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EXPANDING THE RIGHT TO COUNSEL IN EVICTION CASES: ARGUMENTS FOR AND LIMITATIONS OF “CIVIL GIDEON” LAWS IN A POST-COVID-19 WORLD

JENNIFER S. PRUSAK*

INTRODUCTION

With the cost of housing rising nationwide and incomes largely failing to keep pace with this increase, the United States is in the midst of interrelated affordable housing and eviction crises.¹ The housing affordability metric that has long been the bedrock of American housing policy is that households should spend no more than thirty percent of their income on housing.² This is no longer an attainable goal for many Americans. By 2017, forty-eight percent of renter households were “rent burdened”—they paid more than thirty percent of their income in rent.³ Over a quarter of American renters, or 11 million households, are “severely rent

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¹ See Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22 INST. FOR RSCH. ON POVERTY 1, 1–2 (2015) [hereinafter *Unaffordable America*] (“The increasing proportion of poor families paying at least half of their income to housing is the result of a combination of three factors: rents and utility costs have soared, incomes of the poor have fallen or flat-lined, and federal assistance has failed to bridge the gap.”); Alicia Mazzara, *Census: Income-Rent Gap Grew in 2018*, CTR. ON BUDGET & POL’Y (Sept. 27, 2019, 10:30 AM), <https://www.cbpp.org/blog/census-income-rent-gap-grew-in-2018> [https://perma.cc/L34H-46L9] (noting the disparity in wage earnings and the cost of buying a home).

² MARY SCHWARTZ AND ELLEN WILSON, WHO CAN AFFORD TO LIVE IN A HOME?: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY (U.S. Census Bureau 2006), <https://cdn2.hubspot.net/hubfs/4408380/PDF/General-Housing-Homelessness/who-can-afford.pdf> [https://perma.cc/XTV8-ELRM].

³ U.S. GOV’T ACCOUNTABILITY OFF., RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE AFFORDABILITY AND HOUSING QUALITY CHALLENGES (2020), <https://www.gao.gov/assets/gao-20-427.pdf> [https://perma.cc/249V-7CY3].

burdened,” meaning they spend more than half their monthly income on rent.⁴ When a renter is rent-burdened, they have less income remaining for non-housing essentials like food, medicine, transportation, and childcare.⁵ The chances of eviction also climb significantly.⁶

Eviction statistics paint a sobering picture. In 2016—the last year the Princeton University-based Eviction Lab collected and aggregated eviction data at the national level—approximately 2.3 percent of renter households in the United States lost their housing due to eviction.⁷ This figure is roughly double what it was in 2000.⁸ There is also strong gender and racial disparity in these statistics. Black renters face eviction nearly twice as frequently as white renters.⁹ Low-income Black women face the highest eviction rates of all, with one in five Black female renters reporting they have experienced eviction at least once in their lifetimes.¹⁰

⁴ *Id.* at 57.

⁵ THE PEW CHARITABLE TR, AMERICAN FAMILIES FACE A GROWING RENT BURDEN (2018), <https://www.pewtrusts.org/en/research-and-analysis/reports/2018/04/american-families-face-a-growing-rent-burden> [<https://perma.cc/8BRU-WRH4>].

⁶ *Id.*

⁷ See Gracie Himmelstein & Matthew Desmond, *Eviction And Health: A Vicious Cycle Exacerbated By A Pandemic*, HEALTH AFFS. (2021), <https://www.healthaffairs.org/doi/10.1377/hpb20210315.747908/full/> [<https://perma.cc/UQ8U-YUV7>]; Yuliya Panfil et al., *Why is Eviction Data So Bad? Recommendations for Improving the Local and National Landscape*, NEW AMERICA 1, 6, 9, 11 (2021), <https://www.newamerica.org/future-land-housing/reports/why-is-eviction-data-bad/> [<https://perma.cc/52KN-YZ4P>] (noting that in discussing eviction statistics, it is important to note that there is no comprehensive national database of eviction data). In their article, Panfil, Zainulbhai, and Robustelli attribute this to a lack of funding for such data gathering at the national level, insufficient technology, poor understanding of which data might be useful to track, and human error. *Id.* at 10–12. Much of the data that exists, and that academics and advocates rely upon in their scholarship and proposals, stems from the work of the Princeton University-based Eviction Lab, a group of researchers, coders, academics, and web developers that has analyzed tens of millions of records to create the first American eviction dataset. See, e.g., MATTHEW DESMOND, THE METHODOLOGY REPORT 1, 2, 39–40 (EVICTION LAB), <https://evictionlab.org/docs/Eviction%20Lab%20Methodology%20Report.pdf> [<https://perma.cc/QLM6-JS5J>] (finding much of the data that exists, and that academics and advocates rely upon in their scholarship and proposals, stems from the work of the Princeton University-based Eviction Lab, a group of researchers, coders, academics, and web developers that has analyzed tens of millions of records to create the first American eviction dataset, however, as rigorous as The Eviction Lab’s data collection procedures are, their figures undercount the number of eviction filings and evictions in the United States).

⁸ THE EVICTION LAB, NATIONAL ESTIMATES: EVICTION IN AMERICA (2008), <https://evictionlab.org/national-estimates/> [<https://perma.cc/25A6-BP76>].

⁹ Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 1, 24 (2020), <https://sociologicalscience.com/articles-v7-27-649/> [<https://perma.cc/E7WK-HF4K>].

¹⁰ Rachel Dovey, *What 80 Million Eviction Records can Tell City Leaders*, NEXT CITY (Apr. 9, 2018), <https://nextcity.org/urbanist-news/entry/what-80-million-eviction-records-can-tell-city-leaders> [<https://perma.cc/DXL4-46XR>].

The devastating mental, physical, and financial consequences evictions have on individuals, children, families, and communities have been well documented. Eviction means more than just losing a place to live. Mothers who experience eviction suffer higher rates of material hardship, depression, and poorer health than their peers.¹¹ Children facing eviction are more likely to be disciplined in school and involved in child protective services.¹² Eviction can lead to a vicious cycle of housing insecurity and homelessness.¹³ People who are evicted struggle to secure new housing, because evictions stay on a renter's record for years—even if the case was dismissed—and many landlords screen applications for prior evictions through a process called “blacklisting.”¹⁴ Tenants evicted from public housing may, under federal law, be denied future federal housing assistance for up to five years.¹⁵ Evictions further contribute to the ongoing cycle of poverty by damaging renters' credit scores and by increasing the chances they will lose their jobs.¹⁶ And because eviction and housing displacement can increase transiency and force renters into homelessness and crowded living environments, eviction and housing insecurity can increase exposure to and the continued spread of COVID-19.¹⁷

The COVID-19 pandemic made these problems worse. By late December 2020, ten million Americans were behind on their rent obligations due to COVID-related wage and job loss, a figure three

¹¹ Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, SOC. FORCES 1, 2 (2015).

¹² Robin Erasing et al., *Exploring the Impact and Implications of Residential Mobility: From Neighborhood to the School*, 10 ADVANCES SOC. WORK 1, 10–11 (2009).

¹³ Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households*, 24, 39 (Dec. 2018) (unpublished manuscript) (on file with NYU Law School), https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf [<https://perma.cc/S4V4-H28P>] (finding that evicted individuals are more likely to apply for space in shelters in the first two years after being evicted relative to baseline, and that evicted people spend longer in shelters compared to other people in shelters).

¹⁴ Paula A. Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L. J. 661, 666–69 (2018) (“[T]he negatively affected tenant is given no opportunity to clear her name or add context to the report that destroyed her application.”).

¹⁵ 24 C.F.R. § 982.552(c)(1)(ii) (2012).

¹⁶ See Matthew Desmond and Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, SOC. PROBLEMS, 1, 14 (2016) [hereinafter *Housing Insecurity*] (noting how eviction can lead to job loss and other negative consequences).

¹⁷ 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/V9XE-3B5B>].

times higher than the normal rate.¹⁸ Because of this, the pandemic initially brought the eviction crisis into the national conversation in a way that has little historical precedent. During the pandemic's first year, the federal government implemented several new assistance programs to help vulnerable tenants; these included the CARES Act,¹⁹ the Emergency Rental Assistance ("ERA") program contained within the American Rescue Plan,²⁰ and the Center for Disease Control's eviction moratorium.²¹ Each program temporarily bolstered the safety net for low-income renters but fell short of solving the underlying causes of housing insecurity that existed long before the pandemic. Now, with CARES Act funding depleted and the Supreme Court invalidating the eviction moratorium on August 26, 2021,²² there remains little federal protection against eviction—but the crisis facing renters is not over. Two years after the pandemic began, eight million Americans remained behind on their rent and at risk of losing their housing.²³

When the CDC moratorium ended in August 2021 and eviction hearings were permitted to resume, housing activists braced for an eviction "tsunami" they feared would overwhelm courts and displace millions of renters.²⁴ By September 2021, some parts of

¹⁸ Jim Parrott & Mark M. Zandi, *Averting an Eviction Crisis*, URB. INST. 1, 1 (Jan. 25, 2021), <https://www.urban.org/sites/default/files/publication/103532/averting-an-eviction-crisis.pdf> [<https://perma.cc/CE2V-VF4B>].

¹⁹ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-36, 134 Stat. 493-494.

²⁰ See Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 86 Fed. Reg. 34010, 34012-34013 (Jun. 28, 2021), <https://www.federalregister.gov/documents/2020/09/04/2020-19654/temporary-halt-in-residential-evictions-to-prevent-the-further-spread-of-covid-19> [<https://perma.cc/KLF4-83NG>] (noting that Congress provided an additional \$21.55 billion in funds for emergency rental assistance under the plan).

²¹ Press Release, Ctr. for Disease Control and Prevention, CDC Issues Eviction Moratorium Order in Areas of Substantial and High Transmission (Aug. 3, 2021), <https://www.cdc.gov/media/releases/2021/s0803-cdc-eviction-order.html> [<https://perma.cc/NP2Y-5CDP>].

²² *Alabama Ass'n of Realtors v. U.S. Department of Health and Human Services*, 594 U.S. 2485, 2490 (2021).

²³ U.S. CENSUS BUREAU, *Week 39 Household Pulse Survey: September 29 – October 11* (Oct. 20, 2021), <https://www.census.gov/data/tables/2021/demo/hhp/hhp39.html#:~:text=For%20Week%2039%20the%20Census,weighted%20response%20rate%20of%205.4%25.&text=Sections%20on%20this%20page%3A,Detailed%20Tables> [<https://perma.cc/4ZEE-NFXX>] (illustrating data from the total population of people 18 years old and older in rental housing units).

²⁴ Sophie Kasakove, *With Cases Piling Up, An Eviction Crisis Unfolds Step by Step*, N.Y. TIMES (Nov. 7, 2021), <https://www.nytimes.com/2021/11/07/us/evictions-crisis-us.html> [<https://perma.cc/9BR5-66L2>].

the country were already in the throes of this sharp eviction spike.²⁵ In other regions, the predicted “tsunami” was temporarily kept at bay by short-term, local eviction moratoria.²⁶ By late 2021, as these local eviction moratoria began to expire, advocates feared eviction filings would increase in those regions as well.²⁷

So long as housing costs continue to rise faster than incomes nationally, and absent new federal rental assistance programs, additional solutions must be implemented to protect low-income renters. Among them should be a mechanism for making legal representation more readily accessible to tenants at their eviction hearings. Data shows that eviction court favors landlords, partly because most landlords are represented by counsel and few tenants have legal representation.²⁸ Tenants with counsel, however, have a much better chance of either remaining stably housed or negotiating an agreement that will preserve their ability to find future housing.²⁹

There is growing support for a federal right to counsel in civil proceedings where basic human needs are at stake. This is referred to by some as a “civil *Gideon*,” in reference to *Gideon v. Wainwright*, which held that indigent criminal defendants have a constitutionally protected right to counsel in state criminal cases.³⁰ Certain state legislatures,³¹ the American Bar

²⁵ Al Tompkins, *Are Evictions Spiking as Expected?*, POYNTER (Sept. 14, 2021), <https://www.poynter.org/reporting-editing/2021/are-evictions-spiking-as-expected/> [<https://perma.cc/ZD2Z-Z8JN>] (“‘It’s been nonstop,’ says the president of the Phoenix-based group Arizona Tenants Advocates. ‘Landlords are just left and right giving thirty-day notices. They want them out.’”).

²⁶ Annie Nova, *Renters are Still Protected from Eviction in these States and Cities*, CNBC (Nov. 12, 2021, 11:57 AM), <https://www.cnbc.com/2021/11/12/these-are-the-states-and-cities-where-evictions-are-still-banned-.html> [<https://perma.cc/HZN6-FHBG>].

²⁷ Chris Arnold, *Evictions Rising Even as Rental Help from Congress Reaches Millions of People*, N.P.R. (Nov. 11, 2021, 7:00 AM), <https://www.npr.org/2021/11/11/1053540080/evictions-rising-even-as-rental-help-from-congress-reaches-millions-of-people> [<https://perma.cc/6TA2-6KBA>].

²⁸ *Housing Insecurity*, *supra* note 16, at 48–49.

²⁹ Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 *FORDHAM URB. L.J.* 38, 47–49 (2010).

³⁰ *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963).

³¹ *See, e.g.*, CAL. SARGENT SHRIVER CIVIL COUNSEL ACT CODE § 68651(b)(1) (West 2009) (highlighting “housing-related matters”).

Association,³² judges,³³ and scholars³⁴ have posited that housing is such a vital human need that there should be a right to counsel in eviction cases.³⁵ In keeping with this, on August 27, 2021, the U.S. Treasury, the U.S. Department of Justice, and HUD issued a joint statement urging other municipalities to use American Rescue Plan funds to create a new right-to-counsel program for tenants.³⁶

No federal civil right to counsel presently exists.³⁷ But given the vital role legal representation can play in preserving housing for low-income tenants, some cities have passed local tenant right-to-

³² See, e.g., A.B.A., REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A (2006), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2006/2006_am_11_2a.pdf [<https://perma.cc/VN39-56ZA>] (asserting that states have a new focus on legislative recognition of a right to counsel, with California, Texas and New York making room for legislation, statutes and funding for providing a civil right to counsel); Philadelphia Bar Association, *Philadelphia Bar Association's Civil Gideon Corner*, <https://www.philadelphiabar.org/page/CivilGideon> (recognizing that there is a growing national movement that has developed strategies to provide legal counsel to low-income persons in civil proceedings where basic human needs, such as those involving shelter, sustenance, safety, health or child custody).

³³ See Judge Jonathan Lippman, *Shifting the Landscape on Access to Justice*, 38 CARDOZO L. REV., 1159, 1159 (2017) (arguing that, from the perspective of “a judge who is proactive in the pursuit of justice,” the greatest threat to justice “is the desperate need for legal services by the poor and people of modest means”); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999) (“Judges, clerks, and lawyers bemoan the difficulties that the unrepresented litigants cause for other participants in the legal system.”).

³⁴ See Robin M. White, *Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting a Civil Right to Counsel for Indigent Tenants in Pennsylvania*, 125 DICK. L. REV. 795, 805 (2021); Risa E. Kaufman et al., *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 785 (2014) (recognizing that virtually no tenants were represented in Maricopa County, Arizona housing court); Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATHOLIC U. L. REV. 1057, 1058–59 (2010) (stating that poor Americans no longer enjoy a right to counsel in the civil justice system); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 190 (2009) (Several “states, bar associations, judicial commissions, and legislative bodies have called for comprehensive approaches to the provision of a right to counsel” in cases regarding, shelter, sustenance, safety, health and child custody).

³⁵ A.B.A., REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 112A (2006), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2006/2006_am_11_2a.pdf [<https://perma.cc/5U6P-QGNB>] (noting that many states like New York, California and Texas are moving towards appointing counsel in eviction cases).

³⁶ Press Release, Janet Yellen, Secretary of the Treasury, Secretary of the Treasury Yellen and Attorney General Garland and Secretary of the Department of Housing and Urban Development Fudge Sent Letter to Governors, Mayors, State Courts Urging Use of Emergency Rental Assistance Over Eviction (Aug. 27, 2021), <https://home.treasury.gov/news/press-releases/jy0336> [<https://perma.cc/H2Y9-M2FS>].

³⁷ See *Turner v. Rogers*, 564 U.S. 431, 435 (2011); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30–31 (1981).

counsel legislation over the past several years. Moved to act by the COVID-19 pandemic and encouraged by early data suggesting tenant right-to-counsel programs can keep tenants housed, additional jurisdictions are now rushing to do the same. But as they consider passing new right-to-counsel laws, it is important to note not just the successes of these earliest programs, but also some of the logistical, educational, and funding challenges they have faced that have limited their impact.

This paper proceeds in two parts. First, it details the benefits to tenants of being represented by counsel in eviction court, summarizing prior studies that have quantified how legal representation impacts tenant outcomes and highlighting the key reasons why so few tenants have representation. Second, it discusses New York City and San Francisco's tenant right-to-counsel legislation, the first two such laws in the country, noting the impact each has had on tenants facing eviction as well as the challenges they have faced. This paper concludes that while tenant right-to-counsel legislation can be a crucial part of protecting tenants' rights in a system heavily skewed against them, these laws are only as effective as the funding and infrastructural support put in place to implement them. Jurisdictions looking to pass new right-to-counsel legislation should study what has worked—and what has not worked—in other jurisdictions' programs to maximize the effectiveness of their own.

I. THE BENEFITS OF LEGAL REPRESENTATION TO TENANTS FACING EVICTION

A. The Eviction Process—Advantage: Landlord

While state eviction statutes and local court procedural rules differ to some degree, there are strong commonalities.³⁸ Eviction courts are typically courts of high volume. A single judge may call

³⁸ See Engler, *supra* note 29, at 48 (“While the details of eviction procedures vary, the common outcome measurements include possession, rent abatement, and repairs.”).

and dispense with dozens of cases in a single session, spending a handful of minutes on each one.³⁹ Because of this, eviction courts can at times appear to prioritize speed above everything else, including the traditional judicial objectives of factual accuracy and legal correctness.⁴⁰

Tenants facing eviction are vulnerable. They are at a distinct disadvantage throughout the eviction process. They are typically poor, and often women.⁴¹ They are also disproportionately racial and ethnic minorities.⁴² Nothing about the process—from the paperwork a tenant receives from the court notifying them of the hearing date, to the tenant’s rights under the lease and applicable laws—makes intuitive sense to a person with no background or training in housing law. Little, if anything, is explained to the tenant either in advance of the hearing or at the hearing itself.⁴³ Landlords’ attorneys often capitalize on tenants’ fear and general lack of understanding of their rights to engage in highly pressurized settlements in the hallway outside the courtroom.⁴⁴ While the Supreme Court has held that eviction hearings do not violate tenants’ due process rights,⁴⁵ the expedited and coercive nature of eviction court has led some to conclude that it provides little opportunity for a tenant to be heard.⁴⁶

³⁹ See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 97 (2016) [hereinafter *AMERICAN CITY*] (“The sound of eviction court was a soft hum of dozens of people sighing coughing, murmuring, and whispering to children interspersed with the cadence of a name, a pause, and three loud thumps of the stamp.”).

⁴⁰ NAT’L HOUS. L. PROJECT, *PROCEDURAL DUE PROCESS CHALLENGES TO EVICTIONS DURING THE COVID-19 PANDEMIC 1* (May 20, 2020), <https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf> [<https://perma.cc/RG6T-6E3F>].

⁴¹ Engler, *supra* note 29, at 47.

⁴² *Id.*

⁴³ See *AMERICAN CITY*, *supra* note 39, at 97 (“Some tenants . . . were confused by the whole process or couldn’t care less or would rather avoid the humiliation.”).

⁴⁴ *Id.* (Noting an instance where a tenant was pressured into signing a stipulation); see Engler, *supra* note 29, at 48 (“The unrepresented tenant faces swift eviction, and with minimal judicial involvement.”).

⁴⁵ *Lindsey v. Normet*, 405 U.S. 56, 69 (1972).

⁴⁶ Some argue that the nature of eviction hearings—particularly eviction hearings as conducted during the height of the pandemic—deny tenants of their right to due process. See *Lindsey*, 405 U.S. at 85 (Douglas, J., dissenting) (“Finding a lawyer in two days, acquainting him with the facts, and getting necessary witnesses make the theoretical opportunity to be heard and interpose a defense a promise of empty words. It is, indeed, a meaningless notice and opportunity to defend. The trial is likely to be held in the presence of only the judge and the landlord and the landlord’s attorney.”); NAT’L HOUS. L. PROJECT, *supra* note 40, at 4 (noting that eviction courts speed over traditional judicial objectives of factual accuracy and legal correctness). While these arguments are worth examining, doing so goes beyond the scope of this article.

If a tenant fails to appear at their hearing, the judge will immediately grant the landlord a default judgment and issue an automatic order for the tenant to vacate the leased premises, regardless of the reason for the tenant's absence or the merits of the landlord's claims.⁴⁷ Default judgments are the most common outcome in eviction cases.⁴⁸ Tenants fail to appear at their hearings for a multitude of reasons, including confusion over the process, inability to find transportation, inability to get time off work, lack of childcare, and simply wishing to avoid the humiliation of appearing before a judge.⁴⁹ It is also common for tenants facing eviction to believe appearing at their hearing is pointless, as the outcome—an order requiring them to vacate their home—is a foregone conclusion, even in situations where the tenant might have a valid defense.⁵⁰ Poor tenants often feel that housing court is not a place where their voices will be heard.⁵¹ This is an understandable but unfortunate assumption, given that judges usually grant the evictions landlords seek.⁵²

Tenant default rates were especially high early in the pandemic. General confusion over court procedure was made worse by Zoom

⁴⁷ AMERICAN CITY, *supra* note 39, at 97.

⁴⁸ Emily Badger & Quoc Trung Bui, *In 83 Million Eviction Records, A Sweeping and Intimate Look at Housing in America*, N.Y. TIMES (April 7, 2018), <https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html> [<https://perma.cc/W89G-9RR5>] (“[M]ost of those evicted never made it to a courtroom. They didn’t appear because the process seemed inscrutable, or because they didn’t have lawyers to navigate it, or because they believed there is not much to say when you simply don’t have the money.”).

⁴⁹ See AMERICAN CITY, *supra* note 39, at 96 (“Some tenants couldn’t miss work or couldn’t find childcare or were confused by the whole process or couldn’t care less or would rather avoid humiliation.”).

⁵⁰ *Id.*

⁵¹ See *id.* (Illustrating an instance where a tenant felt pressured into an agreement); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 533–34 (1992) (concluding that Baltimore’s rent court fails to provide redress for the claims of tenants with the same regard as it accords the formal rights of landlords).

⁵² See, e.g., Engler, *supra* note 29, at 48 (“[T]he result invariably is a judgment for the landlord.”); MASS. L. REFORM INST., 2005 SUMMARY PROCESS SURVEY (2005), https://www.masslegalservices.org/system/files/library/2005_summary_process_survey.pdf [<https://perma.cc/76XY-BVD5>] (noting that landlords were awarded possession in 78% of cases and tenants in 2% of cases, and the remaining cases were dismissed in a way that made it difficult to know whether the tenant had moved out or had retained possession); LUKE GRUNDMAN & MARIA KRUGER, LEGAL REPRESENTATION IN EVICTIONS—COMPARATIVE STUDY, <https://www.minnpost.com/wp-content/uploads/2018/11/2018-Eviction-Representation-Results-Study-with-logos.pdf> [<https://perma.cc/SBC9-CLNY>] (noting that unrepresented tenants are four to five times more likely to be abruptly forced from their homes by eviction).

eviction hearings and the constantly changing rules of courtroom access, which were frequently poorly communicated to litigants.⁵³ Conducting eviction hearings over Zoom also frequently prevented low-income tenants without adequate internet access or current technology from appearing.⁵⁴

B. The Benefits of Legal Representation During the Eviction Process

Nationally, landlords are represented by counsel roughly ninety percent of the time,⁵⁵ while less than ten percent of tenants facing eviction have legal representation.⁵⁶ There is strong evidence that this representational imbalance is a major contributor to why eviction court so often favors landlords.

It is well-established that civil litigants represented by counsel achieve better results than litigants who represent themselves.⁵⁷ Perhaps unsurprisingly, tenants represented by counsel tend to

⁵³ NAT'L HOUS. L. PROJECT, *supra* note 40, at 4–5. Some housing advocates have argued that the challenging conditions during COVID-19 and courts' varied ability to communicate these challenges to litigants violated tenants' due process rights during the early days of the COVID-19 pandemic. *See id.* (Noting that in some instances the courts were inaccessible to people who had tested positive for COVID-19). The Supreme Court, however, has frequently held that eviction hearings as they are conducted under more normal circumstances do not violate tenants' rights to due process. *See, e.g.,* *Lindsey v. Normet*, 405 U.S. 56, 64 (1972). An analysis of whether tenants' due process rights were in fact violated when courts were shut down and hearings were conducted over Zoom during the pandemic's early days, while admittedly an interesting and important topic to explore, goes beyond the scope of this paper.

⁵⁴ NAT'L HOUS. L. PROJECT, *supra* note 40, at 8.

⁵⁵ *Unaffordable America*, *supra* note 1, at 5.

⁵⁶ *See id.* (“90 percent of tenants do not [have an attorney].”); STOUT, THE ECONOMIC IMPACT OF AN EVICTION RIGHT TO COUNSEL IN BALTIMORE CITY, 10, 23 (2020), https://bmorentersunited.org/wp-content/uploads/2020/05/Baltimore-RTC-Report_FINAL_5.8.2020.pdf [<https://perma.cc/QZH3-57EF>] (noting that in some cities as few as one percent of tenants have legal representation); Kriston Capps, *New York City Guarantees a Lawyer to Every Resident Facing Eviction*, BLOOMBERG (Aug. 14, 2017, 7:00 AM EDT), <https://www.bloomberg.com/news/articles/2017-08-14/new-york-ensures-right-to-counsel-for-all-eviction-cases> [<https://perma.cc/6MKK-3NC3>] (“The act could transform housing court in New York, where landlords appear with counsel in more than 90 percent of cases.”).

⁵⁷ Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 886 n.25 (2016) (citing Engler, *supra* note 29 at 39–40); Deborah L. Rhode et al., *Access to Justice Through Limited Legal Assistance*, 16 NW. J. HUM. RTS. 1, 7 (2018); White, *supra* note 34, at 795; Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 69 (2010) (“Lawyer-represented people are more likely to prevail than people who appear unrepresented, on average.”).

achieve better outcomes in housing court than unrepresented tenants, with some studies showing tenants represented by counsel are between three and nineteen times more likely than *pro se* tenants to win at their eviction hearings.⁵⁸ As discussed above, while the court system is not intuitive to the layperson, lawyers are extensively trained to navigate it. Housing law is complicated and specialized.⁵⁹ Attorneys trained in housing law can identify and raise eviction defenses—such as improper notice or neglected repairs—that a renter may not know to raise. Lawyers are also better able to confront and cross-examine adverse witnesses and present the tenant’s affirmative evidence.⁶⁰ They can identify frivolous eviction lawsuits and know how to move to dismiss them. They are better equipped with training and experience to get better settlements with landlords and their attorneys.⁶¹ These settlements can range from agreeing to a move-out date with the landlord so that the tenant avoids an eviction on their record, to establishing a rent repayment plan in cases where the eviction is based on nonpayment of rent, to getting the eviction dismissed altogether.⁶²

Several studies have analyzed the specific benefit to tenants in eviction cases when they are represented by counsel. In 2013, Harvard University conducted a randomized study of tenants facing eviction (“Harvard Study”) to analyze the impact of full-service legal representation on tenant outcomes in eviction court.⁶³ The Harvard Study also looked at the impact of “unbundled representation” on tenant outcomes, defining “unbundled representation” as situations where the attorney performs only a subset of potential legal tasks.⁶⁴ Attorney representation yielded a large and statistically significant improvement in tenant

⁵⁸ See White, *supra* note 34, at 802.

⁵⁹ See Rachel Kleinman, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 *FORDHAM URB. L. J.* 1507, 1515 (2004) (arguing that the complexity of housing law strongly disadvantages *pro se* litigants).

⁶⁰ Karen Tokarz et al., *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 *WASH. UNIV. J. L. & POL’Y* 243, 251 (2020).

⁶¹ See *id.* at 252 (“[T]enants with attorneys have significantly better outcomes than those who are unrepresented.”); White, *supra* note 34, at 795, 823 (recognizing that a right to counsel in eviction proceedings benefits individuals and communities).

⁶² Tokarz et al., *supra* note 60, at 255.

⁶³ D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901, 903 (2013).

⁶⁴ *Id.* at 903–04, 911.

outcomes.⁶⁵ How *much* assistance tenants received mattered as well. Only thirty-nine percent of tenants offered full representation lost possession of their units, whereas sixty-seven percent of tenants who received limited representation in the form of in-advance procedural instructions lost possession.⁶⁶ Both groups, however, fared better than wholly unrepresented tenants in other studies, some of which show unrepresented tenants losing possession of their unit in seventy-eight percent of cases.⁶⁷

A 2018 study analyzing data from eviction hearings in Hennepin County, Minnesota (“Hennepin County Study”) yielded similar results.⁶⁸ Fully represented tenants were nearly twice as likely to stay in their homes as were tenants who appeared at their eviction hearings without representation.⁶⁹ In situations where the tenant was required to vacate after the hearing, represented tenants were more likely to leave court without an eviction on their record—these tenants had an advantage over similarly situated unrepresented tenants in finding a new place to live.⁷⁰ Furthermore, fully represented tenants who were required to vacate were given nearly twice as much time to do so as tenants without legal representation,⁷¹ mostly through their attorneys negotiating move-out agreements with their landlords.⁷² This is a victory for many tenants—the more time a tenant is given to vacate their unit, the less likely it is that they will be subsequently forced into suboptimal housing or end up homeless.⁷³ Even when attorneys cannot prevent evictions, they can make it more likely that tenants will have a softer landing afterward.

Tenants who received limited legal representation—which in this case constituted lawyers providing brief advice, reviewing

⁶⁵ *Id.* at 928.

⁶⁶ *Id.* at 936.

⁶⁷ See MASS. L. REFORM INST., *supra* note 52, at 8 (noting a statewide survey of eviction cases found landlords and tenants were awarded possession in seventy-eight percent of cases and two percent of cases, respectively; the remaining cases were dismissed in a way that made it difficult to know whether the tenant had moved out or had retained possession); GRUNDMAN & KRUGER, *supra* note 52, at 7 (noting that tenants with representation fared much better than unrepresented tenants).

⁶⁸ GRUNDMAN & KRUGER, *supra* note 52, at 1.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2, 9.

⁷¹ *Id.* at 2.

⁷² *Id.* at 8.

⁷³ See GRUNDMAN & KRUGER, *supra* note 52, at 11 (noting that represented tenants are four times less likely to use a homeless shelter than unrepresented tenants).

files, and advising tenants of their rights—also fared better than tenants who received no legal assistance at all.⁷⁴

Additionally, when certain eviction hearings were paused first under the CARES Act⁷⁵ and later under the CDC moratorium,⁷⁶ tenants with legal counsel were in a better position to avail themselves of these protections than unrepresented tenants were.⁷⁷ The CARES Act moratorium temporarily paused evictions for tenants living in rentals financed by federally backed mortgages,⁷⁸ but tenants without counsel were unlikely to know whether their housing qualified, that such rental protection even existed, or what steps they had to take to get that protection.⁷⁹ Similarly, the steps required of tenants under the CDC moratorium were so detailed some tenants were incapable of fulfilling all the requirements without legal advice.⁸⁰ While both the CARES Act and the CDC moratorium did reduce the number of evictions that took place during the pandemic, thousands of hearings that could have been postponed proceeded due to unrepresented tenants' lack of understanding of their rights.⁸¹

i. Barriers to Increasing Access to Legal Representation

Despite the foregoing, most tenants facing eviction have no legal representation because legal aid organizations—which form the backbone of legal assistance to low-income Americans—are

⁷⁴ *Id.* at 3, 11.

⁷⁵ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116–36, 134 Stat. 493–494.

⁷⁶ Ctr. for Disease Control and Prevention, *supra* note 21.

⁷⁷ GRUNDMAN & KRUGER, *supra* note 52, at 1.

⁷⁸ Laurie Goodman et al., *The CARES Act Eviction Moratorium Covers All Federally Financed Rentals – That's One in Four U.S. Rental Units*, URB. INST. (Apr. 2, 2020), <https://www.urban.org/urban-wire/cares-act-eviction-moratorium-covers-all-federally-financed-rentals-thats-one-four-us-rental-units> [<https://perma.cc/7RVK-WMHV>].

⁷⁹ *See id.* (“[D]etermining which housing is covered under the CARES Act moratorium is difficult and may not even be possible by tenants alone.”); NAT'L HOUS. L. PROJECT, *supra* note 40, at 13 (noting how unrepresented tenants will have a very difficult time navigating their eviction under the CARES Act).

⁸⁰ *See* NAT'L HOUS. L. PROJECT, *supra* note 40, at 14 (noting the “bewildering array” of state and local laws and policies regarding evictions).

⁸¹ *See* NAT'L HOUS. L. PROJECT, *supra* note 40, at 6 (noting how some tenants were not notified on how to appear virtually or how to seek a delay or continuance).

already stretched too thin and are far too underfunded to meet the enormous scope of the current need.

Legal aid to low-income Americans in the United States is primarily funded by Legal Services Corporation (“LSC”)⁸² and by revenue from states’ Interest on Lawyer Trust Accounts programs (“IOLTA”).⁸³ Even taken together, IOLTA and LSC funds are inadequate to meet all the legal needs of low-income Americans. LSC, established by Congress in 1974 to promote access to justice for low-income Americans,⁸⁴ has been a consistent target of right-leaning politicians in the decades since its creation.⁸⁵ LSC funds between one-third and one-half of each state’s legal assistance programs yet face constant threats of budget cuts and elimination.⁸⁶ Furthermore, because IOLTA funds come from the interest from pooled client money specifically set aside to fund legal services, the recent slash in federal interest rates has caused available IOLTA funds to plummet.⁸⁷ This has, in turn, led to a dramatically decreased ability of IOLTA-funded organizations to help low-income Americans with their legal problems.⁸⁸ Additionally, LSC regulations require its monies to be used to only fund legal assistance to people at or below 125 percent of the Federal Poverty Level.⁸⁹ In 2021, this was \$21,960 for a household consisting of three people.⁹⁰

⁸² See NORC AT UNIV. OF CHI. LEGAL SERV., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS*, (Legal Services Corporation, June 2017), <https://lsc.gov/our-impact/publications/other-publications-and-reports/2017-justice-gap-report> [<https://perma.cc/P8HB-HEL8>] (noting how the LSC is the “largest funder for civil legal aid for low-income Americans”).

⁸³ See Jack Karp, *‘Not Our Best Days’: The Fiscal Crisis Coming for Legal Aid*, LAW 360 (Apr. 12, 2020, 8:02 PM), <https://www.law360.com/articles/1262255> [<https://perma.cc/2KH2-UZDR>].

⁸⁴ NORC AT UNIV. OF CHI. LEGAL SERV, *supra* note 82, at 9.

⁸⁵ See Matt Ford, *What Will Happen to Americans Who Can’t Afford an Attorney?*, THE ATLANTIC (Mar. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/03/legal-services-corporation/520083/> [<https://perma.cc/XS79-PH4D>] (listing prominent right-leaning politicians who sought to decrease the funding).

⁸⁶ *Id.*

⁸⁷ Karp, *supra* note 83.

⁸⁸ See *id.* (“[W]e are going to have a lot of people who fall through the cracks . . .”).

⁸⁹ See NORC AT UNIV. OF CHI. LEGAL SERV, *supra* note 82, at 11; 45 C.F.R. § 1611.3(c)(1) (2019) (noting how the income ceiling for LSC is 125% of the current federal poverty guidelines amount).

⁹⁰ DEP’T. OF HEALTH AND HUMAN SERVICES, ANNUAL UPDATE OF THE HHS POVERTY GUIDELINES, 86 FED. REG. 7615, 7733 (Feb. 1, 2021) (illustrating in a chart that for the 48 contiguous states, the poverty guideline for a family of three is \$21,960).

Other traditional sources of free legal assistance to low-income tenants are insufficient to fill this resource gap. Law school pro bono clinics, which provide various forms of representation to low-income clients on a wide variety of matters while training law students, are limited in the number of students and cases they can take on.⁹¹ Private attorneys taking on eviction cases pro bono are also helpful, but the total number of pro bono hours private attorneys devote per year is too small to fully address the problem.⁹² Meanwhile, given the high cost of private attorneys, many rental households earn too much money to qualify for pro bono legal assistance but not enough to afford to pay for legal representation.⁹³

Because of the foregoing, eighty-six percent of the civil legal problems reported by low-income Americans in 2017 received inadequate or no legal help at all.⁹⁴ Simply put, the existing legal aid resources in this country are insufficient to level the playing field for low-income tenants facing eviction. To increase tenants' access to legal representation, considerable additional resources are needed.

⁹¹ See Margaret Meriwether Cordray, *Expanding Pro Bono's Role in Legal Education*, 48 IDAHO L. REV. 29, 29–30 (2011); Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1915 n.227 (1999) (noting that the amount of law students who participate in the clinic varies greatly per session and that the number of participants should ideally be consistent).

⁹² See David Bienvenu, *From the Chair: Pro Bono Services Needed for Eviction Cases*, A.B.A.: PRO BONO EXCH. (Sept. 2, 2021, 8:12 PM), <https://www.americanbar.org/groups/center-pro-bono/publications/pro-bono-exchange/2021/from-the-chair/> [<https://perma.cc/8RWG-DZBN>] (“Pro bono is needed now more than ever to assist with the looming eviction crisis. As the eviction moratorium comes to an end, evictions have increased to nearly double the rate they were before the pandemic.”); A.B.A.: STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 6 (Apr. 2018), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/lsp_b_supporting_justice_iv_final.pdf [<https://perma.cc/G2L3-YHP9>] (“[O]ne out of five attorneys have never undertaken pro bono, and in 2016, 48% of responding attorneys did not undertake pro bono.”).

⁹³ See Martha Bergmark, *We Don't Need Fewer Lawyers. We Need Cheaper Ones*, WASH. POST (June 2, 2015, 6:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/?utm_term=.02f4722c5688 [<https://perma.cc/F8TF-ZMB7>] (“But legal help has become so expensive—about \$200 to \$300 an hour on average and drastically higher at the largest law firms—that it's unaffordable, not just for those struggling to make ends meet, but even for most middle-class Americans.”).

⁹⁴ NORC AT UNIV. OF CHI. LEGAL SERV., *supra* note 82, at 30.

II. TENANTS' RIGHT TO COUNSEL PROGRAMS: A POSSIBLE PATH FORWARD

Recognizing the many benefits tenants receive from legal representation, and that existing legal aid resources are inadequate to meet the widespread need, there is a growing movement to enact right-to-counsel legislation to increase low-income tenants' access to assistance. As of this paper's writing, a handful of cities—including New York,⁹⁵ Philadelphia,⁹⁶ Baltimore,⁹⁷ Cleveland,⁹⁸ Seattle,⁹⁹ Milwaukee,¹⁰⁰ San Francisco,¹⁰¹ Boulder, Colorado¹⁰²—as well as Washington

⁹⁵ N.Y.C. ADMIN. CODE § 26-1302 (2021).

⁹⁶ PHIL., PA. Code § 9-808.

⁹⁷ See BALT., MD. CODE § 20-0625 (2020); Bennett Leckrone, *Baltimore Tenants Now Have Legal Right to Lawyer in Eviction Cases*, MARYLAND MATTERS (Dec. 4, 2020), <https://www.marylandmatters.org/blog/250altimore-tenants-now-have-legal-right-to-lawyer-in-eviction-cases/> [https://perma.cc/5KK7-6AVH].

⁹⁸ See CLEVELAND, OH. CODE § 375.12 (2020).

⁹⁹ See SEATTLE, WA. MUN. CODE § 22.206.195 (2021); Jerry Ianelli, *Seattle's City Counsel Gives Poor Residents Right to Eviction Attorneys*, THE APPEAL (March 29, 2021), <https://theappeal.org/seattles-city-council-gives-poor-residents-right-to-eviction-attorneys/> [https://perma.cc/H6J8-K7TS].

¹⁰⁰ See MILWAUKEE, WI. RESOL. § 21-506 (2021), <https://milwaukeecounty.legistar.com/LegislationDetail.aspx?ID=4969906&GUID=4DAB187E-D6B0-40ED-8452-E6CD0831FE97&Options=ID%7CText%7C&Search=right+to+counsel> [https://perma.cc/DN42-B3VQ] (establishing by resolution a right to counsel for eviction cases); Talis Shelbourne, *Milwaukee County has Established a Right to Counsel Program. Here's Why Advocates Say It Could Reduce Evictions*, MILWAUKEE J. SENTINEL (July 20, 2021, 7:44 AM), <https://www.jsonline.com/story/news/local/milwaukee/2021/07/19/milwaukee-countys-right-counsel-program-expected-launch-sep-1/8011470002/> [https://perma.cc/EEF5-H844] (celebrating the passage of a right to counsel in eviction cases); Press Release, David Crowley, County Executive, Milwaukee County, County Executive David Crowley Signs "Right to Counsel" into Law (Jul. 19, 2021), <https://county.milwaukee.gov/EN/County-Executive/News/Press-Releases/County-Executive-David-Crowley-Signs-Right-to-Counsel-into-Law> [https://perma.cc/8TYN-689E] (explaining that the program is designed to help keep people in their homes).

¹⁰¹ See S.F., CAL. NO EVICTION WITHOUT REPRESENTATION ACT OF 2018, http://sfelections.sfgov.org/sites/default/files/Documents/candidates/Legal_Text_No_Eviction_Without_Representation.pdf [https://perma.cc/XP7W-AHUS] (noting the addition of § 58.4 to the administrative code which provides for legal counsel in eviction cases); *Tenant Right to Counsel*, EVICTION DEFENSE COLLABORATIVE, <https://evictiondefense.org/services/right-to-counsel/> [https://perma.cc/3QHS-PKRR].

¹⁰² See BOULDER, CO. REV. CODE § 12-2-9 (2020), https://library.municode.com/co/boulder/ordinances/municipal_code?nodeId=1048833 [https://perma.cc/3T8S-VAC2]; Matt Bloom, *How a Voter-Approved Program in Boulder Could Drastically Reduce Evictions*, KUNC (Nov. 4, 2020, 4:08 PM), <https://www.kunc.org/2020-11-04/how-a-voter-approved-program-in-boulder-could-drastically-reduce-evictions> [https://perma.cc/FZC4-PXYX] (noting how Boulder was the sixth city in the US to establish a program for free legal counsel to tenants for evictions).

State¹⁰³ has passed tenant right-to-counsel legislation over the past several years. Inspired by the enactment of these “civil *Gideon*” laws and encouraged to act now by the promise of American Rescue Plan funds for this purpose,¹⁰⁴ additional localities are in various stages of passing similar legislation.¹⁰⁵

This is a positive development for tenants’ rights. Early data suggests that these programs have resulted in generally favorable outcomes for tenants, in line with the Harvard and Hennepin County studies discussed above.¹⁰⁶ Additionally, return-on-investment studies have shown that tenant right-to-counsel programs are economically beneficial for the municipalities enacting them. One study estimated that New York City’s right to civil counsel law would save the city \$320 million annually in expenditures on homeless shelters, foster care, emergency room visits, law enforcement, and transportation.¹⁰⁷ A 2018 study concluded that the City of Philadelphia would recoup at least \$12.74 in savings on other social service programs for each dollar spent on providing legal counsel to tenants.¹⁰⁸

¹⁰³ See WASH. REV. CODE § 59.18.640 (2021); Sydney Brownstone & Heidi Groover, *Washington Becomes First State to Guarantee Lawyers for Low-Income Tenants During Evictions*, SEATTLE TIMES (Apr. 26, 2021, 6:57 PM), <https://www.seattletimes.com/seattle-news/homeless/washington-becomes-first-state-to-guarantee-lawyers-for-low-income-tenants-during-evictions/> [<https://perma.cc/D3B9-449F>] (“Washington is now the first state in the U.S. to ensure that its poorest tenants have access to a lawyer during eviction proceedings.”).

¹⁰⁴ See Press Release, *supra* note 36 (urging state legislatures to use federal funds to establish right-to-counsel programs for eviction cases).

¹⁰⁵ NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, 2021/2022 FEDERAL/STATE CIVIL RIGHT TO COUNSEL BILLS, http://civilrighttocounsel.org/legislative_developments/20212022_bills [<https://perma.cc/LEC2-8K73>] (maintaining a comprehensive, regularly-updated list of cities and states contemplating new civil right to counsel litigation, both in and outside of the eviction context and illustrating that jurisdictions with a civil right to counsel laws have been heavily concentrated in Democratic-leaning regions of the country and unless and until a federal civil right to counsel in eviction cases is recognized, it seems likely that how ease of access to legal representation for tenants facing eviction will vary significantly from state to state and city to city).

¹⁰⁶ See ANNUAL REPORT TO CLEVELAND CITY COUNCIL AND COURTESY REPORT TO CLEVELAND MAYOR’S OFFICE, LEGAL AID SOCIETY OF CLEVELAND (January 31, 2021) (“93% of cases represented . . . by a Legal Aid attorney . . . avoided displacement in the first 6 months of Cleveland’s Right to Counsel (RTC).”).

¹⁰⁷ STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A 5, 26 (Mar. 16, 2016), <https://legalaidresearchnlada.files.wordpress.com/2020/01/new-york-214-a-report-stout-risius-ross-2016.pdf> [<https://perma.cc/BER4-P7NN>].

¹⁰⁸ STOUT RISIUS ROSS, INC., ECONOMIC RETURN ON INVESTMENT OF PROVIDING COUNSEL IN PHILADELPHIA EVICTION CASES FOR LOW-INCOME TENANTS, PHILADELPHIA BAR ASSOCIATION’S CIVIL GIDEON AND ACCESS TO JUSTICE TASK FORCE 8 (Nov. 13, 2018), <https://www.philadelphiabar.org/webobjects/pba.woa/contents/webserverresources/cmsresources/philadelphiavevictionsreport.pdf> [<https://perma.cc/JQ4A-QEVM>].

But because most existing tenant right-to-counsel programs are so new it is not yet possible to engage in a detailed, robust analysis or comparison of their outcomes. Complicating matters further is the fact that most existing tenant right-to-counsel legislation was enacted either just before the onset of the COVID-19 pandemic or after it had already begun. The inconsistent patchwork of court closure schedules¹⁰⁹ and eviction moratoria¹¹⁰ that have been in place to varying degrees across the country since March 2020 have correspondingly impacted eviction filing rates, court hearings, and tenant outcomes to widely varying degrees. This is by itself enough to make a detailed comparison of existing program outcomes a nearly impossible challenge. Furthermore, and as discussed in more detail in the following section, some of the existing right-to-counsel laws have yet to be fully implemented due to a lack of funding or other logistical challenges.¹¹¹ While the current spotlight on right-to-counsel programs for tenants suggests that a broad evaluation of outcomes across multiple programs may be possible in several years, attempting to do so now would be premature and of limited utility.

But there are still lessons to be learned from examining these programs today, particularly the oldest among them. New York City and San Francisco were the first American cities to enact civil right-to-counsel legislation for tenants facing eviction, and both did so several years before the pandemic began. Each program has been in existence long enough to provide both time and opportunity for relatively robust post-implementation analysis. Data from both cities show that eviction filings and tenant displacement have declined since their programs were implemented.¹¹² But both programs have also faced significant

¹⁰⁹ U.S. Courts, *Court Orders and Updates During COVID-19 Pandemic* (Aug. 30, 2022, 1:30 PM), <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> [<https://perma.cc/237D-VEUP>] (listing a regularly updated list of court closures due to COVID-19 across the country).

¹¹⁰ *See, e.g.*, *Tiger Lily, LLC et al. v. U.S. Dep't. of Housing and Urban Dev. et al.*, 5 F.4th 666, 668 (6th Cir. 2021) (invalidating the CDC eviction moratorium in the 6th Circuit).

¹¹¹ Taylor Allen, *Philadelphia's Main Anti-Eviction Initiative Fights for its Future*, WHYY (April 29, 2021), <https://whyy.org/articles/philadelphias-main-anti-eviction-initiative-fights-for-its-future/> [<https://perma.cc/U9WX-LCCH>] (noting that in 2019, Philadelphia's City Council unanimously passed a bill to provide legal representation to low-income tenants facing eviction; and while it this program was supposed to pilot in 2021, there remains no funding for it to do so).

¹¹² *See* NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, 2021/2022 FEDERAL/STATE CIVIL RIGHT TO COUNSEL BILLS, http://civilrighttocounsel.org/legislative_

challenges that have limited their initial effectiveness to varying degrees. The stories behind how New York City and San Francisco developed their respective right-to-counsel programs, the generally positive impact each has had on renters, and the challenges each has faced that have limited their reach and effectiveness are worth discussing now, as more jurisdictions contemplate enacting tenant right-to-counsel legislation. This discussion will be instructive both to scholars thinking about civil *Gideon* laws as well as to legislators and housing advocates invested in meaningfully addressing the eviction crisis within their communities.

A. New York City's "Universal Access to Counsel" Program

In 2017, New York City enacted Local Law 136 of 2017, also known as the Universal Access to Counsel ("UAC") law, which guaranteed representation for low-income renters facing eviction.¹¹³ It was the first law of its kind in the United States.¹¹⁴ It came about after years of organizing efforts from New York-based housing advocates and legal aid organizations, support from the New York judiciary, and legal scholars examining the rental housing injustices within New York and across the country.¹¹⁵ As in other parts of the country, before the creation of the UAC program New York City tenants facing eviction had legal assistance roughly one percent of the time.¹¹⁶ Meanwhile, more than ninety-five percent of landlords had legal representation

developments/20212022_bills [https://perma.cc/6WH4-K4YN] (right to counsel can "help transform the general power dynamic between tenants and landlords").

¹¹³ N.Y.C. ADMIN. CODE § 26-1302 (2017).

¹¹⁴ N.Y.U. FURMAN CENTER, IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS 2 (December 2018), https://furmancenter.org/files/UAC_Policy_Brief_12_11-18.pdf [https://perma.cc/S6B2-7PP4].

¹¹⁵ Brian Bieretz, *A Right to Counsel in Eviction: Lessons from New York City*, HOUSING MATTERS: AN URBAN INST. INITIATIVE, (Dec. 31, 2019), <https://housingmatters.urban.org/articles/right-counsel-eviction-lessons-new-york-city> [https://perma.cc/W4UH-GSGF].

¹¹⁶ Allison Dikanovic, *Tenants' Right to Counsel' Expands Citywide. Here's Why that's a Big Deal*, THE CITY (May 20, 2021, 5:44 PM), <https://www.thecity.nyc/2021/5/20/22444023/right-to-counsel-expands-citywide-why-thats-a-big-deal-tenants-nyc> [https://perma.cc/ZFK2-QGXG].

during the same proceedings.¹¹⁷ While New York City had funded legal assistance for renters facing eviction for decades, in other parts of the country this funding was never adequate for legal services providers to represent more than a small fraction of renters who needed help.¹¹⁸

In a city where approximately seven out of ten households are renters,¹¹⁹ this schism between those who had legal representation and who did not have significant ramifications for housing security. As in other parts of the country, because New York City tenants rarely had legal representation, there was little incentive for landlords to withhold filing eviction lawsuits, even frivolous ones, against them.¹²⁰ Before the enactment of the UAC program, over 200,000 eviction petitions were filed against New York City residents annually.¹²¹ Just like in eviction courts across the country, tenants facing eviction in New York City typically either lost or received a default judgment in court, and were required to vacate their units the majority of the time.¹²²

When Mayor Bill de Blasio signed New York City's right-to-counsel program into law in August 2017, it was not just a watershed moment for civil *Gideon* proponents. It was also a momentous achievement for New York-based community activists who had fought for its enactment,¹²³ as well as for advocates across the country who looked to New York as an example of what could be done in their communities.¹²⁴ Under the new law, New York City households with incomes at or below 200 percent of the federal poverty line were eligible for full-service legal

¹¹⁷ *Id.*

¹¹⁸ *See id.* (noting how the number of represented NYC tenants has increased from 1% to 40% and now other cities around the country are looking into similar provisions to protect renters); N.Y.C. OFFICE OF CIVIL JUSTICE, 2016 ANNUAL REPORT (Jun. 2016), <https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report.pdf> [<https://perma.cc/RT3A-N6YD>] (noting the increase in tenants with lawyers).

¹¹⁹ N.Y.U. FURMAN CENTER, *supra* note 114, at 4.

¹²⁰ *See Bieretz, supra* note 115 (arguing that one of the primary motivations for providing right-to-counsel legislation is to make bringing eviction cases costlier, which would in theory discourage landlords from filing frivolous eviction litigation).

¹²¹ N.Y.C. OFFICE OF CIVIL JUSTICE, 2017 ANNUAL REPORT AND STRATEGIC PLAN 18 (2017), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2017.pdf [<https://perma.cc/YXU4-T7FH>].

¹²² *See* N.Y.U. FURMAN CENTER, *supra* note 114, at 3.

¹²³ Bieretz, *supra* note 115.

¹²⁴ *See* Capps, *supra* note 56 ("With New York leading the way, several other cities may soon embrace so-called 'civil *Gideon*' laws . . .").

representation at their eviction proceedings.¹²⁵ Renter households earning more than 200 percent of the federal poverty line were entitled to brief, advice-based legal services rather than full representation.¹²⁶ Because LSC-funded organizations must limit their representation to households earning at or below 125 percent of the federal poverty line,¹²⁷ by assisting households earning up to 200 percent of the federal poverty line, New York City's right-to-counsel program made thousands of renters who would not otherwise have qualified for assistance eligible for free legal services.

New York City's UAC program provided free legal assistance to over 100,000 New York City renters during the fiscal year 2021¹²⁸ for housing challenges including eviction, disrepair, landlord harassment, and other threats to their tenancies.¹²⁹ While eviction filings in New York City were lower in 2021 than in 2020 due to federal and local eviction moratoria, the total number of tenants the program helped in 2021 increased by eleven percent from the prior year.¹³⁰ More than seventy-one percent of tenants who appeared in housing court for eviction cases during the fourth quarter of Fiscal Year 2021 had legal representation,¹³¹ compared with the one percent of tenants who had legal representation before the enactment of this right-to-counsel law. This significant increase in representation corresponded with a proportionately dramatic improvement in outcomes for New York City tenants facing eviction. During Fiscal Year 2021, when tenants facing eviction had legal representation, they were permitted to stay in their homes eighty-four percent of the time and were only ordered to vacate sixteen percent of the time.¹³²

¹²⁵ See Bieretz, *supra* note 115; GA. DEP'T OF CMT'Y HEALTH, 2017 FEDERAL POVERTY GUIDELINES, (Office of Health Planning, Feb. 13, 2017), <https://dch.georgia.gov/federal-poverty-guidelines> [<https://perma.cc/P7Z8-3PKS>] (noting that in 2017, 200 percent of the federal poverty line equaled an annual household income of \$40,840 for a family of three).

¹²⁶ N.Y.C. ADMIN. CODE § 26-1301; GA. DEP'T OF CMT'Y HEALTH, *supra* note 125 (illustrating that the eligibility threshold 200% of the federal poverty guideline was \$40,840 for a family of three in 2017).

¹²⁷ Lewis Creekmore et al., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans*, LEGAL SERVICES CORP., at 2 (2017).

¹²⁸ OFF. OF CIV. JUST. N.Y. CITY HUM. RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR FOUR OF IMPLEMENTATION IN NEW YORK CITY 1, 3 (2021).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 5.

¹³² *Id.* at 25.

Additionally, there are signs that the Universal Access to Counsel Program has had a chilling effect on landlords' filing for eviction actions. Between 2014—the year city council members introduced legislation requiring the New York City Office of Civil Justice to establish a tenant right-to-counsel program¹³³—and 2019, the number of eviction filings in New York City's housing courts declined by thirty percent.¹³⁴ While there have been no in-depth studies confirming this drop is due entirely to the creation of New York City's tenant right-to-counsel program, it is plausible that landlords—formerly used to facing little opposition in housing court—may now be thinking twice before bringing frivolous eviction cases that can easily be defended in court.

i. Challenges in Implementing New York City's Right to Counsel Program

Five years after the creation of New York City's tenant right-to-counsel program, housing advocates across the country now look to it as an example of what is possible in their communities.¹³⁵ In evaluating this program, however, it is important that there were significant logistical, financial, and strategic challenges at the outset that limited the program's initial reach and effectiveness. Some of these challenges continue to this day. To ensure that new right-to-counsel laws are as effective as possible when implemented, advocates and policymakers should take note of these hurdles as well as the steps New York City took and continues to take to overcome them.

¹³³ N.Y.C. CITY COUNCIL, PROVIDING LEGAL SERVICES FOR TENANTS WHO ARE SUBJECT TO EVICTION PROCEEDINGS (N.Y.C. Council 2014), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID%7CText%7C&Search=0214> [https://perma.cc/N9KL-GHWS].

¹³⁴ N.Y.C. OFF. OF CIV. JUST., 2019 ANNUAL REPORT 1, 8 (2019).

¹³⁵ N.Y.U. FURMAN CENTER, *supra* note 114, at 2.

1. New York City Universal Access to Counsel Program: Five-Year Phase-In

Because of the sheer size and scope of creating a new tenant right-to-counsel program in a city with as many renters as New York City, Local Law 136 of 2017 planned for the new UAC program to be rolled out over a period of several years.¹³⁶ Universal eligibility for free legal services was not expected to be available to all income-eligible tenants until 2022.¹³⁷ The first tenants to receive free legal representation under this program were helped in September 2017, shortly after Mayor de Blasio signed the bill into law.¹³⁸ Income-eligible residents of three zip codes per borough—or fifteen zip codes total—were guaranteed representation in the program’s first year.¹³⁹ To ensure priority was given to New York City’s most vulnerable tenants, these zip codes were selected on a variety of factors, including the number of homeless shelter entries in each, the availability of rent-regulated housing, and the number of evictions.¹⁴⁰ But because of this phased-in approach, many New York City tenants in need of legal representation were unable to secure it in the UAC program’s first year due to their zip code of residence.¹⁴¹

The number of New York zip codes eligible for free legal representation under the program slowly ticked upward each year.¹⁴² In the program’s second year, income-eligible residents of four zip codes per borough qualified for legal assistance. In that year 41,000, New York City renter households received legal services under the program.¹⁴³ The number of eligible zip codes continued to increase each year until May 2021, when de Blasio signed a bill officially rolling out the UAC program throughout the city.¹⁴⁴ Four years after the UAC program was first created, all

¹³⁶ See N.Y.C. ADMIN. CODE § 26-1302 (2021).

¹³⁷ N.Y.U. FURMAN CENTER, *supra* note 114, at 2.

¹³⁸ See *id.*; Bieretz, *supra* note 115.

¹³⁹ N.Y.U. FURMAN CENTER, *supra* note 114, at 2.

¹⁴⁰ *Id.* at 7.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Bieretz, *supra* note 115.

¹⁴⁴ See OFF. OF CIV. JUST. N.Y. CITY HUM. RES. ADMIN., *supra* note 128, at 2; CITY OF N.Y., *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->

renter households in New York City with income not exceeding 200 percent of the federal poverty line became eligible for full legal representation regardless of their zip code.¹⁴⁵

There were several reasons why New York City adopted a phased-in approach to its right-to-counsel program instead of opening it to all income-eligible New York City tenants immediately after the passage of the legislation. First, the logistical challenges involved with launching a new program of this size and scope were immense. A key provision of Local Law 136 of 2017 specifically required the legal assistance provided by nonprofit legal services provider partners contracted with New York City's Office of Civil Justice.¹⁴⁶ Yet the number of legal aid attorneys in New York City qualified to represent low-income tenants at their eviction hearings was, at the time the legislation was passed, inadequate to handle the enormous influx of new cases that immediate and full implementation of the law would have created.¹⁴⁷ The city had to recruit, hire, and train new housing law attorneys to increase the capacity of existing legal aid organizations to meet demand.¹⁴⁸ Simply put, the city needed several years to build up existing infrastructure before it could provide the promised services to all income-eligible New Yorkers. This extra time also allowed the city to increase its financial allocations for legal services so that there would be money in place for these new attorneys once they were hired. The city of New York was able to increase investments in tenant legal services from \$6 million in 2013 to \$166 million in 2021.¹⁴⁹

There were also significant and far-reaching logistical challenges in New York City's housing court that needed to be addressed before legal services could be offered to all low-income

york-city-s-first-in-nation-right-to-counsel-program-expanded-citywide-ahead-schedule [https://perma.cc/EJA6-69CU] (noting that while New York City's Universal Access to Counsel program was not officially offered to all income-eligible New Yorkers until May 2021, all New York renters facing eviction were eligible for free legal representation in 2020 because of the COVID-19 pandemic).

¹⁴⁵ David Brand, *Every NYC Tenant Has Access to Housing Court Lawyer, as Eviction Protections Near End*, CITY LIMITS (Nov. 18, 2021), <https://citylimits.org/2021/11/18/every-nyc-tenant-has-right-to-housing-court-lawyer-as-eviction-protections-near-end/> [https://perma.cc/D63G-ZHKC].

¹⁴⁶ OFF. OF CIV. JUST. N.Y. CITY HUM. RES. ADMIN., *supra* note 128, at 2.

¹⁴⁷ N.Y.U. FURMAN CENTER, *supra* note 114, at 10–11.

¹⁴⁸ *Id.* at 11.

¹⁴⁹ CITY OF N.Y., *supra* note 144.

tenants. For decades, New York's housing court had functioned much as it does in other parts of the country. Judges tended to dispense with eviction cases very quickly, giving tenants little opportunity to be heard.¹⁵⁰ Many tenants failed to answer the landlord's court petition within five days from the date of service, which under New York law led to automatic judgments for the landlord.¹⁵¹ With the creation of New York City's tenant right-to-counsel program, significant infrastructural changes became necessary. With significantly more financial resources devoted to ensuring tenants received representation in court, more tenants would, ostensibly, be attending their eviction hearings. The eviction hearings themselves would take longer because both the landlord—still represented by counsel ninety-five percent of the time—as well as significantly more tenants, would be coming to court prepared.¹⁵² With more tenants represented by attorneys well-versed in housing law, it was reasonable to assume both parties would be making more technical and complicated arguments that the judge would need to consider.¹⁵³ When de Blasio signed the Universal Access to Counsel Legislation into law, New York City housing court suddenly needed more physical space for the additional people who would be coming to the courthouse, more interpreters for non-English speaking tenants, and more court staff to handle the proceedings.¹⁵⁴ None of these major infrastructural changes could happen overnight, which further justified phasing in eligibility for New York City's UAC program by zip code.

2. Tenants' Information Gap: Impact on Right-to-Counsel Laws' Effectiveness

In New York City and elsewhere, low-income renters facing eviction frequently do not believe lawyers can help them with their

¹⁵⁰ *Id.*

¹⁵¹ *See* N.Y. REAL PROP. ACTIONS & PROCEEDINGS § 732-3 (2019).

¹⁵² Bieretz, *supra* note 115.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

housing problems. Some do not realize eviction is a legal issue.¹⁵⁵ Others think of an eviction hearing as no different from a debt collection matter.¹⁵⁶ There has also been strong historical messaging from community advocates that attorneys in housing court do not have their best interests in mind and are to be avoided.¹⁵⁷ Countering this messaging and demonstrating that under the tenant right-to-counsel program lawyers are there to help has been a challenge, both in New York City and in other cities looking to enact similar legislation. Determining how to advise tenants that they are entitled to legal representation under the new UAC program was, from the outset, essential to the success of New York City's UAC program, and it remains a somewhat limiting factor in the program's reach and effectiveness.¹⁵⁸

Various methods have been employed to inform New York City tenants of their new right to counsel. Tenant advocacy groups have launched door-knocking campaigns.¹⁵⁹ Various websites have been established by the Right to Counsel Coalition and Housing Court to inform tenants about the new programming.¹⁶⁰ Tenants who appear in housing court *pro se* are also given information about their right to counsel and how to go about seeing legal assistance.¹⁶¹ Additionally, in May of 2021, de Blasio signed a bill requiring UAC program coordinators to work with local tenant organizations and community groups to educate tenants about their rights in housing court.¹⁶² Program advocates hope this official amendment to the New York City Administrative Code will help encourage tenants facing eviction to avail themselves of the legal assistance to which they are entitled.¹⁶³

¹⁵⁵ See AMERICAN CITY, *supra* note 39, at 96–98.

¹⁵⁶ *Id.*

¹⁵⁷ Bieretz, *supra* note 115.

¹⁵⁸ N.Y.U. FURMAN CENTER, *supra* note 114, at 11.

¹⁵⁹ Willem Dehaes, *Educating Tenants on Their Right to Counsel*, INK N.Y.C. (Nov. 2, 2018), <http://theink.nyc/educating-tenants-right-counsel/> [<https://perma.cc/M8HR-N58E>].

¹⁶⁰ See Right to Counsel: NYC Coalition, *Eviction Protections during Covid; Know Your Rights*, https://www.righttocounselnyc.org/eviction_protections_during_covid [<https://perma.cc/M8HR-N58E>].

¹⁶¹ N.Y.U. FURMAN CENTER, *supra* note 114, at 11–12.

¹⁶² N.Y.C. ADMIN. CODE, § 26-1306 (2021).

¹⁶³ Dikanovic, *supra* note 116.

B. San Francisco's Tenant Right to Counsel Program

In June 2018, San Francisco voters passed the “No Eviction without Representation Act,” or the Tenant Right to Counsel (“TRC”) program, through a ballot initiative called Proposition F.¹⁶⁴ This was the second tenant right-to-counsel law enacted in the United States after New York City’s aimed at leveling the playing field for low-income renters, and the first to be enacted through a voter ballot initiative.¹⁶⁵ Before the creation of the TRC program, San Francisco tenants appeared at their eviction hearings without counsel roughly eighty to ninety percent of the time.¹⁶⁶ This unequal access to legal representation had similar implications on tenants’ eviction court outcomes in San Francisco as it had elsewhere, with the majority of renters facing eviction and losing their housing.¹⁶⁷

There are several key differences between San Francisco’s and New York City’s right-to-counsel programs. First, unlike New York City’s, San Francisco’s program was not phased in over a period of years. San Francisco’s legislation mandated that the TRC Program was to be fully implemented in July 2019, the year following its passage.¹⁶⁸ Second, under San Francisco’s TRC Program there is no income eligibility requirement for full legal representation; all San Franciscans facing eviction qualify for full-scope legal representation regardless of household income.¹⁶⁹

¹⁶⁴ See S.F., CAL. NO EVICTION WITHOUT REPRESENTATION ACT OF 2018; J.K. Dineen, *SF’s Measure F Wins, Will Give Tax-Funded Legal Help to Tenants Facing Eviction*, S.F. CHRONICLE (June 5, 2018, 11:14 PM), <https://www.sfchronicle.com/politics/article/SF-MeasureF-to-give-tax-funded-legal-help-to-12970924.php> [<https://perma.cc/Z96G-R5BB>].

¹⁶⁵ Ida Mojada, *Tenants Facing Eviction Cliff Want Lawyers: Here’s What San Francisco is Doing About It*, S.F. EXAMINER (July 19, 2021), <https://www.sfexaminer.com/news/tenants-facing-eviction-cliff-want-legal-representation-heres-what-san-francisco-is-doing-about-it/> [<https://perma.cc/2ABU-KRZ5>].

¹⁶⁶ Martin Kuz, *Meet the Eviction Defenders Helping to Keep Tenants at Home*, CHRISTIAN SCI. MONITOR (July 30, 2019), <https://www.csmonitor.com/USA/Society/2019/0730/Meet-the-eviction-defenders-helping-to-keep-tenants-at-home> [<https://perma.cc/VYJ2-8E7W>].

¹⁶⁷ *Id.*

¹⁶⁸ Laura Waxmann, *Program Aimed at Curbing Evictions Showing Promise But Not Quite There Yet*, S.F. BUS. TIMES (Feb. 25, 2020, 11:53 AM), <https://www.bizjournals.com/sanfrancisco/news/2020/02/25/program-aimed-at-curbing-evictions-showing-promise.html> [<https://perma.cc/LTC4-HU9D>].

¹⁶⁹ S.F., CAL. NO EVICTION WITHOUT REPRESENTATION ACT OF 2018. “Full-scope representation” under this legislation is defined as attorney representation through all stages of the eviction case. *Id.* From 30 days after the tenant receives service of either an

Like New York City's program, San Francisco's TRC program appears to have helped preserve housing for many of the tenants it has worked with, though the data collection for San Francisco's program has been somewhat less robust than what has been collected as part of New York City's UAC program. In the first eighteen months after its creation, 2,345 San Franciscans exercised their right to full-scale legal representation through the TRC program.¹⁷⁰ Sixty-seven percent of the tenants who received full-scale representation in 2019 as part of the TRC program San Francisco's program remained housed.¹⁷¹ While there do not appear to have been studies undertaken yet showing how many tenants would have remained housed in 2019 absent the TRC program's existence, program advocates believe the program has had a generally positive effect on San Franciscans' housing stability.¹⁷² The program has also had a similarly chilling effect on eviction filings to New York's program. The total number of San Francisco eviction filings filed in 2019 dropped by ten percent relative to what the number was in 2018, immediately before the passage of the ballot measure.¹⁷³

i. Challenges in Implementing San Francisco's Right to Counsel Program

San Francisco, however, has faced significant program implementation challenges with the Tenant Right to Counsel Program. While the TRC program was slated to be fully implemented by July 2019, data suggests that approximately thirty-three percent of tenants facing eviction who have sought legal assistance under the program have been turned away due to a lack of resources. These renters have, on balance, obtained

eviction notice or an unlawful detainer complaint, until either the unlawful detainer complaint is withdrawn, the case is dismissed, or a judgment is entered; pursuant to San Francisco Admin. Code § 58.4 attorneys will file any necessary responsive pleadings, appear on behalf of the tenant in court proceedings, and provide the tenant with any required legal advice. Waxmann, *supra* note 168.

¹⁷⁰ Waxmann, *supra* note 168.

¹⁷¹ Mojada, *supra* note 165.

¹⁷² *Id.*

¹⁷³ Waxmann, *supra* note 168.

worse outcomes in court than the renters who were able to secure full-scale representation.¹⁷⁴

There are several reasons for this. In discussing programs seeking to approximate a civil *Gideon* in eviction cases, it is important to note that while *Gideon* guarantees a right to indigent legal representation in state criminal cases, it is an unfunded federal mandate.¹⁷⁵ In certain states, funding for public criminal defense is so inadequate that *Gideon* is in practice hardly a mandate at all.¹⁷⁶ Likewise, if housing advocates wish to reduce eviction rates and protect tenants' rights to counsel, is not enough for them to merely pass tenant right-to-counsel legislation. For public defender programs to function well, states must fund them.¹⁷⁷ Similarly, jurisdictions promising legal representation to all tenants who cannot afford to pay for an attorney must find a way to fund that guarantee.

Inadequate funding, paired with an arguably overly ambitious programmatic scope and a too-short timeframe for full program rollout, has kept San Francisco's Tenant Right to Counsel Program from fulfilling its original promise of full legal representation to all San Franciscan tenants facing eviction to date.¹⁷⁸ While New York City slowly expanded the capacity of its legal service providers over a period of years before offering free legal services to all income-eligible tenants, there are signs that San Francisco failed to adequately anticipate what infrastructural and funding changes would be necessary to fully implement its program. In contrast to New York City's five-year roll-out plan, San Francisco gave itself only one year from the enactment of its Tenant Right to Counsel Law to roll out full legal services to all San Francisco tenants facing eviction, regardless of income.¹⁷⁹ That proved to be too lofty a goal and not enough time for legal aid organizations to ramp up sufficiently to meet the sudden huge

¹⁷⁴ *Id.*

¹⁷⁵ See Tonya L. Brito, *The Right to Civil Counsel*, 148 DAEDALUS 56, 56 (2019) <https://direct.mit.edu/daed/article/148/1/56/27252/The-Right-to-Civil-Counsel> [<https://perma.cc/666G-V94X>]; Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon,'* THE ATLANTIC (Mar. 13, 2013), <https://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/> [<https://perma.cc/U6J8-A2Z6>].

¹⁷⁶ Cohen, *supra* note 175.

¹⁷⁷ *Id.*

¹⁷⁸ Waxmann, *supra* note 168.

¹⁷⁹ See S.F., CAL. NO EVICTION WITHOUT REPRESENTATION ACT OF 2018.

increase in demand for their services.¹⁸⁰ The eleven million dollars San Francisco allotted to this program as part of Proposition F was insufficient to hire enough new attorneys to deliver to tenants everything the new program had promised them.¹⁸¹ The existing legal aid attorneys quickly became overwhelmed by the sudden increase in their workload, causing many to suffer burnout and leave their organizations.

During the summer of 2021, the City of San Francisco passed a budget that would, among other things, increase its expenditures for the Tenant Right to Counsel Program by 7 million dollars.¹⁸² Advocates of the TRC program are hopeful that this will be enough to bring the legal services offered under the program closer to matching what the designers of Proposition F had promised back in 2018.¹⁸³

However, it remains the case that full-service legal representation is expensive relative to other forms of legal assistance, like limited representation.¹⁸⁴ To ensure that the tenants who are most unable to pay for legal representation can obtain it through the Tenant Right to Counsel Program, San Francisco may still wish to follow New York City's lead and establish income guidelines to determine eligibility for its program.

CONCLUSION

Absent significant policy shifts that either increase wages or increase our country's supply of affordable housing stock, it appears likely that our country's eviction and affordable housing

¹⁸⁰ Laura Wenus, *Right to Counsel Helps Tenants Stay in Place, But Effort Is Short on Attorneys*, S.F. PUB. PRESS (March 9, 2020), <https://www.sfpublishpress.org/right-to-counsel-helps-tenants-stay-in-place-but-effort-is-short-on-attorneys/> [https://perma.cc/QRK8-H7ME].

¹⁸¹ *Id.*

¹⁸² NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, ALL ABOUT THE RIGHT TO COUNSEL FOR TENANTS IN SAN FRANCISCO, http://civilrighttocounsel.org/major_developments/1179.

¹⁸³ *See id.*

¹⁸⁴ Tokarz et al., *supra* note 60, at 252–53; Alicia M. Farley, *An Important Piece of the Bundle: How Limited Appearances Can Provide an Ethically Sound Way to Increase Access to Justice for Pro Se Litigants*, 20 GEO. J. LEGAL ETHICS 563, 580–83 (2007).

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crises are here to stay. Most rental assistance programs put in place during the pandemic are either over or will be over soon. This will leave renters in the same place they were in before the pandemic started—or worse. Given the current economic landscape, the recent expansion of tenant right-to-counsel programs in jurisdictions across the country is a positive step toward helping tenants stay housed. But while tenant advocates are right to celebrate these new programs, passing this legislation is not enough. For these right-to-counsel laws to be effective, jurisdictions looking to enact them must ensure that the funding and infrastructure are in place to support promises made to tenants needing assistance. Jurisdictions looking to enact new right-to-tenant legislation should look to New York City and San Francisco’s right-to-counsel programs as examples of how to navigate the path forward.