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Unfair Evictions: Where Fair Housing and Landlord-Tenant Law Intersect

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By Geoffrey Heeren

The law that governs the eviction of tenants may vary from state to state, but one commonality is the summary nature of the process, a feature that often lends eviction courtrooms the aspect of a Jacobin tribunal. The *New York Times* recently summarized the experience of New York City Housing Court, perhaps prototypical of such courtrooms:

> With its boisterous atmosphere of lawyers and tenants negotiating in crowded hallways or barking into cellphones, the housing court can be a desperately bewildering experience. While about 90 percent of the landlords have lawyers, perhaps only 15 percent of the tenants do. And because the hearings before the judges, who are among the most overworked in the system, are typically brief, litigants often have just a few minutes to summarize their predicaments.[1]

Legal aid attorneys, having become singularly adept at negotiating these courts, parlay a limited arsenal of technical defenses, equitable arguments, and procedural tactics into patchwork victories for clients wholly bereft of other resources. Their enterprise, however, can often seem sisyphusian—a curse to quash service endlessly or iterate the argument of waiver, while the housing problems of the poor become more and more intractable. At the same time, legal aid offices are harried, embattled, and overworked and face a steadily increasing population of clients, declining

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[1] David W. Chen, *Litigants in Housing Court Fear What State Fees Will Bring*, N.Y. TIMES, July 10, 2003, at B1. *See also* Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, HOUS. POL'Y DEBATE 14 4 (forthcoming 2003), *available at* www.knowledgeplex.org or www.fanniemaefoundation.org.

funds, and a Congress periodically controlled by hostile ideologues.[2] Having become the favorite target of libertarian or right-wing crusaders, programs in legal services have a heightened wariness of controversy and increasingly tout the number of clients that they have advised and the number of routine cases litigated instead of setting forth initiatives that draw attention to systemic legal problems faced by the poor.[3]

Within this bleak environment, one tool is understandably often overlooked by eviction lawyers—federal fair housing litigation. The Fair Housing Amendments Act, which prohibits the denial of "a dwelling to any person because of race, color, religion, sex, familial status, or national origin," as well as handicap, can be a natural defense in a variety of eviction scenarios.[4] Moreover, there may be occasions where bringing a fair housing suit in federal court against a landlord intent on evicting a tenant can be the best if not the easiest way to protect the tenant. For those advocates interested in more systemic change, a prominent federal fair housing suit may be a community organizing tool and a means to focus public attention on the problems of the poor.[5]

Imagine, for instance, that a disabled African American woman—suppose her name is Ethel—arrives at an intake interview at a legal services office in a large city. Say she tells Cecilia, the attorney who interviews her, that she has lived for the last twelve years in a large apartment complex, where her rent is subsidized by a "mainstream" voucher—a kind of housing subsidy for disabled persons.[6] The building is in a recently gentrified neighborhood of skyrocketing rents.

Suppose Ethel tells Cecilia that last year the building was sold, and the new owner has decided to renovate so that he can better market units to the 20-something white professionals flooding into the neighborhood. Believing that having subsidized tenants in the building makes it less palatable to yuppies, the owner has adopted a "no Section 8" policy and has issued "thirty-day" eviction notices to twelve voucher-holder tenants, including Ethel, whose leases have expired. The thirtieth day on Ethel's notice will pass in a week.

[2]On the current state of legal services offices see BRENNAN CENTER FOR JUSTICE, STRUGGLING TO MEET THE NEED COMMUNITIES CONFRONT GAPS IN FEDERAL LEGAL AID 14–15 (2003). On the increasing population of the poor see U.S CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2001 1 (2002) (about 1.3 million more people in the United States were poor in 2001 than in 2000). On declining funds see, e.g., Kylie Greene, *Legal Aid Clients Could Be Left Without Counsel*, TELEGRAPH HERALD (Dubuque, Iowa), Feb. 16, 2003, at A17.

[3]As an example of legal services' unpopularity with the right wing, a panel of eighteen "conservative public policy experts," including former Rep. Dick Armey of Texas, Cato Institute Executive Vice President David Boaz, and former Delaware Governor Pete DuPont, voted the Legal Services Corporation number one of the "ten most outrageous government programs." *See Special Report: Ten Most Outrageous Government Programs*, HUMAN EVENTS ONLINE, Mar 10, 2003, *at* www.humaneventsonline.com.

[4]42 U.S.C. § 3601-3619 (2003); 42 U.S.C. § 3604(a)–(f) (2003); *see* Crystal B. Ashley, *An Introduction to Fair Housing Law, in* POVERTY LAW MANUAL FOR THE NEW LAWYER 131 (2002)

[5]*See* Lucie E White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 758 (1988). *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[6]The Mainstream Voucher Program is a subset of the Housing Choice Voucher program, under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f (2003), and is governed by regulations at 24 C.F.R pt 982

Cecilia knows that housing advocates in the city have attempted repeatedly and in vain to pass legislation making it illegal to deny housing to persons solely because of their source of income. Because Cecilia herself lives in the neighborhood, she knows that Ethel and the other voucher holders in the building will have a hard time finding a new apartment in the area, even with the help of their vouchers. She checks the eviction notice, finds a technical defect that she might exploit to get Ethel more time to move, but realizes that this is not a true solution. She asks Ethel about the other voucher holders and learns that all are women, seven are African American, three are Latino, one is Asian, and one is Caucasian—a breakdown roughly reflecting the racial demographics of voucher holders across our hypothetical city.

To Cecilia the "no Section 8" policy, though facially neutral, has a disparate impact on women and minorities, and the landlord may be required to accept the voucher as part of its duty to accommodate disabled residents under the Fair Housing Act. Courts had held so far that a landlord's refusal to accept voucher holders did not give rise to a claim of disparate impact under the Act.[7] However, a recent Ninth Circuit decision seemed to renew hope for this type of challenge.[8]

Cecilia realizes that her office could file a federal fair housing case to try to stop the evictions. Aside from bankruptcy filings and social security appeals, however, she has not practiced in federal court, and she took her federal courts class from a professor who imparted little to her but a sense of impending doom whenever she heard the words "Rooker-Feldman."[9]

She now has only seven days to make a series of quick decisions about how to litigate Ethel's potential fair housing claims. Should she plead a fair housing claim as a counterclaim or affirmative defense in the state eviction and risk the rendering of a decision having res judicata effect by an eviction judge who may spend only minutes hearing Ethel's claim? Should she file an administrative complaint with the U.S. Department of Housing and Urban Development (HUD), an independent state court suit, or a federal case? Should she seek to enjoin the eviction proceeding? She knows enough about civil procedure to understand that the consequence of bringing, or in some cases failing to bring, a claim may be to lose it forever.

Here I attempt to answer some of these questions by examining the procedural issues unique to the context of fair housing claims arising from a prospective, pending, or former state court eviction suit. First, I outline some of the general legal and strategic considerations that an attorney and her client should weigh in deciding where and when to bring a fair housing claim. Second, I examine the preclusive effect of bringing or failing to bring the claim as a counterclaim or affirmative defense in a state court eviction proceeding. And, third, I analyze the effect of bringing a fair housing claim in a federal court proceeding that occurs contemporaneously with the eviction or subsequent to the eviction, with a focus upon the Anti-Injunction Act and the federal abstention doctrines.

General Legal and Strategic Considerations

A broad range of eviction scenarios may implicate fair housing law. The data on evictions are "sparse and uneven" and yield little statistical evidence as to the extent to which tenants raise fair housing defenses or, indeed, any defense at

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[7]See Knapp v. Eagle Creek Apartments, 54 F.3d 1272, 1280 (7th Cir. 1995); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 302 (2d Cir. 1998).

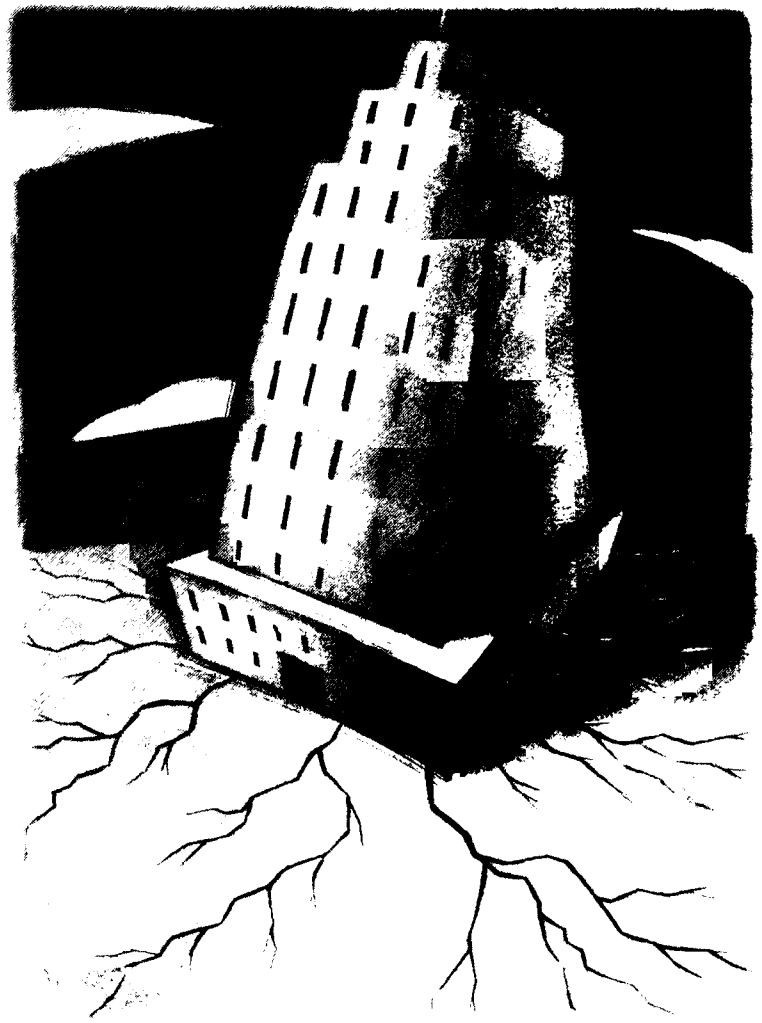
[8]See Giebeler v. M&B Assocs., 343 F.3d 1143, 1153–55 (9th Cir. Sept. 15, 2003) (holding that a landlord's rejection of a disabled tenant whose inability to work meant that he required a relative to assist him with paying rent violated the Fair Housing Act duty to accommodate a disabled tenant).

[9]The *Rooker-Feldman* doctrine taken from two Supreme Court cases provides that a district court may not review a state court judgment. See "*Rooker-Feldman* Abstention" in the main text.

all.[10] However, the proliferation of published decisions in which higher state courts found such defenses to be germane indicates that the issue arises with some frequency.[11] I do not intend to catalogue the grounds for bringing a fair housing claim or to explicate the legal nuances of each such claim.[12] In any fair housing case, however, the predominant consideration in deciding whether and where to bring the claim must be the strength of that claim. If the fair housing claim is a weak (but still colorable) one due to the applicable law, credibility of witnesses, or relevant facts, it can be an affirmative defense in the eviction, but not worth "making a federal case out of it."

The principal forums available to a fair housing claimant include HUD's or other similar state or local administrative agencies' hearing process, the state eviction proceeding, an independent state suit, and federal court. Because the HUD administrative process involves an investigation of the complainant's allegations, it is an opportunity to learn more about the case. However, HUD may be an impractical forum in cases where tenants face imminent eviction.

The Fair Housing Act requires HUD to complete its investigation of a complaint within 100 days "unless it is impracticable to do so."[13] A study, however, shows that HUD regularly takes much longer. In the 2000 fiscal year the average number of days from the time a complaint was received to finding cause (allowing the complaint to proceed to adjudication by an administrative law judge or federal litigation, depending upon the election of the parties) was 497 days.[14] After conclusion of the investigation, however, the average time for resolution of cases appears to be shorter in cases adjudicated by a HUD administrative law judge than those in federal district court.[15]



[10] *See* Hartman & Robinson, *supra* note 1

[11] *See infra* note 19.

[12] For an exposition of federal civil rights laws relevant to the fair housing context, see generally ROBERT G SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION (1990); JAMES A. KUSHNER, FAIR HOUSING DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (2d ed. 1995); Florence Wagman Roisman, *Housing, Poverty, and Racial Justice: How Civil Rights Laws Can Redress the Housing Problems of Poor People*, 36 CLEARINGHOUSE REV 21 (May–June 2002).

[13] 42 U.S.C. § 3610(a)(1)(B)(iv) (2003).

[14] John Relman, *Federal Fair Housing Enforcement at a Crossroads: The Clinton Legacy and the Challenges Ahead, in* CITIZENS' COMMISSION ON CIVIL RIGHTS, RIGHTS AT RISK: EQUALITY IN AN AGE OF TERRORISM 99, 102 (2002).

[15] *See* Michael H. Schill & Samantha Friedman, Ctr. for Real Estate & Urban Policy, N.Y. Univ. Sch. of Law, Enforcing the Fair Housing Act 60 (Aug. 15, 2000) (unpublished manuscript on file with Schill) (finding that for the years 1997 and 1998 it took 313 days longer, on average, to resolve a suit in federal district court than in the U.S Department of Housing and Urban Development).

HUD does not have authority to enter injunctive relief either. Rather, the Fair Housing Act provides that, in cases where "the Secretary concludes at any time following the filing of a complaint that prompt judicial action is necessary to carry out the purposes of this subchapter," the HUD secretary may direct the U.S. attorney general to file suit for injunctive relief in federal court.[16]

Both the Fair Housing Act and Section 1983 claims may be filed in state court, and there may at times be good reasons to do so.[17] State judges or juries may be more sympathetic, or state civil procedure may be more favorable than federal law. Indeed, the multitude of federal procedural hurdles discussed here is a compelling justification for considering state court. However, civil rights attorneys have traditionally found very good reasons to choose a federal forum, and here I focus primarily on this scenario.

Not all states allow a defendant in an eviction action to plead a discrimination claim as an affirmative defense or counterclaim. Because most states have created a summary process for evictions, many of them exclude all counterclaims, or at least those counterclaims or affirmative defenses that are not considered "germane" to the issue of possession.[18] Most states hold that a defense of discrimination is germane to the underlying purpose of the eviction action.[19] But some states hold that discrimination may be raised only as an affirmative defense, and not as a counterclaim for damages or for injunctive relief.[20] Other states, moreover, hold that a discrimination defense may be germane to some kinds of evictions, but not to others, such as a case alleging nonpayment of rent.[21]

Some states have adopted compulsory counterclaim rules similar to the one used in federal courts. The federal rule requires, in essence, that a counterclaim be brought if it arises out of the "same transaction or occurrence" as the opposing party's claim and if the holder of the counterclaim serves a pleading on the opposing party and has not already filed the claim in another suit.[22] Where such a rule is applicable, and a counterclaim is not filed, the effect is the same as if it had been brought and judgment entered against the defendant; the claim may not be brought in a future case.[23] Thus, in a state that considers fair housing claims germane to evictions and has a compulsory counterclaim statute that it applies to evictions, a tenant is required to file the claim in the state eviction court if she has not already filed elsewhere before the deadline for answering.[24]

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[16] 42 U.S.C. § 3610(e)(1) (2003).

[17] *See id.* § 3613(a)(1)(A) (2003) (a Fair Housing Act claim may be filed in "an appropriate United States district court or State court . . ."); Howlett v. Rose, 496 U.S. 356, 375 (1990) (holding that Section 1983 claims filed in state court must be heard there if that tribunal considers similar state law claims).

[18] *See, e.g.*, Clore v. Fredman, 319 N.E.2d 18, 21 (Ill. 1974) ("Only matters germane to the distinctive purpose of forcible entry and detainer proceedings may be introduced.").

[19] *See* Josephinium Assocs. v. Skye Kahli, 45 P.3d 627, 632 (Wash. Ct. App. 2002) (cataloguing cases).

[20] *See, e.g.*, Am. Nat'l Bank v. Powell, 691 N.E.2d 1162, 1170 (Ill. App. Ct. 1997) (holding that counterclaims seeking money damages are not germane to forcible entry claims); Lincoln Square Apartments, Section I, Inc. v. Davis, 58 Misc. 2d 292, 295 N.Y.S.2d 358, 361 (N.Y. Civ. Ct. 1968) (holding that equitable relief to renew an expired lease based on a First Amendment claim was unavailable in a summary proceeding), *aff'd*, 316 N.Y.S.2d 130 (N.Y. App. Term. 1969).

[21] *See, e.g.*, Fayyumi v. City of Hickory Hills, 18 F. Supp. 2d 909, 919–20 (N.D. Ill. 1998) ("[T]he fact that the defendants may have discriminated against the plaintiffs in the past was simply not germane to the fact that the plaintiffs failed to pay their rent in a timely manner, failed to comply with the Landlord's Five Day Notice, and that the defendants were, therefore, entitled to possession.").

[22] Fed. R. Civ. P. 13(a) (2003). For a discussion of the state courts that have adopted a version of this rule, see Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 977–78 (1998).

[23] *See* Baker v. Gold Seal Liquors Inc., 417 U.S. 467, 469 n.1 (1974).

[24] For a discussion of which states apply their compulsory counterclaim statute to evictions, see Kimberly E. O'Leary, *The Inadvisability of Applying Preclusive Doctrines to Summary Evictions*, 30 U. Tol. L. Rev. 49, 91–92 (1998).

The issue of when the best time is for a tenant with a defense based on fair housing law to file a fair housing claim in federal court is a particularly thorny one, which I deal with in greater detail below. The short answer, however, is that the perfect moment is before the eviction action is filed in state court. During this fleeting, "enchanted" moment when a case has ripened based on a landlord's stated intent to sue, but the landlord has not yet done so, courts have found few procedural niceties about which to quibble. That there are grounds for a federal court to abstain in deference to state adjudication is unlikely; there is no claim or issue preclusion; and the Anti-Injunction Act does not bar enjoining the landlord from filing suit.[25]

If the tenant waits a day too long, however, the complexity of her federal briefs will grow exponentially. In cases where a federal proceeding occurs contemporaneously with a state court eviction, the tenant may be forced to address the Anti-Injunction Act, sundry forms of federal abstention, and, if the tenant is unable to enjoin the state proceeding, possible preclusion as well. In a subsequent proceeding for damages, things may be somewhat simpler (especially if the tenant won the eviction case). Then a tenant need cope only with potential preclusion and the *Rooker-Feldman* doctrine.[26]

In summary, for a tenant facing an eviction against which there is a tenable claim of discrimination, the most attractive forum is the state eviction proceeding or an independent state or federal suit. If the tenant chooses to file a federal suit, the tenant will face procedural hurdles if she files anytime after the filing of the eviction suit. In deciding which course to pursue, a tenant and her attorney should consider the relative strength of the discrimination claim, whether the claim is "germane" to the issue of possession under state law and whether the state has a compulsory counterclaim rule. The attorney should also weigh general considerations (e.g., the availability of discovery and trial by jury, and jury demographics) involving the relative attractiveness of the state court compared to federal court. The attorney needs to weigh two additional factors: the likelihood that a state court judgment may have preclusive effect even if the tenant's claim is not brought; and whether the state court proceeding may be enjoined. These last two issues are the subjects of "Preclusion" and "Federal-State Comity," respectively.

Preclusion

The law of preclusion—the effect of a decision rendered in one court upon a subsequent proceeding—varies widely from state to state. In the context of a federal court confronted with a state court eviction judgment, the court should apply the preclusion law of the rendering state.[27] In other circumstances, the issue of which preclusion law should apply is far less clear. Courts struggled, for instance, with the question of which preclusion law to apply to a federal judgment entered in a diversity-of-jurisdiction case.[28] Here I make no attempt to survey these differences or examine general principles comprehensively.[29] Rather, I present only the most basic overview necessary for an advocate to understand the issues at stake under the narrow set of circumstances when an

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[25]Dombrowski v. Pfister, 380 U.S. 479, 483 n.2 (1965).

[26]See "*Rooker-Feldman* Abstention" in the main text.

[27]*See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); Marrese v. Am. Acad. of Orthopedic Surgeons, 470 U.S. 373 (1985); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

[28]*See generally* Ronan Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976), Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Erichson, *supra* note 22.

[29]For an explication of differences in state law on issues such as mutuality, finality, and nuances in the interpretation of "same claim" and "on the merits," see Erichson, *supra* note 22, at 965–83. For a comprehensive examination of general principles, see RESTATEMENT(SECOND) OF THE LAW § 1-42 (1982).

eviction judgment has been entered against a tenant who has filed or subsequently files a federal civil rights suit against her landlord.

A tenant in such circumstances will likely be precluded from raising her fair housing claim where she had a full and fair opportunity to raise the claim in the eviction action even if she failed actually to do so. Advocates whose states provide eviction procedures that are procedurally and substantively equivalent to those afforded by federal law in a fair housing suit thus need not absorb the nuances of the following discussion; they must, in short, plead their fair housing claims within the eviction. Those with state procedures that would prevent them from receiving a full and fair hearing on their claim, or from being awarded full relief within the eviction, may find the following discussion of interest.

The two principal forms of preclusion are claim preclusion, or res judicata in the traditional judicial lexicon, and issue preclusion, or collateral estoppel. The conventional statement of claim preclusion is that a final, valid judgment rendered on the merits is an absolute bar in a subsequent action between the same parties or those in privity with them upon the same claim. Most modern courts have adopted a broad definition of "same claim" that encompasses all actions arising from the same underlying transaction.[30] At the time of judgment, there is said to be "merger" of the claim with the judgment, and further action against the defendant must be on the judgment and not the claim.

The rule of issue preclusion is that a final, valid judgment on the merits is an estoppel between the same parties or those in privity with them as to matters that were *actually* litigated and determined, even though the claim in the subsequent action is different. In the case of both types of preclusion, the underlying policy justification is to assure finality where the parties had a fair and full opportunity to litigate their case. Commentators argue that there are strong policy reasons not to apply preclusive doctrines where the rendering court was an eviction court, with summary procedures that are likely to hinder a tenant from litigating all of her claims.[31]

Nonetheless, eviction judgments are not uncommonly found to preclude plaintiffs from bringing subsequent litigation related to the question of possession.[32] Where the fair housing plaintiff actually pled the fair housing claim in the eviction suit as a counterclaim and lost, or where she pled or argued it as an affirmative defense and lost, claim or issue preclusion probably applies, respectively.[33] Where the claim was not brought, but the landlord argues that the finding that it was entitled to possession should preclude the tenant from later claiming that the landlord's termination of her possession was discriminatory, the outcome is much less clear.

Generally speaking, claim preclusion will likely prevent the tenant from raising a fair housing claim that she could have raised as a defense in the eviction, even where she failed actually to raise it.[34] Where, however, the tenant is not attacking the judgment but is seeking relief independent of possession, such as damages for discrimination in the terms of her tenancy, the subsequent claim may not be precluded.[35]

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[30] Erichson, *supra* note 22, at 973–74.

[31] *See* O'Leary, *supra* note 24.

[32] *See, e.g.*, Ellis v. Minneapolis Comm'n on Civil Rights, 319 N.W.2d 702, 703 (Minn. 1982) (holding that plaintiff was precluded from litigating the issue of discrimination, which he had raised as a defense in a prior eviction suit).

[33] Where the defendant counterplaintiff prevailed on her claim, she may not be barred from bringing a subsequent suit, if she seeks relief that was unavailable in the eviction court. *See* RESTATEMENT, *supra* note 29, § 21.

[34] *See id.* § 22(b).

[35] *Id. But see* Fayyumi v. City of Hickory Hills, 18 F. Supp. 2d 909, 920 n.8 (N.D. Ill. 1998) (holding that fair housing suit for damages was precluded to the extent that it relied upon the discriminatory motivation of the defendants for bringing a prior eviction action).

In response to a motion to dismiss on the basis of claim preclusion, the tenant's strongest argument may be that she would have been unable to raise the claim or would have been impaired in doing so. Where the fair housing claim would not have been considered germane in the eviction action, or the relief sought would not have been obtainable, the fair housing claim should not be precluded.[36] Where the state eviction court procedures were severely truncated, the tenant may also make a strong argument against preclusion. Where states limit discovery in eviction cases, mandate quick dispositional timelines, dilute the traditional rules of evidence, alter the burdens of proof, or otherwise limit the due process to which tenants are entitled, the argument against preclusion seems compelling.

More problematic are those states that appear, on paper at least, to have, for adjudicating eviction suits, a system that allows tenants to plead defenses and counterclaims broadly without limitation on remedy, conduct discovery related to them, and obtain a trial during which they will not be subject to unreasonable evidentiary burdens. In such states the attorney should reconcile herself to litigating the fair housing claim in the eviction because, whether or not she pled the claim, any judgment entered against her client will likely have preclusive effect on subsequently filed fair housing claims.[37]

Federal-State Comity

Federal judges often blanch at the prospect of hearing an eviction. As one New York judge said in a case where a tenant attempted to remove to federal court on the basis of diversity jurisdiction:

> The New York state courts are filled with thousands of summary eviction proceedings. In most of them the tenant seeks to delay the process as long as possible. If we accept the removal of these cases to federal court, we will not only overburden the federal system but will also completely emasculate the state structure for dealing with such disputes.[38]

Perhaps based on the logic of this doomsday scenario, jurists have drawn from a variety of doctrines based loosely in theories of federal-state comity when declining to decide a case involving an eviction. The most pertinent of these doctrines are catalogued and analyzed here. Before beginning this discussion, I should briefly note that one such doctrine is not discussed below—the doctrine of exclusive jurisdiction for cases *in rem* or *quasi in rem*. I have not included substantial discussion of this doctrine because its viability as a basis for a federal court to withhold jurisdiction in a fair housing suit concerning an eviction appears doubtful. Courts historically have held that the first court to attach jurisdiction over property must have exclusive jurisdiction and that any other suit concerning the property must be dismissed or held in abeyance pending the outcome of the first.[39] Evictions have been traditionally characterized as *in rem* or *quasi in rem*.[40] In cases where federal courts have been asked to stay preexisting evictions, however, they appear to have ignored this doctrine of

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[36] *See, e.g.*, Fayyumi, 18 F. Supp. 2d at 919–20 (holding that an eviction judgment was not entirely res judicata as to a claim under 42 U.S.C. § 3617 because under Illinois law the Section 3617 claim would not have been germane to a nonpayment-of-rent case to the extent that it related to the retaliatory denial of services by the landlord); *see* RESTATEMENT, *supra* note 29, § 26(c)(1).

[37] A limited exception exists where the tenant can argue for some reason that the state court judgment is invalid. *See, e.g.*, Long v. Shorebank Dev. Corp., 182 F.3d 548, 561 (7th Cir. 1999) (holding that judgment procured through fraud does not have preclusive effect under Illinois law).

[38] Glen 6 Assocs. v. Dedaj, 770 F. Supp. 225, 229 (S.D.N.Y 1991).

[39] *See* Penn Gen. Casualty Co. v. Pennsylvania, 294 U.S. 189, 195 (1935).

[40] *See, e.g.*, Greene v. Lindsey, 456 U.S. 444, 450–51 (1982); Pelletier v. Northbrook Garden Apartments, 210 S.E 2d 722 (Ga. 1974).

exclusive jurisdiction or forsaken it in favor of the highly manipulable balancing tests of the various abstention doctrines.[41]

The Anti-Injunction Act. The Anti-Injunction Act deprives federal courts of jurisdiction to "grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[42]

The U.S. Supreme Court has so far clearly delineated only one statute that "expressly authorizes" enjoining state court proceedings: 42 U.S.C. § 1983.[43] Although appellate courts found various other statutes to meet the requirements of the test set forth by the Court for determining whether an injunction was "expressly authorized," the First Circuit held that the Fair Housing Act was not one of these.[44] Unless the tenant can show "state action" sufficient to bring her civil rights claim under the guise of a Section 1983 claim, she is unlikely to meet the "expressly authorized" test.[45]

The "protect or effectuate judgments" exception is similarly unhelpful, having been construed to apply only to issues that have been fully and finally adjudicated.[46] Because it comes into play for the most part under circumstances where a state court is flouting an already existing federal judgment, it is unlikely to be relevant in the average fair housing eviction scenario.

The "in aid of jurisdiction" exception has been widely applied to *in rem* suits, "where, to give effect to its jurisdiction, the court must control the property."[47] (In contrast, courts have been reluctant to enjoin a state proceeding based on the "in aid of jurisdiction" exception where both the federal and state cases are *in personam* and involve the same subject matter.)[48] Under traditional principles, the exception was applied with rigid chronological logic to enjoin only later-filed suits. In a sparse line of cases, however, courts have relied upon this exception to enjoin evictions, regardless of when they were filed.[49] These cases did not focus upon the *in rem* nature of the proceedings but relied instead on the rationale that if the court did nothing, the tenants would be evicted, and that it appeared that the tenants would be unable to raise their federal claims effectively in state court.[50]

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[41] *See, e.g.*, Porter v. Lee, 328 U.S. 246, 251 (1946) (holding that under the Emergency Price Control Act a federal court could enjoin, without addressing the doctrine of exclusive jurisdiction, a state court eviction filed by a landlord who did not want families with children); SEC v. Wenecke, 622 F.2d 1363 (9th Cir. 1980) (although assuming *arguendo* that evictions are *quasi in rem*, nonetheless holding that a state court eviction could be stayed); Sladek v Deplomb, 981 F Supp. 1364 (D. Colo. 1997) (applying the multifactor *Colorado River* abstention analysis in a case where tenants filed a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against landlords who had filed an eviction action against the tenants in state court).

[42] 28 U.S.C. § 2283(2003).

[43] *See* Mitchum v. Foster, 407 U.S. 225 (1972).

[44] On statutes found to meet the expressly authorized test, see, e.g., *Zajac v. Fed. Land Bank*, 887 F.2d 844, 855–56 (8th Cir. 1989) (Agricultural Credit Act falls within the "expressly authorized" exception to the Anti-Injunction Act), *rev'd en banc on other grounds*, 909 F.2d 1181 (1990); on the Fair Housing Act failing to meet the expressly authorized test, see *Casa Marie Inc. v. Superior Court of P.R.*, 988 F.2d 252, 262 (1st Cir. 1993).

[45] For a discussion of state action and action taken "under color of state law," see generally SHELDON NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 2 (4th ed. 2002).

[46] *See* Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978).

[47] *See* Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466 (1939).

[48] *See* Atl. Coast Line R.R Co. v Bhd. of Locomotive Eng'rs, 398 U.S 281, 295–96 (1970)

[49] *See* Lattimore v. Northwest Coop. Homes Ass'n, No 90-0049, 1990 U.S. Dist. LEXIS 3285 (D.D.C Mar. 26, 1990), McNeil v. N.Y City Hous. Auth., 719 F. Supp. 233, 256 (S.D.N Y 1989); Caulder v. Durham Hous. Auth., 433 F.2d 998, 1002 (4th Cir 1970), *cert. denied*, 401 U.S. 1003 (1971) *But see* Camprubi-Soms v. Aranda, No 00 Civ 9626, 2001 U.S Dist. LEXIS 11291 (S D.N.Y. June 13, 2001) (Magistrate's Recommendation).

[50] Lattimore v. Northwest Coop. Homes Ass'n, 1990 U.S Dist LEXIS 3285 at *14; McNeil, 719 F Supp at 255; Caulder, 433 F.2d at 1002.

The "in aid of jurisdiction" logic also lends itself to the generous language of the All-Writs Act, which provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[51] Sometimes viewed as an affirmative grant of power to the courts, and at others as an exception to the Anti-Injunction Act, the All-Writs Act has been cited as additional authority for staying pending state cases in order to protect a proposed settlement agreement in federal class action litigation.[52] The All-Writs Act has also been used with increasing frequency to justify removal of a state action that would interfere with a federal judgment or consent decree.[53] Where a court is deterred from relying on the "in aid of jurisdiction" exception because of the *in personam* character of the federal action, or because the state eviction was first filed, the All-Writs Act could provide a rationale for staying the state eviction.

Whether under the "in aid of jurisdiction" exception or the All-Writs Act, the argument for enjoining the eviction remains the same. Just as with claim preclusion, an advocate must point to the state law barriers to effective litigation of the federal claim in state court.

"Younger" Abstention. As currently formulated, the abstention doctrine of *Younger v. Harris* should be inapplicable to evictions, unless the government is a party to the eviction suit.[54] Nonetheless, the doctrine has so expanded since its inception that its appearance in a defendant's brief in a fair housing case is foreseeable.

In its original form, *Younger* required federal courts to withhold equitable relief to avoid undue interference with a pending, ongoing state criminal proceeding except under "special circumstances," such as prosecutorial bad faith or a blatant and flagrant unconstitutional construction. It has since been applied to civil enforcement proceedings and civil actions involving certain orders uniquely in furtherance of the state courts' ability to perform their judicial functions.[55] Such cases have typically been those in which the state is a party to the state court litigation, and among the factors analyzed by courts making a *Younger* holding is a requirement that an important state interest be implicated by the state case. The *Younger* test in essence requires federal courts to abstain from enjoining an ongoing state judicial proceeding that implicates important state interests where there is an adequate opportunity in the state proceedings to raise constitutional challenges.[56]

Courts almost uniformly hold that there is no important state interest in a wholly private dispute between a landlord and a tenant.[57] Even in a case where one of the parties was a public housing authority, a state actor, the court held that the dispute was like one between purely private litigants.[58] Where the state or local gov-

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[51] 28 U.S.C. § 1651(a) (2003).

[52] *See In Re* Joint E. & S. Dist. Asbestos Litig., 134 F.R.D. 32, 37 (E.D.N.Y. 1990).

[53] *See* Joan Steinman, *The Newest Frontier in Judicial Activism: Removal Under the All-Writs Act*, 80 B.U.L. Rev. 773 (2000).

[54] Younger v. Harris, 401 U.S. 37 (1971).

[55] *See* New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 368 (1989) (describing cases).

[56] *See* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982).

[57] *See* Camprubi-Soms v. Aranda, 00 C 9626, 2001 U.S. Dist. LEXIS 11291, *22, n.11 (S.D.N.Y. June 13, 2001); Brooklyn Inst. of Arts & Sciences v. City of New York, 64 F. Supp. 2d 184, 194 (E.D.N.Y. 1999), Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215, 1220 (W.D.N C 1977); Litteral v. Bach, 869 F.2d 297, 300 (6th Cir 1989). *But see* Newell v. Rolling Hills Apartments, 134 F. Supp. 2d 1026, 1036 (D. Iowa, 2002) (relying on precedent of questionable value to find an important state interest in evictions).

[58] *McNeil*, 719 F. Supp. at 255, n.27. *Cf.* Owens v. Hous. Auth. of Stamford, 394 F. Supp. 1267, 1270–71 (D. Conn. 1975) (holding that *Younger* abstention was inappropriate because the issues in the case primarily involved federal and not state law); Skinner v. Boston Hous. Auth., 690 F. Supp. 109, 110–11 (D. Mass. 1988) (same)

ernment is truly a party in the pending state proceeding, courts, however, applied *Younger* abstention.[59]

"Rooker-Feldman" Abstention. Although referred to as an abstention doctrine, *Rooker-Feldman* is, in essence, a kind of federal common-law preclusion. It provides that lower federal courts may not exercise jurisdiction over claims that would require them to review a final judgment of a state court.[60] Courts look to "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment" or, in other words, whether the injury is "inextricably intertwined" with the state judgment.[61] In practice, the *Rooker-Feldman* analysis seems to condense, in federal suits concerning evictions, to the same set of inquiries as those relevant to preclusion. Where federal claims would not have been available in an eviction, courts find *Rooker-Feldman* inapplicable; where they could have been brought, or were brought, the courts abstain.[62]

"Colorado River" Abstention. Advocates might think of *Colorado River* abstention, which provides that a federal court may, under "exceptional circumstances," refuse to decide a case in deference to a parallel state proceeding, as a kind of preemptive *Rooker-Feldman* abstention.[63] While *Rooker-Feldman* abstention allows a federal court to abstain where there have been *former* state court proceedings in which judgment has been entered, *Colorado River* allows a court to abstain in deference to a *pending* state proceeding. Underlying both types of abstention is a conflation of abstention doctrines with those of claim and issue preclusion. In the case of *Colorado River* abstention, it is a concern for the possibility of preclusion, combined with an interest in judicial economy motivating the doctrine.[64]

Where a tenant can argue that the state court action will not result in claim preclusion, she should be able to avoid *Colorado River* abstention.[65] Otherwise, she will need to construct arguments based on the multifactor test set forth by the Court in *Colorado River*.[66]

"Pullman" and "Burford" Abstention. The *Pullman* abstention doctrine allows a federal court to stay federal proceedings until state resolution of unsettled matters of state law that bear directly on the case.[67] The doctrine, as such, is likely to come up in eviction cases only where tenants challenge state eviction law itself as being unconstitutional. In *Troupe v. Fairview Apartments*, for instance, the

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[59]Columbia Basin Apartment Ass'n v. City of Pasco, 268 F.3d 791 (9th Cir. 2001) (holding that *Younger* abstention applied where the plaintiff landlords, landlord association, and tenants sought to enjoin an action filed by the city to enforce its land-use ordinance).

[60]*See* Rooker v. Fid. Trust Co., 263 U.S. 413 (1923); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

[61]Garry v. Geils, 82 F.3d 1362, 1365 (7th Cir. 1996).

[62] *Compare* Long v. Shorebank Dev. Corp., 182 F.3d 548, 558–60 (7th Cir. 1999) (holding that because an eviction defendant would not have been able under Illinois law to raise claims for money damages under the Fair Debt Collection Practices Act and Section 1983 in a forcible case, *Rooker-Feldman* did not bar her subsequently raised federal claims), *with* Gerontis v. Schwartz, No. 98 Civ. 289, 1999 U.S. Dist. LEXIS 39928 (S.D.N.Y. Mar. 31, 1999) (without citing the *Rooker-Feldman* doctrine, holding that abstention was appropriate where a tenant had brought a Fair Debt Collection Practices Act claim in an eviction, filed a postjudgment motion to reconsider, and removed to federal bankruptcy court).

[63]Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

[64]*See* Calvert Fire Ins. Co. v. Am. Mut. Reinsurance Co., 600 F.2d 1228, 1229 n.1 (7th Cir. 1979) ("A suit is 'parallel' when substantially the same parties are contemporaneously litigating substantially the same issues in another forum, thus making it likely that judgment in one suit will have a res judicata effect on the other suit.").

[65]See "Preclusion" in the main text. *Cf. Sladek*, 981 F. Supp. at 1364 (applying *Colorado River* abstention in a RICO case filed by tenants where the court found that the state eviction court was able to decide the RICO claim).

[66]The factors include the inconvenience of the federal forum, the desirability of avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums. *Colorado River*, 424 U.S. at 818.

[67]Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941).

court applied the *Pullman* abstention doctrine to a case where subsidized tenants sought to challenge the constitutionality of the state eviction statute, which did not require good cause for eviction. The court found the tenants' interpretation of the state law to be questionable and ruled that "the state courts should be given the opportunity to interpret state statutory procedures so as to comply with it."[68] In such cases, tenants can avoid a *Pullman* abstention ruling by successfully arguing that the state law is unambiguous and clearly improper on its face.[69] Where a federal court abstains on *Pullman* grounds, the tenant may reserve her claim for federal adjudication after conclusion of the state proceeding if she does not submit the federal claim to the state court and explicitly notes her intention to reserve it.[70] She still runs the risk, however, of issue preclusion.

Similar to the *Pullman* doctrine is the still more amorphous *Burford* abstention doctrine, which allows abstention in cases presenting difficult state law questions that bear on policy issues of "public import whose importance transcends the result in the case then at bar."[71] *Burford* has given rise to far-reaching progeny, which might make it an attractive precedential basis for abstention from a fair housing case involving an eviction.[72]

Although traditionally *Burford* abstention was limited to cases that would require interference with a state administrative proceeding or order, some courts have extended it to cases where a state regulatory scheme merely exists, whether or not any proceeding is pending.[73] Moreover, state courts have been found to be an "administrative body" for purposes of *Burford* abstention, at least in cases where a judge arguably has an administrative function, such as authorizing an abortion in the absence of parental consent.[74]

In jurisdictions that have an administrative eviction scheme, *Burford* could be a dangerous rationale for abstention.[75] Even where the eviction proceeding is judicial, the mutable logic of *Burford* could still emerge, although *Burford* abstention in such a case would seem poorly supported by existing precedent.[76] Advocates can point, in addition to other arguments against *Burford* abstention, to the substantial precedent from *Younger* suits holding that landlord-tenant cases do not involve an important state interest or, in other words, that the eviction involves

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[68] Troupe v. Fairview Apartments, 464 F. Supp. 234, 235 (E.D. Tenn. 1979); *see also Columbia Basin Apartment Ass'n*, 268 F.3d at 806 (staying federal case filed by tenants, landlords, and a landlord association until the parties had the opportunity to litigate the validity of a land-use ordinance under Washington law in Washington state court).

[69] *See* Lindsey v. Normet, 405 U.S. 56, 62 (1972) (declining to abstain where eviction statute challenged as unconstitutional was clear on its face, had been in effect for over 100 years, and had been substantially interpreted by courts).

[70] England v. La. Sch. Bd. of Med. Exam'rs, 375 U.S. 411 (1964).

[71] *Colorado River*, 424 U.S. at 814 (construing Burford v. Sun Oil Co , 319 U.S. 315 (1943)).

[72] *See* 1A James Wm. Moore, Moore's Federal Practice ¶ 0.203[2] (2d ed. 1996) (construing *Alabama Public Service Commission Railway Co.*, 341 U.S. 341 (1951), and *Kelly Services. Inc. v. Johnson*, 542 F.2d 31 (7th Cir. 1976)).

[73] *See* Sierra Club v. City of San Antonio, 112 F.3d 789 (5th Cir. 1997) (holding *Burford* abstention warranted in a case filed under the Endangered Species Act concerning an aquifer in spite of the absence of any pending administrative order or proceeding, and the fact that the "comprehensive regulatory scheme" was not fully in place), *rehearing en banc denied*, 118 F.3d 1580 (5th Cir. 1997), *and cert. denied*, 522 U.S. 1089 (1998).

[74] *See* Planned Parenthood League v. Bellotti, 868 F.2d 459, 464 (1st Cir. 1989) (noting "a federal court's responsibility to avoid usurping a state's authority to supervise its own administrative body, in this case the state judiciary as it implements regulations of minors' abortions").

[75] *See, e.g.*, Haw. Rev. Stat. § 201G-53 (2003) (granting the Housing and Community Development Corporation of Hawaii the authority to conduct an administrative eviction hearing); Haw. Rev. Stat. § 201G-55 (2003) (granting the aforementioned development corporation the authority to issue and enforce a writ of possession).

[76] For a case that followed the logic of *Burford*, without citing it, see *Glen 6 Assocs.*, 770 F. Supp. at 228 ("the law of landlord/tenant relations is strongly grounded in public policy . . .").

no "questions of state law of substantial public import."[77]

Conclusion

Federal litigation can be complex and time-consuming. An attorney might represent a dozen defendants in state eviction court or undertake a substantial community education project during the time that it takes to brief the sole issue of whether the federal court has jurisdiction to hear a tenant's claim. Still, part of the mission of legal services since inception has been to bring to bear on behalf of the poor "a full range of service and advocacy tools—a range as full as that offered by private attorneys for the affluent."[78] If this ideal has survived, it is a strong rationale for federal litigation, which now, more than ever, is the modus operandi of the very well-heeled. (Because the Administrative Office of the U.S. Courts does not maintain statistics on the number of cases filed each year *in forma pauperis*, comparing the number of cases brought by the affluent and those filed by the indigent is difficult. Clearly, however, the legal needs of the poor go largely unmet, in part due to the cost of obtaining representation, and litigants are most likely to represent themselves in state specialist courts rather than federal court.)[79]

The abuse of summary eviction procedures by landlords retaliating or discriminating against their tenants is a significant problem faced by the poor, one that is efficiently obfuscated by the volume of caseloads of eviction courts. The occasional filing of a meritorious federal suit challenging a discriminatory eviction can highlight a systemic problem like this one.[80] Such litigation has the potential to focus the attention of the media, the public, and policymakers and to mobilize clients to speak for themselves.[81]

This is not to say that the ultimate goal of fair housing litigation should be other than to prevail on behalf of a client with a concrete need, or that such success is impossible. In spite of the procedural nuances set out here, attorneys have prevailed in federal cases where landlords attempted to use state eviction proceedings in the service of malice, prejudice, or callous ignorance. In cases like these, filing a federal fair housing suit may simply be the best way to protect a person's rights.

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[77] See "*Younger* Abstention" in the main text and *supra* note 57.

[78] Alan W. Houseman, *Political Lessons: Legal Services for the Poor—a Commentary*, 83 GEO. L.J. 1669, 1684–85 (1995).

[79] *See* Lois Bloom & Helen Hershkoff, *Federal Courts: Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 481–84 (2002); Michael J. Sniffen, *Poor Left Behind as Courts Go High-Tech*, ASSOCIATED PRESS, Oct. 11, 2003, www.washingtonpost.com.

[80] This is what Lucie E. White refers to as "law as a public conversation": "Even when it does not succeed, well-crafted litigation can reveal the law systematically working to contain grievances. Litigants, by reformulating legal norms in light of their intuitions and experience, can project visions that expand the range of social options." White, *supra* note 5, at 758.

[81] *Id. But see* Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970) (arguing that traditional litigation-focused poverty lawyering does little but condition the poor to rely on lawyers rather than themselves).