

11-2018

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Recommended Citation

Martin, Frank J., "Eviction: How Expedited Process and Underfunded Legal Aid Contribute to Our Housing Crisis" (2018). Volume 9, CLR Online. <https://doi.org/10.15779/Z387H1DM8R>

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Eviction: How Expedited Process and Underfunded Legal Aid Contribute to Our Housing Crisis

Frank J. Martin*

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The word *crisis* has lost its essence through overuse and exaggeration. Still, looking through the dictionary, I find myself quietly nodding along with how fittingly the definition describes the current state of housing in Alameda County, home to the East Bay Community Law Center (EBCLC).

Crisis: The turning point of a disease when an important change takes place, indicating either recovery or death.¹

The turning point... The racial and economic diversity of Alameda County is not simply changing; it is at a major turning point. Displacement in historically African-American neighborhoods in Oakland and Berkeley continues unabated. This is on top of significant prior displacement: Oakland's African-American population decreased by nearly twenty-five percent from 2000 to 2010.² This racial diversity will likely never return once it is lost. Economic diversity is on life-support as well. Among other displacing activities, developers are rapidly buying up the few remaining single-room occupancy hotels in downtown

DOI: <https://doi.org/10.15779/Z387H1DM8R>

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1. *crisis*, OXFORD LIVING ENGLISH DICTIONARIES, <https://en.oxforddictionaries.com/definition/crisis> [<https://perma.cc/5VCP-GV9R>] (last visited Apr. 27, 2018).

2. Kalima Rose & Margaretta Lim, *A Roadmap Toward Equity: Housing Solutions for Oakland, California*, POLICYLINK 7 (2015), <http://www.policylink.org/sites/default/files/pl-report-oak-housing-070715.pdf> [<https://perma.cc/3VBG-5B2L>].

Oakland with plans to turn their newly acquired buildings into more profitable ventures like high-end “dorms” for young, wealthy, tech industry employees.³

when an important change takes place... There is no question that this displacement is an important change to our community. I suppose determining if it is malignant or benign is a question of perspective. This depends on whether or not one thinks that cities are best when they are filled with well-off people who work in a few highly-paid fields.

indicating either recovery or death. Time-lapse images of the changing racial and economic composition of Alameda County plainly illustrate that displacement is behaving like a cancer. This cancer started small, grew slowly, and before long was at full tilt. It appears to be taking over the whole community. What was there before will be dead. The street signs and neighborhood markers will still say the same names, but Oakland will no longer Oakland and Berkeley will no longer Berkeley.

Sadly, the law contributes to this crisis. Eviction’s summary proceedings favor dispossession of tenants. And there is a profound imbalance in representation between landlords and low-income tenants.

Understanding the eviction process’s contribution to our housing crisis requires us to think about the complex—and often fraught—relationships among expedited process versus justice, plus poverty versus wealth and real-estate investment versus home.

I.

EXPEDITED PROCESS VERSUS JUSTICE

One way to think about procedural due process is to consider it the quality controls and operating rules in our legal system. A good quality control process has twin goals of detection and prevention. Detection usually involves a second set of eyes looking over the finished product. Among many other functions, our judiciary’s appellate courts can provide that second set of eyes. Prior to detection, the other elements of quality control are in place to prevent mistakes. Think of these as the protocols governing how to operate the machine, the training that the folks operating the machine receive, and the tools they use to operate the machine. More time, deeper thinking and planning, clearer operating manuals, and better skilled operators all contribute to fewer mistakes and better products.

As a general rule, the folks building quality control systems design them on a continuum. When the stakes are high, they aspire to build in quality control measures at every stage of the process and make sure enough time is built into the process for the controls to be meaningful. When the designers think the stakes

3. Darwin BondGraham, *Last Days at Downtown Oakland’s Hotel Travelers?*, EAST BAY EXPRESS (May 26, 2016), <https://www.eastbayexpress.com/oakland/last-days-at-downtown-oaklands-hotel-travelers/Content?oid=4799815> [https://perma.cc/PRL3-JCNS].

are not that high, then they are OK winging it a bit, letting a few mistakes slip through in exchange for more efficient production.

Summary proceedings, or expedited process, is a form of judicial winging it. In essence, it means less time and less procedural safeguards to prevent mistakes. Expedited process is like the conveyer belt in Lucille Ball's famous chocolate factory scene.⁴ With expedited process, things are gonna get smashed, dropped on the floor, or hastily stuffed in a shirt or mouth. Fine in a chocolate factory; heartbreaking when describing the process used to decide if the sheriff should be sent to remove someone from their home.

Justice isn't easily defined. Philosophers, activists, and scholars have worked on various definitions for ages. This list will not do justice to Justice, but here are a few things that can be said about it: Justice means getting the answer right (e.g., preventing innocent people from being found guilty and sent to jail); Justice means making decisions based on the facts and the law, not biases or prejudices (i.e., judges and juries should identify, acknowledge, and intervene in their own implicit and explicit biases); Justice means fairness (*See* Rawls);⁵ Justice means not letting decisions be influenced by factors like wealth (no e.g. or i.e. here, just a statement of fact: The proof that legal representation matters—and matters a lot—is that folks with the means to have legal representation in a legal dispute always—always, always, always—have representation); Justice means *audi alteram partem* (“hear the other side”) is meaningfully brought to life in disputes (i.e., given the complexity and formality of our legal system, for the other side to be meaningfully heard, they need a lawyer versed in lawyer-speak and decorum).

As you can imagine, Expedited Process and Justice rarely marry of their own volition. When there are attempts to bring forth a marriage, their wedding is usually an elaborate kabuki that masks the profound imbalance in the relationship. Justice provides the necessary political cover for the community to bless the union, but Expedited Process holds all the cards. In adopting summary proceedings, like those in eviction cases, the community has already accepted a marriage that traded procedural safeguards normally in place for Justice for the benefit of Expedited Process.

II.

POVERTY VERSUS WEALTH AND REAL-ESTATE INVESTMENT VERSUS HOME

The eviction process can start a number of different ways and play out in many different directions. For most tenants, however, some of those “many different directions” are only possible with the help of legal counsel. Without legal counsel, lots end up with default judgments against them or at a mandatory

4. *I Love Lucy: Job Switching* (CBS television broadcast Sept. 15, 1952).

5. *See* John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223–51 (1985).

settlement day the week before trial is set with no plan or realistic way to assert any defenses to preserve their housing.

On settlement day, our fictional marriage of Expedited Process and Justice meets real-world suffering in a crowded hallway on the second floor of the Hayward courthouse. On settlement day, there is no time to ponder the trade-offs between Expedited Process and Justice.

By settlement day, many of our community members who are poor are potentially a few days away from a high-stakes trial without a lawyer. While the trial is summary in format, it is not procedurally straightforward. On one hand, a family's shelter is at risk. On the other hand, a landlord's handsome stream of investment income. While these interests are both important, they are not equivalent. Justice tells us so.

The handsome stream of investment income enables the overwhelming majority of landlords to hire experienced counsel, while most low-income tenants like the ones represented by EBCLC and other legal aid organizations can seldom afford legal counsel. In Alameda County, prior to recent government and philanthropic initiatives, we estimated that over ninety percent of landlords were represented by legal counsel while only thirty percent of tenants were represented (including those who only received brief legal services). Not only did these tenants not have the same handsome stream of investment income to afford legal counsel, but the vicissitudes of life further compounded the burden: a child's medical emergency requiring a missed day of work led to a lost job, which temporarily interrupted a modest stream of income needed for rent payments; a landlord's refusal to fix a habitability issue in an apartment led the tenant to cover the expense herself and reduce her rent payment, so the landlord threatened eviction; a rent-controlled unit with a long-term tenancy led an unscrupulous landlord, enticed by the possibility of increased profits, to use a pretextual reason to try to evict.

III.

THE ROLE OF LAWYERS AND THE COMMUNITY

What can be done? Or better, what *must* be done if we as a community are going to bring some balance to this relationship and stop this metastasizing cancer? The good news is that there is something to do even if we are unable to change the procedural structure of eviction proceedings. It is what EBCLC does day in and day out in its housing practice: provide free legal representation to low-income tenants. As Professor Matthew Desmond noted in his book, *Evicted: Poverty and Profit in the American City*, “[A] program that ran from 2005 to 2008 in the South Bronx provided more than 1,300 families with legal assistance and prevented eviction in 86 percent of cases.”⁶ The intervention works; the

6. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 304 (2016).

problem is that the demand vastly outstrips capacity. Our community and others facing the same displacement pressures must prioritize funding for eviction defense lawyers. Thankfully, local governments and philanthropic leaders across the country are heeding this call. In New York City, San Francisco, Oakland, Berkeley, and other cities across the country, local governments and philanthropists are starting to prioritize this funding. We must ensure that this momentum continues and that this funding is made permanent. Across the country in communities just like ours, we are in crisis. Expedited process and underfunded civil legal aid will bear partial responsibility for the loss of the vibrancy and diversity we cherish if we do not take action.