202020-09%20Amended%20\(with%20attachment\).pdf](https://www.cookcountycourt.org/Portals/0/Chief%20Judge/General%20Administrative%20Orders/4.22.21%20GAO%202020-09%20Amended%20(with%20attachment).pdf) [<https://perma.cc/65FH-N3EU>].

to pursue eviction if their tenant had access to rental or cash assistance.<sup>123</sup> Roughly 53% shared that they would be more likely to participate in a mediation if the tenant had access to legal representation.<sup>124</sup> Over 66% said they would be more likely to resolve issues of non-payment or late payment of rent via mediation if tenants had access to education programs, financial counseling, or non-legal advocacy.<sup>125</sup> These findings suggest that connecting tenants to resources in advance of mediation not only helps build their negotiating power, but also may increase buy-in and good faith participation in the process from landlords.

### *B. Accessing Services On-Site*

Many court-based and court-adjacent mediation programs offer day-of mediation services at court; this approach long precedes the COVID-19 pandemic. Of day-of mediation, Eisenberg and Ebner write,

[M]ost self-represented tenants are confused, fearful, and desperate to avoid homelessness. . . . On the day of trial, tenants are under tremendous psychological pressure to agree to any terms presented by the landlord to keep a roof over their children's heads, even if the property has housing code violations or needs repairs. The shadow cast by the court (which is just down the hall) might loom so darkly that it compromises self-determination or essentially negates it.<sup>126</sup>

As such, offering stand-alone, day-of-trial mediation services typically denies tenants the opportunity to improve their negotiating power by seeking out resources, support, or preparing documentation in advance of the mediation. In jurisdictions where pre-filing mediation is unavailable, or where coordinating access to holistic services prior to mediation proves challenging, programs may consider making a holistic set of services available on-site, either at the court or virtually.

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123. Parrish, *supra* note 14, at 27.

124. *Id.* Notably, of this same group, 44% of property owners were also more likely to file an eviction if a tenant had access to legal representation.

125. *Id.*

126. Eisenberg & Ebner, *supra* note 36, at 138.

The Massachusetts Lawyer-For-A-Day Program connects tenants with in-house mediators (“housing specialists”), mental health services, and day-of legal assistance.<sup>127</sup> Tenants access these services on-site on the day of their hearing allowing those facing eviction to enter mediation with legal representation.<sup>128</sup> Due to the COVID-19 pandemic, many hearings are now conducted virtually or telephonically.<sup>129</sup> As such, some mediation programs have also adapted their work to online platforms, enabling immediate day-of access or referral to a set of holistic services.<sup>130</sup> For example, in some jurisdictions, parties may, after checking in virtually with a court clerk, be diverted to a virtual resource room where they can connect with representatives from rental assistance, legal assistance, and social and human services organizations providing stabilization resources, as well as access translation and/or technology accessibility resources.<sup>131</sup> This allows parties to enter into mediation with greater financial flexibility, access to new information, and more support. Whether virtual or in-person, this day-of triage approach slows the pace of the otherwise accelerated legal eviction process and helps tenants build their negotiating power.

These design considerations are provided with DSD’s goal of “delivering justice” in mind. By addressing the parties’ incentives, stakes,

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127. MASS. HOUSING CT. DEP’T, LAWYER-FOR-A-DAY PROGRAM MANUAL (2018), <https://www.mass.gov/doc/housing-court-lawyer-for-the-day-program-manual/download> [<https://perma.cc/S5QN-6LGG>].

128. *Id.*

129. See *Virtual Hearings: Statewide Orders for Virtual Hearings*, NAT’L CTR. ST. COURTS (Jan. 16, 2022), <https://public.tableau.com/profile/ncscviz#!/vizhome/StateCourtResponsestoCOVID-19/CovidTheCourts> (select “Virtual Hearings: Research and Guides”); see also Formal Opinion 498, AM. BAR ASS’N, at 2 (Mar. 10, 2021) [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-498.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf) (“Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need.”).

130. Peter Daniels, *A Year of Pandemic Mediation Online—Lessons Learned at the Harvard Mediation Program*, HARV. MEDIATION PROGRAM (May 26, 2021), <https://hnmcp.law.harvard.edu/hnmcp/news/a-year-of-pandemic-mediation-online-lessons-learned-at-the-harvard-mediation-program/> [<https://perma.cc/YX3Q-5MPH>].

131. For example, the Kalamazoo, Michigan, the Eighth District Court Eviction Court Diversion Program brings together court staff, the state Department of Human Services, Legal Aid of Western Michigan, rental assistance and case management services, and community partners representing landlords. See *Kalamazoo, MI, HPRP-Funded Prevention Program*, U.S. DEP’T HOUS. & URBAN DEV., <https://www.huduser.gov/portal/sites/default/files/pdf/HPRP-Case-Study-Kalamazoo-MI.pdf> [<https://perma.cc/7SHL-WWZK>]; see also *Guidance Issued in Conjunction with Administrative Order No. 2020-17*, MI SUP. CT. (2020), <https://www.courts.michigan.gov/4a9db7/siteassets/covid/covid-19/guidelineforao2020-17.pdf> [<https://perma.cc/D5LA-QU53>].

and power dynamics, future designers of eviction mediation programs can empower both parties to engage in the impartial process of mediation voluntarily, self-determinedly, and equitably. In order for parties to make “free and informed” choices, both parties must feel, and in fact be, free and informed.<sup>132</sup>

#### CONCLUSION: A CALL TO MEASURE OUTCOMES

Eviction mediation programs exist without the formality or force of federal intervention. As a result, eviction mediation programs are left to design solutions for the complex questions of how to incentivize landlord participation, lower the stakes for tenants, and account for the ‘lopsided’ power dynamics of eviction. A federal response is required to address the root causes of these issues. Absent that, this Article has assumed that mediation will continue to be used as a feature of eviction diversion efforts and has discussed recommendations that may assist designers of eviction mediation programs to “deliver justice.”<sup>133</sup>

However, to help eviction mediation programs meet their intended purpose of settling cases and increasing housing stability, it is crucial that they are thoroughly and systematically assessed. The scarcity of data or empirical analysis about mediation, and pretrial mediation in particular, critically disadvantages the field as a whole.<sup>134</sup> Eviction mediation programs should address this deficit by measuring the long-term impact of the process on the overall precarity of the parties, as measured by housing security and financial stability. As one mediator stated,

Courts [should] track the outcomes of [the] eviction diversion program more closely, including the court time saved by referring cases to mediation or other non-adversarial processes; the durability of the agreements over

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132. AM. ARB. ASS’N, *supra* note 115.

133. *Supra* note 37.

134. Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 329–31 (1991).

time; and whether individuals remain housed in the same dwelling 3-6 months after being referred to resources.<sup>135</sup>

Any dispute system should provide for periodic reviews to identify ongoing opportunities to improve upon its design and avoid the miscarriage of justice. As such, designers of eviction mediation programs must track the sustainability of mediated agreements. This would not only help programs adapt to community needs; it would safeguard mediation from becoming what critics sometimes suggest as, “another procedural obstacle in the long road to justice.”<sup>136</sup> Eviction mediation programs must not only center justice in the steps leading to the table, but also after the parties have left it.

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135. Interview with author (notes on file with author).

136. Interview with author (notes on file with author).