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# WHY PEOPLE WHO FACE LOSING THEIR HOMES IN LEGAL PROCEEDINGS MUST HAVE A RIGHT TO COUNSEL

*Andrew Scherer\**

“To no one will We sell, to no one will We deny or delay, right or justice.”

—*Magna Carta* (1215)<sup>1</sup>

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”

—*Powell v. Alabama* (1932)<sup>2</sup>

“Everyone needs a place where they can live with security, with dignity, and with effective protection against the elements. Everyone needs a place which is a home.”

—Nelson Mandela (2003)<sup>3</sup>

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The author is indebted to Laura Abel of the Brennan Center on Justice at New York University Law School, who co-authored the discussion of social science research in New York City in this article and whose comments on the remainder of the article were enormously helpful, and to Jonathan Siegelbaum of Wilmer Cutler Pickering Hale & Dorr LLP, for his legal research on potential bases for appointment of counsel in civil cases under New York law. The author also gratefully acknowledges the assistance of Sharon K. Samuel, a second year student at Benjamin N. Cardozo School of Law, for her helpful research assistance and the assistance of Blossom Lefcourt, Senior Articles Editor of the *Cardozo Public Law, Policy & Ethics Journal*, for her thorough and very helpful editing of a series of drafts of this article.

The author takes inspiration for this article from members of growing movement to advocate for the right to counsel in civil litigation on the national and local levels. A National Coalition for a Civil Right to Counsel, comprised of legal services, legal aid and other public interest lawyers, private attorneys and academics, has been organized by Debra Gardner of the Public Justice Center of Maryland and Deborah Perluss of the Northwest Justice Project. A New York City group of advocates, focused on the right to counsel for tenants in Housing Court, has been organized by Lisa Rubin of N.Y. City Councilmember Alan Gerson’s office at the council member’s behest, with much of the work shouldered by Laura Abel of the Brennan Center. The energy, determination and wisdom of the advocates involved in these efforts will, I am confident, lead to monumental advances toward equal justice for all.

<sup>1</sup> Magna Carta § 40, in A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 45 (U. Pr. of Virg. 1998) (1964).

<sup>2</sup> 287 U.S. 45, 68-69 (1932).

<sup>3</sup> Nelson Mandela, *Foreword* to NATIONAL PERSPECTIVES ON HOUSING RIGHTS xvii (Scott Leckie ed., 2003).

## INTRODUCTION

This paper argues in favor of a simple proposition: people who face losing their homes in legal proceedings must have a right to be represented by counsel in those proceedings, whether or not they can pay for counsel. Public policy, the fair administration of justice, constitutional and statutory law, and a growing international consensus on the human right to a fair hearing, all support this proposition. Specifically, this paper argues that New York City residents who face eviction in proceedings brought before New York City's Housing Court have a right to counsel at the government's expense if they are unable to afford counsel.

In October of 2004, the Benjamin N. Cardozo School of Law and the New York County Lawyers Association (NYCLA)<sup>4</sup> hosted a conference to examine New York City's Housing Court<sup>5</sup> on the occasion of the Housing Court's thirtieth anniversary; the title and challenge of the conference was "The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?" Establishing a right to counsel for people who face eviction would vastly improve the New York City Housing Court's ability to "Better Address the Problems Before It."<sup>6</sup> The fundamental purpose of Housing Court, as with any court, is the fair and impartial administration of justice. The Housing Court's biggest problem is that the court is unable to fairly and impartially administer justice because the vast majority of people who pass through its doors facing eviction are not able to defend their interests

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<sup>4</sup> After the conference, on March 14, 2005, NYCLA passed a resolution endorsing, "as a matter of principle, a right to the appointment of free counsel for all tenants in Housing Court unable to afford counsel, and support[ing] initiatives to establish a right to the appointment of free counsel for such tenants in Housing Court, including initiatives that recognize the right for particularly vulnerable sub-populations of tenants such as the elderly." Resolution on Right to Counsel in Housing Court, New York County Lawyers Association, March 14, 2004. [www.nycla.org](http://www.nycla.org) (last visited Apr. 1, 2005).

<sup>5</sup> The New York City Housing Court was established as a special part of the Civil Court of the City of New York in 1974 and is governed by CITY CIV. CT. ACT § 110 (2005).

<sup>6</sup> The conference included a working group that discussed the issue of a right to counsel for tenants in New York City's Housing Court. The working group included "Housing Court Judges, public sector tenants' attorneys, representatives of the private bar and landlords' bar, community organizers and academics." See Conrad Johnson, *Conference Report: The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It? (Report of Working Group III: Right to Counsel)*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 601, 621 (2006). The deliberations and conclusions of the group are published elsewhere in this volume. The group's core recommendation was that "[t]he right to counsel for individuals in danger of losing their home due to a legal or "administrative proceeding must be recognized. Counsel shall be appointed based on clear guidelines for those who are unable to afford counsel." *Id.* at 634.

meaningfully because they need, yet due to their poverty cannot secure, legal assistance.<sup>7</sup> For all the reasons set forth below, the Housing Court cannot fulfill its fundamental purpose unless access to counsel is provided to all people facing eviction who need representation, whether or not they can afford it. No other measure will adequately address the Housing Court's inability to fairly and impartially administer justice: its biggest problem.

#### OVERVIEW AND SUMMARY

Most families and individuals who face eviction from their homes in New York City cannot afford or obtain counsel to represent them.<sup>8</sup> Indigent people coming before New York City's Housing Court risk losing their homes, unrepresented, in adversarial legal proceedings governed by an unfamiliar and complex web of city, state, and federal laws. In contrast, landlords are almost always represented by attorneys who are familiar with the court and the law.

A home is a precious thing to lose. One's home is one's place in the world and is crucial to one's well-being. The home is the locus of family life and child development, necessary for accessing education, jobs, and government benefits, and a prerequisite for participating in civil society and exercising political rights. The precipitous loss of one's home through eviction is a devastating and traumatic experience, partic-

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<sup>7</sup> Although this article addresses the right to counsel for tenants facing eviction in New York City's Housing Court, many of the same policy and legal arguments set forth in the article could support arguments for a right to counsel in other civil proceedings involving important rights and interests as well. Other housing matters such as foreclosure or uninhabitable dwellings, family law matters that implicate the right to child custody (where there is already a right to counsel in New York and many states), legal proceedings involving loss of employment, disability benefits or other government assistance, and deportation, for instance, all involve complex litigation, extraordinarily important individual interests, and a cost-benefit balance that militates in favor of assuring adequate procedures (i.e., a right to counsel) to protect the individual interests at stake. It is the author's view that, to give full meaning to the promise of equal justice under the law, we as a society will need to move toward a judicial system that enables people, regardless of their lack of income and assets, to obtain the assistance of counsel for matters for which a reasonable person, with the means to hire counsel, would use counsel. But this article addresses the specific and compelling (if not entirely unique) reasons to recognize a right to counsel in eviction proceedings in New York City.

<sup>8</sup> See, e.g., COMMUNITY TRAINING AND RESOURCE CENTER AND CITY-WIDE TASK FORCE ON HOUSING COURT, HOUSING COURT, EVICTION AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL iv, (1993). [hereinafter TASK FORCE]; Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 421 (2001).

ularly for low-income tenants in New York City who are displaced into a housing market that has virtually no housing that is affordable to them.<sup>9</sup> While a lucky few find alternative housing, most are forced to double up with family or friends or to enter the city's homeless shelter system. Many who initially double up eventually enter the homeless shelter system when tension and overcrowding make doubling up no longer feasible. The damage done by eviction and homelessness is psychological and physical, as well as economic. Eviction imposes long-term costs on the individuals and families affected and also taxes the social service, child welfare, and criminal justice systems.<sup>10</sup>

Eviction proceedings in New York City's Housing Court are adversarial legal proceedings, thus counsel often makes a determinative difference in the outcome. A lawyer representing a tenant knows how to navigate the court's process, knows the defenses that can be raised and how to pursue them, knows how to secure available government benefits, social services, and other assistance. In most cases, a lawyer helps the tenant avert eviction, and when eviction cannot be averted, a lawyer knows how to negotiate for time to move out before the tenant is forced out. An unrepresented tenant is sorely disadvantaged because he or she likely does not have the specialized knowledge required to maneuver through the morass of the Housing Court.<sup>11</sup>

Fundamental fairness, the constitutional rights to due process and equal protection of law, and sound social policy all require recognition of a right to counsel for tenants facing eviction. A right to counsel for tenants facing eviction in New York City's Housing Court would be consistent with a growing international consensus as to the meaning of the right to a fair hearing under international human rights law. The U.S. Supreme Court established a right to counsel for a person accused

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<sup>9</sup> Lack of housing affordable to low-income households has been a growing problem in New York City as well as throughout the country. One study found that "for every three unsubsidized units affordable for very low-income households in central cities, there are almost five very low-income households in need of them," and in the suburbs, "there are two very low-income households for every affordable unit on the market." ERIC S. BELSKY & MATTHEW LAMBERT WHERE WILL THEY LIVE: METROPOLITAN DIMENSIONS OF AFFORDABLE HOUSING PROBLEMS 15 (Sept. 2001), available at [http://www.jchs.harvard.edu/publications/communitydevelopment/belskylambert\\_w01-9.pdf](http://www.jchs.harvard.edu/publications/communitydevelopment/belskylambert_w01-9.pdf).

<sup>10</sup> Homeless children, for instance, are 50% more likely to die before their first birthday than housed poor children. Julia C. Torquati & Wendy C. Gamble, *Social Resources and Psychosocial Adaptation of Homeless School Aged Children*, 10 J. SOC. DISTRESS AND THE HOMELESS 305, 306 (2001).

<sup>11</sup> See Seron et al., *supra* note 8, at 421 (2001).

of a crime four decades ago.<sup>12</sup> New York State established a right to counsel in child custody matters over three decades ago.<sup>13</sup> Like one's liberty and custody of one's children, having a home is one of the most important and fundamental human needs that may be at jeopardy in legal proceedings. Providing counsel to low-income tenants in eviction proceedings averts the human, fiscal, and social costs of homelessness, streamlines the functioning of the court, and furthers the fair administration of justice in civil society.

I. RECOGNITION OF A RIGHT TO COUNSEL FOR PEOPLE WHO  
FACE EVICTION IS SOUND PUBLIC POLICY

A. *Eviction Proceedings and Other Legal Proceedings Through Which  
People Lose Their Homes are Too Complicated and Difficult for  
Untrained People to Defend Themselves Adequately.*

Eviction proceedings are formal court proceedings in which rules of evidence and numerous technical pleading requirements apply. Under New York law, eviction matters are special proceedings and not plenary actions, therefore evictions move more swiftly than ordinary civil proceedings.<sup>14</sup> Eviction proceedings are particularly complex and technical in New York City where a complicated collection of laws regulate rent levels<sup>15</sup> and public subsidies,<sup>16</sup> grounds for eviction,<sup>17</sup> building conditions,<sup>18</sup> building and apartment registration,<sup>19</sup> and lease renewals.<sup>20</sup>

People facing eviction proceedings without lawyers are far more likely to be evicted than similarly situated people represented by coun-

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<sup>12</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>13</sup> *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972).

<sup>14</sup> For example, the time for a respondent to interpose an answer to an eviction petition is five days, REAL PROP. ACTS. § 743 (McKinney 2005); while the time to answer a summons and complaint in an ordinary civil matter is 20 day. N.Y. CIV. PRA. § 3012(a) (McKinney 1997). Discovery is only available in special proceedings by permission of the court. N.Y. CIV. PRA. § 408 (McKinney 2005).

<sup>15</sup> See generally ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK Ch. 4, "Rent Control and Rent Stabilization" (2005).

<sup>16</sup> See generally *id.*, Ch. 5, "Federally Subsidized Housing Programs" and Ch. 6, "Particular State-regulated and City-owned Housing."

<sup>17</sup> See generally *id.*, Ch. 8 "Holdover Proceedings: Grounds and Requirements," and Ch. 9, "Nonpayment Proceedings: Grounds and Requirements."

<sup>18</sup> See generally *id.*, Ch. 19, "Obtaining Repairs and Services."

<sup>19</sup> See generally *id.*, Ch. 2, "The Residential Landlord-Tenant Relationship."

<sup>20</sup> See generally *id.*

sel.<sup>21</sup> Yet most tenants appear in New York City's Housing Court without counsel, while most landlords have representation. A 1993 study found that counsel represented fewer than 12% of the tenants appearing in the Housing Court, while over 97% of the landlords were represented.<sup>22</sup> The gross disparity in representation is due largely to the extreme poverty of most tenants appearing in the Housing Court. As of 1993, 47.9% of the tenants appearing in the Housing Court had annual incomes under \$10,000, and only 18% had incomes greater than \$25,000.<sup>23</sup>

Although New York City, New York State, the federal government, and private sources all provide some funding for legal assistance for low-income people, all of the available resources combined are not nearly enough to meet the need for counsel in civil matters. Studies have consistently shown that as a general matter throughout the country no more than 25% of the civil legal needs of low-income people are met.<sup>24</sup> New York City funds a targeted anti-eviction legal services program that plays an important role in making counsel available, but the city funding only provides lawyers for a small portion of low-income tenants in the Housing Court. Working families who do not receive public assistance and single individuals are locked out of most of the legal services funded by the city, even though they may be "technically eligible."<sup>25</sup> Further, reimbursement under the current New York City funding does not cover all of the costs of representing clients in the Housing Court; thus, the program cannot support enough legal services and legal aid lawyers to serve even eligible families receiving public assistance.

The direct result of the lack of legal representation is that many tenants are evicted and displaced unlawfully and unnecessarily. About

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<sup>21</sup> Seron et al., *supra* note 8, at 419.

<sup>22</sup> TASK FORCE, *supra* note 8, at iv. This figure includes both low-income litigants and those able to afford counsel—the percentage of low-income litigants who are represented by counsel is much lower. Also, this figure includes only those tenants who respond to an eviction notice—it does not include the many tenants who simply vacate the premises after receiving an eviction notice, and so never appear in court or retain counsel. See NEW YORK CITY FAMILY HOMELESSNESS SPECIAL MASTER PANEL, FAMILY HOMELESSNESS PREVENTION REPORT 24 (Nov. 2003) [hereinafter SPECIAL MASTER PANEL] (The Special Master Panel was appointed by New York State Supreme Court Justice Helen E. Freedman to help resolve *McCain v. Koch*, 511 N.E.2d 62 (1987), concerning the rights of homeless families to emergency shelters.)

<sup>23</sup> TASK FORCE, *supra* note 8, at iii.

<sup>24</sup> LEGAL SERVICES CORPORATION, STRATEGIC DIRECTIONS 2000-2005, at 1 (Jan. 2000).

<sup>25</sup> SPECIAL MASTER PANEL, *supra* note 22.



25,000 actual evictions are performed each year in New York City<sup>26</sup> and many more tenants leave their homes in advance of an actual eviction by a New York City Marshal.<sup>27</sup> Most cases proceed swiftly through the eviction process without the tenant ever raising available defenses or even knowing that such defenses exist. A report of The Special Master Panel in *McCain v. Koch*,<sup>28</sup> which proposed approaches to reducing homelessness, concluded that “[l]egal services can prevent evictions at every stage in the eviction process,” and that “a very small percentage of tenants who obtain representation in Housing Court eviction proceedings actually lose their home.”<sup>29</sup> Substantial evidence supports the Special Master’s conclusion in *McCain*. For example, a recent study found that in New York City Housing Court “only 22 percent of represented tenants had final judgments entered against them, compared with 51 percent of tenants without legal representation.”<sup>30</sup> Similarly, the study found tenants with attorneys were more successful in obtaining orders and stipulations requiring landlords to provide rent abatements or repairs.<sup>31</sup> New York City’s Human Resources Administration funded anti-eviction attorneys in the late 1980s that “saved 3,600 families from eviction or restored them to apartments from which they had been evicted, a 90% success rate.”<sup>32</sup> Likewise, another study found that tenants in New Haven, Connecticut represented by legal services lawyers were over three times more likely to avoid eviction than were tenants without lawyers.<sup>33</sup>

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<sup>26</sup> NEW YORK CITY DEPARTMENT OF INVESTIGATION, NEW YORK CITY MARSHALS, *available at* [http://www.nyc.gov/html/doi/html/marshals/marshal\\_main.html](http://www.nyc.gov/html/doi/html/marshals/marshal_main.html) (last visited Oct. 22, 2004).

<sup>27</sup> New York City Marshals are appointed by the Mayor and authorized to perform evictions, garnish wages and otherwise enforce judgments of the Civil Court of the City of New York. They are subject to oversight by the New York City Department of Investigation. *See* N.Y.C.T. RULES (1st Dep’t) § 6359, Joint Administrative Order 453, at §4(A).

<sup>28</sup> 511 N.E.2d 62 (1987). The *McCain* litigation, which has been pending for over 20 years, has addressed the rights of homeless families to emergency shelter.

<sup>29</sup> *See* SPECIAL MASTER PANEL, *supra* note 22, at 11, 24.

<sup>30</sup> *See* Seron et al., *supra* note 8.

<sup>31</sup> *Id.*

<sup>32</sup> NYC HUMAN RESOURCES ADMINISTRATION, A PROPOSAL FOR A LEGAL SERVICES PROGRAM TO PREVENT HOMELESSNESS 56 (Oct. 1990) (on file with author).

<sup>33</sup> *See* Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?* 13 YALE L. & POL’Y REV. 385, 413 (1995).

The prevalence of a limited education and a limited command of the English language,<sup>34</sup> and the intimidation many low-income people feel in the court further exacerbate the injustice of the system and mitigate in favor of providing counsel to assure a fair proceeding.

In addition to helping clients avert eviction, lawyers provide other assistance that helps clients avoid homelessness. Lawyers help tenants negotiate settlement agreements that allow tenants enough time to find other suitable housing.<sup>35</sup> Lawyers are more successful than unrepresented tenants in negotiating stipulations that require landlords to make essential repairs to their homes, which in turn allows tenants to remain in their homes instead of leaving as a result of substandard conditions.<sup>36</sup> Finally, tenants represented by lawyers are much more likely to comply with settlement agreements than are those without lawyers,<sup>37</sup> which minimizes the likelihood that such tenants will be sued for eviction repeatedly.

Lawyers are able to obtain far more successful outcomes than unrepresented tenants for a number of reasons. In most summary eviction proceedings, attorneys who specialize in the field, and are very familiar with the court system, the judges, and other court personnel, represent landlords. In contrast, most tenants are unable to decipher the relevant laws, which the New York State Court of Appeals has described as “an impenetrable thicket confusing not only to laymen but to lawyers,”<sup>38</sup> in a forum that a former Chief Judge of the Court of Appeals described as comparable to Calcutta on bazaar day.<sup>39</sup> Lawyers are better able to ascertain and assert the various defenses available to tenants.<sup>40</sup> Lawyers are more familiar with the Housing Court procedures and are better equipped to help the court resolve factual and legal issues, such as the amount of rent arrears tenants actually owe, the legal level rent under

<sup>34</sup> Nina Bernstein, *Proficiency in English Decreases over a Decade*, N.Y. TIMES, Jan. 19, 2005, at B1 (reporting that in 2000, more than one in four New York City residents—1.5 million people—had difficulty speaking English, a 30% increase from 1990.)

<sup>35</sup> See *id.* at 413-14; see also SPECIAL MASTER PANEL, *supra* note 22, at 24. Indeed, serious ethical concerns are raised by one-sided negotiations between attorneys and unrepresented litigants. See generally Russell Engler, *Out Of Sight And Out Of Line: The Need For Regulation Of Lawyers' Negotiations With Unrepresented Poor Persons*, 1997 CAL. L. REV. 79 (1997).

<sup>36</sup> Gunn, *supra* note 33, 413-14.

<sup>37</sup> *Id.* at 414.

<sup>38</sup> 89 *Christopher Inc. v. Joy*, 360 N.Y.S.2d 612, 618 (1974).

<sup>39</sup> Edward A. Adams, *State Commission Finds Racism in Courts: 70 Suggestions Proposed to Eliminate 2-Tier System*, N.Y.L.J., Jun. 5, 1991, at 1.

<sup>40</sup> SPECIAL MASTER PANEL, *supra* note 22, at 24.

New York City's rent regulation laws,<sup>41</sup> or the amount of rent abatements tenants are entitled to when landlords have failed to make repairs.<sup>42</sup> Moreover, an attorney's familiarity with the system, the judges, the clerks, and other court personnel eases the difficulty of navigating a case through the system. Finally, some landlords serve frivolous eviction notices in the hope that tenants will simply move out. Although such eviction notices are without merit, tenants without access to legal assistance are far more likely to fail to respond or act to protect their rights.

B. *Unnecessary, Unlawful Evictions Impose High Costs on Tenants and the City.*

Enormously important rights and interests are at stake in eviction proceedings. In addition to loss of one's home, eviction proceedings can significantly affect quality of life and the availability of household resources for other necessities of life.<sup>43</sup> Losing one's home is simply too devastating and traumatic an event for the government not to provide adequate safeguards. A home is one's place in the world and the reference point for fundamental well-being. The U.S. Constitution recognizes the importance of the home: the Fourth Amendment protects the home from unreasonable search and seizure,<sup>44</sup> while the Fifth and Fourteenth Amendments provide a right to due process before one can be removed from one's home and just compensation when one's property interest in the home is taken.<sup>45</sup>

Losing one's home is a horrendous and traumatic experience. Anyone who has ever moved residences recognizes that even the most care-

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<sup>41</sup> Ascertainning the legal rent in New York City is particularly complicated, where two different systems of rent regulation, Rent Control (NYC ADMIN CODE §§ 26-401, *et seq.* (2004)) and Rent Stabilization (NYC ADMIN CODE §§ 26-501, *et seq.* (2004)), govern rent levels for much of the rental housing stock.

<sup>42</sup> Seron *et al.*, *supra* note 8, at 427.

<sup>43</sup> There is a paucity of data and documentation on evictions. See Chester Hartman and David Robinson, *Evictions, the Hidden Housing Problem*, 14 HOUSING POL. DEB. 461 (2003).

<sup>44</sup> See, e.g., *State v. Mooney*, 588 A.2d 145, 152-53 (Conn. 1991) (Connecticut Supreme Court held that homeless man's residence under bridge abutment was protected by Fourth Amendment warrant requirement because he had been using it as his home. "The determination that a particular place is protected under the fourth amendment requires that it be one 'in which society is prepared, because of its code of values and its notions of custom and civility, to give deference to a manifested expectation of privacy.'" (citing *United States v. Tabor*, 635 F.2d 131, 138 (2d Cir.1980))).

<sup>45</sup> See, e.g., *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 101 (1989).

fully planned voluntary move is a difficult undertaking.<sup>46</sup> Eviction is a forcible, violent experience in which property is lost and damaged and lives are disrupted. Because the housing market is so tight, low-income people who are evicted are likely to become homeless, which severely compounds the trauma of eviction and displacement. As New York City Mayor Michael Bloomberg observed, homelessness “breeds alienation and cynicism; it robs a person’s potential for growth, change, and fulfillment.”<sup>47</sup>

Tens of thousands of families are affected by eviction proceedings each year. While New York City Marshals actually evict about 25,000 households each year,<sup>48</sup> many other families simply move out after being served with initial legal papers commencing an eviction proceeding or judgment authorizing an eviction.<sup>49</sup> Many evicted families end up homeless. In 2003, 1567 recently-evicted families sought emergency shelter in New York City (1% of all applicants), and 1439 of those were found eligible and provided with shelter (19% of the total shelter population).<sup>50</sup> Many more became homeless as the result of an eviction after staving off homelessness for some time by doubling up with family or friends.<sup>51</sup> These numbers do not reflect the many families who simply moved out of their homes after receiving legal papers because they believed the papers were tantamount to an eviction order or because they felt they would not be able to defend themselves.<sup>52</sup> Nor do they reflect the many single homeless people who wind up in shelters or on the streets as the result of an eviction. On a single night in 2004, the New York City Department of Homeless Services found 1482 people living on the streets or in subway stations in Manhattan, Brooklyn, and Staten Island.<sup>53</sup>

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<sup>46</sup> Displacement and dislocation has a particularly disruptive effect on the lives of low-income people. See generally CRITICAL PERSPECTIVES ON HOUSING xi (Rachel G. Bratt et al. eds., 1986).

<sup>47</sup> Press Release, Association for a Better New York, Mayor Michael R. Bloomberg, Homeless Policy Address: Ending Chronic Homelessness in New York City, available at [www.nyc.gov/html/dhs/html/press/sp062304.shtml](http://www.nyc.gov/html/dhs/html/press/sp062304.shtml) (June 23, 2004).

<sup>48</sup> New York City Department of Investigation, New York City Marshals, available at [http://www.nyc.gov/html/doi/html/marshals/marshal\\_main.html](http://www.nyc.gov/html/doi/html/marshals/marshal_main.html) (last accessed Oct. 22, 2004).

<sup>49</sup> Approximately 100,000 such orders are issued each year. See Hevesi, *id.*

<sup>50</sup> SPECIAL MASTER PANEL, *supra* note 22, at 23.

<sup>51</sup> *Id.* at 25.

<sup>52</sup> *Id.*

<sup>53</sup> NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, HOMELESS OUTREACH POPULATION ESTIMATE: HOPE 2004, available at <http://www.nyc.gov/html/dhs/downloads/pdf/hope2004results.pdf> (last visited April 25, 2005).

When evicted people end up in the emergency shelter system, the city bears a huge financial burden. While quantifying all of the costs associated with homelessness is difficult, those costs that have been quantified are staggering. The annual budget for the New York City Department of Homeless Services alone is now about \$700,000,000,<sup>54</sup> due in large measure to the high numbers of homeless people residing in emergency shelters and the high costs of the shelter system. As of 2003, the annual cost of providing emergency shelter for one homeless family for one year was approximately \$36,000.<sup>55</sup> The average family stays in the shelter system for about eleven months.<sup>56</sup> The cost of sheltering an individual adult is approximately \$23,000 per year.<sup>57</sup> In October 2003, more than 30,000 individuals and 8200 families with children were in the shelter system.<sup>58</sup>

Homelessness is enormously difficult for adults, but the effect of homelessness on children is particularly devastating. Homeless children are 50% more likely to die before their first birthday than are housed low-income children.<sup>59</sup> Homeless children are hospitalized more often than other children and are more likely to suffer acute and chronic health problems, developmental delays, and emotional and behavioral problems.<sup>60</sup> Homeless children suffer almost twice the respiratory infections, five times the diarrheal infections, seven times the iron deficiency, and significantly worse overall health status compared to housed children.<sup>61</sup> Homeless children often perform poorly in school.<sup>62</sup> Homeless children are likely to be separated from their parents to an astounding degree: in New York City in 1996, “60% of residents in shelters for single adults had children who were not with them; in Maryland, only 43% of parents living in shelters had children with them; and in Chi-

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<sup>54</sup> Bloomberg, *supra* note 47.

<sup>55</sup> SPECIAL MASTER PANEL, *supra* note 22, at 13.

<sup>56</sup> Bloomberg, *supra* note 47.

<sup>57</sup> PARTNERSHIP FOR THE HOMELESS, FACTS ABOUT HOMELESSNESS IN NEW YORK CITY, available at [http://www.partnershipforthehomeless.org/facts/facts\\_home.html](http://www.partnershipforthehomeless.org/facts/facts_home.html) (last visited April 25, 2005).

<sup>58</sup> SPECIAL MASTER PANEL, *supra* note 22, at 12.

<sup>59</sup> Torquati & Gamble, *supra* note 10, at 305.

<sup>60</sup> BOSTON MEDICAL CENTER CHILDREN'S HOSPITAL, THE DOC4KIDS PROJECT, NOT SAFE AT HOME: HOW AMERICA'S HOUSING CRISIS THREATENS THE HEALTH OF ITS CHILDREN 14 (Feb. 1998), available at [http://www.bmc.org/pediatrics/research/Research/Doc4Kids/docs4kids\\_report.pdf](http://www.bmc.org/pediatrics/research/Research/Doc4Kids/docs4kids_report.pdf).

<sup>61</sup> *Id.*

<sup>62</sup> SPECIAL MASTER PANEL, *supra* note 22, at 13.

ago, 54% of a combined street and shelter homeless sample were parents, but 91% did not have children with them.”<sup>63</sup> Homeless children are more likely than children with homes to be sent to foster care.<sup>64</sup> Of the children and youth identified as homeless by state departments of education in fiscal year 2000, only 35% lived in emergency shelters, while 34% lived doubled up with family or friends and 23% lived in motels or other locations. Yet, children and youth who do not reside in emergency shelters may not immediately be recognized as homeless and are sometimes denied the protections and services of the McKinney-Vento Homelessness Assistance Act,<sup>65</sup> which provides federal funding for shelter, social services, and other assistance to homeless people.<sup>66</sup>

Because providing counsel for tenants facing eviction would avert evictions in a significant number of cases,<sup>67</sup> a right to counsel would avert much of the devastating personal costs of eviction and homelessness, as well as much of the costs society bears for addressing the consequences of homelessness.

C. *Providing Counsel for Low-Income People in Housing Court is Cost-Effective and Will Have a Positive Effect on Housing Policy and Housing Court*

Over the years, providing counsel for low-income people has proven to be cost-effective, as was concluded in the *McCain* Special Master’s report, which states: “[A]nti-eviction legal assistance as well as tenant education, tenant outreach, and tenant organizing may provide cost-effective ways to help families maintain apartments.”<sup>68</sup> For more than a decade, New York City has acted on the belief that money is saved by providing legal counsel for indigent citizens. The city appropriates approximately \$3,000,000 annually in Emergency Assistance Funds (EAF), which leverages an additional \$9,000,000 in state and federal funds for legal representation of low-income public assistance

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<sup>63</sup> NATIONAL COALITION FOR THE HOMELESS, HOMELESS, FAMILIES WITH CHILDREN: NCH FACT SHEET #7 (Jun. 2001), at <http://www.nationalhomeless.org/families.html> (last visited Feb. 3, 2005).

<sup>64</sup> SPECIAL MASTER PANEL, *supra* note 22, at 13.

<sup>65</sup> 42 U.S.C. § 11403h (2005).

<sup>66</sup> NATIONAL COALITION FOR THE HOMELESS, HOW MANY PEOPLE EXPERIENCE HOMELESSNESS: NCH FACT SHEET #2, at [www.nationalhomeless.org/numbers.html](http://www.nationalhomeless.org/numbers.html) (last visited Feb. 3, 2005).

<sup>67</sup> See Seron et al., *supra* note 8, at 429.

<sup>68</sup> SPECIAL MASTER PANEL, *supra* note 22, at 45.

eligible families facing eviction.<sup>69</sup> A study of the EAF program in 1996 found that anti-eviction work conducted with the funds kept 6000 low-income families in their homes.<sup>70</sup> As a result, the city saved more than \$27,000,000 that would have been spent to house many families in homeless shelters.<sup>71</sup> In 1993, another study calculated that providing counsel to low-income tenants facing evictions in the city would produce a net savings of \$66,966,097.<sup>72</sup> A separate study, conducted in 1990 by the New York City Department of Social Services, found that every dollar spent on eviction prevention saves four dollars in costs associated with homelessness.<sup>73</sup>

Adaptations in court processes and efforts to provide counsel short of a right to counsel have already been tried; the evidence shows these efforts have been inadequate in addressing the needs of indigent tenants facing eviction. Pro se advice<sup>74</sup> and materials,<sup>75</sup> pro bono efforts,<sup>76</sup> more understandable laws,<sup>77</sup> targeted advocacy efforts by public interest attorneys,<sup>78</sup> more efficient court procedures, technology, and limited as-

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<sup>69</sup> Memorandum from James H.R. Windels to Committee on Pro Bono and Legal Services, Association of the Bar of the City of New York, (Apr. 9, 2002) (on file with the journal).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> TASK FORCE, *supra* note 8, at iv.

<sup>73</sup> See New York City Department of Social Services, *Homelessness Prevention Program: Outcomes and Effectiveness*, 1990, at 2 (on file with author).

<sup>74</sup> In recognition of the fact that most tenants appear in the Housing Court without counsel, CITY CIV. CT. ACT §110(o) (2005) requires that there be sufficient numbers of *pro se* attorneys, also called "Housing Court Counselors," to assist people who are without counsel. CITY CIV. CT. ACT §110(o) (2005).

<sup>75</sup> See Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 869 (2004). Under Blasi's supervision, the Empirical Research Group at UCLA School of Law evaluated a self-help center for tenants in eviction cases and found little difference between objective outcomes for assisted tenants and a control group of unassisted tenants. Ironically, the assisted tenants were more disappointed in the outcomes because they were more cynical about the proceedings. *Id.*

<sup>76</sup> Since 1988, in addition to *pro se* attorneys, the New York City Housing Court has had a volunteer lawyer project through which volunteer lawyers are available one evening a week to provide free legal advice to unrepresented owners and tenants. SCHERER, *supra* note 15, § 7:55.

<sup>77</sup> Efforts to make laws more understandable and accessible are not new. The early nineteenth century movement to codify law was in part an effort to diminish (and in the eyes of some, eliminate) the role of lawyers. Reformers succeeded in codifying more of the law. They failed to reduce the role of lawyers. See Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 *FORDHAM L. REV.* 984, 993-94 (2004).

<sup>78</sup> Law reform litigation can have a significant impact on the rights of the poor but cannot substitute for representation of individuals on a case-by-case basis. See generally Raun Rasmussen, *Affirmative Litigation Under the Legal Services Corporation Restrictions*, 34 *CLEARINGHOUSE REV.* 428 (2000).

sistance (known as “unbundling”)<sup>79</sup> all can help, but fail to make enough of a difference.

No doubt, providing counsel to all tenants who face eviction in New York City’s Housing Court would be a costly undertaking. Government funding for legal assistance would have to be significantly expanded to meet the need.<sup>80</sup> However, significant cost savings would offset the cost of counsel. Further, there are many ways to mitigate the cost of counsel and any possible additional administrative or time burden on the Housing Court that would result from having representation from both sides.

In addition to enormous cost savings associated with averting homelessness, a right to counsel for tenants facing eviction would have further salutary effects. The existence of a right to counsel in the Housing Court could well be the impetus for addressing the long-standing problems associated with the enormously high volume of cases in the current housing dispute resolution system.<sup>81</sup> If both sides in eviction proceedings are represented by counsel with the wherewithal to litigate effectively, there will be incentive to keep matters out of court. Thus, the existence of a right to counsel could lead policy makers to search for ways to avert having landlord-tenant disputes resolved in the complex adversarial court system by instituting dispute resolution measures that could keep eviction matters from ever reaching court. Policy makers could, for example, consider setting up some kind of uncomplicated pre-litigation dispute resolution mechanism, such as an arbitration system, that requires no lawyers for either side and that involves city agencies and social services.<sup>82</sup> A right to counsel could also encourage the

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<sup>79</sup> See Hon. Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1108 (2002). The term “unbundling” in recent years has been used to refer to the practice of dividing up tasks associated with legal representation and providing clients with assistance with a particular task rather than full representation in the legal matter. For example, an attorney providing “unbundled” assistance might help a tenant in an eviction proceeding to draft and file an answer to the landlord’s petition, but not appear in court on behalf of the tenant. *Id.*

<sup>80</sup> Just how much it would cost to provide counsel for all tenants who face eviction yet cannot afford counsel is a difficult calculation to make. The 1993 study of the costs and benefits of a right to counsel concluded that, although the cost of providing counsel would be \$84 million, that cost would be offset by savings in public costs associated with homelessness for a net savings to the government of \$67 million. Resolution on Right to Counsel in Housing Court, *supra* note 4, at iv.

<sup>81</sup> See *supra* note 6.

<sup>82</sup> See DEBORAH L RHODE, ACCESS TO JUSTICE 86-87.



adoption of laws that help foster pre-court compliance with legal obligations and streamlined court processes.<sup>83</sup>

A right to counsel could also be the impetus to provide a quality legal education to landlords and tenants to enable them to recognize and assert their rights and resolve disputes before a need for government intervention arises. A right to counsel could ultimately help solve fundamental social problems that create housing disputes. Problems such as the inability of low-income people to afford market-rate housing in New York City could be ameliorated by raising the public assistance shelter allowance to a level reasonably related to the actual level of rents,<sup>84</sup> extending the Senior Citizen Rent Increase Exemption (SCRIE) program<sup>85</sup> to all low-income people, increasing the number of housing subsidies,<sup>86</sup> and expanding the stock of low-income housing. Implementation of these and other measures to address the causes of landlord-tenant litigation will reduce the Housing Court docket, but are unlikely to take place unless a right to counsel is in effect.

Finally, when counsel represents both landlords and tenants, judges will receive a fair representation of the facts and law. As a result, litigation will proceed more smoothly and cases will more likely be deter-

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<sup>83</sup> A model law, for example, could be an amended version of the Spiegel Law to tighten up its enforcement and expand its protections beyond public assistance recipients to other litigants. N.Y. SOC. SERV. LAW § 143-b (McKinney 2004). Under the Spiegel Law, eviction proceedings are stayed when a public assistance recipient's rent has been withheld by a social services agency because of the existence of hazardous housing code violations in the premises. *Id.* This "clean hands" requirement provides a powerful incentive for landlords to correct dangerous housing conditions prior to commencing a proceeding. Extending the benefits of this statute to all tenants would have a salutary effect on housing code enforcement and would diminish housing court litigation because tenants would be far less likely to withhold rent in order to coerce a landlord to make repairs.

<sup>84</sup> See *Jiggetts v. Grinker*, 553 N.E.2d 570, 575 (1990).

<sup>85</sup> The Senior Citizen Rent Increase Exemption Program ("SCRIE") provides exemptions from all or part of certain rent increases for senior citizens who live in rent regulated, Mitchell-Lama, and other state-subsidized housing, and whose household income is below statutory limits. Eligible households are exempt from increases that bring their rent to over one-third of their household income. If the rent is already at or over one-third of household income, eligible senior citizens are exempt from any further rent increase, but rents are not rolled back. The SCRIE Program is authorized by state enabling legislation under the REAL PROP. TAX LAW § 467 (McKinney 2004), and implemented through local legislation. N.Y. CITY ADMIN. CODE § 26-406 (1992); N.Y. CITY ADMIN. CODE § 26-509 (1992); N.Y. CITY ADMIN. CODE § 26-601.

<sup>86</sup> National Low Income Housing Coalition, *Changing Priorities*, a look at HUD between 1976-2002, at <http://www.nlihc.org/pubs/changingpriorities.pdf>. On both the federal and state levels, there has been a precipitous decline in the governmental commitment to financing and subsidizing affordable housing for low-income people. Between 1976 and 2002, budget authority for federal housing assistance dropped by \$28.1 billion. *Id.*

mined with finality, which will result in fewer cases over time. Furthermore, the availability of counsel will encourage litigants to resolve disputes before bringing them to court and will result in reducing the Housing Court's docket. The availability of representation will improve the decorum at the Housing Court and foster greater confidence in, and respect for, the court and for the administration of justice in New York.

Eviction of low-income people not only leads to homelessness, it leads to long-term loss of low-income housing because the rent laws permit significant rent increases for apartments that become vacant.<sup>87</sup> For individuals, providing counsel will avert homelessness, contribute to enforcement of the laws that relate to housing quality and affordability, and foster long-term stability. Establishing a right to counsel for people facing the loss of their homes reinforces faith in our system of justice and supports a strong civil society. Establishing a right to counsel saves enormous short and long-term social costs and is sound social policy.

D. *People Who Face Losing Their Homes Must Have a Legally-Enforceable Right to Counsel: Funding for Legal Assistance Programs Does Not, by Itself, Solve the Problem.*

The right to counsel for people facing eviction must be an enforceable right that can be exercised by the individuals who need counsel. Legal assistance programs for the poor are important vehicles for providing counsel, but if the need for counsel in eviction proceedings is seen simply as a compelling argument for increased funding for legal assistance programs, the core point will be missed. Although increasing funding is crucially important, funding alone is not the complete answer. Legal assistance programs must operate in their own institutional self-interest out of necessity. Legal assistance programs must secure sufficient funds to support the overall costs of their services, including personnel, office space, and administrative costs. The programs must be

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<sup>87</sup> When a rent stabilized apartment is vacant, a landlord is entitled to a vacancy rent increase. See *791 Eighth Avenue LLC v. Romero*, N.Y.L.J., Apr. 3, 2002, at 17. In addition, the Rent Regulation Reform Act of 1997 authorized deregulation of vacant rent stabilized apartments whose rents are at or above \$2,000 after June 20, 1997 (the effective date of the Act) N.Y. CITY ADMIN. CODE § 26-504.2 (1992). This deregulation provision for vacant apartments renting \$2,000 or over provides landlords with a powerful incentive for seeking vacancies because at any time a \$2,000 rent level is reached, a vacancy will allow the owner to deregulate the unit. Deregulation not only exempts the unit from the limitations on rent increases, it also eliminates the requirement that the landlord provide just cause to evict the tenant. *Id.*

able to say no to additional caseload obligations when the programs do not have the resources to provide assistance and be in a position to demand additional funding when called upon to address additional need. Without a mandated right to counsel, funding for legal assistance programs is subject to legislative whims. If funding is inadequate at the outset or reduced over time, services cannot meet need.<sup>88</sup>

When access to counsel in a legal proceeding is a right, the situation changes. If access to counsel is a right, sitting judges charged with the administration of justice in specific cases are able to appoint counsel in order to ensure a fair proceeding when counsel is not otherwise obtainable by the litigant; judges also then have the power to ensure that the counsel who appear before the court are competent.<sup>89</sup>

The distinction between making counsel available by funding legal services programs and making counsel available by establishing an enforceable right to counsel is important. Even the best funded legal assistance programs are at some point likely to face limitations of staff and funding that result in finite limitations on the numbers of cases that can be handled. When the limitations of legal services programs are reached, the programs reasonably and logically deny additional applicants for services. In legal proceedings where counsel is a right, it is unacceptable to deny indigent litigants counsel in any situation. If counsel is a right, the litigant will be able to prevail upon the court for a remedy, including assignment of counsel and a stay of further proceedings until counsel has an opportunity to appear. In the absence of a right to counsel, access to counsel is limited by the capacity of available resources. Further, if counsel appears, but in the court's view is incom-

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<sup>88</sup> Of course, a recognized right to counsel does not automatically guarantee that sufficient funding will be appropriated to assure that the appropriate quantity and quality of counsel will be available, but it does provide an enforceable legal claim when the right is not adequately funded. *See, e.g.*, *NYCLA v. State*, 763 N.Y.S.2d 397, 419 (N.Y. Sup. Ct. 2003) *appeal withdrawn*, 767 N.Y.S.2d 603 (N.Y. App. Div. 2003). New York's statutory caps on assigned counsel rates for criminal court and family court work violated the constitutional and statutory right to meaningful and effective representation. The caps resulted in an insufficient number of assigned panel attorneys available, denying litigants meaningful representation and seriously impairing the courts' ability to function and process cases in a timely fashion. *Id.*

<sup>89</sup> *See, e.g.*, *NYCLA v. State*, 763 N.Y.S.2d 397, (N.Y. Sup. Ct. 2003), *appeal withdrawn*, 767 N.Y.S.2d 603 (N.Y. App. Div. 2003) "The State of New York continues to ignore its constitutional obligation to the poor by failing to increase the assigned counsel rates that result, in many cases, in denial of counsel, delay in the appointment of counsel, and less than meaningful and effective legal representation. Accordingly, this court declares those portions of § 722-b of the County Law; § 245 of the Family Court Act and § 35 of the Judiciary Law to be unconstitutional as applied." 763 N.Y.S.2d at 399.

petent, the court can fashion a remedy to assure competent representation.

## II. THE U.S. CONSTITUTION, NEW YORK CONSTITUTION, NEW YORK CIVIL PRACTICE LAW AND RULES, AND NEW YORK CIVIL RIGHTS LAWS REQUIRE RECOGNITION OF THE RIGHT TO COUNSEL

Most people think there already is a right to counsel for the poor in civil matters such as evictions.<sup>90</sup> No wonder: an obvious injustice exists in a system in which landlords are routinely represented by counsel familiar with the laws and the culture of the courts, whereas tenants are routinely not represented by counsel. As discussed above, public policy and economic reasons present compelling justification for providing counsel to people facing eviction. Likewise, sound and persuasive legal theories also support the guarantee of a right to counsel for tenants in the Housing Court. The right to due process and the right to equal treatment by the courts provide a constitutional basis for a right to counsel in the eviction context. In addition, Article 11 of New York Civil Practice Law and Rules (CPLR) authorizes the Court to assign counsel in civil proceedings, a discretionary power that is, in most eviction cases, abused if not exercised in favor of assigning counsel.

### A. *Due Process*

Due process is at its core a simple, intuitive notion: people are entitled to a meaningful opportunity to be heard in court when faced with the loss of important property interests. In *Matthews v. Eldridge*<sup>91</sup> the U.S. Supreme Court analyzed the “process due” as a function of three factors: the interest at stake, the difference that would be made by the protection sought, and the government’s interest.<sup>92</sup> Analyzed according to these factors, a right to counsel for persons facing eviction in the Housing Court is warranted. As discussed above, tenants facing

<sup>90</sup> See RHODE, *supra* note 82, at 104.

<sup>91</sup> 424 U.S. 319 (1976).

<sup>92</sup> *Id.* The Court articulates those factors as follows:

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

*Id.* at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1969)).

eviction have enormously important interests at stake,<sup>93</sup> counsel makes an important, often determinative, difference in the outcome of the proceeding and the government has a strong interest in averting the costs of homelessness and in the fair administration of justice. Thus, all of the *Matthews* factors weigh strongly in favor of a due process right to counsel for tenants facing eviction. However, in contrast to the principle established in *Gideon v. Wainwright*,<sup>94</sup> the U.S. Supreme Court has been unwilling to extend the right to counsel broadly to civil litigation. In *Lassiter v. Department of Social Services*,<sup>95</sup> for example, the Supreme Court failed to find a prima facie due process right to counsel in the fundamental matter of the termination of parental rights.<sup>96</sup>

On the other hand, state courts are free to interpret the due process clauses of state constitutions independent of the federal analysis of the U.S. Constitution.<sup>97</sup> Indeed, as the New York Court of Appeals under Chief Judge Judith Kaye's leadership has demonstrated, the New York Courts can and often do decide what the right to due process requires under the New York State Constitution independently of the U.S. Supreme Court's interpretation of the U.S. Constitution.<sup>98</sup>

The text of the Due Process Clause in the New York Constitution, article I, section 6, is identical to its federal counterpart.<sup>99</sup> Pursuant to the New York State due process requirement and prior to the enactment of some of the statutory provisions discussed below, New York courts ordered the appointment of counsel in a number of civil settings. Court-ordered counsel is required in neglect proceedings where a person faces a loss of child custody.<sup>100</sup> The Court of Appeals held that parental rights may not be curtailed in New York without "a meaningful oppor-

<sup>93</sup> Courts have acknowledged the importance of the right at stake in eviction by recognizing the right to emergency temporary shelter in New York. See *Barnes v. Koch*, 518 N.Y.S. 2d 539, 542 (N.Y. Sup. Ct. 1987).

<sup>94</sup> 372 U.S. 335 (1963).

<sup>95</sup> 452 U.S. 18 (1981). *Lassiter* involved termination of parental rights of a mother who was incarcerated at the time of the proceeding. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> See William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

<sup>98</sup> See *People v. LaValle*, 817 N.E.2d 341, 366 (N.Y. 2004) ("[O]n innumerable occasions this court has given—[the] State Constitution an independent construction, affording the rights and liberties of the citizens of this State even more protection than may be secured under the United States Constitution." (quoting *Sharrock v. Dell-Cadillac, Inc.*, 45 N.Y.2d 152,159 (1978))).

<sup>99</sup> Compare U.S. CONST. amend. XIV with N.Y. CONST. art. I § 6.

<sup>100</sup> See *In re Ella B.*, 285 N.E.2d 288 (N.Y. 1972).

tunity to be heard, which in these circumstances includes the assistance of counsel.”<sup>101</sup> New York also requires court-appointed counsel if counsel cannot otherwise be secured in proceedings involving revocation of probation.<sup>102</sup> Both of these decisions were rendered as a matter of state *and* federal constitutional law prior to *Lassiter*.<sup>103</sup> While there is no subsequent case law specifically affirming that their explication of state constitutional law would remain the same after *Lassiter*, there is no reason to expect otherwise. Indeed, after *Lassiter*, in *In re Application of St. Lukes-Roosevelt Hosp. Center*,<sup>104</sup> a New York court determined that *Matthews v. Eldridge* created a constitutional right to counsel for a woman about to be involuntarily transferred to a nursing home.<sup>105</sup>

As a result of litigation and because it is the right thing to do, New York statutes subsequently guaranteed an absolute right to counsel in a number of civil legal matters in which fundamental rights are at issue. The right to counsel is guaranteed by statute in all New York proceedings in which custody of one’s child is at stake, including family court proceedings<sup>106</sup> and surrogate’s court proceedings.<sup>107</sup> The right to counsel is also guaranteed in Article 81 proceedings involving mentally ill patients.<sup>108</sup> A catchall statutory provision exists guaranteeing a right to counsel at the trial and appellate levels for poor litigants in cases involving civil commitment of adults or children, termination of parental rights for mentally ill or retarded parents, and revocation of consent for adoption, as well as cases in which appointment of counsel is “mandated by the constitution of this state or of the United States.”<sup>109</sup> The New York Court of Appeals has relied on this latter provision when requiring appointed counsel in cases involving forced administration of antip-

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<sup>101</sup> *In re Guardianship and Custody of Ornieka J.*, 491 N.Y.S.2d 639, 641 (N.Y. App. Div. 1985) (citing *In re Ella B.*, 285 N.E. 2d 288).

<sup>102</sup> See *People ex rel. Menechino v. Warden*, 267 N.E.2d 238, 240 n.5 (1971) (“[A] parolee is entitled to an attorney under the provisions of section 6 of article I of the New York State Constitution pertaining to the right to counsel and its guarantee of due process.”) (citation omitted).

<sup>103</sup> 452 U.S. 18.

<sup>104</sup> 607 N.Y.S.2d 574 (N.Y. Sup. 1993).

<sup>105</sup> For New York cases regarding a due process or other bases for granting a stay for the purpose of getting counsel, see, e.g., *Lang v. Pataki*, 707 N.Y.S. 2d 90 (App. Div. 2000) (challenge to omnibus housing legislation that, among other measures, limited the availability of adjournment in summary eviction proceedings).

<sup>106</sup> See N.Y. FAM. CT. ACT § 262 (McKinney 1998).

<sup>107</sup> See N.Y. Surr. Ct. Proc. Act § 407 (McKinney 1994).

<sup>108</sup> See N.Y. MENTAL HYG. § 81.10 (McKinney 2004).

<sup>109</sup> N.Y. JUD. CT. ACTS § 35(1)(a) (McKinney 2002).

sychotic medications.<sup>110</sup> Thus, New York State has a long-established tradition of recognizing the importance of the right to counsel as a matter of the process due in the administration of justice.

### B. *Equal Treatment*

The lack of a right to assigned counsel for tenants facing eviction in New York City's Housing Court implicates state and federal constitutional and statutory rights to equal treatment. The vast majority of unrepresented tenants who face eviction in the Housing Court are low-income; most are people of color.<sup>111</sup> Although little demographic data exists on litigants in other courts, this author believes it is likely that empirical studies would show that in other New York civil litigation forums the litigants belong to higher income brackets, are represented by counsel in far higher numbers, and are whiter. In spite of their power to do so, Housing Court judges do not appoint counsel, nor does the government sufficiently fund programs for provision of counsel to assure that those who need counsel are represented. Thus, tenant litigants in Housing Court (mostly poor and non-white) are forced to litigate in defense of their homes without counsel, while litigants in other courts (wealthier and whiter) are able to litigate their matters with counsel. The failure of the court or government to use their powers to assign or fund counsel results in a disparate and far more disadvantageous dispute resolution system for the tenant facing eviction when compared to the other courts.

The U.S. Supreme Court has found that disparate impact of government action on people based on income or racial status does not violate the Equal Protection Clause of the U.S. Constitution.<sup>112</sup> However, government policies that disparately impact on people of color do violate the federal Fair Housing Act.<sup>113</sup> New York City and New York State have additional comprehensive civil rights legislation.<sup>114</sup> Due to

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<sup>110</sup> See *Rivers v. Katz*, 495 N.E.2d 337, 343-44 (N.Y. 1986).

<sup>111</sup> See *TASK FORCE*, *supra* note 8, at iii.

<sup>112</sup> See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Washington v. Davis*, 426 U.S. 229 (1976).

<sup>113</sup> See *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988) (finding a town's refusal to rezone in order to permit multifamily housing in a predominantly white neighborhood was discriminatory under Title VIII of the Civil Rights Act of 1968, because of the disparate impact of the zoning on minority population).

<sup>114</sup> See N.Y. CITY ADMIN. CODE § 8-100 *et seq.* (2005); N.Y. EXEC. LAW § 296 (McKinney 2005); N.Y. CIV. RIGHTS § 47 (McKinney 2005).

the nature of the Housing Court, tenants cannot obtain a meaningful opportunity to be heard without counsel; yet because of their poverty, indigent tenants are often unable to obtain counsel. Thus, the disparity in representation affects access to the justice system<sup>115</sup> and the court's failure to provide poor tenants of color with a meaningful opportunity to be heard may give rise to viable civil rights claims because of the unique importance of access to the court.<sup>116</sup>

The disparity in treatment of low-income tenants facing eviction manifests in other ways, as well. Overall, the court system in New York state spends far more money per case in court time and resources (judges, other court personnel, courtrooms, etc.) adjudicating disputes that involve people who are wealthy enough to afford counsel than the state spends on Housing Court proceedings involving unrepresented litigants. The New York Supreme Court, Court of Claims, and other state courts that entertain disputes of wealthier litigants involve larger courtrooms, more highly paid judges, and more time consuming processes than the Housing Court proceedings. The more expensive civil claims of wealthy litigants cost the system far more per dispute than the Housing Court eviction proceedings, which are often a one-sided, truncated, and rapidly-processed form of litigation. For instance, while New York City's Housing Court handled 19.7% of the civil cases filed in New York State in 2004, the court had only 7% of the non-judicial staff.<sup>117</sup> The disparity in public resources devoted to eviction proceedings when compared with high stake civil suits is another way unrepresented litigants are denied equal treatment.<sup>118</sup>

Society subsidizes the cost of legal representation for people of means, even when the subject of the suit is not serious, while failing to provide legal representation to low-income people (in New York City's

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<sup>115</sup> The importance of meaningful access to the courts was recently underscored by the U.S. Supreme Court in *Tennessee v. Lane*, 541 U.S. 509 (2004) (involving a claim by disabled individuals that they were denied physical access to Tennessee courts).

<sup>116</sup> See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (granting an indigent litigant the right in a divorce proceeding to a waiver of court's filing fee because of the fundamental right of access to courts).

<sup>117</sup> Interview with Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York, in New York, N.Y. (Feb. 25, 2005) (on file with author).

<sup>118</sup> To address this disparity, Wilhelm Joseph, Executive Director of the Legal Aid Bureau of Maryland has suggested that filing fees in civil litigation in which the amount in dispute exceeds \$1,000,000 could be increased significantly to raise funds to provide free legal assistance to the indigent. Wilhelm Joseph, *The Right to Counsel in Civil Cases*, JUSTICE J., March 2004 (Legal Aid Bureau, Md.) (on file with author).



Housing Court, overwhelmingly people of color) in situations where the basic human necessity of a home is at risk. For example, under the Internal Revenue Code, legal fees other than those that are incurred for personal reasons or that must be capitalized, have been generally deductible from taxable income by the taxpayer.<sup>119</sup> Tax deduction for legal fees leads to countless millions, if not billions, of dollars of foregone tax revenue annually, which in essence translates into subsidies for legal representation of the middle and upper class.<sup>120</sup>

The federal subsidy of legal fees for people who can afford to pay them is yet another illustration of the disparate treatment of low-income tenants who must defend their homes in the Housing Court proceedings, yet cannot afford to pay for counsel.

### C. CPLR Article 11

Housing Court judges have the authority to assign counsel to indigent tenants. CPLR Article 11 (New York's "poor person" statute) gives judges the power to assign counsel in a proper case for an individual who is found to be indigent.<sup>121</sup> This provision is rarely used.<sup>122</sup> However, the failure to assign counsel in an appropriate case can be a violation of the obligation to exercise appropriate discretion under Article 11 of the CPLR.<sup>123</sup>

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<sup>119</sup> I.R.C. §§ 162, 212 (1954).

<sup>120</sup> According to the Legal Services Corporation, local legal service agencies received a combined total of \$561,000,000 in federal, state, local, and IOLTA funds, foundation grants and other private donations in fiscal year 1998. A half dozen law firms in the United States each took in more than \$600,000,000 each that year. See Roger Parloff, *Skadden: A Flexible Firm Breaks the Billion Dollar Barrier*, 22 AM. LAW. 88 (2000). For further discussion of these and other similarly revealing statistics, see Justice Earl Johnson, Jr., *Equal Access To Justice: Comparing Access To Justice In The United States And Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83 (2000).

<sup>121</sup> N.Y. C.P.L.R. § 1102 (McKinney 1997); see also *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975) ("[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case.").

<sup>122</sup> There is no documentation of the extent to which counsel is assigned under CPLR Article 11 and this statement is based on the author's observation. Probable reasons for the limited use of the power to assign counsel are that litigants and judges are not sufficiently familiar with the existence of the provision, and because the provision does not authorize payment, so judges would not easily be able to determine who to appoint as counsel.

<sup>123</sup> See N.Y. C.P.L.R. § 1102 ("The court in its order permitting a person to proceed as a poor person may provide an attorney."); see also Andrew Scherer, *Gideon's Shelter: The Need To Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L.L. REV. 557, 586 n.122 (1988).

CPLR Article 11 is rooted in the long-standing common law principle that the courts have the power to assign counsel for poor people when needed.<sup>124</sup> New York common law, like that of the other colonial states, is based upon the common law of England.<sup>125</sup> “New York’s first Constitution in 1777 recognized and adopted the existing common law of England and each succeeding Constitution has continued that practice.”<sup>126</sup> Article I, section 14 of the present-day state constitution provides that the pre-1775 common law not altered by statute shall continue to be the law of the state.<sup>127</sup>

One of the English common law provisions that has remained in force is the right of poor persons to bring *in forma pauperis* suits, the English common law right of meaningful access to the courts in spite of lack of income. This common law right was later adopted in statute.<sup>128</sup> In 1828, the New York Revised Statutes were amended to provide that “[e]very poor person, not being of ability to sue, who shall have a cause of action against any other, may petition the court in which such action is depending, or in which it is intended to be brought, for leave to prosecute as a poor person, and to have counsel and attorneys assigned to conduct his suit.”<sup>129</sup> In cases where such leave was granted, the indigent litigant was entitled to “prosecute his suit without paying any fees to any officers or ministers of justice, . . . and if he be non-suited, or a verdict or judgment be given against him . . . he shall not be liable for any costs in such suit.”<sup>130</sup> This statute is the antecedent to and basis for CPLR sections 1101 and 1102.

While thirty years ago the Court of Appeals held in *In re Smiley*<sup>131</sup> that “there is no absolute right to assigned counsel; whether in a particular case counsel shall be assigned lies instead in the discretion of the

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<sup>124</sup> See *Hotel Martha Washington Management Co. v. Swinick*, 322 N.Y.S.2d 139 (N.Y. App. Div. 1971); *Jacox v. Jacox*, 350 N.Y.S. 2d 435 (N.Y. App. Div. 1973); *Emerson v. Emerson*, 308 N.Y.S.2d 69 (N.Y. App. Div. 1970); *Brounsky v. Brounsky*, 308 N.Y.S. 2d 72 (N.Y. App. Div. 1970).

<sup>125</sup> See *Brown v. State*, 674 N.E.2d 1129, 1138 (N.Y. 1996); *Yearwood v. Yearwood*, 387 N.Y.S.2d 433 (N.Y. App. Div. 1976).

<sup>126</sup> *Brown*, 674 N.E.2d at 1138.

<sup>127</sup> N.Y. CONST. art. I § 14.

<sup>128</sup> See, e.g., *Jeffreys v. Jeffreys*, 296 N.Y.S.2d 74, 78 (N.Y. Sup. Ct. 1968) (“New York followed the English common law as expanded by statute.”).

<sup>129</sup> N. Y. REVISED STATUTES, ch. 8 tit. 1, § 1 (1828).

<sup>130</sup> N.Y. REVISED STATUTES, ch. 8, tit. 1, §§ 1, 4 (1828).

<sup>131</sup> *In re Smiley*, 330 N.E.2d 53, at 55.

court,”<sup>132</sup> courts have been willing to exercise that discretion in favor of assigning counsel. In one civil case where “a substantial amount of money” was at stake, the Appellate Division required that counsel be appointed as a discretionary matter.<sup>133</sup> In another case, counsel was appointed for a tenant who was away performing military service.<sup>134</sup> For much the same set of reasons that assignment of counsel is warranted as a matter of due process—the interest at stake, the difference made by counsel and the government’s interest<sup>135</sup>—the appropriate exercise of discretion in eviction proceedings should, as a general matter, result in assignment of counsel.

### III. THE UNITED STATES IS NOT SYNCHRONIZED WITH OTHER DEMOCRACIES

The experience of other countries in addressing the right to counsel in civil litigation is instructive. A right to counsel in complex civil legal matters for those who cannot afford to pay for counsel is now recognized in many other countries.<sup>136</sup> Yet in spite of its wealth and long, rich history of judicial vindication of constitutional rights, the U.S. lags far behind other parts of the world in recognizing the right to counsel in civil litigation.

For centuries, European nations have espoused some version of the social contract theory of the Enlightenment, which complies with Hobbes’ “Precept of the Law of Nature”: equal justice for the poor and the rich alike.<sup>137</sup> Based on the social contract theory, statutory rights to

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<sup>132</sup> *Id.*

<sup>133</sup> *Davis v. Hanna*, 468 N.Y.S.2d 729, 731 (App. Div. 1983).

<sup>134</sup> 444 W. 54th St. Tenants Assoc. v. Costello, 523 N.Y.S. 2d 374, 376 (N.Y. Civ. Ct. 1987).

<sup>135</sup> *See supra* Section IIA.

<sup>136</sup> Justice Earl Johnson of the California Court of Appeal has been tracing access to justice in other countries for years, and comparing practices elsewhere to those in the U.S. *See, e.g.*, MAURO CAPPELLETTI ET AL., TOWARD EQUAL JUSTICE: A COMPARATIVE STUDY OF LEGAL AID IN MODERN SOCIETIES (1981); Hon. Earl Johnson, Jr., *Will Gideon’s Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 205 (2003) [hereinafter *Gideon’s Trumpet*]. Justice Johnson has long found that the U.S. comes up short: “[a]t some point, Americans will look back and ask how concepts like ‘due process,’ ‘equal protection of the law’ and ‘equal justice under law’ were anything but hollow phrases, while our society still tolerated the denial of counsel to low-income civil litigants.” Earl Johnson, Jr. & Elizabeth Schwartz, *Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants*, 11 LOY. L.A. L. REV. 249, 249-50 (1978).

<sup>137</sup> *Gideon’s Trumpet*, *supra* note 136, at 205 (citation omitted).

counsel were created in both civil and criminal cases in many European countries.<sup>138</sup> In 1851, France enacted a statute that provided a civil right to counsel.<sup>139</sup> Italy created the same right in 1865 and Germany in 1877.<sup>140</sup> While governments initially drafted private lawyers to provide these services without payment, in the twentieth century some governments began to pay appointed counsel.<sup>141</sup> More importantly, however, is the fact that the right to counsel in civil cases has been included in almost all European Constitutions so that “all citizens were ‘equal before the law’ or in all judicial proceedings they were guaranteed ‘fair trials.’”<sup>142</sup> The social contract theory of the Enlightenment found its way into the Declaration of Independence and the U.S. Constitution. While the European Court refers to a right to a “fair hearing,” this concept is indistinguishable from the right to “due process” in the United States.<sup>143</sup> Despite the differences in the language employed, the fundamental import of these concepts remains substantially similar if not identical.<sup>144</sup>

In 1937, Switzerland’s Supreme Court became the first high court to address the problem of whether indigent defendants should be provided free government-funded counsel.<sup>145</sup> In the Judgment of Oct. 8, 1937, the Swiss court held that equality before the law is required in civil cases for all Swiss and is not attainable for poor people unless they are provided with free counsel.<sup>146</sup> In 1972, the Swiss Supreme Court held that the same right applies to criminal defendants.<sup>147</sup>

In 1953, the German Constitutional Court held that the German Constitution’s fair hearing guarantee may require courts to appoint free counsel for indigent defendants when the legal aid statutes do not suffice.<sup>148</sup>

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See generally CAPPELLETTI ET AL., *supra* note 136, at 19 n.57 (1975) (citation omitted).

<sup>142</sup> *Gideon’s Trumpet*, *supra* note 136, at 206.

<sup>143</sup> Justice Oliver Wendell Holmes observed, “Whatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard.” *Frank v. Mangum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting). See also *Gideon’s Trumpet*, *supra* note 136, at 207.

<sup>144</sup> *Id.* at 208.

<sup>145</sup> *Id.*

<sup>146</sup> Francis William O’Brien, *Why Not Appointed Counsel in Civil Cases? The Swiss Approach*, 28 OHIO ST. L.J. 1, 5 (1967) (citation omitted).

<sup>147</sup> *Obergericht des Kantons Luzern*, 27 Sept. 1972, I. 340.

<sup>148</sup> CAPPELLETTI ET AL., *supra* note 136, at 703 (citation omitted).

Two years before the U. S. Supreme Court denied a right to counsel for a parent in a proceeding terminating parental rights,<sup>149</sup> the European Court of Human Rights (European Court) held in *Airey v. Ireland*<sup>150</sup> that based on the European Convention on Human Rights and Fundamental Freedoms (European Convention) right to a “fair hearing in civil cases,” the government must provide free counsel to a low-income civil litigant who sought a divorce.<sup>151</sup> Ireland did not have a legal aid program in 1979. As a result, when Ms. Airey filed for divorce she was not able to retain a lawyer. The trial court denied her request for appointed counsel because Ireland did not provide this right to indigent defendants.<sup>152</sup> The appeals court echoed this reasoning.<sup>153</sup> However, the European Court held that the requirement that government provide counsel to indigent defendants was consistent with the right to a “fair hearing” contained in the European Convention.<sup>154</sup> The Court reasoned that the Convention was designed to provide access to the courts and that purpose was hindered by the state’s failure to provide counsel to indigent civil litigants. Despite the Irish government’s claim that lack of access was in no part due to any affirmative action on the state’s part, the court held that regardless of whether the lack of access is due to an act or an omission, the state has a duty to provide counsel to poor defendants in cases where the law is so complex that the expertise of a lawyer would likely affect the success of a litigant’s case.<sup>155</sup>

The right to appointment of counsel to assure a fair hearing “in cases with important interests at stake and where an unrepresented litigant cannot represent him or herself effectively” was re-affirmed by the European Court in 2005 in *Steel and Morris v. The United Kingdom*,<sup>156</sup> a case involving a lengthy trial in a defamation lawsuit. In *Steel and*

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<sup>149</sup> See *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

<sup>150</sup> *Airey v. Ireland*, 2 Eur. H.R. Rep 305 (1979).

<sup>151</sup> *Id.* at 309. “In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . .” Convention for the Protection for Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 1, 213 U.N.T.S. 222. Much like the Bill of Rights, the European Convention is a document which has been ratified by 45 nations and binds such countries to abide the laws contained therein. *Gideon’s Trumpet*, *supra* note 136, at 210.

<sup>152</sup> *Gideon’s Trumpet*, *supra* note 136, at 205 (citation omitted).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 318.

<sup>155</sup> *Id.* at 317.

<sup>156</sup> *Steel and Morris v. United Kingdom*, 01 Eur. Ct. H.R. 68416, paras. 61, 72 (Feb. 15, 2005), available at <http://www.echr.coe.int>.

*Morris*,<sup>157</sup> the European Court of Human Rights held that two protesters who had been sued for defamation by the McDonald Corporation and denied legal aid for their defense, were deprived of their right to a fair hearing under Article 6, Section 1 of the European Convention on Human Rights. The court observed that

[t]he question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and depended *inter alia* upon the importance of what was at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.<sup>158</sup>

*Airey and Steel and Morris* are applicable to the forty-five nations in Europe that are signatories to the European Convention on Human Rights: a majority of Western democracies.<sup>159</sup>

Europe is not alone in recognizing that access to counsel for low-income civil litigants is a matter of right. In 1999, the Supreme Court of Canada held that there was a constitutional right to counsel for a parent facing temporary deprivation of child custody in the fair hearing requirement of the Canadian Constitution, the Charter of Rights and Freedoms.<sup>160</sup> In *New Brunswick v. G.(J.)*<sup>161</sup> the court held that even when the state is trying to assert continued custody over a child for an additional six months, a mother has the right to free counsel.<sup>162</sup> Canada's legal aid program required the state to provide counsel to poor defendants only if the parent was going to be permanently deprived of custody. However, the court held that even if custody is only being deprived temporarily, the state must provide counsel because an important right is at stake.<sup>163</sup>

A right to counsel in eviction-type proceedings has been recognized in post-apartheid South Africa. In 2001, the Land Claims Court of South Africa reached the issue of providing counsel to indigent defendants in *Nkuzi v. The Government of the Republic of South Africa and the*

<sup>157</sup> 01 Eur. Ct. H.R. 68416.

<sup>158</sup> *Id.* at para. 61 (citation omitted).

<sup>159</sup> *Id.*

<sup>160</sup> CAN. CONST. (Constitution Act, 1982) pt. 1; *see also* *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 3 S.C.R. 46 (1999).

<sup>161</sup> 3 S.C.R. 46 (1999).

<sup>162</sup> *Id.* at 56.

<sup>163</sup> *Id.* at 85.

*Legal Aid Board*.<sup>164</sup> The Land Claims Court is responsible for handling “eviction actions between tenants or occupiers of land and those asserting ownership.”<sup>165</sup> In *Nkuzi*, the court found that “[t]he state is under a duty to provide such legal representation or legal aid through mechanisms selected by it.”<sup>166</sup> Furthermore, the court held that there was no basis to distinguish between civil and criminal cases since the laws and procedures are equally complex.<sup>167</sup>

While the U.S. Supreme Court has been reluctant to rely on foreign decisions in the past, Justices O’Connor, Kennedy, and Ginsburg all have indicated a desire to pay attention to such decisions.<sup>168</sup> Furthermore, the Supreme Court in *Lawrence v. Texas* relied on foreign decisions, in particular those of the European Court.<sup>169</sup> And when recently finding the juvenile death penalty unconstitutional in *Roper v. Simmons*,<sup>170</sup> the Supreme Court relied on the evolving standard of decency around the world on this issue, not just the evolving view in the U.S.<sup>171</sup> While the Court did not find the international view on capital punishment for juveniles controlling, the Court did find the views of the international community relevant.<sup>172</sup>

The U.S. may yet be a long way off from domestic application of international human rights laws involving social, economic and cultural

<sup>164</sup> *Nkuzi Development Assoc. v. Gov. of the Rep. of So. Africa*, 2001 (10) SALR 01, 11 (Land Claims Ct. S. Afr. 2001), available at <http://wwwserver.law.wits.ac.za/lcc/>.

<sup>165</sup> *Gideon’s Trumpet*, *supra* note 136, at 215, n.137.

<sup>166</sup> 2001 (10) SALR at 11.

<sup>167</sup> *Gideon’s Trumpet*, *supra* note 136, at 215.

<sup>168</sup> *Id.* at 224. Justice Johnson’s article describes comments made by the Supreme Court Justices at an international conference sponsored by the World Bank.

<sup>169</sup> 539 U.S. 558 (2003) (holding Texas statute making consensual homosexual sex a crime unconstitutional.).

<sup>170</sup> 125 S.Ct. 1183 (2005).

<sup>171</sup> *Id.* at 1198:

[A]t least from the time of the Court’s decision in [*Trop v. Dulles*, 356 U.S. 86], the [U.S. Supreme] Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.” 356 U.S., at 102-103, 78 S.Ct. 590 (plurality opinion) (“The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime”); see also *Atkins v. Virginia*, 536 U.S. 304, 17, n. 21 (2002) (recognizing that ‘within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved’).

*Id.*

<sup>172</sup> *Id.*

rights in this country,<sup>173</sup> an embarrassing fact for a nation that thinks of itself as a symbol of democracy and the rule of law. Under human rights standards applicable in many parts of the world today, low-income tenants in New York City would not be forced to face eviction from their homes in Housing Court proceedings without counsel, given the interest at stake and the complexity of the proceedings.

#### IV. GETTING FROM HERE TO THERE

A right to counsel for tenants who face eviction in New York City's Housing Court makes sense as social policy, would reinforce fundamental notions of justice, would be cost-effective, would have a salutary effect on the Court and on housing policy, would vindicate important constitutional rights, and would put us on par with a growing consensus in Western and emerging democracies that access to counsel is enforceable under international human rights standards. However, the existence of these compelling reasons alone will not cause a change in law, public policies, or practices. Change will come to the Housing Court, as change always comes in the evolution of the law, because of effective advocacy promoting the change. In the area of the right to counsel in civil litigation, or of "civil Gideon," promising efforts are underway in New York and elsewhere.

##### A. *Strategies in Other Parts of the U.S.*

Advocates throughout the United States have utilized various legal theories to argue for an indigent civil litigant's right to court appointed counsel. Although no state has recognized a general right to counsel in civil litigation, there appears to be a growing recognition of the importance of counsel to the fair administration of justice. One of the most commonly employed arguments in favor of the right to counsel is based on the Due Process Clause of the 14th Amendment. In the early twentieth century, the U.S. Supreme Court held in *Powell v. Alabama* that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>174</sup> The Court recognized that the failure to provide an indigent litigant with counsel can be a denial of due process.<sup>175</sup>

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<sup>173</sup> See, e.g., Philip Alston, *The U.S. and the Right to Housing: A Funny Thing Happened on the Way to the Forum*, 1 EUR. HUM. RIGHTS L. REV. 120-33 (1996).

<sup>174</sup> *Powell*, 287 U.S. 45 (1932), at 69-70.

<sup>175</sup> *Id.* at 50 (1932).



State courts have also viewed the right to counsel as a matter of due process. The concurring opinion in the recent Maryland Supreme Court decision *Frase v. Barnhart* strongly favored such a right to counsel based on due process principles for a parent facing loss of custody of her child.<sup>176</sup> Similarly, pursuant to the Due Process Clause of the Alaska Constitution, the state court in *Flores v. Flores* held that an indigent mother had a right to counsel in a divorce and custody proceeding.<sup>177</sup> The Supreme Judicial Court of Massachusetts found that due process requires a right to appointed counsel in a termination of parental rights proceeding where the adversary is represented and has vastly superior resources to litigate the case.<sup>178</sup>

State courts have also underscored their power to assign counsel. The Louisiana Constitution vests the judiciary with the inherent power to appoint an attorney to represent an indigent client, with or without compensation.<sup>179</sup> In *State of Louisiana in the Interest of A.P.*,<sup>180</sup> the court unambiguously stated that while “[t]he legislative and executive branches can aid this inherent judicial power . . . their acts or failure to act cannot destroy, frustrate, or impede that constitutional authority.”<sup>181</sup> Similarly, in *Joni B. v. State*, the Wisconsin Supreme Court invalidated a statute prohibiting appointment of counsel for anyone other than a child in a child protection proceeding. The court held that the statute amounted to an impermissible intrusion into the authority of the judiciary and thus violated the doctrine of separation of powers and the Due Process Clause of the 14th amendment.<sup>182</sup> The Wisconsin Su-

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<sup>176</sup> *Frase v. Barnhart*, 379 Md. 100, 138 (2003) (Cathell, J., concurring). Judge Cathell argued that when a case involves the fundamental right of a parent, counsel should be provided for indigent parents. Such a provision would be based on the notion of equality among citizens. While perfect equality between the rich and poor may not be attainable, steps should be taken by the court to decide when counsel should be appointed for indigent defendants. The majority decision did not reach the issue of the right to counsel.

<sup>177</sup> *Flores v. Flores*, 598 P.2d 893 (Alaska 1979).

<sup>178</sup> *Department of Pub. Welfare v. J.K.B.*, 393 N.E.2d 406 (Mass. 1979). Before the State “deprive[s] a legitimate (sic) parent of all that parenthood implies,” the requirements of due process must be met. *Id.* at 408.

<sup>179</sup> LA. CONST. ART. V §§ 2, 5(B).

<sup>180</sup> *State of Louisiana in the Interest of A.P.*, 815 So.2d 115 (La. Ct. App. 2002).

<sup>181</sup> *Id.* at 118.

<sup>182</sup> *Joni B. v. State*, 549 N.W.2d 411, 415-17 (Wis. 1996).

preme Court subsequently upheld a right to court appointed counsel for non-indigent defendants when no other alternative was available.<sup>183</sup>

A growing community of advocates around the country has been promoting a right to counsel in civil litigation. The Committee for Indigent Representation and Civil Legal Equality, an organization based in Washington State, has declared that it is willing to argue in the appropriate case that indigent litigants have a right to counsel in civil matters based on democratic principles of due process, equal protection, the right to a fair hearing, fundamental rights, the government's duty to protect individual rights, and the notion that court appointed counsel is essential to provide indigents with access to the courts and justice.<sup>184</sup> Similar efforts are underway in Wisconsin, Massachusetts, and other states.<sup>185</sup>

#### B. *Possibilities in New York City*

Recent advocacy for a right to counsel in eviction proceedings in New York City has taken a non-litigation-based approach, although a litigation strategy may later be implemented. Advocates and their allies in the New York City Council are pursuing a legislative approach, urging passage of legislation that establishes a right to counsel.

New York City has the power to allocate funds for the purpose of providing counsel and has done so through various anti-eviction programs.<sup>186</sup> The city also has the power to establish a right to counsel for certain categories of tenants and to require that landlords inform those tenants of their right to counsel upon service of an eviction notice. In fact, New York City already exercises the authority to protect the public by imposing a number of obligations on landlords in connection with evictions. For example, the city bars evictions based on unenforced pet clauses,<sup>187</sup> bars landlords from evicting people for a variety of reasons

<sup>183</sup> *Chiarkas v. Skow*, 465 N.W.2d 625 (Wis. 1991); *but see* *Mallard v. United States Dist. Court for Southern Dist.*, 490 U.S. 296 (1989) (holding that federal courts are not empowered to force unwilling counsel to litigate a civil case on behalf of an indigent defendant).

<sup>184</sup> See <http://www.wsba.org/atj/board/20031031minutesatj.doc> (last visited April 20, 2005).

<sup>185</sup> *Id.*

<sup>186</sup> For discussion of New York City's eviction prevention programs, see *supra* Section IA.

<sup>187</sup> In 1983, the New York City Administrative Code was amended to provide that when a lease prohibits the occupants of the building from keeping household pets, the landlord must take legal action to enforce the prohibition within three months of the date the landlord or its agents become aware of the violation. N. Y. CITY . ADMIN CODE § 27-2009.1(b) (2004); see also *Corlear Gardens Housing Co., Inc. v. Ramos*, 481 N.Y.S. 2d 577 (N.Y. Sup. Ct. 1984) (upholding law barring evictions based on unenforced no-pet clauses).

including race, creed, color, sexual orientation, disability, and alienage,<sup>188</sup> and prohibits landlords from using tactics such as threats, halting essential services, or changing the locks to evict tenants.<sup>189</sup>

New York City has a progressive and proactive history of housing policy and legislation. The city implemented the first public housing in the country—before the federal public housing program was initiated. The city has the most extensive and protective system of rent regulation in the nation. The city has its own programs, supported with both public and private funds for housing subsidy and homelessness prevention.<sup>190</sup> Accordingly, the city should continue its rich history of pioneering tenant protection by establishing a right to counsel in eviction proceedings.

### CONCLUSION

In more than thirty years of existence, New York City's Housing Court has struggled against overwhelming odds to address and adjudicate the vast numbers of landlord-tenant disputes that come before it.<sup>191</sup> On the one hand, the city expects too much of the Housing Court and its judges: rent collection, improvement of the housing stock, access to government benefits and social services, and the amelioration of human disputes and social problems that are far beyond its control. On the other hand, we expect far too little of the Housing Court with respect to the fair administration of justice, the fundamental purpose of any court

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<sup>188</sup> See N.Y. CITY ADMIN. CODE § 8-101-131 (2004).

<sup>189</sup> See N.Y. CITY ADMIN. CODE § 26-521 (2004).

<sup>190</sup> In 2005, for example, with the support and involvement of the New York City Civil Court, and participation by Legal Services for New York City and Women in Need, the United Way of New York established an innovative Housing Help Center project in the Bronx Housing Court to provide a combination of legal and social services to tenants who live in zip code 10451 and who are sued for eviction. The legal and social services are intended to prevent eviction and address short and long term needs to help stabilize families and individuals and enable them to stay in their homes and communities. The zip code was chosen because it has a high number of eviction proceedings and a high incidence of families entering the emergency shelter system. Leslie Eaton & Leslie Kaufman, *Judges Turn Therapist in Problem-Solving Court*, N.Y. TIMES, Apr. 26, 2005, at A1.

<sup>191</sup> Housing Court handles an astounding number of cases, with relatively minimal resources. More cases are handled in New York City's Housing Court each year than are civil cases handled in all the United States District Courts combined in a single year. Each year more than 350,000 cases are handled in New York City's Housing Court (<http://www.courts.state.ny.us/courts/nyc/housing/index.shtml>, (last visited April 20, 2005)), while fewer than 300,000 civil cases are filed in all the U.S. District Courts (<http://www.uscourts.gov/judbus2004/tables/s7.pdf> (last visited April 20, 2005)).

of law. Until the legislature or the courts mandate that disputes before the Housing Court are handled in a manner that provides an opportunity for fair and impartial adjudication—something that is impossible without a right to counsel—we will continue to fail to address the Housing Court's biggest problem.