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Arkansas Code sec. 18-16-101: A Challenge to the Constitutionality and Desireability of Arkansas' Criminal Eviction Statute

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Allow me to introduce you to the case of Terrence Tenant. Mr. Tenant is a low-income tenant in an apartment located somewhere in the state of Arkansas. As is not uncommon in low-income housing, certain repairs to his apartment are necessary or at least desirable. Mr. Tenant therefore contacts his landlord, and during the course of the phone call, an agreement is reached to the effect that the landlord will accept the reasonable value of the repairs in lieu of the next month's rent. Mr. Tenant thereafter spends what would have otherwise been his rent money making the repairs, assuming that this will offset the obligation to make the usual monthly rent payment. After this has been done, the landlord either decides that the repairs are not worth a full month's rent, or that the quality of the repairs is substandard, or else the landlord fails to remember the terms of the oral agreement. The landlord therefore asks Mr. Tenant for the rent, which he refuses to pay. The landlord thereupon serves Mr. Tenant with written notice to vacate the premises within 10 days. What should happen next if Mr. Tenant does not want to leave his newly repaired apartment?

While you are thinking about Mr. Tenant's situation, consider also the case of Ruth Renter, who contacts Harriet Homeowner in the summer of 2002 about renting a house. Suppose that there is an oral understanding that Ms. Renter will be attempting to get HUD assistance for rent. In addition, assume that there are a number of problems with this home. Nonetheless, without a lease and without any specific agreement about the amount of rent to be paid, suppose that Ms. Renter moves into the house. For the next three months, there are unsuccessful attempts to obtain HUD assistance to make the needed repairs. No rent is paid. At the end of this three month period, Ms. Renter is served with a 10 day notice to vacate. Within the 10 day notice period, Ms. Renter moves out, leaving a few large items which she cannot easily move in the 10 day time period. The next month, Ms. Renter is served, at her new address, with a citation to appear in municipal court for failure to vacate. What should happen to her?

These may seem like hypothetical situations which bear small resemblance to the "usual" case where a landlord is seeking to get rid of a tenant who has not paid his or her rent. In fact, they may not be typical–and I make no assertion here that they are. Unfortunately, they are not purely hypothetical, either. As will be developed in greater detail in the following pages,[1] both of these fact sit-

1. For a discussion of the real-world facts on which the Terrence Tenant hypothetical is based, see *infra* notes 34-35 and accompanying text; for a discussion of the facts on which the Ruth Renter scenario was derived, see *infra* notes 42-43 and accompanying text.

uations come from real cases presented to Legal Aid of Arkansas, the legal services office serving most of the northern and northeastern parts of the state.

In both situations, the answer to my question involves, surprisingly enough, the criminal justice system. In every other state, landlords seeking to evict either Terrence or Ruth would need to initiate a civil proceeding. This would entail filing fees and invoke the usual rules of civil procedure. In most states, statutes provide for expedited procedures, in an effort to minimize the burden on landlords who are trying to regain possession of their property. Arkansas alone continues to criminalize the actions of non-paying tenants, and Arkansas alone allows landlords to resort to the criminal justice system to enforce their claims against tenants.[2]

This may not seem like such a tremendous injustice in the case of a tenant who has no good faith claim or defense, but the criminal justice system is a blunt sword. Landlords routinely invoke the criminal justice system to evict tenants,[3] and they do so in cases where the tenants have at least facially valid defenses to eviction proceedings as well as in cases where they do not.

In order to understand the procedures which are the subject of this note, it is necessary to consider the terms of the applicable statute. Arkansas has criminalized the non-payment of rent and failure to vacate for more than a century, and the statute in question can trace its origins back to 1901. For most of the past several decades, the statute essentially set forth the following rules for landlords who wanted to evict tenants who failed to pay their rent:[4]

> 1) A landlord could give 10 days notice to a tenant to vacate if the tenant refused or failed to pay any rent when due.
> 2) If the tenant willfully refused to vacate the premises within that time period, the tenant could be charged with and found guilty of a misdemeanor
> 3) The fine was to be in an amount between $1.00 and $25.00 for "each offense," which was defined as being each day that the tenant willfully and unnecessarily held over after expiration of the 10-day notice period.

In 2001, that Arkansas Legislature "updated" the statutory provision,[5] making a few minor corrections and toughening some of the sanctions against holdover tenants. In addition to fixing certain grammatical errors and making the statute gender-neutral, the fine was changed from a variable amount of not less than $1.00 or more than

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2. The statute which this note will address is codified at ARK. CODE. ANN. § 18-16-101. The history of this provision is listed as follows: Acts 1901, No. 122, § 1, p. 193; C. & M. Dig., § 6569; Acts 1937, No. 129, § 1; Pope's Dig., § 8599; A.S.A. 1947, § 50-523; Acts 2001, No. 1733, § 1.

3. In *Munson v. Gilliam*, 543 F.2d 48 (1976), the Eighth Circuit Court of Appeals took notice of a stipulation that had been filed in the district court which indicated that in a six month period preceding the filing, "approximately 858 ten day notices" had been issued. *Id.* at 51, n.10. The district court had also specifically observed that "the statue was used primarily to evict tenants and thereby avoid the use of civil processes which afford the tenant prior notice and hearing." *Id.* at 53.

4. Prior to the most recent round of amendments, the statute in question read as follows:

> § 18-16-101 Failure to pay rent — Refusal to vacate upon notice — Penalty.
> Any person who shall rent any dwelling house or other building or any land situated in the State of Arkansas and who shall refuse or fail to pay the rent therefor when due according to contract shall at once forfeit all right to longer occupy the dwelling house or other building or land. If, after ten (10) days' notice in writing shall have been given by the landlord or his agent or attorney to the tenant to vacate the dwelling house or other building or land, the tenant shall. Upon conviction before any justice of the peace or other court of competent jurisdiction in the county where the premises are situated, the tenant shall be fined in any sum not less than one dollar ($1.00) nor more than twenty-five dollars ($25.00) for each offense. Each day the tenant shall willfully and unnecessarily hold the dwelling house or other building or land after the expiration of notice to vacate shall constitute a separate offense.

ARK. CODE. ANN. § 18-16-101 (prior to 2001 amendments).

5. Acts of 2001, Ark. Act No. 1773, now codified at ARK. CODE. ANN. § 18-16-101.

$25.00 per day to a flat $25.00 per day, and a new subsection was added which essentially results in the following set of rules:[6]

1. As was the case before the 2001 amendments, a tenant who refuses to pay rent, and refuses to vacate may, upon conviction, be fined $25.00 per day for the period during which the tenant continues to occupy the premises. The statute no longer permits the court to impose a smaller fine.
2. A tenant has the right to challenge any suit seeking to impose fines for holding over by appearing in court and entering a "not guilty" plea. However, the statute now requires the court to impose upon such a tenant the obligation of depositing into court an amount equal to all of the rent which is allegedly due.
3. If the tenant is found not guilty, the rental payment is to be returned to the tenant, but if the tenant is found guilty, the rental payment is to be turned over to the landlord. The amount paid into court is not intended to benefit the court, regardless of whether or not the tenant is found guilty.
4. There is the additional possibility of conviction for a class B misdemeanor if the tenant is found guilty and has not paid the required rental into the registry of the court. The statute had not previously specified the class of misdemeanor involved.[7]

This note suggests that the statute as written and as it is being applied is unconstitutional, and raises in addition serious issues of fundamental fairness which should lead to its repeal. For ease of reference, this note will consistently refer to this provision as the Arkansas criminal eviction statute.

The remaining sections of this note essentially make the following arguments:

1. Due process cannot sanction the use of the criminal justice system to compel a tenant to pay amounts into court before any hearing or other procedural protections are offered.
2. It is unconstitutional to condition a defendant's right to maintain a defense to a criminal charge on the ability and willingness to pay amounts into court for the benefit of private parties.
3. Regardless of the ultimate constitutionality of the Arkansas criminal eviction

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6. The following language appears at ARK. CODE ANN. § 18-16-101(c):

> (1) Any tenant charged with refusal to vacate upon notice who enters a plea of not guilty to the charge of refusal to vacate upon notice and who continues to inhabit the premises after notice to vacate pursuant to subsection (b) of this section shall be required to deposit into the registry of the court a sum equal to the amount of rent due on the premises. The rental payments shall continue to be paid into the registry of the court during the pendency of the proceedings in accor dance with the rental agreement between the landlord and the tenant, whether the agreement is written or oral.
> (2)(A) If the tenant is found not guilty of refusal to vacate upon notice, the rental payments shall be returned to the tenant.
> (B) If the tenant is found guilty of refusal to vacate upon notice, the rental payment paid into the registry of the court shall be paid over to the landlord by the court clerk.
> (3) Any tenant who pleads guilty or nolo contendere to or is found guilty of refusal to vacate upon notice and has not paid the required rental payments into the registry of the court shall be guilty of a Class B misdemeanor.

7. The earlier version of the statute did not specify that the misdemeanor would be Class B. This might have been significant, because Class B misdemeanors carry the possibility of a jail sentence not to exceed 90 days. ARK. CODE ANN. § 5-4-401(b)(2), whereas "[f]or an unclassified misdemeanor, the sentence shall be in accordance with the limitations of the statute defining the misdemeanor." ARK . CODE ANN. § 5-4-401(b)(4). However, ARK . CODE ANN. § 5-1-108(b) provides that regardless of any designation of an offense as a particular class of violation in the statute defining the offense, the "offense is a violation for purposes of this code if the statute defining the offense provides that no sentence other than a fine, or fine or forfeiture, or civil penalty is authorized upon conviction." The Arkansas Supreme Court has held already held these provisions, taken together, mean that ARK. CODE ANN. § 8-16-101 does not provide for imposition of any jail time as part of the authorized sentence. Duhon v. State, 299 Ark. 503, 774 S.W.2d 830 (1989). While *Duhon* was decided under the old version of the Arkansas criminal eviction statute, its rationale should be equally applicable today, notwithstanding the current designation of the violation as a class B misdemeanor.

> statute, it is an undesirable and unwise allocation of power between landlords and tenants, and places Arkansas sadly out of step with the rest of the nation.

Each of these points will be considered in turn.

First, what are the constitutional problems with allowing landlords to use the criminal justice system to enforce an alleged obligation to pay rent and vacate rented premises? The Arkansas criminal eviction statute, as now written, contemplates the use of the criminal justice system to enforce the obligation of tenants to vacate demised premises upon 10 days' notice, and further to force tenants to pay amounts alleged by their landlords to be due into court. Tenants must pay the amount alleged by the landlord to be owed into court before they are entitled to any hearing, and before any procedural protections are invoked on their behalf. Normally, when a creditor claims to be owed a sum of money, federal and state government authorities decline to employ or offer procedures to compel payment of such amounts, until after certain procedural protections have been followed. This is the essence of procedural due process.

Some of the country's foremost experts on constitutional rights and liberties have opined that "[w]hen a creditor uses government enforced procedures to take the property of his alleged debtor, the debtor-defendant is deprived of a constitutionally significant interest in property."[8] A full-blown trial is not required, but "[w]hen the government assists the creditor prior to trial, it must establish certain procedures to safeguard the interests of the alleged debtor."[9]

In *Sniadach v. Family Finance Corp,*[10] the Supreme Court held that it was impermissible to garnish a portion of wages absent either a prior hearing for the debtor or an extraordinary emergency. The Court has also concluded that, absent exigent circumstances, an individual is entitled to a hearing prior to the time that a court issues any order that would constitute pre- trial attachment. In *Connecticut v. Doehr,*[11] the Supreme Court struck down a state statute authorizing prejudgment attachment of real estate without notice and hearing, even though the statute conditioned issuance of attachment upon a showing that the person seeking the order had filed a court action and that there were reasonable grounds to believe that the plaintiff would likely prevail. The right to a hearing after the attachment was held to be insufficient to safeguard the rights of the defendant. Similarly, in *Fuentes v. Shevin,*[12] the court held that there must be a prior hearing in the event of pre-judgment attachments or replevin, as in the case of wage garnishments.

The Arkansas criminal eviction statute does not, of course, give tenants the right to a hearing before the court orders them to post bond in the amount which the landlord alleges to be due. The statute neither contemplates nor appears to permit the court to impose upon landlords the obligation to show the existence of any exigent circumstances or any other reason why a post-hearing enforcement proceeding would be insufficient, if the landlords' claims are ultimately vindicated.

This is not to suggest that a hearing is required in every case. In fact, the Supreme Court has itself indicated that other procedural protections could suffice. For example, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.,*[13] although the Supreme Court stuck down the challenged pre-judgment garnishment statute, it also said in dicta that no hearing would have been necessary if the statute had satisfied certain other criteria. In order to pass constitutional muster: (1) the creditor should have been required to post bond to safeguard the interest of the debtor; (2) the creditor or someone with personal knowledge of the facts should have

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8. RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW—SUBSTANCE & PROCEDURE § 17.9(b) (updated by 2002 pocketpart)

9. *Id.*

10. 395 U.S. 337 (1969).

11. 501 U.S.1 (1991).

12. 407 U.S. 67 (1972), *rehearing denied,* 409 U.S. 902 (1972).

13. 419 U.S. 601 (1975).

been required to file an affidavit setting out a prima facie claim for prejudgment attachment; (3) a neutral magistrate should have been required to determine whether the affidavit was sufficient before issuing the attachment or replevin; and (4) the statute should have included a provision for a reasonably prompt post-attachment hearing.

There is nothing akin to any of these requirements in the portion of the Arkansas criminal eviction statute which requires courts to order tenants to post a bond whenever a landlord claims that rent has not been paid. Under the Arkansas statute, the landlord does not have to post bond or provide any other assurance that the tenant's damages or expenses will be repaid if the tenant is eventually vindicated; all the landlord has to do under the statute is give 10 days' written notice to vacate. There is no requirement of an affidavit making out a prima facie case of liability, and no neutral magistrate tests the validity of any such document. The timing of the eventual trial is not set in the statute. The Arkansas statute therefore fails to meet any of the Supreme Court's suggested requirements for the use of judicially sanctioned procedures to take a debtor's property before the debtor is given the right to be heard.

The Supreme Court has never hinted that it is permissible to use the criminal justice system to attach property of a debtor, much less without any prior hearing. All of the existing Supreme Court cases deal with civil proceedings, where both parties are on a level playing field. In civil litigation, both sides have to pay their attorney fees. Both sides can bring claims or counter-claims. The rules of civil procedure, including access to liberal discovery, apply equally to all parties. In the case of the Arkansas criminal eviction statute, only the defendant has attorney fees and costs; the landlord gets to have his case presented by the prosecutor. There is no procedure for bringing civil counterclaims in a criminal proceeding, and while the tenant might be able to file a separate civil suit, this would mean that the defendant alone would have filing fees as well.

This is not to suggest that any of these authorities are directly on point, and distinctions can be drawn. For example, the Arkansas criminal eviction statute does not pay over amounts alleged to be due to the landlord before the hearing; rather amounts are paid into court. In the case of pre-hearing garnishment, attachment, or replevin, the process directly and immediately benefits the creditor. However, in all such cases, there are procedures available to a debtor who is being threatened with the wrongful deprivation of property. Due process protects against wrongful loss by the debtor, not against wrongful gain by a creditor. Because a debtor who is forced to pay amounts into court loses just as much as when the debtor is forced to turn over property directly to the creditor, the logic of cases requiring a hearing prior to garnishment, attachment or replevin as a matter of due process should apply to the procedures imposed by the Arkansas criminal eviction statute.

Of course it is not surprising that the U.S. Supreme Court has never addressed the constitutionality of a regime such as the one contemplated by the Arkansas statute. This is rather easily explained by the fact that the Arkansas statute is utterly unique. There is simply no equivalent legislation outside of our state imposing requirements such as those embodied in the Arkansas criminal eviction statute.

The Arkansas Supreme Court, however, twice found the old Arkansas criminal eviction statute to be constitutional.[14] It is worth emphasizing that both of these decisions involved the statute as it appeared before the 2001 amendments, and thus did not consider the constitutionality of requiring a defendant to pay amounts alleged to be owed into court for the benefit of the landlord.

In 1968, in *Poole v. State*,[15] the Arkansas Supreme Court upheld the then- existing criminal eviction statute as a valid exercise of police power. After noting that the statutory provisions in question had "been the law in this state since 1901," and pointing out that "its constitutionality has never been judicially questioned," the court apparently concluded that a hold-over tenant was the legal equivalent of a trespasser.[16] Because "the public health, safety and welfare is always threatened when a person wrongfully trespasses upon another' person's property" the court found it per-

14. Poole v. State, 244 Ark. 1222, 428 S.W.2d 628 (1968); Duhon v. State, 299 Ark. 503, 774 S.W.2d 830(1989).

15. 244 Ark. 1222, 428 S.W.2d 628 (1968).

16. *Id.* at 1225, 428 S.W.2d at 630.

missible for the state to use its police power to enforce the eviction of such persons: "The use of police power in dealing with unlawful trespass is not so unreasonable as to amount to a violation of substantive due process, and ten days notice to vacate premises one holds wrongfully is more than liberal in keeping with our standards of procedural due process."[17]

In 1989, in *Duhon v. State*,[18] the Arkansas Supreme Court held that the Arkansas statute satisfied procedural due process because it "requires a ten day notice and a hearing to determine whether the party charged 'wilfully refused' to vacate."[19] (Note that at this time, the tenant was not required to pay any amounts into court before the hearing or as a condition to maintaining a defense to the demand to vacate.) The court did also rejected application of the rules and principles that had been announced in *Gorman v. Ratliff*,[20] in which the Arkansas Supreme Court had outlawed the use of self-help to regain property. The only explanation given by the majority in *Duhon* was that the court did not "feel" that this authority overcame "the presumption of constitutionality."[21]

The majority opinion in *Duhon* was followed by a blistering dissent by Justice Purtle.[22] After noting that Arkansas was even at that point "the only state in the nation which imposes criminal sanctions on a person who does not pay his rent on time,"[23] Justice Purtle expressed disappointment upon finding out that *Gormon* was not to be interpreted as evidence that "we were joining the rest of the country" in requiring a more equitable relationship between landlord and tenant."[24]

In *Gorman*, the Arkansas Supreme Court had appeared to recognize and hold that a holdover tenant was something other than a mere trespasser. In that case, the court concluded that a landlord was not entitled to utilize self-help to evict a tenant, even one holding over wrongfully. In the words of the court, the tenant was entitled to possession "until the right to possession could be adjudicated" and landlords were compelled "to the more pacific course of suits in court, where the weak and strong stand upon equal terms."[25] The rights of tenants were recognized as sufficient to require "a landlord, otherwise entitled to possession, upon refusal of the tenant to surrender the leased premises to 'resort to the remedy given by the law to secure it.'"[26]

This is not a unique viewpoint. As noted by Justice Purtle in his dissent in *Duhon*, "[p]ractically all jurisdictions have recognized that a renter or lessee has a property interest in the premises. A holdover tenant, whether by written lease or oral agreement, is no longer considered a trespasser by the enlightened courts of the nation."[27]

Nonetheless, this line of reasoning was not sufficient to convince the majority of the Arkansas

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17. *Id.* at 1226, 428 S.W.2d at 631.

18. 299 Ark. 503, 774 S.W.2d 830 (1989).

19. Id. at 508-09, 774 S.W.2d at 834.

20. 289 Ark. 332, 712 S.W.2d 888 (1986).

21. *Duhon*, 299 Ark. at 511, 774 S.W.2d at 835.

22. *Id. at* 512, 774 S.W. 2d at, 836 (1989) (Purtle, dissenting).

23. *Id.*

24. *Id.* He then concluded that he had been mistaken in this belief. In Justice Purtle's words, "[t]he majority has, with all the speed of a crawfish, backed into the 19th century." *Id*

25. Gorman v. Ratliff, 289 Ark. 332, 337, 712 S.W.2d 888, 890 (1986), citing *Vinson v. Flynn*, 64 Ark. 453, 43 S.W. 146, 46 S.W. 186 (1897), quoting *Littell v. Grady*, 38 Ark. 584.

26. *Gorman*, 289 Ark. at 337, 712 S.W.2d at 890 (1986).

27. *Duhon*, 299 Ark. at 513, 774 S.W.2d at 837 (Purtle, dissenting). *Accord* Green v. Lindsey, 456 U.S. 444 (1982) (holding that the right of tenants to continue residence is a significant property interest).

Supreme Court in *Duhon*; it should, however, prevail when the statute as currently written is considered. The Arkansas criminal eviction statute which the *Duhon* court upheld specifically required a hearing before the tenant was compelled to pay anything into court; this hearing was the cornerstone of the *Duhon* court's finding that the Arkansas regime satisfied procedural due process.[28] This was changed in 2001 with the most recent amendments to the statute. Now a tenant wishing to enter a not guilty plea is compelled to pay amounts alleged to be due into court prior to any hearing whatsoever. Since the existence of the right to a hearing was central to the *Duhon* court's conclusion that the Arkansas criminal eviction statute was constitutional, it seems relatively clear that the amendment will have placed the statute as currently written outside the result and rationale of that opinion. This would suggest that the statute which we now have in place is in fact unconstitutional.

The second problem with the statute addressed by this note is somewhat different: it is based on the fact that the Arkansas criminal eviction statute conditions a defendant's right to maintain a defense to a criminal charge upon the ability and willingness to pay amounts into court for the benefit of a private party (the landlord). This goes beyond involving the criminal justice system in a quintessentially civil proceeding; it goes beyond a government sanctioned process for depriving a debtor of property before a hearing. The current Arkansas criminal eviction statute implicates the right of the accused to defend himself or herself, and conditions it on ability and willingness to pay amounts into court that a private party merely alleges to be owed to him or her personally.

The United States Constitution guarantees that no person may be deprived of life, liberty or property, without due process of law.[29] It hardly bears repeating that in the context of a criminal proceeding, due process generally guarantees criminal defendants the right to a full trial in conformity with many constitutional safeguards, unless the defendant knowingly and voluntarily waives those rights.[30] The current Arkansas criminal eviction statute would appear to be squarely at odds with this basic precept by requiring that a tenant who wishes to enter a "not guilty" plea to the criminal charge of "failure to vacate" must pay the full amount of allegedly due rent into court. Surely modern notions of due process cannot countenance rules which would impose upon a criminal defendant the obligation to pay amounts into court for the benefit of a private party prior to any determination of guilt, and as a precondition to being allowed to maintain a defense to the charges. Yet this is exactly what the current Arkansas criminal eviction statute purports to do.

Perhaps the nature of this objection can be more clearly understood by returning the to hypothetical situations which appeared at the outset of this note. If you will recall, I first offered the case of Terrence Tenant, a low-income tenant in an apartment somewhere in Arkansas. In my scenario, Mr. Tennant had contacted his landlord about some needed repairs, and an oral agreement to accept the repairs in lieu of one month's rent had been reached. Although the repairs were made, the landlord subsequently demanded the rent; Mr. Tennant declined to pay and was served with 10 days' notice to vacate. I originally asked what would happen next.

In most cases, assuming the landlord and tenant fail to reach an out-of-court agreement, the landlord is likely to go to the local prosecutor and have Mr. Tenant charged with the crime of "failure to vacate" instead of retaining a lawyer and paying the court costs which would be necessary to institute a civil suit. If Mr. Tenant wants to enter a plea of not guilty, the statute requires the court to impose upon him the obligation to pay the amount of rent alleged to be due into court. The court has no discretion to consider whether the amount alleged to be due is in fact likely to be owed, or whether there are other equities which should affect the amount to be paid into court.

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28. *Duhon*, 299 Ark. at 508-09, 774 S.W.2d at 834 (1989).

29. U.S. CONST. AMEND. XIV.

30. *See generally* California v. Trombetta, 467 U.S. 479 (1984), endorsing the principle that due process requires that criminal proceedings comply with the concept of fundamental fairness. *See also* RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW— SUBSTANCE & PROCEDURE § 17.9 (updated by 2002 pocket part), for a more detailed explanation of what these rights entail.

Admittedly, in my hypothetical we know that Mr. Tenant has a reasonable basis for refusing to pay the rent and for insisting that he has the right to remain in residence. This may be the case in a relatively small number of refusal to vacate cases. Nonetheless, the statute as written would appear to condition his right to maintain a defense to the charge of failure to vacate upon payment of the rent which is alleged due. If we assume that the accused is innocent until proven guilty, how can the statute be upheld against a due process challenge?

Perhaps one might seek to draw a parallel between the type of payment or bond required under the Arkansas criminal eviction statute and the type of bond required when a court imposes a requirement of bail upon a criminal defendant. The authority of courts to impose bail is, after all, a well-accepted part of our criminal justice system. However, a more detailed comparison between bail and the type of payment required under the Arkansas criminal eviction statute reveals why this line of reasoning should fail.

Criminal courts routinely set bail wherever there is a risk that further criminal acts would be committed before trial can be arranged,[31] or where there is evidence that the defendant is a danger to society or is a significant flight risk.[32] However, in every case where bail is imposed, it is the broader interests of society that are being protected. Thus, the courts have discretion to consider the magnitude of the offense or likelihood of flight or other equities when the amount of bail is set. Moreover, they are not allowed to set bail at excessively high amounts, and the accused has the right to argue about whether the amount being set is in fact appropriate. In addition, if bail is forfeited, the amounts are retained by the courts, not by private parties.

This is all in stark contrast to the type of deposit required under the Arkansas criminal eviction statute. First, the statute does not provide for any judicial determination of whether the defendant is a flight risk, a danger to others or to him- or herself, or likely to commit any other criminal offense. In fact, the statute appears to make payment of the bond mandatory, leaving no room for judicial discretion in deciding whether to impose the obligation to tender such amounts into court and no room for the defendant to contest the appropriateness of the amount claimed. Secondly, the amount of the bond is not set by the court as being necessary or reasonable under the circumstances; it is set based upon the allegations of a private party–the landlord. There is no room in the statute for the court to consider the ability of the defendant to make the payment, or even to argue whether the amount claimed is accurate. Third, the deposit is clearly intended to benefit a private party—the landlord. It is the landlord alone who is protected, not society as a whole. Finally, the apparent consequence of non-payment appears to be significantly worse than non-payment of bail. As written, the Arkansas Code conditions the defendant's right to defend against the charges on the payment of amounts allegedly owed. If a criminal defendant cannot make bail, he or she faces pre-trial detention, *not* the loss of the right to maintain his or her innocence. [33]

For readers who are by now convinced that this is another instance of an ivory-tower professor imagining a parade of horribles which would never happen in the real world, consider Case no.1-02-001263, which was brought in the district court of Springdale, Arkansas in early 2002. The defendant, whose name will not be mentioned here even though the case is a matter of public record, was charged with failure to vacate. On March 27, 2002, he appeared and entered a plea of not guilty,[34] at which time the court ordered him to pay a bond of $425 (the amount of rent which was allegedly unpaid). The defendant was given until 4:30 p.m. of that same day to pay the bond; he was informed that if he failed to do so, a warrant was to be issued for his arrest. I became involved in the case as a volunteer for Legal Aid of Arkansas, and I helped write the brief which argued that this process violated the defendant's constitutional rights.

31. Schall v. Martin, 467 U.S. 253 (1984).

32. U.S. v. Salerno, 481 U.S. 739 (1987).

33. The difference between pre-trial detention and loss of the right to defend is obvious.

34. His defense, not coincidentally, was essentially the same as that raised by my fictitious Terrence Tenant, discussed *supra*.

It was my position then, and it continues to be my belief, that the process used by the court unconstitutionally deprived the defendant in that case of his rights to due process. The requirement that the defendant had to pay into court the rent alleged to be due in order to maintain his defense meant that his right to trial turned on his ability and willingness to pay amounts claimed to be owed, before any determination of liability was made. The potential consequences of this would have been staggering if this had been a civil proceeding, as we would normally expect both parties to have equal access to the courts rather than conditioning a defendant's access to a pre-hearing deposit. In this case, the process was even more outrageous, as the defendant's right to defend against *a criminal prosecution* appears to have been conditioned on his payment into court amounts that had not at that time been proven to be owing, but were merely claimed to be due.[35] In addition, the defendant was threatened with immediate incarceration if he did not post the bond. It is hardly surprising then that the tenant simply gave up, and vacated the premises, even though he would have liked to have had his day in court to argue that he had in effect already paid his rent by making agreed-upon repairs. (It is also worth noting that his right to initiate a separate civil action is not a satisfactory alternative to a right to defend in the criminal proceeding. First, the truth is that this man had no money for attorneys' fees or court costs–hence the involvement of Legal Aid in the criminal eviction case. Moreover, a civil proceeding would have been heard long after the criminal proceeding was through.)

The Supreme Court has clearly and unambiguously held that a criminal sentence may only be imposed after a finding of guilt beyond a reasonable doubt.[36] The Arkansas criminal eviction statute comes distressingly close to doing exactly that. While the bond itself does not seem to be the equivalent of a criminal sentence, it is difficult to view the threatened incarceration for failure to pay as anything else. It is clearly not the equivalent of pre-trial incarceration for failure to make bail, as none of the determinations appropriate to such treatment are required or even allowed.

Finally, regardless of whether a court ever determines that the Arkansas criminal eviction statute is unconstitutional, there are significant public policy interests which suggest that the statute as currently written represents an unwise and undesirable allocation of rights between landlords and tenants in this state. In essence, this statute puts us at odds with every other state, and makes us look particularly unenlightened. The truth is that there are other procedures available to protect landlords' rights that would better serve the interests of justice in a fair and equitable society.

The Arkansas criminal eviction statute seems profoundly unfair on a number of counts. First, it seems unfair to single out landlords for the special and unique privilege of having debts which they claim as due and owing enforced at the expense of taxpayers through the criminal justice system. Not only does it convey a special privilege on landlords without any corresponding public policy justification, it also imposes an additional expense and burden on the criminal justice system. In addition, it seems unfair to expose tenants who merely wish to contest their liability for rent to the burden, expense, embarrassment and pressures of a criminal proceeding, where they have all the expenses of paying for legal counsel which the landlord can escape, without the protections of being able to raise counterclaims or use the rules of civil procedure to enable them to conduct discovery. Finally, it seems even more profoundly unfair to have a statute which purports to limit tenants' rights to contest criminal charges on their ability and willingness to pay amounts alleged to be due from them into court.

As a former (and current) landlord, I am cognizant of the frustrations of having tenants who do not pay the agreed upon rent and/or who fail to treat the rented property with any reasonable level of respect. I can understand the problems posed by a tenant who refuses to leave. This does not, however, provide a sufficient policy justification for treating this situation as so different from similar problems encountered by other kinds of creditors that our criminal justice system should be involved.

35. In point of fact, the defendant in this case was not able to post bond, and so was forced to vacate rather than facing the risk of criminal conviction. At this point, it appears that the City of Springdale dismissed the criminal charge.

36. *See* Mullaney v. Wilbur, 421 U.S. 684 (1975); Jackson v. Virginia, 443 U.S. 307 (1979).

Landlords in this state are already entitled to rely on special, expedited procedures to evict tenants who are no longer in lawful possession after having breached an obligation to pay rent.[37] Once summons, a complaint and notice seeking a writ of possession are served on a tenant, the tenant has five business days' to respond. If he does not respond within that very brief period of time, the circuit court clerk is required to immediately issue a writ directed to the sheriff of the county or the police chief of the city commanding the tenant to vacate without delay. If the tenant does respond, the statute provides for a hearing at which the landlord bears the burden of establishing a prima facie case, but at which the tenant also has the right to present evidence. If the court finds that the landlord has made a prima facie case and is likely to win at a full hearing on the merits, the writ of possession is to issue unless the tenant pays reasonable security in an amount set by the court.

These procedures are designed to give landlords an expeditious alternative to the traditional civil action, which may mean a delay of several months or longer before a trial is held. The process contemplated by this statute is relatively quick and reasonably minimizes the burden on landlords without unfairly prejudicing tenants or sacrificing tenants' rights. This ought to be the usual process in Arkansas, as it is in many other states.[38]

The difference between this process and that which is currently employed can probably be seen most clearly by returning to the second hypothetical situation with which I began this note. Recall that this situation involved Ruth Renter, who had contacted Harriet Homeowner about renting a house from her. It was understood that Ms. Renter would be seeking HUD assistance, which is conditioned on the premises being in a satisfactory state of repair. For three months, Ms. Renter lived in the premises, waiting on the repairs. There was no lease during this period of time, and no rent was paid. At the end of this three month period, Ms. Renter was served with a 10 day notice to vacate. Within that period, she did in fact move out, but she left behind a few large items which she could not easily move in the 10 day time period. The next month, Ms. Renter was served, at her new address, with a citation to appear in municipal court for failure to vacate.

My original recitation of the hypothetical ended here. Assume now that Ms. Renter appears in municipal court and is found "guilty" of the crime of failure to vacate. In addition, the court imposes a fine which includes a calculation of "restitution" owed by the defendant to the landlord, in the total amount alleged by the landlord to be due. This penalty is backed up by the requirement that if the tenant does not immediately pay said amount, she is to be committed to and imprisoned in the County jail for a period not to exceed one day in jail for each $10 of the fine and costs.

Is this a proper reading of the statute? The answer is clearly no. At first blush, it might be possible to assume that because Ms. Renter has left behind some personal property, she had not fully vacated the premises, and thus she would appear to be in violation of the statute. However, Arkansas has a statute on point which should lead to a contrary result. The applicable statutory provision reads as follows:

> Upon the voluntary or involuntary termination of any lease agreement, all property

37. ARK. CODE ANN. § 18-60-304, defines unlawful detainer to include situations where a tenant fails to pay rent when due, and then refuses to vacate upon three days' notice to quit. Section 18-60-307(a) provides that the party entitled to possession may file a complaint and affidavit stating the entitlement to possession, and the court is to issue a summons to be served by the county sheriff and a notice of intention to issue a write of possession. Subsection (b) gives the tenant five business days in which to object in writing to the writ, or it will issue. If a written objection is made in a timely fashion, the court sets the matter for hearing. Subsections (c) and (d) provide that the landlord is required to make a prima facie showing of entitlement to possession and the tenant is allowed to rebut any evidence presented. If the court finds, after hearing all the evidence presented, that the landlord is likely to succeed on the merits at a full hearing, and provides adequate security, the court shall issue a write of possession. On the other hand, subsection (e) provides that "(i)f the defendant desires to retain possession of the property, the court shall allow the retention upon the defendant providing, within five (5) days of issuance of the writ of possession, adequate security as determined by the court."

38. It has been reported that "[a] summary proceeding for eviction exists in every state." Mary B. Spector, Tenants' Rights, Procedural Wrongs: The Summary Eviction and The Needs for Reform, 46 Wayne L. Rev. 135 (2000). The same source details numerous state initiatives geared at protecting tenants' rights, many of which go far further than the limited changes proposed here.

> left in and about the premises by the lessee shall be considered abandoned and may be disposed of by the lessor as the lessor shall see fit without recourse by the lessee. All property placed on the premises by the tenant or lessee is subjected to a lien in favor of the lessor for the payment of all sums agreed to be paid by the lessee.[39]

Moreover, the Arkansas Court of Appeals has found that the use of the word "shall" in this statute is mandatory and *requires* that property left in and about leased premises be considered abandoned and subject to whatever disposition made by the landlord.[40] Notice to the landlord that the tenant is moving, or intends to abandon the property, is not necessary.[41] Logically, this means that any property left behind by Ms. Renter after she has physically moved to another address must be treated as abandoned to the landlord. It seems clear, therefore, that the Arkansas criminal eviction statute should not apply to her case. Unfortunately, not all Arkansas courts agree.

In Case No. Cr-2002-1052F in the District Court of Craighead County, the facts of the hypothetical involving Ms. Renter can be found in real life. In this case, the tenant was found guilty of failure to vacate, presumably because she left property behind.[42] Moreover, this error was then compounded when the court not only found the tenant "guilty" of the crime of failure to vacate, but also imposed a fine which included a calculation of "restitution" owed by the defendant to the landlord, in the total amount alleged by the landlord to be due. This penalty was backed up by the requirement that if the tenant did not immediately pay said amount, she was to be committed to and imprisoned in the County jail for a period not to exceed one day in jail for each $10 of the fine and costs. In this particular case, this would amount to jail time of approximately 160 days because the tenant left behind some items of furniture when she moved out.

There are a number of things that seem shocking about this result. First, the Arkansas criminal eviction statute has no provision for including "restitution," or a fine based upon the amounts alleged to be due by the landlord as part of the defendant's penalty.[43] Even if it did, the idea that a criminal court would order restitution to a private party is completely foreign to the traditional role of a criminal court. Finally, there is the problem posed by the court's order of jail time if the "fine" is not paid.

In *Duhon v. Arkansas*,[44] the Arkansas Supreme Court considered the issue of whether the misdemeanor/eviction statute as it existed in this state prior to the 2001 amendments could properly be interpreted as authorizing the imposition of jail time. The tenant in that case had been convicted

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39. ARK. CODE § 18-16-108, which is entitled " Property left on premises after termination of lease."

40. Harris v. Whipple, 63 Ark. App. 84, 974 S.W.2d 482 (1998).

41. In *Harris*, the Arkansas Court of Appeals found that items left behind when a tenant moved her family and most of their belongings from a leased trailer were deemed to be abandoned, even though no notice had been given. Harris v. Whipple, 63 Ark. App. 84, 974 S.W.2d 482 (1998).

42. The prosecutor and court surely had to know that she was not still physically in the house which she was deemed to be refusing to vacate, as they served her at the address to which she had moved after being served with notice to vacate by the landlord. This is reflected on the Craighead County Sheriff's Department Citation to Appear in Case no. 20025610, which gave a then-current address for the tenant of 517 W. Matthews. The property which the landlord had rented to the tenant was at 1205 E. Washington. The summons itself listed both the original rental address and the tenant's new residence.

To find the tenant guilty of failure to vacate on these facts seems to be an obvious misapplication of the statute dealing with abandonment of property, which has been interpreted as being mandatory and requiring no notice by the Arkansas Court of Appeals. *See* Harris v. Whipple, 63 Ark. App. 84, 974 S.W.2d 482 (1998), discussed *supra* at notes 40-41 and accompanying text

43. ARK. CODE. ANN. § 18-16-101 permits the imposition of a fine of $25 per day for the period in which the tenant has wrongfully refused to vacate.

44. 299 Ark. 503, 774 S.W.2d 830 (1989).

of wilful refusal to vacate after notice, and was sentenced to 30 days in jail. In overturning that portion of the trial court's sentence, the Arkansas Supreme Court had the following to say:

> We also find the court erred in imposing a sentence of 30 days imprisonment. While Ark. Code Ann. § 5-1- 107(a)(2) (1987) states an offense is a misdemeanor if it is so designated by a statute that is not a part of the criminal code and § 5-1-107(c) provides that such a statute with no limitations on a sentence to imprisonment is a class A misdemeanor, an exception is provided by Ark. Code Ann. § 5-1- 108(b):
> Regardless of any designation appearing in the statute defining an offense, an offense is a violation for purposes of this code if the statute defining the offense provides that no sentence other than a fine, or fine or forfeiture, or civil penalty is authorized upon conviction.
> Therefore, the appellant's offense is classified as a violation and she is subject to punishment only in accordance with the limitations of Ark. Code Ann. § 18-16-101. See Ark. Code Ann. § 5-4-201(c)(2) (1987).[45]

Although the Arkansas criminal eviction statute was amended in 2001, even as amended, the only penalty which is expressly authorized is a fine in the amount of $25.00 per day. Thus, under the rationale and rules announced in *Duhon*, the statute simply does not authorize the imposition of such criminal penalties. This limitation appears to have been overlooked or ignored by at least one Arkansas court.

By the time this note is published, the tenant in this case will have had another day in another court, because there is an appeal as a matter of right to the circuit court from a sentence such as this. When the circuit court, criminal division, hears the case, it will be de novo, and presumably the most glaring injustices and misapplications of the statute will be avoided.

However, if we did not have the criminal eviction statute, the possibility of such a miscarriage of justice would not exist in the first place. The dispute would be left for the more experienced circuit judges sitting in the hearing on the action for unlawful detainer. Such judges are familiar with landlord-tenant law, and there is nothing novel with asking them to determine whether a plaintiff has made a showing of likelihood of success on the merits in order to grant a writ of possession on an expedited basis. Moreover, if we were to follow procedures that have been adopted and utilized many times in other states, there is a much greater body of reported decisions to draw upon in the event of difficult or unusual arguments or fact patterns.

Having the criminal eviction statute on the books places Arkansas outside the mainstream of American jurisprudence, in a way which makes us look completely out of step with the rest of the nation. Edward H. Rabin opined in the mid-1980's that "we have experienced a revolution in residential landlord-tenant law. The residential tenant, long the stepchild of the law, has now become its ward and darling. Tenants' rights have increased dramatically . . . ."[46] Professor Rabin attributed these developments primarily to the influence of the civil rights movements, and noted how "widespread" the reforms were, reaching "almost every jurisdiction."[47] Another, less effusive, commentator described the history of the recent changes in American landlord-tenant law as follows:

> For several centuries the law of landlord and tenant remained relatively static, weighing heavily in favor of the landlord due to her superiority of estate. The urban housing conditions of today, however, differ drastically from the feudal and agrarian environment in which landlord-tenant law originated. As the need for prepackaged rental housing in crowded cities increased, so did societal recognition of tenants' personality and property interests in their

45. 299 Ark. at 511, 774 S.W.2d at 836.

46. Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 519 (1984).

47. *Id.* at 521.

> homes, a phenomenon comparable to the proconsumer shift in consumer shift in consumer-producer relations. Thus, in recent decades the common law has undergone extensive development and modification, placing the property owner and property renter on more balanced ground.[48]

The predicate for these observations appears, in part, in the literature of the 1960's, which vociferously protested the inequality and injustice in then-prevalent patterns of landlord-tenant relations and law.[49] Notwithstanding widespread criticism of the tendency of historic landlord-tenant law to disregard the fundamental needs and rights of tenants in our modern society, Arkansas has never deviated from the position, taken by the 1901 legislation, that failure to pay rent and failure to vacate upon written demand is a crime.[50] The failure to keep up with modern developments and trends in this area only feeds the negative image of the stereotypical Arkansan as backwards and unenlightened, a view which I personally do not think of as being generally accurate, but which, in this narrow instance, may be deserved.

Having said all of this, what is it that I would like to have happen? Ideally, the Arkansas legislature would repeal our criminal eviction statute. The fact that we have had it on our books since 1901 is not, in my mind, a ringing endorsement for continuing to adhere to what appears to be an outmoded and essentially unfair set of procedures. If the legislature does not act, I hope that the courts will.

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48. Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 U.C.L.A. L. REV. 759, 761-62 (1994) (footnotes omitted).

49. *See, e.g.*, Thomas M. Quinn & Earl Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future*, 38 FORDHAM L. REV. 225 (1969) (opining that "the law in this area is a scandal. More often than not unjust in its preferences for the cause of the landlord, it can only be described as outrageous . . . ."); Schoshinski, *Remedies of the Indigent Tenant: Proposals for Change*, 54 GEO. L.J. 519 (1964) (characterized in the digest as suggesting that "the law governing landlord and tenant relations has failed to adust to the realities of today's predominantly urban society.").

50. ARK. CODE. ANN. § 18-16-101. *See also* Gerchick, *supra* note 48 at 847, n.346-47 and accompanying text, noting Arkansas' unique criminal eviction statute. The statutes most comparable to the Arkansas regime were found to be the statutes prohibiting theft of rental services in connection with failure to pay for a hotel, motel or rooming house room in Alabama, Connecticut, Georgia, Texas, and Utah. See statutes cited at *id.*, n.347. It seems to me at least, that these are not comparable statutes as there is much less of a due process interest in processing a motel or hotel room than in continuing to live in one's home. Moreover, the need to involve the criminal justice system becomes more apparent when the debtor is so much more likely to be transient, and the use of civil proceedings becomes much more problematic.