RESIDENTIAL EVICTIONS IN FLORIDA: WHEN THE RENT IS DUE, WHERE IS THE PROCESS?

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The first time I went to court, as a brand new lawyer, I represented a tenant who was being sued for eviction by the local housing authority. My client was not in court with me that day because she had no transportation. I offered her a ride, but she did not show up at my office that morning. As I left the courthouse I was very glad to have a few minutes alone. The judge had ruled against us, in favor of the housing authority, because I had not been allowed to raise any defense on my client's behalf. As I got in my car, I tried to formulate a way to tell my client that she had twenty-four hours to vacate her apartment.

When I got back to the office, my client was in the waiting room. I sat down beside her and told her that we had lost, that she would need to get out of the apartment immediately. She asked me, "Where will I go?" I had no answer. She had no family, no close friends, not even a car in which to sleep. Eviction from subsidized housing is the deadest of dead-ends.

For me, this was an inauspicious beginning to a legal career that has actually gone fairly well. For the client, on the other hand, it was one long step toward joining the ranks of the homeless.[1] That feeling of utter helplessness has never left me.

I. CONTEXT

Under Florida residential landlord-tenant law, a tenant who is sued for eviction must deposit any alleged past-due rent into

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1. Robert Bickel, *Limited Legal Services: Is It Worth It?* 39 Colum. J.L. & Soc. Probs. 331, 350 (2006) (noting that low-income families subject to eviction will likely be forced into homelessness).

the registry of the court if he or she wants to present any defense in the eviction proceeding.[2] Most tenants do not know this, and withhold rent for any number of possibly valid reasons. When the landlord sues for eviction, the money is just not there to deposit with the court. No defenses can be raised, and the tenant is evicted—nearly every time. This is a charade that consumes valuable court time and resources while disregarding basic notions about the human need for housing.

Florida should adopt the Uniform Residential Landlord and Tenant Act (URLTA)[3] to cure the deficiencies in the current law. The URLTA protects property owners from delinquent or otherwise undesirable tenants, while also protecting tenants from summary evictions that lack any true opportunity to be heard. Current Florida residential landlord-tenant law does neither.[4]

This Article addresses the deficiencies in Florida's residential landlord-tenant law and suggests ways that the URLTA could cure those deficiencies. This Article's goal is to provide a practical overview of the advantages that Florida's landlords and tenants could reap if the legislature were to adopt the URLTA.

A. How Residential Eviction Cases Arise in Florida

Under Section 83.60 of the Florida Statutes, a tenant who wishes to raise any defense to an eviction action, other than payment of the rent, must deposit any alleged past-due rent into the registry of the court. Failure to do so "constitutes an absolute waiver" of any and all defenses that may otherwise be available to the tenant,[5] entitling the landlord to "an immediate default judgment," with no further notice or hearing for the tenant.[6]

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2. Fla. Stat. §§ 83.40–83.797 (2004 & Supp. 2005).

3. Unif. Residential Landlord and Tenant Act (URLTA) §§ 1.101–5.101, 7B U.L.A. 527–647 (2000 & Supp. 2005). Florida adopted a version of the URLTA in 1973, but there are major differences between Florida's version and the Uniform version. *See* 7B U.L.A. at 528. For an example relevant to this paper, compare Florida's twenty-four hour notice of eviction procedure with the URLTA's fourteen to thirty-day eviction procedure. *Compare* Fla. Stat. § 83.62(1) *with* 7B U.L.A. at 627. "The Florida Act is a substantial adoption of major provisions of the Uniform Act, but it contains numerous variations, omissions and additional matter . . . ." 7B U.L.A. at 528.

4. Fla. Stat. §§ 83.40–83.797. Particularly, see Fla. Stat. § 83.60, which requires tenants post a bond in the amount of any unpaid rent before the tenant may raise any claims or defenses.

5. *Id.* at § 83.60(2); *In re Atkins*, 237 B.R. 816, 819 (Bankr. M.D. Fla. 1999); *First*

Very few residential eviction cases in Florida are reported.[7] This is primarily because most defendants in such suits are not represented by legal counsel,[8] so no appeal is ever filed. Furthermore, if the defendant-tenant is never allowed to raise a defense or counterclaim, there is unlikely to be a ground for appeal.

To put Florida's law in context, imagine a landlord whose tenant does not pay the rent when it is due on the fifteenth of the month. The landlord calls or writes the tenant, who responds that she will only pay the rent when the landlord reimburses her for the damage to her property that resulted from a leak in the roof. The landlord files suit for eviction. The tenant is served with the summons and complaint and files a written response with the court, explaining that she is withholding the rent because, in her mind, the landlord actually owes her money, not the other way around. Furthermore, claims the tenant, the landlord's notice to her was insufficient because she did not receive it until twenty-four hours before the landlord claimed he would evict her.[9] The

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Hanover v. Vazquez, 848 So. 2d 1188, 1191 (Fla. 3d Dist. App. 2003); *K.D. Lewis Enters. Corp. v. Smith*, 445 So. 2d 1032, 1036 (Fla. 5th Dist. App. 1984).

6. Fla. Stat. § 83.60(2).

7. *See* Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 Hous. Policy Debate 472 (2003) (available at http://fanniemaefoundation.org/programs/hpd/pdf/hpd_1404_hartman.pdf) (noting severe impediments nationwide in statistics collection regarding evictions). The exception to this rule comes in the form of lawsuits involving tenants of federally subsidized housing, whose rights are different from and greater than those of tenants in private, non-subsidized housing. Sarah Clinton, *Evicting the Innocent: Can the Innocent Tenant Defense Survive a Rucker Preemption Challenge?* 85 B.U. L. Rev. 293, 296–301 (2005) (discussing a public housing tenant's rights). Recipients of federally subsidized housing are given greater rights perhaps because, as stated in the Introduction, *supra*, eviction from subsidized housing is most often a direct path to homelessness.

8. Because landlord-tenant actions are civil, not criminal, tenants do not enjoy a constitutional guarantee to legal counsel. *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18, 25 (1981) (concluding that because civil cases involve no potential for loss of physical liberty, there is no constitutional guarantee of legal counsel). Studies have demonstrated the gross disparity between landlords' representation and that of tenants. *See e.g.* Emily Jane Goodman, *Housing Court: Should Tenants Have a Guaranteed Right to Counsel?* http://www.gothamgazette.com/article/law/20060125/13/1735 (Jan. 25, 2006) (noting that the New York Lawyers Association found that over ninety-seven percent of New York City landlords were represented in court in 2004, while only about twelve percent of tenants were represented by counsel).

9. The landlord must provide the tenant with three days' notice. Fla. Stat. § 83.56(3). The only defense a tenant can raise without depositing the alleged past-due rent with the court is that the tenant already paid the rent allegedly in arrears. *Id.* at § 83.60(2). The tenant waives all other defenses by not depositing the alleged past-due rent with the court. *See Colvin v. Hous. Auth. of Sarasota*, 71 F.3d 864, 866 n. 3 (11th Cir. 1996) (explaining

landlord schedules a hearing with the county court judge, and both parties show up prepared to make their arguments. The tenant has not deposited the alleged past-due rent with the court; accordingly, she is not allowed to present any defenses or make any arguments.[10] The judge enters an immediate default judgment in favor of the landlord, and the sheriff's office posts a notice on the apartment door giving the tenant twenty-four hours to vacate the premises.[11] If the tenant does not vacate the premises within that time, the sheriff's office will remove her and her possessions to the street.[12]

B. How Cases Evolve under the URLTA

The scenario would be different under the Uniform Residential Landlord and Tenant Act (URLTA). When rent becomes past-due, the URLTA requires the landlord to send the tenant a written notice.[13] If the tenant pays the rent, the matter is dropped. If the tenant wishes to raise a defense, the matter proceeds to court, where the tenant may be (but is not necessarily) required to post a bond in an amount determined by the court.[14] If the tenant fails to pay the rent due within fourteen days of the written notice, the landlord may terminate the rental agreement.[15] The landlord may then seek and obtain both injunctive relief and damages, and possibly even attorney's fees, based upon the tenant's violation of the rental agreement.[16] The landlord is protected, the tenant has

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that, because the litigant's defense was that she had already paid the rent, the court did not require the litigant to pay the alleged past-due rent into the court's registry).

10. Fla. Stat. § 83.60(2).

11. *Id.* at § 83.62(1). The procedure is automatic: once the court issues a judgment in the landlord's favor, the court clerk "shall" command the sheriff to post a twenty-four hour eviction notice on the premises. *Id.*

12. *Id.* The statutory language is clear, and tenants' possessions are literally carried to the curb. If you have seen piles of rain-soaked household furnishings beside the street, consider whether those are piles of trash or the entire sum of a dispossessed tenant's worldly goods.

13. Unif. Residential Landlord and Tenant Act § 4.201.

14. *Id.* at § 4.105.

15. *Id.* at § 4.201. In states like Oregon that have implemented this provision of the URLTA, the fourteen-day grace period protects the tenant's property interest as well as preserves the landlord's. *See e.g.* Jodie Leith Chusid, Student Author, *The Oregon Residential Landlord and Tenant Act: The Time for Reform*, 77 Or. L. Rev. 337, 351 (1998) (noting that under Oregon's scheme, if the tenant can correct the problem within fourteen days, the landlord can avoid having to evict the tenant).

16. Unif. Residential Landlord and Tenant Act § 4.201. The "landlord has a claim for

meaningful notice of the impending eviction, there is no need for a sham court appearance, and the ultimate result for nonpayment of rent (recovery of possession) is the same.

C. Results of Eviction Cases under Current Florida Law

Under Section 83.60 of the Florida Statutes, a tenant sued for eviction cannot win. If the tenant has the money when she is sued, she will pay the rent—she will not deposit it in the registry of the court—and the lawsuit will be dismissed. If she does not pay the rent, she will lose the lawsuit and she will be displaced.[17] It is as simple as that. No residential eviction cases filed in Pinellas County in 2004 were decided in favor of the tenant; in every case, the tenant was evicted and possession was returned to the landlord.[18]

Furthermore, any counterclaim a tenant might have raised, but was precluded from raising due to the summary nature[19] of the proceedings, may be lost forever.[20] Courts are inclined to declare any counterclaims moot once the tenant has vacated the premises,[21] which, under current Florida law, occurs within twenty-four hours of the entry of a default judgment in favor of the landlord.[22] For example, a tenant who is sued for eviction but hopes to counterclaim based on a landlord's failure to provide the statutorily required notice, will never have her counterclaim heard. She will be sued for eviction, fail to deposit the alleged past-due rent into the registry of the court, have a default judgment entered against her, and vacate the premises (whether voluntarily or not) within twenty-four hours. While some courts have

possession and for rent and a separate claim for actual damages . . . and for attorney's fees . . . ." *Id.*

17. *Supra* nn. 9–12.

18. This conclusion is based on a search of the Pinellas County Court records conducted in July 2005.

19. This term refers to cases that require expedited disposition. Where a normal civil suit in Florida gives the defendant thirty days to answer, a residential eviction defendant gets ten. Fla. Stat. § 83.05(3)(c).

20. *Supra* nn. 9–10.

21. *E.g. Kerrigan v. Boucher*, 450 F.2d 487, 488 (2d Cir. 1971) (explaining that counterclaims are denied as moot once the relationship between the parties ceases to exist, leaving no actual case or controversy).

22. Fla. Stat. § 83.62(1).

indicated that her claim against her former landlord is not lost,[23] most courts clearly state that once the tenant is gone, any remaining claims related to her occupancy of the rented premises are moot.[24] And a moot case can almost never be resurrected.

Who benefits from this process? No one. Landlords feel aggrieved because they are forced to expend resources by taking the matter to court even when their tenants have clearly violated the rental agreements and the law. Tenants feel aggrieved because they never have an opportunity to be heard. Judges and their assistants are discreetly annoyed at having the court's time consumed by a hearing with an entirely predictable outcome. And the taxpayers, to the extent that they think about these things, should be annoyed that they must pay the sheriff's staff to carry out the posting and forcibly remove the losing tenant. This is a lose-lose situation.

II. HISTORY AND SOCIOECONOMICS

Residential landlord-tenant law has its roots in the law of seisin.[25] While a more thorough history of the law can be found in greater detail elsewhere,[26] it is important, for the purposes of this Article, to be aware of the manner in which the law has evolved.

A landowner is generally entitled to possession of his property unless that right has been contracted away, either expressly or impliedly.[27] However, "[a] man's right in his real property of

23. Some Florida courts have held that a tenant's cause of action against a former landlord is not "lost" even when the tenant has been dispossessed, but the opinions do not specify how the tenant might later bring the claim. *First Hanover*, 848 So. 2d at 1188; *K.D. Lewis Enters.*, 445 So. 2d at 1032.

24. *Supra* n. 19 and accompanying text.

25. *See generally* Tonya Y. Cureton, Student Author, *Wrongful Eviction: The Measure of Damages*, 32 How. L.J. 301 (1989) (discussing the history of eviction damages). Historically, "seisin" meant possession. *Black's Law Dictionary* 1389 (Bryan A. Garner ed., 8th ed., West 2004). Over time, however, its meaning evolved such that seisin and possession were separate concepts. *Id.* Seisin eventually came to mean ownership in fee simple. *Id.* Therefore, tenants have possession but not seisin. *Id.*

26. *See e.g. Symposium: Edited Transcript of Proceedings of the Liberty Fund, Inc. Seminar on the Common Law History of Landlord Tenant Law*, 69 Cornell L. Rev. 623 (1984) (a panel of eighteen legal scholars discussing the "revolution" in landlord-tenant doctrine).

27. "Ownership implies the right to possess a thing, regardless of any actual or constructive control." *Black's Law Dictionary*, *supra* n. 25, at 1138. Ownership also includes "the right to convey [a thing] to others." *Id.*

course is not absolute."[28] There has been a trend in recent United States common law to favor tenants over landlords when there has been some wrongdoing on the part of the landlord.[29] Whether this is a "revolution" in property law is debatable,[30] but certainly tenants throughout the United States have more rights now than they did fifty years ago.[31]

Homeownership is out of reach for many Americans.[32] Certainly there are many reasons people rent rather than buy, but the vast majority of those who rent do so for economic reasons. The supply of affordable housing is shrinking.[33] In the Orlando, Florida area, a single-family home price averages $248,000.[34] Considering a thirty-year mortgage, even with a substantial down payment, the monthly payment is beyond the reach of many Floridians, whose average annual income is around $40,000.[35] Many people find it easier and cheaper—in the short term—to rent rather than to own.[36]

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28. *State v. Shack*, 277 A.2d 369, 373 (N.J. 1971).

29. Any lawyer who practices poverty law can provide anecdotal evidence that landlords have been known to take front doors off of their hinges, to enter rental property in the tenant's absence and remove all of the tenant's belongings, and to change locks on rental property, all in hopes of recovering possession without the benefit of any legal process. These practices prompted the Florida Legislature to incorporate into the landlord-tenant statute a prohibition against such action. Fla. Stat. § 83.67(5).

30. *Supra* n. 25 and accompanying text; *see generally Restatement (Second) of Property* §§ 1.4–1.8, 6.1 (1976) (outlining the appropriate manner in which a landlord should notify a tenant of the termination of a lease or eviction and stating that landlords breach that obligation if they intentionally interfere with a tenant's permissible use of leased property).

31. Landlords may be justifiably frustrated that any legal process, however minimal, is required to remove deadbeat tenants. Yet it seems unlikely that the United States legal system will ever revert to a purely self-help system of evictions. *See* Fla. Dept. Agric. & Consumer Servs., *Landlord/Tenant Information*, http://www.800helpfla.com/landlord_text.html (accessed June 9, 2006) (providing a resource for landlords and tenants regarding the legal eviction process).

32. Melissa DeLoach, *Inflated Real Estate Prices Put Home Ownership out of Reach*, Springfield News-Leader 1A (July 3, 2006).

33. *See* Kelly Griffith, *Manufactured Homes, Easier on Budgets, Post Rising Sales,* Orlando Sentinel C1 (Oct. 19, 2005) (explaining that the boom in manufactured home sales is largely the result of a rise in the cost of traditional homes).

34. *Id.*

35. *See* U.S. Census Bureau, *Income*, http://www.census.gov/hhes/www/income/income04/statemhi.html (updated Aug. 30, 2005) (listing average family incomes by state).

36. Some people rent because they have recently relocated and are unfamiliar with an area; others, such as students, are "temporarily" poor and rent for a short time; others, of course, are life-long renters. Many elderly people on fixed incomes rent rather than own. Charley Hamagan, *Is a Home Your Best Investment? Rewards of Ownership Often Depend*

Socioeconomics thus become inseparable from property law. In Florida residential eviction cases, the defendant is likely to be a low-income resident of (relatively) low-rent housing.[37] Attorneys in private practice are unlikely to represent tenants in residential eviction proceedings, because a client who cannot pay rent also cannot pay a lawyer, leaving the cases to pro bono or legal services lawyers.[38]

The summary nature of eviction proceedings is particularly troubling when the defendant-tenant is uneducated, illiterate, or speaks no English. Florida does not provide court translators in civil cases,[39] and moreover there are no official translators before the case goes to court. Many native English speakers lack the experience or education to understand the nature of legal proceedings. In residential eviction cases, a defendant who does not understand the proceedings will likely not respond properly, and will be summarily evicted.[40]

III. FLORIDA: AN EXCEPTIONALLY CUMBERSOME EVICTION STATUTE

Florida is apparently a unique state when it comes to residential eviction proceedings. A number of states have enacted some form of the URLTA and have thus brought meaning to the eviction process.[41] While a complete survey of all fifty states is

on How Long You Plan to Stay, Post-Standard (Syracuse, N.Y.) 8 (Oct. 30, 2006).

37. Although county court decisions are not reported, and there are no income-reporting requirements in eviction cases, anecdotal evidence indicates that renters in the upper-income levels do not wind up in court in eviction cases. And the term "low-rent" is certainly a relative one. Albert H. Cantril, *Agenda for Access: The American People and Civil Justice* 41 (ABA 1996).

38. Obviously, there are not enough pro bono or legal services lawyers to go around. Bickel, *supra* n. 1, at 331. Representation in eviction cases is also unavailable, in many cases, for the simple reason that the lawyer recognizes that there is no mechanism by which to raise any defense the tenant may have: without depositing the alleged past-due rent in the registry of the court, the tenant cannot present any defense, and the lawyer is ethically precluded from filing an answer containing any defenses if the sole purpose of doing so is to delay the inevitable eviction. Model R. Prof. Conduct 3.1 (ABA 2004).

39. *See* Fla. Stat. at § 29.004 (providing funds for court translators to the extent necessary to comply with constitutional requirements, thus indicating that translators are provided only in criminal matters).

40. Summary eviction refers to the process outlined by statute, pursuant to which the tenants are evicted with no real hearing if they do not deposit the alleged past-due rent in the registry of the court. *Id.* at § 83.60(2).

41. Fifteen states have adopted some or all of the URLTA and although Florida is one

perhaps undesirable in the context of this paper, an overview of the law of a few select states can be informative.

A. Georgia

Under Georgia law, a landlord may obtain a "dispossesory warrant" based upon his or her affidavit that the tenant in possession has failed to pay rent due.[42] However, the tenant has an absolute right to raise defenses and counterclaims.[43] Furthermore, the Georgia statute only requires payment of rent into the registry of the court "when the issue of the right of possession cannot be determined within two weeks."[44] Once this threshold requirement is met, the tenant is required to pay money into the court when and if it becomes due between the time that the dispossessory warrant is issued and the matter goes to trial.[45]

Additionally, the tenant must deposit into the court registry any rent payments that the landlord alleges are owed by the tenant prior to the time the dispossessory warrant is issued.[46] The statute provides, however, that the tenant may refute the landlord's allegation that past rent is owed by submitting receipts to the court indicating that payment has been made.[47] Historically, Georgia courts have interpreted the statute in such a way as to "effectuate" the legislative intent, which "could not have been" to enable a landlord to "deprive a tenant of the right to remain in possession of the premises" simply by not moving the court to require past-due rent payments into the court's registry.[48] Furthermore, in a Georgia month-to-month tenancy, a tenant is enti-

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of those states, Florida's version contains many variations and omissions that make it inconsistent with the Uniform Act. 7B U.L.A. at 527; *e.g.* Fla. Stat. § 83.60 (requiring that tenants deposit alleged past due rent with the court).

42. Ga. Code Ann. § 44-7-54 (1991).

43. *Moran v. Mid-State Homes, Inc.*, 320 S.E.2d 625, 626 (Ga. App. 1984).

44. *Green v. Barton*, 515 S.E.2d 864, 865 (Ga. App. 1999).

45. *Id.*; Ga. Code Ann. § 44-7-54(a)(1).

46. Ga. Code Ann. § 44-7-54(a)(2).

47. *Id.*

48. *Green*, 515 S.E.2d at 865. The statute was recently amended, effective July 2006, so that landlords are no longer required to petition the court to require payment into the court's registry, but it remains to be seen how the courts will interpret the amended version.

tled to sixty days' notice before the landlord may terminate the rental agreement.[49]

This statutory scheme and its interpretation by Georgia courts provides better balance than Florida's lopsided summary eviction process. To illustrate the point, consider the following case: a tenant in Georgia does not pay her rent when it becomes due on the first of the month. The landlord immediately submits an affidavit to the county court. The court directs the local sheriff's office to serve the affidavit on the tenant. The tenant is outraged; she thought she had an agreement with the landlord that her rent would be payable on the fifteenth, not the first, of the month. The tenant files an answer with the court, and the case is set for an expedited trial. At trial ten days later, the landlord presents evidence, the tenant presents evidence along with any compulsory counterclaims,[50] and the judge issues an order granting possession to the landlord. Both parties have been heard, and the court's decision is based on all of the evidence. Although someone is unhappy at the end of the day, this is no more true than in any other form of litigation. The court can enter judgment against either party to redress any damages, and prepayment of rent is unnecessary.[51]

Contrast this with the result under Florida law: a tenant, having been sued for eviction and notified of a hearing date, appears in county court prepared to tell the judge why she did not pay her rent. She is prohibited from speaking; any written answer is dismissed; judgment is automatically entered in favor of the landlord, and the tenant is notified that she has twenty-four hours to vacate the premises. The county court's decision is not based on any evidence or testimony because none is permitted under the statute. The landlord is restored to possession, but such

49. *Cheeves v. Horne,* 307 S.E.2d 687, 688 (Ga. App. 1983).

50. Compulsory counterclaims would include tort claims the tenant wants to bring against the landlord, such as damages incurred because the landlord failed to fix the roof. *Trust Co. Bank N.W. Ga. v. Shaw,* 355 S.E.2d 99, 101 (Ga. App. 1987). Under Florida law, the counterclaim could not be raised at all unless all alleged past-due rent had been deposited in the registry of the court. Fla. Stat. § 83.60(2).

51. *See Mountain Hardwoods & Pine, Inc. v. Coosa River Sawmill Co.*, 211 S.E.2d 712, 714 (Ga. 1975) (unequivocally stating that no money need be paid in order to raise any answer or counterclaim in an eviction action).

restoration is not based on any kind of hearing. Any counterclaim the tenant may have wished to raise is lost.[52]

B. Texas

Texas residential landlord-tenant law can hardly be described as progressive, yet it is less draconian than Florida's. Under Texas law, a landlord may file a suit for forcible detainer to regain possession of leased premises.[53] The landlord may request attorney's fees and costs, including past-due rent.[54] The tenant has six days within which to answer the suit.[55] If the tenant answers, the case is set for trial before either a judge or a jury.[56] The defendant-tenant has the right to present evidence and question witnesses, without any requirement of depositing past-due rent into the registry of the court.[57] The process is expedited in accordance with the legislature's wish to return possession to the landlord as quickly as possible, but the tenant is nonetheless given an opportunity to appear and be heard.[58]

In Texas, therefore, the hypothetical tenant would receive notice of the eviction proceedings, would have six days to file an answer and raise any counterclaims, and would then have an opportunity to go before the judge or jury to explain why she should not be evicted. The court would hear both sides of the case, rather than just one, and the decision would inevitably be more fair because the hearing was more fair. The landlord could regain possession within ten days if the court found that such a remedy was

52. *Supra* nn. 8–10 and accompanying text.

53. Tex. Prop. Code Ann. § 24.002 (2005) (stating that the "demand for possession must be made in writing by a person entitled to possession . . . .").

54. *Id.* at § 24.006 (stating that a prevailing landlord is entitled to recover reasonable attorney's fees from the tenant); Tex. R. Civ. P. 738 (providing that a court may render judgment in an action of forcible entry and detainer and "may at the same time render judgment for any rent due the landlord . . . .").

55. Tex. R. Civ. P. 739, 743. Neither rule explicitly states that the defendant has six days within which to answer the suit, but it may be inferred because Rule 739 provides in part that "the justice shall . . . issue [a] citation . . . commanding [the defendant] to appear before [him] at a time . . . not more than ten days nor less than six days from the date of service of the citation," while Rule 743 provides in part that "[i]f the defendant [fails] to enter an appearance upon the docket in the justice court or file [an] answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly."

56. Tex. R. Civ. P. 747.

57. *Id.*

58. *Scott v. Hewitt,* 90 S.W.2d 816, 818 (Tex. 1936).

appropriate,[59] so the landlord's rights would be protected, but the tenant would be given the opportunity to be heard.

IV. THE PROBLEMS WITH FLORIDA'S LAW

A. Waste

Florida cannot afford to continue to expend scarce resources on sham proceedings. The filing fees do not begin to cover the actual cost of processing an eviction suit.[60] When the ultimate outcome of a case can be predicted with almost absolute certainty, there is nothing to be gained by pursuing it. Unless and until the law is changed in a way that will make the hearings meaningful, Florida might as well dispense with them altogether and revert to some form of self-help forcible entry.[61]

B. Public Confidence in the Courts

It is no secret that the legal profession is not held in high esteem by large segments of the general population.[62] When nonlawyers see the way residential eviction cases are resolved in Florida, that esteem likely sinks even lower. Tenants cannot believe that they can file a written answer and appear in court, yet be forbidden to speak. "What's the point?" they ask, and there really is no answer. Landlords are infuriated by the delay and expense involved in evicting tenants.[63] The landlord incurs expenses to hire a lawyer, file the lawsuit, have the tenant's belongings physically removed from the premises, change the locks, and a variety of other costs.[64] Is it any wonder that both parties walk away feeling that the law is grossly unfair and burdensome?

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59. Tex. R. Civ. P. 739, 743 (requiring a defendant to appear before a court from six to ten days from the date of service).

60. The filing fee to commence a residential eviction in Pinellas County is only $80. Clerk of the Cir. Ct., Pinellas Co., *Schedule of Service Charges*, http://www.pinellasclerk.org/aspIncludeZ/ASPInclude.asp?pageName=fees.htm (Apr. 1, 2006).

61. After all, if the end result is the same, the hearings are unnecessary.

62. Some surveys reveal that lawyers are held in relatively equal esteem with used-car salesmen. Colin W. Uckert, *Ethics and Professionalism*, http://www.vsb.org/sections/rp/articles/uckert.htm (accessed June 9, 2006).

63. Randy G. Gerchick, Student Author, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. Rev. 759, 764 (1994).

64. A modest estimate of the cost of evicting a tenant might be $1,000, including at-

C. Due Process

"The very essence of due process is notice and an opportunity to be heard."[65] A residential tenant has some property interest in the rented property because a home, after all, is a home. Where property rights are involved, due process of law includes both notice and a hearing, as a matter of right.[66] Even if the tenant might have some future opportunity to present an answer and any counterclaims,[67] in the interim he or she is deprived of the use of the property. "Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice *and* a prior hearing this prejudgment [deprivation] violates the fundamental principles of due process."[68]

Mere notice cannot substitute for both notice and an opportunity to be heard. One without the other is meaningless. Because Florida's residential eviction law precludes an opportunity to be heard without first paying for the privilege of doing so, the statute cannot be constitutional.

As previously noted,[69] there is very little case law on residential evictions because the cases are almost never appealed. The tenant loses, is removed from the premises, and life goes on. If there were money for an appeal, the rent would have been paid and the eviction would have been unnecessary. Even pro bono or legal-services lawyers cannot ethically file appeals where there is no ruling on a legal issue that could provide grounds for such an appeal.[70]

The United States Supreme Court in 1972 addressed the due process (and equal protection) concerns raised by a state statute that required, among other things, a residential tenant to pay double bond to secure the right to appeal.[71] *Lindsey v.*

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torney's fees, filing fees, locksmith's fees, etc.

65. *Hall v. Stone*, 189 S.E.2d 403, 404 (Ga. 1972).

66. *Sikes v. Pierce*, 94 S.E.2d 427, 429 (Ga. 1956) (citing *Robitzsch v. State*, 7 S.E.2d 387, 392 (Ga. 1940)).

67. And the tenant probably will not have that opportunity. *See Kerrigan*, 450 F.2d at 488 (discussing the idea that counterclaims are moot once the relationship between the parties no longer exists).

68. *Sniadach v. Fam. Fin. Corp.*, 395 U.S. 337, 342 (1969) (citations omitted) (emphasis added).

69. *Supra* nn. 7–8.

70. Model R. Prof. Conduct 3.1.

71. *Lindsey v. Normet*, 405 U.S. 56, 58 (1972).

Normet[72] concerned a challenge to Oregon's Forcible Entry and Detainer statute,[73] based on its expedited trial, limited scope at trial, and double bond requirements. The Court clearly approved of treating the landlord-tenant relationship differently because of the importance of the landlord's property interests.[74] The tenants argued that the statute violated their right to due process because it required that a trial be held no more than six days after the date on which the complaint was filed.[75] The Court was not troubled by either the expedited trial or the limited scope of the trial.[76] However, the Court did find that the double bond requirement violated due process because it was "arbitrary and irrational."[77] No court has specifically addressed whether Florida's requirement that payment be made into the registry of the court before a tenant may participate in any eviction hearing is also arbitrary in nature.

By way of analogy, it is unconstitutional for a state to deprive its residents of their drivers' licenses by requiring payment of a security, the amount of which is set in an arbitrary manner.[78] At issue in *Wright v. Malloy*[79] was the Vermont Financial Responsibility Act, which required drivers to post a security when they were at fault in car accidents, in order to have their licenses reinstated.[80] There was no hearing before the amount of the security was determined.[81] While the State could have refused to issue licenses to drivers with no liability insurance or security, once those licenses were issued, the state could not "proceed to take them away without providing the licensees with Fourteenth Amendment due process."[82]

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72. 405 U.S. 56 (1972).

73. Or. Rev. Stat. Ann. §§ 105.105–105.160 (2003); *see also Lindsey*, 405 U.S. at 59 n. 3 (discussing the Oregon FED statute).

74. *Lindsey*, 405 U.S. at 72–73.

75. *Id.* at 64. This is clearly distinguishable from the Florida statute, which essentially eliminates any meaningful trial unless the tenant deposits money in the registry of the court. Fla. Stat. §§ 83.04–83.797.

76. *Lindsey*, 405 U.S. at 64.

77. *Id.* at 79.

78. *Wright v. Malloy*, 373 F. Supp. 1011, 1022 (D. Vt. 1974).

79. 373 F. Supp. 1011 (D. Vt. 1974).

80. *Id.* at 1015.

81. *Id.* at 1016.

82. *Id.* at 1020 (quoting *Bell v. Burson*, 402 U.S. 535, 539 (1971)).

A driver's interest in his or her license seems less significant than a renter's interest in his or her home. If the deciding factor is the arbitrary nature of setting the amount of money that must be paid to retain the license, consider the way courts decide how much money a tenant must deposit before being allowed to raise any defense in an eviction case: the landlord alleges a certain amount of money is past-due; the tenant must pay that amount or be foreclosed from participating in the suit.[83] This seems more arbitrary than the Vermont courts determining the amount of money an at-fault driver must pay to retain the right to drive.

V. SUGGESTIONS FOR MEANINGFUL CHANGE

Affordable housing is a necessity, not a luxury. Florida might like to ignore this fact, but the consequences of doing so will be dire.[84] When I worked for the Legal Services Corporation, I met hundreds of clients who had been lured to Florida by the promises of good weather and no state income tax.[85] What those former residents of Kentucky, Pennsylvania, and Ohio (among other places) did not know was that the streets of Florida are not, in fact, paved with gold, and that the Union scale paychecks to which they were accustomed "up North" are few and far between here.[86] Families living in cars may appreciate the warm weather, but it hardly seems like a good trade for decent housing.

Given the average price of an existing home in Pinellas County,[87] for example, it seems clear that homeownership will

83. *Compare Lindsey,* 405 U.S. at 76 (explaining that the Oregon statute was unconstitutional because it entitled the landlord to the disputed rent during an appeal without any proof of actual damages) *with* Fla. Stat. § 83.60(2) (requiring payment of disputed rent before tenant can present any defense).

84. In Pinellas County, for example, the number of homeless is growing rather than shrinking. Homeless Policy Group, *Opening Doors to Opportunity: A 10-Year Plan to End Homelessness in Pinellas County* 3–7, http://www.endhomelessness.org/localplans/Pinellas_CountyFL.pdf (Jan. 2006). While many factors contribute to homelessness, the lack of affordable housing is certainly one.

85. *See* Helen Huntley, *For Floridians, the Tax Burden Is Less of One*, St. Pete. Times 1A (Apr. 9, 2004) (discussing the light state and local tax burden Floridians enjoy).

86. Fla. Intl. U., *Labor Report on the State of Florida, Labor Day 2000*, at 2–3, http://www.risep-fiu.org/reports/2001FLA.pdf (Sept. 2, 2001).

87. *See* Will Van Sant, *Rising Home Prices Squeeze Middle Class*, St. Pete. Times 1A (Oct. 2, 2005) (explaining that in 2005 the median price of a single-family home in Pinellas County was $256,000—a seventy percent increase from homes valued at $151,000 in 2001).

remain out of reach for many. Even mobile homes, which have long been a cheap (if unsafe) form of housing for low-income families and retirees, are becoming scarce: the land on which the mobile home parks sit has become far too valuable to justify its continued use for that purpose.[88] All over Florida, mobile home parks are being sold to developers who use the property for high-density condominium developments, with units selling for hundreds of thousands of dollars.[89] Similarly, apartment buildings "[go] condo" every day, forcing tenants to choose between buying their units, which is simply impossible for many, or relocating.[90] There is never enough subsidized housing available,[91] and many renters, while too poor to buy a condo, are not poor enough to qualify for housing assistance.

The undeniable shortage of affordable housing in Florida, and the concurrent rise in the number of lower-income renters, makes the time right for a change in residential eviction laws. By adopting some meaningful form of the URLTA, the State could begin to address the deficiencies in current Florida law. Tenants must be given an opportunity to be heard, regardless of the payment of alleged rent due, courts must be freed from the necessity of engaging in meaningless proceedings, and landlords must have assurances that possession will be restored to them as soon as it is legally appropriate to do so.

There is no question that a landlord has a property interest in the leased premises.[92] Property owners need an efficient method of removing hold-over or dead-beat tenants. Adopting the

88. *See* Will Van Sant, *Program Aims for More Affordable Housing*, St. Pete. Times, Neighborhood Times 9 (Oct. 26, 2005) (explaining that mobile homes are disappearing to make way for upscale housing and developments).

89. Barbara Basler, *There Goes the Neighborhood*, AARP Bulletin, http://www.aarp.org/bulletin/yourlife/a2004-09-16-neighborhood.html (Sept. 2004).

90. Jerry W. Jackson, *Renters Put Out by Conversions*, Orlando Sentinel A1 (Mar. 5, 2006). Relocation may be just as impossible as buying, if there is no supply of affordable housing. As I drive through downtown St. Petersburg, I see the buildings in which my former clients lived being torn down or converted into upscale condominium units. This makes downtown more attractive and prosperous, which is good for the rest of us, but where did all those poor people go?

91. *See* Julie E. Levin & Murray S. Levin, Tinsley v. Kemp—*A Case History: How the Housing Authority of Kansas City, Missouri Evolved from a "Troubled Housing Authority" to a "High Performer"*, 36 Stetson L. Rev. 77 (2006) (discussing the story of one subsidized housing program in Kansas City, Missouri).

92. *Lindsey*, 405 U.S. at 72–73.

URLTA in Florida could provide that method for Florida property owners by enabling evictions to proceed in a fair and logical manner from notice to hearing to removal. The current system is at best arbitrary and at worst punitive.[93]

There is something unique about housing. It is not the same thing as a driver's license, or a building permit, or even the ownership of rental property. For tenants to be deprived of housing without benefit of a fair and full hearing has repercussions that reach far beyond economics. Children who grow up without safe and stable housing may be at a disadvantage throughout their entire lives.[94] Adults who suddenly lose their homes cannot maintain employment.[95] Personal relationships suffer, as evidenced by domestic violence incidents that accompany household crises.[96] Compare these consequences with the landlord's loss of a month's rent, and the scales seem quite unequal. Of course the owner is entitled to regain possession. But the tenant, who is losing his or her housing, ought to get a meaningful hearing before that right to possession is transferred.

We have no official housing "safety net" in Florida. Evicted tenants readily become homeless people.[97] It cannot benefit soci-

93. For one illustration of the imbalance of power between landlords and tenants, see Paul Swider, *Heave-ho Upsets Snell Isle Renters*, St. Pete. Times, Neighborhood Times 1 (Jan. 25, 2006). The story describes an apartment building that recently sold for $60 million and is being converted to condominiums. *Id.* The tenants, whose rents were as low as $600 per month for a two-bedroom apartment, were given the opportunity to purchase their units, with prices between $200,000 and $400,000. *Id.* One tenant is quoted as saying, "On a teacher's salary, I'm priced out of the housing market in St. Petersburg . . . . Teachers, nurses, firefighters, police, we're all priced out." *Id.* The developer pointed out that the sale and termination of tenancies was, of course, "perfectly legal." *Id.* Obviously, the transactions are legal, and this particular developer was quite generous in giving tenants nine months to find replacement housing. But the legality of the matter may be of little comfort to an elderly tenant living on a fixed income who simply cannot find replacement housing.

94. *See generally* Natl. Hous. Trust Fund, *The National Housing Trust Fund Should Be a National Priority*, http://www.homelesscoal.org/documents/advocacy/nhtffactsheet.pdf (accessed June 19, 2006) (discussing the high school turnover rate for children in unstable housing situations).

95. Norman C. Hursh & William T. McCarriston, Research Brief, *Targeting Employment and Job Retention for Individuals Who Are Homeless*, http://www.bu.edu/vrc/briefs/Research%20Brief%20One.pdf#search='homeless%20AND%20job' (accessed June 19, 2006).

96. Ctr. on Hous. Rights & Evictions, *Women and Housing Rights*, http://www.cohre.org/hrframe.htm (accessed Aug. 22, 2006) (explaining that women who are evicted have a greater chance of becoming involved in domestic violence).

97. *E.g.* Laura Abel, *Make "You Have a Right to a Lawyer" a Reality in Housing Court*,

ety to have large numbers of people with inadequate or unsafe housing.[98] If we choose to elevate landlords' property rights over people's need for notice and an opportunity to be heard prior to eviction, then we should accept some responsibility for the consequences. Instead, we leave it entirely up to private charities to provide housing to those who are unable to pay for their own.[99] It is not clear where we expect people to live if they are not at least comfortably middle class.

VI. CONCLUSION

Florida's residential eviction laws are deficient because they waste judicial resources (which are in short supply), they undermine the public's confidence in the judicial system, and they fail to provide any meaningful opportunity for most tenants to be heard. Florida is not in line with other states, a number of which have adopted the URLTA's due process protections. Florida should follow suit, and bring some balance into the picture: landlords deserve to know that they will be restored to possession of their real estate, but tenants deserve due process prior to returning the property to its owner. If the landlord has committed some wrong, that act deserves a hearing and the resulting consequences, just as does any wrongdoing on the tenant's part. If one goal of the legal system is to ensure fair and just results, Florida

35 Tenant Inquilino 1 (Mar. 3, 2005) (available at http://www.brennancenter.org/presscenter/oped_2005/oped_2005_0406b.html) (nineteen percent of families in emergency shelters in New York City were tenants recently evicted).

98. The poor are notoriously underrepresented by government policies: they have no lobbyists or PACs, and they rarely vote, which may explain in part why no one has yet complained about the inequities in Florida's residential eviction laws. *E.g.* Andrew M. Fleischmann, Natl. Civic League, *Protecting Poor People's Right to Vote: Fully Implementing Public Assistance Provisions of the National Voter Registration Act*, http://www.ncl.org/publications/ncr/93-3/Fleischmann.pdf (Fall 2004) (discussing the underrepresentation of poor people in the democratic system).

99. The Faith-Based and Community Initiatives Program of President George. W. Bush makes this a national policy. White House, *White House Faith-Based & Community Initiatives*, http://www.whitehouse.gov/government/fbci/president-initiative.html (accessed Oct. 1, 2006). The little bit of federal money that is allocated to providing social services to the poor is now funneled through private groups, many of which are religious groups, to distribute as they see fit. *Id.* In my years with Legal Services, I met men who clearly preferred sleeping under bridges to sleeping in shelters where specific prayers were a condition precedent to getting a bed for the night.

must change its residential eviction law. Adopting the URLTA would be a logical response to the deficiencies in the current law.