

CIVIL *GIDEON*: A JUDGE’S PERSPECTIVE ON THE RIGHT TO COUNSEL IN EVICTION CASES

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Our country faces a mass eviction crisis. Millions of eviction cases are filed annually in the United States. To exacerbate the issue, poor people are left to represent themselves in a complicated legal system that can expose them to drastic consequences, including homelessness. The civil right to counsel, also known as civil Gideon, has been a topic of discussion for many years amongst lawmakers and advocates. Although significant adoption has been slow, multiple cities and states have adopted right to counsel in eviction legislation. No jurisdiction provided for a civil right to counsel for tenants prior to 2017, but by 2021, three states and 13 cities provided that right. Although the preferred path for a universal right to civil counsel in eviction proceedings is through the United States Supreme Court, the Court has refused to recognize such a right thus far.

After hours of observing eviction cases from the bench and rethinking what “justice” should look like in our courts, some judges have also become vocal about the right to counsel. This article argues for civil Gideon in eviction cases, justified by our country’s guarantee to life and liberty. I set out to research this issue by conducting interviews with my fellow judges who preside over eviction dockets across the state of Alabama. Through research and analysis, I discovered that many judges strongly endorse the right to counsel for poor people in eviction cases.

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INTRODUCTION

John¹ has fallen behind on his rental payments. An eviction complaint is filed, and he has seven calendar days to answer the complaint in his jurisdiction

¹ Names and facts have been changed to protect identity.

of Alabama. John is not sure what to do, but he scribbles something on a piece of paper and files an answer. The case is set for trial. At trial, he is, again, clueless about the procedural process. He assumes he may be going to court to set up payment arrangements for the late rent. When his case is called for trial, he is shocked to learn that he and the landlord are not discussing the late rent; instead, the landlord wants him out of the property, which he must vacate within seven days. John is even more surprised to find out that there are two counts – possession and money – to the eviction process, and the counts are bifurcated. He does not understand the term, “bifurcation.” He learns from the judge that the money count will be handled at a later date once he vacates the property and the landlord assesses damages. Fees on top of insurmountable fees have been added since the complaint has been filed: late fees, attorney fees, eviction fees, process server fees, and more. Should he have been entitled to an attorney to assist him with such a life-changing proceeding?

Tina² has been given an eviction notice based on criminal activity at the apartment complex where she and her two children reside. The basis of the complaint states that Tina was fighting with her boyfriend outside of the apartment complex. The complaint further states that Tina allowed the boyfriend to reside on the property after he was previously accused of trespassing/caught trespassing by management. Tina files a general answer of denial. The case is set for trial. Tina is afraid because she doesn’t understand the process. She does not admit to anything. The parties appear before the judge, where Tina’s landlord is represented by an attorney. The evidence against Tina mounts while she looks on like a deer in headlights. The judge suspends the proceeding and asks Tina if she understands what is happening. Tina says, “No.” The judge asks Tina if she’d like a brief continuance to speak with Legal Services to find out if she qualifies for representation. Tina says, “Yes.” The case is reset for trial four weeks later. Tina’s lawyer presents evidence that Tina did not invite her *ex-boyfriend* to the apartment complex. Further evidence revealed that Tina’s ex-boyfriend assaulted her inside the apartment in front of their two children. She tried to run outside from him, but he caught her and continued to beat her outside of the apartment. After the close of the evidence, the judge ruled in Tina’s favor. Would Tina have been able to present this information without the assistance of an attorney?

As the presiding district civil judge of Jefferson County, Alabama, the most populous county in the state, I handle a very large eviction docket in Birmingham. Every day, landlords and tenants pack courtrooms for eviction cases. In the scholarly literature, courtrooms like mine are commonly called eviction mills

2 Names and facts have been changed to protect identity.

and eviction machines.³ This description is accurate. Many landlords are represented by attorneys, while most tenants represent themselves as pro se litigants.⁴ Eviction is a common occurrence among renters across America.⁵ And the eviction crisis is a major social problem, because the United States is increasingly a nation of renters. More than a third of Americans rent, which is the highest percentage in 50 years.⁶ As two practitioners write, “[C]ommunities of color and low-income women feel the impacts of eviction the most—[B]lack women in particular.”⁷ Less than half of Black and Latinx families own their homes, while 73% of white families are homeowners.⁸

There have been multiple debates in academic and policy circles regarding the topic of evictions.⁹ Judges play a leading role in the process. In many jurisdictions, a judge’s order is the only barrier standing between the tenant and homelessness. Between 2000-2016, more than 61 million eviction filings were made in the United States.¹⁰ This statistic demonstrates the importance of judges in any discussion as it relates to evictions. The adversarial process itself “relies

3 Ericka Petersen, *Building A House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 66 (2020).

4 *Pro-se* litigants and *self-represented* litigants are synonymous terms, meaning that an individual represents himself/herself without an attorney. Many jurisdictions use the terms interchangeably, and they are used in that manner throughout this article.

5 See, e.g., Emily Benfer, *The Eviction Crisis, Explained*, THE APPEAL (Mar. 3, 2021), <https://perma.cc/K3WF-KXKV>; Sophie Kasakove, *With Cases Piling Up, an Eviction Crisis Unfolds Step by Step*, N.Y. TIMES (Nov. 8, 2021), <https://perma.cc/C94J-H3LU>; Teresa Wiltz, *How Free Legal Help Can Prevent Evictions*, STATELINE (Oct. 27, 2017, 12:00 AM), <https://perma.cc/84JC-PAYV>; Sandra Park & John Pollock, *Tenants’ Right to Counsel is Critical to Fight Mass Evictions and Advance Race Equity During the Pandemic and Beyond*, ACLU (Jan. 12, 2021), <https://perma.cc/7D4S-AYUP>; Maria Roumiantseva & Liel Sterling, *New Report Illustrates How Right to Counsel Prevents Evictions and their Discriminatory Impacts on Communities*, ACLU (May 11, 2022), <https://perma.cc/B8GL-8SLP>.

6 Anthony Cilluffo, A.W. Geiger & Richard Fry, *More U.S. Households Are Renting Than At Any Point in 50 Years*, PEW RESEARCH CTR. (July 19, 2017), <https://perma.cc/C6RT-KWM4>.

7 Park & Pollock, *supra* note 5.

8 Connor Maxwell & Danyelle Solomon, *The Economic Fallout of the Coronavirus for People of Color*, CTR. FOR AM. PROGRESS (Apr. 14, 2020), <https://perma.cc/UAR6-CA89>.

9 See, e.g., Petersen, *supra* note 3; Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J. L. & GENDER 55 (2018); Brian Gilmore, Opinion, *Give Tenants Lawyers*, N.Y. TIMES (Oct. 9, 2018), <https://perma.cc/7M7U-8YF9>; Risa E. Kaufman et al., *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 (2009); Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527 (1991); Andrew Scherer, *Gideon’s Shelter: The Need to Reorganize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).

10 Ashley Gromis et al., *Estimating Eviction Prevalence Across the United States*, PNAS (May 16, 2022), <https://perma.cc/F6EW-D9ZJ>.

on the assumption that the parties to a lawsuit are approximately equal in their legal representation.”¹¹ However, that rarely happens in eviction cases. Tenants usually represent themselves in unfamiliar territory and make life altering decisions without the assistance of a lawyer. Although we proudly declare “equal justice under the law,” that is not the reality for these millions of Americans who are denied equal access to justice.

Some states have recognized the need for eviction defense representation. Cities like New York City, Cleveland, San Francisco, and Newark have passed legislation establishing the right to counsel for tenants facing eviction. This paper will address why the right to counsel in eviction cases is necessary for all communities, how other countries have addressed the right to counsel in civil cases, and how judges can make a difference by advocating for eviction defense representation.

I. WHAT IS *GIDEON*?

Gideon v. Wainwright was a landmark case decided in 1963 by the U.S. Supreme Court guaranteeing the right to counsel for indigent individuals in criminal cases.¹² In its decision, the Supreme Court held that the Sixth Amendment of the U.S. Constitution requires all states to provide an attorney to any criminal defendant unable to afford their own. The right to counsel in criminal cases was not, however, an overnight accomplishment. In 1932, the Supreme Court found a right to counsel for defendants in certain capital cases.¹³ In *Powell v. Alabama*, nine African American teenagers were charged with raping two white women. They were indicted, and the trial began only six days after indictment without the assistance of counsel. Ultimately, all but one of the defendants were sentenced to death.¹⁴ On appeal, “the Court narrowly tailored its opinion, and held that the failure to appoint counsel was a denial of due process only in the particular circumstances of this case and failed to create a broader right.”¹⁵ In 1963, *Gideon* righted the wrong in *Powell*. *Gideon* was “motivated by a desire for substantive justice . . . to protect African American men from abusive states operating under Jim Crow.”¹⁶ It tried to accomplish this goal through the language of procedural fairness.¹⁷ “*Gideon* held out the promise of an important measure of

11 Joseph M. McLaughlin, Note, *An Extension of the Right of Access: The Pro Se Litigant’s Right to Notification of the Requirements of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109, 1124 (1987).

12 *Gideon v. Wainwright*, 372 U.S. 335 (1963).

13 *Powell v. Alabama*, 287 U.S. 45 (1932).

14 The youngest boy, 13 years old, was sentenced to life in prison. See *The Story of the Scottsboro Boys in Powell v. Alabama*, SIXTH AMEND. CTR., <https://perma.cc/Q5DF-Z6XG>).

15 Petersen, *supra* note 3, at 82.

16 Sabbeth, *supra* note 9, at 62.

17 *Id.*

fundamental fairness when the poor encountered the judicial system.”¹⁸ That promise has not been fulfilled.¹⁹

Since *Gideon*, the Court has been more cautious to provide the right to counsel in civil cases where many face the loss of other rights and privileges. In *Lassiter v. Department of Social Services*, the Court declined to find inherent in the Due Process Clause of the Fourteenth Amendment a categorical right to counsel in cases involving the termination of parental rights.²⁰ For many years, *Lassiter* meant that unless the individual faced a possible loss of liberty such as incarceration or institutionalization, there was a presumption against a right to counsel in civil matters. To overcome such presumption, the claimant would have to demonstrate their situation warranted counsel considering the three-prong test established in *Mathews v. Eldridge*: balance of the private interests at stake, the state’s interest, and the risk that the procedures used will lead to erroneous decisions.²¹ In 2011, the Supreme Court declined to find a categorical right to civil counsel in *Turner v. Rogers*—a case involving civil contempt for the failure to pay child support where plaintiff, Michael Turner, possibly faced jail time.²²

II. WHY CIVIL *GIDEON*?

Since the decision of *Gideon*, many policymakers, judges, advocates, and scholars have argued that *Gideon* was meant to be extended in the civil justice system just as it has in the criminal justice system.²³ Notwithstanding this argument, the Supreme Court has yet to establish a right to counsel in serious civil cases where individuals risk losing their children or home.²⁴ Justice Black’s language in *Gideon* is often quoted in the call for a civil right to counsel: “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”²⁵ Importantly, the Court’s analysis in *Gideon* did not make any

18 Andrew Scherer, *Gideon’s Shelter: The Need to Reorganize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L.L. REV. 557, 562 (1988).

19 See *id.*

20 *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981).

21 *Mathews v. Eldridge*, 424 U.S. 319 (1976).

22 *Turner v. Rogers*, 564 U.S. 431 (2011).

23 See, e.g., Jess H. Dickinson, *A Look at Civil Gideon: Is There a Constitutional Right to Counsel in Certain Civil Cases?*, 37 U. ARK. LITTLE ROCK L. REV. 543, 548 (2015); John Pollock, “You Have A Right To A Lawyer . . . If You Can Afford It”: A Look At The History Of The Right to Counsel In Civil Cases And The Current Efforts to Expand It, 81 U.S.L.W. 1797 (2013); Lee Shevell, *Civil Gideon: The Poor Man’s Fight*, 16 PUB. INT. L. REP. 32, 34 (2010); Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. POVERTY LAW & POL’Y 1, 7 (2003).

24 Petersen, *supra* note 3, at 80.

25 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

distinctions as to why it believed an indigent civil defendant was guaranteed a fair trial without an attorney, but an indigent criminal defendant was not guaranteed a fair trial without an attorney.²⁶ The Court was concerned about the defendant's difficulty understanding the law,²⁷ the defendant's ability to determine whether the charges are legitimate,²⁸ and the defendant's inability to properly present a defense.²⁹

These problems are just as prevalent in civil eviction cases as they are in criminal cases. The possibility of facing an eviction and ultimately becoming homeless is wrought with the very issues the justices discussed in *Gideon*. Every case involving the potential of litigation has the potential for difficulty. *Gideon*'s ruling suggests that representation by counsel on both sides is the only way to guarantee a fair trial.³⁰

Clare Pastore notes, "The proposition that an unrepresented litigant is unlikely to secure a fair trial is not only obvious but is supported by an ever greater empirical showing that the outcomes for those with and without access to counsel are far from equal."³¹ In a Virginia study, the National Center for State Courts (NCSC) found that the win rate amongst plaintiffs represented in civil cases is over 60 percent when defendants lack legal representation, but that figure declines to about 20 percent when both parties are represented by attorneys.³² This asymmetry is evident in my courtroom.

Providing a right to counsel for tenants also provides costs savings to the public. One New York City legislator suggested that appointing counsel for *pro se* tenants decreases the number of evictions dramatically and saves millions of dollars spent on homeless shelters, medical care, law enforcement, and other expenses created by housing loss.³³ Evictions bring about drastic economic and social costs. As John Pollock stated, "When you ask what's affected by someone losing their home, the better question is what's *not* affected. Everything is at risk."³⁴ The consequences of an eviction are numerous and multifaceted. This is one reason why a 2009 study conducted in Texas concluded that "for every dollar spent on indigent civil legal services, the state economy gained \$7.42."³⁵

26 See Bindra & Ben-Cohen, *supra* note 22, at 15–18.

27 *Gideon*, 372 U.S. at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

28 *Id.*

29 *Id.*

30 Bindra & Ben-Cohen, *supra* note 23, at 8.

31 Clare Pastore, *A Civil Right to Counsel: Closer to Reality*, 42 LOY. L.A. L. REV. 1065, 1072 (2009).

32 John E. Whitfield, *Summary Report on the Findings of the Virginia Self-Represented Litigant Study*, BLUE RIDGE LEGAL SERVS. (Apr. 4, 2018), <https://perma.cc/QU5H-UKQX>.

33 Sabbeth, *supra* note 9, at 60.

34 Tyler Walicek, *Amid Eviction Crisis, Organizers Win Right to Legal Representation for Tenants*, TRUTHOUT (July 24, 2022), <https://perma.cc/T2N2-SV3Z>.

35 Pastore, *supra* note 31, at 1073.

A. Basic Human Need: Shelter

Food, shelter, and clothing are the most important needs of any human being. In languages spoken all over the world, the word “home” conveys warmth, safety, and family. Home is the primary basis of life. People build memories at home and spend a great deal of time defining themselves in the sanctity of their homes.³⁶ Shelter is critical for survival. Proper shelter protects from bad weather, predators, and illnesses. Inadequate housing affects every facet of life. It can lead to illnesses, physical and sexual assaults, and affect one’s mental health. Housing can impact a person’s dignity and self-perception.

B. Physical and Mental Stability

The stress of being behind on rent is correlated with poorer health.³⁷ Housing instability can create psychological distress, anxiety, and depression.³⁸ Evictions correlate with several negative health impacts, including higher blood pressure, increased frequency of emergency room visits, and exposure to COVID-19 and other infectious diseases.³⁹ Mental health issues such as depression and anxiety often flow from an eviction.⁴⁰ A national study called *The Fragile Families and Child Wellbeing Study* followed 4,900 parents and children in 20 large cities across the United States. The study found that in “the year following an eviction, mothers are 20 percent more likely to report depression than their peers.”⁴¹ Some evidence has shown that mothers who are evicted experience higher rates of depression than their peers years later.⁴² Residential stability begets psychological stability. This, in turn, allows individuals to invest in their home and social relationships in their neighborhood. This produces school stability for children.

36 Sabbeth, *supra* note 9, at 65.

37 CHILDREN’S HEALTHWATCH, BEHIND CLOSED DOORS: THE HIDDEN IMPACTS OF BEING BEHIND ON RENT 2 (2011), <https://perma.cc/KFC2-STXY>; *see also* NAT’L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 6 (2019), <https://perma.cc/CUL3-RXKU>.

38 Rachel G. Bratt et al., *Why a Right to Housing is Needed and Makes Sense: Editor’s Introduction to A Right To Housing* 1, 3-4 (Rachel G. Bratt et al. eds. 2006); James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH 758, 758 (2002) (arguing that lack of housing causes chronic health issues and infectious diseases); Sabbeth, *supra* note 9, at 66-67 (describing how lack of housing can lead to assaults); *see also* JAMES J. O’CONNELL, NAT’L HEALTH CARE FOR HOMELESS COUNCIL, PREMATURE MORTALITY IN HOMELESS POPULATIONS: A REVIEW OF THE LITERATURE 13 (2005); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL’Y 59, 73 (2016).

39 *See* HUMAN IMPACT PARTNERS, HOUSING AND HEALTH FOR ALL: A RESEARCH AND COMMUNICATIONS TOOLKIT FOR COVID-19 AND BEYOND X (Oct. 2022), <https://perma.cc/X7L2-3NGQ>.

40 *Id.*

41 Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, INST. FOR RSCH. ON POVERTY, UNIV. OF WIS-MADISON: FAST FOCUS, March 2015, at 1.

42 *Id.*

Community stability encourages neighbors to develop relationships and take care of their surroundings. However, this rarely happens for the indigent because they are evicted at very high rates.⁴³

C. I've Already Lost My Sanity . . . What Else Can I Lose?

The instability of an eviction creates many losses for tenants. In addition to the loss of home, school, and friends in the neighborhood, possessions are also lost.⁴⁴ It takes years to establish a home with possessions. An eviction can erase that in a matter of minutes. All can be lost when families are set out on the street.

Housing instability can also lead to employment instability. While some may assume that loss of employment leads to an eviction, researchers have found that an eviction can also result in job loss.⁴⁵ If someone does not have a place to prepare for work, they are more likely to lose their job. The stress of evictions can wreak havoc on work performance. Accordingly, “[t]he likelihood of being laid off is roughly 15 percent higher for workers who have experienced an eviction.”⁴⁶ In addition, an eviction can consume a tenant’s time and thoughts and cause tardiness and poor performance on the job.

An eviction can also affect a person’s ability to find a new home because of housing unaffordability and the adverse effects of an eviction record. America is facing one of the worst affordable housing crises in generations.⁴⁷ Most indigent tenants spend over half of their income on rent. This may force them to make difficult budget choices, like deciding whether to pay their utility bills or buy the medicine they need.⁴⁸ Many end up foregoing food, medications, or any care for themselves in order to pay the rent. Those with an eviction record are rarely able to obtain a referral from a prior landlord.⁴⁹ Moreover, a potential landlord does not look favorably upon a prospective tenant with a record of an eviction.⁵⁰ Along with their poor credit, many are often forced to live in less desirable and sometimes uninhabitable dwellings. Many move from poor neighborhoods into even poorer neighborhoods. This creates concentrated poverty and violence. The cycle continues.

43 Matthew Desmond, *EVICTED*, loc. 296 (2016).

44 *Id.*

45 Desmond, *supra* note 44, at 4-5.

46 Desmond, *supra* note 46, at 296.

47 Desmond, *supra* note 44, at 3.

48 Petersen, *supra* note 3, at 70.

49 *Id.*

50 Sabbeth, *supra* note 33, at 67.

D. Homelessness

Housing loss can lead to homelessness, which produces obstacles to employment and educational achievement.⁵¹ Homeless can lead to many hardships such as physical and psychological trauma, illnesses, and possible death.⁵² According to the National Law Center on Homelessness and Poverty, the leading causes of homelessness are a lack of affordable housing and insufficient income.⁵³ Housing cost burdens typically leave very little income for necessities such as food, transportation, childcare, and medical needs. Because of this, low-income renters are burdened with looming evictions for failure to pay timely rent. Evictions are a direct cause of homelessness, whether it occurs “immediately or after social safety networks are exhausted.”⁵⁴ Several studies have found a causal relationship between evictions and homelessness:⁵⁵

“A 2017 survey by Applied Survey Research in Santa Cruz County, California found that 14 percent of its homeless population cited eviction as the primary cause of their homelessness.”⁵⁶

The Institute for Children, Poverty, and Homelessness found in 2017 that eviction was “the second leading cause of homelessness in New York City among families with children, with as many as 33 percent of families citing eviction as the reason for their homelessness.”⁵⁷

As of 2012, 45 percent of households that entered shelters in Massachusetts cited “eviction as the reason they were homeless or at risk of homelessness,” according to the Boston Bar Association Task Force on the Civil Right to Counsel.”⁵⁸

Nearly 40 percent of unhoused people who use homeless assistance programs in a 2001 national study, became homeless through involuntary displacement from their housing.⁵⁹

Further, pilot studies have shown a “direct link between access to counsel in eviction court and reductions in homelessness.”⁶⁰ When renters have rights and assistance of counsel, homelessness decreases.

Our most vulnerable populations should be protected. Poor women of color, mainly Black women, have overwhelmingly been subjects of eviction hearings

51 *Id.*

52 *Id.* at 66–67.

53 *See Homelessness in America: Overview of Data and Causes*, NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, <https://perma.cc/8DWL-7VPP> (last updated Jan. 2015).

54 *See* NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS 7 (2018), <https://perma.cc/LCM7-4FC9>.

55 *Id.*

56 *Id.*

57 *Id.*

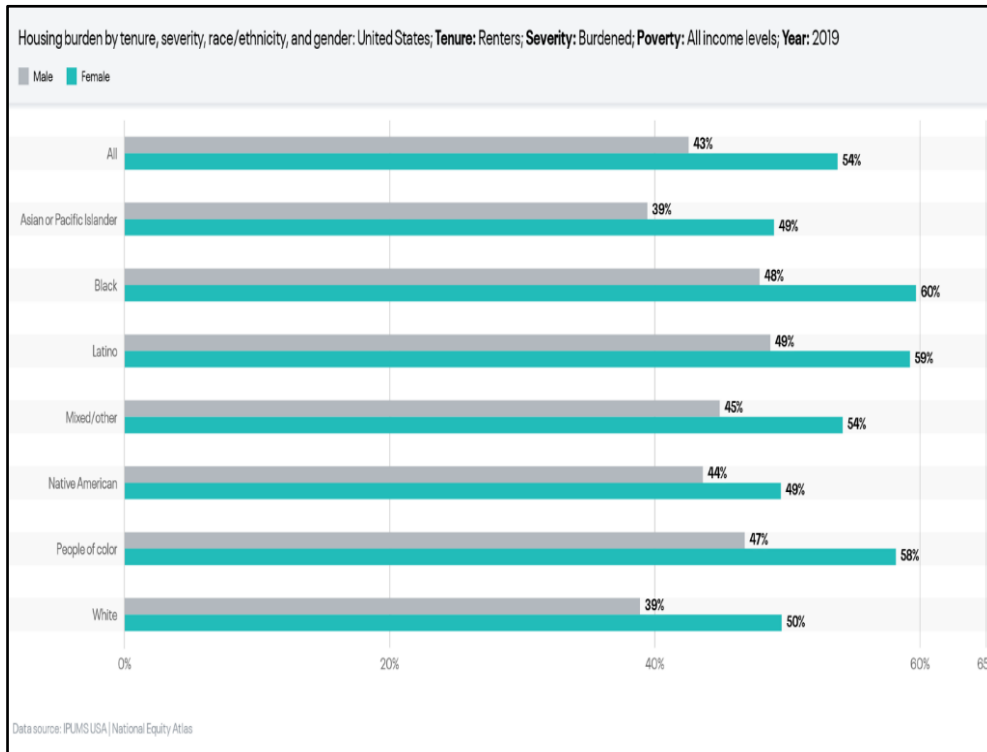
58 *Id.*

59 *Id.*

60 *Id.* at 10.

compared to other tenants.⁶¹ For example, Black female renters in Milwaukee are evicted at three times the rate of white women.⁶² If children are in the home, then there is greater risk of eviction. Matthew Desmond accurately states: “If incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor Black men were locked up. Poor Black women were locked out.”⁶³ The image below, from Results for America, shows the housing cost burdens for renters by race/ethnicity and gender.⁶⁴ The data below demonstrates that Blacks, and Black women in particular, are burdened by housing costs at a higher rate than any other racial/ethnic group.

Figure 1: Housing Burden by Race/Ethnicity and Gender



61 Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL’Y DEBATE 461, 467 (2003).

62 Kate Abbey-Lambertz, *How the Eviction Epidemic is Trapping Black Women in Poverty*, HUFFINGTON POST (Mar. 16, 2016), <https://perma.cc/Y8GH-P6FV>.

63 Desmond, *supra* note 35, at 98.

64 E-mail from Results for America, IPUMS USA, Nat’l Equity Atlas (on file with author).

III. THE WORLD'S VIEW ON THE RIGHT TO COUNSEL IN CIVIL CASES

Some may be surprised to find out that the United States has stood mostly alone on the civil right to counsel issue. Our founding documents that set out to “establish justice” and guarantee citizens “due process” and “equal protection of the laws” appear misleading. America’s investment in civil legal aid continues to fall behind many other nations.⁶⁵ In 2016, Justice Earl Johnson, Jr. wrote:

The sole federal program dedicated to bringing equal justice to the 63 million Americans now eligible for its services has a budget of only \$385 million for fiscal year . . . 2016. In a nation with a population of 317 million people, that is only a bit over one dollar per capita. (In the Netherlands, with a total population of only 17 million, the national government is willing to spend nearly that much—\$355 million—on civil legal aid for its lower income citizens, which is twenty-one dollars per capita.)⁶⁶

As John Pollock observes, “the United States stands mostly alone in this regard; much of the rest of the industrialized world provides a right to counsel in civil cases.”⁶⁷ In many European countries, a right to counsel in civil proceedings had been guaranteed by statute well before *Gideon*.⁶⁸ In England, the right to counsel in civil cases for both parties dates back to 1495.⁶⁹ France has guaranteed the right since 1851.⁷⁰ In 1979, the European Court of Human Rights ruled in *Airey v. Ireland* that appointed counsel in civil cases for indigent individuals is sometimes necessary for the administration of justice when “legal representation is rendered compulsory . . . or by reason of the complexity of the procedure or the case.”⁷¹ Following that ruling, the Council of Europe required all member countries to provide free civil counsel to indigent individuals. Currently, forty-seven countries that are members of the Council of Europe provide a right to civil counsel.⁷² While the standards for eligibility and the scope of services differ from country to country, a means and merits test is common.⁷³ Financial need, however, is not always the sole determinant factor for a right to

65 Justice Earl Johnson Jr., *Lifting The “American Exceptionalism” Curtain: Options and Lessons from Abroad*, 67 HASTINGS L.J. 1225, 1228 (2016).

66 *Id.* at 1229.

67 Pollock, *supra* note 23.

68 Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT’L L.J. S83, S89 (2000).

69 Shevell, *supra* note 23, at 36.

70 Raven Lidman, *Civil Gideon: A Human Right Elsewhere in The World*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 288, 290 n. 16 (2006).

71 *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 12 (1979).

72 See *International Perspective on the Right to Counsel in Civil Cases*, NAT’L COAL. FOR CIV. RIGHT TO COUNS., <https://perma.cc/2MBR-LCCX>.

73 *Id.*

counsel in Europe. Financial eligibility is automatically waived in some countries if the issue is of significant public interest.

“In the past, the United States Supreme Court has looked to international legal policy to determine how to address issues of human rights in the United States.”⁷⁴ Why, then, are we failing to do so in this instance? For example, in *Roper v. Simmons*, the Supreme Court ruled it unconstitutional to impose the death penalty for a crime committed by a child under the age of 18 years old.⁷⁵ In that opinion, the Court discussed practices in other countries and observed that the United States stood alone in allowing the execution of juveniles. In addition, the Court noted that the imposition of the death penalty on a child violated international human rights laws. In *Lawrence v. Texas*, the Supreme Court struck down *Bowers v. Hardwick*, which upheld state laws making homosexual sex a criminal offense.⁷⁶ There, the Court noted that the standard from *Bowers* had been rejected in the wider civilized world and the European Court of Human Rights.⁷⁷ The Court further noted that other nations affirmed the protected right of homosexual adults to engage in consensual conduct.⁷⁸ In *Atkins v. Virginia*, the Supreme Court ruled that intellectually disabled individuals cannot be executed.⁷⁹ As the Court noted, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”⁸⁰ Legal scholar Harold Koh stated in 2004, “[o]ur Supreme Court signaled that it may, at long last, be listening to international and foreign views in deciding whether our country’s conduct meets global human rights standards.”⁸¹ Because these cases followed in the footsteps of European courts, perhaps the civil *Gideon* debate in the United States should be addressed in the same manner. If the United States Supreme Court analyzed civil *Gideon* through international lens as a human rights issue, equal access to justice would be the solution, thereby finding a right to counsel in certain civil cases such as evictions.⁸²

IV. ARGUMENTS IN FAVOR OF RIGHT TO COUNSEL IN EVICTION CASES

Since the Supreme Court’s ruling recognizing the right to counsel in criminal cases, many advocates have argued for a civil version of *Gideon*. Supporters

74 Shevell, *supra* note 23, at 35; *see also* Lidman, *supra* note 70, at 288–89.

75 *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

76 *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *see also* *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

77 *Lawrence*, 539 U.S. at 576–77.

78 *Id.*

79 *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

80 *Id.* at 316 n.21.

81 Harold H. Koh, *Different but Equal: The Human Rights of Persons with Intellectual Disabilities*, 63 MD. L. REV. 1, 19 (2004).

82 Shevell, *supra* note 23, at 36.

argue that the stakes are just as high in many civil cases as those in criminal cases. “The concept of equitable access to justice is empty without a recognized right to counsel in these cases.”⁸³

A. Equal Protection Clause Argument

Equality before the law cannot exist until both litigants in a case have access to the court system on equal terms. Therefore, some scholars have argued that the Equal Protection Clause creates a right to civil counsel.⁸⁴ Generally, if a law “neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”⁸⁵ The rational basis test is relatively easy for the government actor to satisfy and is nearly always met. To apply the “strict scrutiny” analysis, “one would have to prove either that the assistance of counsel is a fundamental right, or that discrimination based on wealth should be considered a suspect category.”⁸⁶ The denial of counsel to an indigent tenant facing an eviction should trigger strict scrutiny. In the strict scrutiny analysis, “classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”⁸⁷ This is a difficult burden to meet. Some have argued that the right to counsel should be a fundamental right, and the state’s denial of the right to counsel for indigent civil defendants constitutes deprivation of that right. While there is no civil equivalent to the Sixth Amendment and explicit Constitutional guarantee, one can analogize between the right to counsel in a civil case and other rights deemed fundamental.⁸⁸

Access to the court itself should be considered a “fundamental right.” Courts do not just decide issues of culpability; their decisions also make a statement about the character and conduct of that person.⁸⁹ All courts are state mechanisms that are run by the rules set by the government and that ultimately make the decision of right or wrong. Although most civil matters involve two private parties, the government determines who has the burden of proof, the elements needed to prove, and what evidence can be admitted.

Most scholars view the Declaration of Independence as asserting the “self-evident truths of individual dignity, the right to be treated equally, and the rights that cannot be taken from us which are classified as life, liberty, and the pursuit of happiness.”⁹⁰ How can one recognize a right to be treated equally without

83 Kleinman, *supra* note 9, at 1509.

84 *See, e.g., id.*

85 *Romer v. Evans*, 517 U.S. 620, 631 (1996).

86 Kleinman, *supra* note 10, at 1510.

87 *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 277 (1995).

88 *See, e.g., Bindra & Ben-Cohen, supra* note 23, at 20 (analogizing to other rights like education and suffrage).

89 *Id.* at 21.

90 *See, e.g., Leonard W. Schroeter, Obstacles to Civil Gideon: The Washington*

recognizing equal access to justice? Without counsel, tenants are deprived of meaningful access to court. Recognizing equal access to justice unequivocally demands recognizing a civil right to counsel. An argument for a right to counsel based on an Equal Protection Clause argument “would necessitate a court recognizing a new fundamental right or suspect class.”⁹¹ The Supreme Court has yet to do so.

B. Due Process Clause Argument

Legal scholar and Professor Andrew Scherer has been a steadfast proponent for the right to counsel in eviction matters for more than thirty-five years. Professor Scherer has played a prominent role in housing policy, landlord-tenant law, and other access to justice issues on the national and international level. In 1988, he argued that the most compelling argument for tenants faced with eviction is that they are entitled to counsel as a matter of due process.⁹² “As a matter of due process of law, a tenant should not have to defend a legal proceeding that can result in the loss of his home without the availability of counsel.”⁹³ The Due Process Clause places emphasis on maintaining procedural safeguards and fair access to the courts.⁹⁴ Poor people do not have the option to hire an attorney when they are involved in a legal dispute. However, indigent individuals are the majority of those who encounter the judicial system in settings where they face potentially devastating effects on their lives. “The three most important of these settings are the criminal courts, where they face a loss of liberty; the family courts, where they face a loss of custody of their children; and the housing courts, where they face a loss of shelter.”⁹⁵

In *Mathews v. Eldridge*, the Supreme Court established a test to determine what constitutional due process is required when someone faces loss of property:⁹⁶

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including . . . [the] administrative burdens that the additional or substitute procedural requirement would entail.⁹⁷

Scherer argues that the *Mathews* factors establish that indigent tenants faced with eviction are guaranteed appointment of counsel.⁹⁸ He further argues that

State Experience, 53 WASH. ST. B. NEWS 29 (1999).

91 Kleinman, *supra* note 9, at 1511.

92 Scherer, *supra* note 17, at 562.

93 *Id.*

94 Bindra & Ben-Cohen, *supra* note 25, at 36.

95 Scherer, *supra* note 17, at 564–65.

96 *Mathews v. Eldridge*, 424 U.S. 319 (1976).

97 *Id.* at 335.

98 Scherer, *supra* note 17, at 563.

tenants have a property and liberty interest at stake.⁹⁹ Regarding the risk of error prong, he argues that the possibility of error is significant in an eviction hearing because most landlords are represented by attorneys, while most tenants are poor and cannot afford to hire attorneys.¹⁰⁰ The private interest at stake is always important to the civil defendant because of the deprivation of property.¹⁰¹ “[I]t is unusual that the government would not have a pressing interest in ensuring that members of society have confidence in the system of law that governs them.”¹⁰² When one party is represented by a lawyer, while another party is not, the notion of “equal access to justice” is undermined. Therefore, the legal system is threatened. “The adversarial system currently employed by the United States works only if both sides have competent representation.”¹⁰³ Based on the three elements, an indigent *pro se* tenant should always have a right to appointed counsel.

In his book, *Evicted*, Matthew Desmond argues that due process has been replaced by mere process because, regardless of their sympathies, judges are more concerned with clearing their dockets for the next day’s pile of eviction cases.¹⁰⁴ Desmond’s argument is truthful in that “rocket” dockets are set up to handle large eviction dockets. While judges sympathize with uninformed indigent tenants, there is not enough time to provide each tenant with the attention and detail each case deserves. A triage process takes place instead of identifying the problem and finding the appropriate solution. Representation for tenants would change this process of an “eviction assembly line” and emphasize the business of justice.

V. ARGUMENTS AGAINST THE RIGHT TO COUNSEL IN EVICTION CASES

Critics of civil *Gideon* argue costs and increased incentive to litigate should limit a guarantee to civil counsel.¹⁰⁵ Some critics argue that *pro se* court reform is necessary instead of focusing on *Gideon*.¹⁰⁶ Others argue that *pro se* clinics, volunteer help desks, and hotlines are the solution. However, existing data suggests that while limited legal assistance may make the processes feel fairer to litigants, there is still no substantive difference in outcomes.¹⁰⁷ This scenario and its predictable results are evident in my courtroom. *Pro se* individuals who have sought the use of a help desk or *pro se* clinic are still ignorant as to their rights

99 *Id.* at 564–69.

100 *Id.* at 572.

101 *Id.* at 564.

102 Bindra & Ben-Cohen, *supra* note 25, at 12.

103 *Id.*

104 Desmond, *supra* note 35, at 304.

105 Kleinman, *supra* note 9, at 1520.

106 Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010).

107 Sabbeth, *supra* note 9, at 101.

in the process when they appear in court against a landlord represented by an attorney. Many help desks will assist with filing documents, but the *pro se* tenant still lacks a fundamental understanding as to certain terms in the filed documents. Though critics raise interesting execution challenges, none of them outweigh the fundamental right and need for assistance of counsel for tenants who face evictions.

A. Costs for All Involved

Many critics of civil *Gideon* argue that costs would increase for everyone: the government, landlords, and tenants.¹⁰⁸ One cannot ignore the financial costs to the government of providing legal services. However, the government interest is served by the provision of counsel to indigents and increased equality with respect to access to justice.¹⁰⁹ Adequate representation is necessary to preserve faith in America's justice system and in democracy. Counsel for defendants provide a service to society as a whole.

Some have argued that the costs of eviction cases to landlords are passed on to tenants. Landlords face increased legal fees when facing tenants that are represented by counsel. Counsel on both sides increases the amount of time it takes for an eviction proceeding to take place. Legal fees are passed on to other tenants in the form of rent increases and poorer housing quality.¹¹⁰

Critics further argue that free legal counsel in eviction proceedings often does not change the results. Many tenants that are usually represented by counsel, they argue, are evicted for non-payment of rent, and therefore have limited legal defenses to an eviction. This, however, is untrue in real time. From my observations from the bench, tenants who are represented by attorneys often present valid defenses related to jurisdictional issues and retaliatory eviction issues that they would not otherwise be able to effectively communicate to the court. Counsel for tenants present valid counterclaims that *pro se* tenants would otherwise fail to file. Even where a tenant lacks a defense, lawyers can negotiate extra time to vacate the property, negotiate a settlement whereby the eviction does not appear on the tenant's record, and assist the tenant with applying for rental subsidies. Additionally, many attorneys often file motions to set aside a possession judgment once the tenant has vacated per the agreement.

Many studies demonstrate that providing counsel to tenants in eviction hearings actually saves money by avoiding negative consequences.¹¹¹ In New York, for example, researchers found that implementing measures to retain more affordable housing as an alternative to short-term shelter use not only reduced

108 Kleinman, *supra* note 9, at 1520–22.

109 *Id.* at 1520.

110 *Id.* at 1521–22.

111 Tonya L. Brito, et al., *What We Know and Need to Know about Civil Gideon*, 67 S. C. L. REV. 224, (2016); *see also* Kleinman, *supra* note 9, at 1520 n. 114.

homelessness, it also reduced criminal activity, public healthcare costs, and overall city spending by over \$300 million.¹¹² Further, another study concluded that if Philadelphia invested \$3.5 million on a right to counsel, Philadelphia would realize \$45 million in savings.¹¹³ The cost objection is vastly overstated.

B. Incentive to Litigate

There is a weak argument that appointment of counsel will make eviction dockets “overly litigious.”¹¹⁴ Critics argue that frivolous claims and unmeritorious defenses would sink the court system.¹¹⁵ This argument is wrought with issues. Any party with a lawyer has the right to bring any and all claims that they believe to have legal merit. Moreover, tenants do not initiate eviction complaints – landlords do. This argument suggests that landlords’ *true* fear is that the right to counsel will provide the poor with a right to effectively defend a case. Massive power imbalances exist in this dynamic, and the party that has counsel typically uses the *Rules of Evidence* to prevent *pro se* tenants from effectively arguing their case. More represented litigants could shift the power balance towards equality and fairness. While there are some measures of accountability for public housing agencies, there are few incentives for private landlords to respect the law in the absence of aggressive enforcement.¹¹⁶ Patience rarely compels the powerful to relinquish control. In addition, judges could see a positive effect on the efficiency of operation with the reduction in the number of unrepresented litigants.¹¹⁷ Litigants with legal representation are up to 148 times more likely to succeed compared to *pro se* litigants in similarly complex cases, according to a 2015 meta study.¹¹⁸ Perhaps, what is even scarier for landlords are accountability measures for the rule of law.

VI. DEVELOPMENTS IN THE MOVEMENT FOR A RIGHT TO COUNSEL

While states are bound by the U.S. Supreme Court’s interpretation of the Fourteenth Amendment, some states have relied on their own constitutions to extend a right to counsel in civil matters, including eviction hearings.¹¹⁹ A great

112 See Stout Risius Ross, Inc., *The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings Under Intro 214-A* (Mar. 16, 2016), <https://perma.cc/S84V-TTQJ>.

113 *Id.*

114 Kleinman, *supra* note 9, at 1523.

115 *Id.*

116 Sabbeth, *supra* note 9, at 108.

117 Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 *TOURO L. REV.* 347, 387 (2013).

118 Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers’ Impact*, 80 *AM. SOC. REV.* 909, 921 (2015).

119 Pamela Cardullo Ortiz, *How A Civil Right to Counsel Can Help Dismantle*

deal of traction has been gained in recent years. Scholarship proposing doctrinal, empirical data, advocates, and favorable arguments have all facilitated this effort. The National Coalition for a Civil Right to Counsel, founded in 2003, has over 600 participants and partners.¹²⁰ In 2006, the American Bar Association (ABA) adopted a unanimous resolution calling on all state and local jurisdictions to recognize a right to counsel in civil cases implicating basic human needs, including housing.¹²¹ The COVID-19 pandemic-fed boom in evictions caused lawmakers to pay more attention to this issue.¹²² There appears to be staying power and some cities have even codified a right to counsel for tenants in eviction hearings.

A. New York City

In 2017, New York City became the first jurisdiction in the United States to create a right to counsel for eviction cases.¹²³ New York City enacted Intro 214-B, which mandates appointment of counsel to all income-eligible tenants in eviction proceedings.¹²⁴ Historically, approximately 90% of landlords in New York City are represented by an attorney, while 90% of tenants are not.¹²⁵ The New York City Council saw the creation of the civil right to counsel as a way to level the playing field for tenants, as well as a cost-effective solution and morally sound decision for its citizens.¹²⁶ During the legislative hearing, one council member noted that, while it costs around \$2,500 in New York City to provide counsel for a tenant, the effects of an eviction “would cost the City tens of thousands of dollars in shelter costs, in extra services in schools, in extra emergency room visits, and increased applications for unemployment benefits, and increased mental health services, and more.”¹²⁷ According to the Fall 2021 New York City Office of Civil Justice Report, 84% of represented tenants were able to remain in their homes.¹²⁸ The report also specified that 100% of tenants with

Concentrated Poverty in America's Inner Cities, 25 STAN. L. AND POL'Y REV. 163, 175 (2014).

¹²⁰ See National Coalition for a Civil Right to Counsel, *A Civil Right to Counsel: The History*, <https://perma.cc/Q6JT-UEHL>.

¹²¹ See American Bar Association, *Report to the ABA House of Delegates* (Aug. 7, 2006), <https://perma.cc/V85A-KWSK>.

¹²² Michael Casey & R.J. Rico, *Eviction Filings are 50% Higher Than They Were Pre-Pandemic in Some Cities as Rents Rise*, AP NEWS (June 16, 2023, 9:22PM), <https://perma.cc/WVE8-QHMS>.

¹²³ Sabbeth, *supra* note 9, at 57–59.

¹²⁴ See Int. No. 214-B, 2014 N.Y.C. Council, Comm. on Courts and Legal Services (N.Y.C. 2014) (enacted).

¹²⁵ Sabbeth, *supra* note 9, at 59–60.

¹²⁶ *Id.* at 60.

¹²⁷ *A Local Law to Amend the Administrative Code of the City of New York, in Relation to Providing Legal Counsel for Low-income Eligible Tenants Who Are Subject to Eviction, Ejectment or Foreclosure Proceedings: Transcript of Minutes of Comm. of Cts. & Legal Servs.*, 2014–2017 Sess. 2-8 (N.Y.C. 2016), <https://perma.cc/K7QE-U43J>.

¹²⁸ See Office of Civil Justice, NYC Human Resources Administration, *Universal Access to Legal Services: A Report on Year Four of Implementation in New York City*

eviction cases had access to representation, while 71% took advantage of that representation by attorneys.¹²⁹

B. Cleveland

In 2019, Cleveland's City Council codified Ordinance 375.12 to create a right to counsel for tenants with minor children facing an eviction.¹³⁰ Prior to COVID-19, "approximately 9,000 evictions were filed annually in Cleveland Housing Court."¹³¹ Of those evictions, the majority involved Black women with children.¹³² Early results over a six-month period revealed that 93% of those represented by counsel avoided an eviction or involuntary move.¹³³

C. New Orleans

In May 2022, the City of New Orleans voted to create a right to counsel for all tenants in eviction proceedings.¹³⁴ The ordinance provides anyone at risk of losing their home in an eviction proceeding the right to an attorney.¹³⁵ Prior to the enactment, Jane Place Neighborhood Sustainability Initiative (JPNSI), a non-profit housing and community development organization, found that only 6% of those facing an eviction in New Orleans had access to an attorney.¹³⁶ In 2019, 62.3% of those facing evictions were evicted. Of that number, 82.2% of tenants were Black, and 56.8% were Black women.¹³⁷ Prior to this ordinance being implemented, 65.4% of tenants who represented themselves were evicted, while only 14.6% of tenants who had counsel were evicted.¹³⁸ Cashauna Hill, executive director of the Louisiana Fair Housing Action Center, stated, "[h]ere in New Orleans, it's majority renters, and our landlord-tenant legal scheme doesn't provide much of any rights at all to people facing eviction. Given the realities of our system and our communities, it just makes sense for everyone to have access to

(2021), <https://perma.cc/2649-WZUC>.

¹²⁹ *Id.*

¹³⁰ See Cleveland, Ohio, Code of Ordinances § 375.12 (2022).

¹³¹ William Winans, *Right to Counsel Prevented 93% of Cleveland Family Evictions in First Six Months of Program That Provides Low-Income Tenants with Free Legal Assistance*, UNITED WAY OF GREATER CLEVELAND (Feb. 10, 2021), <https://perma.cc/R26A-BM95>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Andrew Strickler, *New Orleans, Detroit Join Tenant Right-To-Counsel Movement*, LAW360 (May 20, 2022), <https://perma.cc/Q95Q-4CMP>.

¹³⁵ See New Orleans, La., Code of Ordinances ch. 50, art. 5 (2022).

¹³⁶ Strickler, *supra* note 134.

¹³⁷ Jae In Oh, *Jane Place Neighborhood Sustainability Initiative*, ARCGIS STORYMAPS (May 5, 2021), <https://perma.cc/7J82-3FKE>.

¹³⁸ *Id.*

an attorney before being forced from their home.”¹³⁹

D. Who Else is on the Forefront of This Revolution?

Many cities are on the forefront of a revolution. As recently as February 2023, the City of St. Louis is considering a tenant right to counsel ordinance.¹⁴⁰ Other cities such as Newark, San Francisco, Philadelphia, Baltimore, and Boulder have created a right to counsel for tenants.¹⁴¹ Though the growth has primarily been in large cities, community organizing is needed to drive momentum in smaller cities across the country. The awareness that the right to counsel can actually save money may be a driving force to finally achieving it.¹⁴²

E. Evictions in Alabama

I know firsthand how impactful a right to counsel would be for our city and citizens. While there has yet to be a civil right to counsel in eviction proceedings in Birmingham, this movement has caused advocates to consider other alternatives other than allowing *pro se* tenants to go at it alone in court. From March 2020 to November 2022, 16,513 eviction cases were filed in Alabama.¹⁴³ The most evictions were seen in Jefferson County, which contains Birmingham.

In 2022, the Alabama Center for Dispute Resolution received grants from the Alabama Civil Justice Foundation, Alabama Law Foundation, and the Alabama Access to Justice Commission to provide free mediation services for landlords and tenants. Many of the mediators are attorneys, but all have been trained in mediation and are registered on the state court roster of registered mediators maintained by the Alabama Center for Dispute Resolution.¹⁴⁴ Although the mediator is not an advocate like an attorney, some argue it provides a safeguard between the landlord and tenant to decrease intimidation tactics. According to Eileen Harris, executive director of the Alabama Center for Dispute Resolution, “This program is a great way to help landlords and tenants facing hardships created during the pandemic.”¹⁴⁵ The mediator meets privately with each party to explore the facts and needs of each party. The goal of the mediation is to promote peaceful conflict resolution.

Additionally, Samford University’s Cumberland School of Law is currently

139 Strickler, *supra* note 134.

140 See St. Louis, Mo., Board Bill 180 (2023).

141 Park et al., *supra* note 7. See also Appendix A for “Recent Right to Counsel for Tenant Legislation” provided by the National Coalition for a Civil Right to Counsel (NCCRC).

142 Petersen, *supra* note 9, at 97.

143 E-mail from the Alabama Center for Dispute Resolution (on file with author).

144 See *Alabama’s First Landlord/Tenant Mediation Program*, ALABAMA CTR. FOR DISPUTE RESOLUTION, <https://perma.cc/P3NW-H9Y7>.

145 *Id.*

pursuing a grant to fund an eviction clinic, which was birthed out of the eviction externship of a third-year law student.¹⁴⁶ Although it is in the preliminary stages, the eviction clinic offers legal representation to *pro se* tenants. Some third-year law students are eager to right the wrongs of society, and this program seeks to level the playing field for tenants when they are facing the potential of losing their home. During the eviction externship, one third-year law student, under the supervision of a licensed retired tenant lawyer, represented twenty-nine tenants within a five-month period. Of those 29 clients, all but one were Black, while the majority were single females. Most of the cases were settled with favorable results for the tenants and one case was dismissed based on the tenant's motion.

Many advocates such as John Pollock argue that mediation and "Lawyer for A Day" programs are not solutions to the problem. Pollock argues that the data on civil mediation is deficient and possibly inaccurate. One cannot accurately state if mediation actually changes the rate at which tenants are evicted because much of the data is only on settlement rates and not actual terms. Pollock further states that "Lawyer For A Day" is not a right to counsel, and the resources are scarce. Attorneys are not briefed on the cases before court, nor do they meet with their clients prior to the court hearing.¹⁴⁷

VII. THE ROLE OF THE JUDGE

Judges should be vocal about right to counsel issues in certain civil cases if justice is our primary responsibility. *Pro se* parties create a unique ethical dilemma for judges. Judges should be seen as fair and impartial. Although rules are loosened to a certain degree, how much is too much? Many judges feel uncomfortable guiding *pro se* parties for fear of assisting too much or providing legal advice. My guidance of *pro se* parties has changed in my seven years on the bench. Initially, I did not offer much explanation or relax rules because of fear of "helping too much." However, as the years passed and I observed the trainwrecks and intimidation tactics used against *pro se* parties, my practice changed. Advocating for the right to counsel in eviction cases does not favor the tenant, nor does it prejudge an issue.¹⁴⁸ According to John Pollock, "judges who remain on the sidelines while at the same time witnessing the grave injustice of *pro se* litigants being deprived of basic human needs due primarily to their opponents being represented by counsel may be unwittingly aiding that injustice: 'impartiality' must not become a shield against the responsibility of judges to

¹⁴⁶ E-mail from Professor Emily Davey, Visiting Assistant Professor and Director of Externship Program, Cumberland School of Law-Samford University (on file with author).

¹⁴⁷ This information was provided through a direct conversation via video conference with John Pollock.

¹⁴⁸ John Pollock, *Appointment of Counsel for Civil Litigants: A Judicial Path to Ensuring the Fair and Ethical Administration of Justice*, 56 CT. REV. 26, 26–27 (2020).

ensure the proper administration of justice.”¹⁴⁹ In fact, providing a right to counsel levels the playing field and allows the judge to accurately and fairly dispense justice by hearing both sides of the story. It is a judge’s duty to listen to the facts of a case and apply the law. As it stands now, judges that hear eviction cases merely hear one side of facts. In *Floyd v. Cosi*, Judge Jack Weinstein said, “*pro se* justice is an oxymoron.”¹⁵⁰ Providing a right to counsel for tenants in eviction cases improves the administration of justice.¹⁵¹ More accurate decision making is guaranteed because both parties are represented, and full information is provided from both sides. When representation on both sides occur, courts avoid being inundated with inadequate filings and numerous questions.

On occasion, I have appointed counsel in an eviction hearing where the *pro se* tenant appears to have cognitive and mental disabilities that prevent them from understanding the procedures and law in its simplest terms. In these instances, I consider the appointments as a “guardian ad litem” to protect the interests of the individual. The costs are assessed to the petitioner. The ability to do so is bolstered by the *American Bar Association’s Model Code of Judicial Conduct Rule 2.2*, which governs impartiality and fairness and has been amended to add Comment (4) which states: “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”¹⁵²

A. The Framework

Scholarship regarding the right to counsel has largely been from professors and other advocates, but not much has been from a judge’s perspective. I set out to conduct research by interviewing judges across the state of Alabama that handle eviction hearings. The purpose of my research was to obtain their insight from the bench. As a current member of the bench, I drafted questions based on my observations as a judge, existing literature, and common concerns amongst colleagues. I individually interviewed ten judges with the stated condition of anonymity. Four of the ten judges interviewed preside over the state of Alabama’s highest eviction dockets, sometimes reaching 100 cases per week. Three of the judges interviewed preside over medium sized dockets consisting of about 30 cases per week. The remaining three judges preside over small eviction dockets, some only hearing 3-5 cases per week, because of the population of the county. These judges created a diverse pool with varying age, race, experience, and political affiliation.¹⁵³

149 *Id.* at 42.

150 *Floyd v. Cosi*, 78 F. Supp. 3d 558, 561 (E.D.N.Y. 2015).

151 Pollock, *supra* note 148, at 28.

152 *See* Model Code of Judicial Conduct r. 2.2 cmt. 4 (Am. Bar Ass’n 2020).

153 After completing all interviews, I compiled the data to reflect the statistics seen in Figures 1–4. Axis X represents each judge. Axis Y represents the weekly number of eviction cases per judge.

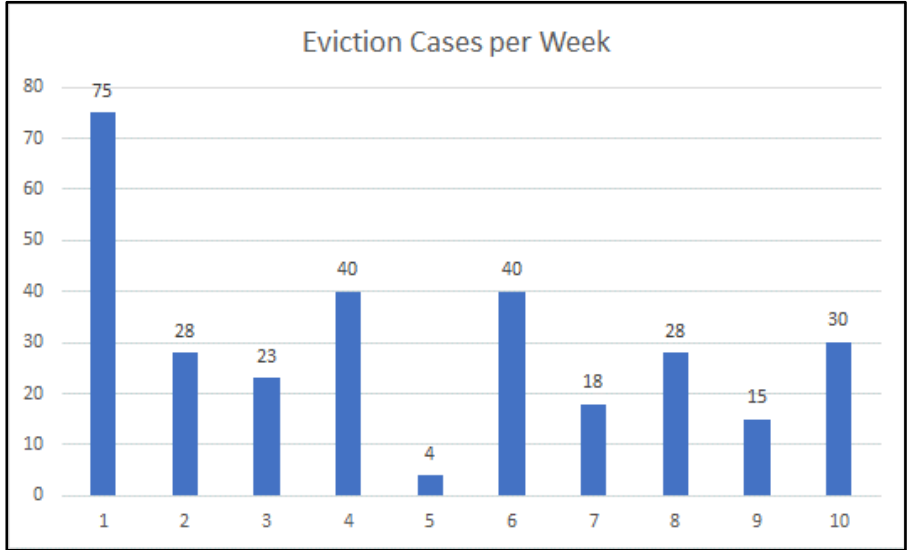
My topics during the discussion concerned the following regarding pro se tenants in eviction hearings:

- Percentage of cases where tenants are pro se
- Extent to which they felt tenants understand the law, procedure, and consequences
- How much explanation is provided regarding the law, procedure, and consequences
- Whether outcomes are typically favorable to the landlord or pro se tenant
- Whether they believed the outcome would be different if a right to counsel existed
- Whether or not pro bono services are offered for pro se tenants in eviction hearings

1. Statistics on weekly dockets.

The number of cases on a weekly basis vary between judges. However, judges in the larger counties handle a significantly higher number of eviction cases, usually 50-100 cases each week. The judges in the smaller counties average about 3-20 cases per week.¹⁵⁴

Figure 2: Eviction Cases Per Week

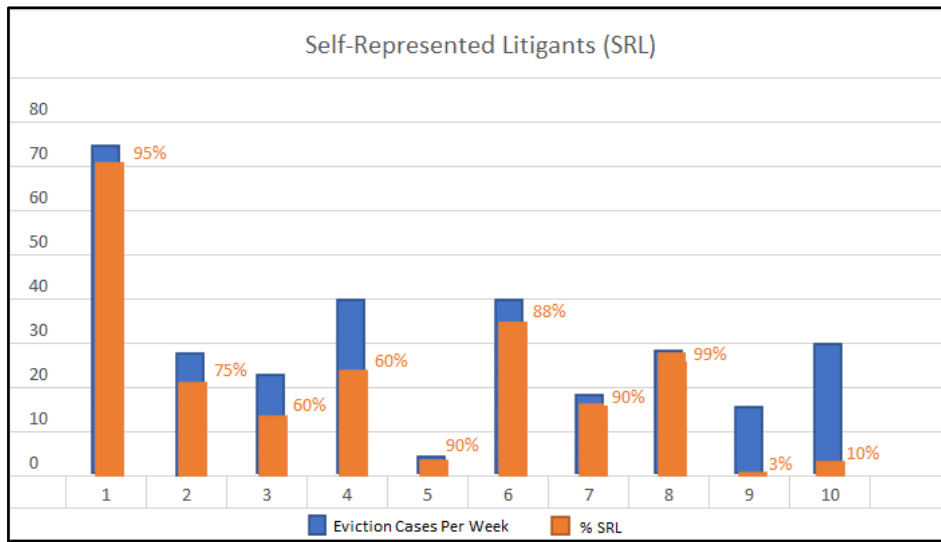


Eight of the ten judges stated that a majority of all tenants in their eviction

154 See Figure 2.

cases do not have attorneys. That number ranges from 60-99% of all tenants as *pro se* litigants. Interestingly, two of the judges met with their local bar association and Legal Services to provide representation to tenants on the day of court. Their creative efforts developed a “Lawyer for A Day” program where several pro bono lawyers and Legal Services attorneys represent tenants who meet certain income requirements. For those two judges with those programs, nearly 90% of their tenants *are* represented by an attorney.¹⁵⁵

Figure 3: Percentage of Pro Se Tenants



All of the judges indicated that nearly 90% of all their eviction cases are for non-payment of rent. Very few cases involve evictions based on criminal activity in each judge’s courtroom. See Figures 3 and 4.

155 See Figure 3.

Figure 4: Percentage of Cases Each Week for Nonpayment of Rent

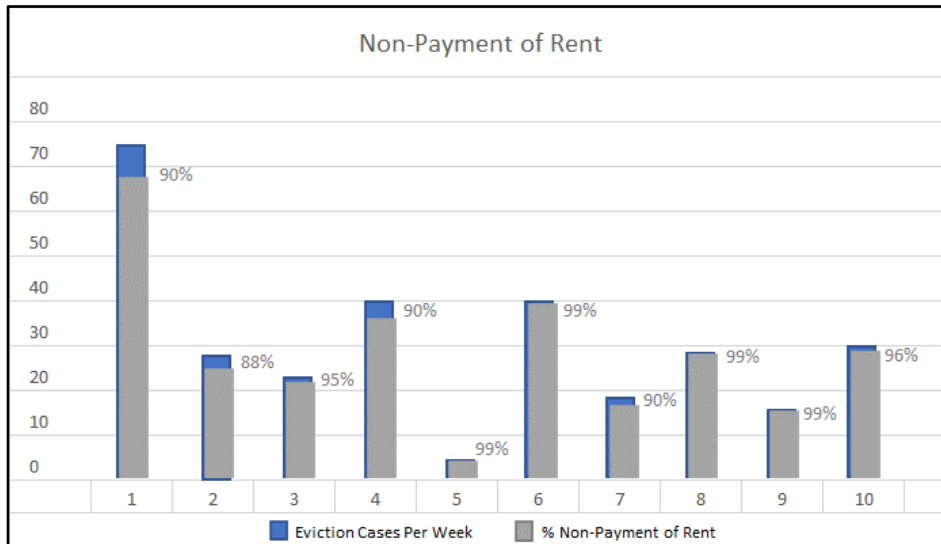
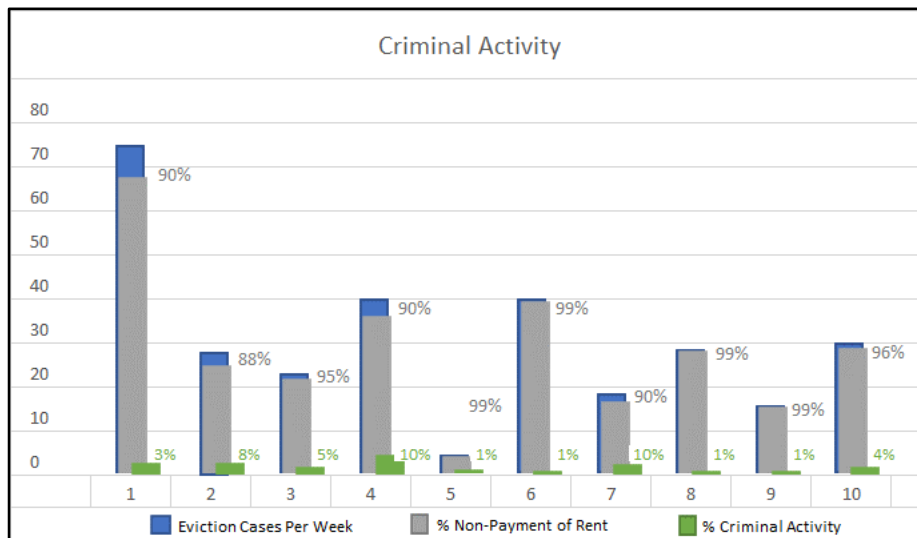


Figure 5: Percentage of Cases Each Week for Criminal Activity



2. Procedure, law, and consequences.

Every Alabama judge participating in the research was asked if they believe *pro se* tenants understand the law, procedure, and potential consequences of an eviction. Nine of the ten judges strongly believe that tenants do not understand

the law, procedure, or any consequences assigned to an eviction. One judge candidly stated:

It is very unfortunate. They don't understand. Many come across as afraid. They are afraid of being homeless. They don't understand the process at all. Many times, they agree to something out of duress. They don't understand the process at all.

If a *pro se* tenant residing in public housing is evicted, that tenant is prevented from applying for other public housing assistance for at least five years in some instances. Eight of the ten judges feel that *pro se* tenants do not understand the consequences related to an eviction involving public housing. One judge could not answer the question because a public housing eviction has never been handled in their courtroom. Another judge believes that *pro se* tenants understand the potential consequences to a public housing eviction in his/her jurisdiction based on the local housing authority's willingness to explain to the tenants. The judge stated the following:

They do understand. Our local housing authority is very thorough and makes sure they understand. Actually, the local housing authority lawyer who represents the Housing Authority bends over backwards to keep tenants in their housing. They don't want tenants to have an eviction on their record. They do everything they can to prevent that.

Some judges expressed a feeling of helplessness for *pro se* tenants because of the way the *Alabama Uniform Residential Landlord and Tenant Act* is written.¹⁵⁶ The law does not provide much discretion for judges. For example, if a complaint alleges non-payment of rent, a valid termination notice and lease agreement between the parties will typically always invoke a seven-calendar day order to vacate the property. The judge has no discretion to allow the tenant additional time to vacate. A tenant that withholds rent based on a viable repair issue by the landlord should not have the same consequences as a tenant that is evicted based on criminal activity. As the law stands, all are treated the same. If a tenant withholds rent because the landlord fails to repair the cooling system during the summer, judges should be able to use their discretion. A tenant in extreme summer heat with children may have to make a decision to use rent money to purchase fans for the property or attempt to fix the cooling system with no assistance from the landlord. Most tenants are unaware that the law does not allow one to withhold rent for failure to repair on the property. The law allows a tenant to provide written notice of the issue and reasonable time for the landlord to repair. If the landlord fails to repair in a timely manner, the tenant's remedy is to break the lease and vacate the property without any recourse. This remedy does not do much for a tenant with children and limited income.

When questioned as to how much explanation each judge provides to the *pro se* tenant, many of the judges made sure to place emphasis on being "careful not to provide legal advice." Six judges stated that they provide procedural advice

156 *Id.*

such as: (1) explanation of bifurcation of the trial if there is a possession count and money count involved, (2) legal time period to vacate the property, (3) any other scheduled court dates regarding the eviction, but not legal advice such as how the unrepresented tenant should properly defend his or her case. Two of the ten judges stated that they provide no explanation. Perhaps, they provide no advice out of fear of “going over the line” or general apathy regarding the situation. Most judges felt uncomfortable providing too much explanation to a *pro se* tenant. One judge stated:

I provide as much as I can. It depends on the level of understanding that I get from each tenant. Some understand. Some don't. We've tried to make sure that tenants understand the law. The Clerk's Office provides a handbook for tenants regarding their rights. I also quote some of the law in my order.

3. Outcomes with *pro se* tenants.

Tenants appear *pro se* in eight of the ten judges' courtrooms. Nearly all outcomes are favorable to the landlord when there is a *pro se* tenant. Some of the frequent comments included:

In the majority of my cases, trials take place and the landlord is successful. Some are consent judgments.

Most do not go to trial. Many settle with consent judgments. A good majority do not appear in court, and judgments are entered based on their failure to appear.

There are a lot of consent judgments. If I have 25 cases, 21 of them will result in consent judgments. The rest are trials. . . . judgments are typically in favor of the landlord.

Most of them are judgments in favor of the landlord. Sometimes, tenants will win, but this isn't something that happens often. . .

Two of the judges interviewed provide attorneys for tenants through their “Lawyer For A Day” program. Their responses were different. Both of those judges stated that the outcomes vary tremendously with attorney representation of tenants. The judges observed that even those tenants that enter into a consent judgment with the presence of an attorney are allowed significantly longer periods to vacate the property. Their comments included:

Now that we have lawyers representing tenants, we see a little bit of everything. I love this because the lawyers are willing to fight for the tenants. They are willing to fight for them on both counts and also negotiate at times.

It varies now, but without an attorney, it is inevitable that a judgment will be entered against the tenant.

4. Would outcomes change if right to counsel was a reality for tenants?

Judges candidly spoke about whether outcomes would change if a right to counsel existed for tenants. Eight of the ten judges unequivocally believe the

outcomes of an eviction hearing would be better for tenants if tenants were represented by attorneys. One judge stated:

Absolutely. They would have someone fighting for them. They wouldn't be fearful. Tenants need someone to explain their options to them. When tenants are represented, I feel more comfortable with the outcome of the case. It's always better for tenants to have representation. As a young lawyer and now judge, I never understood why the criminal justice system has attorneys, but not those facing eviction and the possibility of being homeless. Homelessness or the potential of being homeless is just as important as a life conviction. It's not balanced and nor is it fair. It is not right for someone who is facing the possibility of becoming homeless to represent themselves in court. I don't understand it.

Although the two remaining judges did not clearly state “yes,” they do believe that landlord attorneys would offer better settlement offers if tenants were represented by an attorney. In addition, they believe a right to counsel for tenants would allow tenants an opportunity to file valid claims such as wrongful ouster or counterclaims. Two of the judges in the research have already begun to observe better outcomes. The consensus is that *pro se* tenants do not understand the implications or all that is at stake in an eviction hearing. The two remaining judges still believe a lawyer would help even though they were not sure if the outcome would be different.

B. The Voice of the Judge

Several state court judges have spoken out about the right to counsel in civil cases. California Court of Appeal Justice Earl Johnson may have been one of the first to advocate for such a right in 1985.¹⁵⁷ In his dissent in *Quail v. Municipal Court*, “he explored grounds for recognizing a right to counsel in civil cases such as due process, equal protection, incorporation of English common law that recognized such a right, and the court’s inherent authority.”¹⁵⁸

In 2016, Mississippi Supreme Court Justice Jess Dickinson encouraged supporters to advocate and make civil *Gideon* a reality for the indigent population:¹⁵⁹

We revere our Constitution as our country’s heart. It is the supreme law, and its words and phrases tell us who we are. The preamble’s purpose is to announce to the world why we fought a war to win independence and to set out in plain view our Constitution’s five purposes. And the second of those five purposes is to ‘establish Justice.’ My friends, when justice is for sale, when the poor do not stand equal to the rich in our courts, when poor people by the millions go unrepresented in court—losing their children, their homes, their property, and sometimes their very freedom—we have not established justice. And we will

¹⁵⁷ See National Coalition for a Civil Right to Counsel, *What do Judges Think of Civil Right to Counsel?*, <https://perma.cc/3JFM-XANC>.

¹⁵⁸ *Quail v. Municipal Court*, 171 Cal.App. 3d. 572 (1985).

¹⁵⁹ Sue Honea, *Access to Justice Summit Explores Civil Right to Counsel*, MAGEE NEWS (Aug. 26, 2016), <https://perma.cc/CAH7-AWCY>.

not establish justice so long as we as a country grossly underfund legal services for the poor—leaving millions and millions of Americans with no reasonable chance at fairness and justice in our courts.¹⁶⁰

In 2019, Massachusetts Supreme Court Justice Ralph Gants endorsed a right to counsel for *pro se* tenants and *pro se* landlords in eviction cases.¹⁶¹ In his State of the Judiciary speech, he offered the following: “Many litigants, especially in Housing Court and Probate and Family Court, must navigate a complicated legal system and advocate for themselves with no legal training, and often with limited English proficiency, in cases that can have life-altering consequences, such as eviction from a home or loss of child custody in divorce.”¹⁶² In a ruling by Justice Gants, the Court ruled in favor of tenants and included a lengthy appendix as a guide for *pro se* tenants to understand the process and rules around eviction hearings.¹⁶³

CONCLUSION

Exploring a right to counsel can also be in tandem with other reform relating to *pro se* tenants. Advocating for civil *Gideon* and *pro se* court reform are not mutually exclusive. The simplification of court processes and forms, creation of self-help centers, use of non-lawyer advocates, or the use of technology can all be explored while advocating for a right to counsel.¹⁶⁴ The right to counsel movement advocates for the indigent, but there are others who are not considered “indigent” under the guidelines or fall outside the “basic human needs” categories, and these services can help them to meet those needs.

As Professor Brian Gilmore states, eviction is the “civil equivalent to capital punishment. The person or family that is evicted suffers civic death in society.”¹⁶⁵ Judges should be concerned about the plight of *pro se* tenants in eviction courts across the country. We should look for opportunities to make this a reality in jurisdictions that have no right to counsel for tenants by creatively joining the public’s discourse and working with state access to justice commissions to advance the issue. Providing a right to counsel to tenants addresses representational disparity, filing rates, default judgment rates, compliance with settlement agreements, and more. In addition, it provides the opportunity for judges to hear the entire story of a case. A right to counsel has been shown to reduce burdens of *pro se* litigants on courts and clerks and prevent predatory and illegal landlord

¹⁶⁰ Jess H. Dickinson, *A Look at Civil Gideon: Is There a Constitutional Right to Counsel in Certain Civil Cases?*, 37 U. ARK. LITTLE ROCK L. REV. 543 (2015).

¹⁶¹ Shira Schoenberg, *SJC Chief Justice Ralph Gants Endorses Right to a Lawyer for Tenants and Landlords in Eviction Cases*, MASSLIVE (Oct. 30, 2019), <https://perma.cc/Y284-C46G>.

¹⁶² *Id.*


¹⁶³ *Id.*

¹⁶⁴ Pollock, *supra* note 148, at 42.

¹⁶⁵ Brian Gilmore, *Give Tenants Lawyers*, N.Y. TIMES OPINION (Oct. 9, 2018), <https://perma.cc/7X5Q-HY39>.

behavior. Besides increasing overall court efficiency and fairness, a right to counsel for tenants is morally sound.

APPENDIX A: RECENT RIGHT TO COUNSEL FOR TENANT LEGISLATION

 RIGHT TO COUNSEL FOR TENANTS: ENACTED LEGISLATION, QUICK REFERENCE GUIDE						
City / State	Eligibility requirements?	Admin. hearings?	Affirmative proceedings?	Appeals?	Implementation (Phase in / roll out?)	Funding source
New York City (2017)	Income (200% or less FPL)	Yes	No	Yes	Fully implemented across entire city	General revenue (\$166 million)
San Francisco (2018)	No	Yes	No	Not specified	Fully implemented across entire city and county	General revenue (\$16 million)
Newark (2018)	Income (200% or less FPL)	Yes	No	No (except rent control bd decisions)	By 4/1/19, no phase in specified	General revenue (\$750,000) + private funding (unknown amt)
Cleveland (2019)	Income (100% or less FPL) + 1 child	No	No	Not specified	Fully implemented across entire city	General revenue (\$300,000) + private (\$3 million)
Philadelphia (2019)	Income (200% or less FPL)	Yes	Yes (specified proceedings)	Yes	TBD managing director	General revenue (\$3 million) + private (\$4.5 million over 3 yrs)
Boulder (2020)	No	Yes	No	Yes	Fully implemented across entire city	Rental license excise tax raised to \$75
Baltimore (2020)	No (but low-income priority)	Yes	Yes (specified proceedings)	Yes	Phase in over 4 years	Federal (\$2.5 million CDBG-CV, \$1 million ARPA)
Seattle (2021)	Indigency (unable to pay counsel costs)	No	No	Not specified	Not specified	General revenue (\$750,000)
Louisville (2021)	Income (125% or less FPL) + 1 child	No	No	Not specified	Not specified	Federal (\$400,000 ERAP)
Denver (2021)	Income (80% or less of AMI)	Yes	No (but "functional equivalent" of eviction covered)	Yes	Not specified	Federal (\$2.7 million ARPA)
Toledo (2021)	Income (200% or less FPL)	No	No	Yes	Phase in over 5 years	General revenue (\$1.25 million over 5 years)
Minneapolis (2021)	No (program director can change)	Yes (pgm dir. can change)	No	Yes (pgm dir. can change)	TBD by program director + designated org.	Federal (\$1 million ARPA) and general revenue (\$250k)
Kansas City (2021)	No	No	No	Yes (where appropriate)	Implemented by June 2022	Federal (\$2.5 million ARPA)
New Orleans (2022)	No	Yes	Yes (seeking injunctive relief for illegal eviction)	Yes (where appropriate)	Implementation regulations due within 60 days of passage	Federal (\$2 million ERAP)
Detroit (2022)	Income (200% or less FPL)	Yes	No	Yes	Program launches on October 1, 2022; phase-in not specified	Federal (\$18 million ARPA) + private (\$12 million over 3 years)
Washington (2021)	Indigency (200% or less of FPL or receiving pub. assistance)	No	No	Not specified	Within 12 mo. of enactment	General revenue (\$11 million)
Maryland (2021)	Income (50% or less of state's area median income)	Yes	No	Yes	Not specified	Abandoned property fund (\$14 million)
Connecticut (2021)	Income (80% or less of state's area median income)	Yes	No	Not specified	Phase in priorities, no deadline. Rollout began in Jan 2022.	Federal (\$20 million FRF)