

# Discrimination in Evictions: Empirical Evidence and Legal Challenges\*

*Deena Greenberg,\*\* Carl Gershenson,\*\* and Matthew Desmond\*\*\*\**

*Tens of thousands of housing discrimination complaints are filed each year. Although there has been extensive study of discrimination in the rental market, discrimination in evictions has been largely overlooked. This is because determining whether discrimination exists in evictions presents several challenges. Not only do landlords typically have a non-discriminatory reason for evictions (e.g., nonpayment), but they also wield tremendous discretion over eviction decisions—discretion that can be informed by conscious or unconscious bias against a protected group. Detecting discrimination in evictions, moreover, poses a number of challenges that conventional methods of assessing housing discrimination are ill-suited to address. This Article is among the first to empirically investigate racial and ethnic discrimination in eviction decisions. It does so by drawing on the Milwaukee Area Renters Study, a novel observational study of 1,086 rental households. Statistical analyses reveal that among tenants at risk of eviction, Hispanic tenants in predominantly white neighborhoods were roughly twice as likely to be evicted as those in predominantly non-white neighborhoods. Hispanic tenants were also more likely to get evicted when they had a non-Hispanic landlord. This Article discusses possible explanations for these findings and evaluates legal and policy solutions for addressing discrimination in the eviction process.*

## INTRODUCTION

Every year, tens of thousands of housing discrimination complaints are filed.<sup>1</sup> Between 2004 and 2014, more than 300,000 housing discrimination complaints were reported to non-profit fair housing organizations and gov-

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\*\* J.D., Harvard Law School, 2015.

\*\*\* Ph.D. candidate in Sociology, Harvard University.

\*\*\*\* John L. Loeb Associate Professor of the Social Sciences, Harvard University.

<sup>1</sup> NAT'L FAIR HOUSING ALLIANCE, WHERE YOU LIVE MATTERS: 2015 FAIR HOUSING TRENDS REPORT 17 (2015), available at <http://www.nationalfairhousing.org/Portals/33/2015-04-30%20NFHA%20Trends%20Report%202015.pdf>, archived at <https://perma.cc/T6Y4-LZXX>. These complaints include discrimination in “rental housing, real estate sales, mortgage lending, homeowners insurance, advertisements, zoning and land use ordinances, and harassment in any type of housing.” *Id.* at 16.

ernment agencies.<sup>2</sup> The vast majority of these complaints involved discrimination in the rental market.<sup>3</sup> Estimates suggest that the number of acts of actual discrimination in the rental market is even greater than reported and may exceed four million each year.<sup>4</sup> Accordingly, discrimination in the rental market has generated a great deal of scholarship and court opinions.<sup>5</sup> Identifying and remedying such discrimination is crucial to expanding access to decent and affordable housing and to promoting neighborhood integration.<sup>6</sup>

However, legal scholars and social scientists have generally overlooked the incidence of discrimination in eviction, the forced removal from one's home.<sup>7</sup> Indeed, eviction has been one of the "most understudied process[es] affecting the lives of the urban poor."<sup>8</sup> This lack of attention is particularly troubling considering it is estimated that millions of people

<sup>2</sup> *Id.* at 2, 17. The total number was 308,454. *Id.* at 17. On average, 28,041 complaints were reported for each year between 2004 and 2014. *Id.* The number of complaints has remained relatively constant over the past ten years, with 27,528 complaints reported in 2014 and 27,319 complaints reported in 2004. *Id.*

<sup>3</sup> *Id.* at 23 (noting that discrimination in the rental market comprises almost 90% of the complaints reported to private fair housing organizations).

<sup>4</sup> *Id.* at 2 (citing report by the U.S. Department of Housing and Urban Development).

<sup>5</sup> See, e.g., Ali M. Ahmed & Mats Hammarstedt, *Discrimination in the Rental Housing Market: A Field Experiment on the Internet*, 64 J. URB. ECON. 362 (2008); Pouya Bavafa, *The Intentional Targeting Test: A Necessary Alternative to the Disparate Treatment and Disparate Impact Analyses in Property Rentals Discrimination*, 43 COLUM. J.L. & SOC. PROBS. 491 (2010); Mariano Bosch et al., *Information and Discrimination in the Rental Housing Market: Evidence from a Field Experiment*, 40 REGIONAL SCI. & URB. ECON. 11 (2010); Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It?)*, 40 J. MARSHALL L. REV. 455 (2007); see also Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 101–02 (1979); Zuch v. Hussey, 394 F. Supp. 1028, 1046 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977); United States v. Youritan Const. Co., 370 F. Supp. 643, 647 (N.D. Cal. 1973), *aff'd in part and remanded in part*, 509 F.2d 623 (9th Cir. 1975); U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES (2012), available at [http://www.huduser.org/portal/Publications/pdf/HUD-514\\_HDS2012\\_execsumm.pdf](http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf), archived at <https://perma.cc/MYT4-TRXV>.

<sup>6</sup> See, e.g., Lance Freeman, *America's Affordable Housing Crisis: A Contract Unfulfilled*, 92 AM. J. PUB. HEALTH 709 (2002) (discussing the lack of adequate affordable housing); Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, FAST FOCUS, at 5 (Mar. 2015), available at <http://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>, archived at <https://perma.cc/L6GA-3GTV>; NAT'L LOW INCOME HOUSING COALITION, OUT OF REACH 2014: TWENTY-FIVE YEARS LATER, THE AFFORDABLE HOUSING CRISIS CONTINUES (2014), available at <http://nlihc.org/sites/default/files/oor/2014OOR.pdf>, archived at <https://perma.cc/55SJ-RPE3>.

<sup>7</sup> See Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 462–66 (2003) (providing both narrower and broader definitions of eviction); cf. Scott N. Gilbert, *You Can Move in But You Can't Stay: To Protect Occupancy Rights After Halprin, the Fair Housing Act Needs to Be Amended to Prohibit Post-Acquisition Discrimination*, 42 J. MARSHALL L. REV. 751, 764–65 (2009) (examining the frequency of post-acquisition discrimination based on claims brought to the clinic and explaining that, at least as of 2009, "there [were] no known quantitative studies documenting the frequency of post-acquisition discrimination").

<sup>8</sup> Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 90 (2012) (discussing the existing literature about evictions).

across the United States are evicted each year.<sup>9</sup> Matthew Desmond explained that “[i]n 2013, one in eight poor renting families nationwide was unable to pay all of its rent, and a similar [proportion] thought it was likely they would be evicted soon.”<sup>10</sup> In Milwaukee, Wisconsin, residents from one in fourteen rental houses in majority black neighborhoods are evicted each year.<sup>11</sup> Jackson County, Missouri, which includes half of Kansas City, saw nineteen formal evictions a day between 2009 and 2013.<sup>12</sup> In 2012, New York City courts saw almost eighty evictions per day based on nonpayment of rent.<sup>13</sup> Also in 2012, one in eighteen rental households in Chicago, Illinois, and one in nine in Cleveland, Ohio, received eviction summons.<sup>14</sup> Between 2010 and 2013, eviction filings rose by 21% in Maine, 11% in Massachusetts, and 8% in Kentucky.<sup>15</sup>

Evictions often result in multiple severe consequences.<sup>16</sup> They can lead to homelessness.<sup>17</sup> One in two homeless adults cites eviction or other rental problems as the cause of his or her homelessness.<sup>18</sup> Evicted tenants who do

<sup>9</sup> Les Christie, *Rents Are Soaring—And So Are Evictions*, CNN MONEY (Oct. 29, 2014), [http://money.cnn.com/2014/10/29/real\\_estate/evicted/](http://money.cnn.com/2014/10/29/real_estate/evicted/), archived at <https://perma.cc/JNR8-BS7Q>; see also Matthew Desmond et al., *Evicting Children*, 92 SOC. FORCES 303, 303 (2013).

<sup>10</sup> Desmond, *supra* note 6, at 3.

<sup>11</sup> Desmond, *supra* note 8, at 91.

<sup>12</sup> Tara Raghuvver, “We Be Trying”: A Multistate Analysis of Eviction and the Affordable Housing Crisis (2014) (unpublished A.B. thesis, Harvard University) (on file with editors).

<sup>13</sup> Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 11 ANN. REV. L. SOC. SCI. 15, 24 (2015). In 2012, New York City’s Housing Courts processed 28,743 eviction judgments and 217,914 eviction filings for nonpayment. N.Y.C. RENT GUIDELINES Bd., 2013 INCOME AND AFFORDABILITY STUDY 3, 19 (2013), available at [http://www.nycrgb.org/downloads/research/pdf\\_reports/ia13.pdf](http://www.nycrgb.org/downloads/research/pdf_reports/ia13.pdf), archived at <https://perma.cc/32PU-GN7T>.

<sup>14</sup> Desmond & Bell, *supra* note 13, at 24; Northeast Ohio Apartment Ass’n, *Eviction Index*, SUITES MAG., March 2013, at 28; Kay Cleaves, *Cook Eviction Stats Part 5: Are Eviction Filings Increasing?*, STRAWSTICKSTONE.COM (Feb. 8, 2013), <http://strawstickstone.com/landlords/cook-eviction-stats-part-5-are-evictions-filings-increasing>, archived at <https://perma.cc/R9VE-GP7G>; U.S. Census Bureau, American FactFinder, *Selected Housing Characteristics, 2012 American Community Survey 1-Year Estimates, Cleveland city, Ohio*, FACTFINDER (2012), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_12\\_1YR\\_CP04&prodType=table%20\(Cleveland\)](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_CP04&prodType=table%20(Cleveland)); U.S. Census Bureau, *American FactFinder, Selected Housing Characteristics, 2012 American Community Survey 1-Year Estimates, Chicago city, Illinois*, FACTFINDER (2012), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_12\\_1YR\\_CP04&prodType=table%20\(Chicago\)](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_CP04&prodType=table%20(Chicago)). By comparison, in 2010, the “peak of the housing crisis, the national foreclosure [filing] rate was 2.23%.” Les Christie, *Foreclosures Hit Six-Year Low in 2013*, CNN MONEY (Jan. 16, 2014), [http://money.cnn.com/2014/01/16/real\\_estate/foreclosure-crisis/](http://money.cnn.com/2014/01/16/real_estate/foreclosure-crisis/), archived at <https://perma.cc/T63N-BAGL>. In 2013, the foreclosure rate dropped to 1.04% (one out of every ninety-six homes). *Id.*

<sup>15</sup> Shaila Dewanaug, *Evictions Soar in Hot Market; Renters Suffer*, N.Y. TIMES (Aug. 28, 2014), <http://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html>.

<sup>16</sup> Desmond, *supra* note 8, at 91.

<sup>17</sup> See, e.g., Desmond, *supra* note 6, at 4; Hartman & Robinson, *supra* note 7, at 468–69.

<sup>18</sup> Eric N. Lindblom, *Preventing Homelessness*, in HOMELESSNESS IN AMERICA 187, 189 (Jim Baumohl ed., 1996); see also Hartman & Robinson, *supra* note 7, at 468–69 (noting that almost 40% of homeless people who use homeless assistance programs cite involuntary displacement as the cause of their homelessness). Another major cause of homelessness for tenants living in shared housing is problems with hosts. Lindblom, *supra*, at 193 (“[O]ver one-

secure subsequent housing often must accept substandard housing on unfavorable terms.<sup>19</sup> Many landlords refuse to rent to applicants with recent evictions, and an eviction counts against tenants applying for public housing.<sup>20</sup> As a result, evicted tenants are often forced into inadequate housing in disadvantaged neighborhoods.<sup>21</sup> For low-income tenants, evictions can exacerbate residential instability even after the initial eviction.<sup>22</sup> Evictions also increase the chances of job loss,<sup>23</sup> disrupt children's education,<sup>24</sup> and can have long-term psychological effects for both children and adults.<sup>25</sup>

Further, communities as a whole suffer the effects of evictions. Neighborhoods with a high prevalence of evictions experience constant turnover and instability, which thwarts local collective efficacy and civic empowerment.<sup>26</sup> More broadly, evictions impose societal costs in the form of increased burdens on court dockets, increased use of the marshal or sheriff services used to remove families, and increased demands on social services, shelters, and hospitals by those who become homeless.<sup>27</sup> In 1992, more than \$500 million of public funds were spent on services for the homeless in New York City.<sup>28</sup> The removal of tenants from their homes has also led to physical violence against both tenants and the marshals evicting them.<sup>29</sup>

Given all this, it is imperative that legal scholars design methods to detect and prevent discrimination in eviction decisions to ensure that protected groups are not disproportionately subjected to the negative consequences of involuntary displacement.

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fifth of unattached homeless adults and over three-quarters of homeless single-parent families were in some kind of shared housing immediately prior to becoming homeless. . . . [O]ver two-thirds of the families and over half of the unattached adults who were in shared housing immediately prior to becoming homeless leave because of problems with their hosts."'). Additionally, "[p]erhaps as many as 10% of homeless people lose their previous place to stay because their building is condemned, destroyed by fire, or otherwise made uninhabitable." *Id.*

<sup>19</sup> Desmond, *supra* note 8, at 118; *see also* Hartman & Robinson, *supra* note 7, at 468.

<sup>20</sup> Desmond, *supra* note 8, at 118–19.

<sup>21</sup> *Id.* at 118; *see also* Matthew Desmond et al., *Forced Relocation and Residential Instability among Urban Renters*, 89 SOC. SERVS. REV. 227, 232–33 (2015).

<sup>22</sup> *See* Desmond et al., *supra* note 21, at 232–33, 249–53.

<sup>23</sup> *See* Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity among the Working Poor*, 63 SOC. PROBLEMS 46, 47, 54–59 (2016).

<sup>24</sup> Hartman & Robinson, *supra* note 7, at 469; Sheridan Bartlett, *Children's Experience of the Physical Environment in Poor Urban Settlements and the Implications for Policy, Planning and Practice*, 11 ENV'T & URBANIZATION 63, 70 (1999).

<sup>25</sup> Bartlett, *supra* note 24, at 70; *see also* Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing Hardship and Health*, 93 SOC. FORCES 295, 314 (2015); Desmond, *supra* note 6, at 5.

<sup>26</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 31–32 (1961); ROBERT SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 127, 146–47, 151, 177, 231–32 (2012).

<sup>27</sup> Hartman & Robinson, *supra* note 7, at 469.

<sup>28</sup> *Id.* at 469–70.

<sup>29</sup> *See id.* at 470 (discussing an incident where a police officer shot a tenant resisting eviction, an incident where a tenant killed a marshal trying to evict the tenant, a suicide triggered by eviction, and an incident where a tenant facing eviction set the apartment on fire).

However, determining whether there is discrimination in evictions presents unique challenges. In the sale or rental context, “testers” can pose as otherwise equally qualified apartment seekers.<sup>30</sup> These testers can be used to detect subtler forms of discrimination, even those in which the person being unfairly treated is unaware that discrimination is taking place.<sup>31</sup> Accordingly, numerous national studies have documented and discussed housing discrimination in sales and rentals.<sup>32</sup> Many of these major studies have focused on racial discrimination in particular.<sup>33</sup>

A recent lawsuit illustrates the use of testers to reveal discrimination in the rental context. In 2012, two civil rights organizations, ERASE Racism and the Fair Housing Justice Center, Inc. (FHJC), sent white and African American testers to pose as prospective tenants for a large apartment building in Mineola, New York.<sup>34</sup> In their complaint, ERASE Racism and FHJC described three tests, during each of which white testers were informed of apartments that had not been made available to the African American testers or were offered to white testers at more favorable pricing than the prices offered to the African American testers.<sup>35</sup> Relying on those tests, the two organizations and three African American testers sued the apartment building’s owner and manager, alleging violations of the Fair Housing Act<sup>36</sup>

<sup>30</sup> See, e.g., U.S. Dep’t of Housing & Urban Dev., *Fair Housing Enforcement Organizations Use Testing To Expose Discrimination*, HUD.GOV (2014), <https://www.huduser.gov/portal/periodicals/em/spring14/highlight3.html>, archived at <https://perma.cc/JG2L-WU2L>; U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF POLICY DEV. & RES., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012, EXECUTIVE SUMMARY 2 (2013), available at [https://www.huduser.org/portal/Publications/pdf/HUD-514\\_HDS2012\\_execsumm.pdf](https://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf), archived at <https://perma.cc/L54Z-PZU3>; Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 192 (2003); George C. Galster, *Research on Discrimination in Housing and Mortgage Markets*, 3 HOUSING POL’Y DEBATE 639, 647 (1992).

<sup>31</sup> See Charles, *supra* note 30, at 192; see also Ira Glass, *512: House Rules Transcript*, THIS AMERICAN LIFE (2013) <http://www.thisamericanlife.org/radio-archives/episode/512/transcript>, archived at <https://perma.cc/68Z8-DZ48> (illustrating the use of testers and explaining how housing discrimination has “gotten sneakier, so harder to detect”).

<sup>32</sup> See, e.g., NAT’L FAIR HOUSING ALLIANCE, *supra* note 1, 16–31; Galster, *supra* note 30, at 645–52; Leonora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U.J. GENDER SOC. POL’Y & L. 377, 378–86 (2003); Bo Zhao et al., *Why Do Real Estate Brokers Continue to Discriminate? Evidence from the 2000 Housing Discrimination Study 2–3* (Syracuse University, SURFACE: Center for Policy Research, Working Paper No. 67, 2005), <http://surface.syr.edu/cgi/viewcontent.cgi?article=1095&context=cpr>, archived at <https://perma.cc/2LJT-G4SE> (collecting and discussing studies).

<sup>33</sup> See, e.g., U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF POLICY DEV. & RES., *supra* note 30 at 1–2; MARGERY AUSTIN TURNER ET AL., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 39–40 (2012), available at [http://www.huduser.org/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf), archived at <https://perma.cc/NUU4-YKH4>; see also Charles, *supra* note 30, at 192–93 (describing and discussing the advantages and disadvantages of these studies).

<sup>34</sup> Complaint at 1–2, 8, ERASE Racism v. LLR Realty, LLC, No. 2:13-cv-4821-GRB (E.D.N.Y. Aug. 28, 2013), available at [http://www.eraseracismny.org/storage/documents/Town\\_House\\_Complaint\\_filed\\_8\\_28\\_13\\_00156817.pdf](http://www.eraseracismny.org/storage/documents/Town_House_Complaint_filed_8_28_13_00156817.pdf), archived at <https://perma.cc/K38C-NUSQ>; see also Glass, *supra* note 31 (providing an illustration of how FHJC testers are used).

<sup>35</sup> Complaint, *supra* note 34, at 9–14.

<sup>36</sup> 42 U.S.C. §§ 3601–3619, 3631 (2014).

(FHA) and Nassau County Human Rights Law.<sup>37</sup> The case settled in June 2014, with the plaintiffs obtaining injunctive relief and attorney's fees as well as the building owner's agreement to implement a number of policies, including fair housing training and detailed recordkeeping.<sup>38</sup> In another FHA suit, one lower court explained, "evidence gathered by a tester may, in many cases, be the only competent evidence available to prove that the defendant has engaged in unlawful conduct."<sup>39</sup>

When it comes to evictions, however, employing this strategy to test for discrimination is infeasible. Finding equally situated tenants is a steep task, as tenants can be evicted for nonpayment of rent, for cause (such as violating a lease term), or for no fault at all, when the tenant's lease has expired or if tenancy is "at will."<sup>40</sup> Moreover, landlords often have discretion in deciding whether and when to evict a tenant.<sup>41</sup>

Previous studies have discussed the impact of evictions on minorities, the poor, women, and children.<sup>42</sup> Studies from different cities have found that people of color comprise about eighty percent of those facing evictions.<sup>43</sup> In Milwaukee, women comprised 60.6% of evicted tenants between 2003 and 2007.<sup>44</sup> In Chicago, 62% of tenants appearing in court were women, while in Philadelphia, 70% of tenants facing eviction were women of color.<sup>45</sup> As Desmond has previously explained, "if incarceration has become typical in the lives of men from impoverished black neighborhoods, eviction has become typical in the lives of women from these neighborhoods."<sup>46</sup> Further, the presence of children is itself a significant predictor of eviction.<sup>47</sup>

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<sup>37</sup> Complaint, *supra* note 34, at 17–19. For a summary of the complaint and lawsuit, see Dathan Williams, "Apartment for Rent" Sign Does Not Apply to African Americans, Fair Housing Justice Ctr. (Sept. 3, 2013), <http://www.fairhousingjustice.org/2013/09/03/press-release-wednesday-august-28-2013/>, archived at <https://perma.cc/2R9E-4CEK>.

<sup>38</sup> ERASE Racism et al. v. LLR Realty, LLC et al., 31 N.Y. JURY VERDICT REV. & ANALYSIS 6:28 (2014), 2014 WL 3569256.

<sup>39</sup> *Zuch*, 394 F. Supp. at 1051 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977); see also U.S. DEP'T OF HOUSING & URBAN DEV., FAIR HOUSING ENFORCEMENT PARTICIPANT MANUAL 64 (2005), available at [http://www.fairhousingfirst.org/documents/fair\\_housing\\_act\\_enforcement\\_final.pdf](http://www.fairhousingfirst.org/documents/fair_housing_act_enforcement_final.pdf), archived at <https://perma.cc/VK67-GKWY>.

<sup>40</sup> See *Eviction: An Overview*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/eviction>, archived at <https://perma.cc/ADY7-WY77> (last visited Nov. 12, 2015); see also Hartman & Robinson, *supra* note 7, at 462–63.

<sup>41</sup> Desmond et al., *supra* note 9, at 304; Richard Lempert & Kiyoshi Ikeda, *Evictions from Public Housing: Effects of Independent Review*, 35 AM. SOC. REV. 852, 854 (1970); cf. Richard Lempert, *Discretion in a Behavioral Perspective: The Case of a Public Housing Eviction Board*, in THE USES OF DISCRETION 185, 195–213 (Keith Hawkins ed., 1992) (discussing the types of discretion exercised by a Hawaiian public housing eviction board).

<sup>42</sup> See, e.g., Hartman & Robinson, *supra* note 7, at 467–68 (collecting studies about evictions' impact on minorities, women, and children); see also Desmond et al., *supra* note 9, at 3–4 (discussing the impact on children and the role children play in evictions).

<sup>43</sup> See Hartman & Robinson, *supra* note 7, at 467–68 (collecting studies).

<sup>44</sup> Desmond, *supra* note 8, at 98; see also Desmond, *supra* note 6, at 3–4 (explaining the general disparate impact of evictions on low-income women).

<sup>45</sup> Hartman & Robinson, *supra* note 7, at 467.

<sup>46</sup> Desmond, *supra* note 8, at 91.

<sup>47</sup> See Desmond, *supra* note 6, at 4; Desmond et al., *supra* note 9, at 303.

Controlling for race, gender, and arrears amount, households with children are more likely to receive an eviction judgment than those without children.<sup>48</sup> All else equal, increasing the percentage of children in a Milwaukee neighborhood by 1% leads to a predicted 6.5% increase in a neighborhood's evictions.<sup>49</sup> Further, "the presence of children in a household was more important to explaining the distribution of evictions across neighborhoods and the distribution of eviction judgments across tenants who appeared in court than were factors associated with race, gender or class."<sup>50</sup>

No study to date, however, has examined whether groups protected under the FHA<sup>51</sup>—and racial minorities in particular—are more likely to experience eviction, controlling for eviction-warranting behavior, like non-payment of rent.<sup>52</sup> Are African American or Hispanic families who fall behind in rent more likely to be evicted than white families who do the same? In segregated American cities, does a neighborhood's racial composition affect eviction rates? Analyzing a sample of renters generalizable to a major American city (Milwaukee), this Article addresses these questions, examining the effect of race and ethnicity on evictions. To do so, this Article uses the Milwaukee Area Renters Study (MARS), a survey of 1,086 Milwaukee private rental households.<sup>53</sup> Specifically, it examines whether racial or ethnic minorities had a higher likelihood of eviction, controlling for factors possibly correlated with that outcome: not only violations of the rental agreement but also gender, age, marital status, presence of children, criminal record, socioeconomic status, and income. This study yields two significant findings: First, Hispanics living in neighborhoods where more than two-thirds of residents are white face an increased risk of eviction. Second, among Milwaukee renters, Hispanic tenants with non-Hispanic landlords are at an increased risk of eviction.<sup>54</sup> There were no significant findings for other minority demographics. As discussed in Section I.C, we believe that

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<sup>48</sup> See Desmond et al., *supra* note 9, at 304.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 319.

<sup>51</sup> See 42 U.S.C. § 3604(b) (prohibiting discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin").

<sup>52</sup> One study has examined specifically how the treatment of Hawaii Samoans who were behind in their rent compare to the treatment of non-Samoans before a public housing eviction board. See generally Richard Lempert & Karl Monsma, *Cultural Differences and Discrimination: Samoans Bore a Public Housing Eviction Board*, 59 AM. SOC. REV. 890 (1994). Our Article examines whether racial minorities in a more typical U.S. urban context are more likely to experience eviction in general, controlling for eviction-warranting behavior. As discussed above, other studies have looked at the impact of evictions on groups protected under the FHA but have not controlled for eviction-warranting behavior.

<sup>53</sup> Milwaukee has a population of approximately 600,000. It has approximately 105,000 renter households. U.S. Census Bureau, *Milwaukee (city), Wisconsin*, QUICKFACTS BETA, <http://quickfacts.census.gov/qfd/states/55/5553000.html>, archived at <https://perma.cc/3VZ3-SX5T> (last visited Dec. 2, 2015); Desmond, *supra* note 6, at 3.

<sup>54</sup> Sample sizes are too small to allow for any inference based on reason for the eviction.

the lack of significant effects for African Americans is largely because African Americans are more likely to live in segregated neighborhoods and rent from same-race landlords than are Hispanics. The problem of discrimination in evictions may affect African American tenants living in white neighborhoods just as it does Hispanic tenants in those neighborhoods, but we do not have sufficient data to assess that claim statistically. The findings of this study raise difficult questions about how to address discrimination in the eviction context.

Part I of this Article discusses this study's methods and interprets its findings. Part II offers possible explanations for these findings. Section II.A reviews possible non-discriminatory factors that could produce a disparate impact on Hispanics in the eviction context and argues that those factors cannot explain away the findings of disparate treatment. Section II.B discusses how discrimination can operate, often implicitly, in evictions. Part III identifies and evaluates methods for addressing discrimination in evictions, both within and outside the legal system.

## I. STUDY METHODS AND FINDINGS

### A. Data

MARS is an original in-person survey of 1,086 private rental households in Milwaukee.<sup>55</sup> In *Forced Relocation and Residential Instability Among Urban Renters*, Desmond, Carl Gershenson, and Barbara Kiviat provide three reasons why Milwaukee provides a strategic setting to study urban tenants:<sup>56</sup> First, Milwaukee's rental market shares similar characteristics with many other midsize American cities.<sup>57</sup> Just over half of Milwaukee's occupied housing units (56%) are renter-occupied,<sup>58</sup> which is similar to the proportions of renter-occupied households in Baltimore,<sup>59</sup> Chicago,<sup>60</sup> Columbus,<sup>61</sup> Dallas,<sup>62</sup> Houston,<sup>63</sup> and San Diego.<sup>64</sup> Milwaukee County's me-

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<sup>55</sup> For more information on MARS, see Desmond et al., *supra* note 21, at 234–37 (2015); Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1756–60 (2015).

<sup>56</sup> Desmond et al., *supra* note 21, at 234–35; see also Desmond & Shollenberger, *supra* note 55, at 1757.

<sup>57</sup> Desmond et al., *supra* note 21, at 234.

<sup>58</sup> U.S. Census Bureau, *Milwaukee (city), Wisconsin*, *supra* note 53.

<sup>59</sup> U.S. Census Bureau, *Baltimore (city), Maryland*, QUICKFACTS BETA, <http://quickfacts.census.gov/qfd/states/24/2404000.html>, archived at <https://perma.cc/YQR4-9LS6> (last visited Dec. 2, 2015) (approximately 52% renter-occupied).

<sup>60</sup> U.S. Census Bureau, *Chicago (city), Illinois*, QUICKFACTS BETA, <http://www.census.gov/quickfacts/table/PST045214/1714000,00>, archived at <https://perma.cc/K25Q-7DFJ> (last visited Dec. 31, 2015) (approximately 55% renter-occupied).

<sup>61</sup> U.S. Census Bureau, *Columbus (city), Ohio*, QUICKFACTS BETA, <http://quickfacts.census.gov/qfd/states/39/3918000.html>, archived at <https://perma.cc/98QC-5ZAN> (last visited Dec. 2, 2015) (approximately 53% renter-occupied).



dian rent falls in the country's top third.<sup>65</sup> Milwaukee has a similar rent distribution as Baton Rouge, Louisiana; Charlotte, North Carolina; and Portland, Oregon.<sup>66</sup> Second, Milwaukee's renter protections "are fairly typical."<sup>67</sup> Most cities have renter protection laws that more closely resemble Milwaukee's than those of cities like Boston or New York — two cities that have "a stalwart tradition of tenant unionizing[,] an economically-diverse rental population[, and] tooth[y] tenant protections."<sup>68</sup> Third, while data are readily available on Chicago, Los Angeles, and New York, "Milwaukee is one of many understudied cities within urban sociology."<sup>69</sup> Studying Milwaukee provides an opportunity to produce data "more applicable to cities distinct from America's important yet exceptional global hubs."<sup>70</sup>

In *Housing and Employment Insecurity Among the Working Poor*, Desmond and Gershenson explain how data were collected using MARS.<sup>71</sup> Between 2009 and 2011, surveys were administered in-person in English and Spanish exclusively to renters who had not owned a home in the previous two years.<sup>72</sup> Multistage stratified probability sampling was employed to create a sample of renter households representative to Milwaukee's entire rental population via custom weights.<sup>73</sup> When a block was selected into the sample, interviewers attempted to visit every renter-occupied household within the selected block (response rate = 83.4%).<sup>74</sup> Interviewers employed

<sup>62</sup> U.S. Census Bureau, *Dallas (city), Texas*, QUICKFACTS BETA, <http://quickfacts.census.gov/qfd/states/48/4819000.html>, archived at <https://perma.cc/3F9E-25NW> (last visited Dec. 2, 2015) (approximately 56% renter-occupied).

<sup>63</sup> U.S. Census Bureau, *Houston (city), Texas*, QUICKFACTS BETA, <http://quickfacts.census.gov/qfd/states/48/4835000.html>, archived at <https://perma.cc/QR8U-2ZTU> (last visited Dec. 2, 2015) (approximately 55% renter-occupied).

<sup>64</sup> U.S. Census Bureau, *San Diego (city), California*, QUICKFACTS BETA, <http://www.census.gov/quickfacts/table/PST045214/0666000,00>, archived at <https://perma.cc/V426-6A7H> (last visited Dec. 31, 2015) (approximately 52% renter-occupied).

<sup>65</sup> Desmond et al., *supra* note 21, at 234.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 234–35.

<sup>71</sup> Desmond & Gershenson, *supra* note 23, at 50–51; see also Desmond & Shollenberger, *supra* note 55, at 1756–57.

<sup>72</sup> Desmond & Gershenson, *supra* note 23, at 50; Desmond & Shollenberger, *supra* note 55, at 1756.

<sup>73</sup> Desmond & Gershenson, *supra* note 23, at 50; Desmond & Shollenberger, *supra* note 55, at 1756. After data collection, custom design weights for the regular sample and oversample were calculated to reflect the inverse of selection probability, facilitated by a Lahiri procedure, based on the demographic characteristics of Milwaukee's rental population and adjusted to MARS's sample size. The Lahiri procedure allows the sampler to select probability samples (with a probability proportional to size) and to compute the selection probabilities for the resulting sample. Selection probabilities are then used to calculate the design weights for the overall sample. For more on the Lahiri procedure, see D.B. Lahiri, *A Method of Sample Selection Providing Unbiased Ratio Estimates*, 33 BULL. INT'L STAT. INST. 133 (1951).

<sup>74</sup> Desmond & Gershenson, *supra* note 23, at 50; Desmond & Shollenberger, *supra* note 55, at 1756. In the context of increasing refusal rates for household surveys, this is an excellent response rate. For example, the highly respected General Social Survey experiences re-

a calendar to prime memory when asking questions about recent residential history, including cataloguing “all the places [tenants had] lived or stayed for at least a month” within the past two years.<sup>75</sup> These retrospective residential history data collected information of the places renters lived as well as the reasons why they moved.<sup>76</sup>

As Desmond and Gershenson explained, identifying peoples’ reasons for moving is not simple.<sup>77</sup> Tenants are often biased when responding to questions about their motivations for moving out, with many responding in ways that maximize “their own volition or social desirability.”<sup>78</sup> When “conducting fieldwork among low-income tenants,” Desmond learned that a tenant who was, for example, “evicted from a run-down apartment was more likely to explain that she moved ‘because the landlord wouldn’t fix anything’ than because she was forced out.”<sup>79</sup> In order to collect reliable data about tenants’ reasons for moving, “interviewers asked each respondent a series of ordered yes/no questions, beginning with involuntary removals and ending with voluntary moves”:<sup>80</sup>

An eviction is when your landlord forces you to move when you don’t want to. Were you, or a person you were staying with, evicted?

Did you, or a person you were staying with, receive an eviction notice while living at this place?

Did you move away from this place because your landlord told you, or a person you were staying with, to leave?

Did you move away from this place because you, or a person you were staying with, missed a rent payment and thought that if you didn’t move you would be evicted?

Did you move away from this place because the city condemned the property and forced you to leave?

Did you move away from this place because (a) the landlord raised the rent; (b) the neighborhood was dangerous; (c) the landlord wouldn’t fix anything and your place was getting run down; (d) the landlord went into foreclosure?<sup>81</sup>

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fusal rates as high as 26%. See Jibum Kim et al., *The Polls—Trends: Trends in Surveys on Surveys*, 75 PUB. OPINION Q. 165, 183 (2010).

<sup>75</sup> Desmond & Gershenson, *supra* note 23, at 51.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*; Desmond & Shollenberger, *supra* note 55, at 1757.

<sup>78</sup> Desmond & Gershenson, *supra* note 23, at 51; see also Desmond & Shollenberger, *supra* note 55, at 1757.

<sup>79</sup> Desmond & Gershenson, *supra* note 23, at 51.

<sup>80</sup> *Id.*; see also, e.g., Desmond & Shollenberger, *supra* note 55, at 1757–58.

<sup>81</sup> Milwaukee Area Renters Study, 2009–2011, Principal Investigator: Matthew Desmond; see also, e.g., Desmond & Gershenson, *supra* note 23, at 51; Desmond & Shollenberger, *supra* note 55, at 1757–58.

To reduce recall bias during the interview process, a respondent was asked the following if he or she answered no to all of the above questions: “I see that none of these reasons fit your case. Why did you move away from this place?”<sup>82</sup> Desmond and Gershenson have explained that retrospective data can be accurate even over long recall periods<sup>83</sup> when questions target important life events,<sup>84</sup> do not extend too far into the past,<sup>85</sup> and when the survey instrument includes a memory prop.<sup>86</sup> These criteria were met in our study: involuntary moves<sup>87</sup> and job dismissals<sup>88</sup> are salient life events; respondents were asked only about a two-year recall period; and respondents were aided with a recent history calendar designed to prime recall.<sup>89</sup>

Evictions were coded as formal and informal. Formal evictions went through the court system.<sup>90</sup> Informal evictions did not, and they may involve the landlord instructing the tenant to leave or changing the locks on a tenant’s apartment.<sup>91</sup> Informal evictions comprised 48% of all forced moves, suggesting court records of evictions provide a substantial underestimate of all evictions.<sup>92</sup> Although formal evictions go through the court system, the ultimate eviction decision typically hinges on the landlord’s desire to work with the tenant.<sup>93</sup> In both informal and formal evictions, the process tends to be driven by the landlord’s (rather than the court’s) preferences.<sup>94</sup>

### B. Methods

To investigate whether there was disparate impact or treatment in evictions, we made several methodological decisions.<sup>95</sup> First, we ran models estimating relationships between ethnicity and eviction using the sample

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<sup>82</sup> Desmond & Gershenson, *supra* note 23, at 51; Desmond & Shollenberger, *supra* note 55, at 1758.

<sup>83</sup> Desmond & Gershenson, *supra* note 23, at 52.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See generally Marc Fried, *Grieving for a Lost Home*, in *THE URBAN CONDITION: PEOPLE AND POLICY IN THE METROPOLIS* 151 (Leonard J. Duhl ed., 1963).

<sup>88</sup> See Thomas A. DiPrete, *Life Course Risks, Mobility Regimes, and Mobility Consequences: A Comparison of Sweden, Germany, and the United States*, 108 *AM. J. SOC.* 267, 275 (2002).

<sup>89</sup> Desmond & Gershenson, *supra* note 23, at 52.

<sup>90</sup> Desmond & Shollenberger, *supra* note 55, at 1752.

<sup>91</sup> *Id.* at 1752, 1754.

<sup>92</sup> *Id.* at 1761.

<sup>93</sup> Desmond et al., *supra* note 9, at 319–20 (“Ethnographic observation of Milwaukee’s eviction court conducted by the first author revealed that landlords hold considerable sway over the outcome of eviction proceedings. Provided that all the paperwork is in order and that no egregious violations have been committed, court officials usually defer to landlords’ decisions whether to work with tenants or to evict them.”).

<sup>94</sup> See *id.*

<sup>95</sup> See generally Desmond & Gershenson, *supra* note 23.

generalizable to the Milwaukee renter population.<sup>96</sup> We then fit a second set of models on a more limited sample—only those renters who reported being regularly late with rent payments.<sup>97</sup> These models are better able to detect discriminatory discretion in landlord decision-making because all respondents in the “late payment subsample” are equally implicated by the single most important cause of eviction. The vast majority of tenants summoned to Milwaukee’s eviction court (92%) are accused of having missed rent payments.<sup>98</sup> Tenants in the late payment subsample who avoided eviction did so, likely not on their own merits, but owing to landlord decision not to evict them.

Second, we used interaction terms to estimate how eviction rates among Hispanics differ across neighborhood contexts and landlords’ race and ethnicity.<sup>99</sup> In Milwaukee’s south-side barrio, where Hispanic landlords largely rent to Hispanic tenants, we would not necessarily expect Hispanics to be at a disproportionate risk of eviction.<sup>100</sup> Rather, we would expect Hispanics living in predominantly non-Hispanic neighborhoods to experience eviction disproportionately.<sup>101</sup> If this is the case—and if Hispanic renters relocated post-eviction to predominantly Hispanic areas—then racial residential segregation is reinforced by discrimination not only when it comes to applying for housing, but also in the eviction decision. By using the interaction terms, we consider how the ethnicity of neighborhoods and landlords interacts with the ethnicity of tenants.<sup>102</sup> Are Hispanics more likely to be

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<sup>96</sup> The estimation sample used in these models is smaller than the full MARS sample due to the fact that some observations are missing values for variables included in the models. Only observations with no missing values on these variables are included in the estimation sample.

<sup>97</sup> By “regularly late,” we refer to those respondents who reported being “sometimes,” “often,” or “always” late with rent payments. We collapse these categories for two reasons. First, these assessments of frequency are subjective, and different communities may interpret “sometimes late” differently. Second, too few respondents reported being “always” or “often” late to allow for separate analyses of these response categories. Collapsing these categories should not bias our estimates; among respondents whom we have classified as late-rent payers, there is no relationship between race/ethnicity and the “severity” of respondents’ lateness.

<sup>98</sup> Desmond, *supra* note 8, at 101.

<sup>99</sup> An interaction term is represented in the model as a variable that is itself the product of two variables also included in the model. For example, we might want to estimate the relationship between sex, marital status, and eviction rates. Specifically, we could hypothesize that unmarried men are evicted at higher rates than married men. To test this hypothesis, we would need to include three variables in the model: “Sex,” “Marital Status,” and “Sex by Marital Status.” Respectively, these variables would equal 1 in order to represent the values “Male,” “Married,” and “Married Male.”

<sup>100</sup> See *infra* notes 185–94 and accompanying text (discussing how people tend to favor their “in-groups” while holding prejudices against “out-groups”).

<sup>101</sup> See *id.*

<sup>102</sup> One set of models interacts Hispanic renters with a variable indicating a Hispanic landlord. Another set of models interacts Hispanic renters with a continuous variable equal to zero if the neighborhood is less than two-thirds white. If the neighborhood is greater than two-thirds white, then the variable is equal to the proportion that is white. Models using this variable therefore allow for discrimination against Hispanics to grow more severe in whiter neighborhoods.

evicted when neighborhoods are primarily white or when their landlords are not Hispanic?

To estimate these interaction terms, we used discrete hazard models. These models allow for multiple “failures” (evictions) per respondent. The unit of observation is person-months.<sup>103</sup> Error terms are clustered within respondents.<sup>104</sup> Discrete hazard models allow us to account for a possible source of estimation bias: the fact that many renters who do not experience evictions during the 24-month period observed in the study will experience evictions in the future. This is akin to a missing data problem, and discrete hazard models belong to a class of models that can account for such data structures.

We relied on previous research to select the control variables in our models. As prior research has shown that “family structure is an important predictor of eviction,”<sup>105</sup> we controlled for the respondents’ gender, marital status, the number of children in the household, and the presence of other adults in the household from which the respondents were (or could have been) involuntarily removed.<sup>106</sup> We also included dummy variables for whether the respondents were Hispanic, African American, or “Other” (leaving white as a reference category). Because we are interested in a community with a large number of immigrants, we controlled for the respondents’ countries of birth.<sup>107</sup> We also controlled for variables that indicated a criminal record, one indicator for felonies and another indicator for any criminal record, “which can influence one’s housing prospects.”<sup>108</sup> To account for socioeconomic status, we controlled for level of educational attainment.<sup>109</sup> We also controlled for the renters’ income, roommates’ total income, whether or not the renters received some kind of government assistance, and the cost of rent (net of that assistance).<sup>110</sup> Because immigrants may have less familiarity with the legal culture and (if undocumented) have fewer legal protections,<sup>111</sup> we controlled for whether the respondents were born in the United States. Although we cannot directly measure language skills, we are able to control for whether the survey was administered in Spanish. As a final demographic control, we included a measure for age.

<sup>103</sup> See Desmond & Gershenson, *supra* note 23, at 54.

<sup>104</sup> See *id.*

<sup>105</sup> *Id.* at 53. See generally Desmond et al., *supra* note 9.

<sup>106</sup> Desmond & Gershenson, *supra* note 23, at 53.

<sup>107</sup> See *infra* Appendix Table B for descriptive statistics of tenants’ countries of origin.

<sup>108</sup> Desmond & Gershenson, *supra* note 23, at 53; see also David J. Harding et al., *Making Ends Meet After Prison*, 33 J. POLY ANALYSIS & MGMT. 440, 443, 450 (2014); cf. Bruce Western et al., *Stress and Hardship after Prison*, 120 AM. J. SOC. 1512, 1525–27 (2015).

<sup>109</sup> See *infra* Appendix Tables D–E; cf. Am. Psychol. Ass’n, *Education and Socioeconomic Status*, available at <http://www.apa.org/pi/ses/resources/publications/factsheet-education.pdf>, archived at <https://perma.cc/NVY8-67AL> (last visited Feb. 1, 2016) (explaining that “[s]ocioeconomic status (SES) is often measured as a combination of education, income, and occupation”).

<sup>110</sup> See *infra* Appendix Table C (reporting mean income by race and ethnicity).

<sup>111</sup> See *infra* Sections II.A.2–3.

As is standard in discrete hazard models, we included a variable that accounts for the number of months since the respondent experienced an eviction. For renters with no known previous evictions, this variable measures the number of months since the respondent began living in the first residence reported to the interviewer. Controlling for time in residence is important because “[a]n uninterrupted housing spell indicates that the respondent has a low latent propensity for forced removal.”<sup>112</sup> To some extent, then, controlling for time in residence allows us to control for unobserved characteristics that predict eviction.

Finally, we control for three “shocks” that could lead to eviction: job loss, relationship dissolution, and a previous forced move. These variables take the value of 1 if the respondent lost a job, exited a self-defined “serious” relationship in the prior year, or was forced from a previous residence in the twelve months preceding the month of observation.<sup>113</sup>

### C. Findings

Table 1 displays models fit on the general MARS sample. The first model does not include interaction terms. In this model, we do not find that Hispanics are evicted at an unusually high rate. However, in the “Landlord Model” in Table 1, which controls for the interaction between tenant and landlord ethnicity, we find Hispanic landlords are significantly less likely to evict Hispanic tenants than are non-Hispanic landlords. In the “Neighborhood Model,” which controls for the interaction between tenant ethnicity and neighborhood ethnicity, we find that Hispanics are much more likely to be evicted in neighborhoods where at least two-thirds of the residents are white.<sup>114</sup> This translates to Hispanic renters in 66% white neighborhoods having an eviction rate that is approximately 50% greater than the general renter population, while Hispanic renters in almost entirely white neighborhoods having an eviction rate 100% greater than the general renter population. This is similar in magnitude to our model’s other largest predictor of eviction, which is being regularly late on rent. Most of these evictions were informal.<sup>115</sup> We also note that, across models, the number of children in a household was a significant predictor of eviction, a finding that supports previous research identifying children as a risk factor for involuntary displacement.<sup>116</sup>

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<sup>112</sup> Desmond & Gershenson, *supra* note 23, at 53 n.11.

<sup>113</sup> *See id.* at 53.

<sup>114</sup> Neighborhoods are defined as “block groups,” which are determined by the U.S. Census. *See* Desmond, *supra* note 8, at 92–93.

<sup>115</sup> *See infra* Table 5.

<sup>116</sup> *See generally* Desmond et al., *supra* note 9.

TABLE 1. DISCRETE HAZARD MODELS OF EVICTIONS AMONG MILWAUKEE RENTERS (GENERAL SAMPLE)

|                         | Simple Model |      | Landlord Model |      | Neighborhood Model |       |
|-------------------------|--------------|------|----------------|------|--------------------|-------|
|                         | Coef.        | S.E. | Coef.          | S.E. | Coef.              | S.E.  |
| Hispanic Tenant         | -.037        | .417 | .280           | .396 | -1.004             | .563  |
| Hispanic Landlord (LL)  | .181         | .407 | .703           | .440 | .280               | .395  |
| Hisp. Tenant x Hisp. LL |              |      | -1.501 *       | .618 |                    |       |
| White Neighborhood (NB) | .294         | .362 | .269           | .353 | -.179              | .418  |
| Hisp. Tenant x White NB |              |      |                |      | 1.984 **           | .699  |
| Black Tenant            | .087         | .331 | .077           | .326 | -.210              | .329  |
| Other Race              | .039         | .642 | .020           | .638 | -.125              | .690  |
| Spanish Interview       | -.638        | .939 | -.365          | .937 | -.638              | .955  |
| Born in U.S.            | .466         | .556 | .356           | .560 | .564               | .616  |
| Recent Job Loss         | .644 *       | .323 | .612           | .332 | .625               | .323  |
| Recent Breakup          | -.755        | .773 | -.744          | .775 | -.743              | .773  |
| Forced Move             | -.412        | .323 | -.391          | .324 | -.466              | .329  |
| Regular Late Rent       | .966 ***     | .225 | .973 ***       | .225 | 1.025 ***          | .229  |
| Other Adults in HH      | -.300        | .271 | -.306          | .272 | -.300              | .272  |
| Married                 | -.169        | .379 | -.130          | .384 | -.180              | .382  |
| Number of Kids in HH    | .249 ***     | .074 | .250 ***       | .075 | .255 ***           | .075  |
| Female                  | .346         | .272 | .339           | .272 | .353               | .274  |
| Current Income          | -.182        | .166 | -.204          | .165 | -.170              | .162  |
| Roommates' Income       | -.036        | .090 | -.032          | .087 | -.045              | .097  |
| Monthly Rent            | .061         | .264 | .088           | .260 | .087               | .272  |
| Government Aid          | -.343        | .462 | -.385          | .465 | -.338              | .460  |
| Criminal Record         | .262         | .369 | .294           | .370 | .264               | .372  |
| Felony                  | -.002        | .423 | -.048          | .425 | -.053              | .418  |
| Less than HS Education  | .103         | .536 | .102           | .515 | .205               | .523  |
| High School Education   | .254         | .496 | .231           | .480 | .286               | .490  |
| Some College Education  | .394         | .470 | .386           | .455 | .436               | .456  |
| Age                     | .001         | .010 | -.000          | .010 | -.001              | .011  |
| Time Since Eviction     | -.011 ***    | .003 | -.011 ***      | .003 | -.011 ***          | .003  |
| Constant                | -5.670 ***   | .988 | -5.528 ***     | .981 | -5.462 ***         | 1.044 |
| N (observations)        | 11,186       |      | 11,186         |      | 11,186             |       |
| N (groups)              | 581          |      | 581            |      | 581                |       |
| Pseudo R <sup>2</sup>   | .069         |      | .072           |      | .075               |       |

Notes. Standard errors are clustered within 581 tenants.

\*  $P < .05$  \*\*  $P < .01$  \*\*\*  $P < .001$  (two-tailed test)

In all three models of Table 1, regularly missing rent payments is among the strongest predictors of eviction rates. Accordingly, in Table 2 we display results from our three models after they were fit on a subsample restricted only to those who regularly missed rent payments. As discussed above, this restriction is better suited to observing landlord discretion in the eviction process, as all renters in the sample have committed a major eviction-warranting act.

TABLE 2. DISCRETE HAZARD MODELS OF EVICTIONS AMONG HABITUAL LATE PAYERS

|                          | Landlord Model |       | Neighborhood Model |       |
|--------------------------|----------------|-------|--------------------|-------|
|                          | Coef.          | S.E.  | Coef.              | S.E.  |
| Hispanic Tenant          | .468           | .800  | -.425              | .961  |
| Hispanic Landlord        | -.228          | 1.480 | -.296              | 1.026 |
| Hisp. Tenant x Hisp. LL  | -.694          | 1.875 |                    |       |
| White Neighborhood       | .465           | .680  | .103               | .740  |
| Hisp. Tenant x White NB  |                |       | 2.040 *            | .978  |
| Black Tenant             | .094           | .586  | -.081              | .597  |
| Born in U.S.             | .126           | .683  | .485               | .760  |
| Recent Job Loss          | 1.074 *        | .443  | 1.070 *            | .416  |
| Recent Breakup           | .346           | .856  | .331               | .846  |
| Recent Forced Move       | -.645          | .578  | -.670              | .599  |
| Other Adults in HH       | .122           | .656  | .033               | .668  |
| Married                  | .021           | .652  | .101               | .675  |
| Number of Kids in HH     | .260           | .160  | .274               | .158  |
| Female                   | .269           | .547  | .258               | .544  |
| Current Income           | .019           | .320  | .082               | .324  |
| Roommates' Income        | -.663          | .492  | -.664              | .524  |
| Monthly Rent             | .683           | 1.029 | .299               | 1.034 |
| Government Aid           | -.537          | 1.324 | -.677              | 1.410 |
| Criminal Record          | .464           | .625  | .393               | .607  |
| Felony                   | .275           | .653  | .188               | .654  |
| Less than HS Education   | -.330          | 1.419 | -.097              | 1.385 |
| High School Education    | .117           | 1.362 | .147               | 1.333 |
| Some College Education   | .425           | 1.297 | .409               | 1.260 |
| Age                      | -.013          | .024  | -.013              | .024  |
| Time Since Last Eviction | -.007          | .007  | -.008              | .007  |
| Constant                 | -4.820 ***     | 1.438 | -4.709 **          | 1.431 |
| N (observations)         | 1,773          |       | 1,773              |       |
| N (groups)               | 119            |       | 119                |       |
| Pseudo R2                | .072           |       | .079               |       |

Notes. Standard errors are clustered within 119 tenants. The “Spanish Interview” variable was dropped from these models because all respondents interviewed in Spanish were also evicted. However, note that the Hispanic/Neighborhood interaction remained significant (p = .043) even in these models, which indicates that language is not the sole driver of Hispanic eviction rates.

\* P < .05    \*\* P < .01    \*\*\* P < .001 (two-tailed test)



Note that the finding regarding the match between tenant and landlord ethnicity is not replicated in the “Landlord Model” of Table 2. The finding regarding the match between renter and neighborhood ethnicity, on the other hand, is significant regardless of the sample it is fit on and again has a large effect size (2.040 logits; see below for a more intuitive interpretation of effect size). Accordingly, we have more confidence in our finding of an interaction between tenant and neighborhood ethnicity than in that between tenant and landlord ethnicity.

The discretionary<sup>117</sup> “Neighborhood Model,” which includes the neighborhood interaction term, paints a fraught picture for Hispanics in majority white neighborhoods. Against a base annual eviction rate of 25% for all late payers, we estimate that Hispanics in two-thirds white neighborhoods experience an annual eviction rate of around 35%. This annual rate increases to 45% for neighborhoods approaching entirely white.

As the study controls for tenants who often miss rental payments as well as tenants’ income levels, the findings suggest discrimination against Hispanic tenants residing in non-Hispanic neighborhoods. In predominantly white neighborhoods, most landlords are white. In neighborhoods with greater than two-thirds white residents, for example, around 80% of tenants have white landlords, 10% have Hispanic landlords, 2% have African-American landlords, and 1% have “other race” landlords. (We do not know the race or ethnicity of the remaining landlords, as some tenants have never met their landlords face-to-face.) Among the respondents, 5.7% had received government housing subsidies or assistance in the previous two years. Controlling for subsidized housing and country of birth did not alter our main findings.

In both models of Table 2 (as well as the Simple Model in Table 1), recent job loss was found to significantly increase the likelihood of eviction. Because this association remained significant in a subsample of those who regularly missed rent payments, it cannot be explained by nonpayment alone. Rather, nonpayment owing to job loss represents a unique kind of problem from a landlord’s perspective: the loss of a tenant’s present *and* future income. Our findings suggest that nonpayment owing to a one-time, unexpected expense (e.g., medical emergency, funeral) or a sudden but temporary loss of income (e.g., robbery, benefits sanction) may be less likely to trigger eviction than nonpayment owing to an economic setback (e.g., job loss) that has no immediate remedy.

There were no observable effects on African American renters.<sup>118</sup> This finding may be because in Milwaukee, housing segregation affects African

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<sup>117</sup> This model is fit on only late payers, and so we witness landlord discretion in eviction decisions.

<sup>118</sup> We fit a series of models that were parallel to those displayed in Tables 1 and 2. Whereas the above models included interactions using Hispanic ethnicity, these parallel models include interactions using African American race.

American renters more severely than it does Hispanic renters.<sup>119</sup> As Table 3 shows, African Americans live in poorer, less white neighborhoods than do Hispanics. African Americans are also more likely to have same-race landlords than are Hispanics. Hispanics, on the other hand, tend to live in neighborhoods that are fairly typical in terms of poverty and which are more white than black. The average block group of African-American tenants in our sample is 27% white; the average block group of Hispanic tenants is 59% white.<sup>120</sup> As Table 4 shows, these relationships are especially stark at the level of block groups. When a block group has a high percentage of residents who are African American, this is a strong indication that the block group has a low percentage of white residents. In contrast, the percentage of residents who are Hispanic tells us nothing about the likely percentage of residents who are white, but does tend to indicate a lower percentage of African American residents.

It seems, then, that because African Americans are more likely than Hispanics to live in segregated neighborhoods, a smaller percentage of African American renters are at a heightened risk of experiencing the type of discrimination documented in our models: an increased likelihood of eviction for minorities living in non-minority areas.<sup>121</sup> African American tenants may also be more likely to experience discrimination in the “front end” of the housing process (i.e., distribution and selection into neighborhoods),<sup>122</sup> whereas Hispanics living in non-Hispanic areas may be more likely to experience discrimination in the “back end” (i.e., forced removal from neighborhoods).<sup>123</sup>

The results of our study should not be taken as evidence that African Americans experience average or below-average rates of evictions. Rather, our models show that African Americans are not evicted at a disproportion-

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<sup>119</sup> See *infra* Tables 3 and 4; see also Alexander Kent & Thomas C. Frohlich, *The 9 Most Segregated Cities In America*, HUFFINGTON POST, (Aug. 27, 2015), [http://www.huffingtonpost.com/entry/the-9-most-segregated-cities-in-america\\_55df53e9e4b0e7117ba92d7f](http://www.huffingtonpost.com/entry/the-9-most-segregated-cities-in-america_55df53e9e4b0e7117ba92d7f), archived at <https://perma.cc/7RWN-MPZ9> (describing segregation in Milwaukee); Glass, *supra* note 31 (explaining that “Milwaukee is consistently one of the most segregated cities in the country [and that] the level of black-white segregation by one important measure has declined only by a trickle in 30 years); cf. Charles, *supra* note 30, at 172–75 (explaining that in many regions across the country, “the degree of black-white segregation remains extreme[,]” while “[t]rends in Hispanic and Asian segregation are the opposite of those observed for blacks[,]” and “[i]n most areas, Hispanic-white segregation remains moderate”).

<sup>120</sup> Descriptive statistics calculated with MARS data.

<sup>121</sup> However, we do note that African American tenants experience above-average rates of eviction, as they score highly on measures that predict eviction, including number of children, low income, low education, and criminal record.

<sup>122</sup> Indeed, decades of intentional segregation against African Americans, redlining, and restrictive covenants led to the enactment of the Fair Housing Act in 1968. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2515–16 (2015).

<sup>123</sup> *But see* MARGERY AUSTIN TURNER ET AL., *supra* note 33, at 39–40 (suggesting similar rates of discrimination in the rental market). This is national data, and we do not know whether African American tenants in Milwaukee face more discrimination than Hispanic tenants in the rental market.

ate rate *after* controlling for socioeconomic status, household structure, income, criminal records, and so on. In fact, models that do not control for these factors show that African Americans experience higher rates of eviction than whites.<sup>124</sup> We invite future research on the impact of eviction on African Americans, particularly on those living in primarily non-African American neighborhoods.

TABLE 3. CORRELATION MATRIX FOR AFRICAN-AMERICAN AND HISPANIC TENANTS BY CHARACTERISTICS OF CURRENT LANDLORD AND NEIGHBORHOOD

|                         | Black Tenant | Hispanic Tenant |
|-------------------------|--------------|-----------------|
| Black Landlord          | .687         | -.192           |
| Block Group, % Black    | .776         | -.204           |
| Hispanic Landlord       | -.114        | .482            |
| Block Group, % Hispanic | -.184        | .384            |
| Block Group, % White    | -.752        | .109            |
| Block Group, % Poverty  | .302         | .049            |

Note. This table displays weighted bivariate correlations for variables measuring characteristics of current residence. N = 1,021.

TABLE 4. CORRELATION MATRIX FOR BLOCK GROUP RACIAL PERCENTAGES

|                  | Percent White | Percent Black | Percent Hispanic |
|------------------|---------------|---------------|------------------|
| Percent White    | 1             |               |                  |
| Percent Black    | -.918         | 1             |                  |
| Percent Hispanic | .005          | -.302         | 1                |

Note. This table displays correlations for the 577 block groups included in our sample.

<sup>124</sup> See generally Desmond, *supra* note 6; Desmond, *supra* note 8.

TABLE 5. EVICTION TYPES IN PREVIOUS TWO YEARS BY GROUP

|                     | Estimated<br>Pop.<br>Incidence | Eviction<br>Rate | Standard<br>Error | 95%<br>Confidence<br>Interval |       |           |         |
|---------------------|--------------------------------|------------------|-------------------|-------------------------------|-------|-----------|---------|
| <b>BLACK</b>        |                                |                  |                   |                               |       |           |         |
| All Evictions       | 4,928                          | .078             | 0.015             | 0.049                         | 0.108 | N         | 503     |
| Formal Evictions    | 2,386                          | .038             | 0.009             | 0.020                         | 0.056 | Est. Pop. | 62,796  |
| Informal Evictions  | 2,791                          | .044             | 0.011             | 0.023                         | 0.066 |           |         |
| <b>WHITE</b>        |                                |                  |                   |                               |       |           |         |
| All Evictions       | 5,411                          | .065             | 0.023             | 0.020                         | 0.111 | N         | 332     |
| Formal Evictions    | 796                            | .010             | 0.006             | -0.003                        | 0.022 | Est. Pop. | 83,201  |
| Informal Evictions  | 4,633                          | .056             | 0.022             | 0.012                         | 0.100 |           |         |
| <b>HISPANIC</b>     |                                |                  |                   |                               |       |           |         |
| All Evictions       | 3,072                          | .124             | 0.041             | 0.043                         | 0.206 | N         | 198     |
| Formal Evictions    | 375                            | .015             | 0.006             | 0.003                         | 0.027 | Est. Pop. | 24,759  |
| Informal Evictions  | 2,741                          | .111             | 0.041             | 0.030                         | 0.191 |           |         |
| <b>FOREIGN BORN</b> |                                |                  |                   |                               |       |           |         |
| All Evictions       | 1,823                          | .097             | 0.039             | 0.020                         | 0.175 | N         | 109     |
| Formal Evictions    | 252                            | .013             | 0.009             | -0.004                        | 0.031 | Est. Pop. | 18,696  |
| Informal Evictions  | 1,597                          | .085             | 0.038             | 0.010                         | 0.161 |           |         |
| <b>NATIVE BORN</b>  |                                |                  |                   |                               |       |           |         |
| All Evictions       | 14,612                         | .091             | 0.018             | 0.055                         | 0.127 | N         | 923     |
| Formal Evictions    | 5,241                          | .033             | 0.013             | 0.008                         | 0.057 | Est. Pop. | 160,969 |
| Informal Evictions  | 9,656                          | .060             | 0.014             | 0.033                         | 0.087 |           |         |

NOTE: The "Eviction Rate" column reports the percentage of each racial/ethnic/nativity group that experienced that type of eviction.

## II. DISCUSSION

The increased incidence of evictions of Hispanic tenants in white neighborhoods and by non-Hispanic landlords suggests discrimination. This discrimination is evident among non-Hispanic landlords but is especially strong in majority-white neighborhoods. Section II.A suggests possible non-discriminatory reasons why evictions may have a disparate impact on Hispanic tenants.<sup>125</sup> As these reasons provide at best only an incomplete explanation,

<sup>125</sup> As Linda Krieger and Susan Fiske explain:

[I]n both statutory and constitutional antidiscrimination law, the distinction between disparate treatment theory and disparate impact theory inherently relies on the assumption that the "intent to discriminate" required to establish a disparate treatment claim is psychologically distinct and practically distinguishable from the mindless indifference to harms inflicted on an outgroup by facially neutral policies.

Section II.B discusses how discrimination by landlords in majority-white neighborhoods may operate.

### A. *Potential Non-Discriminatory Explanations*

At least three non-discriminatory reasons potentially explain why Hispanic tenants may be disproportionately affected by evictions. First, language barriers may prevent Hispanic tenants from communicating with their landlords or understanding court documents related to the eviction.<sup>126</sup> Second, Hispanic tenants may be more averse to using the legal system owing to fears of immigration consequences or lack of confidence in the system.<sup>127</sup> Third, for those tenants who want to challenge evictions, the general deficit in legal services for low-income individuals may have a disproportionate effect on Hispanic tenants.<sup>128</sup> Below, we explain why each of these reasons is insufficient to explain the increased incidence of eviction of Hispanics in non-Hispanic neighborhoods and by non-Hispanic landlords.

#### 1. *Language Barriers*

Language barriers may present challenges for Hispanic tenants facing evictions.<sup>129</sup> If the landlord does not speak Spanish, language could prevent the landlord from being able to discuss late payments. Spanish-speaking tenants may also have difficulty interpreting the Notice to Quit (the eviction notification form), understanding court documents, and representing themselves effectively throughout the eviction process. As Sudha Shetty ex-

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Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1012–13 (2006).

<sup>126</sup> See *infra* notes 129–37 and accompanying text.

<sup>127</sup> See *infra* notes 139–47 and accompanying text.

<sup>128</sup> See *infra* notes 148–59 and accompanying text. We note that these issues are similar to those that battered Latina immigrants face when accessing services. In a study of battered Latina immigrants in Washington D.C., the three most frequent problems encountered in seeking services or help were language, not knowing about services, and fear of immigration consequences. See Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 275 (2000). We also note that a recent study on foreclosure rates revealed that Latino homeowners had the highest foreclosure rates compared to African Americans and non-Hispanic whites in Arizona, California, Florida, and Nevada. See Jacob S. Rugh, *Double Jeopardy: Why Latinos Were Hit Hardest by the US Foreclosure Crisis*, 83 SOC. FORCES 1139, 1156–61 (2015). In the “Rust Belt,” however, Latino homeowners faced the same likelihood of foreclosure as African-American homeowners. *Id.* at 1139. Jacob Rugh suggests that the greater incidence of foreclosures for Latino homeowners in part resulted from “significant racial disparities relative to whites in terms of high-cost subprime lending among blacks and Latinos.” *Id.* at 1161. He found that Latinos “were significantly more likely than whites or blacks to be the recipients of risky low-/no-documentation home-purchase loans, especially in low- and moderate-income suburban areas with lower levels of educational attainment and later on in the boom when relatively fewer blacks and whites were transitioning into homeownership.” *Id.* at 1161.

<sup>129</sup> See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 53, 121 (2009).

plains, “[l]anguage barriers prevent many people from being able to read a summons received in the mail or even directions within the courthouse so that they can find the correct courtroom for their hearing.”<sup>130</sup>

In Milwaukee, while Summons and Complaint forms are available in Spanish,<sup>131</sup> many other forms, including Notices to Quit, generally are not.<sup>132</sup> The Department of Housing and Urban Development (HUD) sometimes requires housing providers that receive federal subsidies to provide oral translation services and written translations of “vital documents” to tenants with limited English proficiency.<sup>133</sup> HUD, however, has explained that it “has not undertaken to define or list what documents are vital because, given the breadth of HUD programs and recipients, what constitutes a vital document varies widely from recipient to recipient.”<sup>134</sup>

Language differences could also prevent tenants from obtaining legal and social services. Tenants who do not speak English must seek Spanish-speaking attorneys or attorneys who can access an interpreter.<sup>135</sup> Even the use of an interpreter may cause a tenant to feel less comfortable expressing her claims, and without a skilled lawyer and interpreter, the tenant may not be defended effectively.<sup>136</sup> Additionally, language barriers may prevent tenants from seeking social services such as rental assistance when they are unable to pay their rent.<sup>137</sup>

<sup>130</sup> Sudha Shetty, *Equal Justice Under the Law: Myth or Reality for Immigrants and Refugees*, 2 SEATTLE J. SOC. JUST. 565, 567 (2004).

<sup>131</sup> See MILWAUKEE CTY., SUMMONS AND COMPLAINT, SMALL CLAIMS FORM, available at [http://county.milwaukee.gov/ImageLibrary/Groups/cntyCourts/documents/SC-500\\_es2011.pdf](http://county.milwaukee.gov/ImageLibrary/Groups/cntyCourts/documents/SC-500_es2011.pdf), archived at <https://perma.cc/VX9Y-7482> (last visited Dec. 31, 2015).

<sup>132</sup> See CIRCUIT COURT FORMS, WISCONSIN COURT SYSTEM (April 30, 2012), <http://www.wicourts.gov/forms1/circuit/ccform.jsp?Category=38>, archived at <https://perma.cc/NZ4M-BERP>; EVICTION FORMS, MILWAUKEE CTY., <http://county.milwaukee.gov/CourtServices7714/CivilDiv/SmallClaimsForms2/Eviction.htm>, archived at <https://perma.cc/T6C3-NTTD> (last visited Nov. 12, 2015).

<sup>133</sup> See U.S. Dep’t of Housing & Urban Dev., Final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 72 Fed. Reg. 2732 (Jan. 22, 2007), available at <http://www.gpo.gov/fdsys/pkg/FR-2007-01-22/pdf/07-217.pdf>, archived at <https://perma.cc/EPN9-9QYS>.

<sup>134</sup> LIMITED ENGLISH PROFICIENCY (LEP) FREQUENTLY ASKED QUESTIONS, U.S. DEP’T OF HOUSING & URBAN DEV. (May 4, 2007), [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/fair\\_housing\\_equal\\_opp/promotingfh/lep-mfh-faq#q1](http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/promotingfh/lep-mfh-faq#q1), archived at <https://perma.cc/6QVB-4WZA>.

<sup>135</sup> Cf. Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 HAMLINE L. REV. 149, 156 (2011) (explaining difficulties immigrant litigants have in obtaining divorces); Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 543, 552, 557–58 (2004).

<sup>136</sup> See Rearick, *supra* note 135, at 557–58.

<sup>137</sup> See Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, 53 U. MIAMI L. REV. 749, 751 (1999); Dutton, Orloff, & Haas, *supra* note 128, at 275 (using data from a 1992 study of battered Hispanic immigrants in Washington, D.C., and finding 23.4% of participants cited language as inhibiting them from seeking social services).

However, we found no evidence that language barriers accounted for Hispanics' increased incidence of evictions in white neighborhoods and among non-Hispanic landlords. Interviews in this study were conducted in both English and Spanish, and our sample includes Hispanic tenants with limited English proficiency. Yet controlling for whether the interview was conducted in Spanish did not affect our finding that Hispanics in white neighborhoods were more likely to experience eviction.<sup>138</sup>

## 2. Avoidance of the Legal System

Another potential explanation is that Hispanic tenants may be less likely to fight an eviction.<sup>139</sup> In the domestic violence context, studies have shown that battered immigrants are less likely than U.S. citizens to report domestic violence or follow up with prosecution about domestic violence cases due to concerns about being apprehended and deported;<sup>140</sup> “approaching the legal system for help can be daunting to the immigrant whose primary goal is to avoid contact with this system so as to avoid deportation.”<sup>141</sup> Even when immigrants do not fear deportation, they may not believe they can successfully use the court system to fight their evictions.<sup>142</sup> Mariela Olivares explains, “[m]any immigrants come from countries where the justice system is not [reluctantly] open to all, but rather, a venue providing assistance for the wealthy.”<sup>143</sup> This may be the experience of at least some Hispanic tenants in Milwaukee. In this study, 109 of the respondents, about 10% of the sample, reported being born outside of the United States.<sup>144</sup> The vast majority of these respondents were from Mexico.

In *Access to Justice for the Poor in Latin America*, Alejandro Garro claims that in “Latin America . . . the machinery of justice has historically been beyond the reach of the mass of the population, which happens to re-

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<sup>138</sup> See *supra* Tables 1–2.

<sup>139</sup> Cf. Oliveri, *supra* note 129, at 121.

<sup>140</sup> See Olivares, *supra* note 135, at 178.

<sup>141</sup> Anita Raj & Jay Silverman, *Violence Against Immigrant Women, The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367, 385 (2002) (discussing why battered immigrant women do not seek help); see also Olivares, *supra* note 135, at 162. Fear of the legal system may play a particular role in Milwaukee, where undocumented immigrants have been deported after minor encounters with the criminal system. See Edgar Mendez, *Milwaukee Tough on Undocumented Immigrants*, URB. MILWAUKEE (Apr. 22, 2014), <http://urbanmilwaukee.com/2014/04/22/milwaukee-tough-on-undocumented-immigrants/>, archived at <https://perma.cc/3CZL-JC9P>.

<sup>142</sup> Cf. Olivares, *supra* note 135, at 156–57 (explaining why many immigrants do not seek divorces). Such sentiment may be reflected among poor immigrants and non-immigrants towards the civil justice system. See LAUREINE GEORGE-PRATT, BARRIERS TO CIVIL JUSTICE: A SOCIOLOGICAL APPROACH, UNIV. OF WIS. OSHKOSH RESEARCH PAPER 10 (2014), available at <http://www.uwosh.edu/mcnairscholars/2013-2014-final-research-papers/GeorgePratt-Laureine.pdf>, archived at <https://perma.cc/SL97-EBB6>.

<sup>143</sup> Olivares, *supra* note 135, at 156–57; see also Shetty, *supra* note 130, at 565–66.

<sup>144</sup> See *infra* Appendix Table B.

ceive a small part of the national income.”<sup>145</sup> He describes the poor in Latin American countries as having “virtually no access to legal services, courts, and formal institutions.”<sup>146</sup> The perceived lack of access to the judicial system may be pronounced in the eviction context since landowners hold “real power” in Latin America.<sup>147</sup>

This train of thought applies mainly to Hispanic immigrants, particular those who are undocumented. However, the results of our study remained constant regardless of immigration status. That Hispanics in white neighborhoods remained at a heightened risk of eviction regardless of whether the tenant was born in or outside the United States suggests avoidance of the legal system is not driving increased likelihood of evictions among non-Hispanic landlords and in white neighborhoods.

### 3. Availability of Legal Services

Those Hispanic tenants who wish to use the legal system face the barrier of a limited supply of legal services. Several studies demonstrate that access to legal services may improve outcomes in housing cases.<sup>148</sup> For example, a randomized experiment analyzing legal assistance to low-income

<sup>145</sup> Alejandro M. Garro, *Access to Justice for the Poor in Latin America*, in THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 279 (Juan E. Mendez et al. eds., 1999). David Shirk and Alejandra Ríos Cázares explain that in Mexico, for example, where the majority of immigrants in Milwaukee are from, “[c]itizens have an overwhelming lack of confidence in the justice system.” David A. Shirk & Alejandra Ríos Cázares, *Introduction: Reforming the Administration of Justice in Mexico*, in REFORMING THE ADMINISTRATION OF JUSTICE IN MEXICO 27 (Wayne A. Cornelius & David A. Shirk eds., 2007). A 2002 United Nations report documented “persistent problems in the Mexican justice system,” including “inadequate access to justice for indigenous persons . . . and a general lack of transparency and accountability.” *Id.* at 23; see also David Luhnnow, *Presumption of Guilt*, WALL ST. J. (Oct. 17, 2009), <http://www.wsj.com/articles/SB10001424052748704322004574475492261338318> (describing the Mexican legal system). To be sure, each tenant’s experience is unique. Coming from a country where access to justice for the poor is limited, however, could certainly inform whether a tenant chooses to fight an eviction or leave at the landlord’s request. Cf. Olivares, *supra* note 135, at 156–57.

<sup>146</sup> Garro, *supra* note 145, at 279.

<sup>147</sup> *Id.* at 281–82.

<sup>148</sup> See, e.g., Desmond, *supra* note 8, at 123; D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 927 (2013); Hartman & Robinson, *supra* note 7, at 477–78 (collecting studies); Carol Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y REV. 419, 420 (2001); BOS. BAR ASS’N TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION 15 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>, archived at <https://perma.cc/A886-EK4M>; COLUMBIA LAW SCHOOL HUMAN RIGHTS INST. & NORTHEASTERN UNIV. SCHOOL OF LAW PROGRAM ON HUMAN RIGHTS & THE GLOBAL ECON., EQUAL ACCESS TO JUSTICE: ENSURING MEANINGFUL ACCESS TO COUNSEL IN CIVIL CASES, INCLUDING IMMIGRATION PROCEEDINGS 2–3 & n.14, 19 & n.146 (2014) [hereinafter EQUAL ACCESS TO JUSTICE]; Nabanita Pal, BRENNAN CTR. FOR JUSTICE AT N.Y. UNIV. SCHOOL OF LAW, *Facing Foreclosure Alone: The Continuing Crisis of Legal Representation* 4, 8 (2011); URBAN INST., *National Foreclosure Mitigation Counseling Program Evaluation: Preliminary Analysis of Program Effects* 3 (2010).



tenants in New York City Housing Court found that provision of legal counsel led to fewer judgments against the tenants, fewer evictions issued, and more stipulations mandating rent abatements or repairs.<sup>149</sup> A randomized study comparing tenants in Massachusetts District Court receiving offers of full attorney representation with those receiving offers of only limited or “unbundled” assistance found that tenants who received an offer of full representation from an attorney were less likely to lose possession of their units and obtained better monetary outcomes.<sup>150</sup>

Yet the supply of legal services often cannot meet demand.<sup>151</sup> Fewer than 20% of legal problems that low-income individuals face in the United States are resolved with assistance of legal representation.<sup>152</sup> A report by the Legal Services Corporation (LSC)—a private non-profit organization that allocates federal funding to legal service providers<sup>153</sup>—explained that “for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources.”<sup>154</sup> The report further stated that because “racial minorities and women are more likely to experience poverty in the United States,”<sup>155</sup> the limited supply of legal services creates a “crisis in unmet civil legal needs that disproportionately harms racial and ethnic minorities, women, and immigrants.”<sup>156</sup> When it comes to eviction proceedings, up to 90% of tenants may not have representation.<sup>157</sup>

Further, LSC restrictions may impede legal aid organizations from reaching out to undocumented Hispanic tenants. Specifically, the LSC Appropriations Act and federal regulations prohibit legal service organizations that receive LSC funding from “representing a client as a result of in-person unsolicited advice” or “referring to other recipients [of LSC funding] indi-

<sup>149</sup> Seron et al., *supra* note 148, at 428.

<sup>150</sup> Greiner et al., *supra* note 148, at 903, 926–31, 936. *But see* D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (Sept. 1, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1880078](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078), archived at <https://perma.cc/AJ2U-JJTG> (finding no statistical difference between full and limited representation on tenants’ outcomes in a study of a Massachusetts housing court).

<sup>151</sup> *See* Robert R. Kuehn, *Undermining Justice: The Legal Profession’s Role in Restricting Access to Legal Representation*, 2006 UTAH L. REV. 1039, 1040–42 (2006); EQUAL ACCESS TO JUSTICE, *supra* note 148, at 11–18.

<sup>152</sup> EQUAL ACCESS TO JUSTICE, *supra* note 148, at 1.

<sup>153</sup> Robert L. Bach, *Building Community Among Diversity: Legal Services for Impoverished Immigrants*, 27 U. MICH. J.L. REFORM 639, 642 (1994).

<sup>154</sup> EQUAL ACCESS TO JUSTICE, *supra* note 148, at 13 (quoting LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL NEEDS OF LOW INCOME AMERICANS 1 (2009), available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf), archived at <https://perma.cc/5SY3-935A>).

<sup>155</sup> *Id.* at 3–4.

<sup>156</sup> *Id.* at 1.

<sup>157</sup> In Boston Housing Court, approximately 90% of tenants represent themselves. BOS. BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 16–17 (1998), available at <http://www.bostonbar.org/prs/reports/unrepresented0898.pdf>, archived at <https://perma.cc/A6EE-837Y>. In New York City Housing Courts, anywhere from 79% to 88% of tenants are pro se. Seron et al., *supra* note 148, at 421. This stands in stark contrast to landlords; up to 98% of landlords are represented. *Id.*

viduals to whom they have given in-person unsolicited advice.”<sup>158</sup> This restriction makes it even less likely that Hispanic tenants who do not otherwise know of the availability of LSC-funded organizations will learn about their services. In Milwaukee, one of the two primary legal service providers, Legal Action, receives LSC funding.<sup>159</sup>

However, it is unlikely that limited access to legal services is driving higher eviction rates. Our results are narrow—that Hispanic tenants in white neighborhoods and with non-Hispanic landlords faced an increased incidence of eviction. Lack of access to the legal system would not explain why we observed increased incidents of eviction in only these two areas and not for Hispanic tenants throughout the sample.

We note that out of 682 landlord-tenant cases completed by Legal Action’s Milwaukee office in 2014, 35 (or about 5%) of the clients self-identified as Hispanic.<sup>160</sup> These cases were not necessarily limited to eviction cases and could have included complaints about building code violations, complaints about management, loss of rent assistance, or subsidized housing denials.<sup>161</sup> By contrast, in our data, about 19% of those who experienced eviction are Hispanic.<sup>162</sup> This difference may stem from our sample including informal evictions—those that did not go through the court process.<sup>163</sup> Most of the evictions Hispanics faced were informal.<sup>164</sup> Further, Hispanic tenants faced a higher incidence of informal evictions than African American tenants,<sup>165</sup> so it is unsurprising that our study shows that Hispanic tenants’ eviction rate was higher than the rate at which they sought legal services from Legal Action. We also do not know if tenants who did not seek or receive assistance from Legal Action sought assistance elsewhere, represented themselves in their eviction actions, or left their housing without fighting the eviction.

### B. *Disparate Treatment*

The potential explanations provided above for evictions’ disparate impact on Hispanic tenants are incomplete at best. Indeed, Hispanic tenants on the whole were *not* disproportionately affected by evictions. Only those in white neighborhoods and with non-Hispanic landlords were. Moreover,

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<sup>158</sup> 45 C.F.R. § 1638.3 (2015); *see also* Kuehn, *supra* note 151, at 1051.

<sup>159</sup> *See* Legal Action of Wis., *About Us*, [http://www.legalaction.org/content/index.cfm?cm\\_id=2](http://www.legalaction.org/content/index.cfm?cm_id=2), *archived at* <https://perma.cc/C3SG-HCJR> (last visited July 20, 2015). The other major legal service provider in Milwaukee, Legal Aid Society, does not receive LSC funding. *See* Legal Aid Soc’y of Wis., *About*, <http://lasmilwaukee.com/about/>, *archived at* <https://perma.cc/W3TD-C328> (last visited July 20, 2015).

<sup>160</sup> E-mail from April A. Hartman, Housing LAW Priority Co-Coordinator, Legal Action of Wis., to Deena Greenberg (Aug. 7, 2015) (on file with first author).

<sup>161</sup> *Id.*

<sup>162</sup> *See supra* Table 5.

<sup>163</sup> *See supra* note 91 and accompanying text.

<sup>164</sup> *See supra* Table 5.

<sup>165</sup> *See id.*

many of the reasons detailed above apply specifically to immigrants or those with difficulty communicating in English. However, controlling for the survey's language or tenant's country of origin did not change the results. Accordingly, the results suggest discrimination against Hispanic tenants living in white neighborhoods rather than a disparate impact of evictions on all Hispanic tenants. This discrimination may be implicit or unconscious, just as it may be intentional.<sup>166</sup>

### 1. *The Fair Housing Act, Implicit Biases, and Outgroup Prejudice*

If a landlord in a majority-white neighborhood holds prejudices against Hispanic tenants, why would she rent to them in the first place? One answer might have to do with increased scrutiny when it comes to housing access, with fair housing laws more effectively deterring discrimination in the rental process. The FHA prohibits discrimination “against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.”<sup>167</sup> States and municipalities have similar anti-discrimination laws.<sup>168</sup> And given the ability to compare treatment of tenants of color seeking to rent with similarly situated white tenants, it is easier to detect discrimination when it comes to accessing housing.<sup>169</sup> In 2014 alone, there were more than 6,000 racial discrimination complaints reported by the National Fair Housing Alliance,<sup>170</sup> HUD, Fair Housing Assistance Program agencies,<sup>171</sup> and the Department of Justice, out of nearly 31,000 total reported discrimination complaints.<sup>172</sup> Accordingly, landlords may be more careful not to discriminate when renting apartments and often even follow scripts to ensure they treat prospective tenants fairly.<sup>173</sup>

With respect to eviction, however, identifying discrimination is much more difficult, since landlords often have a facially non-discriminatory rea-

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<sup>166</sup> We note that Hispanics have “been largely overlooked by bias research.” David S. March & Reiko Graham, *Exploring Implicit Ingroup and Outgroup Bias Toward Hispanics*, 18 *GROUP PROCESSES & INTERGROUP REL.* 89, 90 (2015). A 2010 review of three major social psychology journals found that 7% of research focused on biases against Hispanics, compared with 61% of research focusing on biases against African Americans. *Id.* at 90. Therefore, while current research can provide a general framework to explain these findings, future studies are needed to understand the mechanisms by which discrimination operates against Hispanics and in the eviction context more generally.

<sup>167</sup> 42 U.S.C. § 3604(b).

<sup>168</sup> See *infra* note 209.

<sup>169</sup> See *supra* notes 30–39 and accompanying text.

<sup>170</sup> The National Fair Housing Alliance “is a consortium of more than 220 private, non-profit fair housing organizations, state and local civil rights agencies, and individuals from throughout the United States.” NAT'L FAIR HOUSING ALLIANCE, *supra* note 1, at ii.

<sup>171</sup> These include “local and state civil or human rights agencies.” *Id.* at 2.

<sup>172</sup> See *id.* at 21 (noting that 6,044 out of 30,936 complaints of discrimination were based on race).

<sup>173</sup> See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (forthcoming, 2016) (on file with third author).

son for wanting the tenant out, whether it is nonpayment of rent or another violation of a rental agreement. Accordingly, when a tenant exhibits eviction-warranting behavior, the landlord's actual motivation for the eviction is nearly impossible to demonstrate. The tenant would need to show that a white tenant who also missed rent or exhibited the same behavior was not evicted. Knowing a tenant likely could not prove race was the motivating factor, a landlord may use a missed rental payment as an opportunity to evict a tenant of color.

An alternative explanation recognizes that associations and biases can be implicit.<sup>174</sup> That is, people hold attitudes that are "involuntarily and relatively effortless in terms of cognitive resources."<sup>175</sup> Studies examining implicit associations have found negative associations held about Hispanics in general,<sup>176</sup> as well as Hispanic immigrants compared to white and Asian immigrants.<sup>177</sup> In many cases, people are unaware of these associations, and their conscious beliefs can be contrary to their implicit associations.<sup>178</sup> Yet implicit biases can have stronger effects than explicit beliefs,<sup>179</sup> affecting

<sup>174</sup> See, e.g., Katherine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1904–05 (2009); Oliveri, *supra* note 129, at 74–77. For an overview of implicit association tests, see, e.g., Anthony G. Greenwald et al., *Measuring Individual Differences in Cognition: The Implicit Association Test*, 74 J. OF PERSONALITY AND SOC. PSYCHOL. 1464, 1464–65 (1998), and Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129–31 (2012). For a discussion of the implicit association test (IAT) and a summary of ten major studies involving the IAT, see generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946–49 (2006), and John T. Jost et al., *The Existence of Implicit Bias is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. IN ORGANIZATIONAL BEHAV. 39 (2009).

<sup>175</sup> Efrén O. Pérez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517, 519 (2010).

<sup>176</sup> See, e.g., James M. Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISP. J. BEHAV. SCI. 355, 358–62 (2005) (finding, in a study of 41 college students, that participants took longer to associate traits indicative of intelligence with Hispanic than non-Hispanic names, while they could more quickly associate traits indicative of a lack of intelligence with Hispanic names).

<sup>177</sup> Pérez, *supra* note 175, at 529–31; see also March & Graham, *supra* note 166, at 99.

<sup>178</sup> See, e.g., Equal Justice Soc'y & Wilson Sonsini Goodrich & Rosati, *Lessons from Mt. Holly: Leading Scholars Demonstrate Need for Disparate Impact Standard to Combat Implicit Bias*, 11 HASTINGS RACE & POVERTY L.J. 241, 247–48 (2014); Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 303–04 (2003) (citing studies and explaining that implicit and explicit measures of attitudes differ regarding "socially sensitive" issues); Krieger & Fiske, *supra* note 125, at 1010; Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS: THEORY, RESEARCH, AND PRACTICE 101, 111–12 (2002); Oliveri, *supra* note 129, at 76; Scott A. Ottaway et al., *Implicit Attitudes and Racism: Effects of Word Familiarity and Frequency on the Implicit Association Test*, 19 SOC. COGNITION 97, 99 (2001); Pérez, *supra* note 175, at 520.

<sup>179</sup> Equal Justice Soc'y & Wilson Sonsini Goodrich & Rosati, *supra* note 178, at 248 (explaining that implicit biases can "run incongruently to attitudes and beliefs we maintain externally"); Nosek et al., *supra* note 178, at 111 (discussing a study measuring implicit and explicit attitudes and finding that "implicit biases were notably stronger than their explicit counterparts and were sometimes in contradiction to them"); Oliveri, *supra* note 129, at 76

even those who explicitly reject such biases,<sup>180</sup> thereby leading to discriminatory behavior.<sup>181</sup>

Implicit biases are more likely to lead to discriminatory treatment in two situations applicable to evictions: first, when there are “nonracial justifications for the discriminatory behavior,”<sup>182</sup> such as nonpayment of rent or other eviction-warranting behavior; and second, “when people have wide discretion in making quick decisions with little accountability.”<sup>183</sup> When deciding to evict a tenant—unlike when deciding whether to rent—landlords exercise discretion at each stage of the process.<sup>184</sup> For even the most well-intentioned landlord, race may be an implicit motivating factor in the eviction decision.

Outgroup prejudices, both explicit and implicit,<sup>185</sup> may also help explain why Hispanic tenants with white landlords faced higher eviction rates. Studies have demonstrated that members hold preferences for their “ingroup members”—members of groups they belong to<sup>186</sup>—and disfavor “outgroup members.”<sup>187</sup> People are motivated to “exaggerate good traits of ingroups and bad traits of outgroups,”<sup>188</sup> as well as to “respond to members of their own ingroup with greater empathy, respect, and cooperation.”<sup>189</sup> As applied to evictions, white landlords may be more willing to cooperate with white tenants who miss rent, as compared to Hispanic tenants who miss rent, by working to resolve the arrearage without bringing an eviction case.

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("[P]eople are often quite unaware that stereotypes affect the way they perceive others. In fact, such unconscious bias commonly affects the thought processes even of people who consciously reject stereotypes.")

<sup>180</sup> Nosek et al., *supra* note 178, at 111; Oliveri, *supra* note 129, at 76.

<sup>181</sup> Bartlett, *supra* note 174, at 1895–96 & n.3.

<sup>182</sup> Oliveri, *supra* note 129, at 76–77.

<sup>183</sup> Kang et al., *supra* note 174, at 1142. For a summary of studies measuring “prediction of behavior from IAT scores,” see Fazio & Olson, *supra* note 178, at 308–10.

<sup>184</sup> See *supra* note 41 and accompanying text. For a description of the eviction process in Wisconsin, see Tenant Resource Ctr., *Eviction*, <http://www.tenantresourcecenter.org/eviction>, archived at <https://perma.cc/L78B-MT4K> (last visited June 15, 2015). In many ways, this process parallels any other legal process, including the criminal justice process and civil litigation process, where there is potential for bias at each “of the crucial milestones in a criminal case,” from the initial police encounter to sentencing. See Kang et al., *supra* note 174, at 1135, 1151–52. Like in Kang et al.’s description of the criminal justice process, “[t]he number of stages is somewhat arbitrary,” and “more stages in a finer-grained timeline or vice versa” could have been detailed. *Id.* at 1135 & n.30.

<sup>185</sup> See, e.g., Oliveri, *supra* note 129, at 74–75; Laurie A. Rudman et al., *Measuring the Automatic Components of Prejudice*, 17 SOC. COGNITION 437, 437, 460 (1999).

<sup>186</sup> Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 476 (2010).

<sup>187</sup> See, e.g., Bartlett, *supra* note 174, at 1911–12; Greenwald & Krieger, *supra* note 174, at 952; Rudman et al., *supra* note 185, at 437.

<sup>188</sup> Kang & Lane, *supra* note 186, at 515.

<sup>189</sup> Bartlett, *supra* note 174, at 1912. These effects are particularly pronounced among “those who belong to social groups deemed to be ‘good.’” Kang & Lane, *supra* note 186, at 476.

Findings from the mortgage-lending context support this suggestion.<sup>190</sup> In the mortgage-lending market, one study revealed that when faced with “marginally qualified” applicants, white loan officers were more likely to hold black applicants to a higher standard, while they were more likely to help white applicants receive loans by encouraging them to produce additional “compensating” information and trust that information.<sup>191</sup> In contrast, because of perceived dissimilar backgrounds with black applicants, loan officers held black applicants to “standard guidelines” and did not extend the same “helping hand.”<sup>192</sup> The authors of this study suggested that “white officers may feel they know more about white applicants than about minorities, and they thus are more likely to acquire additional information about the creditworthiness of white applicants,” while relying only on basic criteria to evaluate people of color.<sup>193</sup> When applicants had good credit profiles, on the other hand, race did not play a significant role in determining whether a loan was given.<sup>194</sup> Applying these findings to evictions, white landlords may be more willing to trust or work with white tenants than with Hispanic ones, even when both tenants have missed rental payments.

## 2. *Evicting Hispanics from White Neighborhoods*

We observed the most significant effects for Hispanic tenants living in non-Hispanic neighborhoods. Hispanic renters who regularly missed rent payments and lived in predominantly white neighborhoods were almost twice as likely as other habitual late-rent payers to be evicted (38% versus 21%).<sup>195</sup> This finding suggests an interaction between race and neighbor-

<sup>190</sup> See Charles W. Calomiris et al., *Housing-Finance Intervention and Private Incentives: Helping Minorities and the Poor*, 26 J. MONEY, CREDIT, & BANKING 634, 635, 652 (1994); Stephen R. Holloway, *Exploring the Neighborhood Contingency of Race Discrimination Lending in Columbus, Ohio*, 88 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 252, 258 (1998); William C. Hunter & Mary Beth Walker, *The Cultural Affinity Hypothesis and Mortgage Lending Decisions*, 13 J. REAL EST. FIN. & ECON. 57, 57–58 (1996).

<sup>191</sup> Holloway, *supra* note 190, at 258.

<sup>192</sup> *Id.*

<sup>193</sup> Hunter & Walker, *supra* note 190, at 58, 67; see also Holloway, *supra* note 190, at 258 (discussing this study and explaining how the “cultural affinity” hypothesis operates). Hunter and Walker note that “statistical discrimination” may also explain these findings, where the mortgage lenders use statistical information they have about likelihood of repayment based on race. See Hunter & Walker, *supra* note 190, at 67; Holloway, *supra* note 190, at 258; see also Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1320 (1989) (discussing statistical discrimination in the employment context). For a response to this sort of argument and an explanation of its normative and legal problems, see Kang & Lane, *supra* note 186, at 513–19. Such “statistical discrimination” would be inapplicable here, as white and Hispanic tenants missed rent at similar rates (12% of Hispanic respondents reported having been frequently late with their rent at some point in the previous 24 months, compared to 11.8% of white respondents). If “statistical discrimination” were applicable, it would be illegal. See Holloway, *supra* note 190, at 258.

<sup>194</sup> Hunter & Walker, *supra* note 190, at 58, 67.

<sup>195</sup> These estimates of annual eviction rates are based on estimates of monthly eviction rates, calculated by using Bartus’ (2005) marginal effects STATA package. The marginal effects of the interaction terms were statistically significant. For more on marginal effects, see

hood composition. Landlords operating in non-Hispanic neighborhoods may believe that Hispanic tenants can be replaced by white tenants, whom the landlords may prefer.<sup>196</sup> A 2000 survey revealed that 32% of white respondents said their ideal neighborhood did not include Hispanics.<sup>197</sup>

Further, already existing, often implicit, biases may manifest themselves in integrated neighborhoods.<sup>198</sup> In the mortgage-lending market, Elvin Wyly and Daniel Hammel explain that “subtle (and often unintentional) forms of discrimination in the underwriting process . . . will be magnified where gentrification creates a diverse stream of minority and white borrowers.”<sup>199</sup> They suggest that the implicit associations that lead loan officers<sup>200</sup> to extend more assistance to white applicants are exacerbated in neighborhoods with both white and African American applicants, resulting in “worsened relative treatment of . . . African Americans.”<sup>201</sup> Accordingly, the interaction with race and neighborhood composition parallels findings in the mortgage-lending context, where African American applicants were more likely to face discrimination in white neighborhoods.<sup>202</sup> This interaction may explain why we see the greatest likelihood of eviction among Hispanics in white neighborhoods.

We caution against over-interpreting our results, as the restriction of our sample to tenants who regularly make late payments required us to drop a

Tamás Bartus, *Estimation of Marginal Effects Using Margeff*, 5 *STATA J.* 309–29 (2005), <http://www.stata-journal.com/sjpdf.html?articlenum=ST0086>, archived at <https://perma.cc/5P3M-XVLF>.

<sup>196</sup> Cf. Margery Austin Turner, *Discrimination in Urban Housing Markets: Lessons from Fair Housing Audits*, 3 *HOUSING POL'Y DEBATE* 185, 188 (1992); Janelle Bouie, *A Tax on Blackness*, *SLATE* (May 13, 2015, 6:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2015/05/racism\\_in\\_real\\_estate\\_landlords\\_redlining\\_housing\\_values\\_and\\_discrimination.html](http://www.slate.com/articles/news_and_politics/politics/2015/05/racism_in_real_estate_landlords_redlining_housing_values_and_discrimination.html), archived at <https://perma.cc/C9C6-MVM6>.

<sup>197</sup> Lawrence D. Bobo et al., *The Real Record on Racial Attitudes*, in *SOCIAL TRENDS IN AMERICAN LIFE* 39, 51 (Peter V. Marsden ed., 2012) (citing the 2000 General Social Survey); cf. Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 *AM. J. SOC.* 750, 755–57 (1994).

<sup>198</sup> See Elvin K. Wyly & Daniel J. Hammel, *Gentrification, Segregation, and Discrimination in the American Urban System*, 36 *ENV'T & PLAN.* 1215, 1221 (2004). In Wyly and Hammel's study, the authors found “that gentrification was associated with intensified racial discrimination.” *Id.* at 1237.

<sup>199</sup> *Id.* at 1221, 1224.

<sup>200</sup> Wyly and Hammel explain that these loan officers are “usually white.” *Id.* at 1221. Similarly, landlords in Milwaukee's white neighborhoods are largely white. In our data, around three-quarters of landlords in majority white neighborhoods are white. Of the remainder, 15% are Hispanic, 3% are black, and 7% are “other race.” The percentage of white landlords increases along with the percentage of white neighborhood residents.

<sup>201</sup> *Id.* at 1221; see also *id.* at 1224; *supra* notes 190–94 and accompanying text (discussing “cultural affinity” and implicit associations).

<sup>202</sup> Holloway, *supra* note 190, at 262, 272–73 (analyzing data from Columbus, Ohio); see also Wyly & Hammel, *supra* note 198, at 1221 (citing studies that “suggest that neighborhood context mediates lending discrimination”); Steve R. Holloway & Elvin K. Wyly, “*The Color of Money*” Expanded: *Geographically Contingent Mortgage Lending in Atlanta*, 12 *J. HOUSING RES.* 55, 80–86 (2001) (analyzing data from Atlanta, Georgia, and looking at neighborhood income levels).

large portion of our sample. We encourage future researchers to replicate these findings and to extend them to cities with other racial and residential dynamics. These findings also point out the need to look beyond top-level statistics and into situations where discrimination is most likely to be found. Whether Hispanic eviction rates are better explained by discrimination or landlord expectations, these models show that detecting disparate impact requires the ability to look in the right places.

### III. LEGAL AND POLICY IMPLICATIONS: ADDRESSING DISCRIMINATION IN EVICTIONS

This Article presents evidence that Hispanics experience increased eviction risks in at least two situations: (1) when they lived in a white neighborhood; and (2) when their landlord was not Hispanic. How, then, should this problem be addressed? How can a tenant facing an eviction bring a claim of discrimination? And how can one address possible implicit biases taking place on a societal level that manifest themselves in the eviction context? Answers to these questions can be divided into “ex ante” and “ex post” approaches to combating implicit biases.<sup>203</sup> Ex post approaches place legal liability on those who discriminate, while ex ante interventions try to prevent decision-making based on implicit biases.<sup>204</sup> Section III.A discusses the ex post approach of individual lawsuits, which can address individual behaviors but may be less effective at addressing “structural forces that mask and facilitate discrimination.”<sup>205</sup> Further, these lawsuits may be less effective at addressing informal evictions, which comprised the majority of the evictions in this study.<sup>206</sup> Accordingly, Section III.B discusses ex ante approaches to combating implicit associations that could be applied to landlords. In discussing potential approaches, we hope to inspire future research on ways to address discrimination in the eviction context.

#### A. *Liability-Based Solutions*

If a tenant can prove that the landlord’s motivation for the eviction was discriminatory, then she can likely bring a claim under the FHA or, in many cases, state anti-discrimination statutes. While the FHA is typically thought of as covering housing applications, case law suggests that evictions are covered under the FHA as well.<sup>207</sup> Under the current framework, however, mak-

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<sup>203</sup> Kang & Lane, *supra* note 186, at 492 (explaining that an “important distinction, which has been mostly ignored, is whether we are approaching the problem ex ante or ex post (a problem of time orientation)”).

<sup>204</sup> *Id.* at 492. To be sure, ex post liability affects decision-making. The difference between ex post and ex ante interventions, however, is whether liability is imposed after the decision (ex post) or interventions are implemented before the decision (ex ante).

<sup>205</sup> Bartlett, *supra* note 174, at 1899.

<sup>206</sup> See *supra* Table 5.

<sup>207</sup> See *infra* notes 214–33 and accompanying text.



ing a claim of discrimination in evictions will likely be a significant challenge for most tenants absent actual evidence that a landlord's motivation for an eviction was race, rather than nonpayment of rent or another eviction-warranting behavior.<sup>208</sup> Therefore, changes to the current legal framework should be considered when contemplating how the legal system can be used to address implicit biases and discrimination.<sup>209</sup>

In our study, most evictions were informal—"not processed through the court system."<sup>210</sup> These evictions could include a tenant leaving upon landlord request.<sup>211</sup> For tenants to use the legal framework or a lawsuit to challenge an eviction, however, the eviction must reach the courts. That most evictions were informal suggests, first, that lawsuits alone are inadequate to address evictions, and second, that tenants facing an informal eviction who wish to use the legal system to challenge the eviction must either remain in their home until an eviction case is brought or bring an affirmative suit against the landlord.

### 1. *Application of the Fair Housing Act to Evictions*

The FHA prohibits discrimination "against any person in the terms, conditions, or privileges of *sale or rental* of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."<sup>212</sup> While at first glance there may appear to be a question as to whether the FHA covers evictions,<sup>213</sup> current case law indicates that evictions would indeed be covered.

In *Halprin v. Prairie Single Family Homes of Dearborn Park Association*,<sup>214</sup> the Seventh Circuit held that harassment by property owners did not create a claim under § 804 of the FHA<sup>215</sup> because the harassment did not

<sup>208</sup> See *supra* Section II.A.2; cf. Jolls & Sunstein, *supra* note 178, at 970.

<sup>209</sup> We note that the vast majority of states also have anti-discrimination laws and ordinances that can be used to challenge discrimination in evictions. For an overview of the states' anti-discrimination statutes, see *State and Local Fair Housing Enforcement Laws*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/fairhousing/laws/state-laws.html>, archived at <https://perma.cc/PX29-J6WF> (last visited June 15, 2015). Municipalities can also have civil rights ordinances. For example, Wisconsin grants power to municipalities to "enact ordinances prohibiting discrimination in housing within their respective boundaries solely on the basis of an individual being a member of a protected class." WIS. STAT. § 66.1011(2) (2009). Some state anti-discrimination laws include more protected groups than the FHA does. For instance, California prohibits discrimination based on, inter alia, source of income or ancestry. CAL. GOV'T § 12955 (2012).

<sup>210</sup> Desmond & Shollenberger, *supra* note 55, at 1752; see also *supra* Table 5.

<sup>211</sup> Desmond & Shollenberger, *supra* note 55, at 1754.

<sup>212</sup> 42 U.S.C. § 3604(b) (emphasis added).

<sup>213</sup> See Roberto Concepción, Jr., *The Untapped Potential of the Fair Housing Act in Addressing Aggressive Enforcement of "Walking While Black or Brown,"* 17 U. PA. J.L. & SOC. CHANGE 383, 395 n.95 (2014); Mary Pennisi, *A Herculean Leap for the Hard Case of Post-Acquisition Claims: Interpreting Housing Act 3604(b) After Modesto*, 37 FORDHAM URB. L.J. 1083, 1111–25 (2010).

<sup>214</sup> 388 F.3d 327 (7th Cir. 2004).

<sup>215</sup> 42 U.S.C. § 3604.

prevent the plaintiffs from acquiring the property.<sup>216</sup> The court explained that the FHA is limited to “activities . . . that prevent people from acquiring property.”<sup>217</sup> The Fifth Circuit appeared to take a similar position in a suit alleging illegal dumping.<sup>218</sup> The Seventh Circuit, sitting en banc, later appeared to qualify its position, however. In *Bloch v. Frischholz*,<sup>219</sup> the court explained that “[p]rohibiting discrimination at the point of sale or rental but not at the moment of eviction would only go halfway toward ensuring availability of housing.”<sup>220</sup> Accordingly, the court in *Bloch* held that while “isolated acts of discrimination by other private property owners . . . [or] ‘quarrels between neighbors’” generally do not fall within the FHA,<sup>221</sup> constructive or actual evictions do.<sup>222</sup>

Many have argued that the FHA should be either read or amended to explicitly include all post-acquisition claims of discrimination.<sup>223</sup> In alignment with this view, the Ninth Circuit has held that the FHA does reach “post-acquisition discrimination.”<sup>224</sup> The court explained that “[t]he inclusion of the word ‘privileges’ implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling.”<sup>225</sup> At least seven other circuit courts have “recognized the post-acquisition scope of the FHA,” though they have not addressed the question directly.<sup>226</sup> District courts that have encountered the issue have recognized post-acquisition claims as well.<sup>227</sup> Therefore, even those courts that narrowly interpret post-acquisition discrimination claims would likely find that the FHA covers claims of discrimination in evictions.

<sup>216</sup> *Halprin*, 388 F.3d at 329–30. *But see id.* (noting that “the [FHA’s] statutory language might be stretched far enough to reach a case of ‘constructive eviction’”).

<sup>217</sup> *Id.* at 328.

<sup>218</sup> *See Cox v. City of Dallas*, 430 F.3d 734, 741 (5th Cir. 2005) (finding that the FHA did not apply because the plaintiffs’ complaint was “not about ‘availability’”).

<sup>219</sup> 587 F.3d 771 (7th Cir. 2009) (en banc).

<sup>220</sup> *Id.* at 776.

<sup>221</sup> *Id.* at 780.

<sup>222</sup> *Id.* at 776.

<sup>223</sup> *See, e.g.*, Gilbert, *supra* note 7, at 754–56, 780–86; Rigel Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 3, 39–62 (2008) (arguing that the focus should be on the “identity of the defendant and the relationship between the parties”); Pennisi, *supra* note 213, at 1087, 1136–46; Jessica D. Zietz, *On Second Thought: Post-Acquisition Housing Discrimination in Light of Bloch v. Frischholz*, 66 U. MIAMI L. REV. 495, 496, 520–21 (2012). Indeed, evidence of disparate treatment in evictions in our study provides further evidence for Congress to make clear that the FHA applies to evictions.

<sup>224</sup> *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009).

<sup>225</sup> *Id.* at 713.

<sup>226</sup> Gilbert, *supra* note 223, at 779 & n.219 (citing cases from the First, Fourth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits).

<sup>227</sup> *See Pennisi, supra* note 213, at 1115–18 (citing cases from the District of Nebraska, the Middle District of Florida, and the Northern District of California).

## 2. *Liability Under the Fair Housing Act*

Assuming that evictions are covered under the FHA, questions remain over the type of proof necessary to bring a claim, and specifically whether plaintiffs must demonstrate that landlords had a discriminatory intent when evicting them. This past Term, in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*,<sup>228</sup> the Supreme Court held that disparate-impact claims were cognizable under the FHA, thereby adopting the position of HUD and the courts of appeal that had considered the question.<sup>229</sup> Under disparate-impact liability, plaintiffs can point to a “disproportionately adverse effect on minorities,” rather than establishing that the defendant had discriminatory intentions.<sup>230</sup> The plaintiff is required to show not only a racial disparity, but also that the defendant’s policy was the source of the disparity.<sup>231</sup> Once a plaintiff makes this prima facie showing of disproportionate adverse effect, a defendant can “explain the valid interest served by their policies.”<sup>232</sup>

The disparate-impact theory of liability will be a powerful tool for tenants bringing suit who do not have evidence of landlords’ discriminatory motive or intent. Even under this broader liability standard, however, tenants will still face substantial challenges. First, most tenants will have difficulty proving disproportionate impact on tenants of color when the landlord owns a small number of units. Such a showing would require demonstrating that tenants of color are facing greater rates of eviction as compared to white tenants, and tenants may not be able to access or produce data showing that, of all non-paying tenants, only Hispanic ones are getting evicted. Second, tenants would need to establish causation. That is, they would need to show that the landlords’ decision-making is *causing* the disproportionate impact, as opposed to “multiple [other] factors” such as different income levels, missed rent payments, or other eviction-warranting behavior.<sup>233</sup> To be sure, tenants can make discovery requests that can include the landlord’s reasons for an eviction, and tenants may be able to ask for information about other eviction cases the landlord has either chosen to pursue or not pursue when there was nonpayment of rent or other eviction-warranting behavior. But these requests may be of little utility. Records of nonpayment without eviction (the control group) likely do not exist outside a landlord’s personal books, and even if the landlord produces this information, it may not amount to enough data to substantiate a claim of discrimina-

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<sup>228</sup> 135 S. Ct. 2507 (2015).

<sup>229</sup> *Id.* at 2525.

<sup>230</sup> *Id.* at 2513 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)).

<sup>231</sup> *Id.* at 2523.

<sup>232</sup> *Id.* at 2522 (explaining that “[t]his step of the analysis is analogous to the business necessity standard under Title VII and provides a defense against disparate-impact liability”).

<sup>233</sup> *Cf. id.* at 2523–24 (“It may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units.”).

tion. Third, landlords would almost always be able to point to a “valid,” non-discriminatory interest, such as having rent-paying tenants in their properties. Therefore, even under disparate-impact liability, tenants face significant challenges bringing claims of discrimination in eviction under the FHA.

### 3. *Potential Changes to the Legal Framework*

Because of these challenges, changes to the current legal framework may be necessary to make viable claims of discrimination in eviction apart from being able to demonstrate a disparate impact. One possibility would be to create a burden-shifting framework, similar to the one used in the employment context.<sup>234</sup> For example, in employment discrimination law, a plaintiff establishes a prima facie case for discrimination by “prov[ing] that he or she is a member of a class protected by Title VII, and failed to obtain an employment opportunity for which she was qualified, or was subjected to an employment action to which others were not subject.”<sup>235</sup> Once a plaintiff makes a prima facie case, the burden is on the employer to provide a non-discriminatory reason for the adverse employment decision.<sup>236</sup> If the employer can provide a non-discriminatory reason, then the plaintiff must show that the cited reason is a pretext.<sup>237</sup> This framework has allowed plaintiffs to bring claims even when the discrimination was not overt or intentional.<sup>238</sup>

However, a tenant would still face difficulties at steps one and three. Because the employment burden-shifting framework requires the plaintiff to be “qualified” for the job at step one, such a framework would not map onto cases where tenants were not “qualified” to stay in the apartment because they missed rent or engaged in other eviction-warranting behavior. Rather, it would apply only to no-fault evictions, such as refusal to renew a lease at the expiration of a lease term or termination of a tenancy at-will. In such cases, a plaintiff could establish a prima facie case of discrimination by showing that she is a member of a protected class and that she, but not others, was evicted without fault. These cases, however, represent only a

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<sup>234</sup> See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973) (Title VII).

<sup>235</sup> Bartlett, *supra* note 174, at 1921 n.91. Bartlett explains the framework:

[O]nce a plaintiff proves a prima facie case, the defendant bears the burden of producing a non-discriminatory explanation for a negative employment decision. Defendant’s production shifts the burden back to the plaintiff, who has the opportunity to show that the employer’s reason was a pretext. If this burden is met, the factfinder is permitted to infer that the employer based its decision on an illegal reason, although it is not required to do so.

*Id.* at 1921.

<sup>236</sup> *Id.* at 1921.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 1926.

relatively small percentage of evictions.<sup>239</sup> Further, if a tenant could show that she was evicted without fault, while other tenants were not, she could likely bring a suit under the FHA. If the tenant did reach step three under a burden-shifting framework, she would still face the tremendous challenges described above of showing the landlord's cited non-discriminatory reason was a pretext.

Alternatively, legal rules could establish a presumption of discrimination whenever a landlord evicts a member of a protected class.<sup>240</sup> Such a concept has precedent in housing law. Currently, all states as well as the District of Columbia provide anti-retaliation protections, which prohibit the landlord from retaliating when the tenant engages in protected activity such as reporting conditions in the apartment.<sup>241</sup> For example, in Massachusetts, a tenant's demonstration that she was evicted within six months of having engaged in protected activity establishes a rebuttable presumption of retaliation.<sup>242</sup> Once this presumption is established, the landlord must prove with clear and convincing evidence that she had a non-retaliatory explanation for the eviction *and* that the eviction was consistent with her business practice.<sup>243</sup> An analogous framework could be established for members of a protected class who are evicted, even for eviction-warranting behavior.

To be sure, establishing such a presumption comes with several difficulties. It puts an added burden on landlords, who in many cases are fully compliant with the law when they seek to evict tenants for eviction-warranting behavior. It also risks a "chilling effect," where landlords will be reluctant to rent to members of a protected class out of fear they cannot evict these tenants even for legitimate reasons.<sup>244</sup> Indeed, in *Inclusive Communi-*

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<sup>239</sup> See, e.g., Beth Dillman, *Tenant Defenses to Evictions in New Hampshire*, NOLO, LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/tenant-defenses-evictions-new-hampshire.html>, archived at <https://perma.cc/T4YD-LGUK> (last visited Dec. 6, 2015) (explaining nonpayment of rent and violation of a lease agreement are the most common reasons for an eviction in New Hampshire); Linda Wood-Boyle, *Facing Eviction: Homelessness Prevention for Low-Income Tenant Households*, FED. RESERVE BANK OF BOS. (2015), <https://www.bostonfed.org/commdev/c&b/2015/winter/wood-boyle-facing-eviction-homelessness-prevention.htm>, archived at <https://perma.cc/W3HD-ZZ3Q> (explaining that 85% of evictions from subsidized housing are for nonpayment of rent).

<sup>240</sup> Similar suggestions have been made in the employment context. See Bartlett, *supra* note 174, at 1927, 1957–58. For purposes of the housing context, a protected class could include any of the classes protected under the Fair Housing Act: race, color, religion, sex, handicap, familial status, or national origin. See 42 U.S.C. § 3604. Of course, a legislature enacting this proposal could expand the protected groups.

<sup>241</sup> See, e.g., WIS. STAT. § 704.45 (2015); MASS. GEN. LAWS ch. 186, § 18 (2016). For a list of states' anti-retaliation statutes, see Janet Portman, *State Laws Prohibiting Landlord Retaliation*, NOLO, LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/chart-anti-retaliation-statutes-tenants-29668.html>, archived at <https://perma.cc/S7ZW-KC6Z>, (last visited June 16, 2015).

<sup>242</sup> See MASS. GEN. LAWS ch. 186, § 180; ch. 239, § 2A (2016).

<sup>243</sup> See *id.*

<sup>244</sup> Of course, if a landlord refuses to rent to a tenant based on her status as a member of a protected class, this would be prohibited under the FHA and state statutes, and the landlord would then be liable for discrimination in the rental of housing. As discussed in the introduction, however, these anti-discrimination statutes do not stop and cannot capture all incidents of

ties, Justice Kennedy cautioned against “interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision.”<sup>245</sup> In that context, he explained that if the “specter” of litigation prevents private developers from constructing low-income housing, “then the FHA would have undermined its own purpose as well as the free-market system.”<sup>246</sup>

Analogous responses have occurred in other contexts.<sup>247</sup> For example, one study of employers found that one of the top three reasons given for reluctance to hire people with disabilities is that “[t]hey are afraid they won’t be able to discipline or fire a worker with a disability.”<sup>248</sup> In that context, one solution offered to alleviate employers’ concerns that hiring people with disabilities would lead to legal liability was a “trial period,” during which an employee could be dismissed without a lawsuit or complaint.<sup>249</sup> Theoretically, here, the presumption could apply only to tenants who have lived in the apartment for a certain period of time (for example, six months) without missing a rental payment. Nevertheless, concerns about the burden on landlords and subsequent effect on the rental market would remain.<sup>250</sup> Therefore, even changes to the current legal framework would likely not be sufficiently effective to address discrimination in evictions.

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discrimination. See The Leadership Conference, Report: Racial Steering into Segregated Neighborhoods Most Prevalent Form of Housing Discrimination (Apr. 7, 2006), <http://www.civilrights.org/fairhousing/laws/report-racial-steering-into-segregated-neighborhoods-most-prevalent-form-of-housing-discrimination-1.html>, archived at <https://perma.cc/RDF8-X754> (describing a National Fair Housing Alliance study, which found that despite receiving Fair Housing Act training, “real estate agents ‘racially steered’ 87 percent of testers who inquired about purchasing a home”).

<sup>245</sup> *Inclusive Cmty.*, 135 S. Ct. at 2524.

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., Posner, *supra* note 193, at 1329 (discussing sex discrimination laws and suggesting that Title VII could hurt women when “employers are reluctant to hire women in the first place out of fear that Title VII will restrict their ability to fire an unsatisfactory female employee without inviting a lawsuit”); cf. Andrew L. Sandler, *The Consumer Financial Protection Bureau Should Beware of Chilling Effects*, N.Y. TIMES (July 21, 2013, 9:07 PM), <http://www.nytimes.com/roomfordebate/2013/07/21/consumer-finance-agencys-new-clout/the-consumer-financial-protection-bureau-should-beware-of-chilling-effects> (arguing that the “Consumer Financial Protection Bureau[’s] . . . reliance on statistical analysis that looks for disparate impacts among groups—trying to identify potential fair-lending concerns—discourages entities from offering a range of products and creating new products, out of fear of misplaced accusations of discrimination”).

<sup>248</sup> H. Stephen Kaye et al., *Why Don’t Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUPATIONAL REHAB. 526, 529 (2011). These authors surveyed employers from “businesses and government entities known or reputed to be reluctant to hire and accommodate workers with disabilities” and asked them for reasons “employers in general,” rather than their specific organizations, “might be reluctant to hire . . . or retain . . . workers with disabilities.” *Id.* at 527–28.

<sup>249</sup> *Id.* at 535.

<sup>250</sup> Other changes to the legal framework, which scholars have proposed in the employment context, include imposing liability “when the discrimination is clear to those with backgrounds and experiences similar to those of the plaintiff, even though it is not clear to others,” and imposing liability when the employer fails to implement sufficient safeguards against discrimination. See Bartlett, *supra* note 174, at 1927–28 (discussing an approach where employers are liable “when the discrimination is clear to those with backgrounds and experiences

### B. Regulatory and Policy Changes

An alternative to imposing liability for discriminatory actions by landlords would be minimizing landlord discretion at the outset. That is, if landlords were given less discretion in eviction decisions, they would have fewer opportunities to exercise that discretion in a discriminatory manner. One option would require landlords to try to resolve missed rent payments through working with the tenant, without bringing an eviction case.<sup>251</sup> For example, to bring an eviction based on nonpayment of rent, landlords would be required to demonstrate that they tried to work with the tenant to create a payment plan and gave the tenant an opportunity to repay the missed rent. In the foreclosure context, mandatory mediation programs have had promising results.<sup>252</sup>

Other *ex ante* measures could target implicit biases,<sup>253</sup> for instance through licensing requirements for landlords that include implicit bias train-

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similar to those of the plaintiff”); *id.* at 1958 (critiquing this approach); *id.* at 1928–29 (discussing an approach where employers would be held liable for failing to address “structural features” that lead to discrimination); *id.* at 1958–59 (criticizing this approach). In *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, Bartlett advocates for the “honest faith” approach, which looks at people’s good intentions as a means of removing liability. Bartlett, *supra* note 174, at 1900–04, 1956–72.

<sup>251</sup> Mandatory mediation may also prevent informal evictions, if landlords know that they cannot bring an eviction case unless they negotiate with the tenant first. However, like with *ex post* approaches, a tenant facing an informal eviction may have to challenge the landlord, either informally or in court, by pointing to mandatory mediation programs.

<sup>252</sup> See, e.g., Jon Prior, *Forced Foreclosure Mediation More Successful than Voluntary: Boston Fed*, HOUSINGWIRE (Sept. 29, 2011), <http://www.housingwire.com/articles/14425-forced-foreclosure-mediation-more-successful-voluntary-boston-fed>, archived at <https://perma.cc/74JL-FLJS>; Karen Weise, *New York State Foreclosure Mediation Shows Glimmers of Hope in Helping Homeowners*, PROPUBLICA (Nov. 19, 2010), <http://www.propublica.org/article/new-york-state-foreclosure-mediation-shows-glimmers-of-hope-in-helping-home>, archived at <https://perma.cc/8RZU-XL2Z>. While mandatory mediation ordinances can conflict with state foreclosure statutes, see Easthampton Sav. Bank v. City of Springfield, 21 N.E.3d 922, 930–31 (Mass. 2014), the model could still be enacted and imposed by state statute, see, e.g., ANN PFAU, 2010 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS PURSUANT TO CHAPTER 507 OF THE LAWS OF 2009 1–3 (2010), <http://www.propublica.org/documents/item/2010-report-of-the-chief-administrator-of-the-courts>, archived at <https://perma.cc/BPR3-S3LE> (describing the New York model).

<sup>253</sup> Numerous studies have been written about how to eliminate implicit biases. See, e.g., PAMELA M. CASEY ET AL., HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 21–32 (2012), [http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB\\_report\\_033012.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx), archived at <https://perma.cc/CR52-AKM5>; Greenwald & Krieger, *supra* note 144, at 962–65; Jolls & Sunstein, *supra* note 179, at 980–88 (discussing “debiasing strategies”); Kang et al., *supra* note 174, at 1169–86; Kang & Lane, *supra* note 186, at 492–503; Michael A. Olson & Russell H. Fazio, *Reducing Automatically Activated Racial Prejudice Through Implicit Evaluative Conditioning*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 421, 422–32 (2006); Laurie A. Rudman et al., “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 865–66 (2001) (suggesting diversity education); Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 137–39 (2004).

ing.<sup>254</sup> Steps can also be taken that, while not addressing discrimination directly, would likely mitigate its effects. These include increasing access to legal services<sup>255</sup> and to social services, such as rental assistance,<sup>256</sup> for tenants facing evictions.

Yet another approach would involve transferring eviction power from landlords to a body of elected representatives or a board of citizen volunteers. Landlords could appeal to this independent body charged with monitoring disparate impact and with ensuring that all parties involved receive fair treatment. This strategy is not without precedent and, at least in the case of public housing, has been shown to significantly lower the number of evictions.<sup>257</sup>

Finally, trouble making rental payments can be symptomatic of the lack of affordable housing. According to the 2013 American Housing Survey, the majority of renting households below the poverty line are paying at least half of their income on housing costs, with nearly a quarter spending more than 70% on rent and utilities.<sup>258</sup> The right to basic housing is secured in some countries' constitutions and the Universal Declaration of Human

<sup>254</sup> Some studies suggest that when people are aware of their biases and are motivated to be egalitarian, they may be less likely to act on their biases. See, e.g., Bartlett, *supra* note 174, at 1944–47 (citing studies); Kang et al., *supra* note 174, at 1174. But see Bartlett, *supra* note 174, at 1942–44 (citing other studies that indicate that in some situations, attempting to reduce stereotyping actually increases it). Accordingly, some scholars have suggested awareness programs to address these biases. See Fazio & Olson, *supra* note 178, at 320; Kang et al., *supra* note 174, at 1174–77, 1181–84; Rudman, *supra* note 253, at 138. Although not all municipalities have licensing requirements, some do. See *Get a One Family Rental License*, D.C. DEPT OF CONSUMER & REGULATORY AFFAIRS, <http://dcra.dc.gov/service/get-one-family-rental-license>, archived at <https://perma.cc/6FBQ-RNSG> (last visited Oct. 4, 2015) (Washington, D.C.); *Tenant Landlord*, CITY OF PHILADELPHIA LICENSES & INSPECTIONS, <http://www.phila.gov/li/pages/tenantlandlord.aspx>, archived at <https://perma.cc/K44Z-NV6B> (last visited Oct. 4 2015) (Philadelphia, Pennsylvania); *Inspections, Licenses and Permits*, HOWARD COUNTY, MARYLAND, <http://www.howardcountymd.gov/DisplayPrimary.aspx?id=708> (last visited Oct. 4, 2015), archived at <https://perma.cc/P38H-LR6T> (Howard County, Maryland); *Licensing and Registration Unit*, MONTGOMERY COUNTY, MARYLAND, <http://www.montgomerycountymd.gov/DHCA/housing/licensing/index.html>, archived at <https://perma.cc/7NSV-ZUET> (last visited Oct. 4, 2015) (Montgomery County, Maryland); *Rental Housing Licensing*, CITY OF BOULDER, <https://bouldercolorado.gov/plan-develop/rental-housing-licensing>, archived at <https://perma.cc/5TZT-SKT4> (last visited Oct. 4, 2015) (Boulder, Colorado).

<sup>255</sup> To be sure, this recommendation is easier written than executed. As discussed in Section II.A.3, legal service organizations are currently facing a “crisis,” because they lack the funding and capacity to meet demand. See *supra* notes 151–57 and accompanying text; *Introduction: The Current Crisis in Legal Services*, LEGAL SERVS. CORP., <http://www.lsc.gov/introduction-current-crisis-legal-services>, archived at <https://perma.cc/5VBL-7V4X> (last visited Oct. 4, 2015). The hope is that the more attention given to the importance of legal services, the more attention will be given to their need.

<sup>256</sup> Indeed, after distribution of emergency aid from the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (codified as amended in scattered sections of the U.S. Code), to tenants facing eviction, Milwaukee saw a 15% decrease in evictions. See Desmond, *supra* note 8, at 123.

<sup>257</sup> See Lempert & Ikeda, *supra* note 41, at 855.

<sup>258</sup> Desmond, *supra* note 6, at 1.



Rights.<sup>259</sup> Here, however, tenants who cannot pay rent lose even minimally adequate housing. And, as this Article suggests, landlords are selectively enforcing their ability to evict those who cannot pay. Increasing the availability of affordable housing would therefore help ensure not only that people have basic housing, but also that landlords lack the cause to evict them.

## CONCLUSION

Since the 1968 enactment of the Fair Housing Act, much attention has been focused on discrimination in the acquisition of housing. Largely overlooked, however, has been discrimination in the forced removal, or eviction, from housing. Using data from a survey of more than 1,000 rental households, this Article has examined the effect of race and ethnicity on eviction. Our statistical models yielded two significant findings. First, Hispanic tenants are significantly more likely to be evicted when they live in neighborhoods that have at least two-thirds white residents. Second, Hispanic tenants are more likely to be evicted when renting from non-Hispanic (typically white) landlords. The former finding is replicated in a sample designed to detect “discretionary evictions” by looking only at those renters who are regularly late on rent payments. We note that these findings are limited to Milwaukee, and we welcome future research on other metropolitan housing markets. This Article suggests the existence of discrimination in evictions, particularly among Hispanic renters in white neighborhoods.

The sociologist Douglas Massey describes racial discrimination in housing as a “moving target”: “As federal anti-discrimination policies have become more effective in overcoming certain forms of racial bias in housing, new forms have emerged to perpetuate residential segregation.”<sup>260</sup> This

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<sup>259</sup> See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 25; CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 104, 211, 218–23 (2004) (discussing South Africa); OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, *THE RIGHT TO ADEQUATE HOUSING* 14 (2014), available at [http://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf), archived at <https://perma.cc/T7EU-WMF8>. For a discussion of the argument that living in a decent home should be considered a basic human right, see SUNSTEIN, *supra*, at 13, 83, 183. In addition, some states provide a “right” to shelter. For example, Massachusetts guarantees emergency shelter for “needy families with children and pregnant women with no other children.” See MASS. GEN. LAWS ch. 23B, § 30 (2015). New York City provides temporary emergency shelter to homeless individuals. See *Shelter*, N.Y.C. DEP’T OF HOMELESS SERVS., <http://www1.nyc.gov/site/dhs/shelter/shelter.page>, archived at <https://perma.cc/3KQW-B3PP> (last visited Dec. 6, 2015); see also NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *HOMELESSNESS IN THE UNITED STATES AND THE HUMAN RIGHT TO HOUSING* 35–56 (2004), <http://www.mplp.org/Resources/mplpresource.2006-06-13.0349156065/file0>, archived at <https://perma.cc/B4RK-DTVY> (discussing the requirement of shelter in federal and state law); cf. Lisa T. Alexander, *Occupying the Constitutional Right to Housing* (Univ. of Wis. Legal Studies, Research Paper No. 1288, 2015), <http://ssrn.com/abstract=2497695>, archived at <https://perma.cc/98MC-QDA3> (arguing that “recent American housing rights movements . . . give legal meaning to an American constitutional right to housing”).

<sup>260</sup> Douglas S. Massey, *Racial Discrimination in Housing: A Moving Target*, 52 *SOC. PROBS.* 148, 148–49 (2005).

study suggests that Massey's depiction is correct. While direct discrimination in housing may have decreased, it persists in other—often less perceptible—forms.<sup>261</sup> We invite future studies to examine discrimination in evictions and ways to combat it.

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<sup>261</sup> See *id.* at 149.

## APPENDIX

TABLE A.1. DISTRIBUTION OF TENANTS BY RACE FOR AFRICAN AMERICAN LANDLORDS

|          | <b>Mean</b> | <b>Std. Error</b> |
|----------|-------------|-------------------|
| Black    | .960        | .011              |
| Hispanic | .012        | .006              |
| White    | .021        | .008              |
| Other    | .007        | .003              |

Note. N = 448

TABLE A.2. DISTRIBUTION OF TENANTS BY RACE FOR HISPANIC LANDLORDS

|          | <b>Mean</b> | <b>Std. Error</b> |
|----------|-------------|-------------------|
| Black    | .154        | .046              |
| Hispanic | .628        | .070              |
| White    | .102        | .036              |
| Other    | .117        | .061              |

Note. N = 266

TABLE A.3. DISTRIBUTION OF TENANTS BY RACE FOR WHITE LANDLORDS

|          | <b>Mean</b> | <b>Std. Error</b> |
|----------|-------------|-------------------|
| Black    | .230        | .031              |
| Hispanic | .108        | .018              |
| White    | .602        | .034              |
| Other    | .059        | .018              |

Note. N = 924.

TABLE B. BIRTHPLACE OF FOREIGN-BORN RESPONDENTS

| Country     | Number | Percent of Foreign Born |
|-------------|--------|-------------------------|
| Mexico      | 59     | .52                     |
| Puerto Rico | 22     | .19                     |
| Bosnia      | 3      | .03                     |
| Thailand    | 3      | .03                     |
| Venezuela   | 2      | .02                     |
| Laos        | 2      | .02                     |
| Belarus     | 2      | .02                     |
| Canada      | 2      | .02                     |
| Algeria     | 2      | .02                     |
| Korea       | 2      | .02                     |

Note. In MARS, 122 out of 1,086 of respondents (11.2%) indicated they were born outside the United States. Of these, 114 respondents provided their place of birth.

TABLE C. MEAN MONTHLY INCOME BY RACE/ETHNICITY

|                  | Mean      | Std. Error | Lower Bound<br>95% CI | Upper Bound<br>95% CI |
|------------------|-----------|------------|-----------------------|-----------------------|
| African American | 1,318.071 | 41.7482    | 1,236.026             | 1,400.116             |
| Hispanic         | 1,170.400 | 63.980     | 1,044.154             | 1,296.646             |
| White            | 1,814.171 | 72.143     | 1,672.188             | 1,956.154             |

TABLE D. PERCENT OF RESPONDENTS WITH EDUCATIONAL ATTAINMENT BY RACE/ETHNICITY

|                  | Less than<br>High School | High<br>School | Some<br>College | College |
|------------------|--------------------------|----------------|-----------------|---------|
| African American | .394                     | .343           | .207            | .056    |
| Hispanic         | .234                     | .394           | .317            | .052    |
| White            | .088                     | .273           | .349            | .291    |