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PATCHING THE PATCHWORK: MOVING THE CIVIL RIGHT TO COUNSEL FORWARD WITH KEY DATA

MARIA ROUMIANTSEVA*

INTRODUCTION

While the pandemic has exposed many long-standing realities about the United States, the destructive everyday crisis of eviction is top of mind as moratoria have now expired and rental assistance funds dissipate with no anticipated replenishment. Therefore, though this piece addresses legal representation in civil legal proceedings more broadly, we will start with an eviction story.

It can be taken as fact that not too far from where you are reading this piece, a tenant is facing an eviction unrepresented. She cannot afford a private attorney. She is income eligible for legal aid, but the office near her home is at capacity and the one further away does not handle eviction cases at all. She has questions about the eviction papers taped to her door, but she does not have a lawyer to call. She does not have an attorney to assess her available defenses, propose rental assistance options, negotiate a settlement with the landlord's attorney, write and file an answer, enter a counterclaim, or explain the upcoming court appearance. She does not know whether she will be able to make it to court due to childcare issues, and she is still not sure if she is scheduled to work that day. If she makes it in, she will not have a lawyer enter their appearance on her behalf. There will not be an attorney to put on her case, request a jury trial, raise defenses, present evidence, object, preserve issues for appeal, go over legal documents, request more time for compliance, explain the court orders, or ask that the case be sealed. She will navigate the entire

process herself. And she is very likely to do so facing an experienced landlord's attorney familiar with the court, the judge, and the court's staff. Chances are she will lose. And that loss will likely cause more losses: loss of personal possessions (possibly her medications), loss of community, loss of mental and physical health stability, employment, credit standing, etc.

But pin this story to a specific location—say San Francisco or New York City.¹ What is the difference when, by luck of geography alone, the tenant resides in a city that has enacted a *right to counsel* for tenants facing eviction? Just by changing the skyline in the background, she is much more likely to secure legal representation. With this single shift, the main plot points of her story change. With what we know about the impact of tenant representation, she is more likely to present a defense and have that defense be successful. She is more likely to get additional time to remedy the situation. The monetary judgment, if any, is likely to be less. Most importantly, she is likely to remain housed—or if vacating—to get more time to vacate, and she may even avoid having the eviction attached to her record, which would prevent her from securing new housing. Alone, legal representation in eviction cases *cannot* and *does not* prevent all the risks that a tenant facing eviction must endure, but with representation, an eviction is no longer on autopilot; the outcomes are no longer set in stone. With representation, there are options.

For people who cannot hire a private attorney, geographical luck means a lot—not just in eviction cases but in civil proceedings generally.² Every state has a right to counsel in one or more civil

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¹ New York City and San Francisco have enacted the right to counsel for tenants facing eviction. NAT'L COAL. FOR CIV. RIGHT TO COUNS., THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: ENACTED LEGISLATION 3 (October 2022), http://civilrighttocounsel.org/uploaded_files/283/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf [<https://perma.cc/UJ3L-UPBS>] (providing a table summarizing all of the tenant right to counsel enactments).

² See REBECCA L. SANDEFUR, AM. BAR FOUND. & UNIV. ILL. URBANA-CHAMPAIGN, CIVIL LEGAL NEEDS AND PUBLIC LEGAL UNDERSTANDING 2, https://www.americanbarfoundation.org/uploads/cms/documents/sandefur_-_civil_legal_needs_and_public_legal_understanding_handout.pdf [<https://perma.cc/J6H9-CA2L>] (last visited Oct. 7, 2022) ("In the United States, the existing infrastructure of civil legal assistance is the output of many public-private partnerships, most of them on a small scale. Around the country, different states and communities differ substantially in the

legal areas. But the existing rights are a patchwork, varying in existence and substance from state to state, and sometimes city to city.³ Whether a person will have a *right* to counsel in a civil legal proceeding, even one that implicates their physical safety, shelter, or custody over their child, still largely depends on *where they live, who they are, and what kind of legal case it is*. Where there is no right to counsel, people rely on free legal services providers. According to the most recent Justice Gap Report, low-income Americans come to Legal Services Corporation (“LSC”) funded “legal aid providers with an estimated 1.9 million civil legal problems per year.”⁴ And this only accounts for those cases and individuals meeting LSC eligibility guidelines. Those same organizations turn away about half of those cases, and it is not guaranteed that the cases they take on will receive all the legal assistance required.⁵ The U.S. knows the lyrics to the access to justice anthem, we just cannot sing very well.⁶

resources available to support civil legal assistance for eligible populations, in the kinds of services that are available, and in the groups served by existing programs. Little coordination of services exists among service providers, meaning that people in need are less likely to make contact with providers who can help them. The context is one of both diversity and fragmentation, with large inequalities both between states and within them in what services are available to which populations. In this context, geography is destiny: the services available to people from eligible populations are determined not by what their civil justice problems are or the kinds of services they may need, but rather by where they happen to live.”)

³ See *Status Map*, NAT’L COAL. FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> (last visited Oct. 7, 2022) [hereinafter *Status Map*].

⁴ See LEGAL SERVICES CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 70 (Apr. 2022), <https://lsc-live.app.box.com/s/xl2v2uraitobbzrhwtjlgioemp3myz1> [<https://perma.cc/5MNK-ELJ3>]; OR. STATE BAR, BARRIERS TO JUSTICE: A 2018 STUDY MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME OREGONIANS 11 (Feb. 2019), <https://olf.osbar.org/files/2019/02/Barriers-to-Justice-2018-OR-Civil-Legal-Needs-Study.pdf> [<https://perma.cc/4MYS-E4NR>] (“More than half of the survey participants (52.8%) who experienced a legal problem looked for legal help. . . . Just under a quarter of participants (23.9%) tried to get a lawyer to help them. Even fewer (15.8%) were successful in obtaining any kind of help from a lawyer, including simple legal advice.”); REBECCA BUCKWALTER-POZA, MAKING JUSTICE EQUAL, CTR. AM. PROGRESS 4 (Dec. 8, 2016), <https://www.americanprogress.org/article/making-justice-equal/> [<https://perma.cc/HKG2-7RAD>] (discussing the funding declines experienced by LSC and IOLTA programs, the primary funding mechanisms for civil legal aid in the U.S.).

⁵ See LEGAL SERVICES CORP., *supra* note 4, at 71.

⁶ See WORLD JUSTICE PROJECT, *Civil Justice, People Can Access and Afford Civil Justice*, WJP RULE OF LAW INDEX: FACTORS (last visited Oct. 7, 2022), <https://worldjusticeproject.org/rule-of-law-index/factors/2021/United%20States/Civil%20Justice/> [<https://perma.cc/8SMQ-ATYW>] (finding that of 139 countries, the U.S. comes in at 126 for Factor 7.1 which measures “the accessibility and affordability of civil courts, including whether people are aware of available remedies, can access and afford legal advice and representation, and can access the court system without incurring unreasonable fees, encountering unreasonable procedural hurdles, or experiencing physical or linguistic

The U.S., despite the deeply committed legal aid providers on the ground, has not prioritized legal representation for low-income civil litigants, even in cases where the most basic needs are at stake.⁷ Absurdly enough, this decades-long lack of prioritization has created the environment and the tools that might finally *cause* prioritization. Underfunding civil legal aid and failing to ensure consistency in access to legal representation in civil matters both contribute to the untenable civil justice gap *and* have allowed for the development of the tools (including data) that advocates are using to close it. Over the decades, advocates have repeatedly explained the significance of the interests at stake and the consequences of erroneous deprivation in civil proceedings where basic human needs are at stake.⁸ Ultimately, these are the highest justifications for a right to counsel in these cases. But as is evident in the eviction right-to-counsel movement playing out across the country today, progress is greatly assisted by the activation of people with lived experience, *and* the additional element of showing impact and cost efficiency, the latter of which is the focus of this article.

In studies looking at the impact of legal representation, reports analyzing representation pilot projects, and impact evaluations of enacted rights to counsel, there is substantial evidence showing that legal representation in civil matters *matters*. Combined with available explications on the substantial interests at stake, the available data is a tool for advocates to advance the right to counsel in basic human needs civil cases on a massive scale.

barriers”). Since 2015, the U.S. ranking has dropped 40 places. Past issues of the Rule of Law Index are available in the NCCRC’s comprehensive civil right to counsel bibliography.

⁷ See AMERICAN BAR ASSOCIATION [ABA], Res. 112A, at 15–16 (Aug. 2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sclaid_06A112A.authcheckdam.pdf [<https://perma.cc/LKL5-V6TW>] [hereinafter *Res. 112A*] (“In a speech at the 1941 meeting of the American Bar Association, U.S. Supreme Court Justice Wiley Rutledge observed: ‘Equality before the law in a true democracy is a matter of right. It cannot be a matter of charity or of favor or of grace or of discretion.’ If Justice Rutledge’s self-evident statement required proof, the past 130 years of legal aid history have demonstrated its truth. Not only has equality before the law remained merely a matter of charity in the United States, but that charity has proved woefully inadequate.”). The ABA’s Resolution briefly outlines the right to counsel in civil proceedings. In other countries, it is a common phenomenon, but not in the U.S.: “[t]he United States, in contrast, has relied principally on supplying a fixed number of lawyers and providing representation only to however many poor people this limited resource is able to serve. As of today, the level of resource does not approach the level of need, and only a fortunate few of those unable to afford counsel enjoy effective access to justice when facing serious legal problems.” *Id.* at 4.

⁸ See *id.* at 10, 12–14.

Today's advocates have accessible data and information demonstrating the interests at stake, the significant consequences and costs associated with loss, estimates of the financial benefits of legal representation, *and* the impact that legal representation has in civil cases. As a prime example, in eviction proceedings, a growing movement in the U.S. is using this combination of data as part of their argument to convince local and state policymakers, often focused on protecting resources, that a right to counsel for tenants is worth the investment. Eighteen jurisdictions, including three states, have enacted the right to counsel for tenants facing eviction since 2017.⁹

Part I of this article discusses the cases at the heart of the civil right-to-counsel movement generally, *i.e.* cases that implicate basic human needs. The significant interests at stake in these cases rival those in the criminal context, where a defendant has a Constitutionally protected right to counsel. These interests should be enough to justify a right to counsel in basic human needs civil cases, but they generally have not been. Part II explores the state of the civil right to counsel law and movement, which, unlike its criminal counterpart, has expanded on the state and local, rather than federal, levels.¹⁰ This slower, jurisdiction-by-jurisdiction approach has on the one hand created a civil right to counsel patchwork; on the other hand, it allowed for pilot projects and research studies to specifically evaluate the impact of legal representation where represented litigants are compared against cohorts of unrepresented litigants. This research has proven legal representation as an effective intervention in civil proceedings.

Part III provides a broad overview of some of the available data on the impact and cost-efficiency of legal representation in civil cases, including ones where basic human needs are at stake. In general, the research shows that legal representation matters.¹¹ Finally, part IV highlights the growing movement to enact a right to counsel for tenants, which exemplifies the substantial progress that can be achieved when community organizers and advocates

⁹ See NAT'L COAL. FOR CIV. RIGHT TO COUNS., *supra* note 1, at 1–3.

¹⁰ See *Status Map*, *supra* note 3.

¹¹ See Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 942 (2016) (“On the whole, we conclude that while there may be areas where legal representation is likely to have less of an impact on case outcomes, the bulk of the evidence indicates that lawyers matter.”).

push for a right to counsel using legal representation impact and cost/benefit data alongside the information highlighting the interests at stake and data on the consequences of loss in a civil proceeding.

I. CIVIL CASES INVOLVING BASIC HUMAN NEEDS

In civil proceedings, particularly in cases where basic human needs are at stake, a party should have legal representation if they want it, whether they can afford to pay for private counsel or not.¹² Civil right-to-counsel advocacy is generally focused on expanding access to legal representation for low-income people facing cases that involve basic human needs. Almost twenty years ago, the American Bar Association's House of Delegates unanimously adopted Resolution 112A, which urged

[F]ederal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.¹³

¹² See, e.g., *About the NCCRC*, NAT'L COAL. FOR CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/about> [<https://perma.cc/M39J-5MZ7>] (last visited Oct. 7, 2022) (stating "our mission is to encourage, support, and coordinate advocacy to expand recognition and implementation of a right to counsel for low-income people in civil cases that involve basic human needs such as shelter, safety, sustenance, health, and child custody").

¹³ *Res. 112A*, *supra* note 7, at 1.

The list is not exclusive,¹⁴ but these basic human needs were prioritized by the ABA because their deprivation is consequential, particularly for low-income people.¹⁵ The ABA resolution lists out some of the basic human needs cases that fall into these categories:¹⁶

- (1) “Shelter” includes a person or family’s access to or ability to remain in an apartment or house, and the habitability of that shelter.
- (2) “Sustenance” includes a person or family’s sources of income whether derived from employment, government monetary payments or “in kind” benefits (e.g., food stamps). Typical legal proceedings involving this basic human need include denials of or termination of government payments or benefits, or low-wage workers’ wage or employment disputes where counsel is not realistically available through market forces.
- (3) “Safety” includes protection from physical harm, such as proceedings to obtain or enforce restraining orders because of alleged actual or threatened violence whether in the domestic context or otherwise.
- (4) “Health” includes access to appropriate health care for treatment of significant health problems whether that health care is financed by government (e.g., Medicare, Medicaid, VA, etc.) or as an

¹⁴ For instance, physical liberty is missing because it was assumed at the time that the U.S. Supreme Court’s decision in *Lassiter v. Dep’t of Soc. Servs.*, 451 U.S. 18 (1981), had implied there was a right to counsel when physical liberty was at stake, but the Court clarified that is not the case in *Turner v. Rogers*, 564 U.S. 431, 448 (2011). As a result, the ABA passed Resolution 114 in 2018, which called for a right to counsel for all cases that may result in a loss of physical liberty. Albert S. Dandridge III, *ABA Resolution 114: An Important Right to Counsel Measure*, LAW.COM (June 28, 2018, 1:47 PM), <https://www.law.com/thelegalintelligencer/2018/06/28/aba-resolution-114-an-important-right-to-counsel-measure/> [<https://perma.cc/H7D2-XCHQ>].

¹⁵ *Res. 112A*, *supra* note 7, at 13.

¹⁶ *See id.*

employee benefit, through private insurance, or otherwise.

(5) “Child custody” embraces proceedings where the custody of a child is determined or the termination of parental rights is threatened.¹⁷

These cases track the documented civil legal needs of low-income people in America.¹⁸ The 2022 Justice Gap Report estimated that “74% of low-income households experienced at least one civil legal problem in the past year—with many households dealing with multiple problems.”¹⁹ Consumer issues, health care, income maintenance, and housing issues topped the list.²⁰

Each of these civil proceedings carries with it enormous risks and consequences for the litigant precisely because a basic human need is at stake. An eviction jeopardizes shelter, and a court order to vacate triggers not only the loss of that shelter but a cascade of negative effects on physical and mental health, employment, education, child custody, credit score, etc. Termination of parental rights cases implicate a parent’s fundamental right to care and custody of a child, and result in a complete and final severance of the parent-child relationship, with all the accompanying effects on the lives of the parent and the child.²¹ Domestic violence cases implicate the litigant’s safety, and a denial of an order of protection can increase the risks of injury and death. And because

¹⁷ *Id.* The NCCRC maintains a database of the right to counsel in civil proceedings. It tracks cases that fall within these categories, as well as others. The NCCRC’s status map is a comprehensive resource that allows the user to see the right-to-counsel status in each state and each tracked subject area. Tracked subject areas include family-law matters including divorce, child custody, child abuse and neglect, termination of parental rights, parentage proceedings, and child support matters; matters dealing with physical safety such as domestic violence; matters having to do with personal adult autonomy, including conservatorship, guardianship, and adult protection; matters dealing with physical and mental health such as sterilization, quarantine, and civil commitment; as well as matters dealing with housing, benefits, civil contempt, civil forfeiture, fees or fines, bankruptcy, truancy, immigration, and prisoner proceedings. *Status Map*, *supra* note 3.

¹⁸ See LEGAL SERVICES CORP., *supra* note 4, at 7; BUCKWALTER-POZA, *supra* note 4, at 2 (“Past estimates and more recent state-by-state studies suggest that about 80 percent of the civil legal needs of those living in poverty go unmet as well as 40 to 60 percent of the needs of middle-income Americans. But because these figures depend upon self-selection and self-reporting, however, and because many Americans do not identify their unmet legal needs as such, it is impossible to estimate Americans’ total unmet legal needs.”).

¹⁹ LEGAL SERVICES CORP., *supra* note 4, at 32.

²⁰ See *id.* at 33.

²¹ TEDx Talks, *Rethinking Foster Care: Molly McGrath Tierney at TEDxBaltimore 2014*, YOUTUBE (Feb. 27, 2014), <https://www.youtube.com/watch?v=c15hy8dXSps&t=364s> [<https://perma.cc/VA6K-FW5N>].

of historical and ever-present racism within the systems that generate these cases, the reality to this day is that the litigants are often disproportionately people of color.²² In eviction cases, Black women are twice as likely to have an eviction case filed against them as white renters are.²³ And in cases dealing with the child welfare system, parents and children of color are significantly overrepresented.²⁴

Each proceeding also carries with it a translatable cost to society. Evictions can increase the use of publicly subsidized homeless shelters and interactions with publicly funded police or social service providers.²⁵ Foster care is paid for with public dollars.²⁶ And not only are public dollars paying the costs related to those consequences but they are also used to foot the bill for the

²² In North Carolina, a recent study assessed the civil legal needs of the state's low-income population (based on court data from 2019, and interviews conducted throughout 2020). *See In Pursuit of Justice: An Assessment of Civil Legal Needs in North Carolina*, UNC GREENSBORO: CTR. HOUS. & CMTY. STUD. (March 30, 2021), <https://storymaps.arcgis.com/stories/fc04287ea939443a8a9f18e79207b36c> [<https://perma.cc/VC9J-QDUV>] (“Disproportionately, civil legal agencies assisted non-white clients, with 40.0% being African American as compared with 21.4% of the state's population.”).

²³ *See* Peter Hepburn et al., *Racial and Gender Disparities among Evicted Americans*, EVICTION LAB (Dec. 16, 2020), <https://evictionlab.org/demographics-of-eviction/>; Matthew Desmond, *Poor Black Women Are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUNDATION (Mar. 2014), https://www.macfound.org/media/files/hhm_research_brief_-_poor_black_women_are_evicted_at_alarming_rates.pdf [<https://perma.cc/P583-42VG>]. *See also* NEW SETTLEMENT APARTMENTS' CMTY. ACTION FOR SAFE APARTMENTS & CMTY. DEV. PROJECT, *TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT 6* (2013) (detailing the disproportionate lack of legal representation among people of color and the consequences flowing from the loss of eviction proceedings).

²⁴ *See* CHILD'S BUREAU, *BULLETINS FOR PROFESSIONALS: CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2* (Apr. 2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/8NLD-ZPVB>].

²⁵ *See* JACQUELYN SIMONE, COAL. FOR THE HOMELESS, *STATE OF THE HOMELESS 2022: NEW YORK AT A CROSSROADS 44* (2022) (looking at eviction prevention in New York as homelessness prevention); *see also* SEEDCO, *HOUSING HELP PROGRAM: HOMELESSNESS PREVENTION PILOT FINAL REPORT Attachment A* (2010) (a diagram showing the connection between eviction and homeless shelter entry); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 97* (2019) (“[L]aw enforcement officers are tasked with receiving and responding to complaints about homelessness, even when there is no attendant public safety issue.”).

²⁶ *See* Eli Hager & Joseph Shapiro, *State Foster Care Agencies Take Millions of Dollars Owed to Children in Their Care*, NPR (Apr. 22, 2021, 7:00 AM), <https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-ca> [<https://perma.cc/2JUS-EZHC>] (“Nationwide, foster care agencies are funded through a complicated web of federal and state grants and subsidies, paid for by taxpayers.”).

State's attorney in civil proceedings where the state is the opposing side, like child welfare cases.²⁷

In criminal cases, there is a right to counsel in part because of the interests at stake.²⁸ However, even as the abridged overview above shows, civil cases are no less consequential. In civil cases where basic human needs are at stake, litigants risk losing their housing, stretches of homelessness, food insecurity, source of income disruption, unpayable consumer debt, growing medical debt, denials of protection from mental, physical, and emotional violence, the possible loss of life, improper restraints on or wholesale loss of decision-making, incarceration, loss of custody and control over a child, and so much more.²⁹ Termination of parental rights cases have been likened to the *civil death penalty*.³⁰ The loss of an eviction case can lead to the loss of a home in a matter of days.³¹ These consequences not only rival what is at stake in a criminal case, but they can also lead to criminal justice system involvement. Homelessness, for example, can increase interactions with the police or child protective services, which in turn might lead to a criminal investigation or charge.³²

However, the interests at stake in these civil proceedings, the consequences attending the loss of these proceedings, and the

²⁷ See, e.g., Mark Hardin, *Claiming Title IV-E Funds to Pay for Parents' and Children's Attorneys: A Brief Technical Overview*, ABA (Feb. 25, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january--december-2019/claiming-title-iv-e-funds-to-pay-for-parents-and-childrens-attor [<https://perma.cc/YUQ6-SPBN>] ("For the first time, states can now claim federal matching funds through Title IV-E of the Social Security Act to help pay the costs of attorneys representing certain children and their parents in child welfare legal proceedings. Before this change, federal matching funds were available to help pay for attorneys representing child welfare agencies, but not for children's or parents' attorneys.").

²⁸ See *infra* Part III.

²⁹ See, e.g., Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, Soc. Forces Advance Access, Feb. 2015 at 5–6 (describing the consequences of eviction proceedings, including the lack of ability to: retain current housing; obtain new housing; secure food; maintain a steady source of income; stay out of debt; make decisions that require credit; and maintain custody of children).

³⁰ See, e.g., *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004) ("The termination of parental rights has been characterized as tantamount to a 'civil death penalty.'").

³¹ See SEEDCO, *supra* note 25, at 10 ("Once an Order for Eviction . . . has been served, in most jurisdictions if the tenant does not dispute the order within five days, the landlord can move to have the eviction executed . . .").

³² See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 25, at 50, 102 (describing the heightened involvement of law enforcement and child protective services in the lives of those experiencing homelessness as a result of criminalization laws disparately impacting them).

disproportionate impact on communities of color, have not translated into guaranteed legal representation in every state in the cases outlined above. Though there is a right to counsel in every state in one or more civil legal areas, and though some subject areas see more right-to-counsel advancements than others, whether a person has a right to counsel still generally depends on where they reside, their financial status, and the type of civil matter at issue.³³ Without the guarantee of an attorney, many low-income civil litigants “go it alone.”³⁴

That there is no guarantee of a right to counsel in a particular civil case does not mean that both, or all, sides are unrepresented in that case. For example, in a child welfare case, depending on the state, characteristics of the child, and the stage of the proceeding, a child may or may not have client-directed counsel.³⁵ The state and stage of the child welfare proceeding also dictate whether a respondent parent has the right to counsel.³⁶ The state, however, will be represented by a publicly funded attorney (*i.e. the state always has the right to counsel*).³⁷ And the state’s attorney will not only be a licensed, trained lawyer who is likely familiar with the courthouse and the judge, but they will also have all the resources and funds of the state behind them.³⁸ Such is similarly the case with civil forfeiture proceedings, civil proceedings to enforce collection of criminal fees and fines, or child support enforcement cases where the custodial parent receives state benefits.

This routine asymmetry of power is not limited to proceedings where the State is a party. Eviction proceedings, for example, are

³³ See *Status Map*, *supra* note 3.

³⁴ LEGAL SERVICES CORP., *supra* note 4, at 14 (“Every day, millions of low-income Americans grapple with civil legal problems, which often involve basic needs like safe housing, access to health care, child custody, and protection from abuse. Most ‘go it alone’ when dealing with these problems—without legal information, advice, or representation to help them resolve their problems in the civil legal system.”); Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 478 (2010) (citing reports that indicated a rise (at the time) in the number of pro-se litigants in various civil proceedings, including landlord tenant cases, family law cases, domestic relations and divorce cases); *id.* (“[P]ro se litigants are becoming a more common phenomenon in American courts, especially in the area of family law, and in ‘poor people courts’ which deal with cases such as traffic or landlord/tenant disputes, where the pro se litigant has actually become the norm.”).

³⁵ See *Status Map*, *supra* note 3.

³⁶ See *id.*

³⁷ See *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 43–44 (1981).

³⁸ See *id.*

not generally brought by the state (though subsidized tenants may be evicted by a publicly funded public housing authority that will be represented), yet they similarly feature an imbalance of representation. In a review of the studies and reports from localities and states looking at the state of eviction proceedings in their jurisdiction, for those jurisdictions with known figures, landlords were represented 81% of the time on average, compared to tenants who were represented in only 3% of cases.³⁹

Without the guarantee of an attorney and being unable to retain or pay for an attorney, low-income civil litigants seeking legal assistance rely on an underfunded civil legal aid system⁴⁰ that is often at capacity. Our civil legal aid system exists to provide legal services to low-income people and the staff employed there are often doing their best to provide the best representation to as many people as possible. But the system cannot serve all eligible clients and does not serve all clients in need. Without a right to counsel, which puts the onus of sufficient funding on the government, legal aid providers are at the mercy of funders.⁴¹ Funding, of course, caps everything from the number of lawyers and offices to the capacity of each provider to the extent of services provided. Many providers are forced into unceasing triage. And the availability of services, as well as the capacity of providers, can depend on the jurisdiction itself. There might not be a provider in the area that provides the services needed; there might not be a provider at all. For example, a report by the American Immigration Council in 2016 found that immigrants who faced court hearings in small cities were “more than four times less likely to obtain counsel than those with hearings in large cities (11 percent in small cities versus 47 percent in large cities).”⁴² And

³⁹ See NAT'L COAL. FOR CIV. RIGHT TO COUNS., *EVICTION REPRESENTATION STATISTICS FOR LANDLORDS AND TENANTS ABSENT SPECIAL INTERVENTION 1* (2022), http://civilrighttocounsel.org/uploaded_files/280/Landlord_and_tenant_eviction_rep_stats_NCCRC_pdf [https://perma.cc/3J5G-958R].

⁴⁰ See BUCKWALTER-POZA, *supra* note 4, at 2 (“Other developed democracies have enshrined the right to counsel in civil cases and devote 3 to 10 times more funding to civil legal aid than the United States.”).

⁴¹ See *id.* at 4 (explaining that many programs are funded by the Legal Services Corporation, which itself is often in a battle for funding).

⁴² INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, *ACCESS TO COUNSEL IN IMMIGRATION COURT 2* (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

rural areas have specific challenges of their own.⁴³ The lack of funding and what it prevents legal aid from doing also does significant reputational harm to free legal services programs. The inability of legal services providers to take a case can discourage new clients from seeking legal services. Pushing attorneys to the brink in terms of caseload, or inhibiting extensive services, can breed client distrust of the providers.⁴⁴

Though close to half of the people seeking assistance from LSC-funded programs are likely to be turned away, many will not even request legal assistance. Whereas people who have the financial means are likely to “seek [out] a legal remedy,”⁴⁵ the most recent Justice Gap report showed that even for problems that substantially impact their lives, low-income people only sought legal help 25% of the time.⁴⁶ “Members of poor and minority groups are less likely than their higher income counterparts to seek help when they experience a civil legal problem.”⁴⁷ The reasons for this are varied and include not categorizing an issue as a legal issue⁴⁸ and distrust of the legal system and its players.⁴⁹ The overall effect, however, is that many low-income litigants

⁴³ See generally *Rural Justice Task Force*, LEGAL SERVICES CORP., <https://www.lsc.gov/initiatives/lsc-task-forces/rural-justice-task-force> [<https://perma.cc/W2PN-NXYM>] (last visited Oct. 2, 2022) (“[R]ural areas face unique challenges given factors like geographic and social isolation, the frequent lack of Internet service or technology, the low density of legal-aid and other human service providers, and the distinctiveness of different rural populations.”); Nick Devine, *Equality Before the Law: Ending Legal Deserts in Rural Counties*, GEO. J. ON POVERTY L. & POL’Y (Nov. 3, 2020), <https://www.law.georgetown.edu/poverty-journal/blog/equality-before-the-law-ending-legal-deserts-in-rural-counties/> [<https://perma.cc/YJ25-EU7C>] (discussing the issues civil and criminal legal deserts in rural areas across the country and proposing the option of “placing federally employed, general practice attorneys in small towns across the country”).

⁴⁴ See LEGAL SERVICES CORP., *supra* note 4, at 75 (explaining that, due to the extensive number of people seeking legal services, “an estimated 1.4 million problems . . . will not get any or enough legal help”).

⁴⁵ Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1274 (2016) (describing a study to “explain how injurious experiences were identified (naming), causally attributed to second parties as grievances (blaming), and, sometimes, ultimately settled in a court of law (claiming),” and highlighting a key finding in the study: “high income households were more likely than low income households to seek a legal remedy for events considered to be a grievance . . . these socioeconomic differences in civil justice utilization are likely explained by unequal distribution of resources that facilitate the law’s use, such as money and knowledge. This includes not just money to hire a lawyer, but also additional expenses, such as the money to travel to a legal aid office or the knowledge that solutions exist”).

⁴⁶ See LEGAL SERVICES CORP., *supra* note 4, at 18.

⁴⁷ Greene, *supra* note 45, at 1263, 1268.

⁴⁸ See SANDEFUR, *supra* note 2, at 2; Greene, *supra* note 45, at 1275; LEGAL SERVICES CORP., *supra* note 4, at 62.

⁴⁹ See Greene, *supra* note 45, at 1275; LEGAL SERVICES CORP., *supra* note 4, at 62.

navigate these substantively and procedurally labyrinthine civil cases on their own or not at all.⁵⁰

The lack of representation prevents people from vindicating their rights affirmatively, and defending themselves in our adversarial legal system: “Congress and the courts have achieved remarkable progress on civil rights, social welfare, and criminal justice through landmark legislation and rulings. But if the people for whom these rulings are meant to protect do not have access to civil legal aid or receive adequate defense representation, these protections become irrelevant to their daily lives.”⁵¹ These realities of the civil legal aid and civil justice systems also magnify the risk of erroneous deprivation. Unrepresented litigants facing a represented party are not only charged with presenting their case and defenses on their own; to be successful they must also be responsive to the legal tactics an opposing party’s counsel utilizes in furtherance of their client’s case. Though courts have attempted to make proceedings accessible for unrepresented litigants, there is no meaningful access to the courts when an unrepresented party faces an attorney on the opposing side.

Basic human needs cases have been the focus of civil right-to-counsel advocacy because of the interests at stake, the consequences of loss, and the problems faced by our current civil legal aid system. This has led to a slow and steady push for the right to counsel in civil proceedings, one case or subject area at a time.

II. THE CIVIL RIGHT TO COUNSEL: THE PATCHWORK

In general, the right to counsel is a government obligation, established in the law, to ensure and fund legal representation in a legal proceeding. In the U.S., criminal defendants whose liberty or life is at stake have such a right to counsel.⁵² Why? Because of reason, reflection, and the promise of a *fair* trial. According to the

⁵⁰ See NATIONAL CENTER FOR STATE COURTS & STATE JUSTICE INSTITUTE, CIVIL JUSTICE INITIATIVE: THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv, 35 (2015) (“One of the most striking findings in the dataset was the relatively large proportion of cases (76%) in which at least one party was self-represented, usually the defendant.”).

⁵¹ BUCKWALTER-POZA, *supra* note 4, at 3.

⁵² See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Supreme Court in *Gideon v. Wainwright*, it is just that simple: “[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.”⁵³ In civil proceedings, obvious truths about the necessity of counsel to ensure a fair trial and mitigate the risk of error are apparently not obvious enough. In criminal cases, the interests at stake justify the right to counsel—but in civil proceedings, focusing on the interests at stake has generally not been enough to prioritize a right to counsel on a massive scale.

Lassiter v. Dep’t of Social Services of Durham County dashed many a civil right-to-counsel advocate’s hopes to advance the right to counsel for indigent civil litigants in cases that implicate basic human needs under the United States Constitution.⁵⁴ In *Lassiter*, a mother from North Carolina argued that she had a right to counsel in a termination of parental rights case under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.⁵⁵ The Supreme Court held that appointment of counsel in such cases was dependent on first balancing the *Mathews v. Eldridge* factors—the private interest at stake, the government interest at stake, and the risk of erroneous deprivation—and then weighing the result against the presumption that an indigent litigant only has the right to appointed counsel when, if she loses, she will be deprived of her freedom.⁵⁶ *Lassiter* is now in its forties but it can still halt a conversation about seeking a civil right to counsel at the federal level. *Turner v. Rogers*, though opinions differ and positive spins have been made, only made things harder in 2011, when the

⁵³ *Gideon*, 372 U.S. at 344 (continuing, “[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. . . . From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him”).

⁵⁴ See generally *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the refusal to appoint counsel for an indigent parent in a parental status termination proceeding did not violate the Due Process Clause of the Fourteenth Amendment).

⁵⁵ See *id.* at 24.

⁵⁶ *Id.* at 18–19 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Supreme Court held that the Due Process Clause of the Fourteenth Amendment did not require state-funded counsel for a non-custodial, indigent parent facing an unrepresented custodial parent in a child support non-payment proceeding, even if incarceration was possible.⁵⁷

As such, the movement to establish the right to counsel in civil cases has operated at the state and local levels. The ABA's resolution summarized the approach that is still primarily utilized:

The resolution voices the ABA's support for these primarily state-law-based approaches. While it remains important to look for the right in federal due process and equal protection law as the ultimate objective, the resolution seeks to foster the evolution of a civil right to counsel on a state-by-state basis, rooted in the unique provisions of each state's constitution and laws. This approach is likely to achieve significant results and provide doctrinal support for a future reconsideration of the right to civil counsel under the federal constitution.⁵⁸

Hence the patchwork: a court convinced that there is a right to counsel under a state constitution here, a legislature convinced that a right to counsel is a critical policy measure there. The civil right-to-counsel movement uses this slow and steady approach, which accounts for community input⁵⁹ and, in some instances, requires community organizing and activation, and it has yielded substantial results.⁶⁰

⁵⁷ *Turner v. Rogers*, 564 U.S. 431, 448 (2011). ("We consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year)."). The Court declined to address a situation where the State is the plaintiff. But while this might seem to leave the door cracked open, the Court has become even more conservative since then, and several justices have gone so far as to suggest *Gideon* was wrongly decided.

⁵⁸ *Res. 112A*, *supra* note 7, at 12.

⁵⁹ NAT'L COAL. FOR CIV. RIGHT TO COUNS., *Information for Civil Justice Systems About Civil Right to Counsel Initiatives*, at 4, 9 (June 9, 2009) http://www.civilrighttocounsel.org/uploaded_files/115/NCCRC_Informational_Memo.pdf [<https://perma.cc/GU82-ZSB4>].

⁶⁰ *See id.* (listing out and explaining policies that have been enacted in different states)

The National Coalition for a Civil Right to Counsel (NCCRC) maintains an interactive right-to-counsel status map, which compiles all known civil right-to-counsel enactments across the country.⁶¹ Every state in the country has a right to counsel in one or more civil proceedings.⁶² Whether there is a right to counsel depends on the *case* and the *state*. In general, a right to counsel in the civil context is statutory⁶³ or based on the state's constitution.⁶⁴ When litigated, the right to counsel is generally argued under the state constitution's due process or equal protection clause.⁶⁵

Though two states might have a right to counsel in the same type of case, the rights may differ substantively in terms of who is eligible, the timing of the appointment, and the duration of the appointment. Following the NCCRC's categorization, a right to counsel may be categorical in that all indigent individuals have a right to counsel in a particular category of case.⁶⁶ Alternatively, the right might be qualified and dependent on the litigant's characteristics (a right for one age group, but not another, for instance), characteristics of the case, the specific jurisdiction or court, or it may be simply that the statutory language is not clear about its applicability.⁶⁷ In addition, the appointment of counsel in a particular case may be discretionary, wherein a court is permitted but not required to appoint counsel—but this is *not* a right to counsel.⁶⁸ When a right to counsel is established, it is

due to the civil right to counsel movement, as well as proposed measures that are in line with its goals).

⁶¹ *Status Map*, *supra* note 3.

⁶² *Id.*

⁶³ *See, e.g.*, LA. CHILD. CODE ANN. Art. 1016 (2012) (“A. The child and the parent shall each have the right to be represented by separate counsel in a termination proceeding brought under this Title. Neither the child nor anyone purporting to act on his behalf may be permitted to waive the child’s right to counsel. B. The court shall appoint a qualified, independent attorney to represent the child in such a proceeding.”)

⁶⁴ *See, e.g.*, *In re A.W.S.*, 377 Mont. 234, 242 (2014) (holding that the equal protection clause was violated when the state guaranteed counsel in state termination proceedings, but not in private adoption cases).

⁶⁵ *See, e.g.*, *Black v. Div. of Child Support Enforcement*, 686 A.2d 164, 167 (Del. 1996) (finding a right to counsel under the Due Process Clause in civil contempt proceedings in Delaware where there was a possibility of incarceration).

⁶⁶ *Status Map*, *supra* note 3.

⁶⁷ *See id.* (using the phrase “Right or Appointment is Qualified” to classify states where “[t]he established right to counsel is limited in some way”).

⁶⁸ *See id.* (showing which states have “Discretionary Appointment of Counsel”). The discretionary appointment of counsel is not a *right to counsel*. In addition, where the appointment of counsel is discretionary, discretion is rarely utilized. *See* John Pollock, *The*

generally incorporated into an existing infrastructure—public defenders may represent litigants in a proceeding, or legal aid is the primary provider.

In some areas of civil law, the right to counsel is commonplace. In termination of parental rights cases, for instance, nearly every state has established a right to counsel for the parents.⁶⁹ In truancy matters, over 40 states have a categorical or qualified right to counsel.⁷⁰ In guardianship or conservatorship proceedings, most states have a right to counsel for the protected person, although the role of the appointed attorney can vary.⁷¹ In civil commitment proceedings, every state has a categorical right to counsel for indigent people subject to the proceeding.⁷² And there are civil cases that implicate basic human needs, where the right to counsel is recognized in some, but not many jurisdictions. Less than thirty states recognize a right to counsel for the defendant or respondent in paternity proceedings,⁷³ for example.

In other areas of law, the right to counsel is almost nonexistent. In cases concerning benefits (worker's compensation, unemployment, public assistance, etc.) only five states have even a *limited* right to counsel or authorization of appointment of counsel.⁷⁴ For proceedings dealing with Medicaid, only New Hampshire provides a qualified right.⁷⁵ And in child support establishment cases, only three states provide for the right to counsel, again qualified.⁷⁶ Now that is a patchwork.

All of the above—the underfunding of the civil legal aid system, the Supreme Court's adherence to a case-by-case approach to determining the right to counsel in civil proceedings, and the

Case Against Case-By-Case: Courts Identifying Categorical Rights To Counsel In Basic Human Needs Civil Cases, 61 *DRAKE L. REV.* 763, 771 (2013) ("It is true that a categorical right to counsel scheme means that a few cases might receive counsel despite not necessarily warranting it. However, as Justice Blackmun's strong dissent in *Lassiter* noted, the Supreme Court in *Mathews v. Eldridge* held that 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions.'").

⁶⁹ See *Status Map*, *supra* note 3 (showing where parents have a right to counsel).

⁷⁰ See *id.* (showing where a right to counsel exists for truancy matters).

⁷¹ See *id.* (showing where a right to counsel exists for guardianship or conservatorship proceedings).

⁷² See *id.* (showing where a right to counsel exists for civil commitment proceedings).

⁷³ See *id.* (showing where a right to counsel exists for defendants or respondents in paternity proceedings).

⁷⁴ See *id.* (showing where a right to counsel exists for cases concerning benefits).

⁷⁵ See *id.* (showing where a right to counsel exists for health care access cases).

⁷⁶ See *id.* (showing where a right to counsel exists for child support cases).

willingness of civil right-to-counsel advocates to advance the right to counsel in basic human needs cases locally and statewide for the most part—has created the patchwork of rights across both our country and our civil law. Critically, it is this very inconsistency in the guarantee of legal representation that led to research showing the intervention to be a value-add in civil cases.

II. DATA ON THE IMPACT OF LEGAL REPRESENTATION IN CIVIL CASES: AN OVERVIEW

The research shows that, at least in our legal system as it currently stands, litigants generally benefit from legal representation in civil matters. This is in part due to a general societal consensus about needing a civil justice system and about the role that the “lawyer” has taken on in the said system. “Even more than other western legal systems, the American system is lawyer-dominated. At the heart of its procedures, it posits the lawyer, a professional trained to bring her client’s voice and interests before the court.”⁷⁷ Our legal system is as much about the substance of the law, as it is about its interpretation and advocacy by an attorney. There is a significant and valid debate about whether such a system should expand to accept non-lawyer interventions that broaden litigants’ overall access to justice. However, in the system, as it is now, the research supports legal representation as a value add in civil matters.⁷⁸

Synthesizing and interpreting the research on the impact of legal representation on civil proceedings is a complex task. Researchers do not use the same methods or terminology, do not have access to similar amounts or quality of data, and do not necessarily look at the same types of cases, even within a specific subject area.⁷⁹ Yet,

⁷⁷ Zimmerman & Tyler, *supra* note 34, at 476.

⁷⁸ See Taylor Poppe & Rachlinski, *supra* note 11, at 933 (reviewing impact of legal representation research and finding that “[a]lthough the research on legal representation presents interpretive challenges, the overall theme of the research supports the conclusion that representation is valuable”); see also Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 37, 92 (2010) (emphasizing the importance of contextualizing the research and identifying the cases and circumstances where counsel can have the most impact).

⁷⁹ See Engler, *supra* note 78, at 44 (discussing the variance in methodology in the

there are significant surveys and compilations of the available research, and they are relied on heavily in this Part.⁸⁰

Except in some specific areas,⁸¹ “every area of law on which research has been conducted includes numerous studies in which represented litigants fare better—sometimes much better than unrepresented litigants.”⁸² Generally, legal representation can impact the pre-filing behaviors of opposing litigants⁸³ and result in more favorable outcomes for represented litigants.⁸⁴

In administrative proceedings, including those dealing with welfare, unemployment, and disability benefits, litigants have

author’s review of the reports on the impact of legal representation). For an example of just how complicated it can get, see John Pollock, *Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*, 42 NAT’L HOUS. L. BULL. 72, 75 (March 2012), available at http://civilrighttocounsel.org/uploaded_files/48/Comparing_MA_and_CA_studies_Pollock_-_NHLP_.pdf [<https://perma.cc/K76G-N586>] (“On the surface, these three studies look somewhat similar: all three generally attempt to compare ‘full representation’ in eviction cases to something less than full representation, and featured a legal clinic available to all litigants to receive assistance in filling out court forms and learning about court procedures. But after that, the resemblance diminishes, even to a significant degree between the two studies in Massachusetts. As described above, these three studies compared different types of full representation provided by different legal services providers to several different types of limited assistance. And as will be shown later, the three studies were conducted in three different types of courts that had varying procedures (in some instances, the variations were quite significant), examined cases that were not always at the same procedural stage, and contained groups of tenants and landlords that had some collective differences in terms of goals and resources.”); see also Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 SEATTLE J. FOR SOC. JUST. 139, 158 (2010) (discussing issues with a lack of provider data).

⁸⁰ See generally Taylor Poppe & Rachlinski, *supra* note 11; Engler, *supra* note 78.

⁸¹ See Taylor Poppe & Rachlinski, *supra* note 11, at 933 (noting exceptions in juvenile justice research, government benefits cases, and a 2012 study into legal representation in initial appeals of unemployment hearings).

⁸² See Taylor Poppe & Rachlinski, *supra* note 11, at 933 (the authors note various caveats following this conclusion).

⁸³ For example, impact reports after the enactment of a right to counsel for tenants have shown a decline in eviction filing rates. See *Universal Access to Legal Services, A Report on Year Four of Implementation in New York City*, N.Y.C. HUM. RES. ADMIN., at 3 (2021), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA_Annual_Report_2021.pdf [<https://perma.cc/QBD9-Y92G>] (“eviction filings fell by approximately 49,000, 46% lower than the same period the year before and 72% lower than during FY2019, prior to the COVID-19 pandemic”); *Supervisor Dean Preston Holds Hearing on Implementation for Right to Counsel Law*, OFF. S.F. SUPERVISOR DEAN PRESTON (Feb. 24, 2020), http://civilrighttocounsel.org/uploaded_files/262/PRESS_RELEASE_-_Supervisor_Dean_Preston_Holds_Hearing_Monday_on_Implementation_for_Right_to_Counsel_Law.pdf [<https://perma.cc/39PV-WT7E>] (reporting a 10 percent year-over-year decrease in eviction filings).

⁸⁴ See Engler, *supra* note 78, at 39 (noting that “a meta-analysis of studies of the effects of representation reports that parties represented by lawyers are between 17% and 1380% more likely to receive favorable outcomes in adjudication than are parties appearing pro se”).

higher rates of success when they are represented.⁸⁵ In employment studies, plaintiffs who were represented were more likely to win and have an earlier settlement.⁸⁶ In immigration cases, which are a type of administrative proceeding, a 2016 study looking at over 1.2 million deportation cases between 2007 and 2012 showed that immigrants facing deportation who were represented had better outcomes at every stage of the proceeding.⁸⁷ Immigrants with representation were more likely to be released from detention and to request immigration relief.⁸⁸ Most importantly, detained immigrants who had representation “were twice as likely as unrepresented immigrants to obtain immigration relief [when] they sought it,” and, immigrants who had never been detained were nearly five times more likely than those who were unrepresented.⁸⁹ In New York City, an evaluation of the New York Immigrant Family Unity Project (“NYIFUP”)⁹⁰ found that: “Compared to the observed success rate for unrepresented cases at Varick Street before NYIFUP (4 percent) and the observed success rate for nationally unrepresented cases (6 percent), NYIFUP’s 48 percent projected success rate signifies a 1,100 percent increase and 700 percent increase in successful outcomes, respectively.”⁹¹

There is also research showing the benefits of counsel in court proceedings. Represented family law litigants dealing with divorce are more likely to follow the terms of the agreement and

⁸⁵ See Taylor Poppe & Rachlinski, *supra* note 11, at 911–12, 918 (listing studies showing more positive outcomes and noting that “observational studies provide solid support for the conclusion that individuals appearing before administrative agencies allocating various benefits fare better when they are represented”); see also Engler, *supra* note 78, at 58 (discussing administrative agency appeals and noting that “[a]vailable studies consistently reveal the importance of representation as a crucial variable in improving the success rate of appeals”).

⁸⁶ Taylor Poppe & Rachlinski, *supra* note 11, at 919–20.

⁸⁷ Ingrid Eagly & Steven Shafer, *Access to Counsel In Immigration Court*, AM. IMMIGR. COUNCIL, at 2 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [<https://perma.cc/NY9H-ELFU>].

⁸⁸ *Id.* at 2–3, 15.

⁸⁹ *Id.* at 2–3.

⁹⁰ NYIFUP was a pilot project that began in New York City in 2013 to ensure representation of income eligible detained immigrants whose cases began at the immigration court on Varick Street. The history of the project and its implementation is outlined in JENNIFER STAVE ET AL., *Evaluation of the New York Immigrant Family Unity Project: Assessing the Impact of Legal Representation on Family and Community Unity*, VERA 10–11 (2017), <https://www.immigrationresearch.org/system/files/new-york-immigrant-family-unity-project-evaluation.pdf> [<https://perma.cc/57UG-SQ7A>].

⁹¹ *Id.* at 27–28.

obtain spousal support.⁹² Represented litigants dealing with domestic violence cases are more likely to obtain orders of protection.⁹³ In child welfare proceedings, parent representation has been shown to increase the reunification rate, reduce a child's time in care, and reduce the likelihood of termination.⁹⁴ For children involved in child welfare proceedings, a recent report evaluating a program of standards-based legal representation in Washington showed a 45% higher reunification rate and a 30% reduction in the rate of placement moves.⁹⁵

Critically, research into impact also underscores the importance of contextualizing the findings, and the lawyer's experience, training, skill, familiarity with the court, competence in a subject matter, and supervision over less-trained lawyers or representatives. Concerns about the actual lawyer providing the representation are thus a major question in the implementation of a right to counsel. As the right to counsel is enacted, jurisdictions must determine the proper training and supervision, and decide various capacity-related questions to ensure that civil litigants have access to competent representation. “[N]ot just any representative will suffice where litigants are most vulnerable. Attorneys with strong advocacy skills, knowledge of the forum, and knowledge of the law presumptively will be the most effective in a particular scenario.”⁹⁶

⁹² See Taylor Poppe & Rachlinski, *supra* note 11, at 922–24 (reviewing studies and analyses about the effect of legal representation in divorce, domestic violence, and custody cases).

⁹³ See *id.* at 925 (“An analysis of domestic violence cases in Dane County, Wisconsin found that represented petitioners obtained temporary restraining orders in 69% of cases, compared to a success rate of only 55% for unrepresented petitioners. Similarly, a survey of women seeking assistance in confronting domestic violence found that 83% of the women who were represented in seeking a protective order were successful, compared to a success rate of 32% among unrepresented women.”).

⁹⁴ See Abel & Vignola, *supra* note 79, at 150 (noting how the Washington State legislature funded two studies about the impact of the “improved representation,” with each showing that families had better chances of being reunited and parents had a better chance of not having their parental rights terminated); see also *Key Studies And Data About How Legal Aid Helps Keep Families Together And Out Of The Child Welfare System*, JUST. GOV'T PROJECT, 1, 1 <https://legalaidresourcesdotorg.files.wordpress.com/2021/04/foster-care.pdf> [<https://perma.cc/T6D4-LAAS>] (last updated Mar. 23, 2021) (“When children do enter court-supervised out-of-home care, studies show providing legal representation to parents resulted in less time spent in foster care, faster rates to adoption and guardianship, and increased likelihood of achieving permanency.” (citations omitted)).

⁹⁵ *Evaluation of the Washington State Dependent Child Legal Representation Program 2021*, WASH. STATE CTR. FOR CT. RSCH., 1, 1 (2021), <https://www.courts.wa.gov/subsite/wscrr/docs/DCLR%20Report%202021.pdf> [<https://perma.cc/XGZ8-68WL>].

⁹⁶ See Engler, *supra* note 78, at 82 (citing HERBERT M. KRITZER, LEGAL ADVOCACY:

Beyond the impact that legal representation in civil cases has on outcomes, there is also support for its value to the legal system as a whole. When unrepresented litigants who have to traverse the system on their own “are denied access to fair and impartial dispute resolution, the adversarial process itself breaks down and the courts cannot properly perform their role of delivering a just result.”⁹⁷ When unrepresented litigants require assistance in a court case “the overall quality of justice for *all* litigants suffers because courts are less efficient when resources must be diverted from matters involving represented parties to try to assist unrepresented parties”⁹⁸ The lack of representation can impact the sufficiency of the information that makes it before the court, thereby impeding a judge’s ability to make a fully informed decision in a case.

Investment in civil legal representation is also cost-efficient. While increasing legal representation or establishing a right to counsel in a civil legal proceeding requires an up-front and sometimes large financial investment, the long-term expected savings outweigh such up-front costs. The fiscal and social benefits of investing in civil legal aid are well documented. Legal aid programs that serve the civil legal needs of low-income members of their communities “increase federal, state, and local tax revenues, reduce public expenditures, and stimulate the economy.”⁹⁹ Beyond dollars, the social benefits are expansive and priceless:

LAWYERS AND NONLAWYERS AT WORK 5 (1998)); *see also* Taylor Poppe & Rachlinski, *supra* note 11, at 887 (noting that the “benefits of hiring an attorney might depend on the area being addressed and the quality of the attorney”).

⁹⁷ *Res 112A*, *supra* note 7, at 10.

⁹⁸ THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., REP. TO THE CHIEF JUDGE STATE N.Y., 1, 1 (2012) (emphasis added), http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT_Nov-2012.pdf [<https://perma.cc/G38M-6R77>].

⁹⁹ Abel & Vignola, *supra* note 79, at 141. The ABA’s Standing Committee on Legal Aid and Indigent Defense have compiled Needs Assessments and Impact Studies developed by individual states. *Needs Assessments and Impact Studies*, AM. BAR ASS’N, https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/atj-commissions/atj_commission_self-assessment_materials1/studies/ [<https://perma.cc/J555-N3RQ>] (last visited Sept. 30, 2022); *Cost-Benefit Analysis*, LEGAL SERVS. CORP., <https://www.americanbar.org/content/dam/aba/events/aba-day/LegalAidEconomicImpactStudies.pdf> [<https://perma.cc/2NX4-GWXP>] (last visited Sept. 30, 2022) (summarizing economic impact studies on civil legal aid); THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN NEW YORK, *supra* note 98, at 2 (noting that “independent evaluations by nationally recognized experts . . . show that investing in civil legal services provides substantial economic benefits to New York State”).

Equal access to justice contributes to healthy communities and a vibrant economy. No community thrives when people are homeless, children are out of school, sick people are unable to get health care, or families experience violence. Likewise, when a person's legal problem is addressed in a timely and effective way, the benefit ripples out and helps that person's family, neighbors, employer and community.¹⁰⁰

The cost question is an important one. Lawyers and the right to counsel cost money. The up-front costs of and length of time involved in standing up a right to counsel or increasing legal representation make it a more intensive intervention. But as we wrestle with costs, and long-term versus short-term solutions, to various civil justice crises, the justice gap just keeps falling in on itself. As mentioned before, in the most recent Justice Gap report, the LSC found that “[l]ow-income Americans did not receive any legal help or enough legal help for 92% of the problems that substantially impacted them in the past year.”¹⁰¹ Of the estimated 1.9 million civil legal problems presented to LSC-funded programs, about 49% did not receive any help.¹⁰²

As we struggle over enacting rights to counsel and funding legal representation to the degree necessary, other access-to-justice interventions are in the conversation. Resources like hotlines, helpdesks, form simplification, online case tools, day-of advice and counsel programs, assistance with court papers, and non-lawyer advocates to assist people are proposed. These interventions often cost less and can be implemented more quickly.¹⁰³ While it is

¹⁰⁰ CONF. OF CHIEF JUSTICES & CONF. OF STATE CT. ADMIN'RS *The Importance of Funding for the Legal Services Corporation From the Perspective of the Conference of Chief Justices and the Conference of State Court Administrators*, 1, 2 (2012), https://ccj.ncsc.org/_data/assets/pdf_file/0013/23251/lsc_whtpr.pdf [<https://perma.cc/4KDC-5BJD>] (quoting Carol Hunstein, *Legal Aid To Poor Can't Take More Cuts*, ATLANTA J. CONST. (May 26, 2011), <https://www.ajc.com/news/opinion/legal-aid-poor-can-take-more-cuts/6M0poj29qTU9YHRueu07J/>) [<https://perma.cc/V4DW-FYA2>].

¹⁰¹ LEGAL SERVS. CORP., *supra* note 4, at 19.

¹⁰² *Id.* at 71.

¹⁰³ See, e.g., *LawHelp Interactive*, <https://lawhelpinteractive.org/> [<https://perma.cc/PJV8-KXRQ>] (last visited Oct. 5, 2022) (“LawHelp Interactive is a website that helps you fill out legal documents for free. It’s simple: we ask you questions and use your answers to complete the documents you need, no lawyer necessary. And if you are a

rational to examine all options given the size of the justice gap and the fact that even a fully implemented right to counsel is unlikely to assist in all situations (i.e., cases not deemed to be “basic human needs,” or people who are over income), studying these newer interventions is crucial. The available research on the impact of these other access-to-justice interventions has so far been largely limited to the number of clients served and qualitative data as to whether the user was satisfied with an intervention or not.¹⁰⁴

For instance, many legal aid providers provide “unbundled”¹⁰⁵ legal services, attempting to reach more clients.¹⁰⁶ According to the LSC, about 50% of the civil legal problems brought to LSC-funded legal aid providers, are handled through “brief services and advice.”¹⁰⁷ Only 21% are provided “extensive services” which include complex document drafting and representation.¹⁰⁸ There is still little information about what happens when a person receives these services: Are they better off than, or even in the same position, as they would have been if they were fully represented? When programs provide unbundled legal services, litigants generally fare better than unrepresented people but not better than represented people.¹⁰⁹ There have thus been calls for more research before adopting such interventions.¹¹⁰

lawyer, we have tools for you too. Find and prepare forms, edit client responses and manage case files, all in one place.”).

¹⁰⁴ Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 472–73 (2011) (discussing studies that analyze unbundled legal aid). One study cited by Steinberg found high client satisfaction, but it was highest when clients were being helped with “mechanical justice.” A second study looked at litigant outcomes after getting assistance from a self-help center for their eviction and “found that center-assisted tenants achieved no better outcomes than their unassisted counterparts.” *See id.*; Russell Engler, *supra* note 78, at 39 (“With programs facilitating self-representation, litigants and court personnel report high levels of satisfaction; the programs’ impact on case outcomes is less clear.”).

¹⁰⁵ AM. BAR ASS’N, *Unbundling Resource Center*, https://www.americanbar.org/groups/delivery_legal_services/resources [<https://perma.cc/U8B3-BRAV>] (last visited Oct. 5, 2022) (defining “[u]nbundling, or limited scope representation” as “an alternative to traditional, full-service representation”).

¹⁰⁶ *Id.*

¹⁰⁷ LEGAL SERVS. CORP., *supra* note 4, at 72.

¹⁰⁸ *Id.*

¹⁰⁹ *See* Engler, *supra* note 78, at 67 (citing a study that found that although a group of tenants who received services from a clinic “retained possession more often than unrepresented tenants without help, represented tenants still fared far better than those who received clinic help”).

¹¹⁰ *See* Steinberg, *supra* note 104, at 470–71.

The ABA aptly points out in its 2006 Resolution that where courts have reformed a proceeding to facilitate participation by unrepresented people:

the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer. With rare exceptions, this will be true only when certain conditions are met: the substantive law and procedures are simple; both parties are unrepresented; both parties are individuals and neither is an institutional party; both parties have the intellectual, English language, and other skills required to participate effectively; and, the proceedings are not adversarial, but rather the judge assumes responsibility for and takes an active role in identifying the applicable legal standards and developing the facts.¹¹¹

Each intervention likely has a role to play. As Professor Engler writes:

The amount of assistance that is appropriate and necessary requires assessment both of the importance of what is at stake in a given proceeding and of where an advocate is most likely to affect the outcome. . . . Programs providing assistance short of full representation need to understand where their assistance is most meaningful, and where a referral to programs providing counsel is a better use of resources. Programs providing counsel, whether in legal services offices, through the private bar, or through other mechanisms, similarly need to

¹¹¹ A.B.A., *Report to the House of Delegates*, 112A A.B.A. HOUSE OF DELEGATES 14 (2006).

understand when counsel has the greatest impact.¹¹²

The research done on the impact of legal representation is a vital component of the strategy to advance the civil right to counsel.¹¹³ In addition to documenting and explicating the interests at stake and the costs of losing a civil proceeding that implicates basic human needs, advancing a civil right to counsel has also required research demonstrating effectiveness. This research impacts legislative efforts and litigation to establish the right to counsel. Demonstrating the benefits of representation “is critically important not only to persuade policymakers, but also because it factors into two prongs of the standard procedural due process test for appointment of counsel: the risk of erroneous deprivation if counsel is absent, and the cost to the state of providing counsel.”¹¹⁴

With few caveats, studies and reports show that legal representation in civil cases is a value add for litigants, the system, and jurisdictions implementing such a right.¹¹⁵ And the research continues to grow. Today’s advocates have access to more comprehensive, precise, and ever-growing information on effectiveness and cost-efficiency. And, as demonstrated by the movement to establish the right to counsel for tenants, it is evident that in combination with strong organizing campaigns, this data is helping to patch the patchwork.

¹¹² See Engler, *supra* note 78, at 92.

¹¹³ See generally Steven Eppler-Epstein, *Passion, Caution, and Evolution: The Legal Aid Movement and Empirical Studies of Legal Assistance*, 126 HARV. L. REV. F. 102, 108 (2013) (discussing the work of James Greiner on the studies of legal aid; positing that research into whether legal aid is effective is good for civil legal aid development and growth).

¹¹⁴ Pollock, *supra* note 79, at 72.

¹¹⁵ See *supra* Part III.

IV. THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: PATCHING THE PATCHWORK WITH THE STRATEGIC USE OF DATA

In the estimated 3.6 million evictions filed annually,¹¹⁶ not a single one ends without some level of harm.¹¹⁷ An eviction is a brutal storming of a tenant's life and home.¹¹⁸ Evictions threaten every part of a tenant's life in a twisted progression: the loss of home and personal possessions;¹¹⁹ the forced move out of a neighborhood, away from the community, into unfamiliarity and instability;¹²⁰ the disruption to employment and education; the increased risk of homelessness and attendant risks of child welfare and criminal justice system involvement; the long-lasting adverse

¹¹⁶ See ASHLEY GROMIS, EVICTION: INTERSECTION OF POVERTY, INEQUALITY, AND HOUSING 20 (Eviction Lab, May 22, 2019), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/07/GROMIS_Ashley_Presentation_2-1.pdf [<https://perma.cc/996N-BRXT>]; The Eviction Lab, *National Estimates: Eviction in America*, EVICTION LAB (May 11, 2018), <https://evictionlab.org/national-estimates/> (noting that from 2000 to 2016, 1 in 40 renter households was evicted); *On the Brink of Homelessness: How the Affordable Housing Crisis and the Gentrification of America Is Leaving Families Vulnerable Before the H. Comm. on Fin. Servs.*, 116th Cong. 3 (2020) (statement of Mathew Desmond, Principal Investigator, Eviction Lab at Princeton University).

¹¹⁷ See RAYNA AHMED ET AL., THE EFFECT OF STATE & LOCAL LAWS ON EVICTIONS 1, 2 (Legal Services Corporation, Jun. 2021), <https://www.lsc.gov/initiatives/effect-state-local-laws-evictions> [<https://perma.cc/TV8K-EADE>] (noting that an eviction suit can show up on credit reports); Clark Merrefield, *Eviction: The Physical, Financial and Mental Health Consequences of Losing Your Home*, JOURNALIST'S RESPONSE (Oct. 15, 2021), <https://journalistsresource.org/economics/evictions-physical-financial-mental-health/> [<https://perma.cc/97VX-Q6HV>] (noting that landlords will pressure tenants by using eviction notices, even though they don't end up evicting); GRACIE HIMMELSTEIN & MATTHEW DESMOND, EVICTION AND HEALTH: A VICIOUS CYCLE EXACERBATED BY A PANDEMIC, (Health Affairs, Apr. 1, 2021), <https://www.healthaffairs.org/doi/10.1377/hpb.20210315.747908/full/> [<https://perma.cc/TN7S-KZT9>] (noting that evictions can cause a myriad of health issues including mental hospitalizations).

¹¹⁸ See EVICTION LAB, *Video Series: The Eviction Epidemic* (2018), <https://evictionlab.org/why-eviction-matters/> [<https://perma.cc/4GXL-RR5W>]; see also 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://www.aclu.org/news/racial-justice/tenants-right-to-counsel-is-critical-to-fight-mass-evictions-and-advance-race-equity-during-the-pandemic-and-beyond/> [<https://perma.cc/W672-L6Z3>] (noting how the effects of eviction are "devastating" and "long lasting").

¹¹⁹ See Aaron McDade, *Landlord Seizing Tenant's Belongings During Eviction Mean-Spirited, Unconstitutional: Judge*, NEWSWEEK (2021) (noting the "lightning-quick eviction process . . . depriving [tenants] of their homes and personal property"); Bailey Loosemore, *Bill Would Stop Kentucky Landlords From Treating Evicted Renters' Property 'Like Garbage'*, COURIER J. (2022) (noting how Kentucky's eviction process includes allowing property owners "to place tenants' items outside, unprotected while taking possession of a unit").

¹²⁰ See Matthew Desmond & Tracey Shollenberger, *Forced Displacement From Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751, 1768 (2015) ("[F]orced removal may be a significant determinant of neighborhood selection.").

effects on mental and physical health;¹²¹ and throughout COVID-19, the increased risk of exposure to the virus and death.¹²² And, regardless of the case outcome, the mere fact the eviction was filed (sometimes just as a cheap way to collect rent) can stain a tenant's record for years to come.¹²³ Yet, landlords are represented 81% of the time on average, compared to only 3% of tenants.¹²⁴

The tenant right-to-counsel movement is bringing significant, widespread change in the provision and availability of legal representation for low-income people facing eviction. It is also sparking renewed interest in the right to counsel in other areas.¹²⁵ To convince policymakers to advance the right to counsel for tenants facing eviction in their jurisdiction, not only are tenants forming and advancing powerful, organized campaigns, but they are also pointing to the severe consequence of evictions and a growing dataset on representational imbalance, disproportionate effects of evictions on communities of color, the impact of having representation in eviction proceedings, and the cost savings expected from an enacted right to counsel.¹²⁶ This successful

¹²¹ See HIMMELSTEIN & DESMOND, *supra* note 117, at 3 (illustrating the myriad mental and physical health problems tenants endure when dealing with eviction).

¹²² Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URB. HEALTH 1, 2 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7790520/> [<https://perma.cc/F54Y-76S3>].

¹²³ Megan Kimble, *The Blacklist: How Evictions Haunt Tenants in Texas for Years*, TEX. OBSERVER (2020), <https://www.texasobserver.org/evictions-texas-housing/> [<https://perma.cc/8V36-Z8KE>]; COMMUNITY LEGAL SERVICES OF PHILADELPHIA, *BREAKING THE RECORD: DISMANTLING THE BARRIERS EVICTION RECORDS PLACE ON HOUSING OPPORTUNITIES* 1, 7 (Nov. 2020), https://clsphila.org/wp-content/uploads/2020/12/Breaking-the-Record-Report_Nov2020.pdf [<https://perma.cc/MX6Z-QALD>] (“Many [tenants] are upset to learn, sometimes years down the road, that despite sticking to their agreement, paying their debt, and even getting it vacated or marked satisfied, the filing itself remains publicly accessible. The tenant screening companies routinely pull court filing information as part of their reports for landlords in addition to the information appearing on a regular credit report.”).

¹²⁴ NAT'L COAL. FOR CIV. RIGHT TO COUNS., *supra* note 39.

¹²⁵ See The Editorial Board, *You Can Lose Your Kids, Home, and Freedom Without Ever Seeing a Lawyer. It's a Profound Injustice.*, WASH. POST (Feb. 26, 2021, 1:50 PM) (“[I]n courts across the country, poverty-stricken litigants in noncriminal cases routinely face life-shattering outcomes, including jail time, without ever seeing a lawyer or receiving basic legal advice.”).

¹²⁶ See The Right to Counsel NYC Coalition, *Lessons from Four Cities Fighting to Stop Evictions with Right to Counsel* (National Coalition for a Civil Right to Counsel, 2022), https://d3n8a8pro7vhmx.cloudfront.net/righttocounselnyc/pages/1318/attachments/original/1634920669/Lessons_Learned_Key_Highlights_from_the_National_Webinar_on_RTC-compressed.pdf?1634920669 [<https://perma.cc/WW7T-FSP4>] (highlighting strategies that organizers use in different cities across the United States).

approach can be used as a roadmap to progress for the civil right to counsel movement writ large.

In the housing context, for much of U.S. history, not a single jurisdiction had a right to counsel for tenants facing eviction¹²⁷ and low-income tenants were reliant on legal aid or pro-bono legal assistance, and very often attending court unrepresented.¹²⁸ However, even during this time when no right to counsel was on the books, evidence already existed that legal representation mattered.¹²⁹ A 2016 survey of the available research found that housing court studies and randomized experiments, “almost uniformly show benefits of representation.”¹³⁰ In the review of seventeen legal representation studies done in the housing context between 1973 to 2011, thirteen studies showed that representation had a positive impact.¹³¹ The noted benefits included fewer landlord judgments, a greater likelihood of maintaining possession, a longer occupancy rate, a greater number of dismissals, and a lower likelihood of eviction.¹³²

¹²⁷ See *Intro to Tenant Right to Counsel*, NAT'L COAL. FOR CIV. RIGHT TO COUNS.: TENANT RIGHT TO COUNSEL, http://civilrighttocounsel.org/highlighted_work/organizing_around_right_to_counsel [https://perma.cc/YH6L-85YY] (last visited Oct. 2, 2022) (“[P]rior to 2017, no jurisdiction in the country provided a right to counsel for tenants facing eviction.”).

¹²⁸ NEW SETTLEMENT APARTMENTS' CMTY. ACTION FOR SAFE APARTMENTS & CMTY. DEV. PROJECT, *supra* note 23, at 12 (“There are legal services agencies, like Legal Services NYC-Bronx and the Legal Aid Society, that work tirelessly to represent tenants, but with limited funding and capacity they are only able to take a very small percentage of tenants who qualify . . . in an average year, legal services organizations are ‘forced to turn away eight out of every nine New Yorkers seeking civil legal assistance’ due to funding constraints.”).

¹²⁹ See *id.* at 24 (noting studies showing that tenants fared better when represented by a lawyer).

¹³⁰ See Taylor Poppe & Rachlinski, *supra* note 11, at 909 (noting how observational studies have shown benefits to represented tenants in housing court); see also *id.* at 900–01 (analyzing and critiquing a study that suggested that unrepresented tenants do not benefit from representation); Pollock, *supra* note 79, at 74–75 (providing and discussing several factors as to why the results of the housing study contrasted with those of two other similar studies, including the scope of full representation and limited assistance provided, the rate of requesting jury trials, the rate of filing motions, the effect of the court’s mediation program, and the rate of landlord representations).

¹³¹ See Taylor Poppe & Rachlinski, *supra* note 11, at 903–04 (illustrating how multiple studies have shown that legal representation has a positive effect on tenants).

¹³² See Taylor Poppe & Rachlinski, *supra* note 11, at 903 (noting positives for represented tenants including more dismissals, and that represented tenants were more likely to maintain possession).

In one of the clearest demonstrations of impact, a randomized study in the 1990s found that:

Represented tenants are much less likely to have a final judgment and order of eviction against them and more likely to benefit from a stipulation requiring a rent abatement or repair to their apartment. Because this evaluation is based on a true randomized experiment, these differences in outcomes can be attributed solely to the presence of legal counsel and are independent of the merits of the case. Moreover, these outcomes do not appear to come at much expense in terms of the efficiency of the Court; in fact, the presence of an attorney at the tenant's side may actually enhance efficiency by reducing the number of motions, particularly post-judgment motions.¹³³

Additionally, research also showed that fully represented tenants fare better than tenants who received limited or “unbundled” services.¹³⁴

New York City, with powerful tenant organizing along with localized research and reports on eviction realities in the city, rates of representation, and the costs and benefits of enacting a right to counsel, became the first city to pass a right to counsel in 2017.¹³⁵ Four cities—Newark, San Francisco, Cleveland, and Philadelphia—followed suit between 2018 and 2019.¹³⁶ The pandemic exposed the harms of eviction and the disproportionate effect on communities of color and spurred governments to address a coming tsunami of evictions. Existing research on the impact of legal representation, combined with current data out of the

¹³³ Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Random Experiment*, 35 L. & SOC'Y REV. 419, 429 (2001).

¹³⁴ Steinberg, *supra* note 104, at 483–84.

¹³⁵ The Right to Counsel NYC Coalition, *RTC Documentary: Our Rights! Our Power! The Right To Counsel (RTC) Campaign To Fight Evictions in NYC!* (National Coalition for a Civil Right to Counsel, 2022), https://www.righttocounselnyc.org/rtc_documentary [<https://perma.cc/P2NQ-GRRP>].

¹³⁶ THE NAT'L COAL. FOR A CIV. RIGHT TO COUNSEL, *supra* note 1.

jurisdictions that had already passed a right to counsel shows that representation increased tenant housing stability, decreased displacement, and even decreased the eviction filing rate, as well as the cost/benefit reports indicating substantial estimated savings for jurisdictions with a right to counsel, helped *thirteen jurisdictions* pass the right in evictions since 2020.¹³⁷ As of December 2022, fifteen cities and three states have an enacted right to counsel, and numerous others are working to enact such a right.¹³⁸

Impact data from cities that had enacted a right to counsel, and implemented it long enough to be evaluated, including New York City, San Francisco, and Cleveland, only further supports the findings in pre-right-to-counsel studies. In New York City, for example, the latest report shows that with the right to counsel in place, 84% of represented tenants in New York City have been able to remain in their homes.¹³⁹ In San Francisco, after the implementation of a right to counsel, the filing rate decreased by 10% between 2018 and 2019, and of the tenants receiving full-scope representation, nearly 70% have been able to stay in their homes.¹⁴⁰ And despite San Francisco's lack of income limit, the right to counsel is primarily benefitting low-income people.¹⁴¹ In Cleveland, after only six months of implementation in 2020, 93% of represented tenants avoided eviction or an involuntary move.¹⁴²

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *Universal Access to Legal Services, A Report on Year Four of Implementation in New York City*, N.Y.C. HUM. RES. ADMIN., at 8 (2021), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_UA_Annual_Report_2021.pdf [<https://perma.cc/G3LA-36QJ>]; Press Release, Office of the Mayor, New York City's First-in-Nation Right-to-Counsel Program Expanded Citywide Ahead of Schedule (Nov. 17, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/769-21/new-york-city-s-first-in-nation-right-to-counsel-program-expanded-citywide-ahead-schedule> [<https://perma.cc/37XG-QLBW>].

¹⁴⁰ See *All About the Right to Counsel for Tenants in San Francisco*, NAT'L COAL. FOR CIV. RIGHT TO COUNS. (Feb. 3, 2022), http://civilrighttocounsel.org/major_developments/1179 [<https://perma.cc/WR55-SK88>] (noting that 59% of tenants who were fully represented were able to stay in their homes); Press Release, Dean Preston, Supervisor, Supervisor Dean Preston Holds Hearing on Implementation for Right to Counsel Law (Feb. 24, 2020), http://civilrighttocounsel.org/uploaded_files/262/PRESS_RELEASE_-_Supervisor_Dean_Preston_Holds_Hearing_Monday_on_Implementation_for_Right_to_Counsel_Law.pdf [<https://perma.cc/2PEZ-QA9W>] (noting that in San Francisco, of two-thirds of tenants receiving representation, 67% were able to stay in their homes).

¹⁴¹ Press Release, Dean Preston, *supra* note 140.

¹⁴² 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*

An evaluation of Cleveland's right-to-counsel program conducted in 2021 showed that Cleveland Legal Aid, which provides representation under the program, was able to achieve approximately 88% of all clients' goals.¹⁴³

For many of the cost/benefit analyses concerning the right to counsel in eviction cases, jurisdictions commissioned Stout Risius Ross LLC, a global financial advisory firm.¹⁴⁴ By looking at the consequences that are known to accompany an eviction, the studies then look at the costs associated with those consequences. These expenditures, among others, include the costs of foster care, homeless shelter use, and unemployment. The available reports estimate the net-cost savings when enacting a right to counsel in eviction proceedings.¹⁴⁵ In 2016, before New York City enacted a civil right to counsel, a study was conducted to determine the costs and benefits of implementing a civil right to counsel City-wide. The firm found that despite the annual cost of providing counsel to be approximately \$199 million, implementation of the law would have the City realize an annual net benefit of \$320 million.¹⁴⁶ Note that the benefits do not necessarily accrue on the same timeline as the costs.¹⁴⁷ The firm specifically looked at the

Assistance, UNITED WAY GREATER CLEVELAND (Feb. 10, 2021), <https://www.unitedwaycleveland.org/right-to-counsel-prevented-93-of-cleveland-family-evictions-in-first-six-months-of-program-that-provides-low-income-tenants-with-free-legal-assistance/> [<https://perma.cc/R5SU-3AUK>].

¹⁴³ STOUT, CLEVELAND EVICTION RIGHT TO COUNSEL: ANNUAL INDEPENDENT EVALUATION JANUARY 1 TO DECEMBER 31, at 30 (Jan. 31, 2022), https://freeevictionhelpresults.org/wp-content/uploads/2022/01/Stouts-2021-Independent-Evaluation-of-RTC-C_FINAL_1.31.22.pdf [<https://perma.cc/E8VQ-FRC5>].

¹⁴⁴ See STOUT, *Eviction RTC Evaluations and Cost-Benefit Studies*, <https://www.stout.com/en/services/transformational-change-consulting/eviction-right-to-counsel-resources> [<https://perma.cc/U5KW-AW99>] (last visited Sept. 19, 2022) (highlighting the services that Stout offers, including evaluations and cost benefit-studies of the right to counsel in eviction cases).

¹⁴⁵ STOUT, *supra* note 144, at 11.

¹⁴⁶ STOUT, THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A, at 3, 5 (Mar. 16, 2016), <https://cdn2.hubspot.net/hubfs/4408380/PDF/Cost-Benefit-Impact-Studies/SRR%20Report%20-%20Eviction%20Right%20to%20Counsel%20%203%2016%2016.pdf> [<https://perma.cc/JGE7-3VRY>].

¹⁴⁷ *Id.* at n.12 ("It is believed that some of the cost savings estimated in this report would be in periods subsequent to the initial outlay of costs for providing council as not all eviction shelter entries are immediate."). Stout's study for NYC was in line with other reports about the cost-efficiency of funding civil legal aid. A report to the Chief Judge of the State of New York found that there was a projected savings "of \$201 million attributable to civil legal services—\$84.9 million in avoidable medical, mental health and other costs through prevention of domestic violence, and \$116.1 million because of prevention of evictions and homelessness." CONF. CHIEF JUST. & CONF. STATE CT. ADM'RS., THE IMPORTANCE OF FUNDING FOR THE LEGAL SERVICES CORPORATION FROM THE PERSPECTIVE

savings resulting from reduced homeless shelter costs, the preservation of affordable and rent-regulated units, and medical and law enforcement costs associated with the percentage of unsheltered homeless persons who are homeless due to eviction.¹⁴⁸ They also considered, but lacked the data to quantify, other benefits to the city including the educational, juvenile justice, and child welfare costs resulting from children who become homeless due to eviction, welfare costs for people who become unemployed due to eviction, costs associated with the enforcement of rent law and regulations, and the savings from a likely decrease in the need for counsel as landlord eviction filing behaviors change and repeat filings decrease.¹⁴⁹

The tenant right-to-counsel movement has been assisted by tools that could only be developed in such a long-standing civil justice gap: data on the impact of legal representation, which requires people to be unrepresented, and the documented consequences of eviction which accompany the deprivation of shelter when people do not have legal assistance to fight for their interests. Evaluative reports from cities with a right to counsel about the impact of legal representation, increased under a right to counsel, are even more convincing and have helped advocates transform this movement into a force. And many jurisdictions, interested in enacting a right to counsel, are starting to generate their own research, documenting the local iterations of the eviction crisis and showing over and over that those tenants who are represented fare better than unrepresented tenants.¹⁵⁰ As the

OF THE CONFERENCE OF CHIEF JUSTICES AND THE CONFERENCE OF STATE COURT ADMINISTRATORS 5, https://cj.ncsc.org/_data/assets/pdf_file/0013/23251/lsc_whtpr.pdf [<https://perma.cc/ZZB7-XREW>] (last visited Sept. 19, 2022).

¹⁴⁸ STOUT, *supra* note 146, at 7, 19, 21.

¹⁴⁹ *Id.* at 5.

¹⁵⁰ See, e.g., BRANCEN GREGORY, OPEN JUSTICE OKLA. LEGAL REPRESENTATION AND EVICTION OUTCOMES IN TULSA COUNTY 1, 3 (2021), <https://okpolicy.org/wp-content/uploads/Legal-Representation-and-Eviction-Outcomes-in-Tulsa-County-via-Open-Justice-Oklahoma.pdf?x69990> [<https://perma.cc/5Q3L-SJDY>] (analyzing the impact of legal representation on eviction outcomes in Tulsa County District Court using data collected from online court records and finding that representation increased the odds of unit retention by 75%); LUKE GRUNDMAN & MURIA KRUGER, LEGAL REPRESENTATION IN EVICTIONS - COMPARATIVE STUDY 1, 1–2 (2018), <https://www.minnpost.com/wp-content/uploads/2018/11/2018-Eviction-Representation-Results-Study-with-logos.pdf> [<https://perma.cc/7T55-SDKF>] (noting that Hennepin County, Minnesota eviction cases between January 1 and June 30, 2018, found that represented tenants were twice as likely to stay in their homes, had twice as long to move if necessary, four times less likely to use a homeless shelter than those without counsel. 78% of represented tenants left with a clean eviction record, compared to 6% of unrepresented tenants); see generally NAT'L. COAL. FOR

effectiveness of representation continues to be demonstrated in studies and reports coming out of localities and states that pass, or are working to pass the right to counsel, the movement for a right to counsel for tenants facing eviction will only continue to thrive.¹⁵¹

CONCLUSION

[T]he assistance of counsel can have a life-changing impact for vulnerable low-income families and individuals who can remain in their homes, escape from domestic violence, stabilize their families, maintain or obtain subsistence income, or gain access to health care or an education—all of which are truly the essentials of life.¹⁵²

In the United States, there is no across-the-board, general guarantee to counsel in civil cases, even where basic human needs are at stake. The right to counsel in civil cases is nuanced, specific, and localized. It is a patchwork. With the systemic underfunding and neglect of the civil legal needs of low-income people for decades, we have more than enough demonstrations of people navigating the civil justice system on their own, of the significance of what is at stake in basic human needs civil cases, and what the consequences of loss are. The failure to ensure representation (as is guaranteed in criminal cases, or for the government when it is the opposing party in a civil case) for low-income people in cases that implicate basic human needs has created the exact environment necessary for research into the impact of legal representation. The fact that there are unrepresented litigants

A CIV. RIGHT TO COUNSEL, THE RIGHT TO COUNSEL FOR TENANTS FACING EVICTION: ENACTED LEGISLATION 1, http://civilrighttocounsel.org/uploaded_files/283/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf [<https://perma.cc/67EH-4VNL>] (last updated July 2022) (citing to additional research findings on the impact of representation for tenants facing eviction).

¹⁵¹ NAT'L COAL. FOR CIV. RIGHT TO COUNS., *supra* note 150, at 1 (noting the growing tenant right-to-counsel movement).

¹⁵² THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *supra* note 98, at 1.

allows researchers to compare results from those who are represented versus those who are not, and analyze whether legal representation matters.¹⁵³

As the tenant right-to-counsel movement demonstrates, tenants, organizers, and advocates are using this data to advance the right to counsel for tenants faster than ever expected. And once they win, evaluations of their right-to-counsel policies will create further evidence (for other campaigns) that legal representation, especially under a right to counsel, makes a clear difference. *That's patching the patchwork.*

¹⁵³ See Taylor Poppe & Rachlinski, *supra* note 11, at 886 (noting that the overall scarcity in legal services creates a disparity between those who are represented and those who are not, which can be observed and studied).