

2020

## Addressing the Eviction Crisis and Housing Instability Through Mediation

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### Recommended Citation

Karen Tokarz, Samuel Hoff Stragand, Michael Geigerman, and Wolf Smith, *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 WASH. U. J. L. & POL'Y 243 (2020), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol63/iss1/13](https://openscholarship.wustl.edu/law_journal_law_policy/vol63/iss1/13)

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## ADDRESSING THE EVICTION CRISIS AND HOUSING INSTABILITY THROUGH MEDIATION

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### INTRODUCTION

Years into the post-2008 economic recovery, the United States still faces a massive eviction crisis.<sup>1</sup> Over one-third of households in the United States are renters and, of those 47.6 million renter households, more than two million, or one in every twenty-five, are at risk of losing their homes through court evictions every year.<sup>2</sup> Current and future economic challenges, such as that brought on by the COVID-19 pandemic, will significantly increase evictions and exacerbate housing instability.<sup>3</sup> As

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1. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 1-5 (2016).

2. Dyvonne Body & Fin. Sec. Program, *A Glimpse into the Eviction Crisis: Why Housing Stability Deserves Greater Attention*, ASPEN INST. (July 24, 2019), <https://www.aspeninstitute.org/blog-posts/a-glimpse-into-the-eviction-crisis-why-housing-stability-deserves-greater-attention/> [<https://perma.cc/ML9E-Q46M>]; see generally John Eric Humphries, Nicholas Mader, Daniel Tannenbaum, & Winnie van Dijk, *Does Eviction Cause Poverty? Quasi-Experimental Evidence from Cook County* (Nat'l Bureau of Econ. Research Working Paper No. 26139, 2019), <https://www.nber.org/papers/w26139>.

3. Jessica Contrera & Tracy Jan, *Facing Eviction as Millions Shelter in Place*, WASH. POST (Mar. 22, 2020), <https://www.washingtonpost.com/dc-md-va/2020/03/22/evictions-coronavirus-renters-shelter-in-place/> [<https://perma.cc/FDY6-PFJX>]; Conor Dougherty, Matthew Goldstein, & Emily Flitter, *Racing to Head Off Evictions and Foreclosures*, N.Y. TIMES (Mar. 18, 2020), <http://www.nytimes.com/2020/03/18/business/economy/coronavirus-evictions.html> [<https://perma.cc/XU34-MAUM>].

COVID-19 rent freezes and eviction moratoria are nearing an end in most places, an avalanche of evictions is expected in the latter half of 2020.<sup>4</sup>

Evictions in St. Louis City and St. Louis County, Missouri, parallel the harsh housing instability in most major metropolitan areas in the country. In 2019, nearly sixteen thousand eviction lawsuits were filed in the St. Louis City and County courts—an average of more than forty-three eviction cases per day.<sup>5</sup> While eviction lawsuits are an important legal remedy, evictions lead to homelessness, harm family member health, cost landlords money, destabilize the housing market, disrupt neighborhoods, increase crime, and overwhelm the courts.

Many aspects of mediation make it a more just and effective dispute resolution approach than court evictions. A well-functioning court system is vital for any strong democracy. But, when the court system is overburdened and inefficient, and when people do not believe that their voices will be heard or that justice will be done when they walk through the courthouse doors, public trust and confidence are undermined. With court eviction cases, many tenants and landlords feel that the court system does not protect their rights and interests.<sup>6</sup> Mediation addresses these feelings by ensuring the voices of all parties are heard, and frees up the courts to hear non-mediated cases more thoroughly. As discussed below, data show that mandatory mediation of eviction cases leads to better outcomes for all parties and stakeholders.

To bring the benefits of mediation to the eviction crisis, while rebuilding tenants' and landlords' trust in the court system in St. Louis, and at the same time providing learning opportunities for law students, Washington University School of Law Civil Rights & Mediation Clinic (Clinic) developed the St. Louis Mediation Project (Mediation Project), in conjunction with Metropolitan St. Louis Equal Housing and Opportunity

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4. Katy O'Donnell, *Black Community Braces for Next Threat: Mass Evictions*, POLITICO (June 12, 2020), <http://www.politico.com/news/2020/06/12/mass-evictions-314699> [<https://perma.cc/U9VN-M8U4>].

5. Email from Thomas Kloepfinger, Circuit Clerk, Mo. 22nd Judicial Circuit Court, to Karen Tokarz, Charles Nagel Professor of Pub. Interest Law & Policy, Wash. Univ. Sch. Of Law (Jan. 13, 2020, 10:39 PM CST) (on file with Professor Tokarz); Email from Joan Gilmer, Circuit Clerk, Mo. 21st Judicial Circuit Court, to Karen Tokarz, Charles Nagel Professor of Pub. Interest Law & Policy, Wash. Univ. Sch. Of Law (Dec. 26, 2019, 12:03 PM CST) (on file with Professor Tokarz).

6. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

Council (EHOC), a little over a decade ago. In 2012, the Mediation Project expanded to include mediators affiliated with United States Arbitration & Mediation (USAM) to assist with eviction mediations and to develop a foreclosure mediation program.<sup>7</sup> Since its initiation, the Mediation Project has provided free mediation services by law students and volunteer lawyers for the *pro se* housing dockets (where neither landlords nor tenants are represented by legal counsel) in St. Louis City Circuit Court every Friday morning for over ten years, and St. Louis County Circuit Court every Tuesday afternoon for over two years. Over the years, the Mediation Project also has provided mediation training for hundreds of law students and volunteer mediators.<sup>8</sup>

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7. In fall 2012, the Clinic collaborated with USAM, EHOC, Beyond Housing, and other local housing organizations to facilitate passage of an ordinance in St. Louis County (Ordinance 25,190, as amended by Ordinance 25,239), requiring lenders to give homeowners an opportunity to mediate with their lenders to attempt to avoid foreclosure. Such an ordinance was needed because Missouri is a non-judicial foreclosure state. The Missouri Court of Appeals enjoined enforcement of the ordinance in early 2013. *See* Mo. Bankers Ass'n, Inc. v. St. Louis Cty., No. ED-99333, 2013 WL 5629426, at \*1 (Mo. Ct. App. Oct. 15, 2013). The Missouri Supreme Court held the ordinance invalid in 2014. *Mo. Bankers Ass'n, Inc. v. St. Louis Cty.*, 448 S.W.3d 267 (Mo. 2014). The ordinance was effectively preempted by the Missouri General Assembly, which passed legislation prohibiting local governments from interfering with the real-property lending process in 2013. Act of July 13, 2013, 2013 Mo. Laws 762 (codified at MO. REV. STAT. § 443.454 (2016)). In contrast, some non-judicial foreclosure states, such as Rhode Island, have adopted mandatory foreclosure mediation legislation. *E.g.*, R.I. GEN. LAWS ANN. § 34-27-3.2 (West through 2020 2d Reg. Sess.). During the limited lifetime of the St. Louis County ordinance, the first six months of 2013, forty-six residential foreclosures were mediated at USAM headquarters. Although the data is incomplete, of the thirty-five known outcomes, the records reflect sixteen modifications, two short sales, one forbearance, and one homeowner who kept her house through bankruptcy proceedings, and fifteen foreclosures, for a fifty-seven percent settlement rate and twenty foreclosures averted. *See* Robert D. Litz & Colleen O. Davis, *Effectively Resolving Home Foreclosures Through Mediation*, ST. LOUIS B. J., Winter 2014, at 30, 33, 37; *see also* Karen Tokarz, Kim L. Kirn, & Justin Vail, *Foreclosure Mediation Programs: A Crucial and Effective Response by States, Cities, and Courts to the Foreclosure Crisis*, ST. LOUIS B. J., Summer 2012, at 28.

8. Both the City and County courts stopped hearing eviction cases in late March 2020 due to the COVID-19 pandemic. Both courts resumed their housing dockets in June 2020, starting with continued cases in June with new eviction cases scheduled to begin in July and August. Until further notice, all cases are being heard remotely (via WebEx in the City and Zoom in the County). *See In re COVID-19 Re-opening of Courthouses*, COVID-19 Order 26 (Mo. Cir. Ct. June 2, 2020) (Burlison, J.), [www.stlcitycircuitcourt.com/xml/judges/COVID-19\\_Order\\_26\\_Phase\\_One\\_Operations.pdf](http://www.stlcitycircuitcourt.com/xml/judges/COVID-19_Order_26_Phase_One_Operations.pdf); *In re COVID-19*, COVID-19 Order 22 (Mo. Cir. Ct. May 15, 2020) (Colbert-Botchway, J.), <http://www.stlcitycircuitcourt.com/xml/judges/COVID-19%20ORDER%2022%20Div.%2028%20Scheduling%20Order%205142020.pdf>; *For Self-Represented Litigants*, ST. LOUIS COUNTY CIR. CT., <https://wp.stlcountycourts.com/self-represented-litigants/> [<https://perma.cc/B8DD-XZHU>]. The Mediation Project also resumed providing eviction mediations remotely in June 2020.

The Mediation Project has been successful at resolving *pro se* landlord-tenant cases in the courts and helping to reduce evictions. In St. Louis City, for example, seventy-one percent of the *pro se* landlord-tenant cases mediated by the Mediation Project in 2018 (cases where both parties appeared and neither was represented by counsel) resulted in settlement, up from fifty-four percent in 2017.<sup>9</sup> Of cases where mediation was attempted in 2018, fifty-three percent resulted in dismissals, decreasing the overall number of eviction judgments by more than forty percent, resulting in approximately 250 fewer evictions that year.<sup>10</sup> Two years ago, the judges shifted towards requiring parties to attempt mediation, at the encouragement of the Mediation Project, which has significantly increased both the number of cases mediated and the percentage of mediations reaching an agreement, thereby decreasing evictions.<sup>11</sup>

The percentage decrease in evictions in mediated *pro se* cases is beneficial for all involved. The successful completion of mediated agreements means not just fewer evictions, but that tenants have more control over their housing, landlords receive the money or premises owed to them, the region has more housing stability, and the courts spend less time and money adjudicating these cases.

Unfortunately, the overall impact of the Mediation Project is limited by the number of law students enrolled in the Clinic each semester and the number of volunteer mediators, and its use only in the *pro se* landlord-tenant housing court dockets, which make up less than twenty-five percent of the overall eviction caseload in St. Louis City Circuit Court and less than ten percent of cases in St. Louis County Circuit Court.<sup>12</sup> In other words, approximately seventy-five percent of parties in St. Louis City and ninety percent of parties in St. Louis County do not have an opportunity to mediate their cases during the eviction litigation process.

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9. See *infra* Appendix D.

10. See *infra* Appendix D. This decrease in evictions has occurred even though the Mediation Project only mediates landlord-tenant cases where both unrepresented parties appear in court, which is less than half of the overall eviction cases on any given *pro se* docket. Over one-half of *pro se* eviction cases are dismissals (the plaintiff-landlord does not appear) or defaults (the defendant-tenant does not appear), and accordingly cannot be mediated.

11. This shift occurred at the beginning of 2018 and correlates with the changes in outcomes between 2017 and 2018. See *infra* Appendix D.

12. See Kloepfinger, *supra* note 5; Gilmer, *supra* note 5.

With greater resources, the Mediation Project could expand staffing, increase the number of mediators, and participate in more housing and eviction cases in the St. Louis region. One possibility would be for the Mediation Project to provide mediations to landlords and tenants at an earlier juncture, prior to the parties' court date or even prior to the filing of an eviction or other court action, perhaps in a community-based setting. If the parties engaged in mediations before filing or between filing and the trial date, the parties would likely enter the mediation having expended less time, energy, and money, which might motivate parties toward mediated settlements.

Another possibility would be for the Mediation Project to provide mediation services for the entirety of the landlord-tenant dockets, including represented landlord dockets where landlords file multiple cases at the same time and have legal counsel, but tenants are almost always *pro se*. In almost all housing courts, the represented landlord dockets are the largest segment of cases. As noted above, these cases make up approximately seventy-five percent of the housing dockets in the St. Louis City Circuit Court and ninety percent in St. Louis County Circuit Court. Although mediating cases where the landlord is represented by counsel and the tenant is not would certainly present different dynamics in the mediations, the Mediation Project might have a significant and positive impact in those cases as well. Even with a more modest success rate in represented cases, the Mediation Project's intervention could result in hundreds of fewer legal evictions per year in the St. Louis area.

A third possibility would be for the Mediation Project to provide mediations for other circuit court dockets, perhaps, operating within court-sponsored mediation projects.<sup>13</sup> In particular, local judges and municipal leaders have urged the Mediation Project to provide mediations in the St. Louis municipal courts (municipal divisions of the circuit courts) that handle housing and building code enforcement, where both landlords and

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13. Lydia Nussbaum, *Mediation as Regulation: Expanding State Governance Over Private Disputes*, 2016 UTAH L. REV. 361, 361–62, 380; Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 246–49 (2006); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117, 138–39 (2004); Douglas A. Van Epps, *The Impact of Mediation on State Courts*, 17 OHIO ST. J. ON DISP. RESOL. 627, 627–34 (2002).

tenants are frequently *pro se*. Some argue that reasonable code enforcement may upgrade marginal units and help stabilize neighborhoods.<sup>14</sup>

A fourth possibility would be for the Mediation Project to help develop technology to facilitate online dispute resolution mechanisms for the state and municipal housing courts. Many courts across the country and around the world have begun moving to online dispute resolution of cases, and this approach is likely to increase in the wake of COVID-19.<sup>15</sup>

### I. THE CONSEQUENCES OF EVICTIONS

Evictions contribute significantly to the growing epidemic of homelessness, housing insecurity, and financial insecurity in this country. An eviction carries with it compounding difficulties and setbacks for all involved.<sup>16</sup> Families lose their homes and regularly lose their possessions,<sup>17</sup> while children frequently have to change schools, causing them to fall behind academically.<sup>18</sup> Landlords have to manage incoming and outgoing tenants and expenses, which also hurts the economy and safety of the region.<sup>19</sup> Finally, the courts are overwhelmed with the number of housing and eviction cases, contributing to these impediments.<sup>20</sup>

Research shows that evictions, subsequent substandard housing conditions, and homelessness have a significant negative impact on a family's physical and mental health, with a doubling of the rates of depression and anxiety, an increase in toxic stress and suicide rates, and significantly lower overall quality of health.<sup>21</sup> Children of evicted tenants

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14. H. Lawrence Ross, *Housing Code Enforcement and Urban Decline*, 6 J. AFFORDABLE HOUSING & COMMUNITY DEV. L., 29, 29–46(1996).

15. See generally AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (Am. Bar Ass'n Section on Dispute Resolution 2017).

16. Humphries et al., *supra* note 2; Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 295–301 (2015).

17. Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. & SOC. SCI. 15, 26 (2015).

18. *Id.* at 16.

19. DESMOND, *supra* note 1, at 11, 252, 386 n.23.

20. Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 63–66 (2016).

21. See Scott Burris et al., *Creative People and Places Building Health Equity in Housing*, in 4 LEGAL LEVERS FOR HEALTH EQUITY IN HOUSING: REPORT SERIES 1 (2019), [http://phlr.org/sites/default/files/uploaded\\_images/HousingHealthEquityLaw-Report4-Dec2019-](http://phlr.org/sites/default/files/uploaded_images/HousingHealthEquityLaw-Report4-Dec2019-)

experience long-lasting consequences, such as asthma, stress, depression as adults, removal from their parents, and overall poorer health outcomes as they age, plus lower academic grades and delayed graduations.<sup>22</sup> Not surprisingly, low-income people report that getting and holding onto quality housing is the second largest legal problem they face, after consumer issues.<sup>23</sup>

The effects of eviction compound along the intersection of race and gender to create systemic inequalities in both housing and healthcare. Eviction rates are higher among low-income women than men. Black single mothers face the highest eviction rate of any group.<sup>24</sup> Nationally, twenty percent of black women and eight percent of Latina women are evicted each year.<sup>25</sup> Because disadvantaged groups also experience reduced access to mitigating factors, such as psychosocial networks and material resources—including quality alternative housing—black mothers and their families doubly feel the consequences of eviction.<sup>26</sup>

Public records of evictions create a significant barrier for renters seeking future quality housing in a safe neighborhood because many landlords reject housing applicants with recent lawsuits, judgments, or evictions—even if the case was dismissed.<sup>27</sup> Experts call this process

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FINAL.pdf [https://perma.cc/5VNG-7SSL]; Ankur Singh, Lyrian Daniel, Emma Baker & Rebecca Bentley, *Housing Disadvantage and Poor Mental Health: A Systematic Review*, 57 AM. J. PREVENTATIVE MED. 262, 267-70 (2019); Hugo Vásquez-Vera et al., *The Threat of Home Eviction and its Effects on Health through the Equity Lens: A Systematic Review*, 175 SOC. SCI. & MED. 199 (2017); Desmond & Kimbro, *supra* note 16, at 316-17; Katherine A. Fowler, Matthew Gladden, Kevin Vagi, Jamar Barnes & Leroy Frazier, *Increase in Suicides Associated with Home Eviction and Foreclosure During the Housing Crisis: Findings from 16 National Violence Death Reporting System States, 2005-2010*, 105 AM. J. PUB. HEALTH 311 (2015).

22. See Singh et al., *supra* note 21, at 267-70; Desmond & Kimbro, *supra* note 16, at 316-17; Vásquez-Vera et al., *supra* note 21, at 205-06; Lisa Berg & Lars Brännström, *Evicted Children and Subsequent Placement in Out-of-Home Care: A Cohort Study*, 13 PLOS ONE, Apr. 2018, at 1, 2.

23. CHI. BAR ASS'N ET AL., THE LEGAL AID SAFETY NET: A REPORT ON THE LEGAL NEEDS OF LOW-INCOME ILLINOISANS 15 (2005), <http://ltaf.org/wp-content/uploads/2013/02/legalneeds.pdf> [https://perma.cc/JTW8-FRN6].

24. Desmond & Kimbro, *supra* note 16, at 298; Sarah A. Burgard et al., *Housing Instability and Health: Findings from the Michigan Recession and Recovery Study*, 75 SOC. SCI. & MED. 2215, 2219 (2012).

25. DESMOND, *supra* note 1, at 97-98.

26. Vásquez-Vera et al., *supra* note 21, at 205-06.

27. Desmond, *supra* note 1, at 4, 69-70, 100-01, 246. In Missouri, anyone can access eviction court records, which remain in the system even when cases are dismissed. Some jurisdictions have addressed this by sealing files in dismissed cases. Sophie Beiers, Sandra Park, & Linda Morris, *Clearing the Record: How Eviction Sealing Laws Can Advance Housing Access for Women of Color*, ACLU (Jan.

“blacklisting” because it effectively locks tenants with an eviction record out of the housing market.<sup>28</sup> Because of blacklisting, many evicted tenants and their families either find themselves in substandard housing conditions or effectively homeless—completely unhoused or reliant on family or friends to shelter them.<sup>29</sup>

While research documents the painful impact of evictions on tenants, the costs also are borne by landlords, the courts, and society as a whole. Evictions create increased costs for landlords through the court process itself, as well as the lost income from transitioning tenants and related expenses, such as repairs resulting from intentional destruction by disgruntled tenants.<sup>30</sup> Many landlords, especially landlords with fewer properties, operate on relatively thin profit margins that can be dramatically disrupted by the eviction process.<sup>31</sup> Evictions also raise crime rates and lower community stability, which decreases property values.<sup>32</sup> Eviction cases clog the court system, requiring significant time and money, all at the taxpayers’ expense. Accordingly, the entire community benefits from reducing the number of evictions.

## II. LEGAL INTERVENTIONS DESIGNED TO ADDRESS THE CURRENT EVICTION CRISIS

States and municipal governments, courts, and legal aid organizations struggle to address evictions through various interventions, ranging from programs that have been implemented and evaluated to those that have merely been proposed.<sup>33</sup> For the purposes of this paper, the authors examined the legal interventions for individuals facing eviction. (Non-legal interventions include financial counseling, microlending, rent control, vouchers, case management, and psychosocial support.) While the

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10, 2020), <https://www.aclu.org/news/racial-justice/clearing-the-record-how-eviction-sealing-laws-can-advance-housing-access-for-women-of-color/> [https://perma.cc/PKT7-NK5B].

28. Robert R. Stauffer, Note, *Tenant Blacklisting: Tenant Screening Services and the Right to Privacy*, 24 HARV. J. ON LEGIS. 239 (1987).

29. Marieke Holl, Linda van den Dries & Judith R.L.M. Wolf, *Interventions to Prevent Tenant Evictions: A Systematic Review*, 24 HEALTH & SOC. CARE CMTY. 532, 533 (2016).

30. DESMOND, *supra* note 1, at 11, 100.

31. *Id.*

32. *Id.* at 251–52.

33. Holl et al., *supra* note 29, at 536–42.

effectiveness of all of these interventions varies greatly across the existing studies, almost all demonstrate some reduction in evictions. Unfortunately, very few have undergone empirical evaluation and academic scrutiny as to the cost-effectiveness and long-term sustainability. Rigorous evaluation of these interventions could drive improvements to policies and services.<sup>34</sup>

The legal interventions to address evictions and homelessness fall under two large umbrellas: 1) legal representation for tenants through expanded legal aid organizations, “lawyer for the day” programs, limited-scope representation, self-help legal access centers,<sup>35</sup> and law school pro bono clinics,<sup>36</sup> and 2) mediation of housing court disputes.<sup>37</sup> Each of the nonlegal and legal interventions addresses evictions from different perspectives, although many can operate together.

#### *A. Legal Representation for Tenants in Eviction Cases*

Of all the legal interventions, increased access to legal representation for tenants has received the most research—and probably the most widespread support—but also represents the most intense and controversial legal intervention.<sup>38</sup> When taken to its limit, this solution creates a “universal” right to counsel for tenants in housing cases that mirrors the right to counsel for defendants in criminal cases (sometimes called a civil *Gideon* right).<sup>39</sup> Unsurprisingly, attorneys are better at navigating the legal system than laypeople. Attorneys have the training and skills necessary to understand the law, raise and argue defenses, use the rules of evidence, and

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34. *Id.* at 543

35. Breezy A. Schmidt, *North Dakota Case Study: The Eviction Mill's Fast Track to Homelessness*, 92 N.D. L. REV. 595, 638–40 (2017).

36. Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. L.J. 1281 (2002).

37. William Curcio, *Mediation and Homelessness: Passaic County, New Jersey, Steps in to Prevent Evictions*, 50 PUB. WELFARE 34 (1992); *see also* Holl, et al., *supra* note 29, at 543.

38. VICKI BEEN, DEBORAH RAND, NICOLE SUMMERS & JESSICA YAGER, IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS (2018); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967 (2012); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 Touro L. REV. 187 (2009).

39. Amanda Scott, *We Have a Right to Counsel in Criminal Cases. Why Not in Evictions?*, WASH. POST (Nov. 6, 2018), [http://www.washingtonpost.com/opinions/we-have-a-right-to-counsel-in-criminal-cases-why-not-in-evictions/2018/11/06/bbdb8600-d879-11e8-83a2-d1c3da28d6b6\\_story.html](http://www.washingtonpost.com/opinions/we-have-a-right-to-counsel-in-criminal-cases-why-not-in-evictions/2018/11/06/bbdb8600-d879-11e8-83a2-d1c3da28d6b6_story.html) [<https://perma.cc/A3TU-CLHX>].

otherwise conduct themselves in a manner expected by the court. Also unsurprisingly, tenants with attorneys have significantly better outcomes than those who are unrepresented. This solution also raises the quality of housing because landlords quickly learn that attorneys will properly raise defenses about habitability. But, on the other hand, providing legal representation to tenants facing eviction increases the costs to landlords, which are often passed on to tenants as higher rent.<sup>40</sup>

Critics also point to the high costs of providing attorneys to all tenants. However, a recent 2018 study published by the Philadelphia Bar concluded that the City of Philadelphia recouped at least \$12.74 in associated savings on other programs—relating to housing and crime, for example—per dollar spent on providing legal counsel to tenants.<sup>41</sup> Other cities are reportedly exploring this option through pilot programs. However, of all of the solutions, this solution requires by far the most upfront cost and political buy-in and, accordingly, may not be a readily available intervention for many cities.

Increased staffing at legal aid corporations, “lawyer for the day” programs, and limited-scope representation options are effective alternatives to establishing a universal right to access to counsel. The first of these increases the number of clients a legal aid organization can serve and requires little explanation, but necessitates significant increased funding.<sup>42</sup> The second and third interventions create avenues for providing representation with less funding because they rely upon publicly funded or pro bono attorneys representing tenants.<sup>43</sup> In these scenarios, attorneys enter cases on limited bases. Because lawyers-for-the-day and limited-scope representations can take so many forms, attorneys are flexible in what services they choose to offer, and potential clients can either accept offered terms or refuse them.

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40. BEEN, ET AL., *supra* note 38.

41. See STOUT RISIUS ROSS LLC, ECONOMIC RETURN ON INVESTMENT OF PROVIDING COUNSEL IN PHILADELPHIA EVICTION CASES FOR LOW-INCOME TENANTS (2018), <https://www.philadelphiabar.org/webobjects/pba.woa/contents/webserverresources/cmsresources/philadelphiaevictionsreport.pdf>.

42. Harriet McConnell Retford, *The Eviction Crisis in Colorado*, 48 COLO. LAW. 6 (2019).

43. Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 580–83 (2007).

Law school pro bono clinics that provide limited representation can help address the eviction crisis, while also training future lawyers.<sup>44</sup> Different states and universities have tackled these issues differently. Some clinics offer students the opportunity to represent low-income or indigent clients with legal needs that other organizations or programs might not be able to meet, while some clinics provide assistance in conjunction with self-help centers. But, clinics are limited in the number of students and cases that can be undertaken.

### *B. Mediation with Landlords and Tenants in Eviction Cases*

The second legal intervention umbrella is mediation of legal disputes between landlords and tenants. Mediations typically occur after the initiation of eviction proceedings, which has been implemented in various court settings, some as early as the 1990s, although mediations could occur at the pre-filing stage.<sup>45</sup> While minimal statistical analysis has been undertaken, participating judges and attorneys generally report positive results.

Some law school clinics provide mediation services in landlord-tenant courts through projects like the Mediation Project. While successful at resolving disputes without the need for trial and reducing evictions,<sup>46</sup> law school clinics such as the Washington University Civil Rights & Mediation Clinic are rarely big enough to take on full housing-court dockets due to limited faculty and law student resources.

In other instances, mediation services in landlord-tenant courts are provided by court-funded and court-housed projects. Two studies in particular focus on the role of court-sponsored housing court mediations in addressing evictions. The first study found that parties in half of cases attempted mediation when mediation was optional and found positive results.<sup>47</sup> The second study followed the court in Passaic County, New

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44. Margaret Meriwether Cordray, *Expanding Pro Bono's Role in Legal Education*, 48 IDAHO L. REV. 29 (2011); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879 (1999).

45. Curcio, *supra* note 37.

46. See *infra* Part IV.

47. Holl et al., *supra* note 29, at 543.

Jersey, as it implemented mandatory mediations in housing court. There, seventy-five to ninety-five percent of cases resulted in mediated agreements each week and roughly seventy percent of successfully mediated cases resulted in a permanent resolution.<sup>48</sup> This parallels the experience of the Mediation Project in both eviction court cases and pre-foreclosure cases.

As discussed in the next part, many aspects of mediation make it an attractive intervention in the eviction context, especially when there are insufficient funds to provide legal representation for the parties.

### III. WHY MEDIATION IS AN EFFECTIVE INTERVENTION TO ADDRESS EVICTIONS AND HOUSING INSTABILITY, PROVIDE ACCESS TO JUSTICE, AND TRAIN NEW LAWYERS

As the evaluations of the court mediation studies mentioned above and from the Mediation Project suggest, mediated housing court agreements result in better outcomes for all parties. This may be because tenants and landlords experience “procedural justice” and, thus, are more likely to comply with the terms of the settlement.<sup>49</sup> Mediation provides a way for landlords and tenants to express emotions and concerns, and an opportunity to focus on more individually effective solutions than the courts can provide. And, law-school-operated mediation clinics provide valuable learning opportunities for law students.

One of the key challenges for eviction litigants arises from the inherently emotional nature of an eviction. Many times, these emotions stem from landlords feeling cheated or taken advantage of by the tenants and tenants feeling unheard (especially regarding repairs) and fearing forced removal from their homes. Unlike a trial, mediation allows and encourages litigants to share these feelings, address them, and enter into bargaining based on interests. While these cases can heighten emotions on both sides, mandatory mediation prevents either party from outright refusing mediation and thus barring the other party from attempting to reach an agreement.

Much of the power of mediation arises from the mediators’ capacity to hear information often considered irrelevant to a legal case, such as feelings,

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48. Mandatory mediation means that all litigants are required to attempt to mediation before proceeding to trial. Curcio, *supra* note 37, at 5.

49. See generally Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010).

concerns, and the history of the relationship.<sup>50</sup> This power also allows the mediator to temper these feelings by clarifying expectations, exploring settlement alternatives, and viewing the problem through fresh eyes. Mediation is flexible and allows the parties to come to their own unique private contract instead of being bound by a rigid statutory scheme. Because mediators do not have to make any factual or legal findings, they are uniquely situated to provide an opportunity for tenants and landlords to feel heard. Mediators can facilitate alternative options to resolve the case, which would not be available to a judge.

Mediation allows the parties greater creativity in identifying solutions, including solutions that would otherwise fall outside of the case law and the narrow powers afforded to judges.<sup>51</sup> In Missouri, for example, if a tenant owes a landlord *any* money, the court must grant the landlord possession of the property.<sup>52</sup> Although the court may have discretion in determining the amount of damages owed, particularly in cases involving issues of habitability, an order for a “rent and possession” eviction gives the tenant only ten days to move out or redeem their lease before the landlord can execute the order.<sup>53</sup> If the landlord wishes to execute the order, the landlord must then pay the sheriff and pay for the removal of the tenant’s belongings if the tenant has not already removed them.<sup>54</sup> By contrast, because mediated agreements follow contract law instead of the eviction statutory scheme, the parties can extend move-out dates, reduce the expense of eviction for the landlord, and even identify pathways for tenants to remain in the unit through a rental payment plan and other approaches.

Mediated agreements typically allow tenants more time to find alternative housing or to get caught up on rent, and typically save money for landlords. In a standard trial resulting in a judgment for the plaintiff-

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50. JAY FOLBERG, DWIGHT GOLANN, THOMAS STIPANOWICH & LISA KLOPPENBERG, *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 256-261 (3d ed. 2016).

51. *Id.*

52. Absent a defense such as waiver, and subject to the right of redemption, the court must grant the landlord possession of the property. MO. REV. STAT. §§ 535.150–160 (2016).

53. Missouri has two types of evictions: “rent and possession” and “unlawful detainer.” The first is far more common and involves a tenant who has not paid sufficient rent. The latter involves a tenant who remains in the unit at the end of the lease, without permission of the landlord. Each has different elements and defenses. *See* MO. REV. STAT. §§ 534.010–535.300 (2019).

54. *See, e.g., Eviction Procedures and Policy*, CITY OF ST. LOUIS, <https://www.stlouis-mo.gov/government/departments/sheriff/new-eviction-policy-2014.cfm> [<https://perma.cc/7VQN-2G5C>]).

landlord, the plaintiff-landlord still must wait only ten days to execute the judgment, which may include physical eviction and/or collections. By contrast, mediated agreements can include payment plans and/or structured move outs. A payment plan outlines how much the defendant-tenant will pay the plaintiff-landlord over a period of time, which may extend for a number of months or even years. Many plaintiff-landlords will allow defendant-tenants to remain in the unit if they comply with the plan. A structured move-out is often used in tandem with a payment plan. Under this arrangement, a date is set for the defendant-tenant to move out, usually after the ten-day threshold the plaintiff-landlord would get from executing a judgment; thus, the landlord recoups money without the hassle of a forced eviction and its attendant costs.

Housing courts, and specifically *pro se* landlord-tenant dockets, provide an ideal opportunity to implement mandatory mediation. Because many states, including Missouri, expressly forbid any form of self-help eviction, landlords must take a tenant through housing court to reclaim possession of their premises.<sup>55</sup> Funneling eviction cases through housing court provides an opportunity for intervention in all legal evictions, especially where other organizations educate the community about the illegality of self-help evictions. Mandatory mediation, whereby a judge requires parties to attempt mediation before moving to trial, also becomes more effective in housing court because the landlord requires a judgment to legally evict a tenant.

#### IV. THE IMPACT OF THE ST. LOUIS MEDIATION PROJECT

The need for an intervention such as the Mediation Project was confirmed fairly early in an empirical study by the Clinic and EHO of eviction cases filed in St. Louis City in 2012, which revealed that tenants face almost unsurmountable hurdles when their cases are brought to trial.<sup>56</sup> According to the study, of the St. Louis City eviction cases that concluded

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55. See MO. REV. STAT. § 441.233 (2016).

56. ZACHARY SCHMOOK & KAREN TOKARZ, EQUAL HOUSING & OPPORTUNITY COUNCIL, THE STUDY (2012) (unpublished study) (on file with the Metropolitan St. Louis Equal Housing & Opportunity Council). This study was conducted prior to the Mediation Project's expansion into St. Louis County. This remains true in St. Louis City where tenants won between three and five percent of trials in 2017 and 2018. See *infra* Appendix D.

with a trial or default judgment in 2012, only two cases (0.04%) ended in favor of the tenant, while 4,934 cases (99.96%) ended in favor of the landlord. At least 2,282 cases (or 46.23% of the total) were forwarded to the sheriff for execution of the eviction, i.e., forcible removal of the tenant from the property.<sup>57</sup> As starkly shown by the numbers, the odds of a tenant succeeding in court were virtually zero. And, the odds that the tenant would be forcibly evicted from their home by court action and sheriff eviction, with costs to tenants, landlords, housing stability, and the economy, are high if the case goes to trial.<sup>58</sup>

By contrast, the mediations through the Mediation Project have produced very different outcomes. Data analysis of cases from the St. Louis City *pro se* housing dockets in 2017 and 2018 (1,423 cases in 2017 and 1,382 cases in 2018) demonstrates the benefits of mediation for the parties, as well as for the courts. Where both parties appeared for court and engaged in mediations in 2017, fifty-four percent of cases reached an agreement via mediation, and only thirty-five percent resulted in a trial.<sup>59</sup> Where both parties appeared for court and engaged in mediations in 2018, seventy-one percent of cases reached an agreement via mediation, and only twenty-two

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57. These numbers demonstrate that a judgment in favor of the landlord is also not an ideal outcome for landlords, because nearly half still had to pay the sheriff to execute the judgment, pursue garnishment proceedings, etc.

58. Other local interventions previously implemented to address these disparities include expanding the right to jury trials in eviction cases and expanding access to the defense of breach of the implied warranty of habitability. While the direct impacts of these interventions are unknown, the availability of jury trials and increased availability for judges to hear issues of habitability may encourage landlords to mediate and may have also contributed to the increase in successful mediations between 2017 and 2018. See Brief of the Metropolitan St. Louis Equal Housing & Opportunity Council et al. as Amici Curiae in Support of Appellant at 10-14, *Kohner Props., Inc. v. Johnson*, 553 S.W.3d 280 (Mo. 2018) (No. SC95944); see also *Brainchild Holdings, LLC v. Cameron*, 534 S.W.3d 243 (Mo. 2017) (No. SC96376); Karen Tokarz & Zachary Schmook, *Law School Clinic and Community Legal Services Collaborate to Advance the Remedy of Implied Warranty of Habitability in Missouri*, 53 WASH. U. J.L. & POL'Y 169 (2017).

59. Approximately half of all cases result in either a default judgment (where the defendant-tenant does not appear, but the plaintiff-landlord does) or a dismissal (where the plaintiff-landlord does not appear, regardless of whether the defendant-tenant appears). So, although mediated agreements only made up twenty-four percent of all cases in 2017, this number rises to fifty-four percent when accounting only for cases where mediation could be attempted (i.e., those where both parties appeared). The remaining eleven percent of cases settled without mediation, were barred by a bankruptcy proceeding, transferred to another court, or continued beyond the close date of the data set (the end of 2017). See *infra* Appendix D.

percent resulted in a trial.<sup>60</sup> In St. Louis County, seventy-five percent of mediated cases in 2019 resulted in an agreement.<sup>61</sup> These outcomes are consistent with other studies that show mediated cases have a higher rate of settlement than cases that do not go into mediation.<sup>62</sup>

In addition, mediated settlements result in significantly improved outcomes and compliance for both parties. In 2018, over half of all cases that settled through mediation resulted in a dismissal, i.e. the parties successfully completed the terms of the agreement. Only thirty-three percent of mediated settlements resulted in a consent judgment against the defendant-tenant (after the defendant-tenant violated the agreement), and only twenty-five percent of mediated settlements resulted in an execution of the judgment. By contrast, ninety-two percent of non-settled cases that went to trial resulted in a judgment against the defendant-tenant, and the plaintiff-landlord was forced to execute the judgment in forty percent of those cases.<sup>63</sup> These results are consistent with a number of studies showing a greater compliance rate for settlements resulting from mediations rather than judgments arrived through trial.<sup>64</sup>

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60. The rate of default judgments and dismissals remained at approximately fifty percent in 2018. So, although mediated agreements only made up thirty-four percent of all cases in 2018, this number rises to seventy percent when accounting only for cases where mediation could be attempted, i.e., where both parties appeared. The remaining eight percent of cases settled without mediation, were barred by a bankruptcy proceeding, transferred to another court, or continued beyond the close date of the data set (the end of 2018). See *infra* Appendix D.

61. Because many agreements last several months or longer, the final outcome data for 2019 mediations are not yet available. The Mediation Project only started in St. Louis County in summer 2018 and there is not yet a sufficient dataset at this time to assess the impact. The mediation rate indicated above is tracked at the time of the docket call and can be calculated once all of the dockets have been called for the year. The relevant data are on file with authors.

62. Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 694 (2002). See Litz & Davis, *supra* note 7, showing analogous results from the brief experience of the Mediation Project with foreclosure mediations in 2013.

63. Of a total of 1382 cases docketed on the St. Louis City *pro se* housing dockets in 2018, 149 cases went to trial while 476 settled through mediation. Whereas landlords won all but 12 of the cases that resulted in trial, 250 of the 476 cases settled through mediation resulted in a dismissal and no eviction on the tenant's record. See *infra* Appendix D.

64. See Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 LAW & SOC'Y REV. 11 (1984); Neil Vidmar, *An Assessment of Mediation in a Small Claims Court*, 41 J. SOC. ISSUES 127, 138 (1985); Craig A. McEwen & Richard J. Maiman, *The Relative Significance of Disputing Forum and Dispute Characteristics for Outcome and Compliance*, 20 LAW & SOC'Y REV. 439, 444 (1986); Neil Vidmar,

Mediated settlements through the Mediation Project have improved over time. The percentage of cases that successfully mediated increased by seventeen percent, from fifty-four percent to seventy-one percent between 2017 and 2018. Additionally, the percentage of mediated cases that resulted in a dismissal increased by six percent, which reduced the number of consent judgments entered by the same amount. These changes are correlated with the court's shift towards a mandatory mediation model at the beginning of 2018, as suggested by the Mediation Project, wherein litigants must attempt mediation before proceeding to trial. Other potential explanations include the increased appreciation from the judges and the litigants with the success of the Mediation Project, the increased experience of the supervisors and mediators, and the continued refinement of the Mediation Project's training curriculum.<sup>65</sup>

Data analysis for the Mediation Project shows that mediated settlements reduce the rate of judgments against the defendant-tenant by sixty percent and the rate of execution by over fifteen percent, cutting the rate of executed evictions nearly in half.<sup>66</sup> Extrapolating from these statistics, if the 476 families facing eviction that settled their cases through mediation in St. Louis City in 2018 had gone to trial instead, 438 of those families would have ended up with judgments against them and evictions on their record. However, after mediation, only 159 of those families ended up having consent judgments filed against them after failing to adhere the mediated settlement agreement. Put another way, in one court in one year, 279 families successfully avoided evictions on their records and judgments against them by settling their cases through mediation and satisfying that agreement.<sup>67</sup>

Mediated settlements also save time and money for landlords and improve overall housing stability. According to Wes Kozeny, a St. Louis

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*Assessing the Effects of Case Characteristics and Settlement Forum on Dispute Outcomes and Compliance*, 21 LAW & SOC'Y REV. 155, 162 (1987).

65. These hypotheses result from the authors' informal interviews of litigants, mediators, and judges.

66. See *infra* Appendix D.

67. These 279 estimated cases where evictions were avoided through mediated settlement constitute 41% of cases where both parties appeared at the *pro se* housing docket (279 of 673), twenty percent of all cases filed at the *pro se* docket (279 of 1382), and even five percent of all eviction cases filed in St. Louis City in 2018 (279 of 5679). In effect, the Mediation Project resulted in five percent fewer evictions across all cases filed. See *infra* Appendix D.

attorney who represents the mortgage banking industry, commercial real estate owners, and residential lenders,

When I represent a landlord for the first time, I go over the right way and the wrong way to work out disputes with tenants. What really gets their attention is the fact that [mediating] is also the most cost-effective way to either get the tenant back on track, or recover possession of the rental unit.<sup>68</sup>

The community also benefits from freeing up sheriff's officers from eviction activities so that they can engage in productive police and community work.

Mediated settlements benefit the courts, in addition to the parties and the sheriff's offices. Mediations can range from five minutes to nearly two hours but, on average, mediations resulting in settlement last approximately half an hour, roughly the same duration as trials on the *pro se* docket. In current Mediation Project operations, mediators settle on average twelve cases per week in the City Court, and ten cases per docket in the County Court, saving the City Court approximately six hours each week and the County Court approximately five hours per docket.<sup>69</sup> If mediations were expanded into the bulk filing dockets, where landlords have attorneys but tenants are almost always *pro se* and bulk filers settled at a similar rate to *pro se* filers, the Mediation Project would save an additional eighteen court hours each week for the St. Louis City Court and nearly fifty-four court hours each week for the St. Louis County Court. If the Mediation Project addressed the entire housing dockets, the savings could be as much as twenty-four court hours per week in St. Louis City and sixty court hours per week in St. Louis County.

Increased court efficiency through mediated settlements saves the taxpayers money, enhances the productivity of the courts, and improves court-community relations. Judge Nicole Colbert-Botchway, associate circuit judge in St. Louis City Circuit Court, has presided over the housing

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68. St. Louis Mediation Project, *Law Students and Local Attorneys Partner with St. Louis City and County to Provide Free Mediation Services in Landlord-Tenant Courts*, Mo. Bar. (Nov. 1, 2019), <https://cpb-us-w2.wpmucdn.com/sites.wustl.edu/dist/4/1510/files/2018/07/St.-Louis-Mediation-Project.pdf> [https://perma.cc/9AAD-MD54].

69. St. Louis County holds the *pro se* landlord-tenant docket approximately twice a month, rather than every week, hence the shift in language.

dockets for three years and currently oversees the *pro se* housing docket in St. Louis City. As she points out, the Mediation Project helps in multiple ways, including enhanced due process for all parties:

I have seen how the St. Louis community benefits from the Mediation Project with improved relations between landlords and tenants, increased agreements on tenant move-outs and payment plans, and fewer forced evictions through the sheriff's office. Our court gains from its message to the community of its willingness to work with parties to achieve justice. The mediations lessen the burden on the courts, allowing judges to spend more time on the cases that need to go to trial.<sup>70</sup>

Judge Ellen Dunne, associate circuit judge in St. Louis County Circuit Court, who presided over the first landlord-tenant docket mediations in the County in 2018, concurs. She highlights that “[t]he Mediation Project offers assistance to the parties, provides law students real-world experience and an understanding of the contribution *pro bono* service can make to clients and the community, and helps our courts address a serious need in our region. This project is a win-win-win.”<sup>71</sup>

#### V. THE MECHANICS OF THE ST. LOUIS MEDIATION PROJECT

As indicated above, both the St. Louis City and St. Louis County Circuit Courts engage with the Mediation Project to assist with their respective *pro se* housing court dockets. The Mediation Project initially collaborated with judges in the St. Louis City Circuit Court to explore the benefits of mediation for the parties and to address a serious court-overcrowding issue. The Mediation Project expanded its provision of mediation services into the neighboring St. Louis County Circuit Court at the request of the judges there who expressed interest based on their perception of the significant benefits from reduced dockets and successful outcomes that the Mediation Project brings.

The City and County trial judges involved in the Mediation Project have shifted from an opt-in model, where the judges allow the parties to engage

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70. St. Louis Mediation Project, *supra* note 68 (emphasis deleted).

71. *Id.* (emphasis deleted).

in mediation if both parties agree to mediate, to an opt-out model, where trial judges strongly encourage the parties to participate in pre-trial mediation, but any party can refuse to mediate. Most recently, participating judges have shifted to a mandatory model, where all parties are required to attempt mediation before going before the judge for trial.<sup>72</sup> The judges' embrace of the Mediation Project is most evident in their hearty endorsement of this mediation requirement prior to calling their court dockets.

Project supervisors manage the day-to-day operations of the Mediation Project, such as training and scheduling mediators and law students, preparing materials, communicating with the courts, tracking data, and generally supervising the logistics of the Mediation Project while in the courtroom. The Mediation Project does not pay its supervisors nor its mediators, and instead uses a combination of law students and attorneys trained as mediators acting pro bono volunteering their time. Most of the law students are current or past students enrolled in the Clinic or enrolled in law school classes focused on mediation theory and practice. Most of the attorneys are specially trained mediators. All law students and mediators attend at least one training session that includes an overview of local housing law and mediator ethics, and a primer on mediation strategies and agreement drafting. Once the students and mediators attend the training, each must observe at least two mediations, co-mediate at least two mediations, and then be shadowed for at least two mediations before mediating independently.

At the heart of the Mediation Project is custom paperwork that allows for a court-enforceable agreement that does not appear as a judgment against the tenant-defendant unless the tenant-defendant violates the agreement. Although the parties ultimately have complete say over the terms of the agreement, the Mediation Project mediators typically memorialize the agreement in two forms—a conditional continuance and a signed-but-not-filed consent judgment (in addition to the customary

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72. The names and descriptions of these models are extracted from the methods highlighted in Curcio, *supra* note 37, at 5, and Holl et al., *supra* note 29, at 543. As discussed previously, this shift towards a mandatory model was correlated with a significant increase in both the number and percentage of mediations that reach an agreement.

agreement to mediate).<sup>73</sup> Accordingly, mediators explain these forms to the parties—as well as the next steps should either party fail to meet the terms of the agreement—as part of their opening remarks to the parties. These opening remarks also include a brief explanation of mediation, the purpose of the agreement to mediate, and why the parties must sign the agreement to mediate before proceeding. Mediators also address any preliminary questions that either party may ask.

The conditional continuance documents the settlement terms.<sup>74</sup> This document continues the case to another date and notes that, if the parties comply with the terms of the conditional continuance, the case will be dismissed. However, this document also notes that if one party breaches the terms of the conditional continuance, the other party may file the consent judgment. Typically, the consent judgment grants possession and the full rent owed to the landlord.<sup>75</sup> The conditional continuance protects the parties through binding terms. For example, if the conditional continuance requires the landlord to make repairs and the landlord attempts to file the consent judgment with the court, the judge will determine whether the landlord performed the repairs prior to signing and filing the consent judgment. If not, the judge will refuse to sign the consent judgment.

At the time of the mediation, the parties typically sign both the conditional continuance and the consent judgment. The judge, however, only signs the conditional continuance but keeps the consent judgment in the court file. In some mediations, the parties may agree to a continuance without conditions to provide more time for the parties to identify reasonable terms for the settlement. Regardless of the specific settlement terms, almost all mediated settlements include a future court date by which all terms of the settlement must be completed. At that point, unless either party returns to court to file the consent judgment after a settlement violation, the court will dismiss the case.<sup>76</sup> This dismissal then represents a

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73. The agreement to mediate, conditional continuance, and consent judgment forms are attached as Appendices A, B, and C, respectively.

74. *See infra* Appendix B.

75. *See infra* Appendix C.

76. One of the more complicated issues involves designing the appropriate process by which a party can execute the consent judgment after an alleged breach of the settlement agreement by the other party. Specifically, the process for returning to court to file a consent judgment strikes a middle ground between two more traditional options: either requiring the landlord to formally notify the tenant of a “show cause” hearing on one hand, or allowing the landlord to file a consent judgment without appearing

successfully completed settlement for both parties, with the tenant avoiding a judgment on their record and the landlord obtaining the agreed-upon settlement terms—whether money, or possession of the premises, or both.

#### CONCLUSION: NEW DIRECTIONS FOR THE ST. LOUIS MEDIATION PROJECT

Mediations provided by the St. Louis Mediation Project have proven effective in the collective effort to reduce evictions and housing insecurity in the St. Louis region. Mediation presents a significantly positive return on investment, with demonstrable positive outcomes for the parties, the court, and the community. In the end, mediation significantly reduces tenant evictions, increases the likelihood that landlords will receive at least some of what they request without tedious garnishment proceedings or sheriff-led forcible evictions, saves significant time and money for the courts, and overall contributes to enhanced housing stability. In addition, mediation programs provide positive learning experiences for law students and volunteer lawyers.

But, as indicated above, under the current structure, the Mediation Project only has the capacity to undertake mediations in the *pro se* landlord-tenant dockets in the St. Louis City and St. Louis County Circuit Courts. And, under the current structure, the Mediation Project only intervenes on the first court date after proper service upon the tenant, which is usually also the day of trial, when the parties have already experienced significant financial and emotional costs. Thus, the parties basically have one belated opportunity to come to an agreement. If the parties cannot agree in the moment, the case usually continues to trial immediately, absent a mutual agreement to continue the case.

The Mediation Project has identified four directions for possible growth, highlighted earlier, that might reduce evictions and improve housing stability in the region. One direction, embraced in other regions of the country, would involve the Mediation Project providing mediations to landlords and tenants prior to the parties' court date (as is true with most foreclosure mediation programs) or even prior to the filing of an eviction or

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before the judge on the other hand. In practice, we have found that requiring a more formal hearing has significantly dissuaded landlords from even participating in mediation, whereas allowing landlords to file the consent judgment without appearing before the judge has provided too much discretion to the landlord.

other court action, perhaps in a community-based setting. If the parties engaged in mediations before filing or between filing and the trial date, the parties would likely enter the mediation having expended less time, energy, and money. Logically, the parties might be more inclined to reach a mediated settlement. Any mediated settlement prior to a first court date would also save the court time, energy, and money by removing significant numbers of cases entirely from the court's docket.

This approach could be implemented in a number of ways, such as the courts advising landlords of the mediation option/requirement upon filing (or requiring mediation prior to the trial date), bulk filer landlords advertising mediations to their tenants prior to filing eviction proceedings, or a municipality publicly endorsing and encouraging landlords in their region to attempt mediation prior to filing. These approaches might be funded in a variety of ways, by the courts, by local governments, or in partnership with community centers or local non-profit organizations. In addition to providing mediations, these centers could educate landlords and tenants in the community of their rights and help negotiate eviction delays and payment plans, such as the "Here to Stay" program in St. Louis.<sup>77</sup>

This approach has been tried in other regions of the country using multiple structures, including operating at the courthouse, at off-site locations, and in mobile centers that travel to communities.<sup>78</sup> Off-site locations and mobile centers with broader services might have higher rates of community engagement, especially from the community nearest the selected location, but would require significant resources to build and advertise, might lose the impact of court endorsement, and could pose challenges coordinating with the parties, mediators, and the courts.

A second direction would be a bigger, court-endorsed, court-funded mediation project, in which the Mediation Project provided mediations for

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77. Janelle O'Dea, *Affordable Housing Commission Approves \$6 Million in Funding for 54 Groups*, ST. LOUIS POST-DISPATCH (Jan. 10, 2020), [https://www.stltoday.com/news/local/metro/affordable-housing-commission-approves-million-in-funding-for-roups/article\\_405ba4f0-8e82-5c07-a2b6-85fbc35c6186.html](https://www.stltoday.com/news/local/metro/affordable-housing-commission-approves-million-in-funding-for-roups/article_405ba4f0-8e82-5c07-a2b6-85fbc35c6186.html) [https://perma.cc/3BLL-6ZKN].

78. CITY OF PHILA. OFFICE OF CMTY. EMPOWERMENT, AT HOME: EVICTION PREVENTION & RESPONSE PROGRESS REPORT 16-17 (2019), [http://www.sharedprosperityphila.org/wp-content/uploads/2019/10/EvictionPrevention-2019\\_SinglePage-1.pdf](http://www.sharedprosperityphila.org/wp-content/uploads/2019/10/EvictionPrevention-2019_SinglePage-1.pdf) [https://perma.cc/M6UY-2PJ3]; Rebecca Hare, *Mitigating Power Imbalance in Eviction Mediation: A Model for Minnesota*, 38 LAW & INEQ. 135 (2020); Holl et al., *supra* note 29, at 543.

a larger portion of, if not all of, the housing dockets, rather than just mediation of *pro se* cases. Judges in both the City and the County have repeatedly urged the Mediation Project to expand further into the housing dockets (as well as into other state court dockets), akin to programs developed over the years by other state courts across the country with court-sponsored mediation projects.

Of available legal interventions, court-endorsed, mandatory mediation (at the pre-filing stage, or at the first hearing) proves the least expensive and complicated to implement, while still creating a significant impact.<sup>79</sup> According to the research on mediations in housing courts, court pressure on litigants to engage in mediation results in significantly more agreements, which serve as both a short-term and long-term solution to evictions through the court.

A third direction, perhaps within the court-sponsored model, would be for the Mediation Project to provide mediations in the St. Louis municipal courts (divisions of the circuit courts), which handle housing and building code enforcement at municipal locations away from the main court, where both landlords and tenants are frequently *pro se*. These cases seem ripe for mediation and likely to lead to an upgrade of marginal housing units and greater housing stability in the region.<sup>80</sup> The Mediation Project might also facilitate mediations in other municipal cases such as traffic tickets.

A fourth direction within the court-sponsored model would be for the Mediation Project to help develop technology to facilitate online dispute resolution mechanisms for the state and municipal housing courts. This approach is growing in this country and around the world and is likely to expand in the wake of COVID-19.<sup>81</sup>

With any of these directions, the Mediation Project would need increased funding and staffing, and possibly office space and resources within the courthouse. Under the current iteration, the Mediation Project supervisors, law students, and mediators operate outside of the courthouse, except during the mediations. The Project is externally located and acts as a wholly independent entity, relying on the funds and donations of the law school and other organizations to operate. A court-sponsored approach

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79. Holl et al., *supra* note 29, at 543.

80. Ross, *supra* note 14, at 29–46.

81. *See supra* note 3.

would secure the use of mediation as an effective resolution vehicle for landlord-tenant and other housing cases to the benefit of the St. Louis courts and the community.

Each of the new possible directions for the Mediation Project has unique social justice and pedagogical benefits and challenges. Providing mediations at the pre-filing stage seems a likely positive approach that would reduce costs for all concerned, including the courts, but more research is needed to know how and where such might occur. Mediation in landlord-tenant dockets appears to be the cheapest, easiest, and most effective to implement without sacrificing impact. Situating the Mediation Project under the umbrella of the court within the courthouse—coordinated by either the Mediation Project or by the court—seems a logical extension of the past ten years of collaboration between the Project and the courts in St. Louis. Expanding mediation into the broader eviction dockets is another possibility under this umbrella. And, in the COVID-19 world in which we now live, further development of on-line dispute resolutions in eviction courts might be crucial. There is a great likelihood that the Mediation Project's interventions in any of these venues would help address evictions and housing instability in the St. Louis metropolitan area.

APPENDIX A: AGREEMENT TO MEDIATE

CAUSE NUMBER: \_\_\_\_\_ DATE: \_\_\_\_\_

PETITIONER/PLAINTIFF

RESPONDENT/DEFENDANT

\_\_\_\_\_

Welcome to the St. Louis City Circuit Court *Pro Se* Mediation Program. Please take your time to read this agreement over. Participation in this program is free. Mediation is a process in which a neutral third party facilitates communication between the parties to promote settlement. A mediator may not impose his or her own judgment on the issues for that of the parties. Mediation is a voluntary process, which can be terminated at any time by either party or the mediator for any reason. By signing below, you agree to participate in this program.

This program is coordinated with the St. Louis City Circuit Court with trained attorney/mediators and student mediators provided by Washington University School of Law, Metropolitan St. Louis Equal Housing & Opportunity Council (EHOC), United States Arbitration and Mediation (USAM), and the Bar Association of Metropolitan St. Louis (BAMSL). The term mediator as used in this agreement refers both to the attorney/mediators and law students.

The mediator at no time: (a) will be acting as legal advisor or representative for any party or non-party participant; (b) has a duty to recognize, assert, analyze, or protect any legal right or obligation, including, but not limited to, lien rights, statutes of limitation or any other time limit or claim requirement; (c) has a duty to make an independent expert analysis of the situation or raise issues not raised by the parties, or to determine that additional necessary parties should participate in the mediation; and (d) can guarantee that the mediation session will result in settlement. There is no attorney-client privilege between the mediator and any party and/or non-party participant. The mediator may assist the parties in preparing written settlement documents, however, such participation will not be considered as giving legal advice to any party and the parties may have the document

independently reviewed by their own legal counsel before signing any document. The parties are encouraged to consult with their legal counsel at any time.

All communications of any kind, nature or description made or disclosed by or to the mediator, any party, attorney, or non-party participant during the course of the mediation are confidential and not admissible in any court or administrative procedure

No party, counsel or non-party participant in the mediation process will call or subpoena the mediator and/or any employer, employee, agent or servant or any organization identified in this agreement to produce in any civil action, arbitration, or other legal or administrative proceedings of any kind whatsoever any notes or documents related to the mediation or to testify regarding any notes or documents or the mediator's thoughts or impressions.

If you have any questions, please ask before signing this agreement.

\_\_\_\_\_  
Petitioner/Plaintiff    Date                      Respondent/Defendant    Date

Mediator (Print) \_\_\_\_\_ Start Time: \_\_\_\_\_ End Time: \_\_\_\_\_

## APPENDIX B: CONDITIONAL CONTINUANCE

MISSOURI CIRCUIT COURT  
 TWENTY-SECOND JUDICIAL CIRCUIT  
 (CITY OF ST. LOUIS)

Plaintiff(s)	Date Signed by Parties
vs.	
Defendant(s)	Case Number
	Division

**CONTINUANCE**

The Parties come now and continue the above case to \_\_\_\_\_ for disposition. Failure by the Plaintiff to appear on that date, or before, will result in a dismissal of this action without further notice to the parties.

We, the undersigned parties, have agreed to the following settlement of our dispute:

Case Dismissed so long as

\_\_\_\_\_

\_\_\_\_\_

Please check this box if a "Payment Schedule" is included with this agreement.

SO ORDERED:

\_\_\_\_\_  
 JUDGE SIGNATURE

PLAINTIFF: \_\_\_\_\_

DEFENDANT: \_\_\_\_\_



SO ORDERED:

\_\_\_\_\_  
JUDGE

\_\_\_\_\_  
DATE SIGNED AND ENTERED

PLAINTIFF: \_\_\_\_\_

DEFENDANT: \_\_\_\_\_

APPENDIX D: DATA FROM THE MEDIATION PROJECT IN ST. LOUIS CITY  
(2017-2018)

<b>Results from All Cases</b>	<b>2017</b>	<b>2018</b>	<b>Change</b>
Total eviction cases filed in St. Louis City <i>pro se</i> housing court	1423	1382	-41
% of all cases where both parties appeared	40% (n=568)	45% (n=625)	5%
% of all cases that resulted in a trial:	16% (n=223)	11% (n=149)	-5%
% of all cases that resulted in a mediated settlement:	24% (n=345)	34% (n=476)	10%
% of all cases where the tenant defaulted by failing to appear:	34% (n=486)	33% (n=450)	-2%
% of non-settled cases dismissed:	28% (n=298)	29% (n=259)	1%
<b>Results of Mediated Settlements</b>			
% of mediated settlements that resulted in dismissals:	47% (n=161)	53% (n=250)	6%
% of mediated settlements where the landlord filed the consent judgment (but did not necessarily execute):	40% (n=137)	33% (n=159)	-6%
% of mediated settlements where the landlord filed the consent judgment and the sheriff executed, i.e. physically evicted:	26% (n=91)	25% (n=119)	-1%

% of mediated settlements that were not executed; the sheriff did not physically evict:	74% (n=254)	75% (n=357)	1%
<b>Rates of Execution</b>			
% of all cases where the judgment is executed, i.e. the sheriff physically evicts:	23% (n=321)	27% (n=369)	4%
% of non-mediated cases executed (accounting for dismissals):	29% (n=230)	39% (n=250)	10%
% of default judgments executed:	30% (n=144)	39% (n=177)	9%
<b>Results at Trial</b>			
% of cases that the landlord wins at trial:	97% (n=216)	92% (n=137)	-5%
% of cases the tenant wins at trial:	3% (n=7)	8% (n=12)	5%
<b>Results for Cases Where Both Parties are Present</b>			
% of cases where both parties are present that result in trial	34.90% (n=223)	22.14% (n=149)	-12.76%
% of cases where both parties are present that result in mediated settlement	53.99% (n=345)	70.73% (n=476)	16.74%