Are Landlords the New Police? The Unintended Consequences of the Arkansas Residential Landlord-Tenant Act's Access Provision*

I. INTRODUCTION

Prior to its demolition, many considered Chicago's Cabrini-Green tenements as one of the nation's most notorious housing projects because of its association with violent crime.[1] In addition to prevalent gang activity and violence, the housing project was also known for its "thriving illegal drug market."[2] In order to rid Cabrini-Green of illicit activity, the Chicago Housing Authority once implemented a series of investigative "sweeps" aimed at the complex's tenants.[3]

After the Chicago Housing Authority authorized these searches, police conducted them upon the occurrence of certain "preconditions," such as "random gunfire from building to building."[4] The sweeps were expansive searches of entire residential units, including closets, drawers, refrigerators, and personal effects.[5] These searches occurred without a warrant.[6] Although the Chicago Housing Authority obtained consent to search from some tenants, many of the searches happened days after the occurrence of a "precondition[]," without prior tenant

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1. Megan Mollmann, *10 Years in the Making: Chicago's Notorious Housing Project Ending*, AOL REAL ESTATE (Mar. 1, 2010, 9:00 AM), http://realestate.aol.com/blog/2010/03/01/10-years-in-the-making-chicagos-notorious-housing-project-endi/.
2. Douglas Belkin, *Housing Project Goes Dark*, WALL. ST. J. (Dec. 9, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748703493504576007863572238244.
3. Pratt v. Chi. Hous. Auth., 848 F. Supp. 792, 793 (N.D. Ill. 1994).
4. *Id.* at 794.
5. *Id.* at 793.
6. *Id.*

approval, or while the tenant was not present.[7] In response, several residents successfully brought an action to enjoin the Chicago Housing Authority from ordering these warrantless searches or from exercising the search policy.[8] The court concluded that the policy violated the Fourth Amendment's requirement that "non-consensual searches of a home for law-enforcement purposes be based in all cases upon probable cause, and that such searches be made pursuant to a warrant, except in cases of extreme immediate urgency."[9]

Although it may be unfathomable to many that a housing authority or landlord could interfere with a tenant's privacy by searching a residence for criminal activity without prior consent, the Arkansas General Assembly has effectively enabled private landlords to do so. The access provision of the Arkansas Residential Landlord Tenant Act of 2007 provides, "[a] tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to . . . investigate possible criminal activity."[10] The Act does not require a landlord to provide a tenant with advance notice before a search[11] and also grants the landlord the right to terminate a tenant's lease if consent is refused.[12] Perhaps most unsettling, the access provision does not explicitly prohibit landlords from allowing law enforcement to enter the premises without the tenant's consent.[13]

This comment addresses Arkansas's partial adoption of the Uniform Residential Landlord and Tenant Act (the "Uniform Act") and the unintended legal consequences that may follow as a result of the Arkansas Act's empowerment of private landlords to enter a tenant's home for the purpose of investigating potential criminal activity. Part II of this comment discusses the general history of the Arkansas Act and compares it with the Uniform Act. Part III addresses whether the Arkansas Act

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7. *Id.* at 793-94.

8. *Pratt*, 848 F. Supp. at 794.

9. *Id.* at 794.

10. Act 1004, 2007 Ark. Acts 5110, 5119 (codified at ARK. CODE ANN. § 18-17-602(a) (Supp. 2013)).

11. *See* ARK. CODE ANN. §§ 18-17-101 to -913 (Supp. 2013) (lacking any notice requirements).

12. ARK. CODE ANN. § 18-17-705(a) (Supp. 2013).

13. *See* ARK. CODE ANN. § 18-17-602 (Supp. 2013) (broadly empowering a landlord to search the premises without explicitly mentioning the role of law enforcement).

violates constitutional minimum standards and analyzes the access provision's potential intrusion upon a tenant's right to voluntarily consent to a search of his premises. Part IV explores whether the Arkansas Act designates landlords and their employees as "instruments or agents of the government" for the purposes of the Fourth Amendment. Part V discusses whether the Arkansas General Assembly created a reciprocal duty for landlords to protect their tenants against criminal activity. Lastly, Part VI proposes changes to the Arkansas Act's access provision.

II. BACKGROUND

The ancient adage that "a man's home is his castle," and therefore must be free from unlawful government intrusion, has been deeply embedded in our society since its earliest days.[14] This principle was firmly established in American jurisprudence "long before the adoption of the Bill of Rights."[15] The Framers wove this age-old metaphor into the fabric of our nation's laws through the Fourth Amendment to the United States Constitution.[16] Further, the principle has traditionally been recognized within similar provisions of the Arkansas Constitution.[17]

The adage has also been extended to the landlord-tenant context, embodied in the common-law principle that once a lessor has conveyed a leasehold estate to the lessee, the lessee

14. For instance, William Pitt, a Member of Parliament in 1763, questioned the propriety of searches made incident to the enforcement of an excise bill by proclaiming that even "[t]he poorest man may in his cottage bid defiance to all the forces of the Crown." THE OXFORD DICTIONARY OF QUOTATIONS 515 (Angela Partington ed., 4th ed. 1992).

15. Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting).

16. The Fourth Amendment establishes that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

17. *See* ARK. CONST. art. 2, § 15 ("The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); *see also* Griffin v. State, 347 Ark. 788, 792, 67 S.W.3d 582, 585 (2002) ("The principle that a man's home is his castle, and that even the King is prohibited from unreasonably intruding upon that home, was particularly well-developed in the rough-and-ready culture of the frontier, and no less pronounced in the Arkansas Territory. In our 1836 Constitution, the people of our newly admitted state expressed this principle succinctly . . . .").

has "the right of possession, dominion, and control of the premises."[18] Essentially, this means a tenant enjoys a reasonable right of privacy, and a landlord has "no right of entry on the premises if the tenant does not consent to such entry and the lease does not contain a reservation of the right."[19] Arkansas recognized the age-old principle of a tenant's exclusive right of possession at common law, albeit with certain limitations.[20] In addition, a landlord has the right to enter the premises without the tenant's consent for certain purposes, such as to prevent the tenant from committing waste of the rental property during the term of the lease.[21]

In 2007, the Arkansas General Assembly enacted the Arkansas Residential Landlord-Tenant Act in order to "simplify, clarify, modernize, and revise the law governing [the] rental of dwelling units and the rights and obligations of landlords and tenants."[22] Since its enactment, Arkansas's landlord-tenant law has received a flurry of negative publicity from local[23] and national[24] groups regarding its abusive impact on the state's tenants. One of the most highly criticized portions of Arkansas's residential landlord-tenant law is an access provision that provides a tenant with absolutely no protection from an unreasonable entrance by a landlord.[25]

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18. 52A C.J.S. *Landlord & Tenant* § 694 (2003).

19. *Id.* § 692.

20. *See, e.g.*, Smith v. Caldwell, 78 Ark. 333, 335-36, 95 S.W. 467, 468 (1906) (holding that a landlord may interfere with a tenant's exclusive possession of the premises in order to demand payment of rent).

21. *See* 52A C.J.S. *Landlord & Tenant*, *supra* note 18, § 692.

22. ARK. CODE ANN. § 18-17-102(b)(1) (Supp. 2013).

23. A commission established by the Arkansas General Assembly compared Arkansas's landlord-tenant laws with the rest of the states. The commission concluded that "Arkansas's residential landlord-tenant law is significantly out of balance" and recommended significant changes because "Arkansas residential tenants have significantly fewer rights than tenants in any other state." NON-LEGISLATIVE COMM'N ON THE STUDY OF LANDLORD-TENANT LAWS, REPORT TO GOVERNOR MIKE BEEBE, PRESIDENT PRO TEMPORE OF THE SENATE, AND SPEAKER OF THE HOUSE 2 (2012), *available at* http://www.arkansasjustice.org/sites/default/files/file%20attachments/Landlord-Tenant%20Commission%20Report.pdf.

24. In 2013, Human Rights Watch, an international organization dedicated to protecting human rights around the world, released a report finding that Arkansas's landlord-tenant laws are "extremely favorable to landlords," and leave tenants with "very few rights or other legal assurances" compared to other states. HUMAN RIGHTS WATCH, PAY THE RENT OR FACE ARREST 8 (2013), *available at* http://www.hrw.org/reports/2013/02/05/pay-rent-or-face-arrest-0.

25. *See* ARK. CODE ANN. § 18-17-602(a) (Supp. 2013).

The Arkansas Act is loosely based upon the Uniform Residential Landlord and Tenant Act. Drafted in 1972 and subsequently adopted in its entirety by nine states,[26] the Uniform Act endeavored to update the system of landlord-tenant relationships established at common law and substitute it with a legal framework designed to "offer tenants an opportunity to deal with landlords on a more equal basis."[27] In fact, one of the stated purposes of the Uniform Act was to eliminate many of the "threats, indignities, and mutual suspicions" often found in a landlord-tenant relationship.[28]

Included within the Uniform Act is a landlord's right to reasonably access a tenant's premises in order to perform inspections, repairs, and maintenance.[29] The Uniform Act also grants landlords the right to enter a tenant's dwelling for other specific purposes, such as presenting the property to prospective tenants.[30] However, the Uniform Act curtails a landlord's access by restricting entry to "reasonable times" and only after a tenant has received advanced notice of such an entry, absent exigent circumstances.[31]

Notably, the Uniform Act does not provide landlords with additional access into a tenant's premises unless the landlord has secured a court order[32] or is performing maintenance to prevent conditions in the premises from "materially affecting health and safety."[33] Additionally, a landlord may enter the premises in the event a tenant abandons, surrenders, or leaves the property for an extended period of time.[34] The National Conference of Commissioners on Uniform State Laws cited the potential for

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26. The National Conference of Commissioners on Uniform State Laws credits the states of Alaska, Arizona, Kansas, Kentucky, Nebraska, New Mexico, Oregon, Virginia, and Washington with enacting the Uniform Act in its entirety. *See Residential Landlord and Tenant Act Summary*, UNIF. LAW COMM'N, http://uniformlaws.org/ActSummary.aspx?title=Residential%20Landlord%20and%20Tenant%20Act (last visited Aug. 23, 2014).

27. *Id.*

28. *Id.*

29. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT §3.103(a), 7B U.L.A. 373 (2006).

30. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103(a), 7B U.L.A. 373.

31. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103(c), 7B U.L.A. 373.

32. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 3.103(d)(1), 7B U.L.A. 373.

33. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.202, 7B U.L.A. 400.

34. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.203(b), 7B U.L.A. 400 (2006) (stating an extended period is one of more than seven days).

abuse as a primary inspiration for imposing such limitations on landlords.[35]

As commentators have noted, when the Arkansas General Assembly enacted the Arkansas Act, the legislature partially adopted the Uniform Act.[36] Chief among the Arkansas Act's omissions is the removal of the Uniform Act's provisions prohibiting landlords from abusing their access rights, such as the elimination of the requirement that landlords give tenants at least two days' notice prior to entering the premises.[37] The Arkansas General Assembly's fractional enactment of the Uniform Act "dangerously expands the conditions under which the landlord may enter" because the Arkansas Act eradicates all tenant protections against undue access by landlords.[38]

In addition to the removal of the Uniform Act's protections against a landlord's abuse of his access rights, the Arkansas Act also inserted language that allows landlords to enter a tenant's residence to "investigate possible criminal activity." [39] A review of all jurisdictions that have codified the Uniform Act's access provision in some capacity reveals that Arkansas is the only state that grants landlords such access.[40] As one can imagine, the grant of such authority upon landlords may produce serious problems.

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35. UNIF. LAW COMM'N, *supra* note 26.

36. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 24, at 9 ("[T]he Arkansas state legislature purged the [Uniform Act] of almost all references to the rights of tenants and the obligations of landlords before adopting most of what remained.").

37. *See* ARK. CODE ANN. § 18-17-602 (Supp. 2013) (omitting these features of the Uniform Act).

38. Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 et seq.*, 2008 ARK. L. NOTES 71, 73.

39. ARK. CODE ANN. § 18-17-602 (Supp. 2013).

40. *See* ALASKA STAT. ANN. § 34.03.140 (West 2014); FLA. STAT. ANN. § 83.53 (West 2014); IOWA CODE ANN. § 562A.19 (West 2014); KY. REV. STAT. ANN. § 383.615 (West 2014); MONT. CODE ANN. § 70-24-312 (West 2013); R.I. GEN. LAWS ANN. § 34-18-16 (West 2014); TENN. CODE ANN. § 66-28-403 (West 2014); VA. CODE ANN. § 55-248.18 (West 2014).

III. THE ACT'S EFFECT ON A TENANT'S ABILITY TO CONSENT TO SEARCHES

A. The Arkansas Act Violates Minimum Constitutional Standards

The Fourth Amendment to the United States Constitution and article 2, section 15 of the Arkansas Constitution are almost identical.[41] As a result, the Arkansas Supreme Court has historically interpreted what constitutes an "unreasonable search" under the Arkansas Constitution in the "same manner the [United States] Supreme Court interprets the Fourth Amendment."[42] Although states have authority to increase individual protections against unreasonable searches and seizures by granting their citizens more protection than the United States Constitution, a state provision may not be construed to afford fewer rights than those provided by the Fourth Amendment.[43] Clearly, the United States Constitution provides a "constitutional floor" that guarantees citizens minimum protection which may not be infringed upon by states.[44]

However, the access provision of the Arkansas Act effectively provides tenants with less protection against unreasonable searches and seizures than what is guaranteed by the United States Constitution. The United States Supreme Court has held that the Fourth Amendment guarantees tenants a constitutional right to privacy in their residences and that a warrantless police search of the residence—authorized by an owner who lacks authority to enter—is unreasonable because it "would leave tenants' homes secure only in the discretion of their landlords."[45] Although Arkansas adopted the United States Supreme Court's position in *Chapman v. United States* and

41. The Fourth Amendment to the United States Constitution provides: "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV. Article 2, section 15 of the Arkansas Constitution retains much of the substance of its federal counterpart, except its restriction to "[t]he right of the people of this State" to be secure against unreasonable searches and seizures. *See* ARK. CONST. art. 2, § 15.

42. Stout v. State, 320 Ark. 552, 558, 898 S.W.2d 457, 460 (1995).

43. 16 AM. JUR. 2D *Constitutional Law* § 88 (2009).

44. *Id.*

45. Stoner v. California, 376 U.S. 483, 489-90 (1964); *see also* Chapman v. United States, 365 U.S. 610, 617 (1961).

Stoner v. California,[46] the Arkansas General Assembly appears to have stripped the constitutional rights of its citizens.

The United States Supreme Court previously dealt Arkansas "the back of the hand" when the state last attempted to overstep the Court's authority as the final arbiter of protections afforded to citizens under the Fourth Amendment.[47] In *Arkansas v. Sullivan*, the Arkansas Supreme Court held that evidence seized during a traffic stop as a result of an officer's improper subjective intent violated the Fourth Amendment.[48] The court reasoned that the United States Supreme Court's holding in *Whren v. United States*, which held an officer's subjective motivation to conduct a traffic stop is immaterial so long as probable cause is established, was inapplicable. The Arkansas Supreme Court believed it could interpret the "U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights."[49] Holding that the decision was blatantly contrary to precedent, the Court concluded:

> [W]hile 'a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards,' 'it may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them.'[50]

Accordingly, the United States Supreme Court reversed because the Arkansas Supreme Court decision rested upon the federal constitutional guarantee against unreasonable searches and seizures and, consequently, those rights could not be varied in a manner that ignored United States Supreme Court precedent. In light of the decision, Arkansas must tread

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46. *See, e.g.*, Scroggins v. State, 276 Ark. 177, 182, 633 S.W.2d 33, 36 (1982) (holding that a defendant's living quarters, whether or not the residency is permanent, is protected against unreasonable searches and seizures).

47. *See* Stanley E. Adelman, *Towards an Independent State Constitutional Jurisprudence or How to Disagree with the Supreme Court and How Not To*, 2002 ARK. L. NOTES 1, 4 (2002).

48. 340 Ark. 315, 317, 11 S.W.3d 526, 527 (2000), *opinion supplemented on denial of reh'g*, 340 Ark. 315, 16 S.W.3d 551 (2000), *cert. granted*, *judgment rev'd*, 532 U.S. 769 (2001).

49. State v. Sullivan, 340 Ark. 315, 318-C, 16 S.W.3d 551, 552 (2000), *cert. granted*, *judgment rev'd*, 532 U.S. 769 (2001).

50. Arkansas v. Sullivan, 532 U.S. 769, 772 (2001) (emphasis omitted) (quoting Oregon v. Hass, 420 U.S. 714, 719 (1975)).

carefully in its attempts to provide less protection to citizens against unreasonable searches and seizures than what is afforded by the Fourth Amendment.

Similarly, the Arkansas General Assembly's attempt to override decisions on the constitutional right to privacy afforded to tenants through the enactment of the Arkansas Act is analogous to congressional attempts to override the Supreme Court's ruling in *Miranda v. Arizona*. In *Miranda*, the Court held that a criminal suspect must be advised of his right to remain silent, that any statement he makes may be used against him, and that he has the right to the presence of an attorney prior to any police questioning.[51] The majority held any statements obtained without first providing these familiar warnings are inadmissible against a defendant, reasoning that such procedural safeguards effectively protect a criminal suspect's privilege against self-incrimination.[52]

In response, Congress attempted to overrule *Miranda* through the enactment of Title 18, Section 3501 of the United States Code, which required courts to admit a confession made by a criminal defendant where the statement was "voluntarily given," regardless of whether *Miranda* warnings were provided.[53] In *Dickerson v. United States*, the Supreme Court ruled that *Miranda* was a constitutional decision, as opposed to a mere prophylactic measure, and could not be overruled by Congress.[54] Although the Court recognized the authority of Congress to alter or annul decisions that are not constitutionally required, Congress lacks the ability to legislatively overrule the Court's decisions interpreting the Constitution.[55]

Similar to congressional attempts to override *Miranda*, the access provision of the Arkansas Act potentially conflicts with a clear, constitutional rule enunciated by both the United States Supreme Court and highest court of Arkansas. Cases such as *Chapman* and *Breshears v. State* clearly establish that tenants have an expectation of privacy in their residences that cannot be infringed upon unless the authorities adhere to strict,

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51. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
52. *Id.*
53. *See* 18 U.S.C. § 3501(a) (2000), *invalidated by* Dickerson v. United States, 530 U.S. 428, 437, 444 (2000).
54. *See Dickerson*, 530 U.S. at 444.
55. *See id.* at 437, 444.

constitutional mandates.[56] As established in *Dickerson*, legislatures may not override the Court's decisions pertaining to constitutionally required rules.[57] Accordingly, the Arkansas General Assembly cannot usurp a tenant's ability to consent to a warrantless search of his premises through legislative fiat. Arkansas has been down this road before and must allow the courts to interpret or nullify any constitutionally required rules pertaining to unreasonable searches and seizures.

B. The Arkansas Act Interferes with Tenants' Authority to Consent to Searches

The Fourth Amendment places limits on police power by prohibiting unreasonable searches and seizures.[58] However, a citizen may waive this right by consenting to cooperate with the police.[59] In order to be effective, a citizen's consent to a warrantless search must be voluntary and not the result of "duress or coercion, express or implied."[60] Whether police voluntarily obtained consent is a factual question determined by the totality of the circumstances.[61]

Arkansas's partial adoption of the Uniform Act likely infringes upon a tenant's right to withhold consent from warrantless searches of his premises. In fact, some commentators suggest the Arkansas Act's access provision could entirely eliminate a tenant's ability to withhold consent to searches in certain circumstances.[62] The access provision states: "A tenant shall not unreasonably withhold consent to the landlord to enter into the dwelling unit in order to . . . investigate possible criminal activity."[63] The statutory language makes it unclear if a landlord is vested with the power to unilaterally consent to warrantless searches of a tenant's residence by law enforcement officials because the Act fails to define what

56. Chapman v. United States, 365 U.S. 610, 617 (1961); Breshears v. State, 94 Ark. App. 192, 197, 228 S.W.3d 508, 511 (2006).

57. *Dickerson*, 530 U.S. at 437, 444.

58. *See* U.S. CONST. amend. IV.

59. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

60. *Id*. at 227.

61. *See id*.

62. *See* Prettyman, *supra* note 38, at 73-74.

63. ARK. CODE ANN. § 18-17-602(a) (Supp. 2013).

constitutes "unreasonably withhold[ing] consent."[64] Although the United States Supreme Court has established that a citizen's consent is valid under the Fourth Amendment only if it is "freely and voluntarily" given to police,[65] the Arkansas Act presumably obviates the need for consent. As a result, a landlord could potentially circumvent a tenant's refusal to consent in order to allow the police access into a tenant's premises to inspect for illegal activity.

In addition, the Arkansas Act essentially eliminates the right to voluntarily consent to searches by forcing tenants to choose between allowing access or facing the possibility of eviction.[66] Arkansas Code Annotated section 18-17-705 provides, in part: "If the tenant refuses to allow lawful access, the landlord may obtain injunctive relief in district court without posting bond to compel access, or terminate the rental agreement."[67] While the Uniform Act has a similar provision, it also provides a tenant with remedies following a landlord's abuse of his access rights.[68]

For example, a tenant may obtain injunctive relief to prevent the reoccurrence of abuse or elect to terminate his rental agreement.[69] A tenant may pursue either option, regardless of whether his landlord makes an unlawful entry, exercises lawful entry in an "unreasonable" fashion, or makes repeated demands for lawful entry in a harassing manner.[70] The Arkansas Act's omission of the Uniform Act's protections and remedies against landlord access abuse potentially places Arkansas tenants in a precarious situation in the event a landlord attempts to gain lawful entry with the assistance of police.

The Arkansas Act also conflicts with established Fourth Amendment precedent. It is well settled that once a lessor enters into a lease agreement with a lessee, the lessee maintains exclusive possession of the premises during the term of the

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64. *See generally* ARK. CODE ANN. §§ 18-17-101 to -913 (Supp. 2013) (lacking a definition of unreasonably withholding consent).

65. *Schneckloth*, 412 U.S. at 222 (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968)).

66. *See* ARK. CODE ANN. § 18-17-705(a) (Supp. 2013).

67. ARK. CODE ANN. § 18-17-705(a).

68. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.302(a), 7B U.L.A. 410 (2006).

69. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.302(b), 7B U.L.A. 410.

70. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.302(b), 7B U.L.A. 410.

lease.[71] At common law, a tenant's right to exclusive possession extends to all other individuals, including the owner and any "others not having a superior legal or equitable right."[72] Consequently, a landlord is generally proscribed from "giv[ing] . . . consent to a police search of that area which will be effective against the lessee."[73]

A third party may validly consent to a warrantless search of another's residence, provided the party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."[74] In the landlord-tenant context, both the United States Supreme Court and the United States Court of Appeals for the Eighth Circuit[75] have held that, absent certain circumstances, a landlord may not consent to a warrantless search of a tenant's premises because tenants enjoy a superior right of possession.[76] For example, in *United States v. Matlock*, the Court noted that a third party's authority to consent "does not rest upon the law of property, with its attendant historical and legal refinements."[77] Instead, the Court reasoned that common authority depends upon the existence of the following:

> [M]utual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.[78]

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71. *See* 52A C.J.S. *Landlord & Tenant*, *supra* note 18, § 699.

72. *Id.*

73. 4 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.5(a) (5th ed. 2012).

74. United States v. Matlock, 415 U.S. 164, 171 (1974).

75. *See, e.g.*, Chapman v. United States, 365 U.S. 610, 616-17 (1961) (holding that to allow a landlord to give consent to a warrantless search of a tenant's premises would "reduce the [Fourth] Amendment to a nullity"); United States v. Williams, 523 F.2d 64, 66 (8th Cir. 1975) (holding "a landlord cannot give consent to a warrantless search of leased premises").

76. *See* Jimmie E. Tinsley, *Third Party's Lack of Authority to Consent to Search of Premises or Effects*, *in* 18 AM. JUR. 2D *Proof of Facts* 681, 704 (David A. Winn et al. eds., 2d ed., 1979).

77. *Matlock*, 415 U.S. at 171 n.7 (1974).

78. *Id.*

The Court cited *Chapman v. United States* in support of this proposition.[79] In *Chapman*, the police conducted a warrantless search of a tenant's rental home after obtaining consent from the landlord.[80] The landlord had visited the tenant's residence and detected a "strong odor of mash."[81] Shortly thereafter, he contacted the police and informed them of his observations.[82] After establishing that the tenant was not home, the landlord granted the police permission to enter into the residence to investigate the source of the odor.[83] While inside, the authorities discovered an illegal distillery and over 1,000 gallons of mash in the living room.[84]

Despite the government's argument that the landlord had authority to enter the tenant's residence because he "found good reason to believe that the leased premises were being . . . used for criminal purposes," the United States Supreme Court found the search unreasonable.[85] Specifically, the court reasoned that to "uphold such an entry, search and seizure without a warrant would reduce the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords."[86]

Due to a tenant's right to exclusive possession of the premises, there is ample authority from Arkansas supporting the proposition that a landlord cannot validly consent to a warrantless search of a tenant's residence.[87] The most significant case to deal with this issue is *Breshears v. State*,[88] decided one year prior to the passage of the Arkansas Act. In *Breshears*, a landlord permitted police to enter his tenant's premises based on the claim that the tenant had been served with an eviction notice and no longer had permission to live there.[89] A police officer then entered and observed a "strange chemical

79. *See id.* (citing *Chapman*, 365 U.S. at 610).
80. *Chapman*, 365 U.S. at 610.
81. *Id.* at 611 (internal quotation marks omitted).
82. *Id*.
83. *Id.* at 612.
84. *Id.*
85. *Chapman*, 365 U.S. at 610, 618.
86. *Id.* at 616-17 (alterations and internal quotation marks omitted) (citing Johnson v. United States, 333 U.S. 10, 14 (1948)).
87. *See, e.g.*, Grover v. State, 291 Ark. 508, 510, 726 S.W.2d 268, 270 (1987) ("A landlord does not have the right to consent to a search of his tenant's house or apartment.").
88. 94 Ark. App. 192, 228 S.W.3d 508 (2006).
89. *Id.* at 194-95, 228 S.W.3d at 509-10.

odor."[90] Upon further inspection, police discovered drug paraphernalia and instruments used to produce methamphetamine.[91]

Holding that "consent to search [a] premises can only be given by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent," the Arkansas Court of Appeals found the police intrusion into the tenant's premises unreasonable.[92] The court established that the proper test for third-party consent is whether the "facts available to the police . . . warrant a man of reasonable caution to believe that the consenting party had authority over the premises."[93] The court concluded that when the officer entered the premises solely based "on the fact that [the landlord] was the owner of the property and . . . claim[ed] that [the tenant] was trespassing," the officer relied upon the "type of consent that was . . . long ago found not to pass constitutional muster."[94]

After a review of the relevant case law, it appears the Arkansas Act's access provision violates established Fourth Amendment precedent regarding a tenant's authority to consent to searches of his premises. The Arkansas Act's requirement that a tenant must not "unreasonably withhold consent" to a landlord to search for possible criminal activity, without placing any limitations on a landlord's access, potentially provides a landlord with the power to allow police to enter and search a leased premises over a tenant's objection. Therefore, the access provision gives police a powerful loophole to make warrantless entries into a tenant's residence without the need to consider whether the landlord has the authority to consent to a search.

IV. LANDLORDS AS POLICE AGENTS?

A. Does the Arkansas Access Provision Effectively Make Landlords Agents of Law Enforcement?

Another important consideration is whether the access provision effectively makes private landlords agents of state or

90. *Id.* at 194, 228 S.W.3d at 509.

91. *Id.* at 193-94, 228 S.W.3d at 509.

92. *Id.* at 197, 228 S.W.3d at 511.

93. *Breshears*, 94 Ark. App. at 197, 228 S.W.3d at 511 (quoting Hillard v. State, 321 Ark. 39, 44, 900 S.W.2d 167, 169 (1995)).

94. *Id.* at 197-98, 228 S.W.3d at 512 (citing Chapman v. United States, 365 U.S. 610, 616 (1961)).

local law enforcement when they enter into a tenant's premises to investigate suspected illegal activity. It is well established that the Fourth Amendment does not govern unlawful searches conducted by non-law enforcement personnel.[95] Both the United States Supreme Court[96] and the Arkansas Supreme Court[97] have held that the Fourth Amendment's proscription against unreasonable searches and seizures is inapplicable when private parties conduct the searches. However, when a private party acts as "an agent of the [g]overnment or with the participation or knowledge of any governmental official," a search conducted by the private party is subject to Fourth Amendment scrutiny, and any evidence obtained from an unlawful intrusion may be suppressed.[98]

The Arkansas Act unquestionably grants a police function to landlords by expressly authorizing them to enter a tenant's premises for the purpose of investigating criminal activity. However, this grant of police power, without more, is likely insufficient to turn Arkansas landlords into government agents bound by the Fourth Amendment.[99] Instead, such searches would qualify as governmental in nature if the state required landlords to conduct the searches and the searches were "undertaken pursuant to . . . government regulations rather than for some private purpose."[100] Despite the access provision's requirement that tenants allow landlords entry to investigate criminal misconduct, the statute does not require landlords to initiate such searches. Further, if a landlord does not enter and search for the purpose of securing a tenant's criminal conviction, it follows that such an entry would likely be considered a private purpose. This is consistent with the underlying purpose of the exclusionary rule, which is to deter unlawful police misconduct, because the rule does not apply when "a private party . . . commits the offending act."[101]

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95. *See* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

96. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109, 113 (1984) (finding the Fourth Amendment "wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual").

97. *See, e.g.*, Bruce v. State, 367 Ark. 497, 501, 241 S.W.3d 728, 730 (2006).

98. *See Jacobsen*, 466 U.S. at 113.

99. 1 LAFAVE, *supra* note 73, § 1.8(c) ("[T]he fact that statutes . . . specify . . . the power of certain private persons . . . to act in a certain way for their own protection does not alone make such actions governmental.").

100. *Id.*

101. United States v. Janis, 428 U.S. 433, 455-56 n.31 (1976).

However, if a landlord conducted a search pursuant to the access provision with sufficient police instigation or participation, the landlord may be considered an agent for Fourth Amendment purposes. The question of whether a private party acted as an agent or instrument of the government can only be resolved by analyzing the totality of the circumstances, and the fact that the government did not compel a private party to conduct the search is not dispositive.[102] In determining whether a private actor conducted a search as a government agent, Arkansas courts consider multiple factors: (1) whether the government "knew of and acquiesced" to the search; (2) whether the private party intended to assist law enforcement; (3) whether the government requested the search; and (4) whether the private party was offered a reward for the intrusion.[103]

In the landlord-tenant context, it is well established that landlords who act on their own initiative and do not obtain aid from law enforcement are deemed private parties and may enter a tenant's premises to conduct a search without implicating the Fourth Amendment.[104] For example, in *United States v. Church*, the manager of a mini-storage facility cut the padlock off the defendant's storage unit and entered after the defendant became delinquent on his rental payments.[105] While searching the unit's contents, the manager discovered and opened a padlocked footlocker.[106] Upon opening the locker, the manager discovered multiple plastic bags filled with a "white powdery substance."[107] Suspecting that the substance was illegal, the manager contacted police who, after determining that the substance was indeed cocaine, arrested the defendant.[108] The court concluded that the Fourth Amendment did not apply to the landlord's entry of the

102. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 614-15 (1989).

103. *See* Whisenant v. State, 85 Ark. App. 111, 123-24, 146 S.W.3d 359, 367 (2004).

104. *See, e.g.*, Duran v. United States, 413 F.2d 596, 608 (9th Cir. 1969) (holding that a landlord who entered a tenant's room for cleaning did not implicate the Fourth Amendment because "there was no police participation of any kind in the search"); *see also* United States v. Church, 581 F. Supp. 260, 265 (W.D. Ark. 1984) ("It is now well settled that where a search is made by a private person, on his own initiative and for his own purposes, the Fourth Amendment is not implicated.").

105. 581 F. Supp. at 262.

106. *Id.*

107. *Id.*

108. *Id.* at 262-63.

defendant's unit because "[t]here was no participation in any respect by law enforcement agents."[109]

Similarly, in *United States v. Moffett*, a federal district court held that the Fourth Amendment was not implicated because law enforcement was only found to be a "passive recipient of incriminating evidence" obtained by the landlord.[110] After the landlord learned of the defendant's arrest for an outstanding warrant, the landlord entered into the defendant's leased premises and found an "openly visible, unlocked briefcase" filled with money.[111] The landlord immediately turned the briefcase over to police, and the currency was determined to be counterfeit.[112] The court concluded the landlord was not acting as a police agent because he "was not searching for incriminating evidence."[113] Instead, the court reasoned the landlord was acting as a "curious and understandably concerned property owner" when he discovered the briefcase and offered it to police.[114] Interestingly, the court noted that the Fourth Amendment would not have been implicated even if the landlord did not have the "legal right to enter . . . [the] property" and the defendant's briefcase had been "hidden and locked."[115]

However, if a landlord enters into a tenant's residence "at the urging or initiation of the government," the search is not a private action, and the Fourth Amendment applies.[116] The landlord in *United States v. Klopfenstine* entered into the defendant's apartment and "observed sheets of paper bearing the impressions of the backs of $20 bills."[117] The landlord reported his observations to local law enforcement, and police asked the landlord to reenter the apartment and obtain samples of the sheets.[118] As requested, the landlord retrieved two of the sheets and turned them over to police.[119] After the Secret Service intervened in the investigation, it was established that the

109. *Id*. at 266.
110. 885 F. Supp. 237, 239 (N.D. Ala. 1995).
111. *Id.*
112. *Id.*
113. *Id.* (internal quotation marks omitted).
114. *Id.*
115. *Moffett*, 885 F. Supp. at 239.
116. *See* United States v. Klopfenstine, 673 F. Supp. 356, 360 (W.D. Mo. 1987) (citing United States v. Haes, 551 F.2d 767, 770 (8th Cir. 1977)).
117. *Id.* at 358.
118. *Id.*
119. *Id*.

defendant had been counterfeiting Federal Reserve Notes.[120] Although the court found the landlord's initial entry into the defendant's apartment was a private action, it held that his second entry and subsequent seizure of the impressions was unlawful because "there was warrantless official involvement in the seizure of the items."[121] The court reasoned that, despite the search being physically performed by the landlord, he acted as a government agent and the seizure of the sheets was "effectively done by the police."[122]

Likewise, in *United States v. Hardin*, the United States Court of Appeals for the Sixth Circuit held that when law enforcement requested that an apartment manager enter a tenant's apartment to determine if a tenant was present, the manager acted as a government agent.[123] In *Hardin*, an arrest warrant was issued for the defendant, and the police received a tip that the defendant might be staying at his girlfriend's apartment.[124] Police went to the apartment building and asked the manager to enter the apartment and see if the defendant was there.[125] The landlord entered under the guise that he was checking for a water leak, confirmed the defendant was present, and reported his observations to the police.[126] The appeals court concluded that the manager acted as an agent for the government because his "intent to search [the apartment] was wholly dependent on the government's intent."[127]

The law recognizes that a landlord's search of a tenant's premises constitutes a private search so long as police observation remains "confined to the scope and product of the [landlord's] initial search."[128] For instance, when an apartment complex's employees uncovered incriminating evidence in a tenant's closet and subsequently invited police to observe the evidence, the Fourth Amendment was not implicated because the police observed the evidence in plain view without touching

120. *Id.*
121. *Klopfenstine*, 673 F. Supp. at 360 (emphasis omitted).
122. *Id.*
123. *See* 539 F.3d 404, 417 (6th Cir. 2008).
124. *Id*. at 407.
125. *Id.*
126. *Id.* at 407-08.
127. *Id.* at 418 (emphasis omitted).
128. *See* United States v. Bomengo, 580 F.2d 173, 175 (5th Cir. 1978).

or moving it.[129] This approach can be reconciled with the holding in *Klopfenstine* because the search did not go beyond the scope of the landlord's initial discovery.[130]

Clearly, when law enforcement actively takes a role in the search, the Fourth Amendment applies.[131] In *United States v. Reed*, officers accompanied a hotel employee after he requested protection while he checked a guest's room.[132] As the employee entered the room, the police closely followed to ensure the employee's safety and observed suspected crack cocaine in plain view.[133] Once the room was determined to be secure, the officers stood outside while the manager searched through drawers and reported his findings.[134] Police obtained a warrant and discovered more drugs and an unregistered sawed-off shotgun.[135] The court concluded the employee acted as a government agent when he searched the hotel guest's possessions because the officers effectively served as "lookouts" and assisted the manager with knowledge that the guest's privacy interests were being invaded.[136]

Accordingly, Arkansas landlords should proceed with caution when inviting law enforcement to enter a tenant's residence to help investigate criminal activity pursuant to the access provision of the Arkansas Act. Although there is little justification for applying the Fourth Amendment when a landlord enters a tenant's apartment on his own initiative, courts have a strong incentive to invoke the Fourth Amendment if the landlord acted at the direction or control of law enforcement.

B. The Implications for Landlords Hiring Private Security Personnel

Courts must also consider whether the Fourth Amendment's proscription against unreasonable searches applies to searches conducted pursuant to the Arkansas Act's access provision by private security personnel. Today, landlords frequently hire private security to provide services traditionally

129. *See id.* at 175-76.
130. *Id.* at 175.
131. *See* United States v. Reed, 15 F.3d 928, 932 (9th Cir. 1994).
132. *Id.* at 930.
133. *Id.*
134. *Id.*
135. *Id.*
136. *See Reed*, 15 F.3d at 930-32.

offered by local police.[137] This practice of hiring off-duty police officers to patrol apartment complexes has reached Arkansas.[138] Unquestionably, the amount of criminal activity at apartment complexes throughout Arkansas is a major concern, forcing public officials and landlords across the state to consolidate their efforts to eliminate the problem.[139]

If the Fourth Amendment applies to police officers who are working off-duty as private security personnel, then landlords and hired security need a warrant to enter a tenant's apartment to investigate criminal activity pursuant to the access provision. While there is no consensus among the courts, scholars suggest that the "Fourth Amendment applies when [a police officer], even during his private employment, has some special authority under state law."[140] For instance, in *State v. Wilkerson*, the Louisiana Supreme Court held that the Fourth Amendment applied to a search by a police officer, who worked off-duty at an apartment complex because law enforcement officers "never truly go[] off duty."[141] Similarly, a Maryland court held that an off-duty police officer working for a property-management company acted under "color of police authority" during a traffic stop and ensuing search because, during the events in question, he drove a marked police vehicle, carried a police radio, and received assistance from active-duty officers.[142]

Alternatively, other courts have held that an officer must take action that "steps out of [the] sphere of legitimate private

137. *See* THE LAW ENFORCEMENT-PRIVATE SECURITY CONSORTIUM, U.S. DEP'T OF JUSTICE, OPERATION PARTNERSHIP: TRENDS AND PRACTICES IN LAW ENFORCEMENT AND PRIVATE SECURITY COLLABORATIONS 44 (2009), *available at* http://www.ilj.org/publications/docs/Operation_Partnership_Private_Security.pdf. Reports indicate that over 100 housing projects in the Boston area hired private security personnel, licensed through the local police department, to patrol the property and conduct limited arrests. *Id.*

138. In 2010, an officer with the Little Rock Police Department fatally shot an elderly man, who was reportedly assaulting another officer with his cane, while both officers were working private security at an apartment complex. C.S. Murphy, *One Deadly Night*, ARK. DEMOCRAT-GAZETTE, July 3, 2011, at 1A.

139. The Little Rock Board of Directors recently considered legislation to help reduce crime in certain apartment complexes because the criminal activity created "inordinate and excessive demands" on police. *High Crime Creates Nuisance at Apt. Complexes*, FOX16.COM (Mar. 27, 2013, 8:27 PM), http://www.fox16.com/news/local/story/High-Crime-CreaComplexes/d/story/lbjHCiY6fEeS6X4O8QKNUw.

140. 1 LAFAVE, *supra* note 73, at § 1.8(d).

141. 367 So. 2d 319, 321 (La. 1979).

142. *In re* Albert S., 664 A.2d 476, 483-84 (Md. Ct. Spec. App. 1995).

action" in order for the Fourth Amendment to apply.[143] In *Commonwealth v. Leonne*, a police officer working private security entered the defendant's truck to inspect its contents.[144] Over the defendant's objections, the officer entered into the truck's cab, inspected the defendant's personal bags, and discovered a stolen gun.[145] Although the court agreed that the Fourth Amendment applied to state officers that are privately employed as security guards when attempting to secure evidence on behalf of the employer, such conduct should not be considered an unreasonable search "[w]hen the guard's conduct is justified by his legitimate private duties."[146]

Arkansas courts have yet to consider the question of whether police officers working as private security personnel are subject to the constraints of the Fourth Amendment. Landlords in the state will likely continue to employ off-duty police officers to patrol their property, given the increased pressure to provide a safe, crime-free environment for their tenants.[147] In the event a landlord instructs an off-duty officer to enter a tenant's property to investigate possible criminal activity, the answer to the pivotal question of whether the Fourth Amendment applies will likely hinge on whether the officer acted in a purely private capacity.

V. DO LANDLORDS ASSUME A DUTY TO PROTECT TENANTS FROM CRIMINAL ACTS BY INVESTIGATING CRIMINAL ACTIVITY?

Ironically, the Arkansas General Assembly may have provided additional rights to tenants by giving landlords the ability to enter a tenant's residence to investigate possible criminal activity. As a general proposition, Arkansas adheres to the common-law principle that landlords are under no duty to

143. Commonwealth v. Leone, 435 N.E.2d 1036, 1041 (Mass. 1982).

144. *Id.* at 1037.

145. *Id.* at 1037-38.

146. *Id.* at 1041.

147. Representatives from one Little Rock apartment complex stated that management was "considering hiring off-duty police officers to patrol the premises," following an influx in crime and law enforcement's warning to either "clean up or ship out." *Apartments to Fight Crime on Reservoir Road*, FOX16.COM, (Feb. 2, 2009, 8:40 PM), http://www.fox16.com/mostpopular/story/Apartments-to-fight-crime-on-Reservoir-Road/d/story/VNotMXnKBUi1OCtfubFJ_w.

protect a tenant or his guests from the criminal acts of others.[148] However, such an obligation may be imposed upon a landlord if it is created by statute or agreement, such as by the express terms of the lease itself.[149]

In *Bartley v. Sweetser*, the Arkansas Supreme Court reaffirmed that, absent a statute or agreement, a landlord has no duty to protect tenants or their guests from the criminal acts of others.[150] The tenant in *Bartley* filed an action against her landlords after two men entered her apartment and raped her.[151] The tenant alleged the landlords failed to maintain adequate security and failed to warn her of the frequent criminal activity at the apartment complex.[152] Further, she claimed that the terms of her lease prevented her from installing additional locks, and that her landlords "retained sole dominion and control over her door and the common areas of the complex."[153]

Despite the tenant's arguments, the court concluded that policy concerns prevented it from imposing such a duty on landlords.[154] Such a rule would "conflict with public policy allocating the duty of protecting citizens from criminal acts to the government rather than the private sector."[155] The court declined to find a duty because there was no Arkansas law "imposing a duty upon a landlord to protect a tenant from a third party's criminal acts."[156]

However, two years later, the same court suggested that if a landlord enacts policies that rise above "modest, conscientious measures" to ward off criminal activity, he might assume a duty to protect tenants from third-party criminal attacks.[157] In *Hall v. Rental Management, Inc.*, a tenant whose son was murdered at his apartment complex argued that the on-site management "voluntarily undertook a duty to provide security and, having done so, was bound to use reasonable care."[158] The tenant offered an employee manual detailing security measures taken

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148. Bartley v. Sweetser, 319 Ark. 117, 120, 890 S.W.2d 250, 251 (1994).
149. *See* Bussey v. Bearden, 2011 Ark. App. 353, at 5, 384 S.W.3d 41, 44.
150. 319 Ark. at 120, 890 S.W.2d at 251.
151. *Id.* at 119, 890 S.W.2d at 250.
152. *Id.*
153. *Id.*
154. *See id.* at 121, 890 S.W.2d at 252.
155. *Bartley*, 319 Ark. at 121, 890 S.W.2d at 252.
156. *Id.* at 122, 890 S.W.2d at 252.
157. Hall v. Rental Mgmt., Inc., 323 Ark. 143, 149-50, 913 S.W.2d 293, 297 (1996).
158. *Id.* at 144-45, 913 S.W.2d at 294.

by the management company, as well as a deposition from the on-site maintenance employee, to support this contention.[159]

The manual provided guidance on effective security measures, including "being alert for suspicious activities[,] . . . getting acquainted with local law enforcement personnel[,] . . . [and] be[ing] security and safety conscious at all times."[160] The manual also advised managers to perform security checks on the property and to contact police regarding any security concerns.[161] The deposition provided that the maintenance employee would often "patrol the premises" and contact the police if a tenant observed criminal activity, such as witnessing people carrying guns on the property.[162]

Despite these measures, the court found the tenant's arguments unpersuasive.[163] The court agreed that the management company's enactment of such policies helped to "assure the quiet enjoyment and basic safety of the tenants, [and provided] a modicum of deterrence to criminal activity."[164] However, the court concluded that the company's "modest" policies did not "rise to such a level" where management assumed a duty to protect tenants from the criminal acts of others.[165]

While conducting minimally intrusive security measures, such as those in *Hall*, may not create a duty to protecting tenants, Arkansas courts might find that such a duty arises when a landlord actively enters tenant residences for the purpose of investigating criminal activity. Despite the seemingly well-settled rule that landlords have no duty to protect tenants from injury on the premises, the Arkansas Supreme Court suggested such a duty might be established "by statute or agreement."[166] Although the Arkansas Act does not explicitly impose any duties on landlords, one might be implied given the level of dominion and control a landlord enjoys over a tenant's premises under Arkansas law. Accordingly, Arkansas residential landlords should proceed with caution when exercising the right

159. *Id.* at 145, 913 S.W.2d at 294-95.
160. *Id.* at 146-47, 913 S.W.2d at 295.
161. *Id.* at 147, 913 S.W.2d at 295.
162. *Hall*, 323 Ark. at 148, 913 S.W.2d at 296.
163. *See id.* at 150, 913 S.W.2d at 297.
164. *Id.* at 149-50, 913 S.W.2d at 297.
165. *Id.* at 150, 913 S.W.2d at 297.
166. Bartley v. Sweetser, 319 Ark. 117, 121, 890 S.W.2d 250, 252 (1994).

to investigate criminal activity within a tenant's dwelling, as Arkansas case law seems to suggest such action could lead to tort liability.

VI. PROPOSED SOLUTIONS TO THE ARKANSAS ACT'S ACCESS PROVISION

In order for the access provision to comply with the Fourth Amendment, serious reform is needed. The Arkansas General Assembly could effectuate the necessary change by simply striking the language that allows a landlord to enter a tenant's residence to investigate criminal activity. The legislature could also solve the problem by enacting the remedies and protections afforded to tenants by the Uniform Act.

Interestingly, there are current efforts within the Arkansas Generally Assembly to adopt legislation that could quell the Fourth Amendment concerns over the Arkansas Act's access provision. In 2013, legislators introduced Senate Bill 951 to implement reforms recommended by the Non-Legislative Commission on the Study of Landlord-Tenant Laws.[167] The proposed legislation included limitations on certain landlord rights, such as the access provision.[168] The bill explicitly provided that landlords could not "abuse the right of access or use it to harass the tenant," and required landlords to provide tenants with advance notice of their intent to enter, except in emergency circumstances.[169] In addition, the bill provided tenants with the same remedies for abuse of access found in the Uniform Act, such as the ability to obtain injunctive relief or terminate the rental agreement.[170] The Arkansas General Assembly declined to enact the proposed legislation.

VII. CONCLUSION

The Arkansas General Assembly must act swiftly to protect tenants who are vulnerable to unreasonable searches as a result of Arkansas's backwards landlord-tenant law. The legislature has left tenants susceptible to landlord abuse of the right to access and provided the police with a powerful loophole to

167. *See* S.B. 951, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).
168. *See* S.B. 951, 89th Gen. Assemb., Reg. Sess.
169. *See* S.B. 951, 89th Gen. Assemb., Reg. Sess.
170. *See* S.B. 951, 89th Gen. Assemb., Reg. Sess.

avoid obtaining a tenant's consent to search for the purpose of conducting a criminal investigation. Although the report published by the Non-Legislative Commission on the Study of Landlord-Tenant Laws, and the recently proposed legislation it inspired, were promising steps towards reform, more effort must be made if serious change is to be realized in Arkansas.

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