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ARTICLE

Civil Probation

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Abstract. The scholarly literature on the eviction legal system has repeatedly concluded that eviction courts are courts of mass settlement. In court hallways, landlords' attorneys pressure unrepresented tenants into signing settlement agreements in a factory-like process, and judges approve the agreements with a perfunctory rubber stamp. Yet while we know most eviction cases settle, no one has asked, much less answered, the salient follow-up question: What are the terms of the settlements? Based on a representative sample of eviction cases in one jurisdiction, this Article is the first to answer that question and, in doing so, generates a novel theory about the eviction legal system. The Article demonstrates empirically that the substantial majority of eviction settlements in the study jurisdiction contain a distinct set of interlocking terms that amount to what the Article labels "civil probation." Civil probation is the civil analogue in the eviction context to probation in the criminal context. Specifically, it is the imposition of court-ordered conditions on a person's tenancy that, if violated, can result in swift eviction through an alternative legal process.

This Article is the first to identify and conceptualize the phenomenon of civil probation in the eviction legal system. The Article empirically documents the prevalence and features of civil probation in eviction proceedings in the study jurisdiction. The Article then advocates for a new understanding of the eviction legal system as a whole through an

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analysis of civil probation's consequences. These consequences are threefold. First, civil probation gives rise to a shadow legal system by establishing procedural and substantive rules for eviction that differ substantially from those established by statutory law. The data demonstrate that tenants are subject to these rules at a widespread, pervasive level, and that the rules underlie the vast majority of eviction orders issued by judges. This shadow legal system undermines the rule of law, erodes substantive rights, and threatens public regulatory enforcement. Second, civil probation results in the expansion of landlord control. It both increases the number of tenancy terms with which tenants must comply and strengthens landlords' tool for enforcing those terms. The Article argues that the expansion of landlord control is a primary outcome of the eviction legal system. And third, civil probation raises the possibility that a phenomenon of "net-widening" of the eviction legal system is occurring, akin to the phenomenon that scholars have documented in the context of criminal probation. The Article offers recommendations for reform based on these conclusions.

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Introduction

Approximately 3.6 million eviction cases are filed annually in the United States—over ten times the number of *all* civil cases filed in *all* federal courts annually.[1] Scholarship on the eviction legal system has focused primarily on documenting the system of mass settlement that plagues eviction courts.[2] Landlords' attorneys pressure unrepresented, low-income tenants to sign settlement agreements in the court hallways.[3] Judges, faced with enormous docket pressures, not only rubber-stamp the agreements but play an active role in encouraging tenants to sign them.[4] But while we know this mass settlement system exists, no one has asked, much less answered: What are people settling *for*? What are the terms of settlement agreements, how do those terms allocate rights among landlords and tenants, and what are their implications for the eviction legal system as a whole?

In this Article, I put forth an answer to these questions based on an empirical study of the eviction legal system in Massachusetts. My study found that the majority of settlement agreements impose interlocking terms that amount to what I call *civil probation*. I define civil probation as court-ordered conditions placed on a person's tenancy that, if violated, can result in swift eviction with few procedural safeguards. I term agreements that place the tenant on civil probation *civil probation agreements*. The data reveal that the substantial majority—nearly two-thirds—of eviction settlement agreements in the study jurisdiction are civil probation agreements. The data further show that a civil probation agreement is the single most common outcome of an eviction filing overall, with 37% of all filings resulting in this disposition. Civil probation is more common than any other type of final case disposition.

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1. *See* EVICTION LAB, PRINCETON UNIV., https://perma.cc/A94K-HXE5 (archived Feb. 11, 2023); *U.S. District Courts—Judicial Business 2021*, U.S. COURTS, https://perma.cc/T78M-PUAS (archived Feb. 11, 2023) (to locate, select "View the live page") (reporting 344,567 civil cases filed in the U.S. district courts in 2021).

2. *See infra* Part I.

3. *See* Kathryn Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 79-80 (2018); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL'Y DEBATE 461, 478 (2003); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988, 2059, 2068 (1999) [hereinafter Engler, *And Justice for All*]; Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 109-115 (1997) [hereinafter Engler, *Out of Sight and Out of Line*]; Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 573 (1988); *see also infra* Part I.

4. Engler, *Out of Sight and Out of Line*, *supra* note 3, at 124; Engler, *And Justice for All*, *supra* note 3, at 2020, 2061; *see also infra* Part I.

To conduct the study, I randomly selected nearly 1,000 eviction cases filed in eastern Massachusetts over a five-year period.[5] After retrieving the case files from the courthouse, I constructed a database of eviction case information by coding thirty variables from each file. The coding captured characteristics of the parties and tenancy, the reasons for the eviction, the procedural trajectory of the case, the specific settlement terms, and any and all interim and final substantive outcomes.

The data analysis revealed that 65% of settlement agreements contained three defining features: (1) judgment for possession is awarded to the landlord; (2) actual eviction is stayed conditional on the tenant's compliance with certain terms for a certain period, after which the tenancy is reinstated; and (3) upon motion, actual eviction may issue if the tenant violates any of the conditional terms. These interlocking features create a legal structure best understood as *civil probation*.

Civil probation is the civil analogue in the eviction context to probation in the criminal context. In the system of criminal probation, a person's liberty is conditioned on their compliance with certain behavioral terms. These terms are typically expansive and frequently unrelated to the underlying criminal charge.[6] If the probationer is alleged to have not abided by a probationary term, they face a charge known as a violation of probation.[7] The process to adjudicate a violation of probation involves significantly fewer procedural safeguards than the process to adjudicate a standard criminal charge does and affords the defendant fewer substantive defenses.[8] Most notably, the defendant does not have a right to a jury trial and proof beyond a reasonable doubt is not required.[9] Yet a violation of probation, if proved, can result in the same outcome of incarceration as proof of a standard criminal charge.[10]

The legal structure I define as civil probation operates similarly. A person's tenancy becomes conditioned on their compliance with certain terms. These

5. This number of cases constitutes a representative sample of the study population at a 95% confidence level, with a margin of error of 3% and a response distribution of 50%. *See infra* Part II.

6. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295-96, 339 (2016); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL'Y 51, 74-75 n.6 (2013); Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 BROOK. L. REV. 753, 754 (2010); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 177 (2001). This process is sometimes also referred to as a "revocation of probation" proceeding. *See generally* Gagnon v. Scarpelli, 411 U.S. 778, 780, 782 (1973).

7. *See* Doherty, *supra* note 6, at 295-96, 316.

8. *See id.* at 323; *Gagnon*, 411 U.S. at 789-91.

9. *See* Doherty, *supra* note 6, at 323.

10. *See id.* at 322, 341.

terms are typically expansive and are frequently unrelated to the underlying basis for the eviction filing. If the landlord then alleges that the tenant violated any one of these terms, they face a legal process analogous to a violation of probation: an expedited eviction process that operates through a motion to issue execution (a motion for eviction based on a violation of the settlement terms). Like in the criminal probation system, the process of adjudicating a motion to issue execution affords the tenant far fewer procedural rights than an eviction proceeding under formal law. Whereas a tenant faced with eviction under formal law is entitled to a particular type and amount of notice, to take discovery on the landlord's claim, and to a jury trial, a tenant facing a motion to issue execution enjoys none of those rights. The only process due is a motion hearing. Similarly, the majority of substantive defenses recognized under the formal eviction laws are unavailable to tenants facing a motion to issue execution. Yet a motion to issue execution, if granted, can result in the same outcome of eviction.

For example, in the summer of 2017, a family received an eviction filing for failing to pay $676 in rent.[11] The family lived in East Boston, a historically low-income, immigrant neighborhood that is currently experiencing enormous gentrification pressures.[12] By the time of the first court date in August, the family had already repaid the rent they owed.[13] Yet the case was not dismissed.[14] Instead, the landlord and the family signed a settlement agreement that awarded a possessory judgment to the landlord and conditioned the family's ability to remain in the unit on their compliance with a series of terms over an eight-month period.[15] In November, the family additionally agreed to submit lease paperwork for certain members of the household for whom such paperwork was (presumably) outstanding.[16] The issue of the missing paperwork had not been previously raised in the eviction case; the reason for the filing was solely nonpayment of rent.[17] Four months after the initial settlement was signed in August, the landlord filed a motion

11. Notice of Eviction at 1, Trinity Mgmt. LLC v. Alsayadi, No. 17H84SP003165 (Mass. Hous. Ct. E. Div. Aug. 7, 2017) (on file with the Eastern Housing Court of Massachusetts).

12. *See* Beth Teitell, *Gentrification in Eastie and Southie Leaves Some Behind*, BOS. GLOBE (March 25, 2016, 7:35 PM), https://perma.cc/Z287-6MRD (to locate, select "View the live page"); Nerissa Naidoo & Kevin Patumwat, Opinion, *Holding on to Their Homes*, BOS. GLOBE (updated Nov. 18, 2019, 12:10 AM), https://perma.cc/TG3Y-ERKD.

13. Agreement for Judgment, Trinity Mgmt. LLC v. Alsayadi, No. 17H84SP003165 (Mass. Hous. Ct. E. Div. Aug. 31, 2017) (on file with the Eastern Housing Court of Massachusetts).

14. *Id.*

15. *Id.*

16. Agreement for Judgment, Trinity Mgmt. LLC v. Alsayadi, No. 17H84SP003165 (Mass. Hous. Ct. E. Div. Nov. 8, 2017) (on file with the Eastern Housing Court of Massachusetts).

17. Notice of Eviction, *supra* note 11, at 1.

alleging that the family had violated the missing-paperwork term.[18] The family had no right to discovery, to a jury trial, or to any meaningful process beyond a hearing on the landlord's motion.[19] The judge allowed the motion and evicted the family.[20]

This story illustrates the structure of civil probation and the devastating consequences it had on one particular family. Through detailed data analysis, I surface the workings of civil probation at a systemic level.[21] First, civil probation agreements are disproportionately found in cases involving subsidized tenancies, institutional and represented landlords, and lower arrears amounts.[22] Civil probation agreements are highly and disproportionately prevalent in cases filed by these landlords as compared with cases filed by unrepresented, individual, and unsubsidized landlords.[23] Second, probationary conditions are much broader than what is necessary to address the concern underlying the eviction filing.[24] Third, probationary periods are long, with a median length of over a year.[25] The periods routinely extend beyond the point at which the tenant has satisfied the arrears.[26] Fourth, landlords frequently seek enforcement of the probationary terms.[27] In one-third of cases that resulted in a civil probation agreement, the landlord filed a motion to issue

18. Plaintiff's Motion for Execution to Issue ¶¶ 3-5, Trinity Mgmt. LLC v. Alsayadi, No. 17H84SP003165 (Mass. Hous. Ct. E. Div. Aug. 7, 2017) (on file with the Eastern Housing Court of Massachusetts). The landlord claimed that although the family had submitted some paperwork, that paperwork was incomplete. *Id.* ¶ 4.

19. Under Massachusetts Uniform Summary Process Rule 10, as affirmed by the Massachusetts Supreme Judicial Court in *Cassio*, a motion to issue execution filed pursuant to an agreement for judgment is decided after a hearing, at which the standard for allowance is whether a "substantial violation of a material term of the agreement" occurred. Bos. Hous. Auth. v. Cassio, 697 N.E.2d 128, 129 (Mass. 1988); *see also* MASS. UNIF. SUM. PROCESS R. 7, 8, 10, 13; MASS. GEN. LAWS ANN. ch. 239, § 1 (West 2022). Because there is no trial involved in such a proceeding—only a motion hearing—there can be no jury. *See* MASS. UNIF. SUM. PROCESS R. 8; MASS. R. CIV. P. 38 (limiting right to jury to "any issue triable of right by a jury"). Pursuant to Massachusetts Uniform Summary Process Rule 7, a demand for discovery would not be timely because all discovery demands must be made before the first court date in the underlying eviction case.

20. Execution for Possession and Money Judgment, Trinity Mgmt. LLC v. Alsayadi, No. 17H84SP003165 (Mass. Hous. Ct. E. Div. Jan. 9, 2018) (on file with the Eastern Housing Court of Massachusetts).

21. *See infra* Part IV.

22. *See infra* Part IV.A.

23. *Id.*

24. *See infra* Part IV.B.

25. *See infra* Part IV.C.

26. *Id.*

27. *See infra* Part IV.D.

execution alleging violation of the probationary conditions.[28] Fifth, the vast majority of eviction orders issued by judges are issued within the civil probation system.[29] Specifically, an eviction order issued by a judge is over four times more likely to be based on the tenant's violation of the conditions of civil probation than on the underlying merits of the eviction complaint.[30]

Based on these findings, and drawing on criminal probation literature, I argue that civil probation has profound consequences for both civil jurisprudence and the landlord-tenant relationship. From a jurisprudential perspective, civil probation gives rise to a shadow legal system.[31] It establishes procedural and substantive rules for eviction entirely distinct from those set forth in statutory law.[32] These alternative rules not only bear little resemblance to the formal law, but are also devoid of any legislative endorsement. Instead, they are the handiwork of landlords and their attorneys. These rules operate at a widespread, systemic level, apply to an extraordinary number of tenancies at any given point in time, and underlie the overwhelming majority of judicial eviction orders.[33] This shadow legal system undermines the rule of law, erodes tenants' due process and substantive rights, and threatens public regulatory enforcement.[34]

From the perspective of the landlord-tenant relationship, civil probation expands landlord control over tenant conduct by strengthening landlords' mechanism of control and by broadening the substantive reach of their control. Eviction is the primary legal tool landlords have to enforce noncompliance with the tenancy rules. Yet statutory law enmeshes landlords' right to evict within a web of substantive limitations and procedural safeguards. For example, even if a tenant has failed to pay their rent, a landlord has no right to evict if the tenant has warranty of habitability claims the value of which exceeds the amount of rent owed.[35] The tenant would have a right to take discovery on their claims and counterclaims, and they would be entitled to a trial by jury.[36] Civil probation cuts through this web by eliminating or weakening many of these limitations and safeguards. The result is that

28. *Id.*

29. *See infra* Part IV.E.

30. *Id.*

31. Fiona Doherty pioneered the theory that criminal probation creates a shadow legal system within the criminal justice system. *See* Doherty, *supra* note 6, at 294-95.

32. *See infra* Part V.A.1.

33. *See infra* Parts III, IV.C, IV.E.

34. *See infra* Part V.A.3.

35. Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831, 835 (Mass. 1972); MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2022).

36. MASS. UNIF. SUM. PROCESS R. 7-8.

landlords gain the ability to enforce the tenancy rules with greater facility, speed, and certainty than they otherwise possess under the formal law. Their tool of control becomes dramatically more powerful.

Additionally, civil probation widens the substantive reach of landlords' control through the inclusion of probationary conditions that impose new obligations or restrictions on tenants not previously contained in the lease.[37] While such terms are not a universal feature of civil probation agreements, where they exist they can be highly specific, invasive, and onerous. For example, terms will require tenants to comply with mental health treatment, to refrain from having certain family members or friends over as guests, or to participate in financial counseling.[38] The inclusion of these terms represents an expansion of landlords' substantive control over their tenants' conduct. Overall, I argue that the expansion of landlord control should be understood as a primary outcome of the eviction legal system, together with the traditionally understood outcomes of transfer of possession and collection of rent. In this way, civil probation demonstrates that eviction is yet another area of the civil legal system that results in the disempowerment of communities that are disproportionately low-income and nonwhite.[39]

Finally, I raise the possibility that civil probation results in the "net-widening"—the expanded reach—of the eviction legal system overall.[40] While the study methodology does not allow for rigorous analysis of the counterfactual to civil probation agreements, both the existing data and prior research suggest that it is unlikely to be actual eviction. Instead, the overall result is likely an expanded regulatory scope of the eviction legal system as a whole.

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37. *See infra* Parts IV.B, V.B.

38. *See infra* Part IV.B.

39. *See infra* notes 47-48 and accompanying text (citing statistics showing disproportionate impact of eviction filings on people of color and low-income people). The civil legal system has also been used to disempower poor people and people of color. *See, e.g.*, Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317, 318 (2014) (arguing that poor women, and particularly poor women of color, who avail themselves of public welfare are subject to hyperregulation and surveillance); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER, RACE & JUST. 617, 618, 655-56 (2012) (describing the result of the child support system as the long-term placement of parents under court supervision); Khiara M. Bridges, *Pregnancy, Medicaid, State Regulation, and the Production of Unruly Bodies*, 3 NW. J.L. & SOC. POL'Y 62, 83-84 (2008) (describing the ways in which Medicaid regulations lead to state control and surveillance over poor pregnant women). *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (documenting the use of the child welfare system to regulate and surveil families of color).

40. *See infra* Part V.C. The term "net-widening" is drawn from the literature on criminal probation. *See infra* note 264 and accompanying text.

The Article proceeds in six parts. Part I situates the contributions of this Article within the existing literature on the eviction legal system and scholarship on state courts. Part II explains the methodology and context of the eviction court study. Part III reports the core results of the study regarding eviction settlement structures. Part IV presents the study findings on the features of the civil probation system: Civil probation agreements are primarily entered into by institutional, corporate, and represented landlords; probationary conditions are expansive; probationary periods are long; civil probation agreements are frequently enforced; and civil probation underlies the majority of judicial eviction orders. Part V articulates the theoretical consequences of civil probation; namely, that civil probation results in a shadow legal system, has the effect of enhancing landlords' control of tenant conduct, and stands to expand the reach of the eviction legal system overall. Part VI explores potential reforms. The conclusion identifies areas for future research.

I. Mass Settlement in the Eviction Legal System

The eviction legal system is enormously understudied. Annually, there are over ten times as many eviction cases filed in state courts around the United States as there are *total* civil cases filed in the federal district courts.[41] Yet state eviction courts, procedures, and jurisprudence are rarely the focus of legal scholarship.[42] The lack of scholarly attention to the eviction legal system is striking given its profound material significance. Social science research consistently shows that eviction has serious social, economic, and health effects: It causes homelessness,[43] deepens poverty,[44] and results in adverse physical and mental health outcomes.[45] Research further shows that

41. *See* EVICTION LAB, *supra* note 1; *U.S. District Courts—Judicial Business 2021*, *supra* note 1.

42. *See* Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1371-72 (2021).

43. Robert Collinson & Davin Reed, The Effects of Evictions on Low-Income Households 3 (Feb. 2019) (unpublished manuscript), https://perma.cc/V4A8-SR7A; Maureen Crane & Anthony M. Warnes, *Evictions and Prolonged Homelessness*, 15 HOUS. STUD. 757, 767 (2000).

44. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 296-99 (2016); Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOCIO. 88, 120-21 (2012) [hereinafter, Desmond, *Eviction and the Reproduction of Urban Poverty*]; Collinson & Reed, *supra* note 43, at 3; Robert Collinson, John Eric Humphries, Nicholas S. Mader, Davin Reed, Daniel I. Tannenbaum & Winnie L. van Dijk, *Eviction and Poverty in American Cities* 1-3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26139, 2022).

45. *See* Jack Tsai, Natalie Jones, Dorota Szymkowiak & Robert A. Rosenheck, *Longitudinal Study of the Housing and Mental Health Outcomes of Tenants Appearing in Eviction Court*, 56 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1679, 1679-80 (2021); Hugo Vásquez-Vera, Laia Palència, Ingrid Magana, Carlos Mena, Jaime Neira & Carme Borrell, *The Threat of Home Eviction and Its Effects on Health Through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199, 199-200 (2017) (summarizing findings from a

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individuals experience many of these negative consequences simply by receiving an eviction filing and entering the eviction legal system, regardless of whether the filing results in displacement.[46]

The eviction legal system may also perpetuate historical patterns of racial discrimination. Matthew Desmond's foundational study on the demographics of people who experience eviction, *Eviction and the Reproduction of Urban Poverty*, found that renters living in Black neighborhoods are over four times as likely to be evicted as renters living in white neighborhoods, and renters in Hispanic neighborhoods are over twice as likely.[47] Following Desmond's work, local governmental institutions and non-profit organizations conducted studies that showed repeatedly, across jurisdictions, that tenants in neighborhoods of color are disproportionately likely to receive an eviction filing, even when compared with tenants in high-poverty white neighborhoods.[48] Neighborhood racial

collection of articles); Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296 (2015); Gracie Himmelstein & Matthew Desmond, *Association of Eviction with Adverse Birth Outcomes Among Women in Georgia, 2000 to 2016*, 175 JAMA PEDIATRICS 494, 494 (2021); Corey Hazekamp, Sana Yousuf, Kelli Day, Mary Kate Daly & Karen Sheehan, *Eviction and Pediatric Health Outcomes in Chicago*, 45 J. CMTY. HEALTH 891, 891-92 (2020).

46. *See* Tsai et al., *supra* note 45, at 1679-80; Himmelstein & Desmond, *supra* note 45, at 494. Tenants who receive an eviction filing face significant barriers to finding future housing because landlords often screen out prospective tenants with any record of an eviction case, regardless of the outcome. *See* Kathryn A. Sabbeth, *Erasing the "Scarlet E" of Eviction Records*, APPEAL (Apr. 12, 2021), https://perma.cc/M5E9-AFWG; Esme Caramello & Nora Mahlberg, *Combating Tenant Blacklisting Based on Housing Court Records: A Survey of Approaches*, CLEARINGHOUSE REV., Aug. 2017, at 1, 1; Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 44, at 118; Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1349-50 (2007).

47. Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 44, at 98. Desmond also found that evicted households disproportionately include women in Black and Hispanic neighborhoods and families with children. *Id.* at 98-102.

48. *See, e.g.*, David Robinson & Justin Steil, *Eviction Dynamics in Market-Rate Multifamily Rental Housing*, 31 HOUS. POL'Y DEBATE 647, 649, 662 (2021); DAVID ROBINSON & JUSTIN STEIL, CITY LIFE/VIDA URBANA, EVICTIONS IN BOSTON: THE DISPROPORTIONATE EFFECT OF FORCED MOVES ON COMMUNITIES OF COLOR 35-40 (2020); BENJAMIN F. TERESA, RVA EVICTION LAB, THE GEOGRAPHY OF EVICTION IN RICHMOND: BEYOND POVERTY 1 (n.d.), https://perma.cc/R77X-NSC4; ELAINA JOHNS-WOLFE, "YOU ARE BEING ASKED TO LEAVE THE PREMISES": A STUDY OF EVICTION IN CINCINNATI AND HAMILTON COUNTY, OHIO, 2014-2017, at 7 (2018), https://perma.cc/AF5Q-V9E5; *About: Project*, KAN. CITY EVICTION PROJECT, https://perma.cc/R932-4JPS (archived Feb. 15, 2023); MINNEAPOLIS INNOVATION TEAM, EVICTIONS IN MINNEAPOLIS 2-4 (2016), https://perma.cc/MV97-L2FC; *see also* AUBREY HASVOLD & JACK REGENBOGEN, FACING EVICTION ALONE: A STUDY OF EVICTIONS; DENVER, COLORADO, 2014-2016, at 2, 12-13 (2017), https://perma.cc/5GDT-HJS5 (showing a disproportionate number of eviction filings in neighborhoods of color, but not controlling for income).

composition is consistently found to be a stronger predictor of eviction filing rates than neighborhood poverty level.[49]

Despite the clear material significance of eviction and the massive segment of the civil justice system that eviction cases comprise, only a small body of literature exists on eviction litigation. Like in most areas of civil law, the overwhelming majority of cases settle,[50] but the process of eviction settlements is uniquely problematic.[51] With few exceptions, there are massive disparities in legal representation in eviction courts. Most landlords are represented by counsel, whereas most tenants are unrepresented.[52] Rigorous empirical research has found that this disparity matters significantly for case outcomes.[53] As compared to unrepresented tenants, tenants who have legal representation are more likely to retain possession of their units,[54] have lower monetary judgments against them,[55] and win rent abatements for violations of

49. *See, e.g.*, Desmond, *Eviction and the Reproduction of Urban Poverty*, *supra* note 44, at 98-102.

50. *See* J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 61 n.2 (2016); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460-61, 515 (2004).

51. *See* Sabbeth, *supra* note 3, at 79 (noting that "the majority of [eviction] cases end in unfavorable settlements, signed in the hallways of court buildings"); Engler, *And Justice for All*, *supra* note 3, at 2019 (observing a "high rate of settlement, with minimal judicial oversight"); Engler, *Out of Sight and Out of Line*, *supra* note 3, at 117 (finding that in New Haven, Connecticut, most cases settle in the hallways of the court before trial).

52. Data on representation rates, though variable to some extent across jurisdictions, generally show that at least 90% of landlords have legal counsel compared with fewer than 10% of tenants. *See* Sabbeth, *supra* note 3, at 59-60; Engler, *Out of Sight and Out of Line*, *supra* note 3, at 107; Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 750 (2015). Some studies show even lower rates of representation of tenants, but also lower representation rates of landlords. *See, e.g.*, Sudeall & Pasciuti, *supra* note 42, at 1367-68, 1400 (finding rates of representation of tenants ranging from 0.3% to 1.2% and of landlords ranging from 4.6% to 12.2% across three counties in suburban and rural Georgia).

53. *See* Sudeall & Pasciuti, *supra* note 42, at 1424; Nicole Summers, *The Limits of Good Law: A Study of Outcomes in Housing Court*, 87 U. CHI. L. REV. 145, 205 (2020); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 908-09 (2013); Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 429 (2001).

54. *See* Greiner et al., *supra* note 53, at 927 (finding that an offer of representation reduces a tenant's likelihood of vacating the unit by approximately 25% to 35%, as compared with a tenant offered limited assistance representation); Seron et al., *supra* note 53, at 426 (finding that 24% of represented tenants had warrants of eviction ordered against them, as compared with 43% of unrepresented tenants).

55. *See* Greiner et al., *supra* note 53, at 931 (finding that an offer of representation "caused substantively large and statistically significant alterations in monetary outcomes in favor of occupants").

the warranty of habitability at higher rates.[56] This disparity in representation is further compounded by other disparities in power and status between the parties. Tenants are overwhelmingly poor, female, and people of color, whereas landlords are more likely to be white men or institutional actors.[57] Landlords (and their attorneys) also tend to be repeat players and thus are further advantaged by their experience and familiarity with the forum.[58]

Landlords and their attorneys leverage these profound disparities to pressure tenants into signing settlement agreements. These settlements are typically signed in the court hallways, in what Chester Hartman and David Robinson describe as a "factory-like process."[59] According to qualitative research conducted by Russell Engler and others, landlords' attorneys aggressively approach unrepresented tenants, present them with predrafted settlements, and mislead them into thinking they have no option but to sign.[60] It is not uncommon for landlords' attorneys to use threats, manipulation, and other unscrupulous and unethical practices to coerce tenants to enter into the agreements.[61] Tenants are effectively bullied into signing.[62]

Judges exercise minimal oversight over this settlement process. Hallway negotiations are entirely unmonitored, and court approvals of settlement agreements are mainly a rubber stamp: At most, judges make a minimal inquiry into whether the parties understand the terms and have entered into the agreement voluntarily.[63] Further, judges play an active role in encouraging

56. *See* Seron et al., *supra* note 53, at 426 (finding that 19% of represented tenants obtained rent abatements as compared with 3% of unrepresented tenants); Summers, *supra* note 53, at 209-10 (finding that represented tenants who are entitled to rent abatements are nine times as likely to actually obtain rent abatements as compared with unrepresented tenants).

57. *See* Engler, *Out of Sight and Out of Line*, *supra* note 3, at 115 n.155; Sabbeth, *supra* note 3, at 79. My own data presented here show that 76% of eviction cases in the study sample were filed by institutional or corporate landlords. *See infra* Part IV.A.

58. *See* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 915 (2015); *see also* Sabbeth, *supra* note 3, at 78 ("Landlords' disproportionate representation over time has influenced the law and culture of housing courts to favor the landlords' positions."). *See generally* Marc Galanter, Essay, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 123-125 (1974) (theorizing that, despite changes to the forum and rules, the more powerful and represented litigant will almost always prevail over the less powerful and unrepresented litigant).

59. Hartman & Robinson, *supra* note 3, at 478.

60. *See* Engler, *Out of Sight and Out of Line*, *supra* note 3, at 109-15.

61. *See* Engler, *And Justice for All*, *supra* note 3, at 2064; Engler, *Out of Sight and Out of Line*, *supra* note 3, at 111 (suggesting that in eviction court, "improper attorney behavior is the rule, rather than the exception"). Other unethical and unscrupulous practices by landlords' attorneys include impermissible advice-giving, manipulation, and making false promises to the tenant. *See* Engler, *Out of Sight and Out of Line*, *supra* note 3, at 109-15.

62. Engler, *Out of Sight and Out of Line*, *supra* note 3, at 109.

63. *Id.*, at 112, 124-25; Engler, *And Justice for All*, *supra* note 3, at 1988-89, 2011, 2061.

this system of settlement.[64] Judges in eviction court are strongly motivated by docket control: minimizing the total number of cases on their docket at any given point in time, which "depends on the court's ability to settle cases quickly and with minimal oversight."[65]

While eviction cases overwhelmingly settle, and do so through a process involving massive disparities in bargaining power, no researcher has yet investigated the terms of eviction settlements.[66] Researchers are increasingly undertaking empirical studies of settlement outcomes in other contexts, but

64. *See* Engler, *And Justice for All*, *supra* note 3, at 1988-89. Judicial encouragement of settlement is not unique to eviction cases. *See* Marc Galanter, *"... A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 7 (1985) (reporting data demonstrating that a high percentage of state court judges encourage parties to settle and even suggest settlement terms); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 597 (2005) (describing the role of federal judges in encouraging litigants to settle their cases); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340, 1344 (1994) (same); FED. R. CIV. P. 16(a)(5) (listing as one of the goals of the pre-trial conference "facilitating settlement" of the case); FED. R. APP. P. 33 (allowing federal courts of appeals to "direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including . . . discussing settlement").

65. Engler, *And Justice for All*, *supra* note 3, at 1988-89 (noting that the need for docket control gives judges little incentive to put time into educating and protecting unrepresented litigants).

66. Some legal and social science scholars have empirically investigated the basic outcomes of eviction cases, such as the rates of possessory and monetary judgments. *See* Sudeall & Pasciuti, *supra* note 42, at 1406-08; Davida Finger, *The Eviction Geography of New Orleans: An Empirical Study to Further Housing Justice*, 22 UDC L. REV. 23, 35-36 (2019); Breanca Merritt & Morgan D. Farnworth, *State Landlord-Tenant Policy and Eviction Rates in Majority-Minority Neighborhoods*, 31 HOUS. POL'Y DEBATE 562, 569 (2020). None of this research, however, has investigated settlement outcomes at a detailed level. *See, e.g.*, Merritt & Farnworth, *supra*, at 568-69. A recent study of eviction case outcomes in non-urban counties in Georgia by scholars Lauren Sudeall and Daniel Pasciuti explored settlement outcomes in the context of case outcomes overall. *See* Sudeall & Pasciuti, *supra* note 42, at 1367-68. They found that settlements resulted in higher monetary judgments against tenants than judgments awarded after trial, and that settlements resulted in actual eviction at a relatively high rate (35.5% overall). *Id.* at 1409. Some of the earliest legal scholarship on eviction asserted, based on court observations and interviews, that settlement agreements are substantively "one-sided" in favor of landlords. Engler, *Out of Sight and Out of Line*, *supra* note 3, at 112-13; *see, e.g.*, Engler, *And Justice for All*, *supra* note 3, at 2018-20; Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 570 (1992) (explaining the tremendous leverage of landlords in settlement negotiations in housing courts); Scherer, *supra* note 3, at 573. This assertion has become somewhat of a truism in the scholarly literature on eviction. *See, e.g.*, Sabbeth, *supra* note 3, at 79-80; Steinberg, *supra* note 52, at 755 n.51; Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting* Pro Se *Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 661-62 (2006).

this scholarly trend has yet to reach the eviction literature.[67] This empirical void stymies not only our ability to accurately theorize a substantial segment of our civil justice system, but also to formulate effective policies around it.[68]

II. Study Context, Design, and Methodology

I designed an empirical study to investigate the structures, specific terms, and outcomes of eviction settlements in one jurisdiction: the Eastern Housing Court of Massachusetts. I set out to answer the open questions in the literature set forth above: What are the parties in eviction court settling *for*? What are the terms of eviction settlements, and what are the implications of those terms? To conduct this study, I constructed an original dataset of eviction case information, which is not contained in any existing databases.[69] Complete eviction case records are kept in hard-copy files that can only be accessed physically from the courthouse. These files, meanwhile, are maintained in such a fashion that the information can only be coded accurately by hand, rather

67. *See, e.g.*, Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L. REV. 1, 8-10 (2018) (analyzing SEC settlements that required any type of admission from the settling target over an eight-year period); Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 931, 940 (2011) (analyzing employment discrimination settlements over a six-year period in the U.S. District Court for the Northern District of Illinois); Yun-chien Chang, *An Empirical Study of Compensation Paid in Eminent Domain Settlements: New York City, 1990-2002*, 39 J. LEGAL STUD. 201, 221-24 (2010) (analyzing compensation paid in 430 eminent domain settlements); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 127-29 (2007) (analyzing a dataset of over 1,000 confidential employment discrimination settlements over a six-year period); Suzanne Reynolds, Catherine T. Harris & Ralph A. Peeples, *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1632-33 (2007) (comparing trial, settlement, and mediation outcomes in child custody cases); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 500 (1991) (studying a group of securities class actions involving similar claims of fraud in initial public offerings).

68. *See* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 WIS. L. REV. 249, 251 ("The lack of information about state civil courts and judges makes it difficult to develop theoretical expectations about how they operate, to evaluate those expectations empirically, and to develop policies and practices to improve the justice system.").

69. *See id.* at 267 (noting that the study of state civil courts requires "original data collection and coding efforts, including hand-collection of data from case files, in-person field research, and live interviews"); Sudeall & Pasciuti, *supra* note 42, at 1372. Whereas healthcare facilities and schools engage in extensive data collection in order to meet reporting requirements for federal funding, no federal funding exists for eviction courts, so there is no similar incentive for data collection. *See* Carpenter et al., *supra* note 68, at 266.

than through machine coding software.[70] As a result, it is impractical to study multiple jurisdictions at once—construction of a single dataset in even one jurisdiction, based on a large enough sample to draw meaningful conclusions, is extremely laborious.[71]

These barriers to data collection pose analytical challenges. Eviction laws and courts vary by state, and sometimes even at substate levels, such that settlements presumably exhibit at least some degree of variation as well.[72] Building on my prior scholarship examining empirical outcomes in jurisdictions with "good law,"[73] I investigated eviction settlements in a state with some of the most pro-tenant laws in the country.[74] Studying jurisdictions with "good law" (which is, of course, a normative assessment) provides insight

70. Case files are often maintained in an extremely disorganized fashion, involve handwritten orders and notations, and contain nuanced and complicated legal documents such that no machine coding software would be able to properly code the files. I am not aware of any researcher who has successfully used machine software to code eviction case files. Obtaining paper files is usually necessary because eviction courts rarely maintain complete digital records of files. *See* Sudeall & Pasciuti, *supra* note 42, at 1387.

71. To date, very few legal scholars have constructed datasets based on eviction case files. *See* Sudeall & Pasciuti, *supra* note 42, at 1386-87 (coding eviction case files to study procedures and outcomes in three non-urban counties in Georgia); Summers, *supra* note 53, at 181-83 (coding eviction case files to study outcomes related to the use of the warranty of habitability).

72. *See* Kyle Nelson, Philip Garboden, Brian J. McCabe & Eva Rosen, *Evictions: The Comparative Analysis Problem*, 31 HOUS. POL'Y DEBATE 696, 697 (2021) (identifying many challenges to comparing eviction outcomes and processes across jurisdictions); *see also* E.L. Raymond, T. Green & M. Kaminski, *Preventing Evictions After Disasters: The Role of Landlord-Tenant Law*, 32 HOUS. POL'Y DEBATE 35, 47-48 (2021) (finding that evictions rose everywhere after a natural disaster occurred, but that evictions increased more significantly in states with more landlord-friendly laws); Megan E. Hatch, *Statutory Protection for Renters: Classification of State Landlord-Tenant Policy Approaches*, 27 HOUS. POL'Y DEBATE 98, 110-11 (2017) (developing a typology of state policy approaches to landlord-tenant law); Sudeall & Pasciuti, *supra* note 42, at 1369, 1372 (finding that local legal culture is a key factor in shaping eviction outcomes).

73. By "good law," I mean "good" from the perspective of tenants. For my prior scholarship on "good law," see generally Summers, *supra* note 53 (analyzing the "operationalization gap" in New York City's warranty of habitability).

74. Initial empirical studies of a particular topic across fields of legal scholarship typically involve the selection of a study jurisdiction with salient characteristics, such as being a pioneer of a particular policy or facing a particularly entrenched problem. *See, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014) (selecting New York City as a site to study misdemeanor adjudication because New York City "pioneered the intentional expansion of misdemeanor arrests as part of a new policing strategy"); Ion Meyn, *Race-Based Remedies in Criminal Law*, 63 WM. & MARY L. REV. 219, 224-25, 233-35 (2021) (assessing whether risk assessment instruments reduced race-based disparities in Milwaukee and noting that Milwaukee "made nationally recognized efforts to address racial inequities in its criminal system" and is a highly racially segregated and unequal city).

into one end of the spectrum, where we would expect settlement outcomes to be most favorable to tenants.[75] Previously, I adopted this methodology to study warranty of habitability outcomes among tenants facing eviction in New York City, which has "good" (from the perspective of tenants) laws surrounding the warranty of habitability.[76] There, I found that despite the jurisdiction's pro-tenant laws, very few tenants actually received benefits from asserting this claim. Although the findings were from one jurisdiction only, they sounded an alarm more broadly about the effectiveness of the warranty of habitability. The implication is that if such is the outcome in a pro-tenant jurisdiction, the outcomes in pro-landlord jurisdictions are likely to be even worse for tenants.

Studying eviction settlement outcomes in a pro-tenant jurisdiction offers similar possibilities for gleaning insight into the outcomes of eviction courts more broadly. Yet generalizing the results should be approached with caution. Eviction laws, procedures, and court structures vary across the states, and some jurisdictions adjudicate evictions within rent courts that have a different scope of jurisdiction than the court studied here. Housing market conditions also very likely play a role in the outcomes of eviction court—the extent to which a landlord desires actual eviction is likely to be affected by the jurisdiction's vacancy rate and other rental market conditions. The findings of this study are most likely to be generalizable to jurisdictions with landlord-tenant laws and courts that mirror Massachusetts's, as well as rental market conditions that mirror those of the greater Boston area. Ultimately, the findings provide concrete information about eviction settlement outcomes in one jurisdiction only and should be taken as a jumping-off point to understand the issue more broadly by conducting similar studies elsewhere.

I begin this Part by providing an overview of the study jurisdiction's housing policy environment and landlord-tenant laws. Following this discussion, I describe the study design and methodology.

75. *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (explaining that parties to litigation bargain "in the shadow" of what they would expect their outcomes to be were they to proceed with the litigation). Under Mnookin and Korhauser's framework, jurisdictions with eviction laws more favorable to tenants should have settlement outcomes more favorable to tenants. *Id.* at 950. Settlement outcomes are also likely affected by housing market factors, including the vacancy rate and the percentage of units that are professionally managed. *See* Nelson et al., *supra* note 72, at 709.

76. Summers, *supra* note 53, at 183-89.

A. Study Context

I collected data for the study from the Eastern Housing Court of Massachusetts, which is the housing court with jurisdiction over Boston.[77] As nearly any day's copy of the *Boston Globe* will reveal, Boston and the greater Boston area face enormous housing challenges.[78] Half of Boston renter households spend at least 30% of their income on rent, and a quarter spend over 50%.[79] Boston is among the most racially segregated cities in the United States, and scholars have long demonstrated that segregation is linked to higher rates of displacement.[80] Boston is also ranked the fourth most "intensely gentrified" city in the country, which some have argued is associated with greater rates of eviction.[81]

Notwithstanding these structural challenges to housing affordability and stability, tenants in Massachusetts enjoy some of the most protective renter laws

77. During the study period (2013-2017), this court was called the Boston Housing Court and had jurisdiction only over properties in the City of Boston. *See* MASS. GEN. LAWS ANN. ch. 185C, § 1 (West 2022) (amended 2017). For more details on data collection and study methodology, see Part II.B below.

78. *See, e.g.*, Diti Kohli, *Boston's Rental Market Has Reached an All-Time High*, BOS. GLOBE, (updated Jan. 26, 2022, 11:16 AM), https://perma.cc/6GLW-67UF.

79. Chris Salviati, *2019 Cost Burden Report: Half of Renter Households Struggle with Housing Affordability*, APARTMENT LIST (Oct. 9, 2019), https://perma.cc/YAL8-67JA (to locate, select "View the live page," then select "Metro-Boston, MA" from the drop-down menu). Households that spend over 30% of their income on rent are considered "rent-burdened" and households that spend over 50% are considered "severely rent-burdened." *See* JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 2021, at 4 (2021), https://perma.cc/43GR-FUPB.

80. *See* Brian Steele, *Boston Among Most Racially-Segregated U.S. Metro Cities; Hispanics Affected Most, Report Finds*, MASSLIVE (Aug. 28, 2015, 1:50 PM), https://perma.cc/QV3W-QSEV; Peter Hepburn, Devin Q. Rutan & Matthew Desmond, *Beyond Urban Displacement: Suburban Poverty and Eviction*, URB. AFFS. REV., Mar. 7, 2022, at 1, 7; John N. Robinson III, *Surviving Capitalism: Affordability as a Racial "Wage" in Contemporary Housing Markets*, 68 SOC. PROBS. 321, 323 (2021).

81. JASON RICHARDSON, BRUCE MITCHELL & JAD EDLEBI, NAT'L CMTY. REINVESTMENT COAL., GENTRIFICATION AND DISINVESTMENT 2020: DO OPPORTUNITY ZONES BENEFIT OR GENTRIFY LOW-INCOME NEIGHBORHOODS? 4 (2020), https://perma.cc/8857-6TWW. However, the evidence on whether gentrification causes displacement is mixed. *See, e.g.*, ALEXANDER HERMANN, DAVID LUBEROFF & DANIEL MCCUE, MAPPING OVER TWO DECADES OF NEIGHBORHOOD CHANGE IN THE BOSTON METROPOLITAN AREA 8-9 (2019), https://perma.cc/6HRQ-4NKJ (arguing that gentrification causes displacement); Qainat Khan, *Housing Displacement Pressures Mount in Boston's Changing Egleston Square*, WBUR (updated Feb. 19, 2019), https://perma.cc/HL7F-FRPC (same); *cf.* Ayobami Laniyonu, *Assessing the Impact of Gentrification on Eviction: A Spatial Modeling Approach*, 54 HARV. C.R.-C.L. L. REV. 741, 744 (2019) (finding mixed results regarding whether gentrification is associated with higher rates of eviction filing). *But see* Kacie Dragan, Ingrid Gould Ellen & Sherry Glied, *Does Gentrification Displace Poor Children and Their Families? New Evidence from Medicaid Data in New York City*, 83 REG'L SCI. & URB. ECON. 103481, at 2 (2020) (arguing that gentrification does not cause displacement).

in in the country. In her review of the landlord-tenant laws of all fifty states, Megan Hatch classifies Massachusetts as one of thirteen states with "protectionist," generally pro-renter policies.[82] While protectionist states are relatively few in number, they are home to a third of all U.S. renter households.[83]

The core Massachusetts summary process statute, Mass. Gen. Laws Chapter 186, authorizes three types of evictions: nonpayment of rent evictions, "fault" evictions based on lease violations unrelated to the payment of rent, and "no-fault" evictions based on either the lease's expiration or termination of a tenancy at will.[84] To initiate an eviction action,[85] the landlord must first terminate the tenancy by serving the tenant with a notice to quit.[86] Following expiration of the notice to quit, the landlord may file and serve a summons and complaint.[87] The tenant then has a right to answer, and both parties may conduct discovery.[88]

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82. *See* Hatch, *supra* note 72, at 110. The other protectionist states are California, Connecticut, Maine, Maryland, Minnesota, New Jersey, New Hampshire, New York, North Dakota, Oregon, Rhode Island, and Vermont. Protectionist states like Massachusetts are also characterized by having few pro-landlord policies and a higher number of landlord-tenant laws overall. *Id.* at 110 fig.5.

83. *See* NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2022: THE HIGH COST OF HOUSING 23-24 (2022), https://perma.cc/9G3C-TM8T.

84. *See* MASS. GEN. LAWS ANN. ch. 186, §§ 11-12 (West 2022); Adjartey v. Cent. Div. of Hous. Ct. Dep't, 120 N.E.3d 297, app. at 315-17, 325 (Mass. 2019). Massachusetts law also authorizes evictions for certain illegal uses of the apartment pursuant to a separate statute. *See* MASS. GEN. LAWS ANN. ch. 139, § 19 (West 2022); *cf.* Maureen E. McDonagh & Julia E. Devanthéry, *When Can Landlord Evict*, MASS. LEGAL HELP (May 2019), https://perma.cc/WX3P-Z5VP.

85. In Massachusetts, eviction proceedings are referred to as "summary process" actions. *See* MASS. GEN. LAWS ANN. ch. 239, § 1 (West 2022).

86. *See* Cambridge St. Realty, LLC v. Stewart, 113 N.E.3d 303, 306 (Mass. 2018). Statutes set forth the prescribed length of the notice that must be given. *See* MASS. GEN. LAWS ANN. ch. 186, §§ 11-12 (requiring fourteen days for terminations based on nonpayment of rent and thirty days, three months, or the length of the payment period for termination of a tenancy at will, depending on the terms of the lease). No specific amount of notice is statutorily required in terminations for fault. *See Adjartey*, 120 N.E.3d app. at 317 (explaining that in such cases, "the notice requirements are governed by the terms of the lease, provided that those terms are not unlawful"). Leases typically require a seven-day notice.

87. *See* MASS. UNIF. SUM. PROCESS R. 2(b), (d). The landlord is required to use a standardized summons and complaint. MASS. UNIF. SUM. PROCESS R. 2(a). The summons and complaint must be served by formal process at least two-and-a-half weeks prior to the first court date. *See* MASS. UNIF. SUM. PROCESS R. 2(b), (c). Specifically, the summons and complaint must be served between seven and thirty days prior to the "entry date" of the eviction case, and the entry date must be a Monday at least ten days before the first court date, subject to modifications by the relevant administrative judge. *See id.*

88. The answer and discovery requests are due seven days after the entry date. *See* MASS. UNIF. SUM. PROCESS R. 3, 5, 7(a). A tenant need not file an answer to avoid a default judgment; a tenant can simply appear on the first court date without having filed an

footnote continued on next page

The first court date is set approximately two-and-a-half weeks after the filing of the complaint.[89] Where both parties appear, the Housing Court strongly encourages them to attempt to reach settlement. The parties can elect to attend formal mediation led by a trained mediator who works for the Housing Court, or they can negotiate directly without the assistance of a mediator. If the parties reach settlement, the settlement is entered as an order of the court following approval by the judge. If the parties do not reach settlement, the case can proceed to trial immediately unless the parties obtain a continuance.[90]

Tenants have a right to a trial by jury provided they claim this right by the answer deadline.[91] Jury trials typically take several months, if not longer, to schedule, whereas a trial before a judge can take place on the first scheduled court date.[92] Whether before a judge or jury, tenants who lose their case at trial enjoy relatively robust post-judgment protections. Tenants have a right to appeal the judgment, and execution of the eviction is automatically stayed for ten days to allow the tenant time to notice the appeal.[93] If a tenant does appeal, in most circumstances the eviction order is stayed until the appeal is decided, meaning the tenant cannot be evicted until the appellate court renders a final decision.[94] Finally, in no-fault eviction cases, the judge has discretion to stay the eviction post-judgment for up to six months, or for up to a year if the tenant is elderly or disabled, regardless of whether the tenant appeals.[95]

Massachusetts law recognizes a host of procedural and substantive defenses to eviction. Procedural defenses include defects in the notice to quit, improper service of the summons and complaint, and noncompliance with

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answer and present her defense at trial. *See* MASS. UNIF. SUM. PROCESS R. 10(a). Discovery is more limited than in general civil cases. *Compare* MASS. UNIF. SUM. PROCESS R. 7, *with* MASS. R. CIV. P. 33, 34, 36.

89. *See* MASS. UNIF. SUM. PROCESS R. 2(b)-(c). *But see* MASS. UNIF. SUM. PROCESS R. 7 (providing for a two-week postponement of the original trial date following timely service and filing of a demand for discovery).

90. *See* MASS. UNIF. SUM. PROCESS R. 2(c).

91. *See* MASS. UNIF. SUM. PROCESS R. 8.

92. *See* MASS. UNIF. SUM. PROCESS R. 2(c). Where the trial takes places before a judge, the judge must make special factual findings and express conclusions of law. *See* MASS. R. CIV. P. 52(a).

93. *See* MASS. UNIF. SUM. PROCESS R. 12; MASS. GEN. LAWS ANN. ch. 239, § 5 (West 2022).

94. *See* MASS. GEN. LAWS ANN. ch. 239, § 5; MASS. R. CIV. P. 62(d). There is an "exception to the general rule" that an eviction order is stayed pending appeal "where the tenant is being evicted from public housing for one of several specified reasons." Adjartey v. Cent. Div. of Hous. Ct. Dep't, 128 N.E.3d 297, 305 n.8 (Mass. 2019); *see* MASS. GEN. LAWS ANN. ch. 121B, § 32 (West 2022). The trial court judge may order the tenant to post an appeal bond and/or pay use and occupancy while the appeal is pending. *See* MASS. GEN. LAWS ANN. ch. 239, §§ 5-6.

95. See MASS. GEN. LAWS ANN. ch. 239, §§ 9-10.

termination procedures specific to particular subsidies or programs.[96] Depending on the grounds for eviction and the type of housing, substantive defenses may include breach of the warranty of habitability,[97] interference with quiet enjoyment,[98] violation of the security deposit law,[99] violation of the consumer protection statute,[100] retaliation,[101] reasonable accommodation,[102] discrimination,[103] and defenses based on the federal Violence Against Women Act (VAWA).[104] While appellate case law has affirmed many of these procedural and substantive rights, they are grounded in state statutory law and the specific procedural rules for eviction, codified as the Massachusetts Uniform Summary Process Rules.[105]

B. Study Design and Methodology

I designed a study to assess the content of settlement agreements in an eviction court. To conduct this study, I constructed a unique dataset of eviction case data from a random sample of eviction cases that was representative of the study population. I defined the study population as all eviction cases filed in the Eastern Housing Court[106] of Massachusetts over a five-year period. To determinate the appropriate size of the sample, I first determined the size of the study population by identifying the total number of eviction cases filed in each of the five years.[107] This analysis revealed a study population size of

96. *See* Cambridge St. Realty, LLC v. Stewart, 133 N.E.3d 303, 306-07, 310-13 (Mass. 2018).

97. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2022); Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831, 838-39, 841 (Mass. 1973).

98. MASS. GEN. LAWS ANN. ch. 186, § 14 (West 2022); *id.* ch. 239, § 8A.

99. *Id.* ch. 186, § 15B; *id.* ch. 239, § 8A; Meikle v. Nurse, 49 N.E.3d 210, 212 (Mass. 2016).

100. MASS. GEN. LAWS ANN. ch. 239, § 8A; *id.* ch. 93A, § 2.

101. *Id.* ch. 186, § 18*; id.* ch. 239, § 2A.

102. Bos. Hous. Auth. v. Bridgewaters, 898 N.E.2d 848, 850 (Mass. 2009).

103. MASS. GEN. LAWS ANN. ch. 151B., §§ 4.6-4.7B (West 2022).

104. Bos. Hous. Auth. v. Y.A., 121 N.E.3d 1237, 1242 (Mass. 2019).

105. *See supra* notes 85-104 and accompanying text.

106. This court was called the Boston Housing Court during the study period. *See supra* note 77.

107. Cases in the Eastern Housing Court are assigned docket numbers based on the year and in numerical order of the date of filing, such that the first case filed in 2013 is 13H84SP000001, the second case filed is 13H84SP000002, and so on. The numbers and letters "H84" identify the specific court as the Eastern Housing Court. "SP" identifies the case as a summary process case. Thus all summary process docket numbers in the Eastern Housing Court follow the format [Last two digits of year][H84SP][six-digit number of case filed in that year, starting with 000001]. A search on the public court records database by date of filing reveals the last case filed in each year. The final digits of this docket number reflect the total number of cases filed in that year (e.g., 13H84SP005675 means that 5675 cases were filed in 2013).

approximately 25,000 cases. Based on this population size, a sample of 933 cases is representative at a 95% confidence level, with a margin of error of 3% and a response distribution of 50%.[108]

I used a data randomization generation tool to randomly select 933 cases to include in the sample from among all cases filed. Specifically, the tool randomly selected 933 docket numbers from among all the eviction case docket numbers issued in the Eastern Housing Court during the study period. With the permission of the Eastern Housing Court, I retrieved from the courthouse and scanned the paper files of all identified cases.

I then manually coded the case files across thirty variables to construct an original dataset. This coding captured general background information about the parties, tenancy, and type of housing; the procedural history of the case; settlement outcomes; and any and all other substantive outcomes. Variables related to background information included whether the tenancy was subsidized; whether the landlord was a corporation, housing authority, or private individual; the representation status of the parties; the type of eviction case (nonpayment, fault, or no fault); and the amount of any rental arrears alleged, among others. Variables related to the procedural history of the case included the types of motions filed and the dispositional outcome of the case. Variables related to settlement outcomes included both structural terms, such as whether a judgment was entered and in which party's favor, and more specific settlement terms, such as the length of time the tenant must comply with certain conditions before the tenancy is reinstated.[109] Other substantive case outcomes included trial outcomes and outcomes of motions to issue execution (motions seeking the tenant's eviction for violation of settlement terms).

I then analyzed the coded data by examining the frequency of settlement terms, the procedural history, and the substantive outcomes following settlement and trial across the dataset. I also performed analyses to determine the associations of certain background case characteristics with particular outcomes.

III. Settlement Outcomes

This Part presents the empirical findings from the eviction court study. It first presents the core finding: Settlement agreements that I term *civil probation*

108. The margin of error states the amount of random sampling error in a study's results. The confidence interval is a type of interval estimate that might contain the true value of an unknown population parameter. The associated confidence level quantifies the level of confidence that the parameter lies in the interval. The response distribution is the probability distribution of the response (target) variable. 50% is the most conservative choice for the response distribution, yielding the largest sample size.

109. For more discussion of the meaning of tenancy reinstatement and other specific terms, see Parts III and IV below.

agreements constitute the majority of all settlements and are the predominant case disposition in the study jurisdiction. This Part then presents additional findings regarding the prevalence, scope, and enforcement of civil probation agreements.

A. Empirical Findings: The Structure of Settlements

The data analysis revealed that 99% of court-ordered settlements contained terms within one of two overarching settlement structures.[110] The first structure (Structure 1) transfers possession of the unit from the tenant to the landlord. It requires the tenant to move out and allows the landlord to carry out an eviction if they fail to do so. Two interlocking settlement terms give rise to this structure: (1) a term providing that the tenant will vacate the unit by a specified date,[111] and (2) a term entitling the landlord to issuance of the execution (actual eviction) if the tenant does not vacate by that date.[112] There are some variations in other terms across settlements that contain this structure. For example, in some settlements a possessory judgment[113] for the landlord enters immediately, whereas in others a possessory judgment only enters upon the tenant's failure to vacate.[114] In some settlements the execution issues upon motion, whereas in others it issues automatically upon the tenant's failure to vacate. However, the variations in these terms do not alter the fundamental structure of the settlement as guaranteeing transfer of possession of the unit from the tenant to the landlord. These settlements are commonly referred to in landlord-tenant practice as *move-out agreements*. 34% of all settlements in the study sample were structured as move-out agreements, defined as settlements that include the two terms identified above.

The second settlement structure (Structure 2) allows the tenant to retain possession of the unit conditional on their compliance with certain enumerated conditions for a certain period of time and entitles the landlord to

110. The remaining 1% of settlements were primarily settlements that did not contain any possessory judgment and either set additional terms for the tenancy, reinstated the tenancy through a new lease, or simply dismissed the case. All of the settlements in the study sample were court-ordered.

111. The data revealed that the median length of time provided to the tenant to vacate is 57 days.

112. Forcible eviction occurs through the landlord levying on the execution. Under Massachusetts law, levies are carried out by constables or sheriffs. Tenants must receive at least forty-eight hours notice prior to the levy. *See* MASS. GEN. LAWS ANN. ch. 239, § 3 (West 2022).

113. A possessory judgment is a judgment that grants the legal right to possession of the unit.

114. Another distinction is whether the landlord can evict prior to the vacate date if the tenant fails to pay ongoing rent or fails to comply with other specific terms during that time.

recover possession upon motion if the tenant fails to do so. In other words, this structure provides that for a period of time—say, a full year[115]—the tenant has to comply with certain rules,[116] such as paying their ongoing rent on time. If they do not do so, the landlord can simply file a motion to evict them, rather than restart the formal eviction process. This structure is created by a set of three interlocking settlement terms: (1) a term entering a possessory judgment in favor of the landlord; (2) a term providing that execution of the judgment (i.e., actual eviction) is stayed provided the tenant complies with certain enumerated conditions for a certain period of time, after which the tenancy is reinstated;[117] and (3) a term providing that, if the tenant violates any of the enumerated conditions, execution of the judgment may issue upon motion. 65% of settlements in the study sample contained these three terms, which I define as Structure 2 settlements or, as explained below, civil probation agreements. Table 1 below summarizes the defining terms and prevalence of each settlement structure.

Table 1
Settlement Structures

Settlement Structure	Terms	Percentage of All Settlements
Structure 1 (Move-Out Agreement)	• Tenant will vacate by specified date • Landlord entitled to execution (actual eviction) if tenant fails to vacate by specified date	34%
Structure 2	• Possessory judgment in favor of landlord • Execution (actual eviction) stayed pending tenant's compliance with enumerated conditions for a certain period of time, after which tenancy is reinstated • Execution may issue upon motion if tenant violates any condition	65%

115. For more details on the length of the conditional period provided in these settlements, see Part IV.C below.

116. For more details on the content of the rules, see Part IV.B below.

117. As detailed in Part IV.B below, these conditions often include, among others, repaying rental arrears, make ongoing rental payments, and complying with the terms of the lease.

Like move-out agreements, there are variations in other terms across Structure 2 settlements. The primary variation is in the content of the conditions attached to the stay of execution. In some settlements, the conditions are solely related to the payment of rental monies owed ("rental arrears").[118] In other settlements, the stay is conditional on behavioral terms, such as the tenant keeping their apartment clean.[119] I do not consider this distinction to warrant separate structural classifications for two reasons. First, regardless of the content of the conditions, the same legal arrangement emerges: The tenant is under a court order to follow rules that, if violated, can result in eviction through an alternative legal process (eviction upon motion). The specific content of the conditions has no bearing on the legal structure within which they are imposed or on the process that follows if they are allegedly violated. Second, as I will discuss in detail in Part IV.B below, the data reveal that Structure 2 settlements rarely impose conditions *solely* related to the payment of rent or *solely* related to behavior. Rather, the majority of these settlements include conditions related to both rental payments and non-financial behaviors.[120] In practice, these types of conditions are thus not mutually exclusive but overlapping. The legal arrangement emerging from these settlements is therefore best understood as a singular structure.

In the study jurisdiction, the result of the system of mass settlement in eviction court is, overwhelmingly, Structure 2 settlements. Two times out of three, settlement agreements tenants are signing in the court hallways are Structure 2 settlements. The data further reveal that Structure 2 settlements also constitute the most common type of case disposition overall. Approximately 37% of all eviction filings in the study jurisdiction result in Structure 2 settlements. In addition to Structure 1 settlements, four other non-settlement case dispositions appear consistently in the data: move-out agreements (as described above), voluntary dismissals by the landlord,[121] default judgments,[122] and judgments after trial. Structure 2 settlements are by

118. In landlord-tenant practice and policy, settlement agreements requiring the tenant to repay arrears are typically known as *repayment agreements.*

119. Settlement agreements containing non-financial behavioral terms are typically known in landlord-tenant practice as *probationary agreements.* For more details about the content of behavioral terms included in Structure 2 settlements, see Part IV.B below.

120. *See infra* Part IV.B.

121. Voluntary dismissal occurs when the landlord agrees to dismiss the case pursuant to MASS. R. CIV. P. 41(a). No judgment enters for either party. A voluntary dismissal is typically filed on the first court date, but occasionally is filed later in the litigation. Voluntary dismissals occur when the landlord no longer seeks a judgment of possession, usually either because the tenant has already repaid what they owe or because the tenant has already moved out.

122. A landlord is entitled to a default judgment where the tenant defaults by failing to appear in court and the landlord files an affidavit that attests to the amount of rent

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far the most common disposition. Whereas 37% of eviction filings resulted in a Structure 2 settlement, 24% resulted in voluntary dismissal, 19% resulted in a move-out agreement, 15% resulted in a default judgment, and 4% resulted in judgment after trial.[123] The distribution of case dispositions is summarized in Table 2 below.

Table 2
Eviction Case Dispositions

Case Outcome	Percentage of Cases
Structure 2 Settlement	37%
Voluntary Dismissal	24%
Structure 1 Settlement (Move-Out Agreement)	19%
Default Judgment	15%
Trial Judgment	4%

In the study jurisdiction, Structure 2 settlements are not only the majority settlement outcome—they are the predominant outcome of the eviction system overall.

B. Theory of Civil Probation

"Structure 2" settlements have been entirely overlooked by the scholarly literature on eviction. While a limited body of literature has referenced settlements being structured as move-out agreements, no prior scholarship has empirically surfaced, much less theorized, Structure 2.[124] I argue here that these settlements establish a legal framework best understood as what I term *civil probation*. As such, I term Structure 2 settlements *civil probation agreements*.

owed, if any, and that the defendant is not in military service. MASS. UNIF. SUM. PROCESS R. 10. The clerk also must determine that the summons and complaint were properly completed, served, and returned, and that other documents required to be filed with the court were properly filed. *Id.* A tenant does not have to file an answer in order to avoid default. *Id.*

123. Approximately 1% of case filings result in a judicial order of dismissal.

124. Some literature loosely refers to settlements that take the form of a "payment plan," "payment arrangement," or "repayment agreement." *See, e.g.*, Nelson et al., *supra* note 72, at 705, 709; Dan Immergluck, Jeff Ernsthausen, Stephanie Earl & Allison Powell, *Evictions, Large Owners, and Serial Filings: Findings from Atlanta*, 35 HOUS. STUD. 903, 905 (2020); Summers, *supra* note 53, at 178. It is not clear from the literature what terms are included in these settlements; the specific terms of the agreements have not been empirically studied or theorized.

The term *civil probation* is intended to draw an obvious parallel to the well-known system of criminal probation.[125] In criminal probation, a court order conditions a person's liberty on their compliance with certain enumerated conditions for a specified period of time.[126] These conditions impose a host of rules on the probationer's conduct.[127] The judge, along with a probation officer who is deployed to supervise the probationer, retains jurisdiction to enforce compliance with the conditions during the probationary period.[128] If the prosecutor or probation officer alleges a violation of any condition, the probationer faces a charge known as a violation of probation.[129] This charge is adjudicated through a revocation proceeding, rather than through the process that applies to the adjudication of a standard criminal charge.[130] A revocation proceeding affords the probationer far fewer due process protections: Among others, the probationer does not have a right to a trial by jury and is not guaranteed appointed counsel if they are indigent.[131] Yet despite this

125. Approximately three million adults were on criminal probation in the United States in 2020 (the most recent year for which data are available as of the time of writing). *See* RICH KLUCKOW & ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ NO. 303184, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2020-STATISTICAL TABLES 1 (2022), https://perma.cc/N5NB-WPLT. Criminal probation is a sentence imposed by a judge as a punishment for an offense. *See* Doherty, *supra* note 6, at 292; 1 NEIL P. COHEN, THE LAW OF PROBATION AND PAROLE § 1:1 (West 2022). Probation is distinct from parole, which is community supervision imposed as part of an offender's early release from incarceration. *Id.* Parole is also distinct from probation in that it is an "administrative rather than a judicial procedure." *Id.*

126. *See* Doherty, *supra* note 6, at 292.

127. Professor Fiona Doherty conducted a wide-ranging study into the conditions of probation across jurisdictions. *See id.* at 297-300. She found that standard probation conditions not only prohibit the probationer from engaging in criminal conduct; they also prohibit the probationer from committing any violations of civil law and engaging in some conduct that is not otherwise illegal. *Id.* at 295, 302. Some examples of conditions proscribing otherwise legal conduct are that the probationer abstain from consuming alcohol or drugs, avoid "injurious and vicious habits," and refrain from associating with persons of "disreputable or harmful character." *Id.* at 295, 315. Violations of these non-criminal conditions are known as "technical violations." *Id.* at 295-96. Further, Professor Doherty found that the conditions of probation in many jurisdictions include what she calls a "be good" provision, requiring the probationer to be on generally good behavior. *Id.* at 303.

128. *Id.* at 292.

129. *Id.* at 295. In some states, probationers can face a violation of probation for conduct not expressly proscribed by the conditions of probation. *Id.* at 322-23.

130. *Id.* at 292, 322-23.

131. Gagnon v. Scarpelli, 411 U.S. 778, 782, 790 (1973). Many of the core constitutional rights recognized by criminal law doctrine have been ruled inapplicable in revocation proceedings. For example, proof does not have to be beyond a reasonable doubt, there is no presumption of innocence, and the Fourth Amendment exclusionary rule does not apply. Doherty, *supra* note 6, at 322. *Compare Gagnon*, 411 U.S. at 782, 786-87 (listing minimum requirements of due process in probation revocation hearings that do not

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diminished process, a violation of probation, if proved, can result in incarceration.[132]

Structure 2 settlements create an analogous but not identical legal structure within the eviction system. Just as criminal probation conditions a person's liberty on their compliance with certain enumerated conditions, these settlements condition a person's tenancy on their compliance with certain specified conditions. These conditions impose a host of rules on the tenant's conduct.[133] Like in criminal probation, a court order imposes these conditions for a particular period of time, after which the tenancy is reinstated. If the landlord alleges the tenant violated any of these conditions, they can file a motion seeking the tenant's eviction (called a motion to issue execution). Analogous to a revocation proceeding, adjudication of the motion is governed by an entirely different set of procedural rules than those that govern adjudication of eviction complaints.[134] These rules, which are the rules that apply to adjudication of motions generally, involve a much lesser level of process. Among other differences, the tenant has no right to a jury trial, to discovery, or to a particular type and amount of notice.[135] The tenant is entitled only to bare

include jury trials or proof beyond a reasonable doubt), *with In re* Winship, 397 U.S. 358, 362 (1970) (reiterating that "proof of a criminal charge beyond a reasonable doubt is constitutionally required"). Probationers are, however, entitled to notice of the alleged violation(s), the opportunity to be heard and present evidence on their own behalf, and to a written decision by the judge. *Gagnon*, 411 U.S. at 786; *see* Doherty, *supra* note 6, at 323. They are also afforded a conditional right to confront adverse witnesses, which the judge may deny for good cause. Doherty, *supra* note 6, at 323. As Fiona Doherty has summarized, the Court in *Gagnon* upheld this limited due process in revocation proceedings because of the "purportedly caring and supportive character of the probation system." *Id.* at 331. The Court has framed the probation officer and judge as "benevolent supervisors" working to rehabilitate the probationer, and as such has deemed greater levels of process unnecessary and even counterproductive. *Id.* at 331-32. Professor Doherty has observed that the Court has repeatedly invoked a principle of *parens patriae*, which "empowers the state to care for those who cannot care for themselves," in justifying limited procedural rights for probationers. *Id.* at 332.

132. Indeed, there is a movement of advocates and legislators who want incarceration to be structured as a "swift and certain" sanction for any violation of probation. *See* Doherty, *supra* note 6, at 333-34; ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT & CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 9 (2009).

133. These rules are often that the tenant pay rental arrears, pay rent on time, and/or comply with certain behavioral rules. *See infra* Part IV.B.

134. *See supra* note 19.

135. The tenant does not have a right to a jury trial because there is no trial, only a motion hearing. *See* MASS. GEN. LAWS ANN. ch. 239, § 10. There is no right to discovery because tenants only have a right to discovery in eviction proceedings prior to the first court date, i.e., prior to the signing of the civil probation agreement (which occurs on the first court date or later). *See* MASS. UNIF. SUM. PROCESS R. 7(a). The Massachusetts Uniform Summary Process rules provide that the summary process (eviction) Summons and Complaint must be in the form "as promulgated by the Chief

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notice of the motion and a hearing.[136] Yet despite the diminished level of process, a proven violation may result in eviction, much like how a proven violation of criminal probation may result in incarceration.[137] I therefore term this structure *civil probation*, defined as court-ordered conditions on a person's tenancy for a period of time that, if violated, can result in eviction with few procedural safeguards.[138] I define *civil probation agreement* as a settlement agreement that places the tenant on civil probation.[139]

The concept of *civil probation* offers a valuable framework for understanding the legal structure of eviction settlements. It generates the core insight that the agreements place tenants under a more restrictive legal regime by which they can be evicted. It also provides a lens for interrogating the scope and contours of the system the settlements create. What are the contents of probationary conditions? How long do probationary periods last? To what extent are the conditions enforced, which conditions are enforced, and with what result? How often are judges evicting tenants for the violation of probationary conditions versus based on the cause(s) of action in an eviction complaint? Answers to these questions paint a troubling picture of the role of settlements in the eviction system overall.

Administrative Justice of the Trial Court," *see* MASS. UNIF. SUM. PROCESS R. 2(a), and that service of such Summons and Complaint must be made on the tenant between seven and thirty days of the entry of the action and only after any required notice of termination of the tenancy has expired. *See* MASS. UNIF. SUM. PROCESS R. 2(b). No such rules exist for motions generally, or motions to issue execution. *See* MASS. UNIF. SUM. PROCESS R. 6 ("All other [non-pre-trial] motions . . . shall be made in such manner, at such time, and with such notice as the court may permit or direct"); MASS. GEN. LAWS ANN. ch. 239, § 10 (requiring that a plaintiff must file a motion in order for execution to issue following a stay, but imposing no requirements about the form or service of that motion).

136. *See* Bos. Hous. Auth. v. Cassio, 697 N.E.2d 128, 129 (Mass. 1988).

137. *Id.*; *see supra* notes 125-32 and accompanying text.

138. There are two distinctions between civil and criminal probation. First, when criminal probation is imposed on a defendant, there may be a probation officer deployed to monitor and enforce compliance with the probationary conditions. *See* Doherty, *supra* note 6, at 316. There is no equivalent of a probation officer in the civil probation system—no governmental (or private) official becomes empowered to independently enforce the terms of probation. The second main distinction between civil and criminal probation is the role of the state in setting the conditions of probation. In criminal probation, although conditions can be negotiated between prosecutors and defense attorneys, they are often set by the state, either by state legislatures, probation departments, or judges. "Standard conditions" of probation are put forth by probation departments at the state or county level and/or through state legislation. *Id.* at 301-05. In the civil probation system, by contrast, the state plays no direct role in setting the probation conditions. The conditions are not standardized or coordinated through any governmental entity.

139. The study data do not include any instance of a judge issuing an order placing a tenant on civil probation absent the existence of a civil probation agreement.

IV. Features of the Civil Probation System

In this Part, I surface the features of the civil probation system based on data analysis. The data illuminate five key features. First, the system of civil probation results primarily from eviction cases where the tenancy is subsidized, where the landlord is an institutional actor and represented by counsel, and where a relatively low amount of rent is owed.[140] Second, probationary conditions are expansive, typically covering behaviors unrelated to the initial basis for eviction.[141] Third, probationary periods are long, typically a year. Where the tenant is required to repay arrears the period of probation almost always extends past when the arrears are satisfied.[142] Fourth, probationary conditions are frequently and strictly enforced.[143] And fifth, civil probation is the predominant system within which judicial eviction orders are issued.[144]

A. Disproportionate Prevalence of Civil Probation Agreements in Cases Involving Subsidized Tenancies, Institutional & Represented Landlords, and Lower Arrears Amounts

The data show that civil probation agreements are disproportionately concentrated among cases with certain characteristics. First, civil probation agreements are disproportionately prevalent among cases brought against tenants in public and subsidized housing as compared with cases brought against tenants in unsubsidized housing. Of the total eviction cases in the sample, 57% were against tenants in public and subsidized housing[145] and 43% were against tenants in unsubsidized housing.[146] Yet among cases that resulted in civil

140. *See infra* Part IV.A

141. *See infra* Part IV.B.

142. *See infra* Part IV.C.

143. *See infra* Part IV.D. Probationary conditions are enforced through motions to issue execution (motions seeking the tenant's eviction). *See supra* Part III.

144. *See infra* Part IV.E.

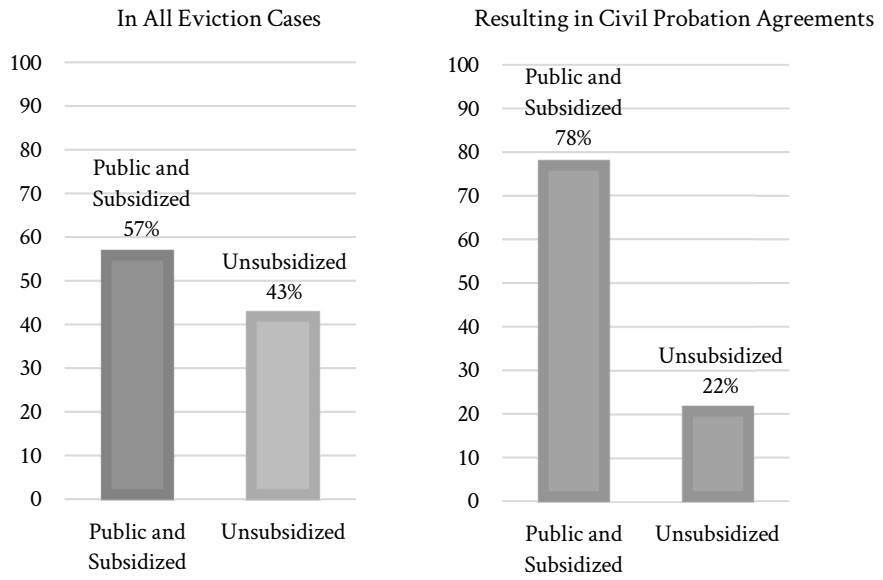
145. Cases were coded as involving public or subsidized housing where the unit or tenant received any federal, state, or local subsidy, and therefore includes tenants in federal public housing, project-based Section 8 subsidized housing, housing units subsidized by the Low-Income Housing Tax Credit or other federal subsidies that attach to the unit, state-subsidized housing, and tenants with federal Section 8 Housing Choice Vouchers or state-funded housing choice vouchers (i.e., vouchers funded through the Massachusetts Rental Voucher Program).

146. Research in other jurisdictions has found that eviction filings are significantly less common against subsidized tenants than unsubsidized tenants. *See, e.g.*, Gregory Preston & Vincent J. Reina, *Sheltered from Eviction? A Framework for Understanding the Relationship Between Subsidized Housing Programs and Eviction*, 31 HOUS. POL'Y DEBATE 785, 798 (2021). This question has not been researched in Massachusetts.

probation agreements, 78% were brought against tenants in public and subsidized housing and 22% were brought against tenants in unsubsidized housing. Examined from a slightly different angle, civil probation agreements accounted for 65% of settlements overall, but accounted for 81% of settlements in cases brought against tenants in public and subsidized housing as compared with only 40% of settlements in cases brought against tenants in unsubsidized housing.[147]

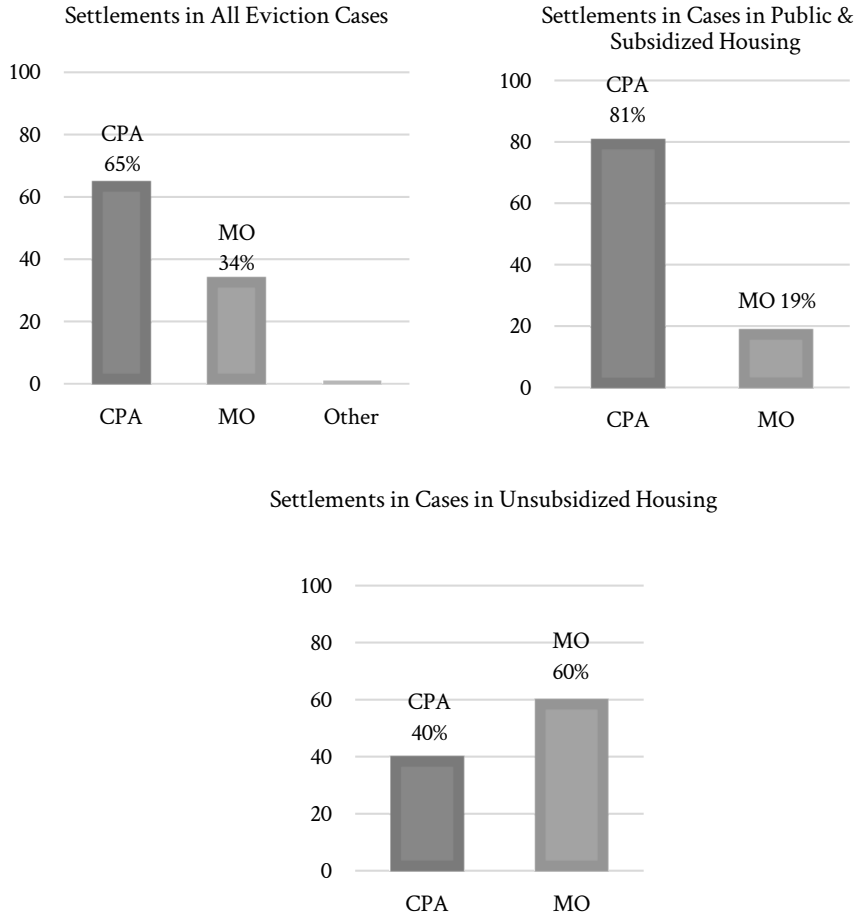
Figure 1

Tenancy Subsidization Status



147. Additionally, 48% of all eviction filings in public and subsidized housing resulted in civil probation, compared to only 18% in unsubsidized housing.

Figure 2
Settlements in Public, Subsidized, and Unsubsidized Housing



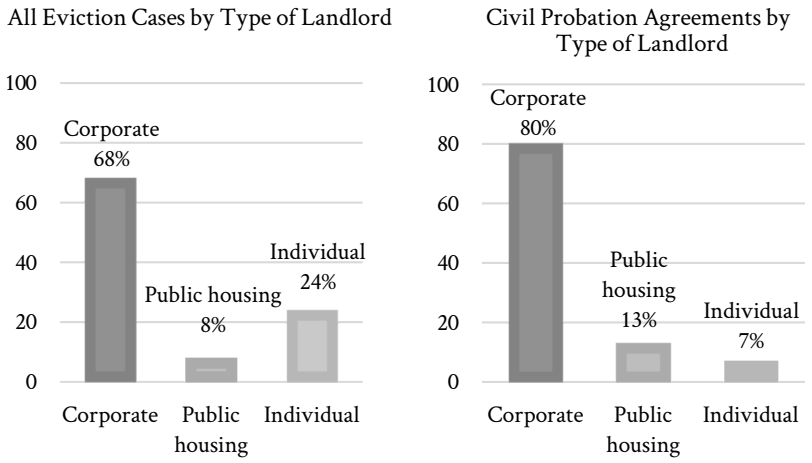
CPA = Civil Probation Agreement (Structure 2)
MO = Move-Out Agreement (Structure 1)

Second, civil probation is especially common in eviction cases brought by institutional landlords;[148] by contrast, it is rarely an outcome in cases brought by individual owners. Overall, 68% of eviction cases in the sample were

148. I define an "institutional landlord" as a landlord that is not an individual person(s), i.e., a landlord that is either a corporate entity or the public housing authority.

brought by corporate landlords,[149] 24% were brought by individual owners, and 8% were brought by the public housing authority.[150] Yet cases filed by corporate landlords accounted for 80% of all civil probation agreements, by the public housing authority accounted for 13%, and by individual owners accounted for only 7%. Similarly, among all settlements, a civil probation agreement was much more likely to result in cases filed by corporate landlords and the public housing authority as compared with cases brought by individual landlords. Among eviction cases filed by corporate landlords, 78% of settlements were civil probation agreements,[151] and among cases filed by the public housing authority, 88% of settlements were civil probation agreements.[152] By contrast, only 19% of settlements in cases filed by individual owners were civil probation agreements.[153] Thus, where tenants are settling eviction cases with corporate landlords or the public housing authority, the result is overwhelmingly likely to be a civil probation agreement. Cases brought by institutional entities are driving the high rate of civil probation agreements overall. These findings are summarized in the charts below.

Figure 3
Cases by Type of Landlord



149. For the purpose of this study, corporate landlords include both for-profit and nonprofit landlords.

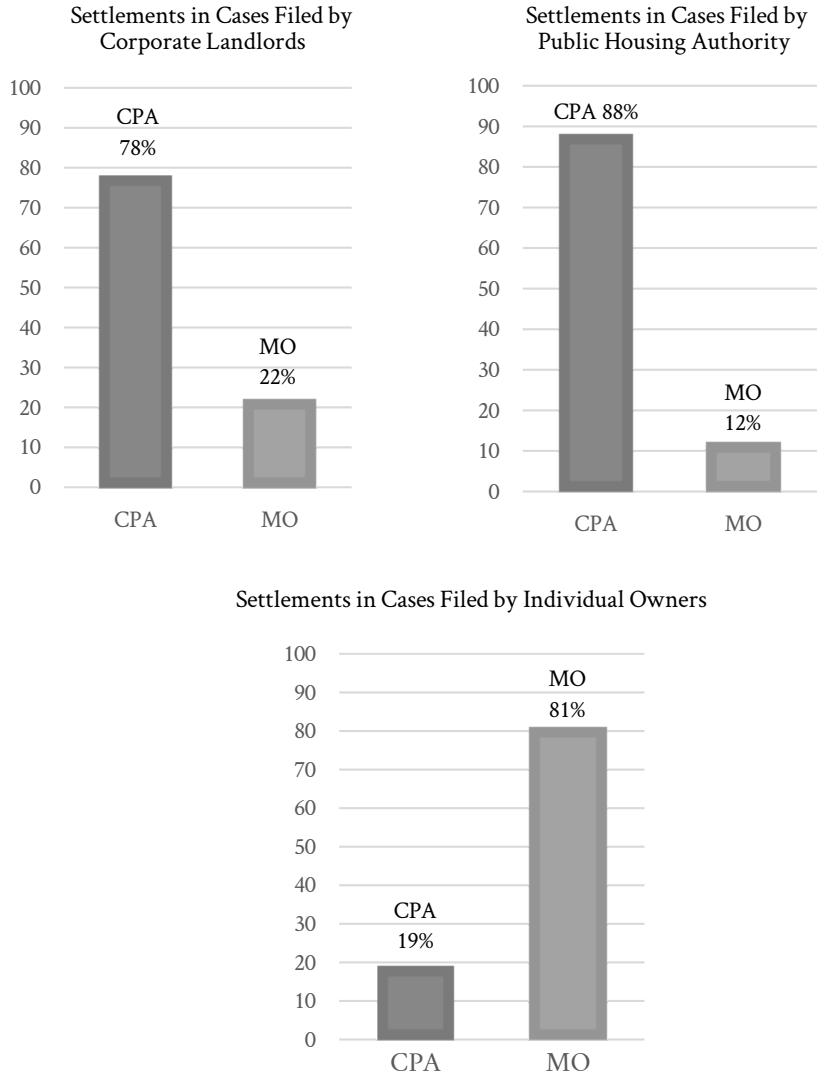
150. In Boston, the public housing authority is the Boston Housing Authority.

151. Of all eviction filings by corporate landlords, 41% resulted in civil probation agreements.

152. Of all eviction filings by the public housing authority, 59% resulted in civil probation agreements.

153. Of all eviction filings by individual property owners, 11% resulted in civil probation agreements.

Figure 4
Settlements by Type of Landlord



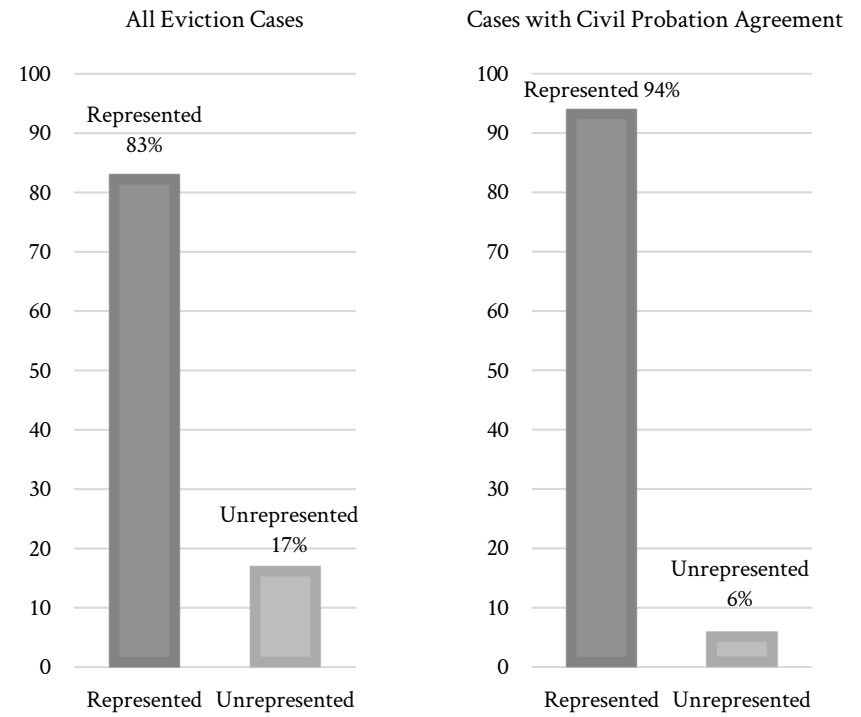
CPA = Civil Probation Agreement (Structure 2)
MO = Move-Out Agreement (Structure 1)

Third, civil probation agreements were significantly more prevalent in cases where the landlord was represented by counsel as compared with cases where the landlord was pro se. Overall, 83% of eviction cases were brought by

landlords with legal representation and 17% were brought by landlords without legal representation. Yet 94% of civil probation agreements were in cases with represented landlords and only 6% were in cases with unrepresented landlords. And whereas civil probation agreements accounted for 72% of settlements in eviction cases filed by represented landlords, they accounted for only 23% of settlements in cases filed by unrepresented landlords. These findings are summarized in the charts below. Further, consistent with the overall rate of tenant representation, 97% of civil probation agreements were in cases with unrepresented tenants.[154] Thus, the system of civil probation is driven primarily by cases involving landlords who are represented by attorneys and tenants who are unrepresented.

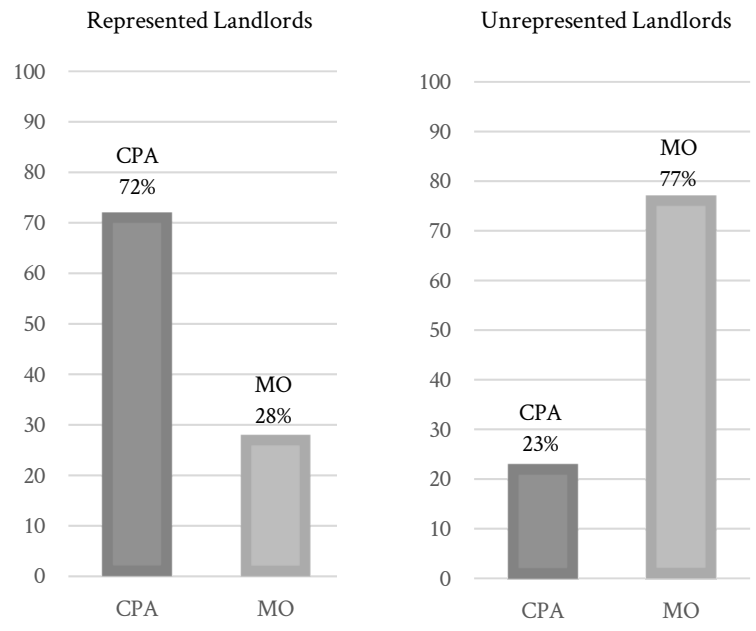
Figure 5

Cases by Landlord Representation Status



154. Across all eviction cases filed, tenants were unrepresented by counsel in 96% of cases. There were too few represented tenants in the sample (n=38) to perform meaningful analyses regarding the distribution of types of settlements across represented versus unrepresented tenants.

Figure 6
Settlements by Landlord Representation Status



CPA = Civil Probation Agreement (Structure 2)
MO = Move-Out Agreement (Structure 1)

Finally, the data show that civil probation agreements result from cases with relatively lower amounts of rent owed. The data showed that among all nonpayment of rent eviction cases filed, the median amount of rent owed was $1,925, whereas in such cases resulting in civil probation agreements, the median amount of rent owed was less than half that amount: $950.[155] Thus, civil probation agreements are relatively concentrated among cases where the arrears are less. These results are depicted in Table 3 below.

155. The "amount of rent owed" is based on the amount of rent allegedly owed as listed on the summons and complaint.

Table 3
Median Rent Owed in All Eviction Cases vs. Cases Resulting in Civil Probation

Category of Eviction Cases	Median Amount of Rent Owed
All Eviction Cases	$1,925
Cases Resulting in Civil Probation Agreement	$950

In sum, the system of civil probation is driven primarily by cases brought against unrepresented tenants in subsidized housing, by institutional and represented landlords, over relatively lower amounts of rent owed.

B. Expansive Probationary Conditions

The second key feature of the civil probation system revealed by the data is that probationary conditions are expansive. As an initial matter, probationary conditions nearly uniformly include obligations related to the basis for the eviction filing. In eviction cases brought for nonpayment of rent, 94% of civil probation agreements made the repayment of rental arrears a probationary condition. Similarly, among fault eviction cases—cases brought for a lease violation unrelated to the payment of rent—98% of civil probation agreements included as a condition of probation that the tenant would refrain from engaging in the identified misconduct.

Yet the majority of civil probation agreements also include probationary conditions that are entirely unrelated to the basis for the eviction filing. In nonpayment of rent cases, 58% of civil probation agreements included as a probationary condition that the tenant comply with all terms of their lease. Lease terms are highly detailed, broad, and comprehensive, governing nearly every aspect of the tenant's behavior at the premises.[156] The Boston Housing Authority lease, for example, includes twenty-two tenant obligations.[157] Thus,

156. In an extensive study of residential leases in Philadelphia, David Hoffman and Anton Strezhnev found that most leases contain unenforceable terms and terms that are oppressive for tenants. *See* David A. Hoffman & Anton Strezhnev, *Leases as Forms*, 19 J. EMPIRICAL LEGAL STUD. 90, 100-01 (2022); *see also* Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 3, 24 (2017) (finding a high number of unenforceable and misleading lease terms in a study of 70 Boston leases).

157. *See* BOS. HOUS. AUTH., BOSTON HOUSING AUTHORITY PUBLIC HOUSING LEASE ¶ 8 (2015), https://perma.cc/83BU-RLGD. Some of these obligations are extraordinarily specific; for example, the tenant is required to "keep private yards free of all hazards and keep the grass and plants therein watered, weeded and trimmed." *Id.* ¶ 8.D. Other obligations establish broad and sometimes vague restrictions on a host of behaviors: the tenants

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in this 58% of cases, even though the landlord's original concern related only to rental arrears, compliance with every single term of the lease, regardless of the term's relation to payment of rent, was included as a probationary condition. Similarly, in fault eviction cases, 92% of civil probation agreements made the timely payment of ongoing rent a condition of probation. Thus, in these cases, even though the eviction filing was unrelated to the tenant's payment of rent, compliance with rental payment obligations was set as a probationary condition. As will be discussed in more detail in Part V below, re-imposing existing tenancy terms (i.e., to comply with the lease or to timely pay rent) as probationary conditions dramatically reshapes the landlord's enforcement mechanisms around these terms.

Overall, among all civil probation agreements, 98% imposed a probationary condition requiring the tenant to timely pay ongoing rent; 81% imposed a condition requiring the tenant to repay rental arrears; 60% imposed a condition requiring the tenant to comply with all terms of their lease; and 17% imposed a condition requiring the tenant to refrain from specific misconduct that was identified as the basis for eviction.

Additionally, probationary conditions regularly impose obligations on tenants that are outside the terms of the lease. Specifically, the data show that probationary conditions imposed such new obligations in 31% of all civil probation agreements. Of civil probation agreements with conditions that imposed new obligations, 78% were in subsidized tenancies, where tenancy terms are generally regulated by the subsidy rules.[158] While in some instances these conditions were relatively benign, such as requiring a certain form of rental payment (e.g., payment by certified check or money order only),[159] in many instances they were not. Conditions included that the tenant participate in financial counseling,[160] that the tenant have limited or

must "conduct themselves in a manner which will not disturb any other resident's or neighbor's peaceful enjoyment of their accommodations" and must "refrain from engaging in . . . any criminal or illegal activity," for example. *Id.* ¶¶ 8.A, 8.J. Analogous lease provisions are included in the federally standardized Section 8 lease. *See* U.S. DEP'T OF HOUS. & URB. DEV, NO. HUD-52641, HOUSING ASSISTANCE PAYMENTS CONTRACT (HAP CONTRACT): SECTION 8 TENANT-BASED ASSISTANCE HOUSING CHOICE VOUCHER PROGRAM 10 (2015), https://perma.cc/BPN4-ME97.

158. *See, e.g.*, 24 C.F.R. § 982.308 (2022) (requiring specific lease terms in tenancies subsidized by the Section 8 Housing Choice Voucher Program). The percentage of civil probation agreements that imposed new obligations in subsidized tenancies (78%) is consistent with the percentage of civil probation agreements in subsidized tenancies overall (78%).

159. Summary Process Agreement for Judgment ¶ 9, 204 Neponset Valley Realty Tr. v. Keith, No. 17H84SP000917 (Bos. Hous. Ct. Apr. 20, 2017) (on file with the Eastern Housing Court of Massachusetts).

160. Agreement for Judgment ¶ 12, WinnResidential *ex rel.* Academy Homes v. Perez, No. 17H84SP002912 (Bos. Hous. Ct. Nov. 2, 2017) (on file with the Eastern Housing Court of Massachusetts).

no guests,[161] that the tenant remove certain members of the household,[162] that the tenant participate in social service programming,[163] and that the tenant receive substance abuse treatment services.[164] Some obligations were particularly invasive, broad, and at times vague. For example, one probationary condition required the tenant to "provide adequate prior advance notice to [the landlord] that she is going to have an overnight visitor and/or guest."[165] Another prohibited the tenant from "allowing any person to be in the premises while the [tenant] is not in the unit."[166] Other agreements required the tenant to "refrain from . . . engaging in any behavior that interferes with the operations of the [landlord], including . . . injuring the reputation of the management company by making bad faith allegations against it"[167] and that the tenant "refrain from . . . failing to live cooperatively with other Residents."[168]

Thus, the data show that the probationary conditions imposed in civil probation agreements are expansive. They regularly encompass not only conduct at issue at the time of the case filing, but also a substantial range of unrelated conduct for which the landlord has identified no present cause for concern.

C. Lengthy Probationary Periods

The third feature of civil probation revealed by the data is that probationary periods are long. The median length of a probationary period in

161. Agreement for Judgment ¶ 3.B, Pine St. Inn, Inc. v. Jannie, No. 16H84SP00315 (Bos. Hous. Ct. Jan. 28, 2016) (on file with the Eastern Housing Court of Massachusetts).

162. Agreement for Judgment for 24 Months ¶ 5.b, United Hous. Mgmt., LLC *ex rel.* Geneva Apartments v. Durant, 17H84SP001078 (Bos. Hous. Ct. July 10, 2014) (on file with the Eastern Housing Court of Massachusetts).

163. Agreement for Judgment ¶ 3.B, Cmty. Builders, Inc. *ex rel.* Cheriton Heights Ltd. P'ship v. Hughes, No. 14H84SP001378 (Bos. Hous. Ct. May 8, 2014) (on file with the Eastern Housing Court of Massachusetts).

164. Amended Agreement—Reasonable Accommodation Plan ¶¶ 2-3, Mission Hill Hous. LP *ex rel.* Hallkeen Mgmt., Inc. v. Sams, No. 17H84SP001371 (Bos. Hous. Ct. Apr. 5, 2018) (on file with the Eastern Housing Court of Massachusetts).

165. Agreement for Judgment ¶ 6.B, Pine Street Inn, Inc. v. Gormley, No. 17H84-SP-1524 (Bos. Hous. Ct. Apr. 27, 2017) (on file with the Eastern Housing Court of Massachusetts).

166. Agreement for Judgment ¶3.B.3, Sentry Prop. Mgmt. Corp. *ex rel.* Sonoma Maple Schuyler LLC v. Harrison, No. 16H84SP000317 (Bos. Hous. Ct. Jan. 28, 2016) (on file with the Eastern Housing Court of Massachusetts).

167. Agreement for Judgment ¶ 3.A.4, Winn Managed Props. LLC *ex rel.* Sargent Prince Ltd. P'ship v. Floyd, No. 16H84SP001882 (Bos. Hous. Ct. June 9, 2016) (on file with the Eastern Housing Court of Massachusetts).

168. Agreement for Judgment ¶ 3.A.3, Pine St. Inn, Inc. v. Jannie, No. 16H84SP00315 (Bos. Hous. Ct. June 9, 2016) (on file with the Eastern Housing Court of Massachusetts).

the data was over a year—specifically, 381 days—and the mean length was 481 days. Among civil probation agreements that required the tenant to repay rental arrears as a condition of probation, 86% continued after the arrears have been satisfied. The median duration for which such agreements extended *past* the tenant's full satisfaction of arrears was 365 days and the average was 275 days. Thus, in these cases, the tenant received an eviction filing for nonpayment of rent, paid off the entirety of the arrears, and yet for approximately a full year later remained on civil probation.

The data further show that the Housing Court appears to approve civil probation agreements without imposing any cap on how long the probationary period can extend. This failure to police the length of civil probation agreements leads to exceptional cases with extraordinarily long probationary periods. The longest probationary period in the data was 6,000 days—over 35 years.

D. Strict and Frequent Enforcement of Civil Probation Agreements

The fourth key feature of civil probation that emerges from the data is that civil probation agreements are strictly and frequently enforced. The data show that landlords filed at least one motion to issue execution—a motion seeking the tenant's eviction based on an alleged violation of the probationary conditions—in 33% of cases with civil probation agreements. This finding means that there is an approximate 1 in 3 chance that a tenant who is under a civil probation agreement will be brought back into Housing Court and face eviction upon motion. In 9% of cases the landlord filed two motions to issue execution over the course of the probationary period, and in 1% of cases the landlord filed three or more such motions.[169]

Of the motions to issue execution filed, 70% were decided by a judge and 30% settled with a new civil probation agreement that extended the length of the probationary period.[170] Judges almost uniformly granted the motions that proceeded to adjudication. Specifically, judges granted 96% of the motions to issue execution that they decided. Thus, where a landlord seeks eviction for a tenant's violation of a probationary condition, they have an extremely high likelihood—a near guarantee—that the judge will rule in their favor.[171]

169. A landlord would file a second or third motion to issue execution if the first motion was denied by the judge or resolved with a settlement agreement that did not allow execution to issue.

170. The 30% figure represents the percentage of motions that settled initially, without ever being heard by a judge. Of the motions to issue execution that were decided by a judge, 21% settled with a new civil probation agreement that extended the total length of the probationary period *after* the judge had allowed the motion.

171. Because the data in the eviction court study is observational and is not based on a randomized control trial, it is possible that the motions to issue execution that settled

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Moreover, the data show that the expansive probationary conditions included in civil probation agreements—the conditions unrelated to the original basis for eviction—are routinely enforced. Specifically, 28% of motions to issue execution filed by landlords were unrelated to the original basis for eviction—in other words, in a case originally brought for nonpayment of rent, the motion alleged that the tenant violated a probationary condition other than the repayment of arrears, or in a case originally brought for fault, the landlord claimed that the tenant violated a condition unrelated to the original allegation. This finding demonstrates that the scope of probationary conditions is not irrelevant or technical, but rather reflects meaningful obligations imposed on tenants that can be the basis for future eviction.

E. Foundation of Most Judicial Eviction Orders

Finally, the data showed that where judges are issuing rulings in eviction cases, they are overwhelmingly doing so within the system of civil probation. The data showed that judges adjudicated 3.3 times as many motions to issue execution as they adjudicated eviction trials. In other words, judges adjudicated 3.3 times as many eviction proceedings based on violations of a probationary conditions as they adjudicated based on a formal eviction complaint.

Examining the data on eviction orders issued by judges (rather than eviction proceedings adjudicated, whether they ended in an eviction order or not) revealed an even starker disparity. The data revealed that judges issue eviction orders overwhelmingly within the civil probation system rather than within the formal eviction laws and procedures. The data showed that among eviction orders issued by judges,[172] 81% were orders allowing a landlord's motion to issue execution pursuant to a civil probation agreement, and only 19% were orders finding in favor of the landlord after trial. In other words, judges issued 4.2 times as many eviction orders based on a violation of a probationary condition as they issued based on the underlying merits of eviction complaints.[173]

Thus, civil probation is the predominant system within which judges are both deciding and issuing orders of eviction. Where judges are deciding and

were ones where landlords believed they would not likely prevail before the judge. Thus, to the extent this phenomenon occurred, the predicted likelihood of a judge's granting of a motion to issue execution would be lower.

172. This category excludes orders issued as the allowance of a landlord's motion to issue execution based on the tenant's failure to vacate pursuant to a move-out agreement. While such orders are also rightfully considered eviction orders, the tenant has already agreed to vacate the unit and has given up all rights to possession.

173. The dataset showed 23 eviction orders issued pursuant to a judgment for the landlord after trial and 96 eviction orders issued pursuant to the allowance of a landlord's motion to issue execution.

issuing eviction orders, they are overwhelmingly doing so within the system of civil probation and its rules, rather than pursuant to the formal evictions laws and procedures.

V. Consequences of Civil Probation

Scholars have long argued that the pervasiveness of criminal probation has deleterious consequences for the criminal legal system overall.[174] Drawing on this body of literature, I here articulate the consequences of civil probation for the eviction legal system as a whole. The first consequence is that civil probation creates a "shadow legal system"—an alternative system of procedural and substantive rules—that drives how the eviction legal system operates in practice.[175] This shadow legal system undermines the rule of law, erodes tenants' due process and substantive rights, and threatens public regulatory enforcement.[176] Second, civil probation expands landlord control of tenant conduct.[177] It does so both by broadening the substantive rules to which tenants are subject and by strengthening landlords' ability to enforce the substantive rules.[178] Finally, the findings raise the possibility that civil probation has resulted in a "net-widening"—an expanded reach—of the eviction legal system by operating as a distinct sanction rather than a genuine alternative to actual eviction.[179]

A. Shadow Legal System

The first key consequence of civil probation is that it gives rise to a *shadow legal system* for eviction—a system of distinct procedural and substantive rules that exist alongside the formal rules established by statutory law. In characterizing these alternative rules as a *shadow legal system*, I am borrowing from the theory developed by Fiona Doherty in the context of criminal probation.[180] Doherty postulates that, "like plea bargaining, probation is a shadow system of law enforcement and adjudication that actually drives how the criminal justice system operates in practice."[181] She argues that this system

174. *See generally* Doherty, *supra* note 6; Horwitz, *supra* note 6. *See also* Phelps, *supra* note 6, at 69; GARLAND, *supra* note 6, at 92.

175. *See infra* Part V.A.

176. *Id.*

177. *See infra* Part V.B.

178. *Id.*

179. *See infra* Part V.C.

180. Doherty, *supra* note 6, at 295.

181. *Id.* Doherty identifies a number of enforcement mechanisms and adjudicatory features that are substantially distinct within the probation system as compared to the formal

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bears little resemblance to the formal criminal adjudicatory system "even though the same judges preside over both systems."[182] Civil probation similarly—though not identically—results in an alternative adjudicatory system that "actually drives" how the eviction system "operates in practice."[183]

I first outline the alternative procedural and substantive rules for eviction established by civil probation. Next, I make the case that these rules amount to a shadow legal system. Finally, I articulate the normative reasons why the shadow legal system is cause for concern.

1. Alternative procedural and substantive rules for eviction

Civil probation establishes procedural and substantive rules for eviction that deviate substantially from those that formally govern eviction proceedings under statutory law and the formal procedural rules for evictions, codified as the Uniform Summary Process Rules.[184] There are four main deviations of the procedural rules from the formal rules. First, civil probation loosens notice and pleading requirements to initiate the process for eviction. Under statutory law and the Uniform Summary Process Rules, the landlord must comply with strict notice and pleading requirements to properly commence an eviction proceeding. These requirements include service of the tenant with a predicate notice to quit, which informs them of the basis for eviction;[185] commencement of the action through a standardized summons and complaint;[186] and service of process.[187]

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criminal legal system: Probation officers have extensive policing powers that are largely exempt from the requirements of the Fourth Amendment; probation officers have powers to punish probationers for violations of probation outside of the court-based revocation system; and the procedural rules that apply in revocation proceedings are categorically different than those that apply in standard criminal proceedings. *Id.* at 316. Many of the core constitutional rights of the defendant disappear in probation revocation proceedings: For example, the alleged violation must be proven only by a preponderance of the evidence rather than beyond a reasonable doubt, there is no right to a jury trial, the exclusionary rule of the Fourth Amendment does not apply, and the defendant is not categorically entitled to counsel or to cross-examine the prosecution's witnesses. *Id.* at 322-23; *see* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); *In re* Winship, 397 U.S. 358, 363 (1970); Note, Winship *on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093, 1102-03 (1993).

182. Doherty, *supra* note 6, at 316.

183. *Id.* at 295. One main difference between the two shadow legal systems is that in criminal probation, the shadow legal system involves probation officers endowed with enhanced policing powers, whereas civil probation involves no such powers. *See supra* Part III.B.

184. *See generally* MASS. UNIF. SUM. PROCESS R.

185. *See supra* notes 84-88 and accompanying text.

186. *See* MASS. GEN. LAWS ANN. ch. 239, § 1 (West 2022); MASS. UNIF. SUM. PROCESS R. 1, 2(a).

187. The time period and content of the notice are statutorily prescribed. *See* MASS. GEN. LAWS ANN. ch. 186, §§ 11-12 (West 2022). No notice is required where the tenant is being evicted following expiration of the lease.

The rules also require the complaint to be served at least two-and-a-half weeks prior to the first court date.[188] Once a tenant is on civil probation, by contrast, the landlord can seek eviction for violations of probationary conditions by simply filing and serving a motion, without adhering to any of these rules. No predicate notice is required, the motion need not take on a standardized form, and service can occur through regular mail.[189] There is also no requirement for the amount of notice the tenant must receive before the first court date.[190]

Second, civil probation eliminates tenants' rights to take discovery on the landlord's asserted grounds for eviction. Under the Uniform Summary Process Rules, tenants in eviction proceedings are afforded full written discovery rights.[191] Where a tenant faces eviction for violation of a probationary condition, however, the tenant's usual rights to discover the grounds for eviction are abrogated.[192] Thus, once on civil probation, a tenant can be evicted for violation of a probationary condition with no right to discover the evidence that will be used against them—what has long been considered "trial by ambush," which is otherwise specifically disallowed in eviction proceedings.[193]

Third, civil probation establishes an entirely different set of rules for adjudication on the merits. Under the state constitution and the Uniform Summary Process Rules, tenants facing eviction have a right to a trial by jury or judge.[194] Where a trial is decided by a judge, the judge is required to make special factual findings and express conclusions of law.[195] Under the civil probation system, by contrast, the tenant's only right is to a motion hearing; the tenant has no right to have the facts decided by a jury of their peers, nor even to a trial before a judge.[196] The judge is also not required to make any factual findings or rulings of law; a written decision merely noting that the motion is allowed (and thereby ordering the tenant evicted) is sufficient.[197]

188. *See* MASS. UNIF. SUM. PROCESS R. 2(b)-(c).

189. The statutes that entitle tenants to a fourteen- or thirty-day termination notice, MASS. GEN. LAWS ANN. ch. 186, §§ 11-12, are inapplicable because the tenancy has already been terminated, and remains formally terminated, until the probation is satisfied.

190. *Id.*

191. MASS. UNIF. SUM. PROCESS R. 7.

192. The tenant does not have a right to discovery because that right expires before the first court date (e.g., before the civil probation agreement is expired). *See* MASS. UNIF. SUM. PROCESS R. 7(a).

193. Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1819 (2018).

194. *See* MASS. CONST. art. XV (West, Westlaw through Feb. 2022 amendments); MASS. UNIF. SUM. PROC. R. 8.

195. MASS. R. CIV. P. 52(a).

196. This flows from the fact that, per the text of a civil probation agreement, the landlord is entitled to execution upon motion.

197. *See* MASS. R. CIV. P. 52(a).

Fourth, civil probation substantially alters the procedural rules following the court's issuance of execution (the granting of legal authority to the landlord to carry out an eviction). Statutory law establishes that where judgment enters for the landlord after trial, the tenant is entitled to an automatic stay of execution of the eviction for ten days, which is equivalent to the statutory period to file a notice of appeal.[198] If the tenant notices an appeal, execution of the eviction is automatically stayed until a decision is rendered by the appellate court.[199] A tenant who is ordered evicted within the civil probation system, by contrast, enjoys neither of these rights; the execution of eviction is not automatically stayed in either circumstance.[200] Thus, whereas under the formal law a judge's eviction order cannot be carried out until the appellate court completes its review (where the tenant invokes their right to appeal)—a process that can take well over a year—under the civil probation system the tenant has no right to any stay of the eviction order, including where it is pending appellate review.

In sum, civil probation establishes an entirely distinct set of procedural rules for eviction. Table 4 below summarizes the differences between the procedures set forth under formal eviction law and civil probation.

198. *See* MASS. GEN. LAWS ANN. ch. 239, § 5 (West 2022).

199. *See* MASS. R. CIV. P. 62(d) (automatically staying execution of appeals from judgments); Adjartey v. Cent. Div. of Hous. Ct. Dep't, 120 N.E.3d 297, 305 (Mass. 2019). There are narrow circumstances in which this automatic stay does not apply. *See* MASS. GEN. LAWS ANN. ch. 121B, § 32 (West 2022).

200. *See* MASS. GEN. LAWS ANN. ch. 239, § 5 (applying only to appeals from judgments); MASS. R. CIV. P. 62(d) (same).

Table 4
Eviction Procedures Under Formal Law and Civil Probation

Procedure	Formal Law	Civil Probation
Notice and pleading	• Predicate notice • Standardized summons and complaint • Service of process • At least two-and-a-half week period between service of summons and first court date	• No predicate notice • No standardized motion or pleading standards • Service by mail • No prescribed time period between notice of motion and court date
Discovery	• Full written discovery rights	• No discovery rights
Adjudication on the merits	• Jury or bench trial • Special factual findings and express rulings of law required	• Motion hearing • Judge not required to make factual findings or rulings of law
Post-execution and appeal	• Automatic ten-day stay of issuance of execution post-judgment • Issuance of execution automatically stayed pending appeal	• No automatic stay of execution • No automatic stay of issuance of execution pending appeal

Civil probation also substantially alters the substantive rules that apply in evictions for nonpayment of rent. That is, where a civil probation agreement requires the tenant to timely pay ongoing rent as a probationary condition (which 98% of civil probation agreements do[201]) and the tenant fails to do so, an entirely different set of substantive rules apply than if the tenant were not on civil probation and instead were defending against an eviction complaint for nonpayment of rent under the formal eviction laws and procedures. This substantive rule shift is effectuated by the conversion of the tenant's rental payment obligation from a term of a tenancy into a term of a court order.[202]

201. *See supra* Part IV.B.

202. Once a tenant is on civil probation, "rent" is referred to as "use and occupancy" because the tenancy has been terminated, and "rent" is only owed in tenancies. *See* MASS. GEN. LAWS ANN. ch. 239, § 3. Under the structure of civil probation agreements, the tenancy is not reinstated until the expiration of the probationary period. *See supra* Part III.A.
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Once this conversion occurs, the tenant's rental payment obligation is removed from the purview of landlord-tenant law. The landlord-tenant laws that limit the landlord's rights to collect rent and to evict for nonpayment of rent are inapplicable because the money is not owed as "rent"—it is instead owed as a term of a court order.[203] In the event of a violation, the sole question before the court is whether the money was paid in compliance with the terms of the court order, not whether the tenant legally owed the rent or whether the landlord was legally entitled to evict for nonpayment of rent.[204]

There are two major substantive rules that are altered by the conversion of the tenant's rental payment obligation into a probationary condition. First, the tenant cannot defend against the eviction by curing the arrears. Under statutory law, tenants who default on their rental payments have a right to avoid eviction by repaying the arrears by a certain deadline.[205] Where a tenant is on civil probation, however, cure is not a defense to eviction.[206] Second, a tenant on civil probation cannot claim withholding of rent as a defense to eviction.[207] Statutory law establishes that tenants may withhold rent where they have monetary damages claims against their landlord, and that if they face eviction for nonpayment of rent, they can assert these claims as defenses to the eviction.[208] Any claim arising out of the landlord-tenant relationship may be the basis for rent-withholding, including most notably the warranty of habitability.[209] Where a tenant is on civil probation, however, this statutory scheme is inapplicable because the tenant is no longer paying "rent."[210] Thus, a

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For ease and accessibility of terminology, I use the term "rent" in the body of the text when referring to use and occupancy owed during the period of civil probation.

203. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2022) (applying to "rent").

204. *See, e.g.*, Bos. Hous. Auth. v. Cassio, 697 N.E.2d 128, 129 (Mass. 1998).

205. *See* MASS. GEN. LAWS ANN. ch. 186, §§ 11-12 (West 2022).

206. The statutes establish this right to cure based around the timing of the tenancy termination and the filing of the summons and complaint. Because the tenancy has long since been terminated and no new summons and complaint need issue, the right to cure does not apply to tenants facing eviction for a violation of civil probation. *See id.*

207. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A.

208. *See id.* The Rent Withholding Statute provides that if the monetary damages established by the tenant's counterclaims exceed or equal the amount of rent owed, possession must be awarded to the tenant. *See id.*

209. The warranty of habitability conditions the tenant's obligation to pay rent on the landlord's obligation to maintain the premises in good repair. *See* Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973); Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072-73 (D.C. Cir. 1970). Other monetary damages claims recognized by Massachusetts law include interference with quiet enjoyment, *see* MASS. GEN. LAWS ANN. ch. 186, § 14, and violation of the consumer protection statute, *see* MASS. GEN. LAWS ANN. ch. 93A, § 9.

210. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (applying only to "rent"); Bos. Hous. Auth. v. Cassio, 697 N.E.2d 128, 129 (Mass. 1998) (affirming that once judgment has entered,
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tenant who is on civil probation cannot defend against eviction by claiming that they are owed damages from their landlord. This precludes, among other defenses, those based on a violation of the warranty of habitability.[211]

2. Alternative procedural and substantive rules as a shadow legal system

As the foregoing demonstrates, civil probation procedurally and substantively transforms the rules for eviction. Altering the rules of the game through settlement, however, is not notable or necessarily cause for normative concern on its own. The use of settlement as a tool for party rulemaking is standard civil practice,[212] and is in fact often touted by scholars as a way to align litigation with party interests, reduce the overall scope of conflict between the parties, and resolve collective action problems, among other benefits.[213] But the form of rule modification that occurs through civil probation differs from standard, and typically accepted, forms of party

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the only question before the court is "whether the tenant was 'in substantial violation of a material term . . . of the agreement for judgment'" (quoting MASS. GEN. LAWS ANN. ch. 239, § 10)).

211. A tenant on civil probation still technically retains the right to a rent abatement based on violations of the warranty of habitability and thus could bring an affirmative claim against the landlord, but they lose the ability to use warranty of habitability damages to offset monies owed that are claimed in the landlord's motion to issue execution (motion seeking eviction) and defend against eviction. *See supra* note 210.

212. *See* Prescott & Spier, *supra* note 50, at 66 ("[S]ettlement as a concept is best interpreted as simply an agreement that happens to occur between parties embroiled in a present dispute—a contract that changes the procedural and/or substantive rules governing that dispute's resolution."); Scott Dodson, *Party Subordinance in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 3-4 (2014) (noting that "parties stand at the apex of the litigation hierarchy" with the law and courts below them); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 511 (2011) (observing that "judicial decisions increasingly are based on private rules of procedure drafted by the parties before a dispute has arisen").

213. *See* H. Allen Blair, *Promise and Peril: Doctrinally Permissible Options for Calibrating Procedure Through Contract*, 95 NEB. L. REV. 787, 816-17 (2017); Prescott & Spier, *supra* note 50, at 118-23; Daphna Kapeliuk & Alon Klement, *Contracting Around* Twombly, 60 DEPAUL L. REV. 1, 1-2 (2010); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 478-85 (2007). Many scholars have also criticized and advocated against party rulemaking on a number of different grounds. *See, e.g.*, Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1336-37 (2012) (arguing that party rulemaking should be limited where it jeopardizes the normative legitimacy of adjudication); Resnik, *supra* note 64, at 623-24 (arguing that party rulemaking undermines values of "public and disciplined factfinding," "norm enforcement," and transparency); Elizabeth Thornburg, *Designer Trials*, 2006 J. DISP. RESOL. 181, 209-10 (emphasizing that party rulemaking can threaten "the development of legal rules" and "the educational and symbolic function of courts").

rulemaking. In civil probation, as described above, the procedural rules are modified in an identical way (i.e., identical changes in notice, final adjudication, and discovery rules), and this occurs on a widespread scale. Civil probation agreements also identically modify the substantive rules that apply to eviction for nonpayment to the extent they include payment terms (which nearly all do). The result, therefore, is not the usual outcome of disparate, diverse, and disconnected party-made rules across cases, but instead a singular, uniform *shadow legal system* for eviction.

The typical scholarly discussion of party rulemaking by agreement generally presumes a situation in which parties tailor-make rules to fit their particular circumstances or better promote their collective interests.[214] For example, parties may agree to alter the rules of discovery, shorten the statute of limitations, or modify the American rule on attorneys' fees.[215] Even where party rulemaking results from agreements between parties of unequal negotiating power, it is generally assumed that the rules adopted are particular to the specific parties' agreement.[216] What distinguishes civil probation from ordinary, everyday party rulemaking is that the agreements all adjust the procedural and substantive rules for eviction in the *exact same way*.[217] Every civil probation agreement makes the same modifications to the rules for pleading, discovery, adjudication on the merits, and post-execution and appeal.[218] Every agreement that contains a payment provision also identically modifies the substantive rules surrounding eviction for nonpayment.[219]

The data show that this uniform reordering of the rules has occurred at a widespread scale. 37% of all eviction cases filed, and 65% of all eviction cases that settle, result in this reconfiguration.[220] With probationary periods lasting approximately a full year, and often even longer, the result is a massive

214. *See, e.g.*, Bone, *supra* note 213, at 1344, 1356; Prescott & Spier, *supra* note 50, at 66.

215. *See* Prescott & Spier, *supra* note 50, at 66-67, 120.

216. *See* Resnik, *supra* note 64, at 661 (discussing the Supreme Court's upholding of a forum selection clause in a cruise ticket contract in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), as an example of party rulemaking in the context of unequal bargaining power between the parties); Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 136 (2018).

217. The uniform reordering of the rules in civil probation agreements has parallels to the uniformity in reordering brought about by binding arbitration clauses. Where binding arbitration clauses exist in contracts, they uniformly prohibit litigation of claims in the courts and require the submission of disputes to a privatized forum. *See* J. Maria Glover, Feature, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3062 (2015) (describing how, historically, the core concept of arbitration has been as "an alternative forum for the resolution of claims").

218. *See supra* Part V.A.1.

219. *Id.*

220. *See supra* Part III.

number of landlord-tenant relationships that are governed by these alternative rules at any given point in time.[221] The pervasiveness of the rules is not merely a theoretical point, but manifests directly in the data on judicial determinations on the merits. Judges decide over three times as many evictions under the alternative rules established by civil probation as they decide under the formal statutory rules.[222] Of all eviction orders issued by judges, 81% are issued pursuant to the civil probation rules.[223]

The result of this widespread alteration of the rules is a shadow legal system.[224] One set of procedural and substantive rules for eviction exists formally, in statutes and official Rules of Procedure, and another exists furtively behind it, inscribed in thousands of settlements entered into by private parties. While all newly-filed eviction cases are initially subject to the formal system, civil probation agreements quickly transform the applicable rules, setting up a parallel system for adjudication of a landlord's future alleged grounds for eviction. This system drives how evictions are adjudicated and eviction orders are issued in practice. Where a judge has issued an eviction order, it is over four times as likely that the procedural and substantive rules applied were not those enshrined in the statutory rules that formally govern eviction proceedings, but instead were the alternative rules established by civil probation.[225]

3. Normative consequences of the shadow legal system

Civil probation's creation of a shadow legal system for eviction is cause for serious normative concern. As an initial matter, the shadow legal system undermines the rule of law. It replaces eviction laws and procedures enacted by legislatures and other public, democratic institutions of government with rules crafted by private parties—most likely, landlords and their attorneys.[226] In doing so, it strips the public of its role in regulating evictions—specifically, in setting the substantive rules for when a landlord has a right to evict, and in shaping the procedures by which eviction determinations are to be made. Official rules for eviction reflect an expression of public values surrounding

221. *See supra* Part IV.C.

222. *See supra* Part IV.E.

223. *Id.*

224. *Cf.* Doherty, *supra* note 6, at 295 (arguing that, "like plea bargaining, probation is a shadow system of law enforcement and adjudication that actually drives how the criminal justice system operates in practice").

225. *See supra* Part IV.E.

226. Extensive prior scholarship has documented that settlements in eviction court are predrafted by landlords and their attorneys and involve very little negotiation. *See supra* notes 59-63 and accompanying text; *see also supra* note 52 (describing results showing the massive disparities in legal representation between landlords and tenants in cases that result in civil probation agreements).

the relative interests of landlords and tenants, as well as the process due to an individual faced with losing their home.[227] The shadow legal system diminishes the force of the public's expressed values, and in turn elevates an entirely different set of values that are entirely devoid of democratic backing.

The effect of the shadow legal system is the erosion of tenants' due process. The procedural protections afforded within civil probation are a sliver of those that exist under the formal law.[228] That is, the procedures of the shadow legal system are not merely different from the formal procedures, they are decidedly narrower. At every stage in the eviction process, civil probation affords the tenant less process than that to which they would be entitled otherwise.[229] The result is that the procedural safeguards codified in statutes and regulations are all but meaningless to a substantial number of tenants facing eviction. The shadow legal system eviscerates tenants' due process rights at a widespread scale.

Tenants' substantive rights are likewise eroded by the shadow legal system.[230] The erosion of substantive rights occurs both directly and indirectly. Directly, civil probation eliminates tenants' core substantive rights surrounding the payment of rent—the right to avoid eviction by curing arrears and the right to withhold rent and subsequently be protected from eviction—at a systemic level.[231] Nearly every tenant on civil probation (i.e., the 98% whose probationary conditions include the timely payment of ongoing rent) is stripped of these rights.[232] An example helps illustrate this point. Imagine a prototypical tenant on civil probation. A probationary condition requires them to timely pay

227. *See* MASS. UNIF. SUM. PROC. R. 1 cmt. (explaining that the summary process rules seek to reconcile specific competing values recognized by the state legislature). *See generally* David Luban, Essay, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626 (1995) ("[L]egal rules and precedents are valuable not only as a source of certainty, but also as a reasoned elaboration and visible expression of public values. Law . . . amounts to [an] 'objective spirit'—the spirit of a political community manifested in a public and objective form."); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that the job of judicial officials is to "explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them").

228. *See supra* Part V.A.1.

229. *Id.*

230. *See* Glover, *supra* note 217, at 3068 (describing how recent developments in arbitration jurisprudence have eroded substantive law and led to private lawmaking); *see also* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 163 (2015) (describing how corporate settlement mills allow defendants to circumvent otherwise mandatory substantive laws).

231. This result is similar to the phenomenon Maria Glover describes in the context of arbitration, whereby private parties are empowered to "frustrate or altogether eliminate claiming in any forum, and thereby to rewrite the scope of their obligations under substantive law." Glover, *supra* note 217, at 3066.

232. *See supra* Part V.A.1.

ongoing rent, and the probationary period continues for a year after the arrears have been satisfied.[233] Imagine that two months after the tenant has satisfied the arrears, their heat goes out, and the landlord, despite notice, refuses to repair it. Were the tenant not on civil probation, they would have the right to withhold rent based on the landlord's violation of the warranty of habitability.[234] If the landlord tried to evict them, they could then raise this withholding as a defense.[235] The tenant on civil probation, however, has no such rights. They are obligated to continue to pay full rent or be evicted.[236] The shadow legal system equates to the broad elimination of these rights.

The shadow legal system also indirectly erodes other substantive claims—those not directly altered by the civil probation structure—through its institution of procedures that make assertion of those claims far less likely to be successful.[237] The elimination of discovery rights, for example, makes fair housing claims significantly more difficult to pursue.[238] Without information about the landlord's policies and practices, information about the landlord's decisionmaking processes, and the opportunity to interrogate the landlord's reasons for the eviction, the tenant has a low chance of prevailing on such claims. Shortened notice periods give tenants less time to prepare, gather

233. 98% of civil probation agreements require the tenant to timely pay ongoing rent, and among civil probation agreements that impose as a condition that the tenant repay arrears, 86% continue after the arrears have been satisfied. *See supra* Part IV.B-.C. The median length of time the probationary period continues after satisfaction of the arrears is 365 days. *See supra* Part IV.C.

234. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2022).

235. *See id.* A landlord's failure to repair broken heat would also give rise to claims for interference with quiet enjoyment and violation of the consumer protection statute. MASS. GEN. LAWS ANN. ch. 186, § 14 (West 2022); MASS. GEN. LAWS ANN. ch. 93A, §§ 2, 9 (West 2022).

236. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (applying to "rent"); Bos. Hous. Auth. v. Cassio, 697 N.E.2d 128, 129 (Mass. 1998).

237. These claims include antidiscrimination claims pursuant to federal and state fair housing law, antiretaliation claims, as well as claims pursuant to the Violence Against Women Act. *See* 42 U.S.C. §§ 3601, 3602, 3604; MASS. GEN. LAWS ANN ch. 151B (West 2022); MASS. GEN. LAWS ANN. ch. 239, § 9; 34 U.S.C. § 12491(b)(1); Bos. Hous. Auth. v. Y.A., 121 N.E.3d 1237, 1243-44 (Mass. 2019) (holding that tenants may assert rights under the Violence Against Women Act as a defense against a motion to issue execution). These rights are unaffected by civil probation agreements because they apply to tenants facing eviction broadly speaking and are not attached to the tenant's payment of rent. Maria Glover documents a similar phenomenon in the context of binding arbitration clauses, where procedural reforms facilitate substantive law reforms. *See* Glover, *supra* note 217, at 3082.

238. *See* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 75, 95-97 (2020) (arguing that discovery is the "lynchpin of private enforcement" of statutes with public purposes, such as statutes in the context of employment, antitrust, and civil rights).

evidence, and secure counsel.[239] And the absence of special factual findings and express legal conclusions in the judge's decision makes appealing erroneous rulings far more difficult.[240] The cumulative effect of this diminished procedural scheme is the subversion of tenants' substantive law claims. It is also likely to lead to less accurate outcomes overall.[241]

The systemic overwriting of the procedural and substantive rules for eviction also threatens public regulatory enforcement—the enforcement of public statutory laws, such as eviction laws, designed to regulate public welfare.[242] As William Moon has compellingly demonstrated, where private parties contract around statutes with regulatory aims, they undercut the statutes' abilities to effectuate their public purposes.[243] The shadow legal system threatens public regulatory enforcement in precisely this way. Public interests underlie the statutory scheme surrounding eviction; concerns regarding tenant safety, the long-term supply of affordable housing, and the public costs of housing instability shape the rules embedded in the statutes.[244] The statutory regime is a public regulatory scheme carefully crafted to promote and balance specific policy goals.[245] By impeding the activation of the statutory laws comprising this scheme, the shadow legal system weakens the public regulatory function of landlord-tenant law and frustrates the policy goals underlying it.

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239. *See supra* Part V.A.1.

240. *See* MASS. R. CIV. P. 52 (applying only to trials).

241. By "accurate," I mean that outcomes reflect the success of meritorious claims and the failure of non-meritorious claims. *See* Jessica K. Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, 42 LAW & SOC. INQUIRY 1058, 1060 (2017).

242. *See also* Remus & Zimmerman, *supra* note 230, at 164 (observing this phenomenon in the context of corporate settlement mills).

243. *See* William J. Moon, *Contracting out of Private Law*, 55 HARV. J. ON LEGIS. 323, 325, 340, 347 (2018); *see also* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1146 (2012) (discussing Congress's reliance on private parties to enforce statutes).

244. *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 554 (1984) (describing the eradication of poor housing conditions in the "slums" as the primary motivating factor for the implied warranty of habitability doctrine); Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 544, 550-52 (1982). The warranty of habitability, for example, is intended to prevent blight and the deterioration of the housing stock. *See* Summers, *supra* note 53, at 154-58; David Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 402 (2011). Similarly, the provision of the Rent Withholding Statute that allows tenants to claim any violation of the security deposit as a defense to eviction is meant to prevent widespread landlord abuse of the security deposit statute. *See* Meikle v. Nurse, 49 N.E.3d 210, 215 (Mass. 2016).

245. *See* Adjartey v. Cent. Div. of Hous. Ct. Dep't, 120 N.E.3d 297, 306-07 (Mass. 2019).

In sum, civil probation creates a shadow legal system—a widespread system of alternative substantive and procedural rules for eviction that exists alongside the formal statutory rules. These alternative rules apply to an extraordinary number of tenants at any given point in time and govern the majority of judicial eviction determinations on the merits. This shadow legal system weakens due process protections, erodes the substantive law, and threatens public regulatory enforcement surrounding eviction.

B. Expansion of Landlord Control

The second main consequence of civil probation is the widespread expansion of landlord control, analogous (though not identical) to the expansion of state control brought about by the use of probation in the criminal context.[246] Much as control in the criminal justice system is a racialized phenomenon involving the increased role of the state in the lives of Black people and other people of color,[247] the expansion of landlord control is deeply racialized as well. Black and Hispanic households and other households of color, and Black women-headed households in particular, are disproportionately likely to be brought into the eviction legal system and to experience its consequences.[248] The expansion of landlord control through civil probation is one of these consequences. By "landlord control," I am referring to the extent to which the landlord has the power to direct the course

246. Criminal law scholars have long argued that probation reorients the ideology of the criminal justice system toward an ideology of control. While criminal probation was initially envisioned as a tool of rehabilitation, over time it evolved into a mechanism to monitor the defendant's behavior. *See* GARLAND, *supra* note 6, at 12; Doherty, *supra* note 6, at 354. While the rehabilitative aim did not disappear entirely, it became transformed as the objective of control gained prominence. For example, rehabilitation became less focused on improving the offender's life and opportunities, and more focused on the instrumentalist purpose of ensuring the protection of the public. *See generally* Gwen Robinson, Fergus McNeill & Shadd Maruna, *Punishment* in *Society: The Improbable Persistence of Probation and Other Community Sanctions and Measures*, *in* THE SAGE HANDBOOK OF PUNISHMENT AND SOCIETY 326 (Jonathan Simon & Richard Sparks eds., 2013). Through the widespread use of "intensive" probation orders, probationers are routinely required not only to refrain from unlawful conduct, but also to abstain from a host of otherwise legal behaviors. *See* GARLAND, *supra* note 6, at 177; Doherty, *supra* note 6, at 295. Probationary terms also began to place personal decisions in defendants' lives, such as deciding whether to terminate or accept a position of employment, within the ambit of the probation system. Doherty, *supra* note 6, at 310. Probation officers are deployed as "strict enforcer[s] of the rules" to monitor and surveil probationers' conduct. *Id.* at 334. Fiona Doherty argues that the result of the criminal probation system is "hypersupervision" with "an almost farcical level of control over people's lives." *Id.* at 293-94.

247. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA (2017); CHRIS HAYES, A COLONY IN A NATION (2017).

248. *See supra* notes 47-49 and accompanying text.

of the tenant's conduct. There are two elements involved in establishing landlord control. The first element is the extent to which the landlord has substantive control over tenant conduct—for example, whether and to what extent the landlord has control over the amount of noise the tenant can make, the number of occupants permitted in the apartment, the degree of cleanliness of the space, and so on. The second element is the landlord's ability to enforce the substantive rules. Enforcement, in theory, can take a number of forms, such as imposing financial penalties or issuing warnings.[249] In practice, however, enforcement of tenancy terms typically occurs through eviction.[250] The ability to enforce is therefore primarily a function of the ease with which a landlord can evict.

Civil probation reconfigures both elements of landlord control. The first element of landlord control—the extent to which the landlord substantively dictates the course of tenant conduct—is typically configured by the lease. A typical lease sets forth a host of rules for tenant conduct, such as restrictions on noise, disturbances, and the number of household occupants, among many others. Civil probation agreements represent a new and additional means by which substantive rules are set. As described in Part IV.B, civil probation agreements result in the expansion of the substantive rules of the tenancy in about one-third of cases.[251] In these agreements, the probationary conditions impose new obligations on the tenant, outside of the existing terms of the lease.[252] While some of these new obligations are relatively benign, many impose quite meaningful restrictions and requirements on the tenant's conduct: that the tenant participate in mental health treatment, not have guests, or attend financial counseling, for example.[253]

To be sure, as David Hoffman and Anton Strezhnev have recently documented, leases frequently contain oppressive and unenforceable terms.[254] In theory, many of the new obligations imposed as probationary conditions could, legally or illegally, appear as lease terms. However, there are two reasons why the inclusion of these obligations as lease terms is unlikely. First, leases increasingly take the form of standardized form contracts, and existing research suggests that landlords, and particularly corporate and subsidized

249. An example of a financial penalty would be a late fee for rent paid past the due date.

250. *See* Philip M.E. Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638, 639 (2019) (finding that landlords "serially file for eviction" as a way to coerce tenants to comply with their rental obligations).

251. *See supra* Part IV.B.

252. *See supra* Part IV.B.

253. For more examples of the types of new obligations imposed, see Part IV.B above.

254. *See* Hoffman & Strezhnev, *supra* note 156, at 91 (reporting their finding that unenforceable and oppressive terms have become increasingly common in residential leases over the past twenty years).

landlords, do not vary their leases at all across tenants.[255] The overall variation and the range of new obligations included as probationary conditions suggest that they are tailored to the particular tenant's circumstances.[256] Thus, it is unlikely that these individually tailored rules would appear in relatively standardized leases. Second, over three-quarters of civil probation agreements that impose new obligations are in subsidized tenancies, where lease terms are strictly regulated.[257] In those tenancies, it is even less likely that individually tailored lease terms would appear.[258]

Regardless of whether specific probationary conditions would or could appear as lease terms, civil probation agreements represent a novel and additional means by which substantive rules dictating tenant conduct are set. The approximately one-third of civil probation agreements that impose new obligations on tenants create more rules with which the tenant must comply and which the landlord has the power to enforce.[259] In doing so, they widen the substantive scope of landlord control over tenant conduct.

Civil probation also reconfigures the second element of landlord control — the landlord's ability to enforce the substantive rules. It does so by establishing an enforcement system for tenancy transgressions that is faster, affords less substantive leeway to tenants, and contains fewer procedural hoops than the enforcement system that exists under the formal law.[260] In other words, the alternative procedural and substantive rules for eviction created by civil probation, which collectively amount to a shadow legal system, strengthen the ability of landlords to use eviction as an enforcement tool for tenant misconduct. Whereas tenants who commit transgressions under ordinary circumstances face eviction through a potentially lengthy process in which they can mount a host of defenses, tenants who commit transgressions while on civil probation face eviction as a "swift and certain" sanction.[261] The landlord's tool to enforce noncompliance thus becomes stronger, and the

255. *Id.* at 105-06 (reporting their finding that the variation across leases "is not *within* landlords, but between them").

256. *See supra* Part IV.B.

257. *See supra* Part IV.B; *see also* Hoffman & Strezhnev, *supra* note 156, at 95-96; 24 C.F.R. § 886.327 (2022).

258. *See* Hoffman & Strezhnev, *supra* note 156, at 99, 123 (describing how housing authorities cleansed leases of unenforceable terms and finding that subsidized leases overwhelmingly complied with federal mandates).

259. *See supra* Part IV.B.

260. *See supra* Part V.A.

261. *See id.* The concept of a "swift and certain" sanction is drawn from literature on the consequences of criminal probation. *See* Doherty, *supra* note 6, at 334 ("Sanction hearings are to be quick and summary."). Under the model of "swift and certain" sanctions, violations of probation automatically or nearly automatically result in imprisonment. *See id.*

substantive rules for tenants become tighter and stricter, with the imposition of civil probation.

Civil probation thus reconfigures the balance of control in the landlord-tenant relationship. It shifts control decidedly upwards, enhancing landlord power to enforce tenancy rules, on the one hand, and increasing restrictions on tenants, on the other. It is unknowable from the data in this study whether landlords file eviction proceedings and sign civil probation agreements with the intention of enhancing their control.[262] And to the extent landlords are interested in enhancing their control, it is also unknowable whether they are interested in control for its own sake, or for some instrumentalist purpose (e.g., to improve their ability to collect rent). Yet, with 37% of all eviction cases and 65% of settlements resulting in civil probation, a primary outcome of the eviction legal system is expanded landlord control.

Traditionally, scholars have considered the transfer of possession and the collection of rent to be the core outcomes of eviction filings.[263] But what civil probation reflects is that a key currency of the eviction legal system—what is often predominantly at stake in the proceeding, and what is regularly being exchanged and reconfigured—is the degree of control the landlord holds over the tenant. As noted above, this control may ultimately serve instrumentalist purposes like collecting rent, but civil probation nonetheless represents yet another instance of the use of the legal system to strip power from low-income communities and communities of color. The result of civil probation is the increased control and regulation of poor people of color and of Black women in particular.

C. The Possibility of Net-Widening

Civil probation also may serve to "widen the net"[264] of the eviction legal system by increasing the number of tenants that are brought into the eviction

262. Qualitative research would be necessary to learn whether landlords are motivated to sign civil probation agreements because they result in an expansion of landlord control.

263. Determination of the legal right to possession has traditionally been considered the primary outcome of an eviction filing. *See, e.g.*, Lindsey v. Normet, 405 U.S. 56, 71-72 (1972) (describing the purpose of an eviction lawsuit as to "settle the possessory issue"); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. POVERTY L. & POL'Y 59, 62-63 (2016) ("Eviction is the process by which a landlord dispossesses a tenant from a property."). More recently, scholars have theorized the eviction system as a forum for rent collection. *See* Garboden & Rosen, *supra* note 250, at 639; Lillian Leung, Peter Hepburn & Matthew Desmond, *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316, 318, 334, 338 (2021); Sudeall & Pasciuti, *supra* note 42, at 1368.

264. The concept of "net-widening" is drawn from the literature on criminal probation. *See* Doherty, *supra* note 6, at 339-40; Thomas G. Blomberg, *Foreword* to DAVID J. ROTHMAN,

footnote continued on next page

legal system and whose tenancies become regulated by it. On one hand, civil probation might be considered beneficial to the extent it acts as a substitute for actual eviction. That is, it is theoretically possible that civil probation agreements are entered into where otherwise the case outcome would be immediate eviction. And to the extent that occurs, we might conclude that civil probation agreements play an important role in promoting housing stability. The counterfactual of civil probation agreements—the outcomes that would have resulted if the parties could not enter into civil probation agreements—is unknowable from the study data. Yet two data points together suggest (though certainly do not prove) that civil probation agreements are not primarily used in lieu of actual eviction and are instead used in cases where actual eviction is *not* the landlord's objective. First, civil probation agreements are entered into in cases with relatively low amounts of rent owed.[265] The data revealed that the median amount of rent owed in cases that resulted in civil probation is $950, which is less than half the median amount of rent owed across all nonpayment of rent cases ($1,925).[266] Second, civil probation agreements are overwhelmingly entered into in cases involving public and subsidized housing.[267] It is a financially disadvantageous for landlords to carry out evictions in these low arrears, public and subsidized housing cases.[268]

Much research has shown that actual evictions are extremely costly for landlords—eviction typically results in two months' lost rent plus turnover costs.[269] A corporate landlord with a large portfolio of multifamily properties in Boston recently stated publicly that an eviction costs between $2,500 and $8,000 per unit.[270] These costs "can be enough to push a property into the red, jeopardizing the long-term health of the housing stock."[271] In general, it is

CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA at i, xii (rev. ed. 2002).

265. *See supra* Part IV.A.

266. *Id.*

267. *See id.*

268. Actual eviction is also often legally unlikely in these circumstances. For example, where a tenant owes only a small amount of rent, there is a strong likelihood that the landlord will not have a legal right to possession. *See* MASS. GEN. LAWS ANN. ch. 239, § 8A (West 2022). And if a tenant has committed a relatively minor lease infraction—for example, has failed to complete annual recertification paperwork—it is likely the judge will decline to order eviction.

269. Garboden & Rosen, *supra* note 250, at 642; *see also* Meredith Greif, *Regulating Landlords: Unintended Consequences for Poor Tenants*, 17 CITY & CMTY. 658, 663 (2018); Philip M.E. Garboden & Sandra Newman, *Is Preserving Small, Low-End Rental Housing Feasible?*, 22 HOUS. POL'Y DEBATE 507, 519 (2012).

270. WINNCOMPANIES, MASSACHUSETTS' HOUSING STABILITY PROGRAM 2 (n.d.) (on file with the author).

271. Garboden & Rosen, *supra* note 250, at 642.

often an immediate financial loss for landlords to complete an eviction where only a small amount of rent is owed.

Completing an eviction over a low amount of unpaid rent is especially financially disadvantageous for public and subsidized landlords. In addition to the financial costs associated with eviction, such landlords face little potential upside from replacing one tenant with another. Tenants who reside in public and subsidized housing are by definition low-income, and overall poverty leads to inconsistent rental payments at a systemic level.[272] Public and subsidized landlords are often required to replace evicted tenants with prospective tenants from a waiting list.[273] There is no reason why a tenant from the waiting list would be more likely to consistently pay rent in full and on time compared with a current tenant, as both likely face similar financial constraints.[274] This analysis suggests that the alternative to civil probation agreements in many of public and subsidized cases is unlikely to be actual eviction—it is simply not worth the cost.[275]

To be sure, the data does not and cannot prove the counterfactual to civil probation agreements, and it is quite possible that in some cases it is eviction.[276] Yet empirical research in other jurisdictions further supports the proposition that actual eviction is often not the landlord's objective when filing an eviction case.[277] This research has shown that landlords file eviction cases not with the goal of actual eviction, but instead with the goal of rent collection.[278] By

272. Studies show that late and missed rental payments are widespread in low-income housing. Daniel Brisson & Jennifer Covert, *Housing Instability Risk Among Subsidized Housing Recipients: Characteristics Associated with Late or Nonpayment of Rent*, 39 SOC. WORK RES. 119, 122 (2015); *see also* Lawrence M. Berger, Theresa Heintze, Wendy B. Naidich & Marcia K. Meyers, *Subsidized Housing and Household Hardship Among Low-Income Single-Mother Households*, 70 J. MARRIAGE & FAM. 934, 941 (2008) (finding that 34% of households receiving unit-based assistance and 40% of households receiving tenant-based assistance had difficulty paying rent).

273. Landlords of tenants with Section 8 Housing Choice Vouchers are not required to replace their tenant with another Section 8 voucher tenant. *See generally* 24 C.F.R. § 982.1 (2022). In addition, certain subsidized units in certain circumstances convert to market-rate units upon the tenant vacating the unit, which would allow the landlord to rent to any prospective tenant. *See* Emily Achtenberg, *Maturing Subsidized Mortgages: The Next Frontier of the Expiring Use Crisis* 6 (Ctr. for Soc. Pol'y, Working Paper No. 2009-8, 2009), https://perma.cc/7CBQ-877K.

274. *See supra* note 273.

275. *See* Garboden & Rosen, *supra* note 250, at 645 (describing research showing that most eviction cases do not end in actual eviction).

276. I suspect that civil probation agreements most commonly act as a genuine alternative to eviction where they are entered into in cases involving high amounts of rent owed or serious lease violations.

277. *See* Garboden & Rosen, *supra* note 250, at 639; Leung et al., *supra* note 263, at 318; Sudeall & Pasciuti, *supra* note 42, at 1419-20.

278. *See, e.g.*, Sudeall & Pasciuti, *supra* note 42, at 1419-20.

engaging in "serial eviction filing," landlords leverage the threat of displacement as a mechanism to collect rental debts and to deter future nonpayment.[279]

To the extent civil probation agreements do not substitute for actual eviction, they represent an overall "net-widening"—an expanded reach—of the eviction legal system. Scholars have well documented the "net-widening" effect of criminal probation in certain jurisdictions.[280] In the criminal context, rather than serving as a true alternative to incarceration, criminal probation instead can serve to widen the net of carceral control by subjecting additional people to criminal punishment, namely, those who have committed minor offenses for which incarceration would not be imposed.[281] Similarly, where civil probation is not serving as an alternative to eviction, it expands the scope of regulation of the eviction legal system overall. The result is that tenancies that otherwise would be governed by an ordinary lease contract become regulated instead by a court order.[282] The expanded regulatory scope of the eviction legal system then heightens exposure to actual eviction by both increasing the number of substantive tenancy rules and weakening substantive and procedural protections, potentially leading to more actual evictions and higher rates of eviction.

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279. *See, e.g.*, Leung et al., *supra* note 263, at 318.

280. *See* Doherty, *supra* note 6, at 339; Blomberg, *supra* note 264, at xii; STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION 126 (1985) (using the term "net-widening" to describe the effect of probation in bringing greater numbers of individuals into the criminal justice system); Robinson et al., *supra* note 246, at 326. *But see* Phelps, *supra* note 6, at 72 ("The results suggest that across place and time, probation paradoxically exerts both a prison alternative and net-widener effect, with the two forces often cancelling one another out.").

281. Phelps, *supra* note 6, at 72; *see* ROTHMAN, *supra* note 264, at 12-13. David Rothman first identified this effect in the early 1970s. *See* ROTHMAN, *supra* note 264, at 12-13. He observed that probation was not acting as a substitute for incarceration, but instead was being imposed for different types of offenses than those for which incarceration was typically imposed. *Id.* This phenomenon is now referred to as "front-end net-widening." *See* Marcelo F. Aebi, Natalia Delgrande & Yann Marguet, *Have Community Sanctions and Measures Widened the Net of the European Criminal Justice Systems?*, 17 PUNISHMENT & SOC'Y 575, 576 (2015). Scholars have also identified "back-end net widening," which occurs when probation results in increased incarceration rates through revocations of probation. *See* Phelps, *supra* note 6, at 57; Michelle S. Phelps, *Ending Mass Probation: Sentencing, Supervision, and Revocation*, FUTURE OF CHILDREN, Spring 2018, at 125, 126 (describing how probation can operate as a "delayed path" to incarceration). Michelle Phelps' analyses of state-level and nationwide data have demonstrated empirical support for the occurrence of net-widening overall since the 1990s. *See* Phelps, *supra* note 6, at 67. In the context of civil probation and the eviction legal system, the possibility of net-widening I am focusing on here is analogous to "front-end net widening"—that civil probation may draw more people into regulation by the eviction legal system to the extent it is used for different types of rental violations than eviction.

282. *See supra* Part V.B.

More research is needed to rigorously assess the counterfactual to civil probation agreements and the extent to which they substitute for actual eviction. Nevertheless, the existing data from this study and prior research findings do not suggest that civil probation serves as a bona fide substitute for actual evictions.

VI. Potential Reforms

While a full discussion of the policy solutions to the problems presented by civil probation is beyond the scope of this Article, this Part proposes several potential reforms that should be considered by policymakers and explored in future scholarship. Reforms aimed at curbing civil probation should be designed carefully to respond to its specific negative consequences: a one-sided shadow legal system that undermines tenants' formal rights; the expansion of landlord control over tenant conduct; and the potential widening of the eviction legal system overall.

Effective reforms are likely to be those that respond to the underlying motivations of the actors involved in civil probation agreements. Why do landlords desire these agreements, why do tenants sign on to them, and why do judges approve them? Attempting to answer these questions, while keeping in mind the goals of reform, helps point towards meaningful solutions that create systemic change rather than merely reshape existing problems. This Part briefly considers potential reforms in three categories: (1) reforms that respond to landlords' motivations for obtaining civil probation agreements, (2) reforms that address tenants' reasons for entering into civil probation agreements, and (3) reforms that address the reasons judges fail to meaningfully police civil probation agreements.

A. Reforms Targeting Landlords

Regardless of the specific motivations of landlords, the data make clear that expanded control, obtained through the eviction legal system, is a tool for the resolution of tenancy issues. This finding is in many ways unsurprising given that the eviction legal system is currently the primary institution available to landlords to respond to social and economic problems in their rental units.[283] That is, if a tenant fails to pay rent or causes a disturbance in their unit, the only robust institutional system in place for resolution of the issue is the eviction legal system.

283. *See* Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1493-94, 1496-97, 1501 (2022).

Reforms should be implemented to provide alternative institutional structures to handle landlord-tenant issues. Particularly during the Covid-19 pandemic, several states have experimented with "upstreaming"[284] or "eviction diversion"[285] programs that provide assistance to tenants and landlords prior to the initiation of an eviction filing.[286] These policies create an alternative structure for resolving economic and social problems that emerge in rental housing: They offer mediation, financial assistance, and social services to address the issues that typically underlie eviction filings, in many instances without the trigger of a court case.[287] For example, where a tenant is in arrears, upstreaming programs provide rental assistance so that the landlord can be made whole without filing for eviction.[288] Where a tenant who suffers from mental health disabilities is creating disturbances at the property, they will put in place treatment and other social services to help prevent the behavior from recurring.[289] Mediation and other alternative dispute resolution services are often a feature of these policies, as they can serve as the forum for the development of a solution that is mutually agreeable to both landlord and tenant.[290]

If upstreaming programs are effective in resolving issues of unpaid rent and improper tenancy conduct, they are likely to make landlords less inclined to use the eviction legal system for these ends. Upstreaming policies are particularly likely to be effective in diverting eviction filings to the extent

284. "Upstreaming" policies are specifically those that provide assistance to tenants before an eviction case is filed. *See* MYCHAL COHEN & ELEANOR NOBLE, URB. INST., PREVENTING EVICTION FILINGS: PILOTING A PRE-FILING EVICTION-PREVENTION CLINIC 3-4 (2020), https://perma.cc/R62V-Y4N7.

285. "Eviction diversion" policies include both policies that provide services prior to an eviction filing and those that try to prevent actual eviction once a case has been filed. *See* MARK TRESKON, SOLOMON GREENE, OLIVIA FIOL & ANNE JUNOD, URB. INST., EVICTION PREVENTION AND DIVERSION PROGRAMS: EARLY LESSONS FROM THE PANDEMIC 1 (2021), https://perma.cc/639Z-N345.

286. *See* DEANNA PANTÍN PARRISH, AM. BAR ASS'N & HARV. NEGOT. & MEDIATION CLINIC PROG., DESIGNING FOR HOUSING STABILITY: BEST PRACTICES FOR COURT-BASED AND COURT-ADJACENT EVICTION PREVENTION AND/OR DIVERSION PROGRAMS 3, 35 (2021), https://perma.cc/2AV4-JY2Q; LOC. HOUS. SOLS., ABT ASSOC. & NYU FURMAN CTR., COVID-19 EMERGENCY RENTAL ASSISTANCE PROGRAMS IN TEN LOCALITIES (2021), https://perma.cc/QZU7-8K6M; COHEN, *supra* note 284, at 3-4.

287. *See* PARRISH, *supra* note 286, at 25*;* Anna Blackburne-Rigsby & Nathan Hecht, Opinion, *It Should Take More Than 10 Minutes to Evict Someone*, N.Y. TIMES (Jan. 13, 2022), https://perma.cc/NCZ9-224A (describing jurisdictions that have implemented eviction diversion programs).

288. *See Preparing for the Expiration of Covid-19 Eviction Moratoria*, LOC. HOUS. SOLS. (Oct. 13, 2020), https://perma.cc/R7KZ-5LR8.

289. *See, e.g.*, *Tenancy Preservation Program (TPP)*, UMASS MEM'L HEALTH: CMTY. HEALTHLINK, https://perma.cc/GF88-A28F (archived Feb. 28, 2023).

290. *See, e.g.*, *id.*

they provide landlords an opportunity to resolve tenancy issues that is quicker, cheaper, and involves less hassle than doing so through the eviction system. While upstreaming policies have yet to be rigorously evaluated, preliminary evaluations suggest that they indeed lead to fewer eviction filings.[291] A recent survey of landlords also found that over 70% would be willing to address issues of nonpayment of rent outside the court system if presented with the opportunity to do so.[292] These data suggest that where landlords are offered an efficient means of resolving underlying social and economic issues with their tenants, they rely less on the eviction system for this purpose.

By creating an alternative institutional structure for the resolution of economic and social issues, upstreaming and eviction diversion programs stand to reduce the landlords' need for civil probation agreements.

B. Reforms Targeting Tenants

Policies also should be enacted to address the reasons tenants enter into civil probation agreements once they are brought into court. Abundant research has documented that tenants sign one-sided settlement agreements because they are pressured into doing so.[293] Massive power disparities exist between landlords and tenants in eviction court, chief among them that most landlords are represented by counsel and most tenants are pro se.[294] Additionally, landlords and their attorneys are frequently repeat players, are sophisticated and savvy in the judicial forum, and are predominantly male, wealthy, and white.[295] Tenants in eviction court, by contrast, are overwhelmingly low-income women of color who are unfamiliar with the legal system.[296] As Russell Engler and others have repeatedly shown, landlords and their attorneys take advantage of these disparities by using unscrupulous and even unethical practices to pressure tenants into signing predrafted settlement agreements.[297]

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291. *See, e.g.*, PARRISH, *supra* note 286, at 36; *see also* Unemployment Info. Ctr., Philadelphia Residential Mortgage Foreclosure Diversion Pilot Program: Survey of Outcomes for Homeowners Facing Foreclosure Who Entered the Diversion Program Between June 2008 and Feb. 2009, at 2 (2009), https://perma.cc/K7TU-LMLZ. *See generally* COHEN & NOBLE, *supra* note 284, at 3-4; U.S. Interagency Council on Homelessness Prevention, SAMHSA's Expert Panel on the Prevention of Homelessness, https://perma.cc/X3QC-692D (archived Feb. 28, 2023).

292. *See* PARRISH, *supra* note 286, at 17.

293. *See supra* Part I.

294. *See supra* Part I.

295. *See supra* Part I.

296. *See supra* notes 57-58 and accompanying text.

297. *See supra* notes 60-62 and accompanying text.

Right to counsel policies that entitle low-income tenants to free legal representation help equalize this imbalance of power. Among other advantages, access to counsel enables tenants to negotiate settlements on a more equal footing, which leads to more balanced outcomes.[298] While no research has specifically investigated the impact of access to counsel on civil probation agreements, studies have consistently shown that access to counsel results in better settlement outcomes for tenants, including a lower likelihood that a possessory judgment will be issued in favor of the landlord.[299] Studies also show that tenants who are represented by counsel are more likely to have their cases dismissed and to prevail at trial.[300] It is therefore highly likely that greater access to counsel for tenants would result in both lower rates and better terms of civil probation agreements.

In addition to the disparities in bargaining power, tenants may sign unfavorable settlements because they are unable to effectively bring their cases to trial without counsel. Unrepresented tenants are likely unaware of the defenses available to them, are unequipped to introduce evidence, and do not speak in the legalistic terms and frameworks that are often required to succeed before a judge.[301] Thus, tenants sign settlements because their alternative—taking the case to trial—is unlikely to succeed. While right to counsel policies would eliminate most of these concerns, jurisdictions that do not adopt such policies should consider other judicial reforms to make trial a more viable option for pro se tenants.

A primary solution advanced to help level the playing field within the courtroom where there are imbalances of power and representation is to dramatically reform the judicial model.[302] Specifically, proponents argue for a model of active judging that "sets aside traditional judicial passivity in favor of some form of judicial intervention or activity to assist people without

298. *See supra* notes 52-62 and accompanying text.

299. *See supra* notes 53-56.

300. *See supra* notes 54-56.

301. *See* Steinberg, *supra* note 54, at 754-56; Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 287.

302. *See, e.g.*, Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 512-13 (2022); Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 661 (2017); Steinberg, *supra* note 52, at 800-02; Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 BYU L. REV. 899, 906; Engler, *Out of Sight and Out of Line*, *supra* note 3, at 142-43; Engler, *And Justice for All*, *supra* note 3, at 2028; Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 975-78 (2004). *See generally* Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear* Pro Se*: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 437 (2004).

counsel."[303] Under the current judicial model, judges presiding over eviction trials operate within an adversarial framework in which they act as passive umpires, applying the procedural and evidentiary rules without assisting litigants.[304] Within an active judge model, by contrast, judges take affirmative steps to assist unrepresented litigants in navigating the legal proceeding.[305] These steps may include eliciting information from witnesses to develop the factual record, identifying legal issues, and simplifying the procedures.[306] Informed by empirical research on state court judges across numerous jurisdictions, Anna Carpenter and her co-authors have highlighted the barriers to judges taking on a more active role, including docket pressure, the lack of a requirement to take on such a role, and ambiguity in the type of assistance to unrepresented litigants that is appropriate.[307]

Adoption of an active judicial model paired with reforms to address the barriers identified by Carpenter and her coauthors could present a viable solution to help curb civil probation. A well-functioning active judging model in eviction court would allow unrepresented tenants to litigate their cases without facing substantial barriers around the introduction of evidence, presentation of the appropriate facts, or awareness of the applicable claims and defenses. Reducing these barriers would offer tenants the realistic option of having their case tried on the merits before the judge, in turn making them less vulnerable to landlord pressure to sign civil probation agreements. Indeed, at least one study has found that where active, inquisitorial, and informal judicial roles are adopted, only a small number of cases settle (and the case outcomes rendered by judges are accurate).[308] Reforming the judicial role in eviction court to more closely align with this model thus could serve as a powerful mechanism to reduce the scope, prevalence, and deleterious consequences of civil probation.

Finally, yet an additional reason tenants enter into civil probation agreements is that in certain circumstances, it is their only opportunity to retain their housing. Where tenants do not have viable defenses to eviction—where they do not have monetary damage claims against their landlords in nonpayment of rent cases, for example, or where they do not have a basis to claim retaliation, discrimination, or a procedural defect—a civil probation agreement often provides the only vehicle for housing stability. This situation often occurs where tenants owe past due rent and do not have meritorious

303. Carpenter, *supra* note 302, at 650.

304. *See generally* Baldacci, *supra* note 66; Bezdek, *supra* note 66.

305. Baldacci, *supra* note 66, at 688.

306. *See* Carpenter et al., *supra* note 302, at 513; Steinberg, *supra* note 302, at 947-48.

307. *See* Carpenter et al., *supra* note 302, at 557-62.

308. *See* Steinberg, *supra* note 241, at 1069, 1080.

defenses to eviction, but could preserve their tenancy if they had an opportunity to pay the arrears. Under statutory law, tenants only have a right to cure—a right to avoid eviction by paying rental arrears—in the early stages of their eviction case.[309] By the time of the first court date, the right to cure has already expired.[310] Thus, even if a tenant is able to pay the total amount of money owed or is presently applying for rental assistance on their first court date, they no longer have a legal right to retain their housing by satisfying the arrears. The result is that where a tenant appears in court and wants to avoid eviction by paying what they owe, their only option is to seek leniency from the landlord. As the data show, however, landlords bestow leniency not in the form of a narrowly-tailored settlement agreement that simply grants a time period for repayment, but rather in a much more expansive, much longer, and much more restrictive civil probation agreement.[311]

Policymakers would be wise to adopt legislative reforms that extend the right to cure such that tenants have a more meaningful opportunity to repay arrears without forgoing other rights. Legislation, for example, could establish a right to cure that extends at least until the time the eviction is executed. Ideally, the law would mandate a certain "pause period" in the case for the tenant to repay arrears and would require dismissal if there is a zero balance by that date.[312] This legislation should be paired with reforms that afford tenants realistic amounts of time to access rental assistance. Such policies would reduce the power of landlords to dictate the terms under which tenants have a right to remain and would instead reinvest that power back in the legislature.

C. Reforms Targeting Judges

Lastly, reforms should address the reasons judges fail to effectively police civil probation agreements. As scholars have repeatedly documented over the past several decades, judges exercise extremely minimal monitoring and oversight of settlement agreements in eviction court.[313] Their role is merely a "rubber-stamp"; at most, they make a minimal inquiry into whether the tenant

309. *See* MASS. GEN. LAWS ANN. ch. 186, §§ 11, 12 (West 2022). Where the tenant does not have a lease, the right to cure expires ten days after service of the notice to quit, and where the tenant has a lease, the right to cure expires on the answer deadline (which is three days prior to the first court date). *See id.*

310. *Id.*

311. *See supra* Part III.B, IV.A-C.

312. During the Covid-19 pandemic, Massachusetts enacted a temporary law that required eviction cases to be stayed while the tenant's application for rental assistance was pending. *See* An Act Providing for Emergency Eviction Protections During the Covid-19 Pandemic Emergency, 2020 Mass. Legis. Serv. ch. 257 (West).

313. *See supra* Part I.

entered into the agreement freely and voluntarily.[314] The empirical findings presented here make clear that a primary outcome of this passive judicial role is widespread civil probation. Left to their own devices, landlords and tenants enter into expansive and lengthy civil probation agreements. Consistent with the findings of other researchers, judges approve these agreements even where the terms are clearly overbroad, one-sided, and undermine the rule of law.

Perhaps surprisingly, this passive judicial role is not legally mandated. Nothing in the Judicial Code of Ethics of the study jurisdiction requires judges to simply approve all settlement agreements that come before them.[315] To the contrary, the Code expressly authorizes judges to play a more interventionist role when dealing with unrepresented parties.[316] Among other actions, judges are permitted to make accommodations for unrepresented litigants and to participate in settlement discussions.[317] Thus, judges are not declining to play a more active role in monitoring civil probation agreements because they are barred from doing so. Rather, the more likely explanations are that they do not have the time, desire, or training such a role would require.

Reforms should address each of these potential barriers to a more active judicial role.[318] Judges' dockets in lower-level state civil courts are extremely large, and court systems often place enormous pressure on judges to move cases through the system quickly.[319] Indeed, at a typical seven-hour eviction session in Boston, each judge has upwards of fifty to seventy trials and motions on their docket.[320] Judges manage their dockets by relying on parties to settle cases without their involvement.[321] Reforms that reduce judges' dockets would likely encourage and make feasible the meaningful policing of civil probation agreements.

To the extent judges do not actively monitor civil probation agreements because they do not want or do not know how to do so, court systems should set forth specific rules and protocols for judges to follow when confronted with

314. *See* Engler, *And Justice for All*, *supra* note 3, at 1988, 2019-20.

315. *See generally* MASS. JUD. CODE ETHICS (2015).

316. *See* MASS. JUD. CODE ETHICS R. 2.3, 2.6 (2015).

317. *See* MASS. JUD. CODE ETHICS R. 2.6 cmt. 2 (2015).

318. *See* Carpenter et al., *supra* note 302, at 557-62 (identifying barriers to active judging); *see also* Engler, *Out of Sight and Out of Line*, *supra* note 3, at 142; Engler, *And Justice for All*, *supra* note 3, at 1988.

319. Carpenter et al., *supra* note 302, at 557.

320. Bos. Hous. Ct., Motion List, Thursday, April 25, 2013 (2013) (on file with the Eastern Housing Court of Massachusetts); Bos. Hous. Ct., Trial List, Thursday, April 25, 2013 (2013) (on file with the Eastern Housing Court of Massachusetts).

321. Engler, *And Justice for All*, *supra* note 3, at 1988, 2019-20.

these agreements.[322] Best practices for reviewing civil probation agreements at minimum should include: (1) making rigorous inquiries into the length of the probationary period, particularly where the period extends beyond the satisfaction of arrears; (2) making rigorous inquiries into the scope of the probationary terms, particularly where the terms extend beyond the original basis for eviction; (3) ensuring that all terms included are the product of genuine negotiation between the parties; and (4) ensuring that unrepresented tenants are aware of their rights to refuse settlement and have their case tried on the merits before a judge (or jury). A more detailed discussion of the implications of the civil probation findings for settlement theory and the role of the judge in settlement will be set forth in future scholarship.

Conclusion

This Article is the first to present empirical findings on the content of eviction settlements, to document the existence and theorize the concept of *civil probation*, and to articulate its consequences for the eviction legal system as a whole. The Article exposes a shadow legal system that drives how the eviction legal system operates in practice. It also demonstrates that expansion of landlord control is a key outcome of the eviction legal system as a whole. Finally, it raises the possibility that civil probation has brought about a "widening" of the eviction legal system akin to that brought about by probation in the criminal legal system.

The conclusions of this Article point towards several directions for future research. As this is the first scholarly work to expose civil probation in the eviction legal system, there is much need for further research on the phenomenon. The study findings reveal the scope and contours of civil probation in one jurisdiction with protectionist landlord-tenant laws. Studies should be undertaken to investigate its emergence across jurisdictions. Does civil probation exist in all protectionist states, or only some? Does it exist in states without protectionist laws? To what extent is there variation in its prevalence and specific features? And if there is variation, what accounts for it? Probing these questions will enable a deeper and more comprehensive understanding of the eviction legal system, the procedural and substantive laws by which it operates, and the reforms that are needed to make it more equitable and just for the litigants it serves.

The core study finding—that civil probation agreements account for the substantial majority of all eviction settlements—highlights the need for in-

322. In their empirical study of judicial practices across state civil courts, Carpenter and her coauthors found that judicial guidance that is only advisory often leads to confusion and inertia among judges, resulting in low take-up rates of recommended practices. *See* Carpenter et al., *supra* note 302, at 557.

depth, nuanced investigations into the eviction legal system, as well as lower-level state civil courts more generally. Without rigorous empirical studies of trial court-level processes and outcomes, major phenomena that drive how the systems operate in practice will be obscured. The phenomenon of civil probation would never be revealed by studying eviction appellate case law, statutes, and procedure as formally written. This Article thus highlights the importance of what Andrew Hammond describes as civil procedure scholarship "from the bottom up"—scholarship on "the everyday procedures that define civil adjudication."[323] As demonstrated here, such scholarship shines a clear light on the actual procedural workings of the lower courts. It shows that the procedures differ meaningfully and substantially from the procedural law as formally codified, and that this difference is brought about by a specific mechanistic tool. More studies of lower-level state courts, including eviction courts, are needed.

323. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1526 (2019).