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## **Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings**

Raymond H. Brescia

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**SHELTERING COUNSEL:  
TOWARDS A RIGHT TO A LAWYER IN EVICTION  
PROCEEDINGS**

*Raymond H. Brescia\**

*This Article provides an overview of the current arguments presented by advocates who seek to establish a right to counsel for indigent tenants in eviction proceedings and assesses the strength of those arguments in the current political, social, and economic milieu. It is beyond question that the overwhelming majority of low-income tenants are unrepresented in proceedings in which their homes are in jeopardy and having counsel in such proceedings often prevents eviction and homelessness. Preventing those evictions reduces the human cost of homelessness, saves government substantial money by not having to provide shelter to the homeless, and preserves the stock of affordable housing at a time when there is a dire shortage of affordable housing across New York State. For years, advocates have stressed the argument that having access to counsel in eviction proceedings is simply a right, and the absence of counsel calls into question the fundamental fairness of our judicial system. This Article attempts to assess whether such an argument is the most persuasive that can be made in the face of current political, social, and economic realities. It goes on to review trends in philanthropy and governance that emphasize a preference for solutions and outcome-based programs. After recounting a discussion of housing experts from across the state, and the arguments formulated during that session, this Article concludes that advocates promoting a right to coun-*

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*sel in eviction proceedings in New York State would be well served by furthering arguments stressing the role the right to counsel plays in preventing eviction and homelessness and preserving affordable housing.*

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**INTRODUCTION**

In 2006, the American Bar Association formally adopted a resolution calling for the provision of counsel, at public expense, to the indigent in cases involving “shelter, sustenance, safety, health and child custody.”<sup>1</sup> In several states, bar associations, judicial commissions, and legislative bodies have called for comprehensive approaches to the provision of a right to counsel in many, if not all, of these categories of cases.<sup>2</sup> This Article assesses the effectiveness of arguments in favor of a right to counsel in cases where a family’s shelter is in jeopardy in the state of New York, so as to assist advocates in this state and others across the nation, gauging what arguments might ultimately prove successful in this endeavor. Because New York courts are varied, from the high volume urban courts in New York City, to the scattered rural courts throughout the state, if arguments can make it here, as the saying goes, perhaps they can make it anywhere.

In March of 2008, legal services and other advocates, elected officials, representatives of the private bar, and academics, gathered as a part of the New York State Bar Association’s (“NYSBA”) con-

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<sup>1</sup> American Bar Association House of Delegates, *Task Force on Access to Civil Justice*, 112A (Aug. 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

<sup>2</sup> See Paul Marvy, *Advocacy for a Civil Right to Counsel: An Update*, 41 CLEARINGHOUSE REV. 44 (2008) (reviewing state efforts).

ference entitled, “An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State,” to discuss strategies for achieving a right to counsel in civil settings, including those facing eviction or foreclosure in New York State. At this conference, a “break out” group was formed for the specific purpose of not only discussing efforts already underway to provide counsel in such settings, but also to devise new strategies for ensuring that litigants facing the loss of their homes would have a right to counsel. It is clear from the break out discussion that an appreciation for the right to counsel cannot and should not be considered in a vacuum, i.e. one which fails to take into account the impact on the broader community of the failure to ensure this right. This Article is an attempt to do just that; place the demand for a right to counsel in housing cases in the current social, political, and legal contexts and attempt to determine the best arguments to succeed in establishing such a right.

In Part I of this Article, I will describe the current state of affairs with respect to the availability of counsel and legal assistance to families and individuals facing eviction. In Part II, I will discuss prior and current attempts to provide counsel as of right, in proceedings involving eviction. In Part III, I will recount the housing discussion held at the NYSBA’s Civil Gideon conference. In Part IV, I will review trends in philanthropy and government reform, noting a growing emphasis on support for outcome- and solutions-based programs. In Part V, I will attempt to contextualize the demand for a right to counsel and argue that the absence of such a right has broad social, economic, and legal ramifications. In Part VI, I will seek to develop

a set of principles that should inform efforts to expand the right to counsel where a family's shelter is in jeopardy.

## I. THE SETTING

The courts that handle evictions in New York State are varied, from the eviction mills of landlord-tenant court in New York City, with its fifty judges spread throughout the five boroughs handling up to 350,000 cases a year,<sup>3</sup> to the town justices in rural communities throughout New York State.<sup>4</sup> In New York City, each borough has its own division of the Civil Court of the City of New York, called the Housing Part, which is dedicated exclusively to landlord-tenant matters.<sup>5</sup> Each year within the five boroughs, approximately 25,000 households in New York City are subject to a formal order of possession, issued by New York City's housing parts and the State Supreme Court.<sup>6</sup>

In counties outside of New York City, the numbers, though

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<sup>3</sup> NEW YORK COUNTY LAWYERS' ASS'N REPORT: THE NEW YORK CITY HOUSING COURT IN THE 21<sup>ST</sup> CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 21 (2005) [hereinafter NEW YORK COUNTY LAWYERS' ASS'N REPORT], available at [www.nycla.org/siteFiles/Publications/Publications195\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf) (citations omitted). In 2007, the housing parts throughout the five boroughs handled 300,182 cases, including 259,120 in which nonpayment of rent was alleged, 29,616 holdover actions, 1,308 illegal lockout cases, 10,124 housing code cases filed by tenants, and fourteen actions pursuant to Article 7A of the Real Property Actions and Proceedings Law. See N.Y. State Office of Court Administration Data (on file with author).

<sup>4</sup> See William Glaberson, *In Tiny Courts of New York, Abuses of Law and Power*, N.Y. TIMES, Sept. 25, 2006, at A1.

<sup>5</sup> See NYCourts.gov, N.Y. City Civil Court Housing Part, <http://www.nycourts.gov/courts/nyc/housing/index.shtml> (last visited Sept. 16, 2008).

<sup>6</sup> This number is relatively constant. For example, in 2007, 24,973 households lost possession in eviction and ejection proceedings. Data from the mid-1990s held true to this number. See N.Y. Office of Court Admin. Data—2005 & 2006 Residential Housing Court Statistics, at 3 (on file with author); see also Dennis Hevesi, *Landlord vs. Tenant: City Eviction Wars*, N.Y. TIMES, Aug. 4, 1996, §9, at 1. It also is a serious undercount; many families flee their homes short of the issuance of a formal warrant of eviction. See *infra* text accompanying note 34.

hard to compile precisely, are similarly daunting. According to the New York State Office of Court Administration records, nearly 88,000 eviction cases were filed in the city and district courts outside of New York City.<sup>7</sup> That number does not include all the eviction cases filed in the 1,250 Town and Village Justice Courts spread throughout the state, with their 1,971 judges presiding, representing two thirds of all of the judges in the state.<sup>8</sup> No records are available for these courts, and it is quite likely that a significant number of eviction cases are included in the 2.2 million cases filed each year in these courts.<sup>9</sup>

While these numbers may seem overwhelming, they do not tell the full story about how tenants fare in these courts. Turning first to the courts in New York City, a visit to any housing part therein reveals a study in contrasts.<sup>10</sup> The tenants are predominantly women of

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<sup>7</sup> See N.Y. Office of Court Admin., *City and District Courts: Filing By Case Type — 2006* (on file with author).

<sup>8</sup> This data was taken from a three-part exposé in the *New York Times* entitled, “Broken Branch,” published in 2006. See Glaberson, *In Tiny Courts*, *supra* note 4; William Glaberson, *Delivering Small—Town Justice, With a Mix of Trial and Error*, N.Y. TIMES, Sept. 26, 2006, at A1; William Glaberson, *How a Reviled Court System has Outlasted Critics*, N.Y. TIMES, Sept. 27, 2006, at A1. At the conclusion of their analysis of town and village court systems, the *New York Times*, which called the system a “second-class system of justice,” concluded that

[t]he examination found overwhelming evidence that decade after decade and up to this day, people have often been denied fundamental legal rights. Defendants have been jailed illegally. Others have been subjected to racial and sexual bigotry so explicit it seems to come from some other place and time. People have been denied the right to a trial, an impartial judge and the presumption of innocence.

Glaberson, *In Tiny Courts*, *supra* note 4, at 2.

<sup>9</sup> Glaberson, *In Tiny Courts*, *supra* note 4, at 2. If just ten eviction cases were filed a month in each of these courts, that would mean over 144,000 additional eviction cases filed each year in these courts.

<sup>10</sup> The description of New York City’s housing court is derived mostly from the author’s personal experiences representing tenants in the Bronx, Brooklyn, Queens, and Manhattan for fourteen years. There is no shortage of descriptions of the City’s housing courts. See,



color, and many have young children in tow.<sup>11</sup> The lawyers, most of whom represent landlords, are predominantly white men. Tenants must often wait for hours and are at the mercy of the schedules of the landlords, and their attorneys, many of who are juggling dozens of cases in numerous courtrooms at one time. The halls of the courthouses, where much of the negotiations of settlements take place, are raucous and overcrowded.<sup>12</sup> Shouted exchanges routinely occur, and shoving matches, though rare, do occasionally break out as tensions run high given what is at stake and the seemingly uncontrolled chaos of the setting.

Outside of New York City, although there is less written about these courts, the situation is no better, even if markedly differ-

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*e.g.*, Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997).

<sup>11</sup> One study found that over fifty percent of the tenants appearing in the New York City housing courts were African-American, and one-third were Latino. See POVERTY & RACE RESEARCH ACTION COUNCIL, HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL 8 (1993) [hereinafter POVERTY & RACE RESEARCH ACTION COUNCIL]. This same study found that children were present in nearly forty percent of the cases. *Id.* at 12. The findings on racial demographics are similar to those from a more recent survey conducted by the Brennan Center for Justice. See Laura Abel, Kira Krenichyn & Nicole Schaefer-McDaniel, *Results from Three Surveys of Tenants Facing Evictions in New York City Housing Court*, Exec. Sum. at 1-2, available at [http://www.brennancenter.org/content/resource/results\\_from\\_three\\_surveys\\_of\\_tenants\\_facing\\_eviction\\_in\\_new\\_york\\_city\\_hous/](http://www.brennancenter.org/content/resource/results_from_three_surveys_of_tenants_facing_eviction_in_new_york_city_hous/) (finding forty-nine percent of tenants facing eviction in New York City Housing Court were African-American and twenty-seven percent were Latino, while sixty-one percent of tenants had children under eighteen years old living with them in the home, a stark contrast to the earlier report). Not surprisingly, the demographics of housing court tenants mirror the demographics of the shelter population. See NYC DEP'T OF HOMELESS SERVICES, EMERGING TRENDS IN CLIENT DEMOGRAPHICS POLICY & PLANNING 3 (2003), <http://www.nyc.gov/html/dhs/downloads/pdf/demographic.pdf> (noting family shelter population sixty to sixty-five percent African-American, thirty to thirty-five percent Hispanic, and five percent White).

<sup>12</sup> See, *e.g.*, Paula Galowitz, *The Housing Court's Role in Maintaining Affordable Housing*, in HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 183 (Michael H. Schill ed., 1999); see ModernCourts.org, The Fund for Modern Courts—Citizen Court Monitoring, <http://www.moderncourts.org/Programs/monitoring.html> (last visited Nov. 16, 2008).

ent.<sup>13</sup> Some of the courts in the cities outside the Big Apple have court rooms dedicated to housing cases, with judges more likely to be amenable to tenant claims and defenses. These courts have a calendar call of eviction cases taking place each day.<sup>14</sup> In the rural courts, housing cases are called together with criminal matters, traffic violations, and all of the other cases that are adjudicated in these courts.<sup>15</sup>

Often forced to wait until all of the other cases on the calendar are called,<sup>16</sup> tenants defending against eviction proceedings must deal with judges who are not lawyers,<sup>17</sup> and who, according to the rural

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<sup>13</sup> Information regarding the practice in rural courts, unless otherwise noted, comes from interviews conducted of four legal services practitioners practicing in rural courts throughout New York State. To the author's knowledge, this is the first in-depth look at what transpires in housing cases outside of New York City. This information was taken from interviews of the following individuals, whose names, affiliations and the counties their offices cover follow: 1) Jeff Hogue, supervising attorney at Legal Assistance of Western New York in its Geneva office, which covers Ontario, Seneca, Yates, Wayne, and Livingston counties, while the organization as a whole has a catchment area covering 14 counties in Western New York in total; 2) Dan Alley, staff attorney with the Legal Aid Society of Northeast New York ("LASNNY"). Dan operates out of LASNNY's Plattsburgh office, which covers Clinton, Franklin, Essex, Hamilton Counties and a part of Warren County; 3) Lewis Creekmore, Deputy Director of Legal Services for the Hudson Valley, which has a catchment area that includes Westchester, Dutchess, Ulster, Putnam, Rockland, Orange, and Sullivan Counties; 4) James Murphy, an attorney with Legal Services of Central New York, which has as its catchment area the counties of Onondaga, Oswego, Jefferson, Cayuga, Cortland, Chenango, Broome, Otsego, Delaware, Oneida, Madison, Herkimer, and Lewis. James primarily practices in Cortland County. References to their respective interviews, the transcripts of which are all on file with the author, will be made throughout the piece, noting the last name of the particular interviewee being cited.

<sup>14</sup> Interview with Dan Alley, Staff Attorney, Legal Aid Society Northeastern New York, at 1-2; Interview with Lewis Creekmore, Deputy Director, Legal Services for the Hudson Valley, at 1, 3; Interview with Jeff Hogue, Supervising Attorney, Legal Assistance of Western New York, at 1; Interview with James Murphy, Attorney, Legal Services of Central New York, at 6-7.

<sup>15</sup> Interview with Jeff Hogue, *supra* note 13, at 4; Interview with James Murphy, *supra* note 13, at 2. And to call them "courtrooms" is quite generous. Many of these judges preside in makeshift offices adjacent to or in shared space with other government offices, like police stations, town halls, and even transportation department facilities. Interview with Dan Alley, *supra* note 13, at 3-4; Interview with Lewis Creekmore, *supra* note 13, at 6-7; Interview with James Murphy, *supra* note 13, at 1.

<sup>16</sup> Interview with Lewis Creekmore, *supra* note 13, at 3-4.

<sup>17</sup> Interview with Jeff Hogue, *supra* note 13, at 1; Interview with James Murphy, *supra* note 13, at 10 (noting that only one of sixteen judges in one county is an admitted attorney).

practitioners interviewed for this Article, are favorably disposed to the interests of landlords, often adopting the mindset that the landlord can do what he or she wants with the leasehold.<sup>18</sup> All in all, tenant rights are rarely protected without the intervention of an attorney, and courts are often in the position of issuing warrants of eviction at the behest of the landlords appearing before them, without any regard for tenants' defenses and counterclaims that might otherwise be available.<sup>19</sup>

Placing this into an appropriate context, it is important to note that all of this occurs against the backdrop of a desperate need for affordable housing across New York State. As of 2006, New York State's population was 19.3 million, with 7.9 million housing units.<sup>20</sup> Only a slim majority of New York State's households are homeowners; as of 2006 the homeownership rate was fifty-three percent, compared to the national average of over sixty-six percent.<sup>21</sup> Renters in New York State are challenged by the high cost of housing across the state.<sup>22</sup> Analysis of the 2000 Census Data, by the United States De-

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<sup>18</sup> Interview with Dan Alley, *supra* note 13, at 15; Interview with Lewis Creekmore, *supra* note 13, at 2. Tenants, ignorant of their rights, cannot expect judges to enforce tenant defenses or counterclaims if the tenants do not raise them. Landlords can move cases quickly through these courts and may obtain warrants of eviction in the shortest amount of time permitted under the law. Interview with Jeff Hogue, *supra* note 13, at 6; Interview with Lewis Creekmore, *supra* note 13, at 8-9.

<sup>19</sup> Interview with Jeff Hogue, *supra* note 13, at 1-2; Interview with James Murphy, *supra* note 14, at 2-3.

<sup>20</sup> See QuickFacts.census.gov, U.S. Census Bureau—State & County Quickfacts, N.Y. State, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Sept. 23, 2008).

<sup>21</sup> See *id.* Homeownership rates vary widely across the state. For example, there is a nineteen percent homeownership rate in the Bronx, and an eighty-two percent homeownership rate in Putnam County. *Id.*

<sup>22</sup> According to the U.S. Census Bureau, New York State is tied with Nevada with the fourth highest percentage of renters paying more than thirty percent of their income on rent and utilities, at 48.1%, trailing the leader, Florida, by fewer than four percentage points. QuickFacts.census.gov, U.S. Census Bureau—Percent of Renter-occupied Units Spending

partment of Housing and Urban Development, shows that at that time, nearly twenty percent of New York State's renters paid more than fifty percent of their income towards their rent, and that fourteen percent of homeowners paid more than fifty percent of their income towards their housing costs.<sup>23</sup>

Looking specifically at New York City, the crisis in housing affordability is acute and well documented. Of the City's two million rental units, a little more than half are subject to one of two different rent regulatory regimes: Rent Control or Rent Stabilization, with the latter making up the overwhelming bulk of the regulated units in the City.<sup>24</sup> Over the last thirteen years, according to figures released by the New York City Rent Guidelines Board, the City has lost a net total of at least 174,000 Rent Stabilized units.<sup>25</sup> The largest single reason for the loss of regulated units was the "high rent/vacancy decon-

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30 Percent or More on Rent and Utilities,  
[http://factfinder.census.gov/servlet/GRTTable?\\_bm=y&\\_-box\\_head\\_nbr=R2515&-ds\\_name=ACS\\_2006\\_EST\\_G00\\_&-\\_lang=en&-format=US-30&-CONTEXT=grt](http://factfinder.census.gov/servlet/GRTTable?_bm=y&_-box_head_nbr=R2515&-ds_name=ACS_2006_EST_G00_&-_lang=en&-format=US-30&-CONTEXT=grt) (last visited Sept. 23, 2008).

<sup>23</sup> See U.S. DEP'T OF HOUS. & URBAN DEV., STATE OF THE CITIES DATA SYSTEM COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY (CHAS) DATA: HOUSING PROBLEMS OUTPUT FOR ALL HOUSEHOLDS, <http://socds.huduser.org> (Follow the "CHAS Data" hyperlink; then follow "Click here to view non-frames version of CHAS" hyperlink; then Select "New York" under "Select State"; then Select "2000" under "Select Year"; then Select "Submit" for "State Data: New York.").

<sup>24</sup> AMY ARMSTRONG, ET AL., STATE OF NEW YORK CITY'S HOUSING & NEIGHBORHOODS 2007 40 (2007), *available at* [http://furmancenter.nyu.edu/documents/SOC\\_2007\\_Final\\_001.pdf](http://furmancenter.nyu.edu/documents/SOC_2007_Final_001.pdf). Roughly half of the City's multi-unit housing is covered by either the Rent Control or Rent Stabilization regulatory schemes. For the purposes of this discussion, I will use the term "rent regulated" when referring to the general rent protections available under the two schemes. See ANDREW SCHERER & FERN FISHER, RESIDENTIAL LANDLORD-TENANT LAW IN N.Y. 113-256 (2007-2008) (describing the many features of Rent Control and Rent Stabilization in New York).

<sup>25</sup> See N.Y. CITY RENT GUIDELINES BD., CHANGES TO THE RENT STABILIZED HOUSING STOCK IN NEW YORK CITY IN 2007, at 12 (2008), *available at* [http://www.housingnyc.com/downloads/research/pdf\\_reports/changes2008.pdf](http://www.housingnyc.com/downloads/research/pdf_reports/changes2008.pdf).

trol” mechanism described below.<sup>26</sup>

Putting aside the outright loss of rent-regulated units, with respect to the loss of *affordable units*, the crisis in New York City is even more dramatic. In 2005, only sixty-nine percent of all rental units were affordable for families at the median household income, a drop from seventy-seven percent in just three years.<sup>27</sup> Furthermore, between 2002 and 2005, the City lost close to 200,000 units with rents affordable to families earning eighty percent of the City’s median income; meaning an additional ten percent of the entire rental housing stock in New York City was placed beyond the reach of the City’s lower income residents over this brief three year stretch.<sup>28</sup> One estimate suggests that another 600,000 units will become unaffordable to this lower income population over the next eight years.<sup>29</sup> Furthermore, the Furman Center at New York University School of Law estimated that in 2002, 421,304 households in New York City paid more than fifty percent of their monthly income on rent. As of 2005, this number increased to 526,211, a nearly twenty-five percent increase over a three-year period.<sup>30</sup> With this loss of affordable housing as a backdrop to the following discussion, I will next address one

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<sup>26</sup> See *id.* at 12, app. 5.

<sup>27</sup> ARMSTRONG, *supra* note 24, at 40 (2007). “Affordability” is defined as having a monthly rent that is thirty percent or less of a household’s gross monthly income. ERIC S. BELSKY ET AL., MEASURING THE NATION’S RENTAL HOUSING AFFORDABILITY PROBLEMS exec. sum. ii (2005), available at [www.jchs.harvard.edu/publications/rental/rd05-1\\_measuring\\_rental\\_affordability05.pdf](http://www.jchs.harvard.edu/publications/rental/rd05-1_measuring_rental_affordability05.pdf).

<sup>28</sup> VICKI BEEN ET AL., STATE OF NEW YORK CITY’S HOUSING & NEIGHBORHOODS 2005 2 (2006), [http://furmancenter.nyu.edu/publications/documents/SOC2005\\_002.pdf](http://furmancenter.nyu.edu/publications/documents/SOC2005_002.pdf).

<sup>29</sup> HOUS. HERE & NOW, LOSING GROUND: HOW MIDDLE CLASS, WORKING & POOR NEW YORKERS ARE BEING PRICED OUT 5 (2007), [www.housinghereandnow.org/downloads/Losing\\_Ground\\_Report.pdf](http://www.housinghereandnow.org/downloads/Losing_Ground_Report.pdf).

<sup>30</sup> See *id.* at 8.

aspect of the loss of regulated units—the drive to create vacancies in such units—that is advancing the erosion of affordability in New York City’s housing stock.

In New York City, pundits have debated the benefits and burdens of rent regulation for decades, and argued over whether controls on rent levels are the most efficient way to ensure an adequate stock of affordable housing.<sup>31</sup> Perhaps the most important aspect of rent regulation in New York State is the emphasis on housing stability: tenants who are able to remain in the same rent regulated apartment over time, and who can avoid eviction, are most often the tenants with the most affordable rents. Rent increases are indeed available each time a tenant renews his or her lease. The requirement that the landlord renew a particular tenant’s lease at his or her option upon the natural expiration of that lease, unless the tenant is committing a substantial violation of a significant obligation of the lease, and the fact that the landlord has many tools at his or her disposal to raise the rent significantly when there is a vacancy, are in conflict. As a result, the mandatory lease renewal is the arguably the most important feature of New York City’s rent regulatory structure for preserving affordable housing. This requirement creates a perverse incentive for landlords to pursue vacancies, however, when vacancies allow landlords to

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<sup>31</sup> See, e.g., CHESTER RAPKIN, *THE PRIVATE RENTAL HOUSING MARKET IN NEW YORK CITY*, 1965 (1966); Peter D. Salins, *Reviving New York City’s Housing Market*, in *HOUSING & COMMUNITY DEVELOPMENT IN NEW YORK CITY* 53 (Michael H. Schill ed., 1999); PETER D. SALINS & GERARD C. S. MILDNER, *SCARCITY BY DESIGN* (1992); GEORGE STERNLIEB, *THE URBAN HOUSING DILEMMA: THE DYNAMICS OF NEW YORK CITY’S RENT-CONTROLLED HOUSING* (1972); Craig Gurian, *Developing Sustainable Urban Communities: Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York*, 31 *FORDHAM URB. L.J.* 339 (2004). See also PAUL L. NIEBANCK, *THE RENT CONTROL DEBATE* (1986).

raise rents significantly, and, in many circumstances, permit landlords to remove apartments from rent restrictions altogether.<sup>32</sup>

It is no wonder landlords, perhaps now more than ever, are pursuing strategies to deregulate apartments by seeking to create vacancies, and/or committing resources to investigating whether rent regulated tenants are violating their leases.<sup>33</sup> Such strategies can in-

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<sup>32</sup> Under New York City's rent stabilization law, when a rent-regulated apartment is first rented to a new tenant, the landlord may increase the rent to be charged on several bases. First, the landlord can increase the rent by twenty percent of the old tenant's rent, if the new tenant signs a new, two-year lease; this is the "vacancy" increase. See The Rent Regulation Reform Act of 1997, S.B. 5553, 1997 Reg. Sess. §§ 18, 20 (N.Y. 1997). This increase is less, determined by a complicated formula, if the new tenant signs a one-year lease. *Id.* Second, if the landlord alleges that he or she has undertaken any improvements to the apartment prior to the new tenant moving in, 2.5% (1/40) of the total cost of the improvements allegedly performed can be added to the new tenant's monthly rent. N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.4(a)(4) (2008). DHCR consent to or approval of the repairs is not required, and will only review these allegations if a subsequent tenant challenges them in a timely fashion. See The Rent Regulation Reform Act of 1993, A.B. 8859, 1993 Reg. Sess. (N.Y. 1993). To see how these increases might work in practice, assume the prior tenant's lease rent is \$1,000 and the annual rent increase permitted by the Rent Guidelines Board is 5% for a new, two year lease. Although this rate for rent increases varies each year, see HousingNYC.com, New York City Rent Guidelines Board, <http://www.housingnyc.com> (last visited Sept. 24, 2008), if the landlord were simply re-renting to the old tenant, he or she could charge that tenant \$1,050. For a new tenant, however, the vacancy increase permits the landlord to add an additional \$200 to the new tenant's lease, a twenty percent jump. Second, assuming the landlord made \$10,000 in repairs by adding some new appliances and new fixtures, he or she can add an additional \$250 to the monthly rent of the new tenant. Taken together, the new tenant will now pay the sum of all of these increases over the prior tenant's rent: \$1,450, a permanent increase of 45% to the monthly rent amount, as compared to the \$1,050 the remaining tenant would have had to pay. Even if the landlord must pay for a lawyer to pursue an eviction of the tenant paying \$1,050 per month, the increased rent of \$400 per month will soon compensate the landlord for the transaction costs associated with that eviction. When you take into account the fact that two figures in the example above will likely change when calculating a particular apartment's legal rent—the starting rent of the prior tenant, and how much the landlord alleges to have spent on repairs—you can see that the higher the rent for the prior tenant, and the more the landlord alleges he or she spent on repairs to the apartment, the more likely it is that the legal rent for a particular apartment will cross that \$2,000 threshold, pushing it outside the restrictions of the rent regulations due to "high rent/vacancy decontrol."

<sup>33</sup> A recent example of the phenomenon of landlords seeking vacancies is found in efforts undertaken by the recent purchasers of two large housing developments on the East Side of Manhattan, Peter Cooper Village, and Stuyvesant Town. Many of the current tenants have lived in the buildings for decades. Many tenants, despite the prestigious Manhattan zip code, are middle and working class, who were lucky enough to have found these apartments when they were still affordable, before the dramatic pressures on housing affordability took place

clude filing bogus claims for rent in non-payment proceedings, or pursuing holdover actions—claiming violations of the underlying lease or rent regulations—through claims of nuisance, non-primary residence, or illegal subletting of the apartment.<sup>34</sup> Landlords that pursue such avenues often hope that they can apply pressure on tenants and that tenants will be intimidated by the thought of going to court, or so frustrated by the process that they will abandon any de-

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in New York City over the last fifteen years. Since purchasing these developments, lawyers working on behalf of Tishman-Speyer, the new owners, have begun wide-scale investigations of the tenants to determine if there are arguable grounds for eviction of any of the tenants, so as to create vacancies and bring as many apartments as possible to market rate. See, e.g., Charles V. Bagli, *Stuyvesant Town Revenues Have Fallen, Report Says*, N.Y. TIMES, July 23, 2008, at B3; Manny Fernandez & Charles V. Bagli, *Tenants Roiled by Challenges on Residency*, N.Y. TIMES, May 27, 2008, at A1. But the efforts of the purchasers of Peter Cooper Village and Stuyvesant Town are just examples of a broader problem, labeled “predatory equity” by advocates concerned with the growth of private equity-backed investments into the regulated rental market in New York City. According to the Association for Neighborhood and Housing Development, Inc. (“ANHD”), private equity-backed developers have purchased approximately 90,000 units (almost 9% of the regulated rental market). See ASS’N FOR NEIGHBORHOOD & HOUS. DEV., INC., *THE NEXT SUBPRIME LOAN CRISIS: HOW PREDATORY EQUITY INVESTMENT IS UNDERMINING NEW YORK’S AFFORDABLE MULTI-FAMILY RENTAL HOUSING 2* (2008) [hereinafter PREDATORY EQUITY]. These developers are advertising a remarkable rate of return for their investors, often ranging from fourteen to twenty percent, to be generated by tenants paying market rates. See Gretchen Morgenson, *As Investment Firms Buy Up Buildings, Tenants See Bullies*, N.Y. TIMES, May 9, 2008, at A1. See also PREDATORY EQUITY, *supra* note 33, at 4 (“In residential real estate in working class neighborhoods, the major way you increase your rate of return to atypical levels, such as those pledged by private equity funds, is by pushing out low-rent paying tenants.”). Clearly, the only way that the purchasers of these buildings can achieve the promised returns on investment is to force rent regulated tenants out of their homes at an alarming rate, using various tactics. As of May 2008, Vantage Properties, which is one of the largest private equity groups, filed over one-thousand eviction cases within nineteen months against the tenants in just one group of buildings containing 2,124 apartments, which it owns in Queens. Morgenson, *supra* note 33, at A1.

<sup>34</sup> Assuming, that the owners adopt a conservative strategy of eliminating ten percent of the regulated units from their portfolios a year, this would still mean a loss of about nine-thousand units of affordable housing a year in just those buildings identified by ANHD as having been purchased by private equity-backed developers. Dealing with this fallout, the public cost of *building* nine-thousand units of affordable housing is simply staggering; assuming the cost of \$133,987 for a “three story, garden apartment” in New York City, to make up for the loss of these private units the public bill would come to over \$1.2 billion. Building units in larger buildings of over fifty units in size would cost nearly \$3 billion. See JERRY J. SALAMA ET AL., *REDUCING THE COST OF NEW HOUSING CONSTRUCTION IN NEW YORK CITY 2005 UPDATE 10* (2005).



fense of their home.<sup>35</sup>

Landlords may also fail to make repairs in the hope that tenants will have concerns for the health of their families, and therefore vacate their apartments without the landlord having to resort to the commencement of eviction proceedings.<sup>36</sup> Tenants who may withhold their rent to apply pressure on their landlords to make repairs may find themselves evicted because they cannot navigate the court system once their landlord takes them to court for nonpayment of rent, regardless of the merits of their defenses against that action.<sup>37</sup>

Tenants are under great pressure to yield their rent regulated apartments to landlords who are interested in improving their bottom line by bringing as many units as possible out from under rent regulation and into the unregulated market, where they can charge three or four times the amount they are receiving in rent under the current rent regulations.

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<sup>35</sup> See VERA INST. OF JUSTICE, UNDERSTANDING FAMILY HOMELESSNESS IN NEW YORK CITY: AN IN-DEPTH STUDY OF FAMILIES' EXPERIENCES BEFORE & AFTER SHELTER 13-16 (2005) [hereinafter VERA INST.], available at <http://www.nyc.gov/html/dhs/downloads/pdf/VERA%20Study.pdf> (recognizing the fact that tenants may abandon apartments upon the threat that their landlord will take them to court); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL'Y DEBATE. 461, 463 (2003) (describing tenant abandonment through the failure to defend against eviction actions).

<sup>36</sup> Daniela Stojanovic et al., *Tracing the Path Out of Homelessness: The Housing Patterns of Families After Exiting Shelter*, 27 J. CMTY. PSYCHOL. 2, 199-204 (1999) (noting that the twenty-seven percent of families studied who returned to the shelter system after placement in permanent housing did so due to poor housing conditions in the placement apartments). It does not require a great leap of faith to conclude there is a connection between homelessness and poor housing conditions when the same neighborhoods from which a disproportionate number of homeless families come are also the same neighborhoods with the poorest housing stock in New York City. Compare VERA INST., *supra* note 35, at 12, with Michael H. Schill & Benjamin P. Scafidi, *Housing Conditions and Problems in New York City*, in MICHAEL H. SCHILL, HOUSING & COMMUNITY DEVELOPMENT IN NEW YORK CITY 32 (1999) (Figure 1.1).

<sup>37</sup> See VERA INST., *supra* note 35, at 14.

Whether or not landlords have arguable grounds for evicting rent regulated tenants, the defenses tenants can raise in these cases are complicated. In order to defend their homes, even against baseless charges, tenants must appear in court, answer the complaint served on them, show up on the appointed date or dates, on the appointed hour, and enter the chaos that is the housing court. This situation is even more desperate if you consider that ninety percent of the tenants in New York City's housing court are unrepresented and ninety percent of landlords are represented.<sup>38</sup> Likewise, there exist a similarly low percentage of tenants represented throughout the state.<sup>39</sup> Given the complex and multi-faceted nature of the typical landlord-tenant proceeding, the typical tenant, who is unrepresented and may have only a rudimentary understanding, at best, of the court processes and laws governing the proceeding, comes prepared for checkers, while his or her opponent is prepared to play three level chess.<sup>40</sup>

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<sup>38</sup> Engler, *supra* note 10, at 107.

<sup>39</sup> The rural practitioners interviewed for this piece estimated that the number of tenants represented in the rural courts range from fewer than ten percent of tenants to no more than one percent of tenants. See *infra* note 114 and accompanying text.

<sup>40</sup> The patchwork of rent laws impacting rent regulated tenancies in New York City have been called an "impenetrable thicket, confusing not only to laymen but to lawyers." *In re* 89 Christopher, Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1974). A host of laws are implicated when a landlord seeks the eviction of a tenant in New York State, from the Real Property Law, the Real Property Actions and Proceedings Law, the State Constitution, and any rent restrictions that might apply. For a subsidized tenant receiving a state or federal subsidy, or in public housing, state or federal regulations governing those tenancies will also come into play, as will the State and Federal Constitutions. See 24 C.F.R. § 982.1 (2008). Add to all of this the rent laws, the housing and building codes, the New York City Civil Court Act, and other bodies of law which are implicated when an eviction proceeding is filed within New York City. Regardless of their county of residence across New York State, tenants can possess a wide range of information about the law governing landlord-tenant relations: some of it gleaned from friends or neighbors or the tenant next to them in the courtroom or the hallways of the court house; some information developed by prior experiences in housing court; some of it obtained from self-help pamphlets, pro se services in the courts or from information clinics. While much of the information might be accurate, some of it, at least, will not be, and the individual receiving still might misunderstand some of it. When confronted

As a result of this disparity in power, while the overwhelming majority of cases in which a tenant actually appears and opposes the landlord's request for an order of eviction are resolved through settlement, these settlements are often one-sided affairs. The settlements typically favor the landlord, and are independent of the relative merits of the tenants' defenses or counterclaims. As such, the tenants, unsure of their rights, terrified of being in court, and relieved by the prospect of avoiding eviction, will sign one-sided stipulations in order to bring about what they believe to be a speedy resolution of their case, not knowing that they may have signed away considerable rights, or ultimately set in motion a series of events that may lead to their eviction. One example would be setting a time-frame for the payment of arrears with which they cannot comply.<sup>41</sup>

Given the complexity of the laws surrounding eviction proceedings and the high-pressure setting of the courthouse, it would seem beyond dispute that a tenant would benefit from having counsel in such proceedings. Numerous studies of the role of tenant attorneys

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by an individual who might appear to be an attorney for the landlord or even someone who the tenant believes is employed by the court that disagrees with the tenants' assessment of his or her rights or the strength of his or her claims, the faith many tenants may possess in their understanding of the law is understandably shaken. Tenants are routinely convinced to waive considerable rights, like claims based on the warranty of habitability, succession rights claims, and even the ability to seek an order to correct existing violations of housing standards present in their apartment or the public areas of their building. See, e.g., Engler, *supra* note 10, at 112-13.

<sup>41</sup> For example, tenants might be led to believe, by either the attorney for their landlord or another tenant, that they can seek assistance from a local welfare office to pay their arrears. They might not know whether they are even eligible for this assistance, and might agree to seek and obtain those arrears within an unreasonable timeframe. The rejection of their application for the rental arrears assistance, or the considerable delays that often accompany even acceptance of the application will jeopardize their tenancy if they have agreed to pay the arrears by a date certain that they cannot meet. See Galowitz, *supra* note 12, at 182 (describing the factors that lead tenants to feel intimidated and pressured to settle their cases).

in New York City Housing Court prove this basic point.<sup>42</sup>

New York studies reach similar conclusions to those of studies conducted on the impact of the provision of counsel to tenants in housing courts within other jurisdictions.<sup>43</sup> While all of these analy-

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<sup>42</sup> A result of a randomized study of tenants who had no representation, compared to those who received representation by volunteer lawyers supervised through The Legal Aid Society of New York ("Legal Aid"), showed that tenants without attorneys were 4.5 times more likely to have a default judgment entered against them, nearly 2.5 times more likely to have a judgment entered against them, and four times more likely to have a warrant of eviction issued against them. At the same time, represented tenants were thirteen times more likely to enter into a stipulation that included rent abatement and over twice as likely to enter into a stipulation requiring repairs than unrepresented tenants in the control group. 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 L. & SOC'Y REV. 419, 428 (2001). A recent study of fifty cases handled by a program that provided an attorney to a tenant in a very limited capacity, mostly for the purpose of assisting that tenant reach a settlement in his or her proceeding, showed that in all cases but one the tenant was able to avoid eviction, a stunning ninety-eight percent success rate. OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, VOLUNTEER LAWYER FOR A DAY PROJECT REPORT: A TEST OF UNBUNDLED LEGAL SERVICES IN THE NEW YORK CITY HOUSING COURT 30-31 (2008), available at [http://www.courts.state.ny.us/courts/nyc/housing/pdfs/vlfdreport\\_0208.pdf](http://www.courts.state.ny.us/courts/nyc/housing/pdfs/vlfdreport_0208.pdf) [hereinafter VOLUNTEER LAWYER FOR A DAY PROJECT REPORT]. In the one case that did result in the eviction of the tenant, it is surmised that the tenant was evicted because she did not assist in her own defense. *Id.* In another study of Legal Aid lawyers' effectiveness, the outcome of over one thousand eviction cases handled in Brooklyn in 1995 was as follows: of the 1,162 cases closed in 1995 by the Brooklyn Office of Legal Aid, ninety-one percent of the cases (1063 total) resulted in the apartment being retained by the tenant; in six percent of the cases (seventy-three total), families had to leave their apartments but were given time to move or received other forms of relocation assistance; and in only five cases (.4 %) was the tenant evicted. Galowitz, *supra* note 12, at 189 (citing the LEGAL AID SOC'Y, STATUS REPORT ON THE WORK OF THE LEGAL AID SOCIETY HOMELESSNESS PREVENTION LEGAL SERVICES PROGRAM FOR FAMILIES WITH CHILDREN, RESULTS & ANALYSIS, APR. 2, 1991-DEC. 31, 1995 (1996)). The Housing Help program of the United Way of New York City, which combines legal services with other eviction prevention interventions, has shown a 98.6% success rate in preventing the eviction of the families involved with the program. See *infra* Part IV.C. A 1990 proposal submitted by the New York City Human Resources Administration to expand the provision of counsel to low-income tenants facing eviction noted that tenants receiving representation through that program avoided eviction, or were restored to their apartments after eviction in ninety percent of the cases. POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 11, at 14.

<sup>43</sup> See, e.g., Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 413 (1995) (analyzing housing court filings from New Haven, Connecticut and finding that represented tenants were three times more likely to avoid eviction than unrepresented tenants); Anthony J. Fusco, Jr. et al., *Chicago's Eviction Court: A Tenants' Court of No Resort*, 17 URB. L. ANN. 93, 115 (1979) (reviewing the study of Chicago's eviction court and finding, *inter alia*, that tenants were twice as likely to lose their cases when unrepresented as compared to represented).

ses account for the lawyer's role in defending evictions in New York City—where the rent regulations are particularly complicated and the need for a lawyer's assistance in assessing tenant defenses under such laws are particularly acute—the need for a lawyer is no less pressing in the unregulated settings of New York's rural areas.<sup>44</sup> Indeed, the rural practitioners interviewed all agreed that having a lawyer makes a difference in the proceedings low-income tenants face, even where there is no system of rent regulation in place.<sup>45</sup>

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<sup>44</sup> For a tenant whose rent is unregulated, local building standards will still apply and tenants can raise defenses based on the existence of building conditions under the warranty of habitability. They can also raise procedural defenses based on improper service or pleading defects. Tenants with subsidies or units in public housing have significant defenses under a web of federal laws; however, they are quite complex and difficult for the pro se tenant to raise. Raising these defenses might get proceedings dismissed outright, or through negotiation, they can translate into reductions in rent arrears, or more time for a tenant to pay those arrears. This time can mean the difference between the preservation of the tenancy and an eviction. Even where tenants may have no defenses, and eviction is imminent, lawyers can often negotiate more time for the tenant to find suitable, alternative housing, rather than receiving no more than a few days to move. Interview with Dan Alley, *supra* note 13, at 13; Interview with Jeff Hogue, *supra* note 13, at 14-15. At the same time, New York City is not the only jurisdiction in New York State in which rent regulations are in effect. Apartments in certain parts of Albany, Nassau, Rensselaer, Rockland, Schenectady, and Westchester Counties are subject to the Rent Control Law, while certain towns in Nassau, Rockland, and Westchester County are also subject to the Emergency Tenant Protection Act. See SCHERER & FISHER, *supra* note 24, at 125-26.

<sup>45</sup> Interview with Dan Alley, *supra* note 13, at 11-14, 21-22; Interview with Lewis Creekmore, *supra* note 13, at 9; Interview with James Murphy, *supra* note 13, at 6. Jeff Hogue described his own experiences as follows,

This [happens] . . . almost every time [we go to court]. We will go to court. At court, we will discover that there is another tenant who was served with the same papers, or with the same errors, or with the same baloney allegations, or with the same bad conditions as the person we are representing, and you know, our's [sic] are almost always dismissed because the triage, we pick the winner. . . . And it's very typical for the other cases with identical defenses to . . . not be dismissed.

Interview with Jeff Hogue, *supra* note 13, at 7.

As Dan Alley stated,

From what I've seen and observed in, especially the justice courts, most of them not all of them, but from what I've seen a tenant who's not represented by a lawyer does not stand a chance. They may have a good defense but they don't stand a chance in most courts without a lawyer. They'll be evicted that night.

While a lawyer can clearly play a critical role in defending a tenant from eviction, the role that *evictions* play in creating homelessness is similarly apparent. This connection leads to the conclusion that if lawyers can prevent eviction, they may help prevent homelessness. A recent report from the Vera Institute of Justice, which followed up on a study conducted in New York City and Philadelphia in the 1990s,<sup>46</sup> analyzed the characteristics of families entering the New York City shelter system.<sup>47</sup> Interviewing hundreds of families that entered the New York City shelter system, Vera found that nearly half (forty-seven percent) had “experienced an informal or formal eviction episode in the five years before they entered [the] shelter [system].”<sup>48</sup> Similarly, an analysis of Department of Homelessness Services (“DHS”) data from Fiscal Year 2003 showed that nineteen percent of the thousands of families entering the shelter system in New York City in that year were “recently evicted” families that had been leaseholders in the apartment from which they were evicted, yet this figure probably does not provide an accurate picture of the true impact of evictions on homelessness.<sup>49</sup>

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Interview with Dan Alley, *supra* note 13, at 15.

<sup>46</sup> Dennis P. Culhane et al., *Where the Homeless Come From: A Study of the Prior Address Distribution of Families Admitted to Public Shelters in New York City and Philadelphia*, 7 HOUS. POL’Y DEBATE 327 (1996); VERA INST., *supra* note 35 at 12.

<sup>47</sup> The goal of this effort was to “help the [City of New York] better understand why families become homeless and to provide the city with the information needed to shift away from operating costly shelter toward more cost-effective and preventive approaches to homelessness, which are less disruptive for families.” VERA INST., *supra* note 35, at exec. sum., i.

<sup>48</sup> These “episodes” ranged from vacating their homes upon receipt of pre-litigation notices from their landlord, formally losing an eviction proceeding filed in court, or succumbing to a landlord request to vacate. *Id.* at 13.

<sup>49</sup> As the Special Master Panel concluded: “Of course, many more evicted families double up with family members and/or friends before applying for shelter and the [19% figure] undercounts the number and percent of families whose eviction eventually leads to a shelter application and entry.” FAMILY HOMELESSNESS PREVENTION PROGRAM, NEW YORK CITY

Lawyers can make a difference by defending tenants on the merits of their claims and successfully defeating landlord attempts to obtain evictions. It is well documented that the provision of lawyers can bring about significant cost savings, even when one takes into account a very narrow cost comparison: reviewing the cost associated with the provision of counsel with the costs associated with the provision of emergency shelter: that is, publicly funded shelter for those who would have been evicted for want of an attorney. By any measure, the difference in costs, even when taking into account this one metric, is staggering.<sup>50</sup> Many legal services providers across New York City will receive from \$1,261 to \$1,700 per case through different contracts.<sup>51</sup> At the same time, the cost of providing a family with shelter amounts to nearly \$3,000 per month.<sup>52</sup> As with the data available for the effectiveness of providing counsel, several estimates exist for the potential costs savings associated with the provision of coun-

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FAMILY HOMELESSNESS PREVENTION REPORT 23 (2003) [hereinafter FAMILY HOMELESSNESS PREVENTION PROGRAM]. The findings of the Vera Institute match the conclusion reached by the Special Master Panel; when asked whether an eviction had anything to do with the loss of their homes, eighty percent of the families interviewed by Vera responded “a lot.” VERA INST., *supra* note 35, at 26.

<sup>50</sup> Such comparisons do not take into account the cost savings associated with keeping homeless families and individuals out of the hospitals and emergency rooms, the lost income that comes from losing one’s job due to missed days of work managing the homeless system, and the lost earning potential (apart from the psychological trauma) of homeless children forced to navigate the school system at a distinct disadvantage. These costs are incalculable. Indeed, as courts have recognized, the mere *threat* of homelessness constitutes irreparable harm. *McNeill v. N.Y. City Hous. Auth.*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989); *Williams v. Barry*, 490 F. Supp. 941, 943 (D.D.C. 1980).

<sup>51</sup> See Letter from Michael Idiokitas, N.Y. City Dep’t of Homeless Serv., to Raun Rasmussen, Legal Serv. of N.Y. City (Dec. 10, 2007) (on file with author) (detailing reimbursement to legal services programs per case of \$1,261 for full representation); Contract between the N.Y. City Dep’t for the Aging and Legal Serv. for N.Y. City (on file with author) (detailing reimbursement rate of \$1,700 per case for full representation in anti-eviction programs).

<sup>52</sup> According to DHS, the average annual cost of housing a homeless family in the shelter system is \$31,116. See VERA INST., *supra* note 35, at 2 (citing DHS Budget Estimate).

sel to at-risk families to avoid homelessness.<sup>53</sup>

Even in rural counties, where the housing affordability crisis looms large, tenants without alternative housing options should they lose their homes, such as the ability to stay with a relative or friend, must rely on public support for their shelter. In many rural communities, the local social services provider will pay for a homeless family to live in a local motel, at a charge much greater than the cost of the monthly rent of that tenant's former home.<sup>54</sup>

Every study that has looked at the potential costs associated with the provision of counsel to indigent tenants in housing courts, at least in New York City, has estimated that considerable cost savings would follow the provision of this right because fewer families would lose their apartments and enter the shelter system. The apartments from which these families would otherwise be evicted would remain affordable (or at least more affordable), and subject to rent regulations where applicable. There would be fewer disrupted lives, fewer families exposed to the physical and mental health risks associated

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<sup>53</sup> A 1990 study by the New York City Department of Social Services estimated that the costs savings associated with eviction prevention services were substantial: every one dollar spent on such services saved the City four dollars in the costs associated with homelessness. LEGAL SERV. PROJECT, FUNDING CIVIL LEGAL SERVICES FOR THE POOR: REPORT TO THE CHIEF JUDGE 7 (1998); see also Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Service: One State's Experience—So Far*, 17 YALE L. & POL'Y REV. 469, 472 n.13 (1998). Calculating the cost to New York City of providing services to homeless people in 1992, and comparing that to the cost of providing legal services to all families eligible for free legal services under such programs' guidelines, one estimate found that the City could save a net amount of nearly \$67 million (in 1993 dollars), by providing counsel to all income-eligible families in New York City's housing court. POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 11, at iv. One 2005 study posited that the prevention of even ten percent of the 25,000 evictions carried out through proceedings filed in New York City's housing courts each year would "yield a savings to the City of roughly \$75 million in direct shelter costs alone." NEW YORK COUNTY LAWYERS' ASS'N REPORT, *supra* note 3, at 24.

<sup>54</sup> Interview with Dan Alley, *supra* note 13, at 11; Interview with Lewis Creekmore, *supra* note 13, at 13-14; Interview with Jeff Hogue, *supra* note 13, at 8-9; Interview with James Murphy *supra* note 13, at 5.



with homelessness, fewer lost days of work and lost employment because of the disruption of eviction, and lastly, fewer days away from school and school transfers.

Given these compelling facts, why have we failed to make more progress in establishing a right to counsel in cases in which a family's shelter is in jeopardy in New York State? The following Part provides an overview and analysis of attempts over the years to establish a right to counsel in such proceedings through litigation.

## II. THE LITIGATION BACK STORY

In this Part, I will briefly discuss the history of the civil right to counsel movement in general and describe the developments towards, and the arguments used to promote, such a right in eviction proceedings in New York State.<sup>55</sup>

### A. Constitutional Arguments

Any discussion of the civil right to counsel must start with the recognition of the right in the criminal context. In the landmark case *Gideon v. Wainwright*,<sup>56</sup> the United States Supreme Court recognized a right to free legal representation in criminal cases. This right to free legal representation in cases in which a criminal defendant's liberty was at stake came after several earlier Supreme Court decisions came

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<sup>55</sup> This movement is national in scope, but is fought, for the most part, as a state-by-state strategy, with advocates in different states using those strategies they feel are most effective in the political and legal conditions under which they operate. See Marvy, *supra* note 2, at 645-48.

<sup>56</sup> 372 U.S. 335 (1963).

close to the recognition of the broad right articulated in *Gideon*.<sup>57</sup> The Court based its decision not just on the Sixth Amendment's protection of the accused's right to the "assistance of counsel,"<sup>58</sup> but also on notions of fundamental fairness and procedural justice.<sup>59</sup>

After *Gideon*, the Court placed a greater emphasis on fundamental fairness arguments as a key element of due process, as opposed to focusing on the Sixth Amendment's right to counsel provision, when upholding the right to counsel in criminal proceedings.<sup>60</sup> The shift away from a constitutional provision applicable only in criminal proceedings to a focus on a due process analysis, which, in theory, could apply equally within civil matters, encouraged advocates for an extension of *Gideon*'s principles to civil contexts, such as when a family's home is in jeopardy through judicial process. A civil

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<sup>57</sup> See *id.* at 343 (noting a series of the Court's own precedents in establishing the indigent defendant's right to counsel in criminal proceedings, including *Smith v. O'Grady*, 312 U.S. 329 (1941), *Avery v. Alabama*, 308 U.S. 444 (1940), *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); and *Powell v. Alabama*, 287 U.S. 45 (1932)).

<sup>58</sup> U.S. CONST. amend. VI.

<sup>59</sup> The Court found as follows:

The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Gideon*, 372 U.S. at 344.

<sup>60</sup> See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (noting "fundamental fairness—the touchstone of due process" might require provision of counsel in probation and parole revocation hearings.); *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972) (recognizing right to counsel in misdemeanor offenses where incarceration is a threat in order "to insure [sic] the accused a fair trial."); *United States v. Wade*, 388 U.S. 218, 227 (1967) (holding that providing counsel at all stages of the adversarial criminal proceeding will ensure "the accused's interests will be protected consistently with our adversary theory of criminal prosecution").

corollary to *Gideon* has proven elusive, however.<sup>61</sup>

Because arguments in favor of a right to counsel in a civil context cannot rest on Sixth Amendment guarantees, advocates seeking to establish a civil right to counsel have argued that a due process analysis provides support for such a claim.<sup>62</sup> Such an argument begins with the Supreme Court's articulation in *Mathews v. Eldridge*<sup>63</sup> of the balancing test applied when determining the application of the Due Process Clause to a particular context.<sup>64</sup>

Following *Mathews*, the Court took up the claims of an indigent parent seeking appointed counsel in a matter in which her parental rights were in danger of being terminated in a civil proceeding.<sup>65</sup> There, despite finding that the parent was not entitled to counsel, the

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<sup>61</sup> The movement to establish a civil corollary to the right to counsel in civil cases begins with *Gideon* and attempts to develop some of the arguments, apart from the explicit Sixth Amendment basis for the criminal right to counsel, that flow from concerns about procedural justice and the lack of fairness in the legal system when one party is represented and one is not, regardless of whether someone is facing a criminal conviction. The Supreme Court first took up the claim of a right to counsel in a civil setting where a juvenile litigant faced detention through a civil proceeding, and thus his liberty was at stake without the benefit of an attorney to defend him. In *In re Gault*, 387 U.S. 1 (1967), the Court concluded that the nature of the right at stake—the defendant's liberty itself—was what was critical in the determination as to whether counsel should be provided, under a due process analysis under the Fourteenth Amendment to the United States Constitution, rather than whether a Sixth Amendment right was implicated. *Id.* at 39-42.

<sup>62</sup> See, e.g., Andrew Scherer, *Gideon's Shelter: The Need to Recognize a Right Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).

<sup>63</sup> 424 U.S. 319 (1976).

<sup>64</sup> There, the Court identified the factors that must be weighed when an individual faces the loss of property, thus potentially implicating the need for Due Process protections, as follows:

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

*Id.* at 335.

<sup>65</sup> *Lassiter v. Dep't of Social Serv.*, 452 U.S. 18, 20-21 (1981).

Court found that her liberty was not at stake, and therefore there was no presumption in favor of the right to counsel in such a context.<sup>66</sup> However, the Court found that judges are free to apply the *Mathews* test on a case-by-case basis to determine if a right to counsel applies in a case where a parent faces termination of parental rights.<sup>67</sup> Arguments for the right to counsel in which a family's home is at stake attempt to meet the *Mathews* three-part test.<sup>68</sup> To date, as set forth below, these arguments have met resistance with respect to claims of a right to counsel in cases in which a family's shelter is in jeopardy in New York courts, under both the United States Constitution as well as the Due Process Clause of the New York State Constitution.<sup>69</sup>

### **B. Efforts in New York State to Establish the Right to Counsel**

In the early 1970s, recognizing claims under the Due Process Clause of the United States Constitution, an intermediate appellate court in New York State found that a tenant in an eviction proceeding was entitled to pursue a claim that representation should be provided

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<sup>66</sup> *Id.* at 26-27.

<sup>67</sup> *Id.* at 27, 32.

<sup>68</sup> In accordance with the *Mathews* test, these arguments stress the following: the importance of the interest at stake (stressing both that one's liberty is in jeopardy if one might end up incarcerated or institutionalized if one is evicted, as well as the property interest in the home); that the risk of erroneous deprivation is high given the complex nature of the laws governing tenancies in New York State; and the cost of providing counsel is outweighed by the government's interest in limiting the harmful effects of homelessness, the interest in preventing unlawful evictions, and saving the costs associated with providing shelter and other social services to the homeless. See Scherer, *supra* note 62, at 573-79; see also Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J. L. & SOC. PROBS. 527, 532-33 (1991) (describing harmful effects of homelessness).

<sup>69</sup> N.Y. CONST. art. I, §6.

to her if she had no other access to counsel.<sup>70</sup> Several years later, the New York Court of Appeals roundly rejected civil claims brought under the due process clauses of both the United States Constitution and the New York State Constitution that sought to establish a right to counsel in such “private cases,” where one is not faced with “the risk of loss of liberty or grievous forfeiture” at the hands of the state.<sup>71</sup>

But advocates are not left to resort to constitutional claims alone in their pursuit of a right to counsel in civil cases under New York law. Under New York’s Civil Practice Law and Rules 1102(a) (“C.P.L.R.”), a court, when faced with an application by a litigant seeking leave to proceed as a “poor person . . . may assign an attorney” to represent that litigant.<sup>72</sup> Tenant advocates filed a case under this provision in the late 1980s, relying on the argument that such language compelled the appointment of counsel to the indigent in civil cases.<sup>73</sup> While the *Donaldson* case was sidetracked on proce-

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<sup>70</sup> *Hotel Martha Washington Mgmt. Co. v. Swinick*, 322 N.Y.S.2d 139, 142-43 (App. Div. 1st Dep’t 1971).

<sup>71</sup> *In re Smiley*, 330 N.E.2d 53, 55 (N.Y. 1975) (rejecting claim for right to counsel in matrimonial actions). There, the Court of Appeals rejected a claim for a right to counsel for indigent parties in matrimonial actions, not only because it found no constitutional bases for such claims, but also in part because the court determined that ordering the assignment of counsel at state expense would exceed the powers of the judiciary. *Id.* at 57. The court added further, in dicta, that there are cases where so-called private cases might impact the indigent, including eviction actions, and the court raised concerns of a slippery slope: that if the court were to find for the defendants in these matrimonial actions, it might open the floodgates for more litigants, in other settings, to make similar claims. *Id.* Following this decision, the same appellate court that previously found that a tenant did, in fact, have a constitutional right to representation in an eviction proceeding, quietly overruled its prior decision. *N.Y. City Hous. Auth. v. Johnson*, 565 N.Y.S.2d 362, 364 (App. Term 1st Dep’t 1990) (relying on *Smiley* and finding tenant not entitled to provision of counsel in residential eviction proceeding under due process theories).

<sup>72</sup> N.Y. C.P.L.R. 1102(a) (McKinney 1997).

<sup>73</sup> *Donaldson v. New York*, 548 N.Y.S.2d 676, 678 (App. Div. 1st Dep’t 1989).

dural grounds and ultimately withdrawn, the appellate division expressed its doubt as to the plaintiff's argument that this provision of the C.P.L.R. was mandatory, and not merely permissive.<sup>74</sup> Subsequent attempts to establish a right to counsel under this provision have proven unsuccessful, with the courts often relying on *Donaldson*.<sup>75</sup>

### C. Assessing the Legal Campaigns as Efforts to Promote Social Change

To date, advocates in New York have been unable to establish a broad right to counsel in eviction cases involving indigent tenants. Professor Russell Engler, in a review of attempts to establish a civil right to counsel in eviction cases through litigation, analyzes the efforts of advocates in several social change contexts and identifies what he sees as the key features of those efforts.<sup>76</sup> Engler asserts that an effective campaign to establish a civil right to counsel would involve “analyzing the context in which the change is to occur, identifying the players in the system, recognizing and then trying to change

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<sup>74</sup> *Id.* at 678-79.

<sup>75</sup> Courts have consistently cited *Donaldson* as authority in denying requests for the assignment of counsel under C.P.L.R. 1102(a), as well as for the proposition that the New York State Constitution does not establish a right to counsel in eviction proceedings. *See, e.g.,* *Hinckson v. Selsky*, 687 N.Y.S.2d 200 (N.Y. App. Div. 3d Dep't 1999) (applying the abuse of discretion standard when upholding a lower court's refusal to provide counsel under C.P.L.R. 1102(a) in proceeding under Article 78 of the C.P.L.R.); *Khedouri Ezair Corp. v. Kosatka*, 591 N.Y.S.2d 773 (N.Y. App. Div. 1st Dep't 1992) (upholding denial of application for appointment of counsel under C.P.L.R. 1102(a)); *170 W. 85th St. Tenants Ass'n v. Cruz*, 569 N.Y.S.2d 705, 707 (N.Y. App. Div. 1st Dep't 1991) (holding no statutory or constitutional right to counsel in eviction proceedings); *In re Brown v. Popolizio*, 569 N.Y.S.2d 615, 620 (N.Y. App. Div. 1st Dep't 1991) (finding no constitutional right to counsel in eviction proceedings); *N.Y. City Hous. Auth. v. Johnson*, 565 N.Y.S.2d 362, 364 (N.Y. App. Term 1st Dep't 1990) (confirming discretionary nature of C.P.L.R. 1102(a)).

<sup>76</sup> Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697 (2006).

their self-interest, and mobilizing powerful allies to support the expanded provision of counsel.”<sup>77</sup> Such a “contextualized” approach to advocacy in this area would lead advocates for the right to counsel in housing cases to attempt to appeal to the self-interest of critical actors in the right to counsel setting; e.g., judges, court personnel, and even landlords’ lawyers. In the right to counsel setting, advocates should highlight the power imbalances present when one party is represented and another is not, and should strive to shame stakeholders into recognizing the fundamental unfairness of such situations.<sup>78</sup> Professor Engler thus believes that the “embarrassment” that the imbalance of power in the legal system creates will shame key stakeholders, court personnel, and judges into recognizing that it is in their self-interest to promote the creation of a right to counsel.<sup>79</sup>

This focus on the apparent unfairness of having one party represented and another unrepresented is consistent with the arguments that have been used repeatedly to support greater access to legal services for the indigent. As discussed above, the Court’s opinion in *Gideon* and its progeny articulated this view.<sup>80</sup> Judges,<sup>81</sup> scholars,<sup>82</sup>

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<sup>77</sup> *Id.* at 711. This analysis is similar to the “interest convergence” theory of Professor Derrick Bell, whose insightful analysis of the Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), concluded that the landmark decision in that case was a product of the critical dynamic at play in the Court’s decision: that the white community had an interest in defeating the Jim Crow legal structure because of the political liability it had become on the international stage, hampering efforts to combat the spread of Soviet communism. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523-25 (1980). See also Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641, 1648 (1997); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62 (1988).

<sup>78</sup> Engler, *Context-Based Civil Gideon*, *supra* note 76, at 711-12.

<sup>79</sup> *Id.* at 718.

<sup>80</sup> See *supra* Part II.A.

<sup>81</sup> Jack B. Weinstein, *The Poor’s Right to Equal Access to the Courts*, 13 CONN. L. REV.

and the administrators at the Legal Services Corporation (“LSC”)<sup>83</sup> have stressed the fact that the absence of lawyers for the poor in many civil contexts reduces the legitimacy of our adversarial system. “Not only does access to legal services help prevent erroneous decisions, it also affirms a respect for human dignity and procedural fairness that are core democratic ideals.”<sup>84</sup>

The failure to meet the legal needs of the indigent and the middle class is often used to justify calls for more funding at the federal level for the Legal Services Corporation, more pro bono work on the part of private attorneys, and greater involvement of law school clinical programs in meeting the legal needs of the poor.<sup>85</sup> This ques-

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651, 655 (1981); The Honorable Robert W. Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL’Y. REV. 503 (1998).

<sup>82</sup> Professor Deborah Rhode’s scholarship on this issue can be associated with this position. See, e.g., Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 387-88 (2004); Deborah Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1818 (2001). Professor Rhode argues that as a consequence of the lack of representation of the indigent, a greater recognition of the injustice of the situation is needed:

It is a national disgrace that civil legal aid programs now reflect less than 1% of the nation’s legal expenditures. And it is a professional disgrace that pro bono service occupies less than 1% of lawyers’ working hours. We can and must do more, and our greatest challenge lies in persuading the public and the profession to share that view.

*Id.* at 1819 (citations omitted).

<sup>83</sup> LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA 17-18 (2007) [hereinafter LEGAL SERV. CORP.].

<sup>84</sup> Rhode, *Connecting Principles to Practice*, *supra* note 81, at 376.

<sup>85</sup> See, e.g., *id.* at 388, 392; Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL’Y. REV. 369, 372 (1999). Studies of the unmet legal needs of the poor in the United States repeatedly highlight the failings of the legal profession to meet an overwhelming percentage of legal problems faced by the indigent. Most studies conclude that an estimated eighty percent of the legal needs of the indigent are not met, while forty to sixty percent of the legal needs of the middle class are unmet. See, e.g., LEGAL SERV. CORP., SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS (2000) (describing unmet legal needs of the poor); Houseman, *supra* note 85, at 371-72; ABA, AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE (1996) (describing legal needs of moderate income Americans); ROY W. REESE & CAROLYN A. ALDRED, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FOR THE COMPREHENSIVE LEGAL



tion about access to justice has been at the core of arguments in support of legal assistance for the indigent for over a century, from the early days of the Legal Aid Society of New York in the late nineteenth century and into the first half of the twentieth century.<sup>86</sup>

In the early 1960s, however, when the availability of legal services was first expanded significantly in the United States, the vision for what such services would look like was much different, and the arguments used to support this expansion emphasized a “law reform” (sometimes called “legal services”) role for lawyers that would reform our legal institutions and bring about greater social justice. This was in contrast to the traditional “legal aid model” that was premised on a fundamental belief in the just nature of society, despite the fact that the indigent did not have access to lawyers.<sup>87</sup>

From its very inception, when the federal government first stepped into funding civil legal services for the indigent through the

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NEEDS STUDY 32 (1994). It is also likely that these studies *underestimate* the actual legal needs of low- and moderate-income individuals because such individuals may not even be aware that they have legal problems that need to be, or could be, addressed. Rhode, *Connecting Principles to Practice*, *supra* note 82, at 380.

<sup>86</sup> For a description of the history of the legal services movement from 1880 to 1960, see MARTHA DAVIS, *BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973*, at 1-3 (Yale University Press 1993); EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 3-19* (Russell Sage Foundation 1974).

<sup>87</sup> At the heart of the legal aid model was the belief that injustice was a product of clients not having enough access to the courts, and the substantive laws were not at fault in creating social disparities; law reform, in contrast, recognized the fundamental inequities inherent in society, and the legal system itself, and was dedicated, as President Kennedy’s Attorney General described it, “to using the law as an instrument of orderly and constructive social change.” U.S. DEP’T OF HEALTH, EDUC. & WELFARE, CONFERENCE PROCEEDINGS—THE EXTENSION OF LEGAL SERVICES TO THE POOR 11 (Jeanette Stats ed. 1964) (statement of Nicholas deb. Katzenbach). For a comparison of the legal aid and law reform models, see JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 26 (1978). For a critique of the apolitical nature of the legal aid model, see Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L. REV. 474, 476-85 (1985).

creation of programs within the Office of Economic Opportunity (“OEO”),<sup>88</sup> political opponents of legal assistance to the indigent were highly critical of the law reform activities of the local legal services offices and later the work of the so-called “backup” centers,<sup>89</sup> which provided technical assistance to front line attorneys and drafted model pleadings to file at the local level in class action litigation and other impact work.<sup>90</sup>

After President Nixon vetoed one bill that would have created an independent entity to oversee the administration of federal funding for legal services, Congress and the Nixon Administration agreed to the creation of the LSC, with Congress succumbing to Nixon’s demand that the work of the backup centers would be limited,<sup>91</sup> and thus the compromise legislation significantly curtailed law reform ac-

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<sup>88</sup> See Houseman, *Civil Legal Assistance*, *supra* note 85, at 373.

<sup>89</sup> See JOHNSON, *supra* note 86, at 180-81 (describing the creation and role of the backup centers); see also Houseman, *Civil Legal Assistance*, *supra* note 85, at 375. In contrast, Houseman never uses the term “backup” centers.

<sup>90</sup> See William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960’s to the 1990’s*, 17 ST. LOUIS U. PUB. L. REV. 241, 242 (1998) (“While law reform has been a key element of publicly funded legal services since its inception, opposition to law reform has also been a key element of legal services throughout its existence.”). Former Governor of California, Ronald Reagan sought to limit the funding to California Rural Legal Assistance (“CRLA”) because of the nature of its work. Additionally, other governors throughout the country, exercising a gubernatorial veto available to them in the OEO legislation, sought to limit legal services funding coming into their states. *Id.* at 248-49; see also Warren E. George, *Development of the Legal Services Corporation*, 61 CORNELL L. REV. 681, 683-87 (1976) (describing attacks on CRLA). Nixon’s one-time Vice President, Spiro Agnew, personally attacked the work of legal services attorneys, calling their work “tax-funded social activism.” Spiro Agnew, *What’s Wrong with the Legal Services Program*, 58 A.B.A. J. 930, 931 (1972). For a description of the opposition to funding legal services through the OEO, see Houseman, *Civil Legal Assistance*, *supra* note 85, at 378.

<sup>91</sup> For a description of the legislative maneuvering involved in the creation of the Legal Services Corporation, see CHARLES K. ROWLEY, *THE RIGHT TO JUSTICE: THE POLITICAL ECONOMY OF LEGAL SERVICES IN THE UNITED STATES* 15-16 (Edward Elgar Publ’g Ltd. 1992); see also George, *supra* note 90, at 698, 717-19.

tivities in several areas.<sup>92</sup> Taking the path of least resistance, proponents of the creation of the LSC utilized the more politically neutral language of “access to justice” when speaking in favor of the program.<sup>93</sup>

Subsequently, while President Reagan pursued further LSC cuts and restrictions,<sup>94</sup> 1981 turned out to be the high water mark for federal funding for the LSC; in present dollars, annual funding has never matched the outlay from that fiscal year.<sup>95</sup> In 1994, the rise of the 104<sup>th</sup> Congress, under Republican management, nearly brought about the end of the LSC; instead, further funding cuts and greater restrictions on law reform activities were imposed<sup>96</sup> and the legislative

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<sup>92</sup> These areas included school desegregation cases under 42 U.S.C. § 2996f(b)(7) (Supp. IV. 1974), cases involving draft evasion and desertion under 42 U.S.C. § 2996f(b)(9), and those in which a client was seeking to “procure a non-therapeutic abortion” under 42 U.S.C. § 2996f(b)(8); they also restricted attorney’s support for the organizing activities of their clients under 42 U.S.C. § 2996f(b)(6). All of the restrictions adopted in that legislation are still in full force and effect. See 42 U.S.C.A. §2996f(b)(6)-(10) (West 2007).

<sup>93</sup> See, e.g., *Proposed Elimination of OEO and Related Legislation: Hearing on H.R. 3641, H.R. 3175, and H.R. 3147 Before the Subcomm. on Equal Opportunities of the H. Commission on Education and Labor*, 93d Cong. 879 (1973) (statement of John G. Brooks, President, Boston Bar Ass’n, expressing concern for the “goal of equal justice” and his desire that “the law is made available to the poor”); *Proposed Elimination of OEO and Related Legislation: Hearing on H.R. 3641, H.R. 3175 and H.R. 3147 Before the Subcomm. on Equal Opportunities of the H. Commission on Education and Labor*, 93d Cong. 1281, at 877 (1973) (statement of Earl Johnson, Jr., Professor, USC Law School, and Chairman, ABA, suggesting that there is “no subject which is more important to the legal profession that is more important to this Nation, than the realization of the ideal of legal justice under law for all.”).

<sup>94</sup> See Quigley, *supra* note 90, at 256.

<sup>95</sup> See LEGAL SERV. CORP., *supra* note 83, at 2.

<sup>96</sup> These greater restrictions included, among other things, limits on the representation of undocumented individuals and families, representation of recipients of public assistance challenging welfare “reform” efforts, and all class action litigation. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, H.R. 3019, 104th Cong., 110 Stat. 1321, \*1321-22 (2d Sess. 1996). For a description of the impact of these restrictions, see David S. Udell, *The Legal Services Restrictions: Lawyers in Florida, New York, Virginia, and Oregon Describe the Costs*, 17 YALE L. & POL’Y REV. 337 (1998) (describing harm caused by legal services restrictions). See also MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE* 306 (2001) (noting that after the conservative attack on legal services in the 1980s “the 104<sup>th</sup> Congress renewed the fight [over legal services funding] with great intensity. . . . The argument was about which legal needs should be met with pub-

debates were replete with references to the most palatable political argument supporting the LSC's continued existence: the promise of "equal justice under law."<sup>97</sup>

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lic funds, what the role was of pro bono assistance, whether advocacy was legitimate, and whether a legal services or legal aid model should shape assistance to poor people.") For a description of law reform activities permissible under the new restrictions, see Raun J. Rasmussen, *Affirmative Litigation Under the Legal Services Corporation Restrictions*, 34 CLEARINGHOUSE REV. 428, 428 (2000) ("High-quality affirmative advocacy—whether in the form of a high volume of cases aggressively litigated, representation of clients on targeted issues, or non-class action individual or group representation in affirmative litigation—can still accomplish immediate, positive results and have broad impacts in changing the practices, policies, or laws that hurt our clients.").

<sup>97</sup> See, e.g., 142 CONG. REC. S12080, S12089 (daily ed. Oct. 1, 1996) (statement of Sen. Helfin) ("I fought very hard to continue the Legals [sic] Services Corporation because I believe it is essential to true equality of justice. Given increasing fees and costs, the American system of justice continues to become more difficult for the poor to access."); S. REP. NO. 104-392, at \*11 (1996) ("Congress finds that there is a need to encourage equal access to justice through private and governmental efforts. To preserve the strength of the legal services program, efforts must be made to free the system from the influence of political pressures and to free the corporation and its grantees from lobbying and political activity."); 142 CONG. REC. E1380-03, D1380 (July 25, 1996) (statement of Hon. Elijah E. Cummings)

The Legal Services Corporation (LSC) is a modest but vitally important and effective program that helps millions of needy families gain access to the justice system in cases relating to domestic violence, housing evictions, consumer fraud, child support, and other critical matters. The legal services program is the only means to assure that the most vulnerable citizens in our country—poor children, battered spouses, the elderly, disabled, migrant workers, and other low-income individuals—have access to legal representation in civil cases;

142 CONG. REC. H8149-04, H8161 (July 23, 1996) (statement of Rep. Skaggs) ("These funding cuts represent an unconscionable abandonment by this Congress of the Nation's commitment to equal justice for all citizens regardless of economic status."); 142 CONG. REC. H8149-04, H8163 (July 23, 1996) (statement of Rep. Jackson-Lee)

[M]illions of poor people in rural areas in the South, Southwest, and large parts of the Midwest, which have virtually no non-LSC funding, will have extremely limited resources to obtain meaningful access to justice . . . . We must not allow this program to be gutted—it is fundamental to our Nation's sense of fair play;

142 CONG. REC. H8149-04, H8168 (July 23, 1996) (statement of Rep. Fazio) ("Access to justice is the great equalizer in American society. Equal Justice Under Law is not only one of our Nation's founding precepts; it is also the promise inscribed on the pediment of the Supreme Court building itself. The serious reduction in the fiscal year 1997 LSC appropriation effectively undercuts this promise, and I urge my colleagues to support an increase to the LSC budget."); 142 CONG. REC. H5104-01, H5108 (May 15, 1996) (statement of Rep. Slaughter) ("We take an oath to protect and defend the Constitution. Shouldn't we be concerned about guaranteeing every citizen, regardless of their income, the right to due process and the right of fair and just representation?").

To the present day, the argument used most consistently, and often made quite eloquently,<sup>98</sup> is the argument proffered by Professor Engler; we must embarrass the legal system itself to recognize the fact that an adversarial system that fails to have advocates on both sides of the dispute before it is hardly an adversarial system at all.<sup>99</sup> If our system of justice is built on the supposed strength of our adversarial system, then the legitimacy of our entire system of justice is thrown into doubt by this disparity in representation. As Deborah Rhode asserts, “[i]nequalities in legal representation compound other social inequalities and undermine our commitments to procedural fairness and social justice.”<sup>100</sup>

If the unit of measure is that a system of justice will be assessed by the extent to which there is parity in representation between adversaries, then New York State’s system of determining housing disputes is one that fails miserably. In New York City’s housing courts, landlords are represented in approximately ninety percent of the cases, while tenants go unrepresented in roughly the same percentage.<sup>101</sup> While estimates about the percentage of landlords who go unrepresented in the State’s rural courts vary, from fifty percent<sup>102</sup> to

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<sup>98</sup> See, e.g., David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 212 n.9 (2003); see also Stephen Wizner, *Rationing Justice*, 1997 ANN. SURV. AM. L. 1019, 1019-1020 (1997) (quoting ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275 (Phillips Bradley ed., Henry Reeve et al. trans., Vintage Books 1990) (1835)).

<sup>99</sup> An effective adversarial system requires that both parties are permitted to speak, and assert their respective views. To quote David Luban, “to exclude or silence voices makes the human world less just.” Luban, *supra* note 98, at 217.

<sup>100</sup> Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415, 2418 (1999).

<sup>101</sup> Engler, *Out of Sight*, *supra* note 10, at 108.

<sup>102</sup> Interview with James Murphy, *supra* note 13, at 3.

a much smaller percentage (at least until a legal services attorney appears on the case, in which case the landlords often get counsel of their own),<sup>103</sup> advocates estimate that the percentage of tenants that are represented in their communities range from ten percent down to as little as one percent.<sup>104</sup> Thus, across New York State, the percentage of tenants in need of representation exceeds even the glaring national figures of unmet legal needs of the poor.<sup>105</sup>

Is highlighting this disparity in order to embarrass the system, as Engler inquires, the best line of argument to justify the expansion of the right to counsel in housing cases in New York State? This and other questions were taken up by a range of advocates, elected officials, court personnel, and academics at a forum held at the Civil Gideon conference in March of 2008 at the Touro Law Center, one of several “break out” sessions, this one focusing on housing cases in particular. The following section recounts that discussion.

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<sup>103</sup> Interview with Dan Alley, *supra* note 13, at 17; Interview with James Murphy *supra* note 13, at 3.

<sup>104</sup> Interview with Dan Alley, *supra* note 13, at 7 (estimating that one percent of tenants are represented by counsel in the counties in which he practices); Interview with Jeff Hogue, *supra* note 13, at 2-3 (estimating that eight percent of tenants are represented in the rural courts in which he practices); Interview with Lewis Creekmore, *supra* note 13, at 11 (estimating that the number represented is less than ten percent); Interview with James Murphy, *supra* note 13, at 3 (estimating that the number represented is less than ten percent).

<sup>105</sup> Given these estimates, it is clear that fewer than ten percent of indigent tenants in eviction cases in many parts of New York State, including New York City, are represented. As a result, the unmet legal needs of low-income tenants in the state exceed the national average of unmet legal needs of the poor of eighty percent. *See, supra*, note 85. Accurate figures on a state-wide basis are impossible to calculate, however, because, at present, no hard numbers are available from the 1,200 rural courts scattered throughout the state, because such information is just not maintained. Regardless, it is impossible to disprove the simple fact that in New York State, the overwhelming majority of tenants and homeowners facing eviction or foreclosure proceedings do so without the benefit of an attorney, for no other reason than they cannot afford one.

### III. THE EXPERTS WEIGH IN

The breakout session on the right to counsel in settings where shelter is in jeopardy attempted to address many of the cross-cutting issues raised by the topic in a state like New York, where demographics, geography, population density, and the relative availability of free legal assistance all vary widely across the state. The group noted the tensions inherent in attempting to recognize a right to shelter that would apply equally across the state despite the wide diversity of settings in which tenants face eviction through the courts. The similarities across the state are that low- and moderate-income tenants throughout the state face the pressures of a lack of affordable housing, an eviction process that is difficult to navigate pro se, and a shocking lack of free representation. Overall, the group tried to address several of the challenges facing any movement for the recognition of a right to counsel in housing proceedings, while also trying to come to grips with the forces, as well as the political reality, that might impede this movement.

In broad terms, the group addressed three issues. First, the group members attempted to get the lay of the land, to recognize how and where counsel is being provided in housing proceedings.<sup>106</sup>

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<sup>106</sup> At the outset, the moderators attempted to limit the discussion to eviction proceedings only, and decided not to address the issue of foreclosure proceedings. See Transcript of Shelter Break-Out Session, *An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, at 5-6 (Mar. 7, 2008) [hereinafter Shelter Break-Out Session]. As the discussion unfolded, however, it was revealed that in advocacy to establish a right to counsel for the elderly in eviction proceedings in New York City, it was determined that it was politically advantageous to add foreclosure proceedings into the types of cases in which counsel would be provided in order to secure the broadest support for the legislation. *Id.* at 86. To recount the discussion, I will describe the range of proceedings addressed by the working group as “housing proceedings” to emphasize the broader range of cases the group ultimately discussed.

Next, the participants attempted to articulate the strongest arguments in favor of the recognition of a right to counsel in such proceedings. Lastly, they attempted to measure the relative strength of these arguments given the current political context, and to assess the arguments that are most likely to have the greatest chance of success in the political arena, in the courts of law, and in the court of public opinion.

### A. The Need

At the outset, the participants in the break-out session made an assessment of the extent to which the array of legal services providers, pro bono programs, and private counsel were meeting the need of indigent tenants and homeowners with regards to legal representation when their shelter was in jeopardy. The participants recognized that the context in which the need for counsel arises varies across the state, from eviction from multi-unit buildings in Manhattan and two- and three-unit houses in Queens, to mobile homes in rural counties. Regardless, all agreed that counsel is available in these proceedings in only a fraction of the cases.<sup>107</sup>

Given the inability of legal services providers to meet the need for counsel in these settings, most providers of legal services agreed they engage in a form of triage in which various factors are taken into account when determining whether to accept an applicant seeking legal services; in other words, most participants agreed that legal services providers set priorities when determining which cases

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<sup>107</sup> *Id.* at 13-21.



to accept for representation.<sup>108</sup> The session's participants clearly acknowledged that given limited resources, this sort of triage was necessary to ensure that legal representation would be available—to the fullest extent possible—to those who could most benefit from it.<sup>109</sup>

In addition, some providers recognized that, either through their own office's priorities, or through the priorities of certain funding sources,<sup>110</sup> particular populations might also receive consideration for representation, regardless of whether a rent regulated apartment or rental subsidy was in jeopardy. This was out of a recognition that certain populations, such as the elderly and disabled, might be the least able to navigate the confusing and intimidating halls of the housing courts, and therefore might end up facing an eviction through default due to their minimal understanding of the process and/or little ability to negotiate for a surrender of an apartment in such a way that afforded an impaired tenant sufficient opportunity to find suitable, alternative housing.<sup>111</sup>

Besides the provision of legal services to the indigent from traditional providers of such services, the group also recognized that

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<sup>108</sup> *Id.* at 17. Cases where a tenant had few, if any, defenses to an eviction are often given the lowest priority for representation. *Id.* at 15-16. At the same time, most providers agreed that tenants meeting certain criteria would receive a higher priority for representation: for example, actions where a rent regulated apartment was in jeopardy that had an affordable rent that would be lost if the tenant lost his or her eviction proceeding, or actions involving a tenant in a rural community who was at risk of losing his or her mobile home or who was in receipt of a rental subsidy that would be in jeopardy were that tenant to lose the eviction proceeding. *Id.* at 18-19.

<sup>109</sup> *Id.* at 15-17.

<sup>110</sup> The New York City Department for the Aging's "assigned counsel" program is one such program. See N.Y. City Dep't for the Aging, *A Place to Turn for Queens Seniors Facing Eviction*, Dec. 2007, <http://home2.nyc.gov/html/dfta/html/newsletters/newsletter-dec07.htm#queens> (last visited Sept. 16, 2008) (describing what kind of representation is provided to the elderly).

<sup>111</sup> Shelter Break-Out Session, *supra* note 106, at 20-26.

there are other models for delivery of legal services in the shelter context, such as the “lawyer for the day” programs carried out by the private bar,<sup>112</sup> and the information resources provided by groups like the City-Wide Task Force on Housing Court.<sup>113</sup> Despite the combination of an array of services, from full representation to pro se information and so-called “unbundled” legal services, it was generally acknowledged that the current state of representation in the shelter context is one in which the overwhelming majority of indigent tenants are without representation.<sup>114</sup>

## B. The Arguments

In order to promote the right to representation in the context of shelter, moderator Lou Prieto outlined the types of arguments that could support the recognition of such a right. He summarized these as idealistic/democratic arguments, or those that would be based on fundamental notions of fairness and due process; those which would

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<sup>112</sup> See Tri-Cap.org, Tri-Community Action Program Inc., <http://www.tri-cap.org/probono/LOTDAAtty.html> (last visited Sept. 17, 2008) (describing counseling program for low income tenants and landlords).

<sup>113</sup> See CWFHC.org, The City-Wide Task Force On Housing Court, <http://www.cwtfhc.org> (last visited Sept. 17, 2008).

<sup>114</sup> Shelter Break-Out Session, *supra* note 106, at 11. In addition to acknowledging that there is a substantial lack of counsel for individuals and families facing the loss of their home in New York State, some of the members of the group, those that are involved with representing indigent tenants and homeowners in rural communities, outlined some of the additional structural barriers these populations face with respect to access to justice, many of which were echoed by the rural practitioners interviewed for this Article. In many counties, there are no legal services available, so that there might be an ad hoc assigned counsel program. Housing courts are often subsumed in the general town justice courts scattered throughout the state, making the provision of legal services very difficult to coordinate. Furthermore, many town justices are unwilling to recognize tenant defenses in eviction cases, forcing legal services attorneys to bring appeals to require local judges to honor tenant defenses. These issues highlighted the practical complexities associated with asserting a broad right to counsel across New York State’s many jurisdictions in cases in which an individual’s or family’s shelter is in jeopardy. *Id.* at 13-15, 28-30.

be based on a cost-benefit analysis: i.e., comparing the financial cost of providing counsel with the social costs associated with *not* providing counsel; and even those claims based on international law.<sup>115</sup>

The group discussed the viability of pursuing a right to counsel in the shelter setting through appeals to notions of fundamental fairness, as well as international law.<sup>116</sup> While these arguments might carry a certain moral weight, and might even serve as an organizing tool for mobilizing popular support for such a right,<sup>117</sup> it was unclear that pursuing these lines of argument would garner much support in the lower courts of New York State.<sup>118</sup> There was also a growing recognition that the courts are probably not sympathetic to a claim of a broad-based right, regardless of the simplicity of finding such a right through litigation, which would then leave the legislature with the responsibility of finding the funds to provide that right.<sup>119</sup>

Other approaches were set forth by the group, such as exposing the fundamental unfairness of having a court system where gross disparities in the availability of counsel are glaring.<sup>120</sup> Unfortunately, political forces at work tend to undercut these arguments, and, as some may argue, the courts might actually function “better” without representation on both sides, at least in terms of how quickly the

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<sup>115</sup> *Id.* at 32.

<sup>116</sup> For an analysis of developments in the provision of counsel in civil settings in International and Foreign Law, see Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 TEMP. POL. & CIV. RTS. L. REV. 769, 787-88 (2006); Andrew Scherer, *Securing a Civil Right to Counsel: The Importance of Collaborating*, 30 N.Y.U. REV. L. & SOC. CHANGE 675, 680, 683 (2006).

<sup>117</sup> Shelter, Break-Out Session, *supra* note 106, at 49.

<sup>118</sup> *Id.* at 45-46.

<sup>119</sup> *Id.* at 73-74.

<sup>120</sup> *Id.* at 85.

cases move through the system.<sup>121</sup> In the end, it was felt that these arguments, while generally considered strong by the group, might serve to help “tip the balance” in terms of establishing the right.<sup>122</sup> Standing alone, however, they might not be able to convince legislators, the courts, or the general public of the necessity of a right to counsel in proceedings where shelter is at risk.<sup>123</sup>

The group ultimately came to the realization that different arguments, like the fairness and the cost argument, may prove stronger in different arenas; in the political arena, for instance, arguments based on cost might be seen as the better to promote.<sup>124</sup> The group realized that even this approach raised an issue that posed the greatest barrier to establishing the right: the costs associated with the denial, as well as the provision, of the right to counsel in such settings.<sup>125</sup> What follows is the group’s discussion about the costs associated with having, as well as not having, a right to counsel in eviction settings.

## C. The Cost

### 1. *The Cost of Providing Counsel*

In terms of the costs of providing the right, the greatest impediment appears to be a concern for the overall cost associated with providing counsel to all income-eligible individuals. This has been

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<sup>121</sup> *Id.* at 40-41.

<sup>122</sup> Shelter, Break-Out Session, *supra* note 106, at 47.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 48.

<sup>125</sup> *Id.*

identified as a key obstacle to the passage of a bill in the New York City Council, which would provide low-income residents, elderly tenants, and homeowners, access to counsel in eviction, ejection, and foreclosure proceedings.<sup>126</sup> Since there are likely hundreds of thousands of low-income households facing eviction in New York State in a given year who might qualify for representation in an eviction or foreclosure proceeding, if the poverty line or some similar income limit is used, the costs associated with providing the representation could run into the tens of millions of dollars.<sup>127</sup> One reason the bill currently pending before the City Council of the City of New York provides the right to counsel to low-income seniors facing eviction is that limiting the availability of counsel to a discrete population would reduce the overall cost of the initiative as compared to the recognition of a right that would apply to all low-income populations.<sup>128</sup>

The group articulated two main types of costs that are related to the provision of the right to counsel in eviction proceedings: the cost of providing attorneys for all of those eligible and the increased court costs that might be associated with having counsel on both sides in eviction proceedings: additional motion practice, more trials, more time spent on each case negotiating matters, etc.<sup>129</sup>

The main cost associated with the provision of a right to counsel would be the actual cost of paying for the lawyers to do the work. Assuming an approach to the provision of legal services in this

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<sup>126</sup> *Id.* at 85. For a discussion of the pending City Council bill, see, *infra*, note 205.

<sup>127</sup> Shelter Break-Out Session, *supra* note 106, at 86-87.

<sup>128</sup> *Id.* at 85-87.

<sup>129</sup> *Id.* at 39.

setting that entailed funding of non-profit legal services providers to handle these cases, the cost of salaries, benefits, and overhead associated with such an initiative would clearly be the most significant costs associated with the provision of the right to counsel.<sup>130</sup>

Another cost often associated with the provision of a right to counsel in eviction proceedings are the costs associated with an increased drain on the courts. With an increase in the number of lawyers representing tenants, it is argued, there would be an increase in activity in defense of these tenants. For example, there would be fewer default judgments that could be dispensed with summarily; difficult cases would be litigated fully, with vigorous motion practice and more trials; and negotiations would no longer be a one-sided affair with tenants agreeing to sign stipulations in an effort to avoid court altogether, out of ignorance of their rights and defenses.<sup>131</sup> While arguing against the fairness of the position that housing courts, if a right to counsel were implemented, would actually resemble an adversarial setting with a greater balance of power between the parties is difficult to do with a straight face, it is one that the group felt would be made by opponents of a right to counsel nevertheless.<sup>132</sup>

To counter, the group offered several responses. First, there was a belief that with a greater balance of power in the courts, unscrupulous landlords would bring fewer cases for fear that cases of questionable or borderline merit would result in protracted litigation,

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<sup>130</sup> See *infra* text accompanying notes 144-181 (for the actual monetary value of the cost of the provision of counsel, on a case-by-case basis).

<sup>131</sup> Shelter Break-Out Session, *supra* note 106, at 39.

<sup>132</sup> *Id.* at 44.

ultimately ending in the landlord's defeat. Furthermore, if landlords knew tenants would be represented they might be more willing to seek out-of-court settlements in an effort to save their own attorney's fees. In addition, even for those cases that were filed, attorneys on both sides might be able to make fair assessments of the relative merits of the claims and defenses and reach quicker settlements as a result, placing less of a burden on court personnel who would not have to mediate complex cases.<sup>133</sup>

In a similar vein, the group's participants believed that one of the main arguments in favor of improving access to counsel in eviction proceedings is the hope that greater representation of tenants would improve the culture of the housing courts across the state.<sup>134</sup> Instead of courts that operated like eviction mills, there would be greater civility<sup>135</sup> and greater respect of tenants' rights across the board, because having lawyers for tenants in the courts would serve a monitoring function to ensure the courts would be more responsive to tenants' concerns.<sup>136</sup> The experience of staff at Nassau-Suffolk Legal Services may be instructive on this point. Members of the panel recounted the organization first started providing provided pro se in-

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<sup>133</sup> *Id.* at 38-43.

<sup>134</sup> *Id.* at 68. Moderator Louise Seeley stated that, "[c]hanging the culture of housing court is to me one of the main policies [behind a right to counsel]." *Id.*

<sup>135</sup> It is certainly possible that having more tenants' attorneys' present would create more rancor, as landlords and their attorneys would be frustrated that they no longer enjoyed their competitive advantage and might take that frustration out on opposing parties and their attorneys. My personal experience in the courts of New York City leads me to believe that having a greater balance of powers in the housing courts will lead to greater civility, as the direct contact between lawyers for both sides can help to minimize the highly charged emotional atmosphere of the courts when landlords and tenants battle over something as fundamental as the continued occupation of the home.

<sup>136</sup> See Shelter Break-Out Session, *supra* note 106, at 68-70.

formation clinics for tenants and then started representing tenants in court when very few tenants were generally represented.

[T]he culture and the way the courts responded, the judges and the lawyers on the other side, when they saw that there were lawyers in court, even though a small percentage of the tenants were represented, nonetheless . . . it had a tremendous change in the way the judges and the landlords and landlord attorneys handled themselves and saw the cases. That constant presence had an impact on this.<sup>137</sup>

Short of full representation, the group addressed whether there might be other effective models of legal assistance that might provide some assistance to otherwise unrepresented tenants, even if those tenants would not receive actual representation.<sup>138</sup> Even the expansion of these services would not likely tip the balance of power in the housing courts and would not change the culture of those courts, as the group agreed was an important goal of the right to counsel effort.

One model the group discussed at length, which has received a great deal of attention in recent years, is the concept of “unbundled”

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<sup>137</sup> *Id.* at 69-70.

<sup>138</sup> Such models could reduce the cost of providing representation, while providing some level of assistance to tenants, even if it is short of full representation. At present, there are services that provide pro se information in the housing courts of New York City which are offered through organizations like the City-Wide Task Force on Housing Court, which places staff in tables in court house hallways offering information to tenants facing eviction. In addition, many legal services offices and government entities offer guidance to litigants in housing court through written materials and on their websites. *See, e.g.*, South Brooklyn Legal Services, [www.sbls.org](http://www.sbls.org) (last visited Sept. 27, 2008) (offering a range of pro se information for litigants); New York State Unified Court System, <http://www.courts.state.ny.us/index.htm> (last visited Sept. 27, 2008); DHCR.state.ny.us, New York State Division of Housing and Community Renewal—Office of Rent Administration, <http://www.dhcr.state.ny.us/AboutUs/Offices/RentAdministration/> (last visited Sept. 27, 2008); New York City Rent Guidelines Board, <http://www.housingnyc.com> (last visited Sept. 27, 2008) (provides New York State residents valuable information about housing court and rent regulations).



legal services, which is where an attorney is available to help a party with a discrete aspect of his or her case, often limited to assistance with a single appearance. This practice has been attempted, to a limited degree, in housing courts in New York City and in some of the counties north of New York City.<sup>139</sup>

The shelter break-out group had misgivings about such “spot” representation that is available through lawyer for the day programs.<sup>140</sup> The biggest concern for the break-out session participants was that an unbundled approach would not get to the root of the problem the tenant is facing, the reason he or she might be in court in the first place.<sup>141</sup> While a lawyer for a day might be able to enter into a stipulation on behalf of a tenant and obtain more time for that tenant so that the tenant might seek a method for paying his or her arrears, that lawyer is not going to work with the tenant to ensure that he or she is able to secure those arrears and will not deal with a welfare

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<sup>139</sup> See Fern Fisher-Bradveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 *FORDHAM URB. L.J.* 1107 (2002) (describing and critically analyzing the unbundled legal services models).

<sup>140</sup> A recent study of the provision of unbundled services in New York City’s housing courts might help dispel some of the fears of the group’s participants about an expansion of such an approach, yet the fact remains that such alternatives are no substitute for full representation. See *VOLUNTEER LAWYER FOR A DAY PROJECT REPORT*, *supra* note 42. In that study, fifty non-payment cases were handled by volunteer attorneys who were trained in basic housing law and procedure and committed to assist a number of tenants on a particular day in housing court. The volunteer attorneys were granted permission to sign limited retainers that authorized them to restrict their representation to assisting a tenant on a particular day, so their assistance would not extend to services outside of court or on subsequent return dates. For the most part, lawyers helped tenants to raise defenses and negotiate stipulations with opposing counsel, finding their assistance was most beneficial when an attorney was present when a final stipulation was reached in the proceeding. *Id.* at 9-17. Even the authors of this report, while praising the benefits of unbundled legal services, understood the following: “Full legal services in litigated matters is the preferable method of representation . . . . Unbundled legal services provide less than full representation. Unbundled legal services alone are not the solution to the lack of legal assistance in New York State civil matters, which has reached epidemic proportions.” *Id.* at 57.

<sup>141</sup> Shelter Break-Out Session, *supra* note 106, at 56-60.

sanction that tenant might have, which is why the tenant has been hauled into court in the first place. Participants expressed fear that the lawyer in these settings becomes a facilitator for the court, assisting the court with docket control and moving cases quickly through it, as opposed to an advocate for the client.<sup>142</sup> Ultimately, the group concluded that the unbundled approach is not going to meet the goal that all agree should be at the heart of the representation: securing and preserving affordable housing. As group participant Ms. Weinstein put it:

If the point is to prevent homelessness and to preserve housing, the quickie service doesn't do that. So, even though it may be cheaper in the short run, it's more expensive or as expensive in the long run as nothing. *So the definition has to be that the point of the right to counsel is to preserve housing.*<sup>143</sup>

As we will see, the group took up this theme in greater detail when discussing the costs of not having a right to counsel in eviction proceedings.

## 2. *The Cost of Not Having a Right to Counsel*

While concerns about the costs associated with providing a right to shelter might seem prohibitive, the group overwhelmingly supported an analysis that looked at and articulated the costs associated with the status quo, the cost of not having access to a lawyer and

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<sup>142</sup> *Id.* at 58.

<sup>143</sup> *Id.* at 61 (emphasis added).

all of the social costs that flow from that denial of access to justice.<sup>144</sup>

The costs associated with not having a right to counsel in eviction and foreclosure proceedings are certainly more amorphous and harder to quantify than the direct costs associated with hiring attorneys to represent indigent tenants. The hardship of eviction brings with it many consequences that can be devastating even for those who have alternative housing to occupy; disruption at school and work, unsettling of social networks, and the costs associated with securing and moving property. When a family becomes evicted and must seek housing through a homeless shelter, the experience of this dislocation and a stay in the shelter can be utterly traumatizing with long-term and lasting impacts. Children have difficulty focusing in school, employment is difficult if not impossible to maintain, and stress and depression often follow.<sup>145</sup> While these consequences are hard to measure in terms of the fiscal cost associated with days of work lost, disruption in education, and the costs of medical care (or untreated illnesses), there is one measurement that is somewhat easier to grasp and quantify: the simple cost associated with housing evicted individuals and families in homeless shelters, a cost that is almost universally borne by localities.

In addition, another significant consequence of eviction is the loss of affordable housing opportunities when a tenant loses his or her home. First and foremost, in communities in which rent regula-

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<sup>144</sup> *Id.* at 34-35.

<sup>145</sup> The Shelter Break-Out Session discussed these social costs associated with the loss of the home. *Id.* at 34-38. See also Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 707-10 (2006); Scherer, *Gideon's Shelter*, *supra* note 62, at 568-69; Karas, *supra* note 68, at 531-34.

tions are in place, the loss of an apartment to eviction generally means that the landlord can raise the rent of that apartment, often resulting in deregulation of the apartment altogether.<sup>146</sup> With public housing, or housing in which a subsidy is in place, the loss of that apartment generally means the loss of affordable housing and/or the subsidy for the evicted family or individual. That tenant or family can reapply for affordable housing but will have to move to the bottom of a very long and stagnant waiting list. For the tenant with a subsidy, that subsidy could be forfeited with the loss of the apartment. The group agreed that the lack of viable affordable housing opportunities for low- and moderate-income tenants is apparent not only in New York City, but in Westchester and Rockland counties as well as upstate New York.<sup>147</sup>

Out of this discussion, a consensus emerged that advocates for a right to counsel in eviction proceedings had to make the case that at the heart of the claim for a right to counsel in such settings was the connection between what that right provided and the social goods it helped to preserve and promote, notably, the preservation of affordable housing stock, the prevention of homelessness, and the consequences to individuals and families as a result thereof.

As Andrew Scherer eloquently argued,

[I]t is not really about the right to counsel, it is about what you have counsel fighting for. Here it is about fighting for a home. . . . [In] the public policy realm when you get good lawyers who see their role in the proper way, which is to be transformative, then they

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<sup>146</sup> See discussion *supra* Part I.

<sup>147</sup> Shelter Break-Out Session, *supra*, note 106, at 34, 44.

actually see beyond I'm here to hold this person's hand while they get evicted; and they think about the loss of publicly-subsidized housing . . . or what is going on in this community and how can I tackle it in a more broad based way. . . . [T]he more you get people there to represent, the more you get a take on the underlying social problems and you can address the problems.<sup>148</sup>

What follows in Part IV is an exploration of this argument, as well as a review of trends in government reform and philanthropy. These sectors, this review concludes, are looking for ways to solve social problems, and not by simply throwing money at them. As a result, advocates for the right to counsel are well served by making the argument to legislators and the philanthropic sector that a lawyer in an eviction proceeding does so much more than simply make the eviction process more fair.

#### **IV. CHANGES IN PHILANTHROPY AND GOVERNMENT REFORM**

##### **A. Philanthropy**

The philanthropic sector in the United States has transformed itself over the last decade, becoming more transparent in its decision making, more international in focus, and more committed to securing measurable outcomes from the funds it distributes. These shifts have come about due to a range of factors. First, globalization and the Internet has enabled the transmission of information about the desperate need throughout the world in an instant, raising awareness of

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<sup>148</sup> *Id.* at 50-51.

global poverty and global issues and encouraging global philanthropy.<sup>149</sup> Second, a generational shift in the donor class means that a younger crop of philanthropists, some with experience in business, are looking to replicate the demands for accountability placed on the business world in the philanthropic sector.<sup>150</sup> Third, high profile philanthropic efforts have placed a greater focus in the public consciousness on global impact and global problems over domestic concerns.<sup>151</sup> Fourth, devolution, international commitments, and a renewed interest in reducing the role of the federal government in the

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<sup>149</sup> See, e.g., SUSAN RAYMOND, PH.D., AS THE WORLD TURNS: TRENDS IN GLOBALIZATION AND THE AMERICAN NONPROFIT AND PHILANTHROPIC SECTOR (2007) (noting the impact of globalization on philanthropy); Mario Morino, Remarks at the Washington Regional Ass'n of Grantmakers Annual Meeting 2 (June 21, 2001), available at [http://www.morino.org/advan\\_sp\\_ven.asp](http://www.morino.org/advan_sp_ven.asp) (last visited Oct. 10, 2008) (noting the impact of the "new economy," globalization, and the Internet on philanthropy).

<sup>150</sup> William F. Meehan III et al., *Investing in Society: Why We Need a More Efficient Capital Market and How We Can Get There*, STANFORD SOC. INNOVATION REV. 34, 36 (2004) (identifying a "new breed of givers . . . [that] view themselves as 'investors,' rather than simply donors, who seek information about the nonprofits they fund, and expect measurable social returns on their investment, much as investors in the stock market aim for financial returns. It is with these investors that the future of the social sector lies"); Sean Stannard-Stockton, *The Evolution of the Tactical Philanthropist*, in MAPPING THE NEW WORLD OF AMERICAN PHILANTHROPY: CAUSES AND CONSEQUENCES OF THE TRANSFER OF WEALTH 45 (Susan Raymond ed. 2007) (describing new philanthropists as demanding accountability of their donees). This new wave of philanthropists have been called "philanthrocapitalists" by one commentator. See Matthew Bishop, *What is Philanthrocapitalism*, ALLIANCE, Mar. 2003, at 30. Those who believe that business analysis should be used in ensuring the effective functioning of philanthropic ventures, have their critics.

The philanthrocapitalists are drinking from a heady and seductive cocktail, one part "irrational exuberance" that is characteristic of market thinking, two parts believing that success in business equips them to make a similar impact on social change, a dash or two of the excitement that accompanies any new solution, and an extra degree of fizz from the oxygen of publicity that has been created by the Gates-Buffer marriage and the initiatives of ex-President Clinton.

MICHAEL EDWARDS, JUST ANOTHER EMPEROR: THE MYTHS AND REALITIES OF PHILANTHROCAPITALISM, 13 (2008), available at [http://www.justanotheremperor.org/edwards\\_WEB.pdf](http://www.justanotheremperor.org/edwards_WEB.pdf).

<sup>151</sup> The efforts of the Bill and Melinda Gates Foundation and the Bill Clinton Global Initiative are just two examples of new and high profile philanthropic efforts with both domestic and international interests.

provision of services at the local level has meant a heavier reliance on nonprofit institutions to address unmet local needs; with this added pressure to meet such needs comes a greater demand that the nonprofit sector must meet as many needs as possible with either the funds they have or fewer funds.<sup>152</sup> Fifth, scandals in the nonprofit sector have led donors to demand greater accountability from the entities they fund.<sup>153</sup> Some also argue the tax revenue lost due to the tax deduction for charitable giving is lost revenue that could otherwise go towards alleviating social ills and, as a result, there is a duty imposed on the nonprofit sector to address those social ills efficiently and effectively.<sup>154</sup> All of these forces mean that in the philanthropic sector, there is a greater emphasis on measurable results<sup>155</sup> and sup-

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<sup>152</sup> MARIO MORINO & BILL SHORE, HIGH ENGAGEMENT PHILANTHROPY: A BRIDGE TO A MORE EFFECTIVE SOCIAL SECTOR 11 (2004), available at [http://www.vppartners.org/learning/reports/report2004/report2004\\_essay.pdf](http://www.vppartners.org/learning/reports/report2004/report2004_essay.pdf); Edward Skloot, *Foundations Must Meet the Era's Challenges*, THE CHRONICLE OF PHILANTHROPY, Nov. 15, 2001; Kirsten A. Gronbjerg & Lester M. Salamon, *Devolution, Marketization and the Changing Shape of Government-Non-Profit Relations*, in THE STATE OF NON-PROFIT AMERICA 447 (Lester M. Salamon ed., 2004).

<sup>153</sup> Katie Cunningham & Marc Ricks, *Why Measure: Nonprofits Use Metrics to Show That They Are Efficient. But What if Donors Don't Care?*, STAN. SOC. INNOVATION REV. 51 (2004) (noting the importance of outcome measurements for institutional foundation staff to ensure their professional stewardship over donors' funds); Jon Christensen, *Exploring New Ideas for Making Finances Clearer and Scandals Rarer*, N.Y. TIMES, Nov. 17, 2003, at F16 (noting the rise of services for measuring effectiveness of nonprofit organizations); Evelyn Brody, *Accountability and Trust*, in THE STATE OF NON-PROFIT AMERICA 471 (Lester M. Salamon, ed., 2004).

<sup>154</sup> See, e.g., NAT'L COMM. FOR RESPONSIVE PHILANTHROPY, UNDERSTANDING SOCIAL JUSTICE PHILANTHROPY 3 (2003), available at <http://www.ncrp.org/PDF/UnderstandingSocialJusticePhilanthropy.pdf>; MARK DOWIE, AMERICAN FOUNDATIONS: AN INVESTIGATIVE HISTORY (2001); Bill Bradley & Paul Jansen, *Faster Charity*, N.Y. TIMES, May 15, 2002, at A23 (noting the \$50 billion in annual loss of federal revenue due to charitable deductions and suggesting greater scrutiny of foundation practices in distribution of funds they maintain in their endowments).

<sup>155</sup> GLOBAL LEADERS TOMORROW, PHILANTHROPY MEASURES UP 9 (2003), available at <http://www.salesforcefoundation.org/files/Philanthropy+Measures+Up.pdf> (outlining the growing demand for effective methods for measuring outcomes); NAT'L COMM'N ON PHILANTHROPY AND CIVIC RENEWAL, GIVING BETTER, GIVING SMARTER: RENEWING PHILANTHROPY IN AM. 77 (1997), available at

porting innovative programs that focus on achieving impact, that address the root causes of social issues, as opposed to continued provision of services, with little attention to impact and effectiveness.<sup>156</sup> In order to thrive in this new environment, nonprofit leaders must become “social entrepreneurs” that “are not content just to give a fish or teach how to fish. They will not rest until they have revolutionized the fishing industry.”<sup>157</sup> In this way, the transformative goal of advocacy that promotes a right to counsel will need to look not just to ensure that every low-income tenant or homeowner in New York State has access to a lawyer, but rather, should emphasize the goal of counsel in such settings is to preserve affordable housing and prevent homelessness.

Because of the greater emphasis in the domestic philanthropic community on global issues, however, domestic efforts, like any pro-

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[http://pcr.hudson.org/index.cfm?fuseaction=book\\_giving](http://pcr.hudson.org/index.cfm?fuseaction=book_giving) (urging donors to evaluate the effectiveness of their prospective donees).

<sup>156</sup> In the end, nonprofit entities are going to have to pay more attention to outcome measurement, which might prove challenging to organizations that are not used to doing so.

Outcome measurement is new to most private nonprofit organizations. Nonprofit organizations are more often familiar with monitoring and reporting such information as the number of clients served, the quantity of services, programs, or activities provided, the number of volunteers or volunteer hours contributed, and the amount of donations received. These are important data, but they do not help nonprofit managers or constituents understand *how well they are helping their clients*; that is, such statistics provide administrative information about programs, but not about the program’s results. For program improvement, further examination of the reasons for good or poor results is needed.

ELAINE MORLEY ET AL., *OUTCOME MEASUREMENT IN NON-PROFIT ORGANIZATIONS: CURRENT PRACTICES AND RECOMMENDATIONS* 5 (2001), *available at* <http://www.independentsector.org/programs/research/outcomes.pdf>.

<sup>157</sup> Posting of Bill Drayton to Government Engagement Blog, <http://www.socialedge.org/blogs/government-engagement/topics/Bill%20Drayton> (Apr. 8, 2008) (Bill Drayton, CEO, chair and founder of Ashoka, which promotes the development of social entrepreneurs, is a global-nonprofit organization devoted to developing the profession of social entrepreneurship).



gram built around the right to counsel, must present a compelling picture of need, and the effectiveness of such programs' responses to such need, to potential funders. For example, a foundation like the Ford Foundation, which invested heavily in organizations like Mobilization for Youth in New York City in the early 1960s, which combined legal services with social services and community organizing, is no longer making large grants to legal services programs serving the indigent within the United States.<sup>158</sup>

## B. Government Reform

Over the last twenty years, there has been a growing movement to “reinvent” government, to make government activities more efficient, accessible, transparent, and result-oriented.<sup>159</sup> This theme was first adopted on a national level at the beginning of the Clinton

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<sup>158</sup> Some of the initial pilot legal services projects, funded in large part by the Ford Foundation, often included partnerships between lawyers, social service providers and community organizers, i.e., part of interdisciplinary and holistic, community-based approaches to addressing the needs of the poor and the injustices faced by low-income and marginalized communities. For a description of the early legal services pilot projects, see JOHNSON, *supra* note 86, at 21-34; Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L. J. 1317 (1964); Allan W. Houseman, *Racial Justice: The Role of Civil Legal Assistance*, 36 CLEARINGHOUSE REV. 5 (2002).

<sup>159</sup> Although the concept of effective government is by no means new and can be traced back most recently to Enlightenment philosophers and as far back as the writings of Confucius, the more modern trend finds its roots in the works of David Osborne and Ted Gaebler. See, e.g., DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1993); DAVID OSBORNE & PETER PLASTRIK, *BANISHING BUREAUCRACY: THE FIVE STRATEGIES FOR REINVENTING GOVERNMENT* (1997). Osborne and Plastrik define reinventing government as “the fundamental transformation of public systems and organizations to create dramatic increases in their effectiveness, efficiency, adaptability, and capacity to innovate. This transformation is accomplished by changing their purpose, incentives, accountability, power structure, and culture.” *Id.* at 13-14. See also Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., 2001); Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463, 1506-13 (1996) (describing goals of reinventing government movement) (citations omitted).

Administration, through the creation of the National Performance Review, chaired by Vice President Gore,<sup>160</sup> but the approach has been utilized in states and localities across the country.<sup>161</sup> Emphasizing measurable outcomes, privatization, and local control, reinventing government strives to provide better services in a more efficient and less costly way.<sup>162</sup> Due to this trend, an approach that is based on performance measurement in government and the promotion of “best practices” has been adopted in legislation in many contexts, requiring

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<sup>160</sup> See VICE PRESIDENT AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, REPORT OF THE NATIONAL PERFORMANCE REVIEW (1993), [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/14/0a/c1.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/14/0a/c1.pdf).

<sup>161</sup> Barry M. Feldman, *Reinventing Local Government: Beyond Rhetoric to Action*, in THE MUNICIPAL YEARBOOK (1999) (surveying activities of local governments to adopt principles of reinventing government); CORNELIUS HOGAN, THE POWER OF OUTCOMES: STRATEGIC THINKING TO IMPROVE RESULTS FOR OUR CHILDREN, FAMILIES, AND COMMUNITIES (2001), available at <http://www.nga.org/Files/pdf/1999OUTCOMES.pdf> (urging the use of outcome measurement to improve delivery of social services); SARA WATSON, IMPLEMENTING RESULTS-BASED DECISION MAKING: ADVICE FROM THE FIELD (2001), available at <http://www.nga.org/Files/pdf/1999WELFAREBARRIERS.pdf> (assessing success of strategies that incorporate principles of results-based decision making); NAT'L GOVERNORS ASS'N, SOCIAL, ECONOMIC & WORKFORCE DEVELOPMENT DIVISION, RESTRUCTURING AND REINVENTING STATE WORKFORCE DEVELOPMENT SYSTEMS (1997), available at <http://www.nga.org/Files/pdf/011597WORKFORCESTRUCT.pdf> (assessing efforts to “re-invent” workforce development policies). See also Patricia E. Salkin, *National Performance Review: A Renewed Commitment to Strengthening the Intergovernmental Partnership*, 26 URB. LAW. 51, 52 (1994) (assessing the potential impact of the federal government's reinvention approach on state and local governments).

<sup>162</sup> Of course, this trend is not without its critics: those who fear devolution and local control are simply ways to reduce government spending on social programs and make them more subject to the whims and biases of local officials. See, e.g., Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (tracing the impact of devolution and privatization on welfare administration); MICHAEL J. BALLARD & MILDRED E. WARNER, TAKING THE HIGH ROAD: LOCAL GOVERNMENT RESTRUCTURING AND THE QUEST FOR QUALITY, (2000), available at <http://government.cce.cornell.edu/doc/pdf/TakingTheHighRoad.pdf> (identifying “high road” and “low road” management practices which incorporate either innovative strategies to improve performance or focus on downsizing and privatization as a means to reduce government spending and services); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (criticizing the 1996 amendments to federal welfare laws that granted state officials discretion to make distinctions in the provision of benefits based on immigration status).

government agencies to measure the outcomes of their activities to improve services and government functions.<sup>163</sup>

It is arguable that no administration has embraced this new approach to governance with more abandon than Mayor Michael Bloomberg of New York City,<sup>164</sup> business man turned elected official, and perhaps no more enthusiastically in application than within

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<sup>163</sup> See, e.g., David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 296-97 fig.2 nn.7-17 (2006) (detailing federal laws requiring that federal agencies incorporate assessment of best practices in different fields and noting that the term “best practices” “appeared three hundred times in the 2004 Federal Register, up from three appearances in 1980”); see also IAN AYRES, *SUPER CRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART* 69 (2007) (noting the existence of three thousand state statutes in the United States that mandate randomized trial experiments for assessing government functions).

<sup>164</sup> For a review of the Bloomberg Administration’s effort to utilize information management to improve government functioning, which had at its roots the experience of the New York City Police Department under Mayor Rudolph Giuliani, see DENNIS C. SMITH & WILLIAM J. GRINKER, *THE TRANSFORMATION OF SOCIAL SERVICES MANAGEMENT IN NEW YORK CITY: “COMPSTATING” WELFARE* 34-39 (2005), available at [http://www.seedco.org/archive/publications/compstating\\_welfare.pdf](http://www.seedco.org/archive/publications/compstating_welfare.pdf). In a recent address to employees of the World Bank, Mayor Bloomberg touted his accomplishments and philosophy:

But to be effective, innovation has to be coupled with the third value that I want to stress: Rigorous and publicly accountable governance - governance that is transparent, efficient, and that makes decisions based on data. There’s a saying: “In God we trust. Everyone else bring data.” I’ve found that in business and government, those are good words to live by.

In New York City, we’ve not only used data to drive decisions, we’ve made it transparent—so that the public will be able to see where the problems lie. That’s why, for example, we’ve begun grading all 1,500 of our public schools—the schools, not just the kids—so that parents will know how their child’s school compares to other schools. If their children go to a school that’s failing, will they yell and scream until things get better? They should! And that’s exactly the point.

Accurate, transparent, and continually collected data is also crucial to deciding when and how to most efficiently use scarce resources.

Press Release, Office of the Mayor of N.Y. City, Michael R. Bloomberg Addresses World Bank Employees on “Building Better Cities: New York’s Experience in Urban Transformation” at World Bank Urban Sector Day (Feb. 21, 2008), <http://www.nyc.gov> (follow the “New and Press Releases” hyperlink; then follow “February 2008” hyperlink; then follow “Read the Press Release” hyperlink from Feb. 21, 2008).

his Department of Homeless Services (“DHS”). Soon after Mayor Bloomberg took office, DHS released its strategic plan for combating homelessness in New York City, a problem that had plagued prior administrations.<sup>165</sup> In that strategic plan, DHS committed itself to a greater emphasis on homelessness prevention and better data collection and outcome measurement.<sup>166</sup> Furthermore, DHS now publishes data about shelter usage on its website, including daily census counts of the shelter population.<sup>167</sup>

This ethic of accountability and efficiency is also present at the state level in New York, as Governor Patterson’s administration is promoting a result-based orientation for many of its agencies<sup>168</sup> and

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<sup>165</sup> N.Y. CITY DEP’T OF HOMELESS SERV., THE SECOND DECADE OF REFORM: A STRATEGIC PLAN FOR NEW YORK CITY’S HOMELESS SERVICES (2002), *available at* <http://www.nyc.gov/html/dhs/downloads/pdf/stratplan.pdf>.

<sup>166</sup> DHS later explained its focus on the use of data to drive policy reform in the area of homelessness prevention as follows:

“A research and data—driven approach allows for the creation of prevention models that target the most at-risk individuals and families who have the most critical needs—before they are knocking at the front door of the shelter system,” noted Maryanne Schretzman, DHS’ deputy commissioner of policy and planning.

“A data-based approach will also enable the city, for the first time, to evaluate existing prevention programs to see which ones are working, understand why those programs are successful, and ensure that best practices are replicated,” she continued.

New York City Dep’t of Homeless Serv., *A Data Driven Approach to Prevention*, DHS HOMEPAGE 1, 3 (May/June 2004), *available at* [http://www.nyc.gov/html/dhs/downloads/pdf/hp\\_issue\\_2.pdf](http://www.nyc.gov/html/dhs/downloads/pdf/hp_issue_2.pdf).

<sup>167</sup> NYC.gov, N.Y. City Department of Homeless Services—Statistics, <http://www.nyc.gov/html/dhs/html/statistics/statistics.shtml> (last visited Sept. 29, 2008).

<sup>168</sup> See, e.g., OMH.state.us, N.Y. State Office of Mental Health-- Implementing Evidence-Based Practices and Quality of Care in New York State, <http://www.omh.state.ny.us/omhweb/EBP/implementing.htm> (last visited Sept. 29, 2008) (providing examples of evidence-based practices in the mental health system in New York State); OCFS.state.us, N.Y. State Office of Children & Family Services—Effective and Promising Practices, [http://www.ocfs.state.ny.us/main/sppd/eff\\_practices](http://www.ocfs.state.ny.us/main/sppd/eff_practices) (last visited Sept. 29, 2008) (providing a list of resources “for professionals and stakeholders interested in advancing programs and practices that are designed to achieve positive outcomes for the children, families, and communities of New York State”).

recently issued a report, originally commissioned by then-Governor Spitzer, to reform the functioning of local governments throughout the state.<sup>169</sup>

Given these trends, with New York City and New York State looking to adopt reforms essential to improving the functioning of government programs, advocates will be well served to pursue arguments that support the right to counsel in the housing context using language that appeals to this ethic of good governance, an ethic that has become even more critical in the current financial crisis.

The following is a description of one program in which counsel is provided to families facing eviction in New York City that draws support from government, the philanthropic sector, nonprofits, and the courts, and perhaps offers valuable insights into what might serve as key features of a program that may help to strengthen the arguments in favor of the right to counsel on a larger scale.

### **C. Housing Help: A Private-Public Partnership**

The Housing Help program is an example of an innovative program that combines a nonprofits' desire to create and support strategic programs, with government's interest in promoting efficiency in its systems. This innovative anti-eviction program was started four years ago by United Way of New York City ("UWNYC") as part of its "strategic approach to fighting critical issues in" New York

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<sup>169</sup> See N.Y. STATE COMM'N ON LOCAL GOV'T EFFICIENCY & COMPETITIVENESS, 21<sup>ST</sup> CENTURY LOCAL GOVERNMENT (2008), *available at* [http://www.nyslocalgov.org/pdf/LGEC\\_Final\\_Report.pdf](http://www.nyslocalgov.org/pdf/LGEC_Final_Report.pdf) (setting forth commission recommendations for improving efficiency and effectiveness of local governments in New York State).

City,<sup>170</sup> in collaboration with private funders,<sup>171</sup> the New York City Civil Court, the NYC Department of Homeless Services, and various community-based providers. Initially, based on data compiled by the Vera Institute for Justice,<sup>172</sup> the program targeted the provision of integrated legal, financial, and social services to families facing eviction in one zip code in the South Bronx which had been designated by the DHS as the last zip code of residence of a disproportionate number of families entering the shelter system. These cases, were identified at the time of filing an answer, and were screened by paralegals for homelessness risk factors and income eligibility. All the cases were then channeled into a single courtroom before a single judge.

Today the Housing Help Program consists of two integrated parts: a court-based unit housed with lawyers, social workers, and paralegals, adjacent to the courtroom where the HHP cases are heard, and a community-based office staffed with social workers both managed and operated by the Legal Aid Society of New York (LASNY).

This concept of an enriched services courtroom with one judge dedicated to the zip code will foster knowledge of the community and problem solving around the issue of homelessness prevention. The court-based unit provides legal and general social services to prevent homelessness while an individual's legal case is pending, while the community-based unit offers more

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<sup>170</sup> See UnitedWayNYC.org, United Way of New York City: Our Programs & Initiatives, <http://www.unitedwaynyc.org/?id=17&pg=hbp> (last visited Sept. 29, 2008).

<sup>171</sup> In addition, the United Way of New York City has contributed funds to the program from the private donations it has received from individual and corporate donors including the Bank of New York Mellon, Booth Ferris Foundation, and the Mizuho USA Foundation. See *id.*

<sup>172</sup> See VERA INST., *supra* note 35, at 3-6.

in-depth social services to prevent homelessness.<sup>173</sup>

The program engages in intensive screening and data collection, to identify families most at risk of homelessness and most able to benefit from the integrated legal and social services intervention.<sup>174</sup> The courtroom component of the program is supervised by a single attorney who uses a triage method to determine what level of legal and social service assistance is appropriate for each family: i.e., whether full services, including representation is required or whether eviction can be avoided with the comprehensive brief service model.<sup>175</sup> All cases are tracked throughout the court process to ensure the appropriate level of legal service is being deployed and ensure the family is not evicted, with the more complex cases receiving full legal representation.<sup>176</sup>

In addition to the comprehensive legal assistance that is provided, intensive social services interventions are utilized to assist families in need of services other than pure legal assistance. This can

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<sup>173</sup> United Way, *supra* note 170. For a discussion of the benefits of channeling cases from a particular community to a particular judge, see Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573, 1581-82 (2003).

<sup>174</sup> Interview with Jo Gonsalves, United Way Director of Affordable Housing and Homeless Prevention and Steve, Kaufman, United Way of New York City, at 1-2 (June 26, 2008).

<sup>175</sup> *Id.* at 2-4. Triage, and the provision of a continuum of services—from brief advice to full representation—that are targeted and directed as needed, means that some clients receive the direct assistance of an attorney formally appearing in their case. Others receive legal advice and social work interventions as necessary. Critical to the success of these targeted services is the fact that an attorney screens and monitors all cases to ensure an appropriate level of assistance is provided at all times. The program has seen no appreciable difference in outcomes between families receiving full representation and those receiving brief service. Again, this is a function of adequate screening and monitoring, however, and a case that might be identified as one in which brief service is all that is needed at the outset, could become a case in which an attorney must formally appear, in the event a determination is made that the client cannot proceed on his or her own behalf. *Id.*

<sup>176</sup> *Id.* at 2.

range from assistance with any problems clients may have with receipt of their public assistance, or linking clients to employment related services.<sup>177</sup> For the attorneys involved in the program, having social services staff available to handle some of the issues their clients face that might impede a successful defense of the eviction proceeding is extremely beneficial.<sup>178</sup> In addition, lawyers with clients facing other legal issues are able to tap into the expertise and resources of The LASNY's other staff attorneys, to ensure that such other legal problems do not impact the eviction case in harmful ways, as with a client needing to adjust his or her immigration status in order to qualify for certain public assistance benefits.<sup>179</sup> Over the first three and a half years of the program, this combination of geographically targeted legal and social services has served over 1,100 families, and fewer than fifteen families in the program have lost their homes, a stunning 98.6% success rate.<sup>180</sup>

This innovative program, which has the complete support of the courts, can help serve as a model for expanding access to counsel. Its use of lawyers and social workers, its court-adjacent status, its application of a triage approach that applies a range of legal services as appropriate, and its long-term case management approach to families after they successfully defend their evictions, may prove more costly than legal services standing alone, but the benefits, as evidenced by its remarkable success rate, are obvious. A critical component of the

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 4.

<sup>179</sup> Interview with Jo Gonsalves & Steve Kaufman, *supra* note 174, at 16.

<sup>180</sup> *Id.* at 4-5, 12.



program, as it is presented to the general public, potential funders, government stakeholders, and the courts, is that it is designed and marketed as a homelessness prevention program, one that is both holistic and interdisciplinary because it looks at the causes of homelessness, and the families most at risk of homelessness. It also provides ongoing services to maintain family stability.<sup>181</sup>

Can this model grow in scale, and have the same type of success when faced with county- or city-wide need? The philanthropic and government sectors, this review concludes, are looking for ways to solve social problems in effective and efficient ways. As a result, advocates for the right to counsel are well served by making the argument to elected officials and the philanthropic sector that a lawyer in an eviction proceeding does so much more than simply make the eviction process fairer. Rather, a lawyer in an eviction proceeding helps preserve affordable housing, reduces the demand for homeless shelters, combats dependency, and preserves the self-sufficiency of individuals and families. Funding lawyers to assist tenants facing eviction will do so much more than garner respect for the judicial process or validate the adversarial system. Rather, such assistance helps to solve the problem of a lack of affordable housing while also preserving family stability. These arguments, in the end, might just tip the balance and justify judicial intervention to require a right to counsel in these settings.

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<sup>181</sup> *Id.* at 13, 15.

**V. PROMOTING A SOLUTIONS BASED FRAMEWORK FOR PROMOTING THE RIGHT TO COUNSEL**

Courts across the state of New York, when handling housing matters, resolve disputes involving not only complicated areas of law, but also decide the fate of hundreds of thousands of families a year with respect to whether they can remain in their homes. The ability of the overwhelming majority of families whose homes are in jeopardy to defend themselves by obtaining counsel is severely limited by their income, the shocking lack of resources for legal services programs across the state, and the failure of the private bar to deploy itself on a volunteer basis in such a way that might help to meet even a fraction of the staggering need.

All of this brings us back to the question that is at the heart of this inquiry: What are the most effective arguments to bring about full access to counsel for families facing the loss of their home?

The absence of counsel for the indigent is a national disgrace and undermines the effectiveness of the courts as a legitimate check on the power of the state. The unfairness of a legal system in which many have access to counsel because of their relative income, while others do not, is apparent. Courts serve as critical checks on public and private power, and can guarantee that the laws, adopted by democratically elected legislatures, are faithfully enforced. In order to achieve this, the indigent, like the wealthy, must have access to counsel in order to protect their interests in the forum where disputes about such interests are most often resolved.

These truths are self-evident. A system of laws permitting some to enforce their rights based on their relative wealth, while es-

entially denying the indigent the ability to protect those same rights, is clearly flawed, and cannot comport with most Americans' notions of justice.<sup>182</sup>

And it is precisely these arguments that advocates of funding of legal services have made for decades. LSC champions still stress the argument of imbalance in representation in the legal system. Looking to Engler's social change analysis, is this the argument most likely to win over the many stakeholders in the right to counsel context? Should we continue to make these arguments when they have proven unsuccessful to date, and hundreds of thousands of families, in just the eviction context of New York State alone, continue to face the prospect of the loss of their home each year without the benefit of legal representation? Given the context of a deep recession brought on, in part, by the subprime mortgage crisis and the impact it will have on state and local tax bases, are there other arguments that advocates might consider using to strengthen the claim for a right to counsel in settings in which a family's continued residence in their home might be in jeopardy? What role does community mobilization play in bringing about social change, and does the "access to justice" argument serve as an organizing tool from which a popular base of support can rise?<sup>183</sup>

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<sup>182</sup> Earl Johnson, Jr., *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 201 (1994) (noting nearly eighty percent of Americans believe the poor are entitled to representation in civil matters).

<sup>183</sup> Assessing the interplay between legal strategies and mass mobilization in bringing about meaningful social change is beyond the scope of this Article, but, suffice it to say, it is this author's opinion that social change in many contexts is impossible without a groundswell of popular support for it, and it is unlikely that the right to counsel context is any different. For a review of the scholarship on the relationship between lawyers, social change and community organizing, see GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S*

### A. **Appealing to Government, Philanthropy, and the Community**

The instincts of the break-out participants, what research exists concerning the effectiveness of counsel in eviction proceedings in New York City, and the experiences of the practitioners who appear in eviction cases in New York State's rural counties, all confirm the premise that having a lawyer in a proceeding in which a family's home is in jeopardy is essential to that family in its efforts to avoid eviction and homelessness. The availability of legal assistance, whether it is full representation or some form of legal information or "unbundled" legal services, depending on the need of the family at risk of eviction, is critical to preventing that eviction and that family's homelessness.

As described above, philanthropy and government actors are looking for ways to make their efforts more efficient and to ensure that such efforts yield measurable results. Given these trends, would arguments promoting the right to counsel, that stress the importance of counsel in avoiding homelessness and preserving affordable housing, help to appeal to the "self interest" of potential funders for such

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VISION OF PROGRESSIVE LAW PRACTICE (1992); Richard L. Abel, *Lawyers and the Power to Change*, 7 LAW & POL'Y 5 (1985); JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 U.C.L.A. L. REV. 443 (2001); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049 (1970); For an assessment of the role of litigation in bringing about social change, see MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); David Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's, "The Hollow Hope: Can Courts Bring About Social Change?"* 12 J. L. & POL'Y 63 (1996). For an analysis of social change in the housing context and the role of mass mobilization in promoting that change, see Peter Marcuse, *Housing Policy and the Myth of the Benevolent State*, in RACHEL BRATT & CHESTER HARTMAN, CRITICAL PERSPECTIVES ON HOUSING 248 (Ann Meyerson ed., 1986).

initiatives in the philanthropic sector? Would the cost effectiveness of providing counsel, when compared to the cost of providing shelter to the evicted or building affordable housing for all of those who need it as opposed to preserving the affordable units they already occupy, appeal to the interest of local executive branch officials and legislators who must deal with spending billions to construct new, affordable housing?<sup>184</sup> This consideration is impacted by the budgetary drain associated with the provision of shelter for the homeless, which has taken literally billions of dollars from New York City's budget in the last twenty years.<sup>185</sup> Could advocates garner popular support for efforts to recognize a right to counsel in housing cases if they were framed as part of a strategy designed to preserve the affordability of New York City's housing stock for low-income and working poor New Yorkers, and minimize displacement throughout the state?<sup>186</sup>

## B. Appealing to the Courts

Furthermore, appealing to other key stakeholders (here, the courts), advocates should stress the connection between the lack of

<sup>184</sup> See, e.g., N.Y. CITY DEP'T OF HOUS. PRES. & DEV., *THE NEW HOUS. MARKETPLACE: CREATING HOUSING FOR THE NEXT GENERATION* 3 (2003), available at <http://www.nyc.gov/html/hpd/downloads/pdf/10yearHMplan.pdf> (describing the new housing initiative to spend \$7.5 billion to preserve and create affordable housing in New York City from 2004-2013).

<sup>185</sup> According to the City of New York, from 1993 to 2003 alone, "approximately 4.6 billion dollars have been spent building and maintaining a network of emergency shelters and an astounding 416,720 individuals, including 163,438 children, have received shelter services during this time." See *ACTION PLAN FOR NEW YORK CITY, UNITING FOR SOLUTIONS BEYOND SHELTER* 4 (2003), available at <http://www.nyc.gov/html/endinghomelessness/downloads/pdf/actionbooklet.pdf>.

<sup>186</sup> There are a number of efforts currently underway in New York City to fight displacement and preserve affordable housing. The New York is Our Home campaign of Housing Here and Now, a coalition of dozens of New York City based groups and elected officials, is just one of them. See *Housing Here and Now*, <http://www.housinghereandnow.org/index.html> (last visited Sept. 29, 2008).

representation and the threat of homelessness due to the loss of affordable housing as a way to strengthen arguments under the *Matthews* due process analysis. When one assesses the right to counsel claim under this traditional rubric, and views it in light of the critical role that counsel can play in preventing homelessness and preserving housing affordability, the arguments in favor of the recognition of the right under a due process analysis become significantly stronger.<sup>187</sup>

In addition to pressing demands under due process protections, a more aggressive approach under C.P.L.R. 1102(a) is also warranted, one stressing the overwhelming evidence that for many families the provision of counsel will mean the difference between keeping their home and being homeless. Under New York law, when courts are given discretion in a particular area, judges are afforded wide latitude in their exercise of that discretion.<sup>188</sup> This wide latitude

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<sup>187</sup> First, the “private interest” at stake is not simply the desire to remain in a particular residence, but rather the desire to avoid homelessness and preserve the affordable housing stock. When a rent regulated apartment and/or a subsidy will be lost due to the eviction, the societal cost is extremely high. When measured against the consequences of that loss, homelessness, demands on the public fiscally, the loss of a subsidy and/or the loss of a unit of affordable housing forever, the importance of that interest is increased exponentially. Even in rural areas and other communities in which rent regulations do not exist that might otherwise preserve rents at an affordable level, there are still many pressing reasons why tenants in such areas need counsel to preserve their tenancies: they might have a rental subsidy, they might reside in publicly funded housing to begin with, they might have a long-term lease at a relatively affordable rent, and they certainly face a tight housing market should an eviction proceeding jeopardize their tenancies. See Interview with Lewis Creekmore, *supra* note 13, at 12-13, 15-16; Interview with James Murphy, *supra* note 13, at 5. Second, the “risk of erroneous deprivation” is considerable given the complicated nature of the laws that govern regulated rental and subsidized housing and the demonstrated effectiveness of lawyers in the eviction context to preserve their clients’ homes. Third, the government interests are clearly served by the provision of counsel in proceedings in which a family’s shelter is in jeopardy when viewed in light of the role counsel plays in lowering demands for publicly funded shelter and affordable housing constructed at public costs.

<sup>188</sup> Under New York law, the intermediate appellate court is actually permitted to “substitute” its discretion for that of the trial court. Should an appeal lie with the Court of Appeals, it is limited to reviewing the matter only for abuse of discretion. *People v. Henriquez*, 469 N.E.2d 685, 686 (N.Y. 1986) (holding appellate term can substitute its discretion for that of

is not without its limits, however, and courts must exercise it “reasonably, and not capriciously or willfully.”<sup>189</sup> Where judges are required to take into account different factors when exercising their discretion, the failure to do so can constitute abuse of that discretion.<sup>190</sup> Indeed, where a court, in the exercise of its discretion, “fails to take into account all the various factors entitled to consideration, it commits error of law.”<sup>191</sup>

In accordance with this view of the courts’ discretion to assign counsel under C.P.L.R. 1102(a), advocates should press courts to take into account factors relevant to the determination of whether the assignment of counsel is advisable.<sup>192</sup> Given our understanding of the role counsel plays in preventing homelessness, courts should take into account the danger that a particular family will become homeless in the absence of counsel. Further, given our growing knowledge about a particular family’s risk of homelessness, courts should look at the neighborhood in which the family resides, whether a family

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the lower, trial courts).

<sup>189</sup> *Spears v. Mayor of New York*, 72 N.Y. 442, 444 (Ct. of App. 1878) (holding the trial court “has a discretion to permit or to refuse a supplemental pleading; but that discretion must be exercised reasonably, and not capriciously or willfully.”).

<sup>190</sup> *Stamm v. Deloitte & Touche*, 608 N.Y.S.2d 498, 499 (App. Div. 2d Dep’t 1994) (failure to take into account all relevant factors pertaining to dismissal on grounds of *forum non conveniens* constitutes abuse of discretion).

<sup>191</sup> *Varkonyi v. Varig*, 239 N.E.2d 542, 544 (N.Y. 1968). *See also* *Hibbs v. Marvel Enter., Inc.*, 797 N.Y.S.2d 463, 464 (App. Div. 1st Dep’t 2005) (overruling trial court’s rejection of certification of “opt-out” class where there was “no discernible reason” for court’s preference for opt-in process, conclusion about the benefits of a settlement were “contradicted by the facts” and the preference for opt-in approach was mere judicial preference). This approach to the abuse of discretion standard is similar to that used when courts review agency action that is committed to discretion. In such settings courts have found that an agency abused its discretion when it “relied upon inappropriate factors” in the exercise of that discretion. *See In re Stone Landing Corp. v. Bd. of Appeals*, 773 N.Y.S.2d 103, 106 (App. Div. 2d Dep’t 2004).

<sup>192</sup> N.Y. C.P.L.R. 1102(a) (McKinney 2008).

member is on public assistance, whether a family member has received some form of housing subsidy,<sup>193</sup> whether the family's current rent is affordable, whether the family has other housing options, and whether the family had been homeless before.<sup>194</sup> When looking at housing affordability and the consequences evictions have on reducing the number of affordable units across the state, courts should also consider the risk that a tenant's eviction from a regulated unit will result in the removal of that unit from the protections of rent regulations. Courts should also consider that a tenant will lose his or her subsidy if evicted, placing affordable housing further out of reach. Lastly, courts need to realize that with each eviction from a regulated unit, another unit of affordable housing is lost.

As the court of appeals has concluded, when reviewing the application of the poor person's provision in the old Civil Practice Act, "[q]uite obviously," this remedy is found in "a remedial statute and should be given a broad and liberal interpretation."<sup>195</sup> Courts should undertake such a liberal interpretation of the current poor person's statute and exercise their discretion to assign counsel based upon the factors described above. If courts are unwilling to do this in the absence of some legislative directive, advocates would be well served to pressure the state legislature to amend the C.P.L.R. to incorporate these issues as factors to be weighed by the courts when

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<sup>193</sup> Research of the patterns of families leaving New York City's shelter system indicates that a family's receipt of a housing subsidy is the best predictor of that family's ability to remain housed and avoid homelessness. See VERA INST., *supra* note 35, at 2; FAMILY HOMELESSNESS PREVENTION PROGRAM, *supra* note 49, at 14.

<sup>194</sup> VERA INST., *supra* note 35, at 4-29, 33.

<sup>195</sup> Smith v. Smith, 138 N.E.2d 790, 792 (N.Y. 1956).



deciding whether to assign counsel under C.P.L.R. 1102(a).<sup>196</sup>

Short of the recognition of a full right to counsel in eviction proceedings, the court of appeals' reservations with respect to assigning counsel because of cost factors under this provision of the C.P.L.R., as articulated in *Smiley*, could be addressed on an interim basis by creating a separate fund to provide resources to cover certain cases.<sup>197</sup> In order to handle the increased costs associated with courts exercising their discretion to assign counsel under C.P.L.R. 1102(a), the Legislature or a foundation could create a "1102(a) Fund" for the provision of counsel in a certain number of cases. The provision of grants through this fund could be targeted to certain priority cases, such as all cases emanating from a few census tracts, cases involving rent regulated or subsidized units, and cases involving low-income families. Courts could be encouraged to assign counsel in such situations where it was deemed necessary in order to prevent eviction and preserve affordable housing, and to assess the different outcomes that arise because of the provision of counsel in such cases. The entity maintaining the fund could monitor costs so as to provide an accurate picture of the costs associated with the provision of counsel.

### **C. Principles That Should Inform Efforts to Promote a Right to Counsel**

It is respectfully submitted that the following are key principles that should inform advocates striving to promote the right to counsel in proceedings where a family's home is in jeopardy in New

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<sup>196</sup> See N.Y. C.P.L.R. 1102(a) (McKinney 2008).

<sup>197</sup> *In re Smiley*, 330 N.E.2d at 57.

York State.

1. ***Focus on Housing Affordability and the Prevention of Homelessness***

The arguments above lead this author to conclude that in order to promote the expansion of the right to counsel in proceedings in which a family's home is in jeopardy, advocates would be well served to stress the critical role that the provision of counsel plays in avoiding homelessness and preserving affordable housing. These arguments can appeal to many sectors that have stakes in preserving family and economic stability. Some have assumed this role by choice, as in the case of the philanthropic sector, where foundations, directed by their staff or donors, have assumed the lead in promoting programs that address homelessness. Others have done so by law, as is the case in New York State, where the state constitution recognizes a right to shelter. Courts, too, may be swayed by these arguments. The emphasis on the prevention of homelessness and the preservation of affordable housing can strengthen the argument that due process requires the right to counsel in shelter proceedings because of the interest at stake, the risk of erroneous loss of that interest without counsel, and the clear government interest in providing counsel to prevent homelessness. Courts should also exercise their discretion by assigning counsel where appropriate, thereby preventing homelessness and further erosion of affordable housing across the state.

**2. *Attempt to Obtain an Accurate Picture of the Issue of Costs, and Costs Savings, Associated with the Right to Counsel***

Estimates about the cost savings of the provision of counsel in New York City's housing courts exist.<sup>198</sup> Compiling more rigorous data, however, poses significant challenges. It is easy to make assertions about the impact of the provision of counsel in eviction cases. In New York City alone, 25,000 orders of possession are issued each year.<sup>199</sup> Given the success rates of legal services programs, one could assert that 24,000 of these evictions would not occur if counsel had been available to these families. If we were to assume every evicted family ends up in the shelter system, the savings would be astronomical. But, in reality, 24,000 families are not entering the shelter system each year; rather, only a fraction of those families do so, and only a fraction of those enter the shelter system directly after their evictions. At the same time, data suggest that evictions play a greater role in families entering the different shelter systems throughout the state. This is because families may spend time with relatives or friends until such arrangements become untenable. It is also easy to compare the cost of building affordable housing to the cost of providing access to counsel in eviction proceedings, with counsel costing, per case, close to two percent of the cost of constructing new affordable housing. Again, this is a facile analysis that leaves much to be desired.

The provision of targeted services to families most at risk of

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<sup>198</sup> See *supra* text accompanying notes 85-87.

<sup>199</sup> NYC.gov, New York City Marshals, [https://www.nyc.gov/html/doi/html/marshals/marshal\\_main.html](https://www.nyc.gov/html/doi/html/marshals/marshal_main.html) (last visited Sept. 29, 2008).

homelessness, combined with an analytical model comparing the costs associated with the provision of counsel and other eviction prevention services with the cost of housing such families, will most likely yield the type of data that will permit key stakeholders to make an accurate assessment of the financial costs and savings associated with a robust anti-eviction program geared towards preventing homelessness and preserving affordable housing. Rigorous analysis of the cost-effectiveness of the UWNYP's Housing Help Program would be a good start in this direction, but more work must be done, and that work, itself, will cost money. Given the public and philanthropic sectors' interest in data-driven programs and measurable results from such programs, perhaps stakeholders in these sectors could be convinced to fund such an analysis.

### **3. *Include Provision of Social Work and Levels of Representation***

The Housing Help Program has proven that lawyers are not the only professionals who can play critical roles in preserving housing stability for families in need. Lawyers can work hand-in-hand with social workers and other professionals to ensure the underlying reasons why a family's home is in jeopardy are addressed.<sup>200</sup>

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<sup>200</sup> For the value of multidisciplinary services provided by lawyers and social workers, see Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123 (1999); Leigh Goodmark, *Can Poverty Lawyers Play Well With Others? Including Legal Services in Integrated, School-Based Service Delivery Programs*, 4 *GEO. J. ON FIGHTING POVERTY* 243 (1997); Tanya Neiman, *Creating Community by Implementing Holistic Approaches to Solving Clients' Problems*, 33 *J. OF POVERTY L.* 19 (1999). For a description of several multidisciplinary programs, see Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 *CLINICAL L. REV.* 227 (2000) (describing different multi-disciplinary collaboratives).

In the early twentieth century, there were tensions between social workers and lawyers, as questions were raised about whether lawyers should be a part of the settlement house movement, or remain independent, both physically and politically, from the movement.<sup>201</sup> In the beginning of the War on Poverty, lawyers were “embedded” once again with social workers in a number of settings, out of a desire to connect lawyers with social work professionals engaged in community organizing.<sup>202</sup> A growing awareness of the benefits of multidisciplinary approaches to advocacy services that promote housing and family stability, and the effectiveness of these programs, like the Housing Help Program, counsel a concomitant expansion of legal services and social work services to help tenants and mortgagees to secure better, long-term outcomes.

#### 4. *Seek to Broaden Coverage to Assist the Working Poor*

Social scientists recognize that, historically, social programs geared towards assisting only those in poverty are less likely to enjoy broad public support. Instead, broad-reaching, and non-means-tested programs, like Medicare, that serve as social insurance programs rather than poverty interventions, are far more popular and more politically palatable.<sup>203</sup> Taking into account these considerations, the

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<sup>201</sup> Michael Grossberg, *The Politics of Professionalism: The Creation of Legal Aid and the Strains of Political Liberalism in America, 1900-1930*, in TERENCE C. HALLIDAY & LUCIEN KARPIK, *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE & NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES* (1997).

<sup>202</sup> DAVIS, *supra* note 86, at 27-29.

<sup>203</sup> See Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in CHRISTOPHER JENCKS & PAUL E. PETERSON, *THE URBAN UNDERCLASS* 411, 414 (1991) (“When U.S. antipoverty efforts have featured policies

break out session expressed an interest in pursuing a right to counsel that would assist not just those traditionally eligible for legal services programs, but also those in the working class.<sup>204</sup> Furthermore, as is the case with the Right to Counsel legislation pending before the City Council of the City of New York<sup>205</sup> which would ensure the provision of counsel to elderly tenants facing eviction *and* foreclosure, the proponents of that legislation thought it would gain broader support in the council if the scope of covered proceedings included both evictions and foreclosures.<sup>206</sup>

Similarly, current income restrictions on certain funding for many legal services programs may prohibit such programs from using that funding to represent households with incomes exceeding 125% of the federal poverty line,<sup>207</sup> or, in some circumstances, up to 200% of the federal poverty line.<sup>208</sup> While some programs might use private dollars or attorney fee awards to expand their coverage of families earning more than these amounts, few governmental programs would permit such broader representation, and families whose

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targeted on the poor alone, they have not been politically sustainable, and they have stigmatized and demeaned the poor.”); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1991) (advancing arguments against selective programs in favor of programs with broader eligibility).

<sup>204</sup> Shelter Break-Out Session, *supra* note 106, at 50-52.

<sup>205</sup> “A Local Law to amend the administrative code of the city of New York, in relation to evictions of elderly tenants.” See Webdocs.NYCCouncil.info, Int. No. 51, available at <http://webdocs.nycouncil.info/textfiles/Int%200051-2006.htm?CFID=1889229&CFTOKEN=38766777>.

<sup>206</sup> Interview with Rosie Mendez, Council Member, City Council of the City of New York, 1 (June 23, 2008) (on file with author).

<sup>207</sup> See 45 C.F.R. § 1611.3 (West 2008).

<sup>208</sup> See, e.g., OTDA.state.ny.us, N.Y. State Office of Temporary and Disability Assistance—Supplemental Homelessness Intervention Program, [http://www.otda.state.ny.us/main/pma/programs/SHIP\\_2007-2008.asp](http://www.otda.state.ny.us/main/pma/programs/SHIP_2007-2008.asp) (last visited Sept. 29, 2008) (restricting representation to individuals and families earning less than 200% of the federal poverty guidelines).

incomes exceed these figures have difficulty accessing free legal assistance throughout the state.<sup>209</sup>

Two programs in New York City operated by local legal service providers offer examples of activities in which legal services clients can earn more than is traditionally permitted. First, the Legal Services for the Working Poor Coalition (“LSWP” or the “Coalition”) has been awarded grants by the New York City Council permitting the members<sup>210</sup> of the coalition to serve households with earnings up to the “Self-Sufficiency Standard” in New York City. The social scientists who devised this standard describe it as follows: “the Self-Sufficiency Standard measures how much income is needed for a family of a certain composition in a given place to adequately meet their basic needs—without public or private assistance.”<sup>211</sup> The Self-Sufficiency Standard for the City of New York is a more accurate reflection of what it means for a family to live independently because it is designed to take into account the needs of families of different sizes and in different neighborhoods. Families under the Self-Sufficiency guidelines, who would not earn enough to meet their basic necessities, such as shelter and food, are unable to afford attorneys to defend them when facing foreclosure or eviction. The LSWP contracts with the City of New York specify that the members of the

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<sup>209</sup> See FAMILY HOMELESSNESS PREVENTION PROGRAM, *supra* note 49, at 26 (noting the difficulty of the working poor in accessing free eviction prevention legal services). See also Interview with Lewis Creekmore, *supra* note 13, at 11-12.

<sup>210</sup> The members of the Coalition include the Urban Justice Center, the Northern Manhattan Improvement Corporation, Housing Conservation Coordinators, Inc., and CAMBA Legal Services, all operate in New York City.

<sup>211</sup> DIANA PEARCE, THE SELF-SUFFICIENCY STANDARD FOR THE CITY OF NEW YORK 2004 1 (2004), available at <http://www.unitedwaynyc.org/?id=69> (follow hyperlink to download the full report).

Coalition may represent households earning below the Self-Sufficiency standard,<sup>212</sup> which, in most instances, is above 200% of the federal poverty guidelines. Second, Legal Services of New York City provides representation to individuals and families in ensuring their access to the Federal Earned Income Tax Credit where they qualify. In that program, also funded by the City Council of the City of New York and administered by the City of New York, Legal Services of New York City can represent “individuals or families whose employment income is below 250% of the federal poverty level.”<sup>213</sup> With the reduction of the welfare rolls due to welfare “reform,” and greater attention paid to the role of low-wage work in the economy<sup>214</sup> that is increasingly performed by immigrant communities, there is growing interest in the plight of the working poor.<sup>215</sup>

Right to counsel advocates should strive to connect with the working poor as a constituency and seek to include working tenants and homeowners as those entitled to representation in housing matters. Given the current focus on the subprime mortgage crisis, and the foreclosures central to it,<sup>216</sup> and the renewed interest in the plight

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<sup>212</sup> See Urban Justice Center contract (on file with author).

<sup>213</sup> Contract between the City of New York and Legal Services N.Y. City dated March 2, 2006, at 2-3 (on file with author).

<sup>214</sup> See, e.g., DAVID K. SHIPER, *THE WORKING POOR: INVISIBLE IN AMERICA* (2004); BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001).

<sup>215</sup> See, e.g., Juliet M. Brodie, *Post-Welfare Lawyering: Clinical Legal Education and a New Poverty Law Agenda*, 20 WASH. U. J.L. & POL'Y 201 (2006) (arguing poverty lawyers should draw from attention to economic well-being of low-wage workers to craft new anti-poverty strategies).

<sup>216</sup> See, e.g., PEW CHARITABLE TRUSTS, *DEFAULTING ON THE DREAM: STATES RESPOND TO AMERICA'S FORECLOSURE CRISIS 4* (2008) (predicting one in thirty-three households in the United States will enter foreclosure in the next two years). Foreclosure filings across New York State have reached record levels over the last several years, increasing 150% from January 2005 through April 2008. See NEW YORK STATE UNIFIED COURT SYS., *RESIDENTIAL MORTGAGE FORECLOSURES: PROMOTING EARLY COURT INTERVENTIONS 1* (2005).



of the working poor, it is possible there might be greater political will for broader access to counsel.

### 5. *Take into Account the Unique Needs of Rural Communities*

The rural practitioners in the Break-Out Session all expressed an appreciation for the unique challenges the recognition of a right to counsel in cases in which a family's shelter is in jeopardy would pose in rural communities.<sup>217</sup> Currently, as has been well documented, the right to counsel that attaches in criminal proceedings, a right protected under both the United States<sup>218</sup> and New York State<sup>219</sup> Constitutions, is routinely ignored in rural Town and Village Courts.<sup>220</sup> In some communities, counsel is provided in criminal settings through an assigned counsel setting, others through a public defender's office. Given the fact that there are substantial physical distances between the many rural courts, and there is no coordination of court calendars such that housing cases could be heard in numerous communities throughout a particular county on the same day, providing the right to counsel in housing cases in these communities will prove quite chal-

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<sup>217</sup> Shelter Break-Out Session, *supra* note 106, at 13.

<sup>218</sup> See U.S. CONST. amend. VI (stating in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

<sup>219</sup> See N.Y. CONST. art. I, § 6, ("In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel.").

<sup>220</sup> A commission appointed by New York State Court of Appeals Chief Judge Judith Kaye found that with respect to the provision of counsel in criminal settings where it is constitutionally mandated, "the deprivation of indigent defendants' right to counsel was widespread in Town and Village Courts." COMM'N ON THE FUTURE OF INDIGENT DEFENSE SERV., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 22 (2006), available at [http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

lenging.<sup>221</sup> In the end, any recognition of the right to counsel in cases in which a family's shelter is in jeopardy would have to be tailored to the unique needs of each community, and courts could respond by coordinating calendars, or consolidating housing cases in regional or centralized courts<sup>222</sup> dedicated specifically to housing cases, to make the provision of the right to counsel in those communities easier to manage.<sup>223</sup>

## 6. *Consider Advocacy to Achieve Improved Housing Conditions*

As stated above, the communities from which many homeless families enter the New York City shelter system are the same communities in which some of New York City's worst housing conditions are found.<sup>224</sup> There is a connection between housing conditions and homelessness. Some families withhold rent to obtain arrears, and then are unable to defend themselves in housing court once the landlord sues them for nonpayment of rent. For families re-entering the shelter system after having been placed in what was believed would be permanent housing, one study of this population found that twenty-seven percent of those families lost their housing because of poor conditions.<sup>225</sup> Furthermore, such an approach would dovetail

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<sup>221</sup> Interview with Dan Alley, *supra* note 13, at 21; Interview with Jeff Hogue, *supra* note 13 at 19.

<sup>222</sup> See also N.Y. CITY BAR ASS'N TASK FORCE ON TOWN AND VILLAGE COURTS, REPORTS ON TOWN AND VILLAGE COURTS: SUMMARY WITH RECOMMENDATIONS 3 (2008), available at [http://www.nycbar.org/pdf/report/Town%20\\_Village\\_exec\\_summary.pdf](http://www.nycbar.org/pdf/report/Town%20_Village_exec_summary.pdf) (recommending court consolidation in Town and Village Justice Courts).

<sup>223</sup> Interview with James Murphy, *supra* note 13, at 10.

<sup>224</sup> See *supra* text accompanying note 36.

<sup>225</sup> *Id.*

well with the advocacy of dozens of community-based organizations and tenant associations across New York City that engage in advocacy to promote improved housing conditions; such connections could help link community-based organizing campaigns with right to counsel efforts.<sup>226</sup>

The provision of legal and community organizing services designed to combat housing conditions to those communities where homelessness is high and housing conditions poor may also help prevent homelessness in those communities by bringing about desperately needed repairs there, and ensuring the housing stock is decent and safe. Preserving the housing stock and keeping families secure in it, not only will prevent homelessness, but also will preserve affordability of housing stock by preventing vacancies and rent increases.

Ironically, when the New York City housing part system was created in the early 1970s, the main purpose of these courts was to create a forum for tenants to commence actions against their landlords for repairs.<sup>227</sup> Now, affirmative cases brought on behalf of tenants for repairs make up approximately three percent of the housing cases filed in these courts across the five boroughs.<sup>228</sup> A renewed attention and focus on housing conditions, together with a greater rec-

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<sup>226</sup> The Initiative for Neighborhood and City Wide Organizing (“INCO”) is an example of grassroots organizations involved in housing preservation strategies. INCO is a network of grassroots, community based organizations that receive technical assistance from the Association for Neighborhood and Housing Development (“ANHD”), and funding from the Neighborhood Opportunities Fund (a consortium of donors). According to the ANHD website, the INCO initiative strives to achieve the following: “By strengthening the community voices of low-income neighborhoods, we will ensure that our city’s housing policy is responsive to the needs and priorities of poor and working people.” See ANHD.org, ANHD Programs, <http://www.anhd.org/programs/programs.html> (last visited Sept. 29, 2008).

<sup>227</sup> Galowitz, *supra* note 12, at 177-183.

<sup>228</sup> N.Y. State Office of Court Administration Data, *supra* note 3.

ognition of their connection to homelessness, is warranted. Increased advocacy towards maintaining the housing stock and preserving its affordability is desperately needed.

### 7. *Consider Impact on Certain Populations*

Lastly, are there reasons for seeking incremental change by pursuing the right to counsel for certain populations least able to navigate the shelter system in order to provide protections to those individuals and families most susceptible to eviction and loss of their housing? One bill pending in the City Council seeks to protect only elderly tenants and homeowners facing eviction or loss of their home through foreclosure.<sup>229</sup> Advocates also assert that individuals with physical or psychiatric disabilities are also severely disadvantaged when faced with eviction proceedings because they might have greater difficulty navigating the court system and might stand to lose subsidized housing should they be evicted. If the prevention of homelessness is critical to the expansion of the right, focusing on geographic areas from which the homeless tend to originate, as the Housing Help Program does, might be another approach.

Unfortunately, a discussion that focuses on particular populations or communities might pit advocates for one group of tenants against another and could weaken the political will to support any expansion of the right to counsel. Perhaps the best approach is to start with the most sympathetic population in a particular community and win the right to counsel for that group; next, analyze the effect

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<sup>229</sup> See, *supra*, text accompanying notes 126-29 and notes 204-206.

representation has on that population in terms of preserving housing affordability and preventing homelessness, while ultimately seeking to expand the right to other populations. Analogies to the types of outcomes secured can be drawn for more groups of individuals.

## VI. CONCLUSION

There is no question of the profound injustices encountered by the low-income and working poor tenants and homeowners when attempting to secure access to counsel when their homes are in jeopardy. Securing access to counsel for such families has long been a priority for advocates, philanthropists, and elected officials, but those efforts have not succeeded in securing the broad right to counsel recognized in the criminal setting. Those seeking an expansion of the right to counsel in eviction and foreclosure cases must explore every avenue and deploy their arguments to advance their cause. A new “vision” for legal services in this context might help break this impasse. To borrow from Alan Houseman, and his suggestion for how such a vision can help expand the reach and effectiveness of legal services programs generally:

It is a vision that accepts the political context in which legal services functions and attempts to improve the legal services delivery system through programmatic, incremental, and sustained change.

Under this vision, the legal services program would focus on helping economically deprived communities solve the problems they face. It would do so by supporting and enhancing poor citizens’ ability to control their own lives and escape poverty. Legal services would focus its work on helping the economi-

cally deprived to effectively marshal and increase the resources, services, and opportunities available to benefit them. I use the term “economically disadvantaged” because it conveys a constituency broader than just the very poor, a constituency that includes those unable to afford adequate legal counsel and those not defined by arbitrary or artificial percentages of the poverty line.

....

Solving problems of individual and group clients will involve more than lawyers, law students, and paralegals. It will require utilizing skills of people from a variety of different disciplines and developing interdisciplinary and holistic approaches to advocacy. Thus problem solving should focus on the client’s problems as defined by the client and look beyond narrow legal conceptions and approaches.<sup>230</sup>

It is respectfully submitted that in the current political and fiscal climate, the strongest arguments that can be made to promote a right to counsel in proceedings in which a family’s home is in jeopardy must center around the role lawyers can play in preserving affordable housing, at a time when such housing is in desperate need, and preventing homelessness, at a time when this scourge is as bad as it has ever been, particularly in New York City.

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<sup>230</sup> Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L. J. 1669, 1706-07 (1995).

