

# Criminalization of Landlord/Tenant Law: Arkansas’ “Failure to Vacate” Statute

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## INTRODUCTION

Arkansas is not a notable state. It is often confused with Kansas or Alabama. It is difficult for most Americans to find on a map. Perhaps Arkansas has few distinctions. However, it is the only place in the country where a tenant can be thrown in jail for missing a rental payment. The legal landscape of Arkansas is unique in many ways, primarily in its old-fashioned, even archaic, view of property law.

First, this article examines the history behind the Failure to Vacate statute. Next, this article reviews the constitutional challenges that the statute has faced, and recent litigation. Then, this article reviews the data gathered regarding enforcement of Failure to Vacate across the state. Next, the article examines and analyzes these findings. Finally, the article makes final recommendations on how the failure to vacate should be changed and amended.

## I. FAILURE TO VACATE STATUTE

Arkansas is the only state that criminalizes a tenant’s failure to pay rent.<sup>1</sup> Under 18-16-101, a tenant may be criminally charged if they do not pay rent. This statute specifically criminalizes “failure to pay rent,” and cannot be used for other types of lease violations. In other states, landlords follow a civil eviction process against unpaying tenants. However, under the “Failure to Vacate” law, the non-paying tenant is instead convicted of a crime.

This statute is not a civil eviction and does not actually return possession of the dwelling back to the landlord. Instead, the notices, charges, convictions and fines are a means of encouraging tenants to move out of the dwelling. As the Arkansas Attorney General has made clear, criminal judges cannot issue eviction orders or force tenants to leave the property.<sup>2</sup>

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<sup>1</sup> See Lynn Foster, *The Hands of the State: The Failure to Vacate Statute and Residential Tenants’ Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1, 2 (2013) for a discussion about the novelty of Arkansas housing law.

<sup>2</sup> Off. Att’y Gen., Opinion Letter on A.C.A. §18-16-101 (June 14, 2004), *as reprinted* in Ark. Op. Att’y Gen. No. 2004-148 (Ark. A.G.), 2004 WL 1475631 (“This Code section, a copy of which is enclosed for your convenience, authorizes the *criminal prosecution* of tenants who fail to pay rent when due and who hold over after receiving a written ten-day notice from their landlord to vacate the premise. . . . [T]he tenant will be convicted of a misdemeanor and fined. A judge does not, however,

Under this statute, any tenant that fails to pay rent when due “shall at once forfeit” all right to occupy the dwelling.<sup>3</sup> This means that, if the tenant is even one day late with the rent, he has “forfeited” and lost any right to remain in the dwelling. It does not contain any grace period to allow tenants to pay their rent late. The statute says that the forfeiture occurs “at once,” meaning that the “forfeiture” occurs automatically as soon as the rental payment is not made. The landlord or the lease does not need to declare a “forfeiture.” Finally, this forfeiture can occur if the rent is even one dollar short.<sup>4</sup> Once the tenant fails to pay rent, the landlord can then initiate the criminal process.

*A. Notice to Vacate — § 18-16-101 (b)*

After the tenant misses rent, the landlord or agent must give the tenant a written 10-day “notice to vacate.”<sup>5</sup> The statute does not specify any required format or content for this notice to vacate. For example, it does not require the landlord to include any information regarding the effects of the tenant’s failure to vacate, inform the tenant of their legal rights, etc. In addition, the notice does not have to notify the tenant that they may face criminal charges for failing to leave.

Similarly, Arkansas does not have a particular form for the “notice to vacate.” The notice can be hand-written, from the landlord, or his agent or attorney. This notice does not come from the State, but from the individual landlord. The statute does not specify how the landlord must give the notice to vacate to the tenant. The notice to vacate could be posted, mailed, handed in person, or delivered by other means.

After the landlord gives the tenant a 10-day notice, if the tenant “willfully refuses” to vacate and surrender possession to the landlord, the tenant is then guilty of a misdemeanor.<sup>6</sup> The tenant can be criminally charged with “failure to vacate” and brought before a judge. “Failure to vacate” cases are heard at the district criminal court level.

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order a tenant’s eviction pursuant to § 18-16-101. Eviction is a *civil* remedy that may be pursued under A.C.A. §§ 18-60-301–312, the unlawful detainer statutes that comprise the civil counterparts to A.C.A. § 18-16-101. . . . Although subsection 18-16-101(a) provides that the tenant shall ‘forfeit all right to longer occupy the dwelling’ by failing to pay rent when due, there is no procedure under this statute for removing the tenant from the property. Instead, the tenant is subject to criminal prosecution if he fails to vacate after receiving the requisite notice. It thus cannot be contended that the judge must force the tenants to leave pursuant to A.C.A. § 18-16-101.’ (citations omitted)).

<sup>3</sup> ARK. CODE ANN. § 18-16-101 (West 2017).

<sup>4</sup> See Colin Boyd, *Property Law—Beyond Repair: The Persistent Unconstitutionality of the Failure to Vacate Statute*, 44 U. ARK. LITTLE ROCK L. REV. 379, 388 (2022) (“There is no minimum amount in controversy; therefore, a landlord could allege that he or she is the victim of a tenant’s failure to vacate the property even if the tenant falls only one dollar short or one day behind on rent.”).

<sup>5</sup> ARK. CODE ANN. § 18-16-101 (West 2017).

<sup>6</sup> *Id.* § 18-16-101(b)(1).

After the tenant is convicted, the tenant can be fined between one and twenty-five dollars per offense. Each day that the tenant stays in the dwelling after the ten-day notice expires is considered a separate offense; thus, a tenant may be fined per day.<sup>7</sup> The statute is an “unclassified misdemeanor,” which does not provide for jail time.<sup>8</sup>

As an example of how the statute works, let’s say Tom Tenant has a one-year written lease with Larry Landlord, with rent of \$600 due on the first of the month. On April 1, Tom does not pay the rent. Pursuant to §18-16-101, by failing to pay the rent on the date due, he has “at once” forfeited all right to occupy the apartment. On April 2, Larry Landlord can issue a “10-day notice” telling Tom to vacate the apartment. Larry can hand-write this notice himself and post it to Tom’s front door. By April 12, the 10-day notice has expired. If Tom has not moved out, Larry can then call the police and ask the police to arrest Tom for failing to vacate the premises. The police can go to Tom’s door and issue a citation or arrest him. Tom will receive a court date of April 20. On that date, Tom can go to court to defend himself. If the judge finds that Tom violated the statute, Tom will be found guilty of a misdemeanor and ordered to pay a fine for each day he remained in the apartment after April 12.

Notably, the “failure to vacate” statute does NOT actually allow judges to evict tenants from the property.<sup>9</sup> Instead, landlords that want to receive an order of possession must follow the civil eviction process.<sup>10</sup> District court judges do not have jurisdiction to enter orders regarding possession of real property. In a 2004 opinion, the Arkansas Attorney General (“AG”) confirmed that a judge cannot order the eviction of a tenant under the “failure to vacate” statute.<sup>11</sup> Instead, the tenant can simply be charged and fined. The AG clarified that, even though the statute states that a tenant “forfeits” his tenancy, there is no procedure under the statute to actually remove the tenant. Judges can find the tenant guilty of a crime, but they cannot force the tenant to move out.<sup>12</sup>

In Arkansas, the criminal “failure to vacate” process co-exists alongside traditional civil eviction laws. If a tenant misses rent, a landlord may choose to file an “unlawful detainer” action in civil circuit court to

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<sup>7</sup> *Id.* § 18-16-101(b)(2)(B)

<sup>8</sup> ARK. CODE ANN. § 5-1-108 (West 1975).

<sup>9</sup> Off. Att’y Gen., *supra* note 2, at 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (“A judge does not, however, order a tenant’s eviction pursuant to § 18-16-101. Eviction is a civil remedy that may be pursued under A.C.A. §§ 18-60-301–312, the unlawful detainer statutes that comprise the civil counterparts to A.C.A. § 18-16-101.”); ARK. CODE ANN. § 18-60-309(c)(1)–(2) (West 2007) (providing the civil remedy to recover the property).

<sup>12</sup> Off. Att’y Gen., *supra* note 2, at 1 (“Although subsection 18-16-101(a) provides that the tenant shall ‘forfeit all right to longer occupy the dwelling’ by failing to pay rent when due, there is no procedure under this statute for removing the tenant from the property. Instead, the tenant is subject to criminal prosecution if he fails to vacate after receiving the requisite notice.”); ARK. CODE ANN. § 18-16-101(a) (West 2017).

receive possession and damages,<sup>13</sup> or a civil eviction action in district court pursuant to the 2007 Residential Landlord/Tenant Act.<sup>14</sup> Finally, the landlord may initiate criminal “failure to vacate” charges pursuant to §18-16-101. These statutes create three different legal processes that can be taken against a non-paying tenant — two involving civil court evictions, and one involving charges against the tenant in criminal court.

Since the “failure to vacate” statute is not an actual eviction, it does not comply with federal rules for subsidized housing. Tenants in federally-subsidized housing cannot be subjected to “failure to vacate” charges.<sup>15</sup> The United States Department of Housing and Urban Development (“HUD”) has determined that “failure to vacate” is not a “judicial action for eviction” and cannot be used against tenants in HUD-subsidized housing.<sup>16</sup> Subsidized-housing landlords must pursue civil eviction instead. The “failure to vacate” statute remains on the books in Arkansas, a unique hybrid of criminal law and landlord/tenant law. Unlike every other state in the United States, a landlord in Arkansas may choose to pursue criminal charges against a tenant that fails to pay rent.<sup>17</sup>

## II. HISTORY OF THE FAILURE TO VACATE STATUTE

### A. Legislative History

The failure to vacate statute was originally passed in 1901.<sup>18</sup> It was controversial at its outset; Senators had a spirited debate on the floor regarding the bill’s morality and purpose. One senator described it as “simple class legislation in favor the landlord, no more, no less,” while another opined that it “amounted to nothing more nor less than to give the landlord the right to throw his tenant in jail if he failed to pay the rent.”<sup>19</sup> Another raised concerns that a tenant who could not pay the fine would be “sent to jail and compelled to work it out.”<sup>20</sup> Another opponent said that

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<sup>13</sup> ARK. CODE ANN. § 18-60-304 (West 2005).

<sup>14</sup> ARK. CODE ANN. § 18-17-701 (West 2009).

<sup>15</sup> Memorandum from Robert E. Moore to Sterling Cockrill, Hous. Urb. Dev., Area Director, Roger N. Zachritz, Deputy Area Director, and Andy L. Watts, Dir., Hous. Mgmt., (May 24, 1978) [hereinafter Moore Memorandum] (“It is our opinion that it is inappropriate for management of a subsidized multi-family housing project to utilize 50-523 as the tool for eviction . . . . It is our opinion that 50-523 is not a judicial action for eviction. It is merely a criminal statute that is utilized to force a tenant to vacate the property under threat of fine.”); *see also* Foster, *supra* note 1, at 11 (discussing HUD actions on the “failure to vacate” law).

<sup>16</sup> *See* Moore Memorandum, *supra* note 15, at 1.

<sup>17</sup> Only one other state, Florida, has ever passed a similar statute. *See* 1933 Fla. Laws 422 (repealed 1973 Fla. Laws 770). However, Florida’s statute, enacted in 1933 and repealed in 1973, criminalized tenants that “held over” on the premises after their tenancy had ended. In contrast with the failure to vacate statute, it did not criminalize tenants who simply failed to pay rent during their tenancy.

<sup>18</sup> Boyd, *supra* note 4, at 382.

<sup>19</sup> *Id.* at 383.

<sup>20</sup> *Id.*

the bill “allowed a man to be put in jail for debt.” In contrast, supporters stated that the bill was “intended to compel men to come up to their contracts,” “only provides for a fine,” and “sought to give relief to landlords who were unable to eject tenants who would not pay their rent.”<sup>21</sup> The bill ultimately passed the Senate by one vote, and the failure to vacate statute became law.<sup>22</sup>

The law remained virtually unchanged from 1901 until 2001, when the Arkansas General Assembly amended the statute.<sup>23</sup> The 2001 bill created a higher penalty and imposed additional requirements on tenants.<sup>24</sup>

It raised the daily penalty from a allowing a range between \$1–\$25 to a flat rate of \$25 a day. And the bill added a new section—(c)(1)—to the statute, with higher penalties. This section required tenants to deposit the rent allegedly owed to the court, and it imposed a higher criminal penalty on tenants if the rental payments were not made.<sup>25</sup> Under this section, if a tenant wanted to plead “not guilty,” the tenant must first deposit to the court any rent allegedly due. The tenant must continue to pay monthly rent to the court throughout the criminal proceedings.<sup>26</sup>

If a tenant is found guilty, or pleads “not guilty” or “nolo contendere,” and has not paid the required monthly rent to the court, the tenant is guilty of a Class B misdemeanor.<sup>27</sup> Class B misdemeanors subject the defendant to 90 days in jail and a fine of up to \$1000.<sup>28</sup>

After several successful court challenges (discussed below), the Arkansas General Assembly again amended the statute in 2017.<sup>29</sup> This changed the failure to vacate statute back to its original form, deleted section (c)(1), eliminated the requirement to pay into the registry, and removed the elevated Class B misdemeanor.<sup>30</sup> The statute remained an “unclassified misdemeanor,” with a daily fine of between \$1 and \$25.<sup>31</sup>

Legislators have introduced bills to repeal the failure to vacate statute. In 2015, one such bill repealing the failure to vacate statute was defeated in committee.<sup>32</sup> Most recently, in March 2021, State Representative Clowney introduced a bill (H.B. 1798) that would repeal the failure to vacate law.<sup>33</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 384.

<sup>23</sup> ARK. CODE ANN. § 18-16-101 (West 2017).

<sup>24</sup> 2001 Ark. Acts 1733 (H.B. 2291).

<sup>25</sup> ARK. CODE ANN. § 18-16-101(c)(1) (West 2001).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 18-16-101(c)(3).

<sup>28</sup> ARK. CODE ANN. § 5-4-401(b)(2) (West 1983); ARK. CODE ANN. § 5-4-201(b)(2) (West 2009).

<sup>29</sup> 2017 Ark. Acts 159 (S.B. 25).

<sup>30</sup> *Id.* § 2(c)(1).

<sup>31</sup> *Id.* § 2(c)(3).

<sup>32</sup> Maya Miller, Ellis Simani & Benjamin Hardy, *Bill Aims to Repeal Arkansas's Unique 'Criminal Eviction' Law*, ARK. TIMES (Mar. 19, 2021, 12:47 PM), <https://arktimes.com/arkansas-blog/2021/03/19/bill-aims-to-repeal-arkansas-unique-criminal-eviction-law>.

<sup>33</sup> *Id.*; H.R. 1798, 93d Gen. Assemb., Reg. Sess. (Ark. 2021).

However, this bill faced stiff opposition from landlords. In a House Committee hearing, the president of the Arkansas Landlords Association spoke against the bill.<sup>34</sup> The 2021 bill was ultimately narrowly defeated in a House Committee.<sup>35</sup> The failure to vacate law remains effective in Arkansas and is a part of the current Code.

## *B. Court Challenges*

### *1. State Court*

Due to its unique features, the failure to vacate statute has faced several challenges to its Constitutionality. In the case of *Poole v. State*, the Arkansas Supreme Court upheld the constitutionality of the failure to vacate statute.<sup>36</sup> In this case, Patricia Poole, a Little Rock tenant was charged with failure to vacate.<sup>37</sup> She pled not guilty, was tried and found guilty.<sup>38</sup> Poole then appealed the conviction to the Arkansas Supreme Court, arguing that the failure to vacate statute itself should be declared unconstitutional.<sup>39</sup>

Poole argued that the statute constituted an invalid and unreasonable exercise of the State's police power, and that it derived her of her due process rights under the Fourteenth Amendment.<sup>40</sup> However, the court disagreed.

First, the Arkansas Supreme Court found that the statute was not unconstitutional.<sup>41</sup> The court stated that statutes passed are presumed to be constitutional, and will not be struck down unless obviously unconstitutional.<sup>42</sup> The Court pointed to the statute's long existence (since 1901), as evidence of its validity.<sup>43</sup> Secondly, the Court found the statute to be a valid exercise of the State's police power to protect the public safety and welfare. By willfully failing to pay rent, tenant has essentially "become a trespasser on property."<sup>44</sup> Further, the court stated that "public . . . welfare is always threatened when a person wrongfully trespasses on

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<sup>34</sup> Max Brantley, *House Committee Defeats Repeal of Criminal Eviction Statute*, ARK. TIMES (Apr. 5, 2021, 11:01 AM), <https://arktimes.com/arkansas-blog/2021/04/05/house-committee-defeats-repeal-of-criminal-eviction-statute> ("William Jones, president of the Arkansas Landlords Association, opposed the bill. He said it is an 'effective tool.' It saves him money because he doesn't have to use an attorney.").

<sup>35</sup> *Id.*

<sup>36</sup> *Poole v. State*, 428 S.W.2d 628, 631 (Ark. 1968).

<sup>37</sup> *Id.* at 629.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 630.

<sup>42</sup> *Poole*, 428 S.W.2d at 630.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

another person's property."<sup>45</sup> Because preventing wrongful trespass is within the police power of the State, the court found this statute to be a valid exercise of State power.<sup>46</sup> Further, the court found that a 10-day notice to vacate is sufficient procedural due process.<sup>47</sup> The Arkansas Supreme Court affirmed the tenant's conviction for failure to vacate. *Poole* strongly affirmed the constitutionality of the failure to vacate law. In later court challenges, judges would cite to *Poole* in their decisions upholding the statute.<sup>48</sup>

In *Duhon v. State*, the Arkansas Supreme Court again weighed in on the failure to vacate law.<sup>49</sup> In this case, a Little Rock tenant challenged the constitutionality of the statute.<sup>50</sup> The tenant relied upon recent decisions in *Greene v. Lindsey* and *Gorman v. Ratliff* that recognized additional tenant rights;<sup>51</sup> *Greene* held that posting a notice to vacate on the front door was not sufficient notice for due process, and *Gorman* outlawed Arkansas landlords using self-help to remove tenants.<sup>52</sup> However, the Arkansas Supreme Court felt that these cases were not enough to outweigh the presumption of constitutionality, and it reaffirmed *Poole*'s holding.<sup>53</sup>

In a vigorous dissent, Justice Purtle stated that "[t]he majority has, with all the speed of a crawfish, backed into the 19th century."<sup>54</sup> He pointed out that Arkansas is the only state that imposes criminal sanctions for failure to pay rent, and stated that he believed *Gorman* opinion meant the state was "joining the rest of the country" in "rendering an enlightened decision on the relationship between landlord and tenant."<sup>55</sup> He further pointed out that the tenant was pulled out of bed by police and taken to jail for failing to pay rent.<sup>56</sup> The dissent also stated that holdover tenants are no longer considered trespassers because renters have a property interest.<sup>57</sup> Echoing some of the earliest opposition to this bill, Justice Purtle stated that the "state has simply lent her hands to landlords," and it "criminalizes a breach of contract for failure to pay a debt."<sup>58</sup> He believed the majority's

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 630–31; However, the crime of trespass can never be brought against a tenant, because the tenant has not illegally entered the property. "Failure to vacate" is the only proper charge against a current tenant. See *Williams v. City of Pine Bluff*, 683 S.W.2d 923 (Ark. 1985).

<sup>47</sup> *Poole*, 428 S.W.2d at 631.

<sup>48</sup> *E.g.*, *Duhon v. State*, 774 S.W.2d 830, 835 (Ark. 1989).

<sup>49</sup> *Id.* at 832.

<sup>50</sup> *Id.* at 832–34.

<sup>51</sup> *Id.* at 835 (citing first *Greene v. Lindsey*, 456 U.S. 442 (1982); then citing *Gorman v. Ratliff*, 712 S.W.2d 888 (Ark. 1986)).

<sup>52</sup> See *Greene*, 456 U.S. at 444; *Gorman*, 712 S.W.2d at 891.

<sup>53</sup> *Duhon*, 774 S.W.2d at 835.

<sup>54</sup> *Id.* at 836 (Purtle, J., dissenting).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 837.

<sup>58</sup> *Id.*

opinion conflicted with the theme of the *Gorman* opinion.<sup>59</sup>

While *Duhon* still upheld the law, the opinion reveals dissent and doubts regarding the enforcement and overall fairness of the statute. After the 2001 amended statute was enacted, the statute faced more court challenges. And, for the first time, judges refused to affirm the statute.

In the 2015 case *State v. Smith*,<sup>60</sup> a Little Rock Circuit Court judge found the failure to vacate statute unconstitutional.<sup>61</sup> The judge noted that the decisions in *Poole* and *Duhon* upholding the statute were issued prior to the 2001 amendment, so they considered the amended statute's constitutionality anew.<sup>62</sup>

The judge was most concerned about the statute's new requirement that tenants must pay rent to a court registry in order to plead not guilty.<sup>63</sup> This would effectively deprive the tenant of property (rent money) before any hearing is held on the merits. The judge found that this registry provision did violate the tenant's procedural due process rights under the Fourteenth Amendment.<sup>64</sup> In addition, the court found that the registry to plead not guilty also has a chilling effect on the defendant's right to pursue a jury trial under the Constitution.<sup>65</sup>

The judge further found that the statute imposed "cruel and unusual punishment" under the Eighth Amendment, and it would not survive equal protection analysis as a "narrowly tailored" means to accomplish compelling government objectives.<sup>66</sup> Finally, the court found that the law creates an impermissible debtor's prison. The Arkansas Constitution prohibits "imprison[ment] for debt . . . unless in cases of fraud,"<sup>67</sup> and the Arkansas Supreme Court has previously struck down other laws that criminalized debt.<sup>68</sup> While the court stated that some of the due process concerns could be resolved by excising the registry requirement, it nonetheless held that the statute itself was facially unconstitutional.

As a result of this ruling, Pulaski County halted all prosecutions for "failure to vacate."<sup>69</sup> This opinion also reflected an impetus for circuit courts to prohibit failure to vacate cases. In 2014, at least two other circuit court judges found that the failure to vacate statute was unconstitutional

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<sup>59</sup> *Duhon*, 774 S.W.2d at 836–37 (citing *Gorman v. Ratliff*, 712 S.W.2d 888 (Ark. 1986)).

<sup>60</sup> *State v. Smith*, No. 2014-2707, 2015 WL 991180 (Ark. Cir. Pulaski County Jan. 20, 2015).

<sup>61</sup> *Id.* at \*7.

<sup>62</sup> *Id.* at \*2.

<sup>63</sup> *Id.* at \*2–3.

<sup>64</sup> *Id.* at \*4.

<sup>65</sup> *Id.*

<sup>66</sup> *Smith*, 2015 WL 991180 at \*5.

<sup>67</sup> *Id.* at \*5 (quoting ARK. CONST. art. II, § 16).

<sup>68</sup> *Id.* at \*5 (citing *State v. Riggs*, 807 S.W.2d 32 (Ark.1991) (striking down law that criminalized contractors' failure to pay for materials)).

<sup>69</sup> Max Brantley, *Eviction Lawsuit Victory a Landmark*, *Advocates Say*, *ARK. TIMES* (Jan. 22, 2015, 12:31 AM), <https://arktimes.com/arkansas-blog/2015/01/22/eviction-lawsuit-victory-a-landmark-advocates-say>.



and unenforceable.<sup>70</sup> As a result of these decisions, fewer and fewer jurisdictions brought charges for failure to vacate. In 2017, the Legislature responded to *State v. Smith* and the similar cases by amending the statute to remove the registry requirement.<sup>71</sup>

## 2. Federal Court

Some court challenges to the failure to vacate statute have also been brought in federal court. In *Munson v. Gilliam*, tenants charged with criminal failure to pay rent sought an injunction against the prosecutions.<sup>72</sup> A federal district court granted the preliminary injunction. However, on appeal, the Eighth Circuit Court of Appeals found that there was not enough evidence of bad faith to justify the injunction, that state courts could vindicate the tenant's constitutional rights, and that a state may determine that a non-paying tenant is effectively stealing from the landlord to allow criminal punishment.<sup>73</sup>

Tenants have recently brought claims in federal court against Arkansas agencies, with unclear results. In 2016, the American Civil Liberties Union (ACLU) of Arkansas filed suit on behalf of Purdom.<sup>74</sup> Purdom asked his landlord for permission to have an emotional-support dog. The landlord initially denied this request. After Purdom complained to Arkansas Fair Housing, the landlord then told him he could keep the dog if he paid a \$500 pet deposit fee. When Purdom refused to pay the fee, the landlord gave him a 10-day notice to vacate.<sup>75</sup> Purdom filed a federal lawsuit against the landlord and city attorney of Mountain Home. In his complaint, Purdom requested an injunction against enforcement of the law and a declaration that the statute was unconstitutional.<sup>76</sup> The federal district court issued a preliminary injunction preventing the city attorney from enforcing the statute.<sup>77</sup>

While the federal action was pending, Purdom moved out of the premises, and the Arkansas legislature enacted the bill amending the failure to vacate statute. The court found that Purdom's claims against Morgan

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<sup>70</sup> See Order at \*3, *State v. Jones*, Nos. 2014-389 & 2014-390 (Ark. Cir. Poinsett County Apr. 15, 2015); Order at \*4, *State v. Bledsoe*, No. 2014-77-2 (Ark. Cir. Woodruff County Apr. 24, 2015).

<sup>71</sup> ARK. CODE ANN. § 18-16-101 (West 2017).

<sup>72</sup> *Munson v. Gilliam*, 543 F.2d 48, 50–51 (8th Cir. 1976).

<sup>73</sup> *Id.* at 53–55.

<sup>74</sup> Purdom v. Morgan: *Criminalizing the Failure to Vacate*, ACLU OF ARK., <https://www.acluarkansas.org/en/cases/purdom-v-morgan> (last visited Sept. 20, 2024); John Lynch, *ACLU of Arkansas Sues Over Law Allowing Courts to Jail Tenants with Unpaid Rent*, ARK. DEMOCRAT GAZETTE (June 15, 2020, 6:09 PM), <https://www.arkansasonline.com/news/2020/jun/15/aclu-arkansas-sues-over-law-allowing-courts-jail-t/>.

<sup>75</sup> Complaint at 4–5, Purdom v. Morgan, No. 16-3072 (W.D. Ark. June 13, 2016).

<sup>76</sup> *Id.* at 13–14.

<sup>77</sup> See Purdom v. Morgan, No. 3:16-CV-3072, 2017 WL 6327582, at \*1 (W.D. Ark. Dec. 11, 2017).

were rendered moot, and it dismissed the action with prejudice, never reaching the merits.<sup>78</sup>

In June 2020, another tenant filed a federal action challenging the failure to vacate statute.<sup>79</sup> In his complaint, the tenant alleged that the failure to vacate statute was unconstitutional because it impermissibly chilled his right to trial, constituted cruel and unusual punishment, and violated his right to due process under the Arkansas and U.S. Constitutions.<sup>80</sup> The tenant brought a civil rights action pursuant to 42 U.S.C. § 1983, naming the McGehee City Attorney, Desha County Sheriff, and Chief Clerk of McGehee as defendants.<sup>81</sup>

In the case, Allen said that he fell behind on the rent after losing his job as a factory worker.<sup>82</sup> He received a notice to vacate from the Sheriff and was told to move out of the house in two days.<sup>83</sup> However, Allen said he had no other place to go. The lawsuit asked the federal judge to issue a temporary restraining order preventing enforcement until a later trial on the constitutional merits of the statute.<sup>84</sup> However, in contrast with *Purdom*, the judge denied the temporary restraining order, stating that Allen was unlikely to succeed on the merits at trial.<sup>85</sup> The judge cited to the two Arkansas Supreme Court cases upholding the statute.<sup>86</sup> Allen also moved out while the proceedings were pending, and the case was dismissed.<sup>87</sup>

Most recently, a federal class action was filed in 2021, *Easley v. Howell*.<sup>88</sup> The Easleys moved into a house in Malvern, Arkansas in 2019, where they paid \$400 a month on a month-to-month lease.<sup>89</sup> In August 2020, the water tank stopped working, and the Easleys did not have running water.<sup>90</sup> They asked the landlord to fix the tank, but that was never done.<sup>91</sup> In November 2020, the Arkansas Department of Health condemned the home's water distribution system, and ordered that water service be terminated until the landlord fixed it.<sup>92</sup> The landlord waived November 2020 rent, but then demanded rent anyway.<sup>93</sup> In December 2020, the

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<sup>78</sup> *Id.* at \*3.

<sup>79</sup> Complaint at 1, Allen v. Ferguson, No. 2:20-cv-132 (E.D. Ark. June 15, 2020).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 3–4.

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Id.* at 11.

<sup>85</sup> Order at 2, Allen v. Ferguson, No. 2:20-cv-00132, (E.D. Ark. June 17, 2020), ECF No. 6; *see also* Maya Miller and Ellis Simani, *When Falling Behind on Rent Leads to Jail Time*, PROPUBLICA (Oct. 26, 2020, 11:30 AM), <https://www.propublica.org/article/when-falling-behind-on-rent-leads-to-jail-time>.

<sup>86</sup> Order at 3, Allen v. Ferguson, No. 2:20-cv-00132, (E.D. Ark. June 17, 2020), ECF no. 6.

<sup>87</sup> *See* Miller & Simani, *supra* note 85.

<sup>88</sup> Complaint at 1, Easley v. Howell, No. 6:21-cv-06125 (W.D. Ark. Sept. 2, 2021).

<sup>89</sup> *Id.* at 9.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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

<sup>93</sup> *Id.*

Easleys stopped paying rent due to the lack of running water.<sup>94</sup> In April 2021, the Hot Spring County Sheriff served them with a 10-day notice to vacate the premises or face charges for failure to vacate.<sup>95</sup> However, the Easleys were not able to find other housing during that time.<sup>96</sup> They both had disabilities and used wheelchairs, relying upon Social Security Disability payments.<sup>97</sup> The house still had no running water.<sup>98</sup> In May 2021, the prosecutor opened a criminal case against the Easleys.<sup>99</sup>

On September 2, 2021, the Easleys filed a federal class action against the Hot Springs County Sheriff and the Hot Springs Prosecuting Attorney. Similar to Allen, the Easleys brought § 1983 claims alleging that the statute violated Fourteenth Amendment's Procedural Due Process Right and Right to Equal Protection, and Eighth Amendment right to be free from cruel and unusual punishment or excessive fines.<sup>100</sup> In response, on September 14, 2021, the prosecutor filed a nolle prosequi of the criminal case against them.<sup>101</sup>

Both the prosecutor and sheriff filed motions to dismiss the federal class action. These motions argued that the Easleys could not state a claim that the statute was unconstitutional under the Eighth or Fourteenth Amendments.<sup>102</sup> Also, the motions argued that the plaintiffs lacked standing, and their claims were moot, so that the Court lacked subject-matter jurisdiction.<sup>103</sup> Specifically, the Sheriff argued that their claims were moot because the tenants moved to Michigan in May 2022, and were no longer under threat of prosecution.<sup>104</sup>

The District Court judge did not rule on the statute's constitutionality. The court found that the tenants did have standing because they faced a threat of injury. However, the court found that their claims were now moot as a result of moving to Michigan.<sup>105</sup> Although a threat of prosecution existed while they were in the premises of the state, the court found that their relocation to another state "struck a large blow" to the possibility of

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<sup>94</sup> Complaint at 10, *Easley v. Howell*, No. 6:21-cv-06125; see also *Cynthia and Terry Easley v. Hot Spring County*, EQUAL JUSTICE UNDER LAW, <https://equaljusticeunderlaw.org/easley-v-hot-spring-county>.

<sup>95</sup> Complaint at 10, *Easley v. Howell*, No. 6:21-cv-06125.

<sup>96</sup> *Id.* at 10–11.

<sup>97</sup> *Id.* at 10.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 13–26.

<sup>101</sup> *Cynthia and Terry Easley v. Hot Spring County*, EQUAL JUSTICE UNDER LAW, <https://equaljusticeunderlaw.org/easley-v-hot-spring-county>.

<sup>102</sup> See Risha Bijlani, *Case: Easley v. Howell*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE (Jan. 26, 2022), <https://clearinghouse.net/case/18231/>.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Order of Dismissal at 15, *Easley v. Howell*, 6:21-cv-6125 (W.D. Ark 2021).

prosecution.<sup>106</sup> For that reason, the court found that there was no longer a live case or controversy, making their claims moot, and dismissed the Easleys' case without prejudice.<sup>107</sup> The court did not reach or consider any of the Plaintiffs claims regarding the constitutionality of the statute.

In all of these cases (*Purdom*, *Allen*, and *Easley*), the tenants were low-income renters, facing financial difficulties. *Purdom* and the Easleys were disabled as well. And in at least two cases, the failure to vacate case originated out of a separate dispute with the landlord. In the *Easley* case, the landlord was able to bring criminal charges against the Easleys after failing to provide running water for months, while in *Purdom*, the case began with a dispute with the landlord over the tenant's emotional support dog. In addition, the transient nature of the housing situation made it difficult for the tenants to show continuing imminent harm. In each case, the State dismissed the charges after the federal case was filed. And in both *Easley* and *Allen*, the cases were eventually dismissed on mootness grounds because the tenants moved out of the property. Because each case was dismissed on procedural grounds, federal district courts never reached a conclusion on the underlying merits of the constitutional challenges.

However, these results also show how the statute could escape review in civil rights claims. It is easiest to simply nolle prosequi or dismiss the criminal case prior to the federal case being heard. Tenants, especially low-income tenants facing dispossession, are in a transient state and seeking alternative housing. If tenants end up moving out of state while the action is pending, the claim can then be dismissed for mootness.

### C. Continuing Controversy and Questions

During all this controversy, and all the legislation and litigation, people have acted without knowing how common failure to vacate cases actually are. The *Easley* case received significant media coverage, and those articles included information about the statistics regarding failure to vacate cases. For example, one article stated that "the number of failure-to-vacate arrests per year has not exceeded 30 since 2014, when it peaked at 70, according to the data from the past decade."<sup>108</sup> Since 2011, "324 tenants have been arrested under the failure to vacate statute, according to the Arkansas Crime Information Center."<sup>109</sup> The *Easley* complaint also relied on data from the Arkansas Crime Information Center,<sup>110</sup> which showed that Black women accounted for more than 25% of those arrests. Based on

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<sup>106</sup> Bijlani, *supra* note 102.

<sup>107</sup> Order of Dismissal at 16, *Easley v. Howell*, 6:21-cv-6125.

<sup>108</sup> Tess Vrbin, *Arkansas' Unique Eviction Law, Source of 324 Arrests since '11, Challenged in Federal Court*, NW. ARK. DEMOCRAT GAZETTE (Sept. 12, 2021), <https://www.nwaonline.com/news/2021/sep/12/arkansas-unique-eviction-law-source-of-324/>.

<sup>109</sup> *Id.*

<sup>110</sup> Complaint at 7, *Easley v. Howell*, No. 6:21-cv-06125-SOH (W.D. Ark 2021).

these statistics, failure to vacate charges would seem to be a somewhat rare and uncommon occurrence.

However, a ProPublica investigation found far more cases, finding that over 1,050 criminal evictions were heard in Arkansas courts from 2018 to October 2020.<sup>111</sup> ProPublica further found that over 200 cases had been filed between mid-March and late-October 2020, despite the then-ongoing pandemic,<sup>112</sup> and at least seven women were detained or sentenced to jail based on these charges. ProPublica also included examples of several tenants that moved out without ever realizing that criminal charges had been filed against them, only to be later arrested and held on bond. Their investigation found these cases continued to be tried in 2021, with three dozen new cases filed from January to March 2021, despite a moratorium on evictions by the Center for Disease Control and Prevention (“CDC”).<sup>113</sup>

One thing that is consistent is the lack of consistency. Almost all sources agree that the statute is enforced inconsistently across the state, with some counties heavily prosecuting tenants, and other counties refusing to enforce the statute at all. Consistently, women, especially Black women, seem to form a disproportionate number of cases.

In order to form an informed opinion, people would need to know the overall impact of this statute on the people of Arkansas. This information would also be useful to judge the ultimate constitutionality of the failure to vacate statute. Is the statute being enforced fairly? Or are certain populations disparately impacted? Are excessive fines being imposed pursuant to the Eighth Amendment? Is sufficient notice being given to tenants to guarantee due process rights? Is this statute, in fact, creating a debtors’ prison?

However, the public could form very different impressions on the overall weight on the population based on these varying statistics and articles. Is the failure to vacate statute rare, or common? Is enforcement still prevalent, or is this law an obsolete anachronism? What is the burden it is imposing on tenants? Are tenants being fined, or jailed? How many failure to vacate cases are actually being heard in Arkansas? How are those cases being tried? Where is it being enforced? How is it currently being enforced across the state? It seems like no one knows for sure. There appears to be no reliable database that collects or counts the total number of failure to vacate cases across the state.

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<sup>111</sup> Miller & Simani, *supra* note 85.

<sup>112</sup> Maya Miller, *There’s Only One State Where Falling Behind on Rent Could Mean Jail Time. That Could Change.*, PROPUBLICA (Mar. 19, 2021, 1:00 PM), <https://www.propublica.org/article/theres-only-one-state-where-falling-behind-on-rent-could-mean-jail-time-that-could-change>.

<sup>113</sup> Miller & Simani, *supra* note 85.

### III. PROJECT INVESTIGATING ENFORCEMENT OF FAILURE TO VACATE

This project attempts to take a peek behind the curtain to evaluate how the failure to vacate statute is being enforced across Arkansas. In this project, the clinic targeted various areas, gathering data from state, county, and local agencies regarding their enforcement of the failure to vacate statute. Primarily, this data was gathered via Freedom of Information Act (FOIA) requests or other requests for information.

#### *A. Methodology*

First, the Clinic requested information from the Arkansas Crime Information Center (ACIC). This is a state agency that is “responsible for providing information technology services to law enforcement and other criminal justice agencies in Arkansas.”<sup>114</sup> The ACIC maintains the National Crime Database, which receives information from law enforcement throughout the state, and their database reports have been cited in several news articles regarding this statute.<sup>115</sup> However, the ACIC stated that law enforcement participation in this database is completely voluntary, meaning each law enforcement entity can decide if it would like to share its department’s information or not. Without having complete information from local law enforcement, ACIC reports would be incomplete and present a lower number of cases than actually exist.

The Clinic issued FOIA requests to 25 counties throughout the state.<sup>116</sup> Each FOIA request was for failure to vacate cases from 2016, 2017, and 2022. Typically, FOIA requests were issued to the county-level law enforcement—the Sheriff and local police forces. Each request asked for the following: “public records under the criminal failure to vacate statute, Ark. Code Ann. § 18-16-101,” “Failure to pay rent — Refusal to vacate upon notice — Penalty.” This includes failure to vacate notices, citations, arrests, reports, court dockets, court records, and dispositions for the years 2016, 2017, and 2022. FOIA requests were also issued to District Courts in each county, likewise asking for court records related to the failure to vacate statute.

On a state level, FOIA requests were issued to the Arkansas State Police requesting their records for these same years. Finally, a FOIA

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<sup>114</sup> About Us, *Arkansas Crime Information Center*, ARKANSAS DEPARTMENT OF PUBLIC SAFETY, <https://www.dps.arkansas.gov/crime-info-support/arkansas-crime-information-center/about-us/> (last visited Sept. 13, 2024).

<sup>115</sup> See generally Tess Vrbrin, *Eviction Threatens State-Law Challenge; Lawsuit’s Filers Told to Get Out*, ARK. DEMOCRAT GAZETTE (Feb. 11, 2022, 6:57 AM), <https://www.arkansasonline.com/news/2022/feb/11/eviction-threatens-state-law-challenge/>.

<sup>116</sup> These counties were: Arkansas, Ashley, Benton, Carroll, Clark, Craighead, Crawford, Faulkner, Garland, Hot Spring, Jefferson, Lincoln, Lonoke, Miller, Mississippi, Montgomery, Polk, Pope, Pulaski, Randolph, Saline, Scott, Sebastian, Sharp, Washington, White.

request was issued to the Administrative Office of the Court, requesting court cases from 2016, 2017, and 2022. All FOIA requests were for the years 2016, 2017, and 2022 to create a uniform data set.

### *B. Summary of Findings*

Below is a summary of findings from this data set. In the following section, this article will expand upon each of these findings in depth. First, the article will give a larger overview of the patterns found in the data set, before zooming in with specific findings on particular issues.

#### *1. Findings:*

- 25 counties were surveyed in all. Of these counties, 13 counties did not enforce the failure to vacate statute,<sup>117</sup> and 12 counties did.<sup>118</sup>
- The failure to vacate statute is still being enforced across the state.
- Enforcement varied widely from county to county, or even from city to city in the same county.
- Different counties followed vastly different processes for failure to vacate cases.
  - For example, in Lonoque County, an arrest warrant was issued for each failure to vacate case, while in Sebastian County, tenants were simply given a citation.
- Different counties reached very different results in failure to vacate cases.
  - For example, in some districts almost all failure to vacate cases were dismissed or declared nolle prosequi, while in others almost all resulted in a guilty sentence.
- Some unusual practices were found related to failure to vacate cases.
  - Cases were brought with insufficient landlord affidavits.
  - In at least one county, failure to vacate cases are still being brought and reported as a Class B misdemeanor, resulting in potential fines and jail time.
  - Even though failure to vacate is now an “unclassified misdemeanor,” some tenants are still being jailed for long periods of time, especially due to charge stacking.
  - Cases were reported that did not actually involve a landlord-tenant situation.

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<sup>117</sup> Counties that did not have responsive records regarding failure to vacate cases: Arkansas, Ashley, Benton, Carroll, Craighead, Crawford, Faulkner, Lincoln, Mississippi, Pulaski, Randolph, Saline, Sharp.

<sup>118</sup> Counties that did have responsive law/court records of failure to vacate cases: Clark, Garland, Hot Spring County, Lonoque County, Miller County, Montgomery County, Polk County, Pope County, Scott County, Sebastian County, Washington County, White County.

- For example, in Katlynn County
  - HUD housing authorities have brought failure to vacate actions against tenants.
  - Cases were reported where defendants lacked the ability to receive a public defender.
  - “No Contact” orders were issued for buildings.

### *C. Enforcement Patterns*

#### *1. Heavy enforcement throughout the state*

The “failure to vacate” statute is still being heavily enforced across the state. At least 2,423 criminal “failure to vacate” cases were prosecuted in Arkansas courts in the period from 2016–2022, according to data from the Administrative Office of Courts (AOC).<sup>119</sup> And the total number is actually higher (much higher) than that because many counties do not report their court data to the AOC. The AOC data shows enforcement in 12 different counties.<sup>120</sup>

The AOC also maintains “CourtConnect,” an online database. Users can look up individual court cases in CourtConnect, by party or case number. However, the information on CourtConnect is incomplete because many counties do not report their cases to the AOC database. In fact, most Arkansas counties do not participate or submit their District Court records to AOC.<sup>121</sup> Failure to vacate cases are heard only in district court. This means that the 2,423 failure to vacate cases reported to AOC are likely a small percentage of the cases heard statewide during that time period. The state apparently does not have a central database of all “failure to vacate” cases, making it difficult to evaluate how many cases are filed across the state and where they are all filed.

In order to gather additional data, it is necessary to go to the county/local level. For this project, we surveyed 25 counties across Arkansas, requesting “failure to vacate” records from local law enforcement and district courts. Of these counties, almost half (12) did have records showing enforcement of the “failure to vacate” statute; while the other half (13) counties did not have any records showing enforcement

<sup>119</sup> Failure to Vacate Data from Arkansas Administrative Office of Courts, on file with the author.

<sup>120</sup> *Id.*

<sup>121</sup> *It's Time to Retire Public CourtConnect and Introduce Search ARCOURTS!*, ARCOURTS, [https://caseinfoold.arcourts.gov/cconnect/PROD/public/ck\\_public\\_qry\\_main.cp\\_main\\_srch\\_options](https://caseinfoold.arcourts.gov/cconnect/PROD/public/ck_public_qry_main.cp_main_srch_options) (last visited Sept. 13, 2024). The AOC, and subsequently CourtConnect, receives data from the following District Courts: Crawford County, Craighead County, Crittenden County, Faulkner County, Garland County, Hot Spring County, Independence County, Poinsett County - Tyronza Dept., Polk County, Pulaski County, Pulaski County - Little Rock Dept., Van Buren County, White County - Searcy Dept.; and receives partial information from Arkansas, Ashley, Bradley, Chicot, Clay, Crittenden, Desha, Drew, Greene, Independence, Jackson, Lafayette, Lawrence, Perry, Randolph, Sebastian, and Stone County.



of the statute. This was not a complete sample, as Arkansas has 76 counties in all. However, these results indicate that the “failure to vacate” law is still very alive in Arkansas, and that it is being enforced across the state.

### *2. Vastly uneven enforcement throughout the state*

However, enforcement is vastly uneven throughout the state. Many critics have pointed to this uneven enforcement when challenging the statute’s validity.<sup>122</sup> The results can vary drastically depending simply on where a tenant lives in the State. Many counties simply refuse to enforce the “failure to vacate” statute at all, based on either a Circuit Court judicial order, or the county prosecutor and/or law enforcement’s own discretion.<sup>123</sup>

In the sample above, a slight majority of counties had no failure to vacate records at all, meaning no cases had been brought since at least 2016. Other counties, right next door, did enforce the statute. This unequal enforcement leads to a patchwork approach and can lead to tenant uncertainty about what they can face as a result of missing a rental payment. A tenant in Miller County will likely face criminal charges for missing a rental payment, while a tenant in Lafayette County, the neighboring county, would only receive a civil eviction. A few miles difference can completely change the tenant’s legal rights and the legal consequences of missing a rental payment.

This difference in enforcement can even differ from city to city within the same county. For example, Clark County’s capital and largest city is Arkadelphia (population 10,380).<sup>124</sup> However, the Arkadelphia Police Department does not enforce the failure to vacate statute, and so no citations are issued to tenants in this city. In contrast, Caddo Valley (population 595),<sup>125</sup> a much smaller city in the same county, does enforce the statute, and so several failure to vacate citations were issued in that city. These micro-differences in enforcement can make it almost impossible for a tenant to know where a failure to vacate case may be brought against them.

### *3. Heavy vs. light enforcement of the statute*

Finally, even in areas that enforced the statute, the level of that enforcement varied wildly. Some counties that do enforce the statute nonetheless had very few failure to vacate cases, while others had a much

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<sup>122</sup> Foster, *supra* note 1, at 10–11.

<sup>123</sup> E.g., Brantley, *supra* note 34, at 2 (“[A] retires law professor who’s long worked on the issue[] said she believed only about 20 percent of the state’s district courts still enforce the law, with about 350 cases in the last year, mostly in Garland and Miller counties).

<sup>124</sup> CITY OF ARKDELPHIA, <https://arkadelphia.gov/> (last visited Sept. 13, 2024).

<sup>125</sup> U.S. CENSUS BUREAU, CADDO VALLEY, ARKANSAS (2020), <https://data.census.gov/all?q=Caddo%20Valley%20town,%20Arkansas> (last visited Sept. 13, 2024).

larger number of cases with a smaller population. The enforcement levels vary from light to heavy enforcement. This variation resulted in drastically different numbers of cases from one county to another. For example, Miller County served over 1000 tenants with “notices to vacate” during 2016, 2017 and 2022, while Sebastian County served just 17 during the same time period.<sup>126</sup>

Some areas are “hot-spots” for failure to vacate cases, with high numbers of cases far beyond what would be expected based on their population. The hottest of these hot spots is Hot Springs, Arkansas. Hot Springs has a population of 37,930 people<sup>127</sup> and yet files more failure to vacate cases than any other area of the state. Hot Springs has gained somewhat of a reputation as a “hub of criminal evictions,”<sup>128</sup> often appearing in media reports and legislative hearings<sup>129</sup> about the statute.

That reputation is justified according to our data. According to the AOC, Hot Springs City alone heard over 1,699 criminal failure to vacate cases from 2016–2022. This means that, out of the 2,423 cases reported to the AOC, the vast majority of cases were heard in Hot Springs City, with only 714 cases from the rest of the state district courts.

A FOIA request to Hot Springs Police produced 389 criminal citations that police had issued in 2016, 2017, and 2022.<sup>130</sup> Compiling this data reveals Hot Springs Police issue an average of 14 citations every month.<sup>131</sup>

What does this mean for the average tenant in Hot Springs? United States census data shows 17,402 households in Hot Springs, with 55.6% living in owner-occupied housing, where the owner owns and lives in his own home.<sup>132</sup> That leaves about 7,726 “non-owner occupied households,” or households that are renting the property they live in. With only 7,726 rental households, and 1,699 criminal failure to vacate cases, about 21% of renting households were involved in a failure to vacate case. That means the average Hot Springs tenant has a 1 in 5 chance of being tried on failure to vacate charges!

Contrast this with Cabot City, in Lonoke County, a city of similar size (27,190),<sup>133</sup> in a county that also enforces the failure to vacate statute.

<sup>126</sup> Miller and Sebastian Counties Notices to Vacate (2016, 2017, 2022), on file with the author.

<sup>127</sup> U.S. CENSUS BUREAU, HOT SPRINGS CITY, ARKANSAS (2020), <https://data.census.gov/all?q=Hot%20Springs%20city,%20Arkansas> (last visited Sept. 13, 2024).

<sup>128</sup> Miller & Simani, *supra* note 85.

<sup>129</sup> See, e.g., Brantley, *supra* note 34 (noting that one landlord “said judges in Hot Springs are happy to hear these cases.”).

<sup>130</sup> Hot Springs Police Failure to Vacate Citations (2016, 2017, 2022), on file with the author.

<sup>131</sup> *Id.* Broken down by year, 142 citations were issued in 2016, 147 in 2017, and 74 in 2022.

<sup>132</sup> U.S. CENSUS BUREAU, HOT SPRINGS CITY, ARKANSAS (2022), [https://data.census.gov/table/ACSDP5Y2022.DP04?q=Hot%20Springs%20city,%20Arkansas&t=Owner/Renter%20\(Householder\)%20Characteristics](https://data.census.gov/table/ACSDP5Y2022.DP04?q=Hot%20Springs%20city,%20Arkansas&t=Owner/Renter%20(Householder)%20Characteristics) (last visited Oct. 5, 2024).

<sup>133</sup> U.S. CENSUS BUREAU, CABOT CITY, ARKANSAS (2023), [https://data.census.gov/profile/Cabot\\_city,\\_Arkansas?g=160XX00US0510300](https://data.census.gov/profile/Cabot_city,_Arkansas?g=160XX00US0510300) (last visited Oct. 5, 2024).

Using the same Census statistics, and the recorded number of Cabot “failure to vacate cases” reported to the AOC (62 cases), only 1.7% of renting households were involved in criminal failure to vacate cases. The average Cabot tenant has less than a 1 in 50 chance of being tried on these charges. In other cities of the same size (e.g., Benton, population 35,318) in areas that do not enforce the failure to vacate statute, the number of tenants tried is zero. Arkansas tenants face a risk of criminal failure to vacate charges that ranges anywhere from 1 in 5, 1 in 50, or 0 based simply on the city where that tenant lives. These vast differences in enforcement levels create vastly different, and unequal, results for tenants living in different areas of the state.

#### *4. Vastly different processes in each county*

Different counties and district courts follow very different processes for bringing “failure to vacate” charges. In some areas, like Hot Springs City, the landlord gives the tenant a 10-day notice, then calls the local police when the notice expires.<sup>134</sup> Police then respond and typically issue a citation to the tenant with a court date.<sup>135</sup> In some counties, the county Sheriff will actually escort the landlord as they issue the notice to vacate, and will sign the notice to prove it was given. In areas where police issue a citation, the tenant is typically not taken into custody, but they are told to appear for their court date.<sup>136</sup>

However, in other areas, like Lonoke County, the criminal process is initiated when the landlord files an affidavit with the prosecuting attorney.<sup>137</sup> The landlord issues a 10-day notice, and after the notice expires, contacts the prosecuting attorney asking for failure to vacate charges to be brought against the tenant. The landlord then fills out an affidavit for a warrant of arrest. In this affidavit, the landlord includes their own name, the tenant’s name and address, the statute allegedly violated, and “facts constituting reasonable cause.” In the last section, the landlord includes facts that show that the tenant has violated this statute. This affidavit is then presented to the district court judge. If the judge finds reasonable and probable cause, a warrant for the tenant’s arrest will be issued.<sup>138</sup>

So, in some counties, like Lonoke County, a warrant for the tenant’s arrest is issued in nearly every failure to vacate charge. This difference in process means that a tenant in Garland County will likely only receive a

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<sup>134</sup> See Hot Springs Police model Failure to Vacate Citations (2017), on file with the author.

<sup>135</sup> *Id.*

<sup>136</sup> Hot Springs Failure to Vacate Citations (2017), on file with the author.

<sup>137</sup> Notice to Vacate Affidavits, Lonoke County (2022), on file with the author.

<sup>138</sup> *Id.*

citation, while a tenant in Lonoke County will receive a warrant for their arrest for the same exact criminal charge.

In many areas that issue citations, the police officer can also file an “incident report” that details what happened when they responded and why they issued the citation.<sup>139</sup> That police officer can also testify at the criminal hearing. But, in areas where a landlord’s affidavit is filed to bring charges, the State is relying largely on the landlord’s own affidavit in determining whether charges should be brought and an arrest warrant should be issued. The use of “landlord’s affidavits” as a basis for criminal charges has been criticized in many scholarly articles and non-profit reports about this statute.<sup>140</sup> Prosecutors allegedly rarely go beyond the affidavit itself or conduct an independent investigation before seeking criminal charges.<sup>141</sup> This leaves open the possibility that a self-serving landlord could file a false affidavit in order to initiate criminal charges against a tenant.<sup>142</sup>

#### *5. Vastly different outcomes and dispositions in each county*

Finally, even in counties that enforce failure to vacate cases, the cases often have vastly different outcomes and dispositions from county to county. These different outcomes seem to be based on the policy of each district court. For example, in Sebastian County, failure to vacate charges were almost all dismissed, while in Scott County, many tenants were tried and found guilty of failure to vacate. This difference seems to depend less on the tenant’s individual situation, and more on the general policy in that district. In Sebastian County, for example, the charges would typically be dismissed or nolle prosequi as long as the tenant moved out of the property. So again, a tenant in different areas of the state would face vastly different outcomes to the criminal case based on nothing more than where they live.

#### *D. Problematic Practices*

The section above takes a macro view of overall enforcement. The next section takes a micro- level view of the data, evaluating issues found in individual records. In addition to the general difference in level and quality of enforcement in different areas, some additional issues and problematic practices materialize from the data received.

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<sup>139</sup> Incident Reports, Failure to Vacate (2017), on file with the author.

<sup>140</sup> E.g., HUMAN RIGHTS WATCH, PAY THE RENT OR FACE ARREST: ABUSIVE IMPACTS OF ARKANSAS’S DRACONIAN EVICTIONS LAW (Feb. 2013), <https://www.hrw.org/report/2013/02/05/pay-rent-or-face-arrest/abusive-impacts-arkansas-draconian-evictions-law>.

<sup>141</sup> Foster, *supra* note 1, at 15.

<sup>142</sup> *Id.*

### *1. Subsidized housing*

As outlined above, tenants in HUD-subsidized housing should be protected from failure to vacate charges. HUD's memo specifically prohibits Arkansas-subsidized housing authorities and Section 8 landlords from initiating failure to vacate against their tenants.

Despite this, we found at least one failure to vacate case that listed a subsidized housing authority as the landlord. This failure to vacate case in Montgomery County, the landlord's affidavit was entered by the city "Housing Authority."<sup>143</sup>

Other landlord forms don't require the landlord to state they aren't subsidized or Section 8 landlords. In many districts, failure to vacate cases begin when the landlord files an "affidavit" showing reasonable cause. This affidavit is often created by the district court for the landlord to complete. For example, Lonoke County District Court has a form "affidavit for warrant" that landlords complete.<sup>144</sup> This form contains space for the landlord to fill in the crime committed (failure to vacate), and facts constituting reasonable cause, along with a space for the landlord's signature. However, the form affidavit does not contain any statement that the landlord is not a HUD-subsidized or Section 8 property. Similarly, landlords are not required to include any statement in the notice to vacate.

As reviewed above, these cases are often prosecuted based solely upon the landlord's affidavit. Without any way to distinguish subsidized vs. privately-owned properties, tenants in subsidized housing could be routinely prosecuted under the failure to vacate statute. Similarly, after reviewing thousands of police reports and incident reports, not one narrative ever mentioned whether the property was HUD-subsidized, or even asked the landlord about it.<sup>145</sup>

In contrast, for example, during the CDC moratorium, the Arkansas Supreme Court required landlord complaints to include a statement to the effect that they are not a HUD-subsidized property.<sup>146</sup> No such requirement exists for criminal failure to vacate cases, in spite of the fact that these tenants should be excluded from such actions pursuant to HUD regulations.

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<sup>143</sup> Montgomery County Failure to Vacate Citation, against public housing tenant, on file with the author.

<sup>144</sup> On file with the author.

<sup>145</sup> Scott County Police Reports (2016), on file with the author.

<sup>146</sup> Jerome Wilson Jr., *Consequences of Covid: The Eviction Ban and Arkansas*, ARK. J. SOC. CHANGE & PUB. SERV. (Nov. 9, 2020) ("On April 28, 2020, the Supreme Court of Arkansas issued *In re Response to the COVID-19 Pandemic, Eviction Filings* (per curiam), wherein all new eviction complaints for nonpayment of rent or other fees filed under Arkansas Code Annotated §§ 18-60-304 or 18-17-901, or failure-to-vacate charges brought under § 18-16-101, are required to affirmatively plead that the property that is the subject of the eviction dispute is not a covered dwelling under the CARES Act.").

## 2. *Insufficient landlord affidavits*

In many districts, such as Cabot, Arkansas, a failure to vacate case begins when the landlord files an affidavit for arrest with the district court.<sup>147</sup> In this affidavit, the landlord must include facts showing “reasonable cause” that the tenant has violated this statute. If the district court judge finds that “reasonable and probable cause” exists, the district judge will issue a warrant for the tenant’s arrest.

Although the affidavits include a section for “reasonable cause,” the facts are often bare-boned and conclusory. For example, several affidavits stated simply: “*Facts Constituting Reasonable Cause*: Failed to vacate.”<sup>148</sup>

In other cases, the affidavits would detail a long story that seemed to be a domestic dispute, instead of a landlord-tenant matter, and would not even allege rent due (e.g., “my husband and father of our three children was keeping his kids”).<sup>149</sup> Regardless of how conclusory the affidavit was, a warrant to arrest the tenant was typically issued by the district court.

In many cases, the landlords did include enough facts to show a violation of the “Failure to Vacate” law; an affidavit from March 3, 2016, stated the tenant “was served notice to vacate for violating his lease terms on 2-22-2016 and is still occupying said address.”<sup>150</sup>

However, an affidavit that simply states that the tenant “failed to vacate” or “violated lease” is not sufficient to show probable cause. Tenants can violate many lease terms beyond failing to pay rent; for example, having additional residents, or prohibited pets, etc. However, none of these lease violations can form the basis for a criminal failure to vacate charge.

## 3. *Orders of Protection for Buildings*

Strangely, in Hot Springs District Court, judges are also issuing “no contact” orders for buildings. A survey of the data showed at least 57 criminal “no contact” orders were issued against tenants in failure to vacate cases in 2016, 2017, and 2022.<sup>151</sup> These “no contact” orders used the same form as that typically used in domestic violence matters. However, instead of a person, in these cases the listed “victim” is the building itself.<sup>152</sup>

The “no contact” orders are issued in the failure to vacate case after defendant pleads guilty to the charge. The “no contact” orders the defendant not to contact the “victim”. Here, where the victim’s name would normally be filled in, the tenant’s property address is listed instead. It also

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<sup>147</sup> Cabot County Affidavits (2016, 2017, and 2022), on file with the author.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Chart of Hot Springs Citations and Corresponding Court Cases, on file with the author.

<sup>152</sup> Hot Springs No Contact Orders (2016), on file with the author.

states that the tenant must “immediately leave and stay away from the victim’s residence/apartment complex.” It orders the defendant to “stay away from the victim’s workplace.” Judges also check line 4: “You may not exercise visitation rights for the duration of the order.”<sup>153</sup>

This leads to a “no contact” order that reads, for example, “You are ordered not to contact 555 Main Street (hereinafter referred to as ‘VICTIM’), or victim’s family. . . and [you] must stay at least 100 yards away from the victim, even if the victim seems to allow or request contact.” In a slightly ridiculous way, the orders also prohibit speaking to the building’s family, or visitation with the building’s children, even if the building seems to want contact with the tenant.

The “no contact” orders state that a violation of the “no contact” order will constitute a violation of release, and result in the defendant’s immediate arrest or warrant. These orders are typically entered along with waivers to the right to an attorney. The “no contact” orders last for one year.

*i. When can No Contact Orders be issued?*

Is it appropriate to issue no contact orders on behalf of buildings? Pursuant to Ark. Code §16-85-714, “no contact” orders can be issued in criminal cases for crimes involving terroristic threats, trafficking in persons, or false imprisonment in the first degree.<sup>154</sup> In addition, a no contact order can be issued if “[i]t appears that there exists a danger that a defendant will: (i) [c]ommit a serious crime; (ii) [s]eek to intimidate a witness; or (iii) [o]therwise unlawfully interfere with the orderly administration of justice.”<sup>155</sup>

“Failure to vacate” is not a serious crime; it is the lowest type of misdemeanor and does not involve any jail time. While it is possible tenants may be trying to intimidate a witness, it seems unlikely in matters where the tenant is already pleading guilty. However, the last basis, “otherwise unlawfully interfere with the administration of justice,” is very broad and vague. Perhaps the “administration of justice” could involve the expeditious resolution of a criminal case, or justice in the larger sense of excluding trespassing tenants. It is difficult to speculate because the no contact orders do not include a description or factual basis for their entry.

Without court transcripts, it is difficult to inquire more into why these “no contact” orders were issued. It is possible, for example, that a particular tenant was threatening or intimidating the landlord. However, the relatively large number of “no contact” orders could indicate that these orders are being issued fairly routinely as a part of the tenant’s guilty plea.

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<sup>153</sup> *Id.*

<sup>154</sup> ARK. CODE ANN. § 16-85-714(b)(1)(A) (West 2023).

<sup>155</sup> ARK. CODE ANN. § 16-85-714(b)(1)(B) (West 2023).

However, the “no contact” orders could serve as a way around one of the key faults of the failure to vacate statute: it does not allow a judge to evict the tenant. Unlike civil cases, the criminal cases do not result in an “order of possession,” evicting the tenant and returning the dwelling to the landlord.<sup>156</sup> It only allows the tenant to be convicted and fined. It is difficult to escape the conclusion that these “no contact” orders constitute a way of evicting tenants from the property, even though the failure to vacate statute does not create a mechanism to do so.

The “no contact” order requires the tenant to “immediately leave and stay away from the victim’s residence/apartment complex.” This means that, after pleading guilty, the tenant cannot go back to their residence without violating the order. Even returning to move out their personal property could violate the order. Further, the order prohibits the tenant from contacting the landlord/building in any way to arrange a move-out date, ask for permission to return, or make alternate arrangements or extensions of time. At the moment the tenant pleads guilty, he is effectively, irrevocably, and immediately removed and barred from the residence. In this way, a landlord can efficiently remove the tenant and re-rent the premises.

These “no contact” orders place a high burden upon the (now-former) tenants. Violation of a “no contact” order results in an immediate arrest or warrant being issued against the Defendant. And violation of a no contact order is a Class A misdemeanor,<sup>157</sup> the highest classification, resulting in sentences of up to a year in jail<sup>158</sup> and fines of up to \$2,500 dollars.<sup>159</sup> Although the “failure to vacate” law itself does not allow for jail time, tenants will now risk significant jail time and fines if they ever try to return to the residence.

These “no contact” orders seem to tilt the “failure to vacate” law overwhelmingly in the landlord’s favor. In addition to receiving the benefits of a criminal proceeding, the landlord can also receive the key benefit of a civil eviction: possession. The landlord no longer needs to seek a civil eviction to effectively receive an “order of possession,” one that removes the tenant from the residence and returns control of the residence back to the landlord.

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<sup>156</sup> ARK. CODE ANN. § 18-60-307(b) (West 2023) (“Upon order of the court, shall immediately issue a writ of possession directed to the sheriff commanding him or her to cause the possession of the property described in the complaint to be delivered to the plaintiff.”).

<sup>157</sup> ARK. CODE ANN. § 16-85-714(d) (West 2023) (“Upon conviction, violation of a no contact order issued under this section is a Class A misdemeanor.”).

<sup>158</sup> ARK. CODE ANN. § 5-4-401(b)(1) (West 1983).

<sup>159</sup> ARK. CODE ANN. § 5-4-201(b)(1) (West 2009).



#### 4. Notices to Vacate

As outlined above, pursuant to § 18-16-101, after a tenant fails to pay rent due, the landlord must send a “ten days’ notice in writing” to vacate the premises. If the tenant does not move out after that point, the tenant can be found guilty of a misdemeanor.<sup>160</sup>

The statute itself does not lay out what form the landlord’s notice must take, nor what language needs to be included in the notice. There are no other requirements beyond 1.) being in writing and 2.) giving ten days’ notice to move. Would a text suffice? Does the landlord need to sign the notice? How does the landlord need to give the notice to the tenant? The statute is silent. Because this notice is issued by landlords themselves, and not attorneys or law enforcement, there could be wide variability in how landlords issue these notices, and what information is included.

As a result of FOIA requests, we received notices to vacate from two counties, Scott and Polk Counties.<sup>161</sup> These notices to vacate were issued by landlords, served by the Sheriff, and later became part of the “failure to vacate” court case against the tenants. An examination of these records reveals wide disparities in the form of the notice to vacates. While most are typed, some are handwritten. Some are long, hand-written letters, while others are scrawled, one-sentence notes left on the tenant’s front door.

Typically, the notices included a short statement that the occupants must vacate the premises by a certain date, ten days after the notice was sent, without any indication what will happen after that point. The notices can also lead to significant confusion for tenants about the risk they face by not vacating.

*Civil vs. criminal not stated* – Almost none of the notices specify that the landlord can or will seek criminal charges pursuant to the failure to vacate statute.<sup>162</sup> This could leave tenants to believe that they will only receive a civil eviction process. As noted above, in Arkansas, landlords can choose between pursuing a criminal failure to vacate case or pursuing a civil eviction action (typically “unlawful detainer”).<sup>163</sup>

What is worse, many of the notices indicated that the landlord would file a civil eviction. For example, one 10-day notice stated “[t]his notice is made pursuant to the Ark. Code Ann. Sec. 18- 60-304 ‘Unlawful Detainer,’” but was then followed with a citation for criminal eviction.

*Three-day notices* —The failure to vacate statute requires a 10-day notice,<sup>164</sup> while unlawful detainer actions require a 3-day notice.<sup>165</sup> A

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<sup>160</sup> ARK. CODE ANN. § 18-16-101 (West 2017).

<sup>161</sup> Scott and Sebastian Counties Notices to Vacate (2016, 2022, 2023), on file with the author.

<sup>162</sup> *Id.* Only one notice to vacate from either of the counties on file stated criminal charges would result if the tenant failed to vacate.

<sup>163</sup> ARK. CODE ANN. § 18-60-304 (West 2005).

<sup>164</sup> ARK. CODE ANN. § 18-16-101(b)(1) (West 2017).

<sup>165</sup> ARK. CODE ANN. § 18-60-304 (West 2005).

tenant (or advocate) who is trying to determine the process they face could reasonably believe that a 3-day notice means that the landlord will seek civil, not criminal remedies.

However, in Polk County, numerous landlords actually sent “3-day” notices to vacate that gave tenants “3 days” to vacate the premises. One realty company utilized a form letter that stated “[y]ou are hereby given notice to vacate the property within 3 days,” and stated that the tenant was in default of the lease for nonpayment of rent. The realty company issued this same form letter to at least five different tenants; each time, the 3-day notice was followed by a criminal “failure to vacate” citation. Two other landlords issued a three-day “Notice to Quit” for nonpayment, stating that “noncompliance will institute legal proceedings to recover rent and possession.” Again, this notice contains the incorrect day and format for a “Notice to Vacate,” and leads the tenant to believe that they will only face a civil eviction for rent and possession.

In two other cases, the landlord sent a form “Arkansas Three Day Notice to Quit,” that said “legal action will be taken to evict you . . . and to recover all unpaid rent. THIS NOTICE IS IN ACCORDANCE WITH AR Code 18-60-304(3).” This notice specifically cites the unlawful detainer statute and gives three-day notice pursuant to that statute. A reasonable tenant would believe that this notice means a case will proceed in civil court.

While these 3-day notices suffice for unlawful detainer action, it is questionable whether this notice suffices for a criminal failure to vacate action. It does not contain the proper 10-day notice requirement. It does not notify the tenant that they will instead face criminal eviction. In fact, it is misleading the tenant to believe that the consequences are less dire than they are, and leaves the tenant surprised by the criminal citation. The tenant is not receiving any notice of the potential criminal charges against them.

*Thirty-day notices* — Finally, in several other cases, the notice to vacate actually gave the tenant 30 days to move out of the premises (e.g., “this is your 30[-]day notice to vacate my rental”<sup>166</sup>). In some cases, the landlord specified that the tenant did owe rent (“you are two months behind now . . . please remove yourself by [date 30 days later]”) and may have been giving the tenant extra time to move. In other cases, the reason is not given. This raises the possibility that the landlord may instead be simply providing “30 day” notices of lease termination.

Many tenants, especially lower-income tenants, do not have a written lease. Pursuant to Arkansas law, any tenant with an oral lease is considered a month-to-month tenancy, which may be terminated with a 30-day

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<sup>166</sup> Polk County Notice to Vacate (2022), on file with the author.

notice.<sup>167</sup> In these cases, the tenant has not actually missed rent, but must still leave within 30 days because the verbal lease has ended. So, are these landlords mistakenly, or perhaps gracefully, giving 30 days, instead of 10 days, to current tenants in that have missed rent? Or are landlords simply giving 30-day lease termination notices to month-to-month tenants, then proceeding on failure to vacate charges at the end of that time period? Without more information, the use of a “30 day” notice to vacate leaves open the possibility that the landlord was simply trying to end a month-to-month lease. Landlords themselves may not realize which is the proper notice to use, or the proper court to seek remedies.

One notice gave 90 days because “the owner of the property is returning and wants to live in his house. . . . I am giving 90 days['] notice, providing your rent is kept current, so you have plenty of time to locate a new place.” The notice, dated February 14, 2022, asked the tenant to move out by June 1, 2022. On June 3, 2022, a citation for failure to vacate was issued against the tenant. In this case, the landlord did not even allege that the tenant had failed to pay rent, but simply asked the tenant to leave so that the owner could move back in. After 90 days, the landlord still later sought criminal charges against the tenant.

*Not for dwellings* – Some notices did not appear to be for actual “dwellings” or apartments. One notice to vacate was addressed to “Executive Inn, Room 145” and posted on that hotel room door. Two others were sent to travel trailers and camp lodges.

*i. Alleged facts not sufficient for Failure to Vacate*

Concerningly, in some notices to vacate, the landlord did not allege non-payment of rent at all, but *other* problems they had with the tenant. None of these problems would entitle a landlord to seek “failure to vacate” charges against the tenant. For example, one 10-day notice said the tenant must vacate for “doing drugs and tried to steal a crock pot (theft).” These allegations, if true, would allow the tenant to be charged for drug abuse or theft, but do not form a valid basis for failure to vacate charges.

Another “notice to vacate,” was actually a notice to remedy lease violations other than nonpayment of rent.<sup>168</sup> This notice, dated August 3, 2023, gave the tenant 14 days to remedy a violation of the tenant’s lease “[i]n accordance with Section 18-17-201 of the Arkansas Code.” It stated that “[t]he violation is described, and can be remedied, as follows: [u]npaid utilities[,] [d]amages due to trailer[,] [d]ogs allowed in when told there was to be no animals inside.”<sup>169</sup> The notice did not allege that the tenant had failed to pay rent, but alleged other violations. It stated that if the violations

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<sup>167</sup> ARK. CODE ANN. § 18-16-105 (West 2009).

<sup>168</sup> Polk County Notice to Quit (2023), on file with the author.

<sup>169</sup> *Id.*

are not remedied, the landlord can seek “possession of the Premises, any unpaid rent, . . . and other damages.”<sup>170</sup> On August 18, 2023, a criminal failure to vacate citation was issued against the tenant.<sup>171</sup>

In this case, the landlord appears to be attempting to give the tenant a 14-day notice to cure prior to a civil eviction action. This notice states that it was issued “in accordance with Section 18-17-701 of the Arkansas Code.” Pursuant to the Arkansas Landlord/Tenant Act, a landlord can also choose to pursue a civil eviction in district court if the tenant violated the lease. This section<sup>172</sup> states that if a tenant is not complying with lease terms (other than rent), the landlord can give tenants a 14-day notice specifying the acts that constitute noncompliance. If the tenant has not fixed the violations within 14 days, the landlord can then terminate the lease and seek eviction and damages in civil court.<sup>173</sup>

In this notice, the landlord is not alleging that the tenant failed to pay rent, but alleged other lease violations (dogs, utilities, damage to the property). On its face, this notice is insufficient for a failure to vacate charge, because the landlord is not alleging that the tenant failed to pay rent.

Even if everything in the notice was true, the landlord could only seek lease termination and damages in civil court. Further, this 14-day notice is citing to, and following the exact requirements of, § 18-17-701. It appears that the landlord used a form “14-day notice of remedy,” which is issued to tenant prior to a civil action for lease violations. Instead of the landlord pursuing that civil action, a criminal “failure to vacate” citation was issued to the tenant instead.

A deep dive of the “notices to vacate” reveals significant inconsistencies and problems. First, the notices to vacate almost never notify the tenant that they will face criminal charges if they fail to vacate the premises. Secondly, many notice actually contained the incorrect time periods (ranging from 3 days to 90 days) for a failure to vacate charge.

#### *ii. Notices to Vacate – Summary*

Arkansas’ legal landscape may be confusing to tenants and landlords alike. The notice to vacate is made by the landlord or his agent, not by an attorney or law enforcement official. An unsophisticated landlord may just look for form “notice to vacates,” without ensuring they actually follow the requirements of a criminal “failure to vacate notice”. For example, a landlord could find and use a form “3-day notice to quit” meant for unlawful detainer actions, or a “14-day notice of remedy” used for non-

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> ARK. CODE ANN. § 18-17-701(West 2009).

<sup>173</sup> ARK. CODE ANN. § 18-17-701(c)(1) (West 2009).

payment lease violations, without being aware that a 10-day notice for nonpayment is required. Alternately, unscrupulous landlords could use the criminal “failure to vacate” process to avoid the time and expense of perusing civil eviction actions against tenants who have violated other lease terms, or with whom the landlord would like to end a month-to-month lease.

However, this also means that tenants are not given proper notice, or any notice, that they will face criminal failure to vacate charges at the end of that period. Indeed, the incorrect notices to quit would mislead tenants (or advocates) into believing that the only potential consequence is a civil eviction action. Tenants would be unable to know the consequences in order to make a correct determination of the risks and benefits of remaining at the property, or to protect themselves from criminal charges. Landlords can issue “notices to vacate” in whatever form. Once the criminal justice system becomes involved, landlords can then allow that process to force the tenant out without any further action from the landlord to accomplish that goal.

### *5. Charge stacking*

Although the current version of the statute does not include jail time, many tenants are actually going to jail as a result of failure to vacate charges. This is because a failure to vacate charge can lead to a cascade of other criminal charges and fines, resulting in the tenant’s imprisonment.

In Arkansas, if a defendant fails to appear for a criminal court hearing, that defendant receives an additional charge for “failure to appear.” (FTA)<sup>174</sup> This failure to appear will be charged at the same level as the underlying crime.<sup>175</sup> In addition, a bench warrant can be issued for the tenant’s arrest and presentment to the next hearing. Once the tenant is arrested on FTA charges, the tenant may be held in custody until their arraignment and hearing. If bond is set, and the tenant cannot meet it, that tenant will remain in jail until their court hearing on the underlying charges. Finally, if the judge issues a fine against the tenant, and the tenant does not pay that fine, the tenant can also then be charged with “failure to pay” (FTP).

For example, in one case, the tenant “Charlotte Smith<sup>176</sup>” was charged with failure to vacate on October 26, 2017, with bond set at \$245.<sup>177</sup> She pled not guilty, and the matter was set for a hearing on February 7, 2018. When she did not appear for that hearing, the judge issued a bench warrant

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<sup>174</sup> ARK. CODE ANN. § 5-54-120 (West 2019).

<sup>175</sup> *Id.*

<sup>176</sup> Cabot Lonoke County Affidavit for Warrant of Arrest (2016, 2017, 2022), on file with the author.

<sup>177</sup> *Id.*

for her arrest and added an additional criminal charge for failure to appear. She was then served, arrested, and jailed on February 28, 2018, having her arraignment hearing on the jail docket on the same day. She was released pending trial on August 25, 2018.

On the trial date, she did not appear and yet another FTA warrant was issued. On October 15, 2019, she was served and again sent to jail until posting bond. On December 18, 2019, she pled guilty to contempt of court for failing to comply with a court order (FTC), receiving a sentence of 5 days in jail, suspended to pay the balance of fines. The total fines were \$860.00. Charlotte pled guilty and entered into a payment plan to pay the fines. She made regular payments of \$100 from January – October 2020, but she apparently did not pay off the balance. Most recently, on April 12, 2022, Charlotte was charged with contempt of court for failure to pay fines, another misdemeanor. An additional \$320.00 in court fees were added onto the balance.

This is an example of “charge stacking,” where a case that began with one low-level misdemeanor eventually snowballed into five separate criminal charges, with jail time and significant fines and fees. In this case, a failure to vacate case that began in October 2017 is still creating active criminal consequences for the tenant even years later.

In evaluating the data, I found several examples of tenants that ended up spending time in jail and paying high court fees, even though the failure to vacate statute does not currently allow for either. Most often, this was a result of additional charges for failure to appear or failure to

pay. If the tenant fails to appear, the defendant’s driver’s license may also be suspended, resulting in later charges of driving on a suspended license. These charges can result in additional criminal sentences, including imprisonment and high fines. Although failure to vacate itself may not allow these punishments, in practice, they can occur as other charges are added onto an underlying failure to vacate charge.

#### *6. No attorney*

Under the current version of the statute, tenants are not entitled to a public defender in failure to vacate cases. Public defenders can be assigned in any matter that involves the possibility of jail time.<sup>178</sup> Because failure to vacate is an unclassified misdemeanor, without specified jail time, defendants are not able to request or receive a public defender. In almost every failure to vacate case reviewed, the tenant is unrepresented. This means that the tenant does not have an advocate to protest potential mistreatment, inadequate evidence or misapplication of the law.

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<sup>178</sup> ARK. R. CRIM. P. 8.2(a) (2022).

### *7. Failure to Vacate Listed as Class B Misdemeanor*

In some areas of the state, failure to vacate is still listed as a Class B misdemeanor. As outlined in Section 2, above, “failure to vacate” was originally an unclassified misdemeanor, resulting in a fine. In 2001, the statute was amended to add a new provision, which made failure to vacate a Class B misdemeanor if the tenant did not pay rent into the court registry. This version of the statute faced several court challenges, and in 2017 the General Assembly amended the statute again, back to its original version. The 2017 amended statute no longer includes the provision making it a Class B misdemeanor if the tenant does not pay rent to the registry, and does not allow for jail time, only fines. The current statute is an “unclassified misdemeanor,” where the defendant is sentenced pursuant to the terms of the statute itself (here, fines of up to \$25 dollars per offense.)<sup>179</sup>

Nonetheless, failure to vacate cases are still listed as “Class B misdemeanors” in many areas. For example, the certified dockets of Cabot District Court always listed failure to vacate charges as Class B misdemeanors in cases extending into 2022.<sup>180</sup> So, for example, one certified docket states “Violator: 18-16-101, Level: Class B Misdemeanor, Violation Date: 8-30-22.”<sup>181</sup> In this case, the actual violation occurred in August 30, 2022, well after the statute was amended to make it an unclassified misdemeanor.

However, it is likely that the certified court dockets were not updated after the law changed. In this district, tenants who fail to appear for the hearing are charged with failure to appear, as a Class C misdemeanor (violation). Since FTAs are charged at the same level as the underlying crime, this indicates that, despite the certified court docket entry, failure to vacate cases are not actually being tried as a Class B misdemeanor.

In other districts, the court docket itself simply lists the failure to vacate charge, but the actual warrants for arrest list the violation as a Class B misdemeanor. For example, in Scott County, one tenant’s court docket lists the following: “Violation: 18-16-101 MB: Fail to Pay Rent – Refusal to Vacate Upon Notice. Violation Date: 02/14/22.” In this case, the failure to vacate violation occurred on February 14, 2022.<sup>182</sup>

The tenant failed to appear for the failure to vacate hearing and a warrant for his arrest was issued. The warrant of arrest states the following: “Warrant of Arrest Failure to Appear. It appearing that there are reasonable grounds for believing that (Defendant) has committed the following

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<sup>179</sup> ARK. CODE ANN. § 5-54-120(c)(6) (2019).

<sup>180</sup> Cabot Lonoce County, Ark. Affidavit for Warrant of Arrest (2016, 2017, 2022), on file with the author.

<sup>181</sup> *Id.*

<sup>182</sup> On file with the author.

offenses: 5-54-120(c)(4) (2015) Fail to Appear on Class B Misdemeanor (FTA) a Class B Misdemeanor. Violation Date: 6-APR-22, on the charges of: 18-16-101 Fail to pay rent, refusal to vacate upon notice, a Class B misdemeanor, Violation Date: 14-FEB-22.” The defendant’s bond was set at \$590.00. The defendant was served with the warrant and released on promise to appear at the next court date.<sup>183</sup>

So, according to this warrant of arrest, on April 22, 2022, the defendant committed the Class B Misdemeanor of Failure to Appear, by failing to attend a hearing on the underlying charge of “[f]ail to pay rent,” which is also listed as a Class B Misdemeanor.

However, by 2022, failure to vacate was no longer considered a Class B misdemeanor, and so failure to appear for the hearing should also not be considered a Class B misdemeanor either. However, in several counties, the warrants for arrest still routinely list both charges as a Class B misdemeanor.

Again, it is possible that the fields for the warrants have not been updated to show the current classification of failure to vacate matters. But, this still could potentially mislead the tenant about the nature of the charges they face, leading them to believe they face “Class B” misdemeanor, including 90 days jail and high fines. In addition, the Sheriff’s Department executing the warrant would also have no reason to doubt the warrant, believing the underlying charge is more serious than it actually is.

In this example, the court docket also listed the FTA violation as “5-54-120(c)(4), MB: Fail to Appear on Class B Misdemeanor (FTA), Violation Date 04/06/22,”<sup>184</sup> so the failure to appear is listed as a Class B misdemeanor on both the warrant and the court docket. In this case, both charges were dismissed at the later hearing. In these cases, there is typically no formal order, but the judge writes “case dismissed” or other disposition on the court docket printout.

This case is one example. However, in at least three counties, failure to vacate charges from 2022 are still routinely listed as “Class B misdemeanors” on either the arrest warrants or the court dockets.

Again, one explanation is likely that the fields have simply not been updated in the warrants and the court dockets. However, it also creates a possibility that tenants are actually still being charged with Class B Misdemeanors in some districts, in spite of the fact that the law has changed. Without having court transcripts, or complete court filings/records of judgement in many districts, it is difficult to be sure about what actually occurred during the hearings.

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<sup>183</sup> On file with the author.

<sup>184</sup> On file with the author.



However, the incorrect classification on both court dockets and warrants for arrest can cause confusion and misunderstandings for both tenants, law enforcement and court officials as well. And it can lead tenants to believe they face a Class B misdemeanor, when the current failure to vacate law does not actually allow that.

## CONCLUSION

### *A. Overall Results*

The failure to vacate statute has caused controversy since its very inception, with critics claiming it criminalizes debt and poverty, while advocates claim it offers a streamlined option for landlords to manage their properties. It has faced several constitutional challenges, resulting in its amendment in 2017. Despite all this, the failure to vacate statute is still a part of the Arkansas code, and it is actively enforced in many areas of the state. Just how actively it is enforced, and how it is being enforced, has remained opaque.

This project sought to look behind the curtain, looking at data at a state, county, and local level to ascertain more about how the failure to vacate statute is being enforced. Data was gathered from the state Administrative Office of Courts and State Police, as well as surveying the law enforcement and district courts in 25 different counties.

Overall, this data reveals several important issues with failure to vacate charges. First, in contrast to some reports, the statute is clearly being actively enforced across the state. This is not an obsolete or anachronistic statute, but one that is being used against thousands of tenants throughout the state.

However, that enforcement is vastly uneven in different areas. As detailed above, some counties refuse to bring failure to vacate cases at all, while other counties still enforce it heavily. Even within the same county, enforcement rates can vary from one city to another. And even where counties enforce the statute, some counties rarely bring such charges, and some counties bring a proportionally large number of cases. All of these differences mean that the law is essentially different in different areas of the state. Tenants in one county will never face these charges, in another area rarely, and in yet another area tenants commonly face failure to vacate charges. This vastly uneven enforcement can make it difficult for tenants to know where or how they will be prosecuted on failure to vacate charges, and leads to confusion on all levels as to where and when such charges are brought. The unequal enforcement levels can also lend support to arguments that the statute violates the Equal Protection Clause, by denying equal treatment under the law to tenants across the state, and creating a disparate impact on tenants in certain areas.

*B. Final Recommendations*

Given the uneven and unequal treatment of tenants across the state, the lack of notice in many areas, and the other problematic issues with the statute, I believe that the statute should be repealed. Landlords also have the option to pursue civil eviction, a process that is less problematic, and which also allows landlords to receive damages and an order for possession.

Even if the statute is not repealed, the data suggests that more procedures are necessary to safeguard tenant's rights and safety. Standardization of the process and forms across the state could lead to less issues. For example, instead of landlords making their own "notices to vacate," a standardized "10-day notice" form could be used instead. Landlord affidavits can be standardized to include a statement affirming that the tenant does not live in HUD-subsidized housing.

Finally, the failure to vacate statute could be amended to require notices to warn the tenant that they will face criminal charges if they do not move out. Standardization of these notices and processes would help to avoid some of the most troubling aspects of the current enforcement practices.