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GIDEON'S SHELTER: THE NEED TO RECOGNIZE A RIGHT TO COUNSEL FOR INDIGENT DEFENDANTS IN EVICTION PROCEEDINGS

*Andrew Scherer**

I have no illusions about law and courts or the people who are involved in them. I have read the complete history of the law ever since the Romans first started writing them down and before of the laws of religions. I believe that each era finds a improvement in law each year brings something new for the benefit of mankind. Maybe this will be one of those small steps forward.

—letter from Clarence Earl Gideon to his attorney, Abe Fortas, November 13, 1962.[1]

Introduction

The young, single mother of three tearfully described how she had returned home to her South Bronx apartment to find the City Marshal and two helpers packing her belongings in cardboard boxes.[2] Although she begged them to stop, one of the assistants told her that, because the landlord had obtained

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[1] A. Lewis, Gideon's Trumpet 78 (1964).

[2] The following description is based on the author's experience of nearly a decade as a housing advocate in New York City. While fictitious, it is highly representative of the conditions under which eviction occurs around the country.

a court order for her eviction, there was nothing they could do. As she and her children looked on in disbelief, the Marshal changed the lock on the door and attached a notice stating that the landlord had been granted possession of her apartment.

The notice, which the woman had her ten-year-old son translate into Spanish for her, stated that she should contact the Department of Sanitation to locate her belongings. When she finally found her property, she was told she could not have access to it unless she was willing to have it removed from the warehouse. She had neither a place to store her possessions nor the money needed to move them; she would have to leave them there.

A few weeks earlier she had received papers from the landlord notifying her that he sought to evict her for nonpayment of rent. These too were translated by her son. She called the free legal services program but was told that they were too busy to see her before her court date because of the lack of sufficient staff. In court, she agreed to pay her unpaid rent. In return, the landlord promised to inspect her apartment and make whatever repairs were necessary. The landlord never made the repairs. Now she found herself and her family evicted and with no place to go.

Had this South Bronx tenant been represented by counsel, she would have been able to assert defenses and counterclaims in a timely and proper manner that would have, in all likelihood, enabled her to avoid eviction. Some variation of this scene occurs in poor communities in this country virtually every day. In New York City alone, over 25,000 evictions take place each year—one eviction every six minutes of the work week.[3] This Article sets forth the argument that counsel must be provided to indigent tenants facing eviction. Procedural due process forms the foundation of this argument. The Article then explores the potential statutory bases for appointment of counsel for tenants faced with eviction and suggests additional arguments to support the establishment of a right to counsel.[4] Finally, the

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[3] New York City Department of Investigation, Statistical Analysis of Evictions Performed by City Marshals 1 (1985).

[4] The arguments and theories set forth below are not intended to be exhaustive. Statutory and constitutional provisions and common law, on the state and federal levels,

Article discusses the issue of who can and should be appointed as counsel and how a right to counsel could best be implemented.

I. Eviction and the Availability of Affordable Housing

A tenant confronted with eviction, especially a low-income tenant, now faces not only the immediate trauma and disruption of a forced move, but also the prospect of displacement into a housing market that no longer provides any options.[5] In many parts of the country, due to the unavailability of affordable housing, a low-income tenant has few alternatives to her present home no matter what its condition. In our complex modern society, shelter is negotiated as a commodity in the marketplace. Wealth determines the quality of construction, quantity of space and desirability of location of one's home. In recent years, a critical shortage in the availability of affordable and habitable housing in the United States, especially in large urban areas, has meant that wealth can now determine one's ability to retain a dwelling.[6] When a landlord threatens the typical tenant with eviction she will have to defend pro se her right to a home. She will face the landlord's lawyer in a court proceeding that involves a complex web of federal, state and local laws that she is ill-equipped to utilize.[7]

The only options for those who cannot afford to pay for representation are publicly-funded legal services programs or

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may provide additional arguments in support of appointment of counsel for indigent tenants faced with eviction.

[5] The diminishing affordability of housing for low-income households has been a matter of great concern in recent years. A 1984 report of the U.S. Conference of Mayors found that "[s]ince 1978, the number of households living in poverty has increased by 32%, with 1 in 7 Americans—or 34.4 million persons—now living below the poverty line. Many of these households have been priced completely out of the private housing market." U.S. Conference of Mayors, Housing Needs and Conditions in America's Cities: A Survey of the Nation's Principal Cities 3 (June 1984).

[6] *See The Vanishing Pool of Affordable Places to Live: A Search for Solutions to the Housing Squeeze*, N.Y. Times, July 12, 1987, § 4 (Washington Review), at 5 ("Nationally, low-income units have been disappearing at the rate of half a million a year, while salaries and public assistance levels have not kept pace with housing costs. The pressure is particularly acute in gentrified urban areas.").

[7] *See, e.g.*, Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. Rev. 503 (1982) (setting out the evolution of regulatory protections formally available to tenants).

the services of volunteer private attorneys. These options, however, are extremely limited. Indeed, at the same time that the intensity of the housing crisis has grown, publicly-funded programs for the provision of free legal services in civil matters have suffered debilitating budget cuts.[8] The recent growth in volunteer programs has not sufficiently addressed the need for more legal assistance for the poor.[9] Programs that provide free legal services to the poor are thus only able to represent a small fraction of those who are eligible for their services.[10]

By failing to recognize a right to counsel in most civil matters, the United States lags behind many developed western nations. A basic assumption of the legal systems of England, France, Switzerland and other European countries is that, for the poor to have meaningful access to the courts, they must have a right to representation by counsel.[11] Indeed, a right to appointment of counsel in civil matters under English common law dates back to the fifteenth century.[12]

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[8] A recent survey by the American Civil Liberties Union (ACLU) found that 81% of the legal services programs that responded to an ACLU questionnaire reported that the number of attorneys in their programs had decreased as a result of budget cuts. American Civil Liberties Union, Justice Evicted: An Inquiry into Housing Court Problems 44 (1987). An earlier ACLU report had found that grantees of the federal Legal Services Corporation (the primary provider of free civil legal services nationally) had lost 28% of their attorneys between 1981 and 1982. American Civil Liberties Union, No Justice for the Poor: How Cutbacks Are Destroying Legal Services 8–9 (1983).

[9] *See e.g.*, Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 Conn. L. Rev. 651 (1981); and Miskiewicz, *Volunteerism Alone Not Enough: Mandatory Pro Bono Won't Disappear*, Nat'l L.J., Mar. 23, 1987, at 1, 8–9.

[10] *See, e.g.*, Washington Council of Lawyers, Report on the Status of Legal Services for the Poor 27–28 (1983) (closings and staff reductions in offices providing free legal services have prevented many eligible tenants from obtaining legal assistance).

[11] As the authors of one law review article observed,

> At the outset, it should be recognized that England has lived with a common law right to counsel of this dimension for four and onehalf centuries. Germany has survived with a comprehensive statutory right since 1871, Sweden's similar guarantee dates from 1919, Italy's from 1923, and France's from 1851. Similarly, Switzerland's *constitutional* right to counsel in civil cases has existed for over forty years.

Johnson & Schwartz, *Beyond* Payne*: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 Loy. L.A.L. Rev. 249, 258 (1978) (footnotes omitted).

[12] *See* Statute of Henry VII, 1495, 11 Hen. 7, c. 7, 2 Statutes of the Realm 578

Although a tenant who loses an eviction proceeding in this country faces the possibility of homelessness, the United States has not recognized a right to assigned counsel for indigents who cannot otherwise obtain free legal services.

Despite the striking inequality of the eviction context, the historical trend in other judicial contexts has been for our legal system to develop more numerous and more effective mechanisms to protect members of society from grievous loss. Prime examples in this country include the emergence of a right to a meaningful hearing prior to termination of government benefits,[13] and the right to counsel for criminal defendants.[14] At the very least, the system ensures in these contexts that when loss occurs, it is for legally valid reasons and that basic due process has been observed.

The year 1988 marks the twenty-fifth anniversary of *Gideon v. Wainwright*,[15] the Supreme Court's landmark ruling guaranteeing the right to counsel for indigent defendants in criminal cases. The evolution of these protections, however, has been a slow and often uncertain process. The establishment of a broad right to counsel for criminal defendants took forty years. In 1932, the Supreme Court found a right to counsel for defendants in certain capital cases.[16] In 1942, however, the Court held that "appointment of counsel is not a fundamental right, essential to a fair trial."[17] In 1963, this decision was overruled and the right to counsel was extended to serious criminal cases in *Gideon*. In 1972, the Court held that "no person may be imprisoned for any

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(transcribed in 2 Statutes at Large 85) (repealed 1883, 46 & 47 Vict. c. 49), *reprinted in* Johnson & Schwartz, *supra* note 9, at 253, which provided:

> And after the seid writte or writtes be retorned, . . . the Justices . . . shall assigne to the same pou psone or psones Councell lerned by their discrecions which shall geve their Councelles nothing taking for the same, and in like wise the same Justices shall appoynte attorney and attorneyes for the same pou psone and psones . . . which shall doo their duties without any rewardes. . . .

[13] Goldberg v. Kelly, 397 U.S. 254 (1969).
[14] Gideon v. Wainwright, 372 U.S. 335 (1963).
[15] 372 U.S. 335 (1963).
[16] Powell v. Alabama, 287 U.S. 45 (1932).
[17] Betts v. Brady, 316 U.S. 455, 471 (1942).

offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[18] *Gideon* held out the promise of an important measure of fundamental fairness when the poor encountered the judicial system. This promise has yet to be fulfilled.

Often, the task of the legal profession is to take a need of a client or group of clients—a perception that a particular notion is "right" or "just"—and articulate that need in a way that moves the judicial apparatus. In an age characterized by diminishing availability of housing[19] for low-income households and a marked growth in homelessness,[20] the need for assuring the fairness of the eviction process has become manifest. Application of established principles of law to the eviction context should lead to the recognition of a right to counsel for low-income tenants faced with eviction.

II. Legal Arguments

A. Federal Due Process Analysis

The most compelling argument for recognizing a right to counsel for tenants faced with eviction is that, as a matter of due process of law, a tenant should not have to defend a legal proceeding that can result in the loss of his home without the availability of counsel. The notion that the constitutional right to due process of law should encompass a right to representation by counsel when faced with the loss of something as crucial as one's home is a notion that Americans would accept intuitively.[21]

When people of economic means are involved in any legal dispute, the consequences of which could significantly affect their lives, they hire lawyers to help them. Poor people do not have that option. Yet in massive numbers, low-income people

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[18] Argesinger v. Hamlin, 407 U.S. 25, 37 (1972).

[19] *See, e.g., supra* notes 5–6.

[20] *See infra* notes 33–34 and accompanying text.

[21] Indeed, a study by the National Center for State Courts found that 71% of the public favors using tax dollars to "make good lawyers available to anyone who needs them." National Center for State Courts, State Courts: A Blueprint for the Future 56 (1978).

encounter the judicial system in settings which could have equally devastating effects on their lives. The three most important of these settings are the criminal courts, where they face a loss of liberty; the family courts, where they face a loss of custody of their children; and the housing courts, where they face a loss of shelter. In all jurisdictions, a right to counsel has been established for criminal defendants;[22] in most jurisdictions, people faced with loss of custody of their children are entitled to appointment of counsel.[23] Astonishingly, no jurisdiction to date has clearly established a right to counsel for people faced with eviction, even though the establishment of such a right is consonant with the evolution of the notion of due process.

1. The Mathews *Test*

In *Mathews v. Eldridge*[24] the Supreme Court set forth the framework for determining what constitutional due process is required when a person faces the loss of property. In *Mathews* the process is required when a person faces the loss of property. In *Mathews* the Court set out three distinct factors to be considered in determining the particular process due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including . . . [the] administrative burdens that the additional or substitute procedural requirement would entail.[25]

When these factors are applied to eviction proceedings, it becomes clear that poor people faced with eviction should be guaranteed the appointment of counsel.

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[22] *See* discussion of Gideon *supra* text accompanying notes 16–18.

[23] *See, e.g.*, V.F. v. State, 666 P.2d 42 (Alaska 1983); *In re* Jacqueline H., 21 Cal. 3d 170, 178, 577 P.2d 683, 687, 145 Cal. Rptr. 548, 552 (1978); *In re* Ella B., 30 N.Y.2d 352, 357, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972).

[24] 424 U.S. 319 (1976).

[25] *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1969)).

a. The Interest at Stake

A tenant faced with eviction has an enormous interest at stake in the eviction proceeding which encompasses both a property and a liberty interest.

(i) Property Interest

The right of a tenant to continued occupancy of his home is a traditionally recognized property right. In *Greene v. Lindsey*,[26] for example, tenants alleged that eviction judgments that had been obtained against them by default were invalid because they had not been given constitutionally adequate notice of the proceedings. The Supreme Court, in the course of vindicating the tenants' due process rights, underscored the constitutionally protected nature of the rights at stake: "[I]n this case, appellees have been deprived of a significant interest in property . . . the right to continued residence in their homes."[27]

Obviously, trauma is likely to be associated with forced removal from one's home. Indeed, even a voluntary move from one residence to another is, especially for a household with children, an enormous strain. To be forced from one's home vastly multiplies that stress. Moreover, given the tight housing market in many parts of the country, removal from one's home often means removal from one's community. Social scientists have amply documented the fact that forced dislocation from an urban low-income or working class community is a highly disruptive and disturbing experience.[28]

For low-income tenants, the trauma and disruption associated with eviction are no longer merely transitory. There is now a significant possibility that, because of the unavailability of

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[26] 456 U.S. 444 (1982).

[27] 456 U.S. at 450–51. *See also* L. Tribe, Constitutional Law 509 (1978); Escalera v. New York City Hous. Auth., 425 F.2d 853, 861 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970).

[28] For a discussion of the impact of dislocation on low-income households, *see, e.g.*, Critical Perspectives on Housing (R. Bratt, C. Hartman, A. Meyerson eds. 1986); H. Gans, The Urban Villagers (1965); M. Young & P. Wilmott, Family and Kinship in East London (1957).

affordable housing for low-income households,[29] eviction will result in homelessness. Thus eviction proceedings threaten not only a tenant's ability to remain in the same dwelling or community, but often his access to any shelter at all. Due to the low-income housing stock which is diminishing nationally at a rate of half a million units per year[30] and the federal government's virtual abandonment of its role in providing publicly subsidized housing,[31] there is close to a complete absence of housing affordable to low-income individuals in many parts of this country.[32]

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[29] A 1985 report by the U.S. General Accounting Office found that higher rents disproportionately burden low-income households:

> Higher rent burdens result in households paying a greater percentage of their incomes for rent, leaving them a smaller percentage of their incomes for other expenditures. During the period 1975–83, the number and percentage of lower-income households with rent burdens in excess of 30 percent increased by about 4.1 million—from 7.8 million (54 percent) in 1975 to 11.9 million (64 percent) in 1983 . . . HUD often uses the figure of 30 percent or less of gross income as a benchmark for a reasonable or affordable rent burden for a lower-income household.

General Accounting Office, Changes in Rent Burdens and Housing Conditions of Lower Income Households 3 (Apr. 23, 1985).

A recent study of low-income housing needs concluded that, "the less income you have, the higher the proportion that goes for shelter." This conclusion was based on census data from 1983 that showed, inter alia, that 18% of all renter households paid more than 60% of their incomes for rent and utilities, and that 95% of these households had incomes under $15,000. Dolbeare & Cushing, Low Income Housing Needs 2 (Dec. 1987).

[30] *See supra* note 5.

[31] This trend is clearly reflected by the rate of decline of public housing units started in the years 1960–1984:

1960	44,000	1976	10,000
1965	38,000	1978	16,000
1968	38,000	1980	20,000
1970	35,000	1983	9,000
1973	12,000	1984	6,000
1975	11,000		

United States Bureau of the Census, Statistical Abstract of the U.S. 724 (1986).

[32] The growing need for low-income housing is reflected in a number of ways and has been amply documented by a number of sources. According to estimates made by the United States Department of Housing and Urban Development in 1981, approximately 24 million households (29% of the total) had grossly expensive, overcrowded or inadequate housing. Office of Policy Development and Research, U.S. Dep't of Hous. & Urban Dev., Housing Production in 1982 and 1983 and the Stock of Housing in 1981, Tables E-9, E-10 (Apr. 1987).

Predictably, this shortage of housing impacts disproportionately on renters, very-

The result of this situation has been the emergence of a low-income population with no access to housing whatsoever.[33] Although estimates of the number of homeless in the United States vary greatly, Although estimates of the number of homeless in the United States vary greatly, congressional findings set forth in proposed federal legislation in 1985 stated: "[n]ot since the Great Depression has homelessness in America reached the epidemic proportions that it has today among major segments of the national population. The number of homeless persons is estimated to be as large as 3 million, and by all accounts is increasing."[34]

The interest in the continued availability of shelter is an even more fundamental one than the interest in continued occupancy in the same residence. Thus the Supreme Court's recognition in *Greene v. Lindsey*[35] of a property interest in the continued residence in one's home acquires added significance in an era in which eviction can mean homelessness.

(ii) Liberty Interest

The eviction process implicates liberty interests as well as property interests. Liberty interests are not merely confined to

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low-income households, minority group members, female-headed households and the elderly. *Id.* Moreover, it has been estimated, based upon 1980 census data, that for very-low-income households alone, a gap of 1.2 million affordable housing units exists. Critical Perspectives on Housing, *supra* note 28, at xiii (1986).

Numerous studies from around the country identify eviction as a prime precipitating cause of homelessness. *See, e.g.*, Atlanta Task Force for the Homeless, Homeless in Metro Atlanta: A Working Paper and Recommendation 5 (June 1987) (Forty-nine percent of the women with children entering shelters had been evicted); Chicago Coalition for the Homeless, Pilot Study of Homeless People 50 (1983) (Thirty-two percent of homeless respondants reported that their homelessness was precipitated by eviction); Melnick and Williams, Homeless in the District of Columbia, Children and Families Without Homes: Observations From Thirty Case Studies ix (1987) (Two thirds of those polled became homeless as a result of involuntary eviction). For similar findings, *see also*, New York State Department of Social Services, Homeless in New York State: A Report to the Governor and the Legislature 11 (Oct. 1984); Psychiatric Epidemiology Program, School of Public Health, UCLA, Basic Shelter Research Project 50 (1985); Task Force on the Homeless, Life in Transit, Homeless in Michigan 7 (Mar. 1986).

[33] In January of 1988 in New York City alone, there were over 5,155 families, including more than 12,000 children quartered by the city in welfare hotels and shelters. New York City Human Resources Admin., New York City Temporary Housing Program for Families with Children 1 (Jan. 1988).

[34] Homeless Americans Survival Act of 1985, at 9 (1985).

[35] Greene v. Lindsey, 456 U.S. 444 (1982).

the right to be free from the physical restraint of one's person, but also include:

> the right of the citizen . . . to use [his faculties] in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any lawful trade or vocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements . . . are infringements upon his fundamental rights of liberty, which are under constitutional protection.[36]

The homeless who live on the streets are potentially subject to the loss of their physical liberty through incarceration and institutionalization.[37] Even when they are not subject to physical restraint, however, due to the perils of life on the streets,[38] homeless persons are subject to conditions that severely trammel their ability to enjoy their "fundamental rights of liberty."

Because of the potential of forcible incarceration or institutionalization and because the fundamental right to enjoy liberty is implicated, the liberty interests facing the homeless are similar to the interests discussed in *Lassiter v. Department of Social Services*.[39] In this case, which involved termination of parental rights, the Supreme Court adopted a presumption that "an indigent litigant has a right to appointed counsel only when,

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[36] Allgeyer v. State of Louisiana, 165 U.S. 578, 589 (1897). *See also* Meyer v. Nebraska, 262 U.S. 309, 399 (1923). Indeed, in Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 Duke L.J. 527, 530 (1974), Professor Michelman notes that the right to meaningful access to the courts is itself a liberty interest.

[37] In addition to the risk of arrest and incarceration pursuant to vagrancy statutes, the homeless may also be threatened with forced institutionalization. New York City has in fact adopted a program to forcibly remove homeless individuals from the streets when they are perceived to be mentally ill, or when the temperature drops below freezing. *See* Boggs v. New York City Health & Hospitals Corp., 132 A.D.2d 340, 523 N.Y.S.2d 71 (1987), where a homeless petitioner successfully challenged her institutionalization on the ground that the city failed to establish that her mental condition was likely to result in serious harm to herself or others as is required for civil commitment.

[38] *See infra* notes 43–51 and accompanying text.

[39] 452 U.S. 18 (1981).

if he loses, he may be deprived of his physical liberty."[40] Because the threat of eviction poses the threat of homelessness and its devastating consequences, the liberty interest at stake is one which falls within the rubric enunciated by the Court in *Lassiter*.[41]

To truly comprehend the interests at risk for members of low-income households who are threatened with eviction and homelessness, it is important to understand the potentially devastating consequences of homelessness.[42] The homeless are at much greater risk than the general population of suffering severe medical and social problems that endure long beyond the initial trauma of eviction. For example, the homeless are, on the whole, more likely to be infected with a larger range of diseases than the general population.[43] Because of the itinerant nature of homelessness, it is difficult to control diabetes, seizures and other chronic disabilities.[44] In addition, since the possibility of proper diet and hygiene is diminished, a variety of additional physical problems may arise.[45]

The impact of homelessness on infants and children is particularly tragic. Women living in welfare hotels are more than twice as likely to give birth to babies with low birth weights than is the average woman.[46] Moreover, the infant mortality rate for babies born to these women is more than twice the national average.[47]

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[40] *Id.* at 27.

[41] Even if the threat of eviction is not viewed as implicating a tenant's liberty interest, the reasoning of *Lassiter* nevertheless supports the appointment of counsel for a tenant faced with eviction. The *Lassiter* Court held that a *presumption* of a right to counsel exists where there is a threat to a liberty interest. In the absence of such a presumption, courts, rather than being unable to find a right to counsel, are relegated to making determinations on a case-by-case basis.

[42] It is the mere *threat* of these consequences that makes the interest in continued shelter so critical. For the purpose of analyzing the interest at stake in eviction, therefore, it is irrelevant whether these are inevitable consequences in each individual case.

[43] Clark & Rafferty, *The Sickness That Won't Heal: Health Care for the Nation's Homeless*, 16 Health Pac Bull. 21 (July–Aug. 1985).

[44] *Id.*

[45] For example, a high incidence of severe malnutrition, anemia, lice infestation and tooth decay have been documented among homeless youth. *Id.* at 22.

[46] *Id.* In New York City, 18% of babies born to women in these dilapidated, temporary dwellings had low birth weights, which is more than twice the 8.5% average for the city as a whole. Mothers in welfare hotels had received significantly less prenatal care than women living under "normal circumstances," and many gave birth to premature babies who had to spend weeks in expensive special care units. *Id.*

[47] Between 1982 and 1984 the infant mortality rate in New York City's welfare

The effects of separation from a stable community can have long-range consequences for children. The disruption caused by becoming homeless often creates gaps in school attendance. Predictably, the movement of children in homeless families from one school district to another often makes regular attendance impossible, as do jurisdictional disputes among school districts regarding who has responsibility for these children.[48] More fundamentally, homelessness often causes the break-up of families, and results in the placement of the children in foster homes.[49]

While the dire consequences of homelessness for children are perhaps more poignant, homeless persons of all ages are severely handicapped in their ability to function as productive members of society. They are less likely than others to be able to vote.[50] In addition, finding and holding a job is more difficult without a permanent address. Finally, the homeless are also much less likely to sustain relationships based on friendship, kinship and community—relationships that provide necessary support for one's sense of identity and well-being.

In sum, both the property and liberty interests at stake for the low-income tenant faced with eviction are quite significant. Such a tenant faces not only the loss of continued occupancy of his home, but potentially, the absolute loss of shelter and the devastating sociological consequences of homelessness.

b. Risk of Error

The risk to an unrepresented tenant of erroneous deprivation of rights is inherent in the procedures used for eviction in all jurisdictions. Throughout the development of the common law, the relationship between landlord and tenant has become increasingly more complex, with rights and responsibilities governed by a wide range of legal constraints.

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hotels was 25 deaths before age 1 per 1000 births. N.Y. Times, June 10, 1986, at B3, col. 1. The comparable national average in 1984 was 11 deaths per 1000 births. *Id.*

[48] *See, e.g.*, Delgado v. Freeport Pub. School Dist., 131 Misc. 2d 102, 499 N.Y.S.2d 606 (Sup. Ct. 1986); Citizens' Committee for Children of New York, 7000 Homeless Children: The Crisis Continues 17 (Oct. 1984).

[49] Office of City Council President, Children and the Housing Crisis: From No Home to Foster Home 1 (Oct. 1984).

[50] *See, e.g.*, Pitts v. Black, 608 F. Supp. 696 (S.D.N.Y. 1984).

In the last several decades, a vast array of remedial legislation has been enacted at federal, state and local levels to enable tenants to obtain decent housing and to avoid arbitrary treatment by the administrative and judicial system.[51] Through these new laws, legislatures have created housing and building codes to protect the life, health and safety of tenants;[52] have established a variety of forms of rent control, rent subsidy and government ownership to assure the affordability of housing;[53] and have provided legislation to regulate the procedures and grounds for eviction.[54] Mastery of, or at least familiarity with, the relevant legislation is a prerequisite to effective defense of an eviction proceeding.

Moreover, eviction cases involve adversarial court proceedings where rules of evidence and a host of other legal 'niceties' apply. And because eviction proceedings are generally summary proceedings, they move much more swiftly toward judgment than do ordinary civil cases.[55] As Justice Douglas said

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[51] *See generally* Glendon, *supra* note 7.

[52] *See, e.g.*, Abbott, *Housing Policy, Housing Codes and Tenant Remedies*, 56 B.U.L. Rev. 1, 40–49 (1976); Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 Urb. L. Ann. 3, 10–15 (1979).

[53]

> Prior to 1969, rent control laws were limited in application to war-generated "temporary housing emergencies," except in New York City where controls have been in effect continuously since 1942. Between 1969 and 1975, rent control legislation was adopted in Boston and several neighboring cities, over 100 New Jersey municipalities, Washington, D.C., Miami Beach, Berkeley, and other localities. . . . Since 1978, rent controls have become widespread in California.

Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutgers L. Rev. 723, 727 (1983). For a description of federal housing programs and tenants' rights under those programs, see National Housing Law Project, HUD Housing Programs: Tenants' Rights: A Legal Services Practice Manual Chapter 1 (1981); National Housing Law Project, 1985 Supplement, HUD Housing Programs: Tenants' Rights Chapter 1 (1985).

[54] *See, e.g.*, Conn. Gen. Stat. §§ 47a-23 to -42.

[55] Eviction proceedings in most jurisdictions have long been governed by summary proceeding statutes that enable landlords to obtain judgments entitling them to have tenants evicted far more expeditiously than the ordinary course of civil legal proceedings. New York's current summary eviction proceeding statute, for example, has its origins in a statute passed in 1820 to give landlords a "simple, expeditious and inexpensive means of regaining possession of [their] premises." Reich v. Cochran, 201 N.Y. 450, 454 (1911); Laws of New York, 1820, ch. 194. One commentator observed that the state of California "enacted a comprehensive series of laws governing unlawful detainer"

of eviction proceedings in a 1967 dissenting opinion in *Williams v. Shaffer*:

> Summary eviction proceedings are the order of the day. Default judgments in eviction proceedings are obtained in machinegun rapidity, since the indigent cannot afford counsel to defend. Housing laws often have a built-in bias against the poor. Slumlords have a tight hold on the Nation.[56]

The problem of housing for the poor has become far more critical in the twenty-one years since Justice Douglas' observation.[57] Further, issues such as the condition of the premises, the appropriateness of the rental amount sought by the landlord and the content and manner of service of required notices are all legally relevant in eviction proceedings. It is not surprising that the highest court of one state has referred to the law governing eviction proceedings as "a 'patchwork' of legislation that has responded to decades of social, economic and political pressure . . . an 'impenetrable thicket confusing not only to laymen but to lawyers.'"[58]

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which "reflect an ancient civil compromise" whereby the "landlord is forbidden any form of self-help to evict a tenant, but is assured the swiftest judicial remedy possible." Epstein, *The Los Angeles Landlord-Tenant Court*, 17 Urb. L. Ann. 161, 163 (1979).

Epstein further notes that litigation involving "unlawful detainer litigation has an absolute preference on the civil calendar." He emphasizes that "when suit is filed, a five-day summons is issued, rather than the usual thirty-day summons," thus, "a defendant has only five days to answer or otherwise plead, instead of the thirty days permitted in other civil cases." *Id.*

For similar pleadings in Connecticut, *see* Conn. Gen. Stat. §§ 47a-23 to -42, cited in Note, *The Connecticut Housing Court: An Initial Evaluation*, 12 Conn. L. Rev. 296, 297 (1980). In Connecticut, as elsewhere, summary process eviction statutes are strictly construed. *Id.* at 301.

[56] Williams v. Shaffer, 385 U.S. 1037, 1040 (1967), *denying cert. to* 222 Ga. 334, 149 S.E.2d 668 (1966) (Douglas, J., dissenting) (footnote omitted).

[57] *See supra* notes 5–6.

[58] La Guardia v. Cavanaugh, 53 N.Y.2d 67, 70, 423 N.E.2d 9, 10, 440 N.Y.S.2d 586, 587, (1981) (quoting *In re* 89 Christopher, Inc. v. Joy, 35 N.Y.2d 213, 220, 318 N.E.2d 776, 780, 360 N.Y.S.2d 612, 618 (1974)). Eviction proceedings are based on a complex interplay of procedural and substantive rights in most jurisdictions. A 1981 report prepared by the United States Department of Housing and Urban Development and the American Bar Association notes that:

> not long ago, evictions tended to be truly "summary." A landlord needed only to have alleged nonpayment of rent and, barring any technical defects in his or her pleadings, would have won a judgment for possession almost automat-

While most landlords are represented by counsel in eviction proceedings, most low-income tenants are unable to obtain counsel and appear pro se.[59] Indeed, funding for programs which provide legal services to the poor has decreased in recent years.[60] While there is an "underlying assumption of the adversarial system . . . that both parties have roughly equal legal resources . . . [t]his assumption is destroyed when only one side is represented."[61]

The technical and complex nature of the proceedings, coupled with adequate legal representation for the landlord, leaves the unrepresented indigent tenant severely disadvantaged in her ability to defend an eviction case. While a wide range of defenses are now typically available to tenants faced with eviction, because the unrepresented tenant lacks the requisite knowledge and expertise, she is generally unable to take advantage of them.[62]

> ically. Recent laws enacted by legislatures, and in other instances interpreted into case law by the courts, have made legal issues far more complex. The idea of mutually dependent covenants—that the tenant must pay his or her rent and the landlord must maintain the premises in habitable condition—is only one illustration of major changes affecting tenancy relationships.

U.S. Dep't of Hous. and Urban Dev. & American Bar Ass'n, Executive Summary, Specialized Courts: Housing Justice in the United States 16 (Jan. 1981).

[59] A national survey which sought estimates from attorneys who work in federally funded legal services programs in 1987 found that the vast majority of tenants appear without representation in eviction cases. American Civil Liberties Union, Justice Evicted, *supra* note 8, at 42. *See also* The City Wide Task Force on Housing Court, 5 Minute Justice or "Ain't Nothing Going on But the Rent!" 34 (Nov. 1986) (only 20.8% of all tenants in New York City's Housing Courts were represented). Birnbaum, Collins & Fusco, *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 Urb. L. Ann. 93, 114–15 (1979) (citing J. Birnbaum, N. Collins, A. Fusco, Jr., Judgment Landlord: A Study of Eviction Court in Chicago (1978)) (approximately 7% of all tenants were represented).

[60] From 1981 to 1987, funding for the federal Legal Services Corporation declined 5%, from $321.3 million to $305 million. During that same period, salaries and other costs increased, with a net result that nearly 30% of the casehandling staff was lost. American Civil Liberties Union, Justice Evicted, *supra* note 8, at 44 (1987).

[61] Merritt v. Faulkner, 697 F.2d 761, 764 n.3 (7th Cir. 1983) (citing Bounds v. Smith, 430 U.S. 817, 826 (1977)), *cert. denied*, 464 U.S. 986 (1983).

[62] One writer commenting on the Detroit Housing Court found that it was nearly impossible for unrepresented tenants to comprehend and thus meaningfully raise appropriate defenses in eviction cases, with the result that, "[i]n short, many people view landlord-tenant court as an 'eviction mill,' providing neither careful consideration of each case nor an aggressive approach to code enforcement." Reed, *Detroit Code Enforcement and the Housing Court Debate*, 17 Urb. L. Ann. 215, 219 (1979) (footnote omitted).

> Additionally, the physical settings and procedural circumstances in which eviction cases are litigated often contribute to the inability of unrepresented tenants to defend themselves adequately: Heavy caseloads tend to breed (a) time pressures that intimidate defendants; (b) judicial failure to determine whether inarticulated defenses exist; (c) cursory examination of plaintiffs' proofs whereby plaintiffs win in spite of fatally defective proof; (d) timesaving procedures that may violate individuals' rights to a fair hearing; (e) pressure on defendants in landlord-tenant cases to settle in the hall resulting in imbalanced, unsupervised settlements.[63]

One judge who spent time observing housing courts around the country concluded that if "fairness, effectiveness, and sensitivity are equated with justice, then injustice is the norm."[64] The judge found that litigants were both "ignorant and uninformed of their procedural and substantive rights and responsibilities [and that] they did not comprehend the litigation process."[65] While many "cases were summarily disposed of rather than adjudicated . . . [e]ven when adjudications were fairly and sensitively made, the results obtained did not respond effectively to the needs of the litigants."[66] Thus, due to the tenant's lack of legal sophistication and the unwillingness of the legal system to protect the unrepresented tenant's rights, the risk of an erroneous or unfair determination is enormous for the tenant defending himself in an eviction action.

Representation by counsel makes a tremendous, and in many cases determinative, difference.[67] Attorneys are generally

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[63] Scott, *Housing Courts and Housing Justice: an Overview*, 17 Urb. L. Ann. 3, 6–7 (1979) (footnotes omitted). The author observed that even "more extreme problems reportedly occur in some jurisdictions in terms of courtroom behavior and decorum." *Id.*

[64] Garrity, *The Boston Housing Court: An Encouraging Response to Complex Issues*, 17 Urb. L. Ann. 15, 24 (1979).

[65] *Id.*

[66] *Id.*

[67] The Chicago Eviction Court Study established that "[o]utcomes were markedly different, however, between tenants represented by an attorney and tenants who did not retain counsel." Birnbaum, Collins & Fusco, *supra* note 59, at 114.

familiar with the procedural requirements for maintenance of eviction proceedings, and with substantive legal protections such as warranty of habitability, warranty of quiet enjoyment, retaliatory eviction and constructive eviction. They are aware of the legal and equitable defenses available to the tenant in an eviction proceeding such as waiver, laches, lack of personal jurisdiction and failure to state a claim. Most importantly, they are familiar with court procedures—motion practice, calendaring of cases, trial practice, and rules of evidence.

In contrast, since the unrepresented tenant does not have access to this information she cannot use it to her advantage. As the Supreme Court noted in *Goldberg v. Kelly*,[68] the "opportunity" to be heard is deficient if it is not "tailored to the capacity and circumstances of those who are to be heard."[69] As the eviction process fails to accommodate the special needs and characteristics of the indigent tenant population, it is fatally deficient. Most tenants faced with eviction are in no position to become familiar with court proceedings. Thus, the results of these uneven proceedings necessarily reflect the inequality caused by the tenant's lack of counsel. As a report on New York City's Housing Court concluded:

> In a process that happens so quickly that many tenants are left wondering if the case is actually over or not; when most tenants have no legal training and are confronted with documents full of legal jargon; when the landlords' attorneys are so at home in the court that they appear to tenants to be court personnel; . . . and when the person writing up the agreement they are expected to sign is the adversary; can justice be found?[70]

In *Powell v. Alabama*,[71] the Supreme Court stated that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[72] The Court

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[68] 397 U.S. 254 (1969).
[69] *Id.* at 268–69 (footnote omitted).
[70] The City Wide Task Force on Housing Court, *supra* note 59, at 91.
[71] Powell v. Alabama, 287 U.S. 45 (1932).
[72] *Id.* at 68–69.

recognized that "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law."[73] As *Powell* specifically addressed the rights of defendants in criminal cases, the Court found that "[i]f charged with crime, [a defendant] is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence."[74] The Court emphasized the need for an attorney because "[l]eft without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible."[75] Since the defendant lacks

> both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one[,] [h]e requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[76]

While the consequences of the proceedings differ, the unrepresented tenant faced with eviction is no less handicapped than the unrepresented defendant in a criminal proceeding. Despite the availability of procedural protections, affirmative defenses, or counterclaims, these protections are "virtually meaningless for the tenant being evicted without benefit of counsel."[77]

In *Lassiter*, the Court found that the presence of counsel could not have made a determinative difference because of the informality of the proceeding, the overwhelming evidence against the defendant, and the defendant's exhibited lack of interest in the proceeding.[78] Most eviction proceedings, on the

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[73] *Id.* at 69.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] F. Werner, *Toward a Right to Counsel for Indigent Tenants in Eviction Proceedings*, 17 Housing L. Bull. 65 (Sept./Oct. 1987). Werner reports the "revolutionary" developments in tenancy law such as the increased willingness to view residential leases as contracts with "mutually dependent covenants that condition the obligation to pay rent upon the delivery and maintenance of habitable premises," and new regulatory controls on demolition, condominium conversions and rent increases which often require just cause for eviction. *Id.*
[78] 452 U.S. at 33 (1981).

other hand, are litigated in formal courts of law, where rules of evidence and a variety of technical procedural requirements apply. Moreover, most poor tenants facing eviction have a variety of defenses available to them and a strong desire to assert those defenses and retain their homes. In sum, the risk of error in an eviction is great. This risk, however, can be substantially reduced though representation by counsel.

c. The Government's Interest

In evaluating the governmental interest in the appointment of counsel for indigent defendants in eviction proceedings, several factors must be considered. These include the government's interest in the administration of justice, the just and equitable distribution of finite financial resources, and its interest in the health, safety and welfare of its citizens. Viewed in light of each of these factors, a right to counsel in such proceedings would benefit both the government and the tenant.

The government shares the defendant's interest in the fair resolution of litigation in which eviction is sought. The primary purpose of procedural protections in our judicial system is to ensure the fairness and the accuracy of judicial determinations.[79] The Supreme Court in *Lassiter* noted that "the state's interest . . . may perhaps best be served by a hearing in which both [parties] are represented by counsel," since an equal contest is most likely to lead to accurate and just results.[80]

The overarching public interest in assuring decent housing for low-income people has made this an area of heightened local, state, federal, and even international concern.[81] Thus, apart

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[79] *See* Parham v. J.R., 442 U.S. 584 (1979) (the state always has a substantial interest in the fairness and accuracy of its own adjudications); Stone v. Powell, 428 U.S. 465 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976); McKeiver v. Pennsylvania, 403 U.S. 528 (1971); *In re* Gault, 387 U.S. 1 (1967).

[80] 452 U.S. at 28.

[81] The National Housing Act of 1937, 42 U.S.C. § 1401, set forth the national goal of "a decent home and a suitable living environment for every American family . . ." — a goal later to be affirmed in the Housing Act of 1947, 42 U.S.C. § 1441. Indeed, the fundamental need for shelter is often viewed in terms of human rights as well. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security . . . in circumstances beyond his control." Universal Declaration of Human Rights, art. 25(1) (1948), *reprinted in* P. Sieghart, The

from a general interest in the fairness of its dispute resolution mechanisms, the government has a particular interest in the fair adjudication of claims regarding housing.

Because eviction, displacement and homelessness all adversely affect the health, safety and welfare of their victims and thereby frustrate the government's mandate to provide for the general welfare, the government likewise shares an interest in the effects that homelessness has on tenants. Moreover, the existence of a permanent class of people that is without shelter can potentially have a long-range impact on the quality of life in the society at large. Children reared in public shelters and welfare hotels daily confront drug and alcohol abuse, prostitution, and other deleterious conditions. In addition they are poorly educated and isolated from stable communities. Thus a generation of children will mature with a slim chance of growing up to become productive members of society.[82]

Finally, the government's interest in the appointment of counsel involves two competing fiscal concerns. If the government were required to pay for counsel[83] it would have an obvious concern with that cost. But, even if that expense were high, and not offset by commensurate savings, cost alone should not deter the government from vindicating important legal rights. In discussing the proposed defunding of the Legal Services Corporation, the Chief Judge of the United States District Court of the Eastern District of New York rejected the notion that "in times of inflation, constitutional rights go by the boards," or that our "concept of equality" should be "inversely linked to the prime rate."[84] Finally, the Judge, quoting Justice Learned Hand, stated: "If we are to keep our democracy there must be one commandment: thou shall not ration justice."[85]

International Law of Human Rights at 193 (1983). *See also* International Covenant on Economic, Social and Cultural Rights, art. 11(1) (1966), *reprinted in id.* at 193 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."). For a discussion of the binding effect of the declaration on member states of the United Nations, *see id.* at 53–55.

[82] *See generally* J. Kozol, Rachel and Her Children (1988) for an in-depth discussion of the condition of life for families in homeless shelters and welfare hotels.

[83] As discussed below, *infra* pp. 589–90, because of the available option of mandatory and uncompensated appointments, this may not be necessary.

[84] Weinstein, *Equal Access to the Courts*, *supra* note 9, at 657.

[85] *Id.*

Moreover, as the government has long been deeply involved in the subsidization of legal costs for corporations and affluent individuals,[86] the inequality of "rationing" justice for the poor is even more disturbing. Under sections 162 and 212 of the Internal Revenue Code of 1954 for example, legal fees, other than those which are incurred for personal reasons (such as perfection of title to property), or which must be capitalized, are generally deductible by the taxpayer in computing taxable income.[87] For individuals in the highest tax bracket, the government subsidy for deductible legal fees is seventy percent of the fee.[88]

In any event, balanced against the cost of making counsel available must be the heavy governmental costs associated with eviction and homelessness. Although every low-income household that is evicted will not necessarily become homeless and in need of temporary shelter at government expense, the prospect of significant numbers of households encountering such a fate is daunting. The costs of homelessness to the public purse have become staggering. In New York City alone, the public cost of providing temporary shelter and related services to the homeless was estimated at over $125 million in 1987.[89] Annual

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[86] For corporations in the highest tax bracket (all corporations with taxable income exceeding $100,000), almost half of the corporation's deductible legal fees are in effect paid by the government.

Legal fees incurred in connection with a taxpayer's trade or business are generally deductible under section 162 of the Internal Revenue Code of 1954, as amended, and these fees may be deducted regardless of whether the taxpayer itemized deductions. In addition, some legal expenses incurred in connection with the production of income, but not incurred in connection with a trade or business, are deductible under section 212(1) or (2) of the Code by individuals who itemize their deductions.

Some examples of deductible legal fees include:

1. Fees incurred by a corporation named as a defendant in a divorce proceeding between a shareholder and his wife, Dolese v. United States, 605 F.2d 1146 (10th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980);

2. Fees incurred by an underwriter in the unsuccessful defense of a criminal prosecution for fraud under the securities law, Commissioner v. Tellier, 383 U.S. 687 (1966);

3. Fees incurred by a corporation in defending and settling a tort claim arising out of the negligent use of a company-owned car, Kopp's Co. v. United States, 80-2 T.C. 9747 (4th Cir. 1980);

4. Fees incurred in applying for a federal income tax ruling, Rev. Rul. 67-401, 1967-2 C.B. 123; Kaufmann v. United States, 227 F. Supp. 807 (W.D. Mo. 1963);

5. Fees incurred by a taxpayer in defending criminal prosecution for tax fraud, even if convicted, Rev. Rul. 68-662, 1968-2 C.B. 69.

[87] I.R.C. §§ 162, 212 (1954).

[88] *Id.*

[89] Committee on Legal Assistance of the Association of the Bar of the City of New York, Report on the Prevention of Homelessness By Providing Legal Representation

maintenance of a family of four in a New York City welfare hotel can cost up to $25,000[90] and the average length of stay for these families is thirteen months.[91] Indeed, to the extent that provision of counsel could avert the homelessness of even a small portion of those represented, expenditure for that purpose could be highly cost-effective. A report of the Association of the Bar of the City of New York concluded that: "The preliminary data in New York City indicates that the costs of providing legal services to the poor [to defend against evictions] is more than offset by savings in expenditures that would otherwise have to be made to shelter individuals and families made homeless by wrongful eviction."[92]

2. *Access to Court*

In addition to the three-tiered *Mathews* test, another framework for analyzing the process due the low-income litigant faced with eviction from her home is provided by a line of cases which addresses the right of poor persons to meaningful access to the courts.

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to Tenants Faced With Eviction Proceedings 2 (Dec. 3, 1987). Other localities have encountered similar costs. *See, e.g.*, Task Force for the Homeless, Homelessness in Metropolitan Atlanta 2 (June 1987) (the city of Atlanta spends in excess of $650,000 annually on shelters and other services for the homeless). *See also* Executive Office of Human Services, Homeless Families in Massachusetts 5 (Jan. 1987) (housing services for the homeless and staffing for preventative programs in Massachusetts totalled over $1 million in fiscal year 1987). Moreover, the federal government recently appropriated $400 million to address the problem of homelessness. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 1987 U.S. Code Cong. & Admin. News (101 Stat.) 482.

[90] New York City Human Resources Administration, Advisory Task Force Report on the Homeless, Toward a Comprehensive Policy on Homelessness (Feb. 24, 1987).

In Los Angeles, $13,870,749 was spent on shelter for the homeless in 1986. Shelter Partnership, Inc., The Short-Term Housing System of Los Angeles County: Serving the Housing Needs of the Homeless: An Analysis of Operating Characteristics and Funding Activity 9 (1987).

[91] New York City Human Resources Administration, New York City Temporary Housing Program for Families with Children 7 (May 1986).

[92] Committee on Legal Assistance of the Association of the Bar of the City of New York, Report on the Prevention of Homelessness By Providing Legal Representation to Tenants Faced With Eviction Proceedings 23 (Dec. 3, 1987). In recognition of the connection between eviction and homelessness, New York City's Department of Social Services funded pilot projects in fiscal year 1987–88 to provide legal assistance to low-income tenants at risk of eviction or recently evicted. In his proposed budget for 1989, Governor Cuomo of New York State has allocated several million dollars for such programs.

In *Boddie v. Connecticut*,[93] the Supreme Court held that an indigent person could not be barred from filing for divorce because of his inability to pay a filing fee. The principle articulated in *Boddie* rests on the fundamental argument that no person should be denied access to civil courts because he cannot afford to pay a fee, finance a bond, risk a penalty or hire an attorney. The Court stressed that "[p]ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[94] This notion is an integral aspect of the right to procedural due process.[95]

The fact that the dissolution of marriage could only be accomplished through the courts was a pivotal issue in *Boddie*.[96] Similarly, the indigent tenant who is a defendant in an eviction proceeding has no extra-judicial recourse available to her. In most jurisdictions, severance of the landlord-tenant relationship can only be accomplished through adjudication.[97] In addition to the requirement that the litigant be forced to rely on the courts, the interest at stake must be of basic importance before poor persons will have a constitutional right to court access without charge.

Thus, in *United States v. Kras*,[98] the Supreme Court held that an indigent individual was not entitled to waiver of a filing fee for a bankruptcy petition because the ability to declare bankruptcy was not as important as divorce, nor was bankruptcy the petitioner's sole recourse for protection against cred-

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[93] 401 U.S. 371 (1971).

[94] *Id.* at 377. *See also* Michelman, *supra* note 36, at 530.

[95] *See* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955–56 (1971) (Black, J., dissenting), *denying cert.*, 225 Ga. 91, 166 S.E.2d 88. In his dissent, Justice Black stated that "*Boddie* cannot and should not be limited to either its facts or its language." He argued that "there can be no doubt that this country can afford to provide court costs and lawyers to Americans who are now barred by their poverty from resort to the law for resolution of their disputes." *Id.* at 956.

[96] 401 U.S. at 377.

[97] *See, e.g.*, Kassan v. Stout, 9 Cal. 3d 39, 507 P.2d 87, 106 Cal. Rptr. 783 (1973) (although a tenant's attempted assignment of his lease constituted a violation thereof, the landlord was not authorized to forcibly evict the tenant, or his assignee, but was required to seek assistance from the courts, and, having failed to do so, was liable to the tenant in a forcible entry and detainer action); Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process*, 6 A.L.R.3d 177 (1966) (landlord may be subject to criminal liability or civil sanctions under state law for reentering leased premises by force or a breach of the peace).

[98] 409 U.S. 434 (1973).

itors. In contrast, in the eviction context, it cannot be said that the interest at stake is any less than that of someone seeking divorce. Indeed, as discussed above,[99] the interest at stake for the tenant faced with eviction is quite substantial.

Cases involving the rights of prisoners to legal assistance are illustrative of the Supreme Court's willingness to remove barriers to legal participation. The Court has held that the due process clause of the fourteenth amendment requires that prisoners be given free and full access to the courts.[100] In *Procunier v. Martinez*,[101] the Supreme Court invalidated an administrative regulation that barred prisoners' access to the assistance of law students and paralegals, holding that such regulations were inconsistent with the due process right of access to the courts. Further, in *Bounds v. Smith*,[102] the Court held that a prisoner's right to meaningful access to the courts required the provision of legal assistance in the preparation of habeas corpus and other writ petitions, where prisoners did not have access to adequate law libraries.

In the context of eviction proceedings, for access to the courts to be meaningful, the defendant must have an opportunity to be represented by counsel. As one commentary on the right to counsel in civil proceedings concludes: "The right to bring or defend a lawsuit without an accompanying right of counsel is, in most cases, hollow. A realistic court could not long reconcile granting a right of access to the courts with denial of the rights which make access effective."[103]

3. Government as Landlord

While *Mathews* and the cases which delineate the requirements of meaningful access to the courts present the framework

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[99] *See supra* pp. 39–41.

[100] *See, e.g.*, Younger v. Gilmore, 404 U.S. 15 (1971); Johnson v. Avery, 393 U.S. 483 (1969).

[101] 416 U.S. 396, 419 (1974).

[102] 430 U.S. 817, 828 (1977).

[103] Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545, 559 (1967).

for a due process right to assigned counsel in the eviction context, that right becomes imperative when a governmental entity threatens to evict a tenant. In situations where the government acts as landlord, or where there is substantial government involvement in the administration of housing, the significance of the fourteenth amendment's mandate that no state shall deprive an individual of due process of law is particularly evident. The government has a dual role in the deprivation of property in such instances as the state is both the entity seeking the property and the entity adjudicating the dispute over the property. Because the government is both the plaintiff and the arbiter, defendants who are evicted by the state for the benefit of the state have a particularly strong claim that they have been denied due process of law.

While claims to continued occupancy and shelter are important property interests, the tenant in housing provided or subsidized by the government has an additional interest in retaining the benefits of the government program.[104] Most government-run or subsidized housing programs provide benefits, most notably affordability, that are simply not provided by the private sector. Such housing is also generally filled to such a capacity that, once evicted, a tenant has a slim chance of finding similar replacement housing.[105] To the extent that the *Mathews* test involves a balancing of the competing interests, the individual's interest becomes more significant in light of the twin role of government.[106]

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[104] *See, e.g.*, Swann v. Gastonia Hous. Auth., 675 F.2d 1342, 1345–46 (6th Cir. 1982) (recognizing legitimate expectation of eviction only with good cause); Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir.) (identifying statutorily supported property interest in retaining government owned housing), *cert. denied*, 400 U.S. 853 (1970). *See also* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("The inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the actor may be fairly treated as that of the State itself.").

[105] A recent report by the United States Conference of Mayors found that 65% of the cities surveyed had closed their waiting lists for various forms of assistance housing due to their extensive length. Chicago reported a 10-year waiting list for such housing while Washington, D.C. reported an 8-year waiting list. None of the cities that were surveyed expected to meet the housing needs of low-income households in the forseeable future. United States Conference of Mayors, The Continuing Growth of Hunger, Homelessness and Poverty in America's Cities: 1987, A 26-City Survey 43 (1987).

[106] *See* Reich, *The New Property*, 73 Yale L.J. 733, 769 (1964).

B. State Due Process

Most state constitutions have due process clauses.[107] Further, in many states it has been held that the rights enforceable under such clauses are not coterminous with the rights recognized under the due process clause of the fourteenth amendment.[108] Indeed, many states have determined that their due process clauses afford substantially greater protections than those afforded by the federal Constitution.[109]Rather than exploring the diverse application of the due process clauses of the various state constitutions, this Section will present various arguments that may prove successful in establishing a right to counsel on state constitutional grounds.

State courts are free to formulate their own analyses of the states' constitutional requirements of due process and are not constrained by the analyses used by the federal judiciary.[110] Indeed, the Supreme Court in *Lassiter* suggested that "wise public policy . . . may require that higher standards be adopted [by the states] than those minimally tolerable under the [federal] constitution."[111]

Although the due process rights of tenants faced with eviction have not been addressed in state cases which have differentiated state due process rights from federal rights, state courts have found a greater right to due process under state constitutions in other contexts. Family law is one area in which states have taken a more expansive view of their due process clauses. For example, the due process clause of the Alaska constitution

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[107] *See, e.g.*, Miss. Const. art. 3, § 14; Nev. Const. art. 1, § 8.

[108] *See generally* Note, *The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324 (1982).

[109] *See generally The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 959 (1985). *See also* Note, *supra* note 108.

[110] It has been widely noted that the Supreme Court has, in the last decade, substantially shifted the focus of constitutional doctrine away from the dependence on federal law and federal courts characterized by the Warren Court, and toward increased reliance upon state law and state courts. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502–03 (1977); Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 814 (1985); Rosenfeld, *The Place of State Courts in the Era of* Younger v. Harris, 59 B.U.L. Rev. 597, 603 (1979).

[111] 452 U.S. at 33.

has been interpreted to require appointment of counsel for an indigent parent faced with termination of parental rights.[112] Likewise, the due process clause of the Michigan constitution has been interpreted to require appointment of counsel for an indigent putative father in a paternity suit.[113]

Criminal law is another area in which states have more broadly interpreted due process rights than has the federal judiciary. In the area of search and seizure, for example, the Supreme Court has held that standing to seek the supression of evidence obtained during an illegal search is limited to the subject of the search.[114] The Supreme Court of Louisiana, in contrast, has held that any potentially aggrieved party has standing to seek to exclude illegally obtained evidence.[115] Likewise, the Supreme Court has held that the right to counsel for criminal defendants does not extend to persons asked to participate in lineups prior to the formal "initiation of adversary judicial proceedings."[116] The California Supreme Court, in contrast, has upheld the right to counsel at preindictment lineups.[117]

Since state courts have independently interpreted the right to due process under state constitutions, even if federal courts fail to recognize the right to counsel based on federal constitutional grounds, an indigent tenant faced with eviction may be entitled to appointment of counsel on state constitutional grounds.

C. Poor Persons Statutes

As early as 1494, English law authorized the appointment of counsel to represent poor persons without charge.[118] In 1917, the California Supreme Court ruled that indigent California lit-

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[112] *See* V.F. v. State, 666 P.2d 42 (Alaska 1983); Flores v. Flores, 598 P.2d 893 (Alaska 1979). Other state constitutions have been similarly interpreted to support a right to counsel for a parent faced with termination of parental rights. *See, e.g., In re* Ella B., 30 N.Y.2d 352, 357, 285 N.E.2d 288, 290, 334 N.Y.S.2d 133, 136 (1972).

[113] *See* Artibee v. Cheboygan Circuit Judge, 397 Mich. 54, 243 N.W.2d 248 (1976).

[114] Alderman v. United States, 394 U.S. 165, 171–72 (1969).

[115] State v. Culotta, 343 So. 2d 977, 981–82 (La. 1976). The Louisiana Supreme Court relied on the specific language of the Louisiana Constitution.

[116] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[117] People v. Bustamante, 30 Cal. 3d 88, 97–102, 634 P.2d 927, 932–35, 177 Cal. Rptr. 576, 581–84 (1981).

[118] *See supra* note 11.

igants were entitled to the same in forma pauperis rights that were conferred in early English law.[119] The court quoted Blackstone's *Commentaries*: "And paupers . . . are, by statute (Stats. 11 Hen. VII, c. 12), to have original writs and *subpoenas gratis*, and counsel and attorney assigned them without fee; and are excused from paying costs. . . ."[120]

The direct descendants of this early English law are the federal and state "poor persons" statutes. Many states have poor persons statutes that authorize the appointment of counsel in civil matters for people who cannot afford the costs of prosecuting or defending a proceeding.[121] Although the language of most of these provisions makes the appointment of counsel discretionary, a strong argument can be made that, because of the interests at risk, it would be an abuse of discretion to refuse

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[119] Martin v. Superior Court, 176 Cal. 289, 168 P. 135 (1917).

[120] 176 Cal. at 294, 168 P. at 137.

[121] Examples of state poor persons statutes that authorize the appointment of counsel include:

> Ill. Ann. Stat. ch. 110, ¶ 5-105 (Smith-Hurd 1983):
> Poor Person. If any court shall, before or after the commencement of an action, be satisfied that the plaintiff or defendant is a poor person, and unable to prosecute or defend the action and pay the costs and expenses thereof . . . [t]he court may assign to such person counsel, who, as well as all other officers of the court, shall perform their duties in such action without any fees, charge or reward.
>
> Ind. Code Ann. § 34-1-1-3 (Burns 1986):
> Attorney for poor person—Any poor person not having sufficient means to prosecute or defend an action may apply to the court . . . for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend . . . shall assign him an attorney to defend or prosecute the cause. . . .
>
> New York Civil Practice Law and Rules § 1102(a) (McKinney 1978):
> the court in its order permitting a poor person to proceed as a poor person may assign an attorney.
>
> Va. Code Ann. § 14.1-183 (Supp. 1987):
> Persons allowed services without fees or costs.—Any person . . . who, on account of his poverty is unable to pay fees or costs may be allowed by a court to sue or defend a suit therein without paying fees or costs; whereupon he shall have, from any counsel whom the court may assign him . . . all needful services and process, without any fees to them therefor. . . .

Over half of the states and the District of Columbia have statutes authorizing the appointment of counsel. *See* Note, *Indigents' Right to Appointed Counsel in Civil Litigation*, 66 Geo. L.J. 113 n.16 (1977).

to appoint counsel for an indigent tenant who is forced to defend a summary eviction proceeding.

Jurisdictions have adopted varying standards to determine when the right to appointment of counsel under poor persons statutes attaches.[122] However, in most jurisdictions, there is not extensive case law addressing this issue. Thus, the task of a court when faced with a motion for appointment of counsel under a state poor persons statute is to determine whether appointment of counsel is appropriate under the circumstances.

The federal analogue to the state poor persons statutes is 28 U.S.C. § 1915 (1982).[123] In *Merritt v. Faulkner*,[124] the Seventh Circuit Court of Appeals reiterated a useful, widely followed standard for determining an indigent's entitlement to appointment of counsel. In examining the request, courts should consider

> (1) whether the merits of the indigent's claim are colorable; (2) the ability of the indigent plaintiff to investigate crucial facts; (3) whether the nature of the evidence indicates that the truth will more likely be exposed where both sides are represented by counsel; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint.[125]

The indigent tenant faced with eviction will generally be able to satisfy these criteria. Most indigent defendants have at least colorable defenses to a claim for their eviction. Often,

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[122] For example, under New York's poor person statute, where (1) indigent status is not disputed (or is beyond doubt), (2) prima facie merit of the claim or defense is indicated, and (3) counsel from federally-funded or other free legal services organizations is unavailable, failure to assign counsel under § 1101(a) is an abuse of discretion. Yearwood v. Yearwood, 54 A.D.2d 626, 387 N.Y.S.2d 433 (N.Y. App. Div. 1976).

[123] Section 1915(d) provides in pertinent part that, "[t]he court may request an attorney to represent any such person unable to employ counsel." 28 U.S.C. § 1915(d) (1982).

[124] 697 F.2d 761 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983).

[125] *Id.* at 764 (citing Maclin v. Freake, 650 F.2d 885, 887–89 (7th Cir. 1981)). The *Maclin* factors, although they are not exclusive, have been generally followed in other circuits. *See* Hodge v. Police Officers; Colon #623 and Repuerto, #145, 802 F.2d 58, 61 (2d Cir. 1986); Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984); Ulmer v. Chancellor, 691 F.2d 209 (5th Cir. 1982).

because of the generally deficient quality of the housing inhabited by poor people, at least in jurisdictions where a warranty of habitability has been established, many poor people will be able to raise the conditions of the premises as a defense to a threatened eviction.[126]

Proving defenses in an eviction action may require the use of discovery devices such as the subpoena of various witnesses and documents. Yet it is beyond the ability of most indigent defendants to use these devices to investigate crucial facts and thus to defend adequately against eviction. Eviction proceedings often involve sharp factual disputes such as whether the ceiling leaks or whether rent was paid. Accurately resolving the disputes presented to the court is virtually impossible when one party is represented and the other is not. In addition, in proceedings which involve procedural mechanisms such as rules of evidence and motion practice, indigent tenants are often incapable of adequately presenting their cases. Finally, as discussed earlier,[127] modern eviction proceedings can be remarkably complex, involving the interplay of a wide variety of local, state and federal law.

Because tenants in eviction proceedings are typically unable to retain counsel while landlords are almost always represented, a compelling argument may be made that appointment of counsel is warranted under general poor persons statutes. Although this approach has yet to be adequately tested in the state courts, such statutes represent a promising area for further exploration in the jurisdictions in which they exist.[128]

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[126] In a New York program to provide representation to low-income tenants in eviction proceedings, "[e]very case achieved some or all the tenant's objectives. . . . This was accomplished in many cases when the volunteer attorney asserted the landlord's breach of its warranty to maintain the apartment in a habitable condition." The availability of such defenses is common among indigent tenants but they are rarely asserted absent competent counsel. Moynihan, Selected Sections of a Narrative Report on the Brooklyn Family Anti-Eviction Project 2 (Mar. 1988).

[127] *See supra* text accompanying note 58.

[128] Careful scrutiny of the context in which eviction proceedings take place may reveal additional bases upon which a right to counsel could be established. For example, while the federal judiciary has explicitly declined to evoke "strict scrutiny" regarding economic distinctions in the law, San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("At least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."), the California Supreme Court has recognized wealth as a suspect classification for equal protection purposes. Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*,

III. Application of a Right to Appointed Counsel

Ideally, application of the *Mathews* test or some comparable analysis will result in the establishment of a right to counsel for all tenants faced with eviction. Such a result would be warranted based on the common characteristics of all eviction proceedings, i.e., the magnitude of the interest at stake for the tenant, the risk of error in the absence of counsel and the government's interest in a fair adjudication and the ability of low-income people to retain their homes.

Realistically, it is possible that initially an across-the-board approach may meet with judicial resistance. If, for example, courts choose to extend *Lassiter*'s presumption against the appointment of counsel to the eviction context, an individualized or case-by-case approach may prove more acceptable. It is thus worth examining some of the variables that a court should consider in a case-by-case approach to analyzing the right to appointment of counsel in the eviction context.

One such variable is the statutory and case law of the jurisdiction. Paradoxically, in jurisdictions with more procedural and substantive protections for tenants, the risk of error for a tenant who appears unrepresented is much greater than in jurisdictions with fewer rights. Another variable is the defendant's ability to represent her own interests effectively. Defendants who have difficulty speaking English, who are disabled or elderly, or who have a limited education may be at much greater risk of wrongful eviction if forced to litigate pro se. Such individuals may also have much more at stake in an eviction proceeding because they may be less able to compete aggressively for severely limited housing resources and, if evicted, would be more likely to become homeless than others. An additional variable is the elasticity of the rental housing market in the locality. Tenants in jurisdictions with a very limited availability of low-cost housing have much more at stake than tenants in jurisdictions with an abundance of affordable housing. By analyzing these and other variables on a case-by-case basis, courts

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432 U.S. 907 (1977). Constitutional analyses such as this one, peculiar to particular states, may provide further bases for the recognition of a right to assigned counsel in eviction cases.

can begin to develop "bright-line" rules regarding appointment of counsel.

An individualized approach may ultimately prove unworkable, however. One factor that prompted the Supreme Court in *Gideon* to establish an across-the-board right to counsel for criminal defendants was the complexity and unworkability of a case-by-case approach. The inconsistency that would result from the discretionary application of the *Mathews* test or other analyses by many different judges could easily lead to confusion and inordinate complexity. In the final analysis, the long-range failure of an individualized approach could well result in the emergence of an across-the-board policy.

IV. Who Should Be Appointed?

Whether it is as a due process entitlement, in the exercise of discretion under due process or through an in forma pauperis statute, the possibility of court appointment of counsel for low-income tenants faced with eviction raises the inevitable issue of who should be appointed. The options are finite. One alternative is to solicit a volunteer attorney to provide representation. If no volunteer can be found, or if they are so inclined, judges in most jurisdictions may order a member of the bar to represent the indigent defendant. If a mandatory appointment is made, the issue is further complicated because of the need to determine who is an appropriate attorney to appoint, what are the rights of the designated attorney to reject such an appointment, and whether the appointed attorney has a right to compensation.[129]

For most of the last decade, a debate has raged in the legal community over whether pro bono provision of legal assistance by attorneys should be made a mandatory obligation for all members of the bar.[130] If proponents of this concept are suc-

[129] The issue of whether courts have the power to mandate a private attorney to represent a client free of charge has been sharply contested in recent years. Although the trend appears to be the recognition that courts do have that power, the debate is far from resolved. *See generally* Huskey v. Tennessee, 56 U.S.L.W. 2466 (U.S. Feb. 23, 1988); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966). *But cf.* State *ex rel.* Scott v. Roper, 688 S.W.2d 757 (Mo. 1985) (en banc) (attorney cannot be forced to represent indigent client where attorney's funds would be spent in representation and attorney's services would go uncompensated).

[130] *See, e.g.*, Graham, *Mandatory Pro Bono: The Shape of Things to Come?*, A.B.A. J. 62 (Dec. 1, 1987).

cessful, free legal assistance to indigent people will be far more abundant and the problem of lack of counsel for tenants faced with eviction will be somewhat ameliorated. Currently, the prospects for such a development are remote,[131] as the voluntary efforts of members of the bar have not yet significantly contributed to the availability of counsel for the poor in civil matters.

In the absence of sufficient numbers of uncompensated counsel who can be cajoled or compelled into representing indigent tenants in eviction proceedings, if a right to counsel for such tenants is established, states will be obligated to provide compensation for appointed attorneys. Many states already have programs for compensation of private attorneys who are appointed as counsel in criminal matters. While such a system could be set up to compensate appointed attorneys for representation in eviction cases, this system may not be the most efficient solution.

Perhaps the simplest and most efficient answer to the question of whom to appoint would be to expand the availability of publicly-funded legal services programs to meet the need. The need for a judicially-recognized right to counsel exists because free legal services programs are unable to serve the needs of poor people for representation. At the levels at which they are currently funded, such programs could not serve additional clients in the event of the recognition of a right to counsel.[132] Nor can attorneys in legal services programs funded through the federal Legal Services Corporation be appointed in any greater numbers than the remainder of the bar in general.[133]

Yet, if tenants faced with eviction are entitled to appointment of counsel, a large number of defendants will need representation.[134] In large urban jurisdictions, representation of in-

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[131] *Id.*

[132] *See supra* note 10.

[133] "Attorneys employed by a recipient [of funding from the Legal Services Corporation] shall be appointed to provide legal assistance without reasonable compensation only when such appointment is made pursuant to a statute, rule or practice applied generally to attorneys practicing in the court where the appointment is made." 42 U.S.C. § 2996e(d)(6) (1977).

[134] While there would be a large number of tenants entitled to representation, the total number of eviction proceedings would likely diminish. First, landlords would be more likely to seek to negotiate agreements if they knew that tenants would be represented by counsel in an eviction proceeding. Second, if tenants are represented by counsel, disputes could be resolved with greater finality and thus the need for multiple

digent tenants should be handled by an organization which has expertise in the area of housing law, and is equipped to competently represent a large volume of cases simultaneously. Because of the investment of time that is necessary to master landlord-tenant law, and the economy of appearing in court to represent several individuals on the same day, it would be preferable to utilize organizations that are structured to handle such cases efficiently. Because existing programs for the delivery of free legal assistance satisfy these criteria, these organizations should be expanded to enable them to serve the needs of all indigent tenants facing eviction proceedings.

Conclusion

There is much at stake for a low-income tenant faced with eviction. On one level, the tenant faces an imminent threat of a disrupted life and displacement from her home. On another level, the tenant faces the possibility that she will be unable to find any alternative housing and therefore will be rendered homeless and subject to the devastating consequences that homelessness engenders.

The judicial system itself makes a tenant's right to counsel considerably more important. An unrepresented tenant will encounter substantial difficulties defending himself in a technical eviction proceeding which is based on a wide variety of procedural and substantive legal requirements.

In light of the risks at stake and the complexity of the legal issues, attorney representation can mean the difference between access to a home and homelessness. The recognition of a right to counsel for low-income tenants faced with eviction will not, of course, be a panacea for the housing ills of this nation. It will, however, have a profound influence on the eviction process. At a time when there is simply no place to go for low-income families and individuals who lose their homes, the right

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proceedings will be greatly obviated. For example, a tenant who is sued for eviction based on nonpayment of rent may be entitled to assert a defense based on the warranty of habitability. A represented tenant is more likely to be able to take advantage of the court's power to enforce the warranty of habitability by asserting the appropriate defenses and counterclaims. Resolving rent and repairs issues in the same proceeding eliminates the need for additional, protracted proceedings.

to counsel will maximize tenants' ability to defend their interests and minimize the risk of unjust eviction. At a time when local, state and federal governments are spending millions of dollars for temporary shelter for the homeless, the recognition of such a right will enable some who would otherwise become homeless to stay in their homes. Most importantly, at a time of growing consciousness of the low-income housing crisis and the long-range consequences to the individual and society of the loss of a home, it will be a step that affirms the fairness and integrity of the judicial process and enables those faced with the loss of their homes to have a meaningful opportunity to be heard.