Eviction Court and a Judicial Duty of Inquiry

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In the recent Illinois Appellate Court decision in *Draper & Kramer, Inc. v. King*,[1] the court remanded a landlord's action for possession of an apartment, in part on the ground that the tenant likely did not know that she had agreed to vacate the apartment when signing an order to resolve the dispute. The tenant, who was not represented by an attorney, testified that she thought she had agreed to pay the past due by a date certain, but not that she also agreed to vacate the premises.[2] Noting that the tenant was unrepresented and the judge had not asked her whether she knew she was being evicted under terms of the order, the court found "it is understandable that defendant was under the impression that she had agreed she could remain in the apartment by paying the amounts demanded."[3]

The scenario depicted in *Draper & Kramer* is all too prevalent. Countless tenants, confused and pressured in court, sign orders presented to them by the landlord's attorney that they may not understand require them to leave their homes. Many judges routinely rubber stamp these

1. 24 N.E.3d 851, 855 (Ill. Ct. App. 2014), *reh'g denied* (Jan. 28, 2015).
2. *Id*.
3. *Id*. at 864.

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consent agreements without a second look and sometimes without even speaking with the tenant, as the eviction court judge apparently did in *Draper & Kramer*.

The goal of this essay is to persuade judges in eviction courts to take a minute or so before entering an agreed upon Order of Possession between landlords and unrepresented tenants to ensure that tenants are fully aware that the agreed upon order terminates their rights to housing. As in other contexts of the law, such as plea bargaining or the right to represent oneself in court, judges should ensure that parties before them knowingly are relinquishing a fundamental interest.

Accordingly, in Part I, we briefly describe the eviction court process and the evidence that we have unearthed, which strongly suggests that tenants too often unwittingly agree to vacate their residences. We then canvas the key reasons why the right to continued housing is so fundamental in this society. In Part II, we turn our gaze to comparable areas in which courts, before enforcing waivers of rights, have ensured that the parties involved understand the consequences of their waivers. In Part III, we analogize to court enforcement of particular settlements in which courts have exercised independent authority to ensure that the settlements are fair when parties are not represented adequately or not likely to understand the terms. Finally, in Part IV, we conclude that the costs of imposing a limited duty of inquiry on the courts, although not negligible, plainly are eclipsed by the profound benefits of ensuring that those involved understand that they have agreed to vacate their residences.

I. The Eviction Process

A. The Regulatory Scheme

Chicago's eviction process is relatively representative of that in the country at large.[4] In order to prevent risks associated with self-help, state courts offer somewhat expedited eviction procedures to allow landlords and property owners to repossess their property relatively quickly in the event of default. The process begins with service of a termination notice from the landlord to the tenant and a period of time in which the tenant has an opportunity, where possible, to cure the violation (usually non-payment of rent or a violation of other lease provisions). If the tenant has not cured the violation within the applicable period of time, the landlord may then file suit to evict the tenant in the form of a single action (possession of premises only) or joint action (possession and rent owed). The action will be scheduled for trial on the first court date after the tenant has been served with a summons.

4. For a detailed overview of the Chicago eviction process, see *No Time for Justice: A Study of Chicago's Eviction Court*, at 7–9, Lawyers' Committee for Better Housing (2004), http://www.lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf.

The case is set for trial on the initial court date, which takes place within as little as seven days of service of summons unless the tenant requests a continuance; the eviction court usually will grant a seven-day continuance to permit the tenant an opportunity to obtain an attorney. At trial, whether before a judge or jury, the landlord must first establish his or her prima facie case: (1) the landlord has the right to possession; (2) the tenant has possession; (3) the tenant is in violation of the law or the lease agreement or is otherwise unlawfully occupying the premises; (4) the landlord served the tenant with a valid termination notice; and (5) the amount of rent due, if a joint action. The tenant then has an opportunity to present his or her defenses. The defense takes one of two forms: written if the matter is continued, or oral argument if the parties proceed to a bench trial. Parties rarely opt for a jury trial. Many of the issues that a defendant raises, including partial tender of rent, personal or financial hardship, application of the security deposit to cover delinquent rent, or full payment of rent after the "cure" period has expired, are not legally valid defenses.[5] If the landlord wins, the judge will issue an Order of Possession giving the tenant a specified period of time in which to vacate the premises. The Order of Possession functions as an eviction order. If the tenant does not comply, the landlord may file the order with the sheriff for physical eviction.

In the time leading up to trial, the landlord and tenant may communicate with each other outside the supervision of the court, often in informal settings, to attempt to come to an agreement that would obviate the need for a trial. For instance, tenants often agree to pay back amounts due by a certain date, and they may, depending upon the circumstances, agree to vacate the premises by a certain date as well. When reduced to a written agreement, these orders are deemed agreed upon Orders of Possession. Such agreements are presented for approval to the judge, who will then enter the agreement as an enforceable agreed order. Even if landlords are willing to permit tenants who are in arrears to stay in the premises upon paying the amount past due, they often seek an Order of Possession as a lever to use in case of future default.[6] Under ideal circumstances, the agreed upon order is fair, equitable, and understood by both parties. Those circumstances, however, are not always present, as highlighted by *Draper & Kramer*. Indeed, courts in other jurisdictions have addressed situations where tenants unknowingly have signed away key rights under the mistaken assumption that consenting to an agreed order is either

5. As we observed, defenses may be presented orally in Chicago. For the methodology of our observation, see text accompanying note 10, *infra*.

6. Although landlords in a separate agreement could demand to receive an amount due by a specific date, we did not observe any landlord agree to such a compliance order. Rather, the landlords insisted upon Orders of Possession, presumably to pressure tenants to pay the past due amount or to pursue eviction.

required, customary, or would otherwise allow them to remain in their homes.[7]

B. The Problem of Agreed Upon Orders

Based upon our observations at Chicago's eviction court[8] as well as data compiled by the public interest organization CARPLS (Coordinated Advice and Reference Program for Legal Services),[9] we are convinced that the situation highlighted in *Draper & Kramer* is not unique, at least in Chicago. In the emotional and confusing atmosphere of eviction courts, unrepresented tenants may well sign away their rights to continued possession of their homes without realizing it. Indeed, the very term "Order of Possession" may confuse tenants who do not realize that, by entering into an agreement to vacate the premises, an eviction will show up on their credit records.

Between October 2014 and April 2015, we observed 250 eviction court proceedings. These observations took place in four different courtrooms in Cook County with five different judges during various times of the day.[10] The four observers attended different courtrooms with different judges. We developed a checkbox tally system to track whether the landlord's attorney met with the tenant prior to appearing before the judge, whether the parties presented an independently agreed upon order before the judge, whether the judge asked meaningful questions of unrepresented tenants, and whether there were additional notes of interest unique to that observation. Meaningful questions, in our terminology, included questions that ensured understanding of specific terms of the order but not generic confirmation that a tenant would respond to reflexively. For example, the question "Do you understand that you're agreed to be evicted from the residence?" would qualify as a meaningful question, but "Is this your order?" would not. An agreed upon order was defined

7. *See, e.g.*, Cmty. Realty Mgmt., Inc. for Wrightstown Arms Apts. v. Harris, 714 A.2d 282 (N.J. 1998) (vacating an agreed order entered by an eviction court because a *pro se* tenant reasonably believed she was agreeing to repayment of rent and not her own eviction). *C.f.* Vernon Assocs. v. Brown, No. CV 990071363S, 2000 WL 670043 (Conn. Super. Ct. May 11, 2000) (denying landlord's application for approval of attorney fees pursuant to a written stipulation signed by the landlord's attorney and *pro se* tenant and approved by the trial court outside the presence of the parties without further explanation to the tenant).

8. Four members of the Honors Scholar class of 2016 undertook this study under the supervision of Dean Harold Krent. The methodology is discussed at text accompanying note 10, *infra*. Honors Scholars pursue a public interest project each year.

9. The raw data are available upon request.

10. The observation process was conducted independently over the course of several months. The time and setting of observation varied between morning and afternoon, early in the week and late in the week, to ensure that we observed a cross section of proceedings.

in our observations as an agreement reached by the tenant and landlord's attorney to be presented to the judge for approval. Tenants or their representatives were present when the orders were submitted for the judge's approval.

We collected the data from the front row of the observation area in each courtroom. We did not identify ourselves to the judges, attorneys, or tenants so as not to influence behavior in any way. Sixty-three of the hearings observed resulted in the entry of an Order of Possession between tenant and landlord (25.2 percent). Of those sixty-three agreed orders, forty-six were concluded on the day of the hearing between landlord and tenant or, more frequently, between tenant and landlord's counsel (73 percent). There is an area separated from each courtroom in which the parties can discuss their cases independently so we were able to track when the landlord's attorney concluded an agreement with an unrepresented tenant. If a landlord's attorney and unrepresented tenant discussed their case privately before appearing in front of the judge and then presented an agreed order to the judge, the observer noted this as a same-day agreed order. In forty of the observed agreed orders (63.5 percent), the judge engaged in some sort of explanation to or questioning of the tenant, but in only *eleven* of those cases did the questioning get at more than simply asking "Is this your order?" Note that the data were collected after the *Draper & Kramer* decision so we were surprised by the statistics.

Extrapolating, more than a quarter of all eviction cases in Cook County are resolved through the agreed-order process. Nearly 75 percent of agreed orders are put together and placed before a judge within minutes of the tenant meeting the landlord's attorney, allowing the tenant very little time to obtain counsel or carefully reason through a decision. And, judges explained the terms of the agreed orders in barely 27.5 percent of the cases.

Yet, we noted that judicial inquiry in some cases yielded significant results. For example, a case was continued because a tenant did not speak English sufficiently to understand the proceedings. The continuance was ordered after an agreed order was presented to the judge for approval. In another case, the landlord's attorney was chastised by a judge when the agreed order was unclear in its terms and the tenant did not understand it. The parties were sent to the end of the docket to clarify the order. One judge habitually outlined each individual term to the tenant when an agreed order was placed in front of her, ensuring complete understanding each time. These anecdotal observations illustrate both the problem and the solution. Agreed orders at times are abused, but the abuse can be easily curbed.

CARPLS is a legal aid service that uses a hotline and court-based advice desks to give immediate responses to everyday legal problems confronting low-income residents of Cook County. We asked CARPLS to record data for eight months on tenant complaints arising from agreed

eviction orders with their landlords. The data collected from the thirty-two separate complaints bolstered what we witnessed in eviction court.

For example, CARPLS recorded that eleven tenants reported that they did not read the orders before signing them, and nineteen others reported that they did not understand the order they had signed. Only four tenants related that the judge had tried to explain the order. Of course, evidence from the tenants can be self-serving in that some may have been desperate to find a way to stay in their residences. Nonetheless, the data reported support our findings that many tenants do not understand the agreed orders that they sign, and only in the minority of cases do judges explain those orders to tenants before entering them.

The CARPLS data also reveal that the problem of agreed upon orders does not stem from just one or two outlier judges. Rather, the data show that a significant number of judges over that period of time failed to explain to tenants what the order they were agreeing to meant. Many merely asked, "Is this your agreement?" or "Do you agree?"[11] Overall, the data indicate that, when tenants sign away important rights, judges do not make sure that they understand what they are giving up.[12] Because the power dynamics in eviction court often pressure tenants to sign orders drafted by landlords' attorneys, the court's role should be to make sure tenants knowingly and willingly enter into agreed orders before the court makes those agreements binding.

C. Fundamental Interest in Housing

Many believe that possession of a home is a basic human right.[13] The right of shelter is enshrined in our traditions, if not in the Constitution. A residence is critical to privacy, safety, and health. Those who are evicted not only may lose shelter but a neighborhood, school, and access to work.

11. That said, the judges who asked meaningful questions to ensure that tenants understood their rights did so consistently.

12. The director of Legal Services at CARPLS, Patricia Wrona, observed, "If I see a pattern, it is the client does not read the order; if they read, they do not comprehend; and the court is doing little to explain."

13. Several international human rights declarations and conventions recognize housing as a fundamental right. For example, the Universal Declaration of Human Rights (1948) recognizes the right to adequate housing, as does the International Covenant on Economic, Social and Cultural Rights (1966). Housing rights are also protected within the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1989), the Convention Relating to the Status of Refugees (1959), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). *See* Mayra Gómez & Bret Thiele, *Housing Rights Are Human Rights*, 32:2 HUM. RTS. (Summer 2005), *available at* http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/summer2005/hr_summer05_housing.html (last visited Jan. 5, 2016).

Furthermore, tenants who are evicted often lose their possessions.[14] Many other societies have elevated the right to one of constitutional or statutory order.[15]

In addition to the interest in maintaining possession of their home, individuals also have an important interest in avoiding the penalties associated with having an eviction on their record. As Matthew Desmond, Assistant Professor of Sociology and Social Studies at Harvard University, explains, "Evictions carry a stigma. Many landlords will not rent to persons who have been evicted, and an eviction can also ban a person from affordable housing programs."[16] Just as the mark of a criminal record can negatively impact one's success on the job market,[17] the stigma of eviction can substantially influence one's success on the housing market.[18]

The economic straits of those evicted almost always worsen substantially. Having an eviction on one's record not only can prevent one from securing affordable housing in a decent neighborhood, it also can tarnish one's credit rating.[19] A court-ordered eviction, whether by agreement of both parties or not, can make a household ineligible for some forms of emergency shelter assistance.[20] And recent research has demonstrated the likelihood of being laid off to be 11 to 15 percentage

14. Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94(1) Soc. Forces 295, 299–300 (2015), *available at* http://scholar.harvard.edu/files/mdesmond/files/desmondkimbro.socialforces.2015.pdf?m=1445266029 (families who receive an eviction judgment are often ordered to vacate in a matter of days, and if the family is removed by sheriff deputies, their possessions are usually piled on the curb or confiscated by movers).

15. For example, South Africa's Constitution establishes that "[e]veryone has the right to have access to adequate housing"; Egypt's 2014 Constitution "guarantees citizens the right to adequate, safe and healthy housing"; and Venezuela's Constitution states that "[e]very person has the right to adequate, safe and comfortable hygienic housing." Introduction, S. Afr. Const. 55.1 (Westlaw through June 2008 amendments); *The Right to Adequate Housing in the Egyptian Constitution* (Oct. 7, 2013), http://www.tadamun.info/2013/10/07/the-right-to-adequate-housing-in-the-egyptian-constitution/?lang=en#.VP5FhGR4qld; Constitution of the Bolivarian Republic of Venezuela art. 82 (Mar. 2006), *available at* http://venezuela-us.org/live/wp-.

16. Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MacArthur Found. (Mar. 2014), http://www.macfound.org/media/files/HHM_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

17. *See generally* Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration (2007).

18. James D. Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901, 914–15 (2013).

19. *Id.*

20. *Id.*

points higher for people who experienced an eviction or other involuntary move compared to those who did not.[21]

This increased likelihood of unemployment following an eviction could be due to the general disruption that evictions cause in peoples' lives, but it could also be due specifically to the psychological effects of eviction. Indeed, previous research has shown that experiencing involuntary housing loss may result in "economic scarring" that has been linked to persistent depressive symptoms.[22]

These problems logically are exacerbated given that the persons being evicted are already one of America's poorest demographic groups: low-income mothers.[23] Indeed, among tenants who appear in eviction court, women and children, even after accounting for differences in debt, are those most likely to receive an eviction judgment.[24] Applying statistical analysis to a nationally representative and longitudinal data set, Desmond showed in a recent study that eviction negatively affects mothers in multiple ways.[25] Compared to those not evicted, "mothers who were evicted in the previous year experienced more material hardship, were more likely to suffer from depression, reported worse health for themselves and their children, and reported more parenting stress."[26]

Desmond's findings have revealed that black women are disproportionately evicted in a manner similar to how black men are disproportionately incarcerated. Comparing the devastating long-term consequences of an eviction record with those of a criminal record, Desmond quipped, "Poor black men are locked up while poor black women are locked out."[27] Desmond concluded from his research, which analyzed 29,960 eviction records in Milwaukee County from January 1, 2003, to December 31, 2007, and included 251 on-site surveys at Milwaukee's eviction court in

21. *See* Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, Soc. Problems 46–67 (forthcoming 2016).

22. *See generally* William Gallo et al., *The Persistence of Depressive Symptoms in Older Workers Who Experience Involuntary Job Loss: Results from the Health and Retirement Survey*, 61 J. of Gerontology, B: Psychol. Sci. & Soc. Sci. S221, S221–28 (2006) (Investigators in a variety of disciplines, but most notably economics, have studied the enduring effects of a significant life experience, referred to as "scarring.").

23. *See* Desmond & Kimbro, *supra* note 14, at 298; *see also* Luke Broadwater, *Baltimore Eviction Rate Among Highest in Country, Study Says*, Balt. Sun, Dec. 7, 2015, www.baltimoresun.com/news/maryland/bs-md-cl-rent-court-20151204-story.html (finding that most evicted in Baltimore County are "black women, living on less than $2,000 per month without public housing assistance").

24. Matthew Desmond, Weihua An, Richelle Winkler & Thomas Ferriss, *Evicting Children*, 92 Soc. Forces 303, 303–27 (2013).

25. Desmond & Kimbro, *supra* note 14, at 296.

26. *Id.*

27. Desmond, *supra* note 16, at 1 ("Women from black neighborhoods in Milwaukee represented only 9.6 percent of the population, but they accounted for 30 percent of the evictions.").

January and February 2011, that "eviction is a *cause*, not just a *condition*, of poverty."[28] Eviction precipitates poverty because many who are evicted end up on the streets or in shelters.[29] Alternatively, if those who are evicted do find housing, their record of eviction means they are limited to decrepit units in unsafe neighborhoods.[30]

The consequences of eviction are even more severe for those in federally assisted housing programs. In *Draper & Kramer*, the Illinois Appellate Court stressed that, if the agreed order between the tenant and the landlord's counsel were carried out, the tenant would suffer a "severe penalty" because she would "lose her federal housing assistance and this would likely result in homelessness."[31] The court stated that "[i]n light of the severity of the penalty that would result from affirming the trial court's order denying defendant's motion to vacate, we find that the relative hardships in this case favor defendant."[32]

Accordingly, the emotional devastation of eviction is accompanied by lasting economic degradation. Before a court enforces an order requiring eviction, it should take steps, if feasible, to ensure that tenants understand that they have agreed to vacate and that an eviction order negatively may impact future housing options.

II. Judicial Duty of Inquiry

The law requires consent to be made freely, willingly, and knowingly in important areas where the consequence of that choice implicates the surrender of fundamental liberty interests.[33] These areas include, but are not limited to, the waiver of certain constitutional rights in criminal trials, the waiver of parental rights in surrogacy and adoption agreements, and the requirement for assent to abortion or other surgical medical procedures. While some of these areas involve the relinquishment of Sixth Amendment rights and liberty interests that are of constitutional dimension, in other areas, such as family law, the practice of establishing knowing consent reflects more judicial custom than constitutional dictate.

28. Elizabeth Gudrais, *Disrupted Lives*, HARV. MAG. (Jan.–Feb. 2014), http://harvardmagazine.com/2014/01/disrupted-lives (last visited June 14, 2015).

29. *Id.*

30. *Id.*

31. 24 N.E.3d 851, 860 (Ill. Ct. App. 2014), *reh'g denied* (Jan. 28, 2015).

32. *Id.* at 865. And, of course, many individuals enjoy a Due Process right to public housing, which independently would require adequate notice prior to eviction *See, e.g.*, Johnson v. Illinois Dep't of Pub. Aid, 467 F.2d 1269, 1273 (7th Cir. 1972) (holding that tenancy in public housing cannot be terminated without affording the tenant adequate procedural safeguards).

33. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 241 (1969).

A. Court-Imposed Duty of Inquiry in Constitutional Criminal Procedure Context

Nowhere is the magnitude of establishing knowing consent more critical than when individuals agree to give up their liberty. In *Boykin v. Alabama*,[34] the Supreme Court held that consent to a plea agreement must be willingly, intelligently, and knowingly given and accordingly imposed a duty of inquiry upon courts to ensure that the consequences of the plea were plainly understood. In *Boykin*, an indigent defendant was accused of five counts of common law robbery and pled guilty to all charges at his arraignment; the penalty meted was death.[35] Given that the death sentence in Alabama automatically was appealable, the appellate court inquired into whether the defendant's plea of guilty, made silently and non-affirmatively, was sufficient to waive that defendant's constitutional rights. A plea of guilty is not just a confession of guilt; in the eyes of the law, it is a conviction and, at the appellate level, is treated as if a jury found the defendant guilty of the crime.[36] Upon review, the appellate court determined that, because a plea of guilty implicates important constitutional rights, including a waiver of privilege against self-incrimination, right to trial by jury, and the right to confront one's accusers, the lower court's acceptance of his waiver was "error, plain on the face of the record . . . to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."[37]

Accordingly, judges must ensure that the record reflects that a defendant intelligently, knowingly, and willingly waived those rights. As a result, at both the federal and state levels, procedural protection for defendants entering pleas of guilty have been implemented, mandating trial court judges to advise defendants of the rights they are giving up in what has been colloquially named a *Boykin* form.[38]

The court's duty of inquiry has expanded to other criminal procedure contexts. Most notably, judges must ensure that criminal defendants who decline counsel understand the ramifications of their decision, given that the right to counsel is so critically tied to the adversary system. In recognizing a constitutional right to self-representation, the Supreme Court in *Faretta v. California*[39] nevertheless stressed that a court typically must engage criminal defendants in extended conversation about the process of a

34. 395 U.S. 238, 241 (1969).

35. *Id.* at 239.

36. *See id.* at 242.

37. *Id*. at 242–43.

38. *See* FED. R. CRIM. P. 11 (Federal Rule of Criminal Procedure governing the requirement of the court to inform and confirm the understanding of defendants regarding the conditions of their pleas and the relevant waiver of certain rights); *see, e.g.*, State *ex rel.* Jackson v. Henderson, 255 So. 2d 85, 90 (La. 1971) (interpreting *Boykin* to require the court to establish, from the record, that the accused was informed of the waiver of constitutional rights and articulated that waiver).

39. 422 U.S. 806 (1975).

trial to ensure that their waiver of the right to an attorney is knowing and intelligent. The Court explained that

> [a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."[40]

The *Faretta* inquiry is now routine.[41]

B. Duty of Inquiry Triggered by the Legislature

Legislatures have imposed a judicial duty of inquiry in a wide variety of family law contexts. For instance, judges must approve minors' requests for an abortion in the absence of parental consent.[42] Thirty-six states have enacted laws imposing a duty on family law judges to ensure that minors understand the gravity of the abortion decision and have good reason to bypass their parents' consent, whether for fear of retribution or because of continual abuse.

Adoption represents another area of family law where judges play a critical role to ensure informed consent. In all fifty states, the birth mother and father have the primary right to consent to adoption, with limited resort available to courts in extreme circumstances.[43] The decision to adopt out a child is irrevocable in most circumstances.[44] As a result, most states have implemented various judicially managed procedures to ensure that individuals do not make the decision hastily or rashly.[45] This sort of regulated oversight may be paternalistic, but it is warranted when the right being waived is crucial.

Legislatures, therefore, at times have directed judges in the abortion and adoption contexts to ensure that individuals recognize the dramatic consequences of their actions. Life changing decisions can be made only after understanding some of the benefits and costs involved.

In the criminal procedure context as well, legislatures have imposed a duty of inquiry to make sure that waivers are knowing and voluntary, even when not required by the Constitution. Several states, including California and Connecticut, mandate that trial court judges advise certain defendants considering plea agreements of the potential deportation

40. *Id.* at 837.

41. *See, e.g.*, Holland v. Florida, 775 F.3d 1294 (11th Cir. 2014); United States v. French, 748 F.3d 922 (9th Cir. 2013).

42. *Parental Consent and Notification Laws*, Planned Parenthood, http://www.plannedparenthood.org/health-info/abortion/parental-consent-notification-laws.

43. U.S. Dep't of Health & Hum. Services, Child Welfare Information Gateway, *State Statutes Search*, https://www.childwelfare.gov/topics/systemwide/laws-policies/state/?hasBeenRedirected=1.

44. *Id.*

45. *Id.*

consequence stemming from a plea.[46] Legislatures thus have expanded the duty of inquiry to protect critical individual interests—in this context, the right to stay in the United States.

Legislatures have also imposed a judicial duty of inquiry in the immigration context to ensure that foreign nationals are not waiving statutorily granted relief that could protect them against removal from the United States. For instance, individuals subject to removal proceedings for overstaying their visas or lying on immigration documents may choose, as an alternative to the removal proceedings, to leave the country voluntarily without going through the proceedings.[47] Such a result could be attractive to foreign nationals since they could avoid the consequences of forced removal, such as a future bar from admission to the United States.[48] On the other hand, voluntary departure deprives the foreign national of a complete hearing that could result in relief from removal.[49] Accepting voluntary departure has the effect of waiving as well any subsequent appellate rights, including an administrative appeal to the Board of Immigration Appeals and judicial review.

Individuals may seek judicial review of an order of removal by an immigration judge.[50] A waiver of a foreign national's appellate rights must be knowingly and intelligently made.[51] There is statutory basis for an immigration judge's responsibility to ensure that removable foreign nationals are notified of their appellate rights.[52]

In *Narine v. Holder*, the Fourth Circuit held that an immigration judge's duty to inquire requires more than a mere question as to whether an unrepresented foreign national accepted a voluntary departure decision as final.[53] Rather, the IJ had to ensure that the unrepresented foreign national understood the consequences that flow from removal, i.e., precluding the right of return.[54] During the removal hearing, without counsel present, Narine requested voluntary departure. The following colloquy between the IJ and Narine ensued:

46. *See* CAL. PENAL CODE ANN. § 1016.5 (West); *see also* CONN. GEN. STAT. § 54-1j (2001); D.C. CODE § 16-713.

47. *See* 8 U.S.C. § 1229c (2012) (listing the conditions for a grant of voluntary departure).

48. *See, e.g.*, 8 U.S.C. § 1182(a)(9).

49. *See, e.g.*, 8 U.S.C. § 1229b (cancellation of removal and adjustment of status).

50. *See* 8 U.S.C. § 1252 (judicial review of orders of removal).

51. Narine v. Holder, 559 F.3d 246 (4th Cir. 2009) (citing United States v. Mendoza-Lopez, 481 U.S. 828 (1987)).

52. *See* 8 U.S.C. § 1229a(c)(5) ("If the immigration judge decides that the alien is removable and orders the alien to be removed, the judge shall inform the alien of the right to appeal that decision and of the consequences for failure to depart under the order of removal, including civil and criminal penalties.").

53. *Narine*, 559 F.3d at 250.

54. *Id*.

Q: Mr. Narine, did you intend to leave the United States?

A: Yes.

Q: Okay. And, this is the only request that you're making on the court, right?

A: Yes, Your Honor.

Q: And, if I grant voluntary departure today, do you intend this as the final decision in your case today?

A: No.

Q: If you say no, then you're not eligible for voluntary departure and this stays at the proceeding. My question to be clear is if I sign an order that says you can leave voluntarily, do you agree that this is the end of this court case?

A: Yes.[55]

The Fourth Circuit's finding that the waiver was neither knowing nor intelligent had two dimensions. First, because Narine was not represented by counsel at the time and there was nothing in the record to show that his previous attorney had fully explained the right of appeal, it was the IJ's responsibility to "explicitly advise the [foreign national] that he or she must waive the right to appeal in order to be granted this form of voluntary departure."[56] Moreover,

> given the regulatory requirement that the right to appeal be waived and the due process implications of construing an "implicit" waiver of the right to appeal, as well as the jurisdictional implications of a waiver itself, [it is] critical that the record must clearly demonstrate that the right of appeal was actually, and not merely constructively, waived by the alien.[57]

Second, because he was an unsophisticated party, Narine did not demonstrate a "clear understanding of the consequences of accepting voluntary departure" by responding affirmatively when the IJ asked if he agreed that his decision was final. While "the precise articulation of appeal rights required in any given case will necessarily depend on the circumstances of that case," where a foreign national is unrepresented, the need for an explicit explanation of a waiver of appeal rights is "especially important."[58] The Fourth Circuit, therefore, expanded the colloquy required by statute.

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55. *Id.* at 248.

56. *Id.* at 249 (quoting *In re* Cordova, 22 I. & N. Dec. 966, 971 (B.I.A. 1999)).

57. *Narine*, 559 F.3d at 250 (quoting *In re* Ocampo-Ugalde, 22 I. & N. Dec. 1301, 1304 (B.I.A. 2000)).

58. *Id.* at 251. The *Narine* court further explained that

> [a]sking the parties whether they accept a decision as "final" is a shorthand expression commonly used by Immigration Judges. . . . Those who understand the meaning of this shorthand expression, such as aliens represented by attorneys

Thus, judges, in part on their own volition in the immigration context, have imposed a duty of inquiry upon themselves to ensure that the consequences of a voluntary return are understood. Judges are not providing legal advice, but rather are ascertaining whether individuals understand the rights they are waiving. When the rights at stake are high and the burden from inquiry limited, judges should determine whether the parties involved recognize the magnitude of the decision at stake and yet intend to waive their rights. Such duty can spring from the Constitution, the legislature, or from judges' need to ensure that fundamental rights waived in their presence be freely and knowingly relinquished. Indeed, two judges on the D.C. Circuit recently stressed that "the practical benefits of an on-the-record colloquy are not limited to the criminal setting."[59]

The examples above shed light on the eviction process. Consistent with precedents in criminal, immigration, and family law, judges should inquire to ensure that unrepresented tenants understand that, in the agreed upon orders, they have consented to eviction and that such orders will impair their ability to find housing in the future. The judges' role is not to act as an attorney for the unrepresented individual, but rather to ensure that, before the court stamps its imprimatur on an agreement or waiver, it can assure itself that the unrepresented party has agreed to the conditions knowingly and intelligently.

III. Duty to Assess Fairness of Settlements

Although private parties are free to settle their disputes in whatever way they deem appropriate, federal courts in a number of contexts have exercised an independent duty to assess the fairness of settlements, principally to protect the interests of parties not directly involved in the litigation. From class actions[60] to bankruptcy,[61] courts have assumed the

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> or accredited representatives, may effectively waive appeal in response to this simple question. However, the meaning and significance of this shorthand expression may not be apparent to the unrepresented alien. Asking an unrepresented alien whether he or she accepts a decision as "final" does not necessarily alert the alien to the fact that the question concerns the right of appeal or that an affirmative answer will be construed as an irrevocable waiver of that right.

Narine, 559 F.3d at 250–51 (quoting *Rodriguez-Diaz*, 22 I. & N. Dec. at 1322). *See also* Biwot v. Gonzales, 403 F.3d 1094, 1098 (9th Cir. 2005) (holding that a foreign national's waiver of the right to appeal was not considered and intelligent where the foreign national said, "Your Honor, I accept the decision as final because I cannot do anything right now" because he was under the misapprehension that he had no choice but to waive his appeal and he did not have counsel to disabuse him of that misconception).

59. United States v. Gewin, 759 F.3d 72, 89 (D.C. Cir. 2014) (Brown, J., and Pillard, J., concurring) (addressing judicial duty of inquiry in civil contempt case).

60. *See infra* text accompanying notes 64–65.

61. *See infra* text accompanying notes 66–67.

responsibility to consider the fairness of settlements.[62] And they routinely scrutinize settlements involving the rights of minors to protect their rights.[63] Just as in the plea bargain context, judges question parties to ensure that they fully comprehend the terms in the settlements. The settlement precedents further bolster the case for judicial inquiry in the eviction court context.

Federal Rule of Civil Procedure 23 serves as an exemplar. The rule specifies that settlement is to be upon "the court's approval."[64] Courts therefore ensure that the settlements agreed to protect the interest of the absent members of the class.[65] Given that there is no practical way for members of the class to participate in the settlement negotiations and that members of large class actions are not even likely to know about the lawsuit, judicial scrutiny is essential to maintain the fairness of the process. Indeed, the interests of named parties, absent parties, and the class attorneys may well diverge, making the case for judicial scrutiny that much stronger.

Similarly, Rule 9010(a) of the Federal Rules of Bankruptcy Procedure provides for judicial oversight of contested matters within the bankruptcy estate.[66] Each claim may be resolved at the expense of another creditor or creditor class so oversight is critical to ensure that the Trustee in Bankruptcy is proceeding fairly.[67] As in the class action context, judicial supervision of settlements upholds the integrity of the process because not all those affected by the settlement have a direct say in its terms.

Review of agreed orders in eviction cases reflects one critical difference. In the eviction context, the concern is not so much for an absent party, but rather that the private party does not understand the terms of the settlement. Nonetheless, the class action and bankruptcy contexts readily demonstrate that courts routinely consider the fairness of settlements when sufficient concern for the process exists. And courts have assumed that obligation even when not required under the rules.[68]

62. *See generally* Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123 (2012); Sanford J. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55 (1999).

63. *See infra text* accompanying notes 69–72.

64. FED. R. CIV. P. 23e.

65. *See, e.g.*, Devlin v. Scardeletti, 536 U.S. 1 (2005); Crawford v. F. Hoffman Laroche, 267 F.3d 760 (8th Cir. 2001).

66. *See, e.g.*, *In re* Holly Marine Towing, 669 F.3d 796 (7th Cir. 2012); Chira v. Saal, 567 F.3d 1307 (11th Cir. 2009).

67. *See, e.g.*, *In re* Levine, 287 B.R. 683, 690 (Bankr. E.D. Mich. 2002) ("The purpose of Rule 1019(a) is simply to give the trustee the opportunity to secure from the court a declaration that her decision to enter into a settlement was consistent with her duties as a fiduciary.").

68. *See generally* Note, Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judgment 'Approval' and 'Rejection' Out of Non-Class Mass Settlements*, 80 FORD. L.

Moreover, in settlements involving the rights of minors, courts play an active role to ensure that the guardian has represented the rights of the minor sufficiently. Because the minor cannot be expected to understand fully issues explicated in the settlement, courts assess the proposed terms of any agreement to protect the minor's rights. In Cook County, for instance, Rule 12.15(b)(1) directs judges to ensure that settlements in personal injury cases involving minors are fair. More generally, in Illinois "the court has a duty and broad discretion to protect the minors' interests. That duty to protect . . . requires that the court approve or reject any settlement agreement proposed on behalf of a minor."[69]

Judges protect the rights of minors at times because of legislative command but at other times through their inherent authority. As a federal district court judge in Pennsylvania court noted, judges have the "inherent duty to protect the interest of minors . . . before [them]."[70] That judge's views are not aberrant. The Alabama Supreme Court asserted in *Large v. Hayes*[71] that "[t]his Court has recognized the special nature of an attempted settlement of a minor's claim. Before such a settlement can be approved, there must be a hearing, with an extensive examination of the facts, to determine whether the settlement is in the best interest of the minor."[72] A judicial duty of inquiry in the eviction process thus would be consistent with the tradition of judicial examination of settlements where there is special reason, by virtue of absent parties or parties who may not fully understand the terms, to ensure that the interests of all the parties affected are being fairly protected.

IV. The Duty of Inquiry in the Eviction Context

No clear boundaries demarcate when a judicial duty of inquiry should be triggered, absent constitutional or legislative command. Nonetheless, some common determinants arise from the contexts previously canvassed.

First, the rights at stake must be fundamental. The plea bargain decision, the right to stay in this country, and questions of family integrity are all critical and have been viewed so for generations. Similarly, the right to housing is fundamental for all the reasons previously discussed.[73] Issues of dignity, health, safety, and basic economics all turn on maintaining a roof over our heads.

Second, there must be an appreciable risk that the parties did not intend to waive their rights or did not realize the consequences attendant upon pursuing a course of action. Foreign nationals may not appreciate

Rev. 319 (2012) (critiquing judicial trend to scrutinize settlements in non-class cases).

69. Wreglesworth v. Arctco, 738 N.E.2d 964 (Ill. Ct. App. 2000).

70. Keith *ex rel*. Eagan v. Jackson, 855 F. Supp. 765, 775 (E.D. Pa. 1994).

71. 534 So. 2d 1101 (Ala. 1988).

72. *Id*. at 1105.

73. *See* text accompanying notes 13–15, *supra*.

the impact of voluntary departure, criminal defendants may not appreciate the consequences of self-representation, and minors cannot be expected to understand their rights fully. Similarly, in the eviction process, our study has convinced us that too many tenants do not realize that they have relinquished their right to stay in their premises when entering an agreed order to pay their arrears. Moreover, tenants who think that they are agreeing to move do not understand that doing so via an agreed Order of Possession may impact their ability to obtain future housing or to obtain (or retain) a federal housing subsidy.

Finally, in most of the contexts, the judicial duty of inquiry is brief and imposes only modest burdens upon the court. Indeed, inquiring whether a party intended to waive a right and understands the consequences of the waiver should be far more brief than in the *Faretta* context. And the duty of inquiry proposed is far less comprehensive than a judicial duty to consider the fairness of a class action settlement. To be sure, the eviction hearing typically is far shorter than a hearing to approve a plea bargain or to approve bypassing parental consent for an abortion. The entire hearing may last a couple of minutes. Yet, the duty of inquiry should impose no more than a minute of additional time, if that, and we in fact witnessed judges who made the inquiry quickly and efficiently.

For instance, as part of opening announcements in the courtroom, the presiding judge might announce: "If you have reached an agreement that resolves all the issues in your case and if you do not have an attorney, I will enter the agreement only after I have confirmed that you understand its terms. If the agreement awards your landlord possession of the premises, this means that the landlord will have the right to evict you. The landlord may still decide to let you stay, but does not have to. Therefore, if you want to enter an agreed order that allows you to stay in your apartment after you pay everything you owe by a certain date, you must make sure that there is a provision in the agreement allowing you continuing possession."

Statements at the outset of the session, however, are insufficient given that unrepresented tenants likely will only be able to understand the significance of the judge's admonition when their cases are called. Moreover, tenants often are not present for the beginning of a court session. Accordingly, as each agreement for an Order of Possession is presented for approval, the judge should scan the agreement to ensure that tenants understand that (1) they have agreed to vacate the premises; and (2) despite the agreement, an eviction will appear in the court records and impair the individual's ability to obtain housing in the future. If the tenant then reconsiders, the judge should inform him or her again of the right to an attorney. This quick checklist approach is appropriate in light of the dramatic consequences at stake to ensure that pro se litigants understand the ramifications of an Order of Possession.

The duty of inquiry accordingly can be brief. Despite the volume of cases, judges should have the responsibility to determine whether the

tenants' agreements to give up the premises are understood. Moreover, requiring the inquiry will avoid future appeals as in *Draper & Kramer* and thus may end up saving judicial resources overall.[74] On balance, inquiring whether an unrepresented tenant understands the terms of agreed-upon orders comports with many examples in our jurisprudence and would impose only marginal costs on the judicial system.

V. Conclusion

In the tumultuous and emotionally charged atmosphere of eviction court, tenants too often agree to orders presented by their landlords' attorney without appreciating that they have committed to leaving their residence in addition to paying arrears. In light of the importance of housing in itself and also as it protects health and education, courts should take the step of ensuring that the tenants understand what is in the agreement. The judge's duty of inquiry can be limited but is essential to ensuring that the court does not become an unwitting tool of needless suffering.

74. *See also* United States v. Gewin, 759 F.3d 72, 90 (D.C. Cir. 2014) (noting that the burden of a colloquy is offset by avoidance of lengthy appeals questioning whether rights were waived knowingly). Landlords as well should benefit from enhanced finality.