

**The Grim Outlook for the Indigent Tenant: The Need for the Right to Appointed Counsel
in Eviction Proceedings**

Written By

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For Professor Miller

Introduction

Since the Supreme Court decision of *Gideon v. Wainwright*, our society has widely accepted the idea that indigent criminal defendants have a constitutional right to an appointed attorney in criminal cases.¹ The analogous right, however, has not yet been recognized by the courts or states legislatures in the civil context, where the interests at stake may be just as important.² The most glaring example of such important interests is in the area of eviction proceedings. When indigent tenants face eviction, not only do they face the risk of loss of their shelter, a basic human necessity, but also the possibility of homelessness and subsequent displacement from the community.³

Although there are government funded legal service organizations and private firms who provide free legal services to indigent clients, the demand vastly outweighs the supply.⁴ Therefore, scholars and lawyers alike have made both constitutional and public policy arguments in advocating for an expansion of the right to appointed counsel to include civil matters, or more specifically, eviction proceedings.⁵ Their argument is mainly based on our society's core principle that each person should be afforded equal access to justice.⁶ As former Supreme Court Justice, Lewis Powell, observed: "Equal justice under law [...] is perhaps the most inspiring ideal of our society. It is fundamental that justice should be the same, in substance and availability, without regard to economic status."⁷ Although our nation's legal system is based on the assumption that both sides have the same access to legal resources, this assumption rarely

¹ 372 U.S. 335, 336 (1963).

² See *infra* text at 5-7.

³ See *e.g.* Andrew Scherer, *Symposium: The New York City Housing Court in the 21st Century: Can it Better Address the Problems Before It?: Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right To Counsel*, 3 *Cordozo Pub. L. Pol'y & Ethics J.* 699 (Jan. 2006).

⁴ See *infra* text at 7-9.

⁵ See *infra* text at 10-11.

⁶ ABA Presidential Task Force on Access to Civil Justice (hereinafter "ABA"), *Executive Summary with Recommendation on Civil Right to Counsel*, 2 (August 7, 2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf>.

⁷ *Id.*

holds true in the situation of an indigent defendant facing eviction. This defendant does not have the means to hire a lawyer and is, otherwise, incognizant of the complex body of eviction laws.⁸ Advocates, therefore, argue that the only way to ensure “equality” and “meaningful” access to the justice system is for states to recognize the right to appointed counsel for indigent tenants in eviction proceedings.⁹

Part I of this article will discuss the evolution of the recognition of the right to counsel in criminal proceedings and the Supreme Court’s subsequent reluctance to recognize the same right in civil cases. Part II examines the constitutional, economical and public policy arguments that have been made in favor of the recognition of the right to appointed counsel in eviction proceedings. Part III of this article, on the other hand, lays out some of the social and economic problems associated with the recognition of such a right. Finally, Part IV of this article examines some possible methods of implementation of this right.

I. The Evolution of the Right to Counsel

A. Recognition of the Right to Counsel in Criminal Cases

One’s understanding of the history behind the right to counsel in criminal proceedings is necessary in understanding the controversy regarding the recognition of the same right in civil proceedings. The Sixth Amendment of the U.S. Constitution provides that an accused shall enjoy the right to counsel in “all criminal prosecutions.” Despite this clear language, the Supreme Court, up until the 1930’s, had substantially restricted this right by holding that it only applies to federal capital offense crimes.¹⁰ The Supreme Court began to widen the application of this right in 1938, where it held in *Johnson v Zerbst* that the Sixth Amendment guarantees the

2

⁸ Scherer, *supra* note 3, at 708.

⁹ *See e.g.* ABA, *supra* note 6.

¹⁰ Joan Grace Ritchey, *Limits on Justice: The United States’ Failure to Recognize a Right to Counsel in Civil Litigation*, 79 Wash. U.L.Q. 317,320 (2001).

right to counsel to all criminal federal defendants.¹¹ The progression of this right did not stop there. In *Powell v. Alabama*, African American defendants were charged in state court of rape of two white girls on a freight train and faced death sentences.¹² Counsel was not employed for the defendants until the day of the trial. Subsequently, the trial court convicted the defendants and sentenced them to death.¹³ Under Supreme Court review, the Court noted that “[...] the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, [made the necessity of counsel so imperative]... that the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.”¹⁴ As a result, the Court held that the Fourteenth Amendment requires that states provide counsel for defendants charged with capital offenses.¹⁵ Although this holding was a great victory for indigent defendants, the right was limited to only capital crimes. In *Betts v. Brady*, the Supreme Court subsequently held that neither the Sixth nor Fourteenth amendments required the right to counsel for criminal defendants accused of non-capital offenses.¹⁶ In so holding, the court noted that these cases must be analyzed on a case by case basis and that the “Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.”¹⁷ This was the approach courts carried out until 1963 where the Supreme Court overruled *Betts* in

¹¹ 304 U.S. 458 (1938). The defendants were charged with “feloniously uttering and passing” counterfeit money. *See* 92 F.2d 748, 749 (1937).

¹² 287 U.S. 45, 49 (1932).

¹³ *Id.* at 53.

¹⁴ *Id.* at 71.

¹⁵ *Id.* at 73.

¹⁶ 316 U.S. 455 (1842). In *Betts*, the defendant was charged with robbery and the trial court denied his request for counsel. *Id.* The judge advised the defendant that it was local practice to only provide counsel for indigent defendants that were charged with murder or rape. *Id.* at 456.

¹⁷ *Id.* at 462.

the landmark case of *Gideon v. Wainwright*.¹⁸ In that case, the defendant, Earl Gideon, was charged by the state of Florida with breaking and entering a pool hall with the intent to commit a misdemeanor.¹⁹ Gideon was unable to afford an attorney and appeared in court requesting the appointment of counsel.²⁰ His request was denied by the trial judge on the grounds that a defendant in Florida was afforded a right to counsel only when charged with a capital offense.²¹ After proceeding to represent himself at trial, the jury found him guilty and sentenced Gideon to five years in prison.²² Gideon then petitioned the Florida Supreme Court via habeas corpus on the grounds that the trial court's refusal to appoint him counsel violated his constitutional rights. The Florida Supreme Court denied Gideon's petition.²³ Subsequently, Gideon filed a writ of certiorari to the United States Supreme Court. The Supreme Court granted certiorari and appointed counsel to represent Gideon before the court.²⁴ After hearing oral arguments for two months, the court overturned *Betts* in holding that the Sixth amendment affords the right to counsel to criminal defendants and that this right extends to state court cases via the Fourteenth amendment.²⁵ The Court noted that "[...] any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."²⁶ This case was monumental not only in regards to increased rights for criminal defendants, especially in state courts, but also in providing hope for defendants in the civil arena.²⁷ As a result of *Gideon*, many

¹⁸ Ritchey, *supra* note 10, at 320.

¹⁹ 372 U.S. 335, 336 (1963).

²⁰ *Id.* at 336.

²¹ *Id.* at 337.

²² *Id.*

²³ *Id.*

²⁴ Ritchey, *supra* note 10, at 322.

²⁵ *Gideon*, 372 U.S. at 345. See also Steven R. Glassroth, *The Right to Counsel: Gideon v. Wainwright at 40: Book Review: Gideon's Trumpet: The Clarion Call for Justice*, 27 *Champion* 61, (2003) (examining the factual background of the *Gideon* case and examining the significance of the holding in relation to the *Betts* case.)

²⁶ *Id.* at 344.

²⁷ See e.g. Ritchey, *supra* note 10, at 323. Ritchey argues that the *Gideon* case, although monumental, is very broad in scope. *Id.* The Court did not mention what kind of non-felony crimes were covered or at what stage of the

proponents have utilized the legal arguments advanced in *Gideon* to advocate the recognition of the same right in the civil context.²⁸

B. The Aftermath of Gideon: The Advocacy of the Recognition of a Right to Appointed Counsel in Civil Cases.

Despite the efforts of many advocates, the Supreme Court has refused to recognize a general right to appointed counsel in civil cases.²⁹ In the landmark case of *Lassiter v. Department of Social Services*, the Department of Social Services sought to terminate parental rights of Lassiter with respect to her son.³⁰ Lassiter was unable to afford an attorney and proceeded to represent herself at the termination hearing.³¹ Subsequently, the hearing concluded with court termination of Lassiter’s parental rights.³²

Upon review, the Supreme Court recognized that “The parents [in termination hearings] are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation.”³³ Despite these factors that “combine to overwhelm an uncounseled parent,”³⁴ the Court held, in a 5-4 decision, there is no automatic right to state-appointed counsel court in a proceeding for the termination of parental rights. Such a decision, they hold, needs to be made on an ad hoc basis by each trial court.³⁵ More specifically, the Court ordered that each trial court must evaluate three factors to determine whether due process requires the court appointment of counsel: (1) the

proceeding counsel was required. *Id.* These issues were later addressed by the Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Miranda v. Arizona*, 384 U.S. 436 (1966).

²⁸ *Id.*

²⁹ ABA, *supra* note 6, at 5-6.

³⁰ 452 U.S. 18, 20 (1981).

³¹ *Id.* at 22

³² *Id.* at 23-24.

³³ *Id.* at 30. The Supreme Court also recognized that with respect to civil defendants, “Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries...” *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964).

³⁴ 452 U.S. at 30.

³⁵ *Id.* at 31.

private interest at stake; (2) the government interest; and (3) the risk that the procedures used will lead to an erroneous decision.³⁶ In addition to evaluating this due process test, they must also be conscious of the rebuttable presumption that a right to appointed counsel only exists when there is risk of loss of physical liberty.³⁷ In applying the test outlined above, the Court in *Lassiter* held that the parental rights at stake, as well as the risk of error, were not substantial enough to rebut the presumption that the right to counsel is reserved for cases only where physical liberty is at stake.³⁸

Justice Blackmun, joined by Justice Brennan and Justice Marshall, delivered the dissenting opinion of *Lassiter*. In his dissent, Justice Blackmun expressed his discontent with the majority's "case-by-case" approach.³⁹ He argued that not only is the majority's ad-hoc approach highly inefficient and costly, but it also has the tendency of yielding incorrect results.⁴⁰ Finally, Justice Blackmun expressed that the interests of a parent are fundamental and "occupy a unique place in our legal culture, given the centrality of family life..." and that such interests clearly overshadow any minimal government interests of saving money.⁴¹

The *Lassiter* decision has proved to be a major hurdle to indigent civil litigants who seek court-appointed counsel.⁴² The American Bar Association (hereinafter "ABA") Task Force on Civil Justice has recently recognized in a nationwide report that the standard expressed in *Lassiter* "virtually exclude[s] the appointment of counsel except in the most extraordinary

³⁶ *Id.* at 27.

³⁷ *Id.* at 31.

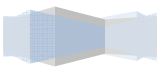
³⁸ *Id.* Court also noted that the government interests are weak. *Id.* See also Ritchey, supra note 10, at 328.

³⁹ *Id.* at 35

⁴⁰ *Id.* at 49-51

⁴¹ *Id.* at 38. Justice Blackmun also notes that "...parental rights have been deemed to be among those 'essential to the orderly pursuit of happiness by free men....'" *Id.* For a through discussion of the dissent's due process analysis See Ritchey, supra note 10, at 328, note 99.

⁴² See generally ABA, supra note 6.



circumstances.”⁴³ Not only must a civil litigant advocating for the right overcome the stringent due process analysis expressed in *Lassiter*, but he or she must also rebut the presumption against appointment of counsel when there is no risk of loss of physical liberty.⁴⁴ This harsh standard has left the legal needs of millions of indigent civil litigants unaddressed each year.⁴⁵ Without a recognized civil right to appointed counsel, an indigent litigant’s only remedy is to seek pro bono services or government legal aid programs, which are substantially under-funded and, thus, practically inaccessible.⁴⁶

C. The Current State of Civil Legal Aid to Indigents and its Pitfalls.

Since the 1800’s, our society has realized that low-income individuals faced a wide range of legal problems, but without meaningful access to any legal assistance.⁴⁷ However, historically in this country, the only funding for indigent civil legal aid came by way of private charities.⁴⁸ These private charities were formed and operated by various bar associations and social service organizations in various cities.⁴⁹ Finally, in 1965, the government announced its funding for civil legal aid as part of the War on Poverty.⁵⁰ Then in 1974, the government formed the Legal Services Corporation (LSC) which is the central entity that distributes legal funds to legal aid clinics nationwide.⁵¹ These legal aid clinics in each state have differing standards for distributing

⁴³ *Id.* at 6.

⁴⁴ *Id.* at 6. *See also Lassiter*, 452 U.S. at 31.

⁴⁵ *See* ABA, *supra* note 6, at 5. This report suggests that about 70%-80% of the legal needs of the indigent go unaddressed each year. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 4

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Ritchey*, *supra* note 10, at 329.

aid to the indigents.⁵² Despite the LSC's promising initiation, its expansion and funding has regressed as it has become under intense political attack.⁵³

Since the decline in government funding of the LSC, states have become more pro-active in adopting other creative funding programs such as the Interest on Lawyers Trust Accounts (IOLTA).⁵⁴ This program has been adopted by all fifty states.⁵⁵ Explained briefly, the program uses interest from client trust accounts, to fund legal services. IOLTA programs have become a significant source of funding for indigent legal aid.⁵⁶ Its effectiveness is in dispute, however, since the program is only voluntary in some states.⁵⁷

Lawyer pro bono service has also been a significant means of providing legal assistance to indigents.⁵⁸ The ABA Model Rules of Professional Conduct states that "A lawyer should aspire to render at least 50 hours of pro bono publico legal services a year."⁵⁹ Many states have adopted this model rule or its equivalent in order to encourage attorney participation in providing legal aid.⁶⁰ However, the effectiveness of these kinds of provisions is in dispute because they do not impose mandatory obligations on attorneys. They merely specify "aspirations."⁶¹ There has been discussion in a few states to make a certain amount of pro bono service by attorneys mandatory.⁶² But, as expected, such efforts have been vehemently attacked by the legal community.⁶³

⁵² *Id.*

⁵³ ABA, *supra* note 6, at 4.

⁵⁴ *Id.*

⁵⁵ *Ritchey*, *supra* note 10, at 331.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 330.

⁵⁹ Model Rules of Prof'l Conduct R. 6.1 (2004). Currently, California does not have an equivalent rule in its rules of professional conduct. Stephen Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* (Aspen Publishers 2005), at 337.

⁶⁰ *Ritchey*, *supra* note 10, at 330.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Despite all of these efforts to provide adequate legal aid for the poor, the legal needs of many have gone unaddressed.⁶⁴ A 1993 study by the ABA Task Force on Access to Civil Justice showed that 70% of the “serious legal problems” experienced by poor people were left unaddressed.⁶⁵ More recently, a 2002 report by the California Commission on Access to Justice stated that despite \$149 million of funding for California legal service programs,⁶⁶ only 28% of the legal needs of California’s poor and lower-income residents were being met in the year 2000.⁶⁷ The report attributed this shortage mostly to the decrease in federal funding and state trust fund support sustained in 1995. The report concludes that the outlook of “diminishing the access gap” for the poor is grim due to the economic downturn and the high inflation rate.⁶⁸

It is evident from the above mentioned California study as well as similar studies conducted in many other states that this “access gap” for the poor will continue to persist unless there is a national resolution to this problem.⁶⁹ A myriad of scholars as well as the ABA argue that an indigent’s need for “meaningful access to the justice system” can only be addressed through the nations guarantee to “[...] its low income people equality before the law as a matter of right, including the legal resources required for such equality [...]”⁷⁰ In other words, the courts recognition of a civil right to counsel.⁷¹ The rest of this article will focus on both the

⁶⁴ ABA, supra note 6, at 5.

⁶⁵ *Id.*

⁶⁶ California Commission on Access to Justice, *The Path to Equal Justice; A Five Year Status Report on Access to Justice in California 3* (October 2002). This total dollar amount includes funding from both government and private sources. *Id.*

⁶⁷ *Id.* The report stated in year 2000, the number of poor people in California totaled 6,439,000. *Id.* at 58. This number declined 10.32 percent since 1996. *Id.* See also ABA, supra note 20, at 5-6. A September 2003 report by the District of Columbia Bar Foundation revealed that less than 10% of the legal needs of the poor in that area were being met. *Id.* Similarly, a Washington state study conducted in the same year discovered that 87% of the indigents in the state encountered serious legal problems per year and only 12% of them were able to obtain legal aid. *Id.*

⁶⁸ California Commission on Access to Justice, supra note 66, at 3 and 58.

⁶⁹ ABA, supra note 6, at 16.

⁷⁰ *Id.*

⁷¹ See e.g. *Id.*

feasibility and merits of this argument in the context of eviction proceedings, where basic human needs are at stake.⁷²

II. Arguments for the Recognition of a Right to Appointed Counsel in Eviction Proceedings.

Many scholars and advocates have focused on a right to appointed counsel in eviction proceedings not only because of the disparity between an indigent tenant and landlord's access to financial and legal resources, but also because of the importance of the interest at stake.⁷³

A home is a basic human need, in which there is no substitute. As former South African President, Nelson Mandela exclaimed, "Everyone needs a place where they can live with security, with dignity, and with effective protection against the elements. Everyone needs a place which is a home."⁷⁴ Although some indigents who are evicted from their homes may be able to bunk-up with family or friends, the rest are displaced in a market where affordable housing is virtually non-existent.⁷⁵ Subsequently, these individuals are forced to enter a state homeless shelter system which is already overcrowded and under-funded.⁷⁶ Arguably, their displacement from their home could have been avoided if they were privy to legal assistance and were not forced to face a very distressing and complex eviction proceeding alone.⁷⁷

⁷² See *Id.* at 13. The ABA notes that the nations' recognition of a right to appointed counsel in the civil context should begin with cases where basic human needs are at stake. *Id.* at 16.

⁷³ See e.g. Scherer, *supra* note 3. See also ABA, *supra* note 6, at 13.

⁷⁴ Nelson Mandela, Foreword to *National Perspectives on Housing Rights xvii* (Scott Leckie ed., 2003).

⁷⁵ Scherer, *supra* note 3, at 701-02. See also Eric S. Belsky & Matthew Lambart, Where Will They Live: Metropolitan Dimensions of Affordable Housing Problems 15 (Sept. 2001). Belsky describes a study which found that in metropolitan areas, for every three "unsubsidized" affordable unit in the market, there are five low-income households in need of them. *Id.* Moreover, in the suburbs, for each affordable housing unit in the market, there are two low-income households in need of them. *Id.*

⁷⁶ See Scherer, *supra* note 3, at 701-02.

⁷⁷ See Caron Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419 (2001). This article presents the results of an experimental evaluation of a legal aid program for indigent tenants in New York City's Housing Court. *Id.* The results indicate that indigent tenant's represented by counsel in eviction proceedings were more likely to avoid final judgments against them than those who were not represented by counsel and proceeded pro se. *Id.* More

The argument for the recognition of the right to counsel in eviction cases can be separated into three categories; constitutional, economical, and public policy. First, advocates argue that the constitutional principles of due process, equal protection and fundamental rights each warrant the recognition of such right.⁷⁸ Second, in the economical aspect, advocates argue that the appointment of counsel for low-income households would avert homelessness and, thus, alleviate the financial burden on the cities' homeless shelter system.⁷⁹ Finally, in the public policy aspect, advocates argue that the recognition of this right is necessary in order to avoid the social costs of homelessness. These include family separation, child trauma, dissociation from the community, and the deprivation of a homeless individual's civil liberty interests.⁸⁰ Each of these arguments will be thoroughly examined in the following sections.

A. Due Process Analysis

The due process clause of the Fifth Amendment of the U.S. Constitution states that “No person shall be deprived of life, liberty, or property, without due process of law.”⁸¹ The Supreme Court has interpreted this clause to mean that an individual has a right to a “meaningful” opportunity to be heard whenever important interests, such as life, liberty or property, are at stake.⁸² Many argue that the right to be heard is not “meaningful” unless a defendant is

specifically, 22% of represented tenants had final judgments against them, as opposed to 51% of tenants without legal representation. *Id.*

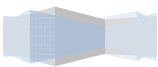
⁷⁸ See e.g. Scherer, *supra* note 3.

⁷⁹ See e.g. Seron et al., *supra* note 77.

⁸⁰ See e.g. Rachel Kleinman, *Comment: Housing Gideon: The Right to Counsel in Eviction Cases*, 31 *Fordham Urb. L.J.* 1507 (Nov. 2004).

⁸¹ U.S. Const. Amend. V.

⁸² Wikipedia: The Free Encyclopedia, *Due Process*, at http://en.wikipedia.org/wiki/Due_process.html (Oct. 15, 2006). Due Process also requires that an individual be given adequate notice of proceedings or charges against him. *Id.*



represented by counsel in a proceeding, especially in eviction cases, where “property” interests are at stake.⁸³

In *Lassiter* and its predecessors, the Supreme Court analyzed a three-factor test to determine what “due process” requires: (1) the private interest at stake; (2) the government interest; and (3) the risk that the current procedures used will lead to an erroneous decision.⁸⁴ In applying this three-part test, a conclusion can be made that the appointment of counsel to indigents in eviction cases is warranted. First, indigent tenants facing eviction risk the loss of “shelter,” a basic human need and, thus, a fundamental interest within the realm of the due process clause.⁸⁵ Second, not only does the government have a strong interest in the “fair administration of justice,” but also in “averting the cost of homelessness” and avoiding financial strain on the cities’ homeless shelter system.⁸⁶ Finally, recent studies have shown that indigent tenants who were not represented by counsel were far more likely to get evicted than those who had counsel representation.⁸⁷ It follows, therefore, that the risk of erroneous decisions are high in eviction proceedings where the tenant is not represented by counsel.⁸⁸ Thus, it is evident from the foregoing due process analysis that the right to appointed counsel is warranted in the context of eviction proceedings. The Supreme Court, however, has yet to acknowledge this argument.⁸⁹

⁸³ See generally ABA, supra note 6. See also generally Scherer, supra note 3.

⁸⁴ *Lassiter*, 452 U.S. 18, 27 (1981). See also supra text, at 6. This three-part test was originally formulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁸⁵ ABA, supra note 6, at 13.

⁸⁶ Scherer, supra note 3, at 708-09. Scherer notes that the cost of providing homeless shelter for one family for one year in New York City is approximately \$36,000. *Id.* Scherer also notes that in 2003, 19% of the total shelter population in New York City consisted of recently-evicted families who sought emergency shelter. *Id.* This does not count the numerous numbers of families who were denied shelter by the city and were forced to live on the streets or “double-up” with family or friends. *Id.* Thus, Scherer and many others argue that financial stress on a local government’s homeless shelter system can be relieved with the recognition of the right to appointed counsel in eviction cases. *Id.*

⁸⁷ Seron et al., supra note 77, at 419. Seron states that 22% of represented tenants had final judgments against them, as opposed to 51% of tenants without legal representation. *Id.*

⁸⁸ See e.g. *Id.*

⁸⁹ See generally *Id.*

As a result of the U.S. Supreme Court’s resistance to recognize such a right, attention has been turned to state constitution for the answer.⁹⁰ Most states have a due process clause in their constitution which reads identical to the federal constitution.⁹¹ Moreover, state courts are free to interpret the due process clause with respect to the state constitution independent of the ruling of the Supreme Court.⁹² Subsequently, many state courts have exercised this authority and have held that due process requires appointment of counsel in certain civil contexts.⁹³

As a result of state courts’ liberal interpretation of the due process clause and subsequent codification of state court decisions, many states now guarantee a right to counsel in a myriad of civil legal matters.⁹⁴ The California Family Code, for example, provides an absolute right to counsel for parents and children in state-initiated termination of parental right proceedings, guardianship, and custody proceedings.⁹⁵ Moreover, almost all states, for example, have statutes guaranteeing a right to counsel or guardian ad litem for children in abuse and neglect proceedings.⁹⁶ Other categories of family law matters in which states have guaranteed a right to counsel include, divorces and annulments, private petitions to terminate parental rights, paternity proceedings, and child custody, support and visitation proceedings.⁹⁷

Undoubtedly, states have found the above matters to involve “fundamental” interest where due process requires appointment of counsel for the parties involved.⁹⁸ The question that

⁹⁰ See e.g. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, Clearinghouse Rev. 246 (Jul-Aug 2006).

⁹¹ Scherer, *supra* note 3, at 717.

⁹² *Id.* See also generally William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977).

⁹³ Abel & Rettig., *supra* note 90, at 245.

⁹⁴ See generally *Id.*

⁹⁵ See Cal. Fam. Code §§ 7862 & 7895 (West). See also Cal. Welf. & Inst. Code §§ 317 & 366.26(f) (West). See also Abel & Rettig., *supra* note 90, at 253.

⁹⁶ Abel & Rettig., *supra* note 90, at 245. Thirty states appoint an attorney who represents ‘best interests and wishes of the child’, ten appoint only a non-attorney guardian ad litem, and the remainder of the states appoint both a guardian ad litem and an attorney. *Id.* at 245 n5.

⁹⁷ *Id.* at 246.

⁹⁸ See e.g. See also generally Abel & Rettig., *supra* note 90.

naturally follows, therefore, is that if due process requires the appointment of counsel to parties where family law interests, such as “parental rights,” are at stake, must not the same right be afforded to those who risks the loss of their home in an eviction proceeding? States and their courts alike have recognized that a parent who risks the loss of their child in a custody or termination proceeding stands a lot to lose.⁹⁹ As Supreme Court Justice Blackmun has recognized, “[parent interests...] occupy a unique place in our legal culture, given the centrality of family life [...]”¹⁰⁰ Then what about property interests? Do these interests not occupy a special and “unique place” in our legal culture? Everyone needs, as Nelson Mandela has described, “security” and “protection from the elements.”¹⁰¹ Thus, shelter is, as the ABA has aptly pointed out, a “basic human need.”¹⁰² There is no substitute or alternative for this need. It is an interest, therefore, just as fundamental as parental custody and the other family law matters recognized by states as warranting due process protections. For this reason, there shall be similar due process protections for indigent tenants who risk the loss of their shelter.

B. Equal Protection & the Fundamental Right of Access to the Courts

The Supreme Court has long held that the right of access to the courts is a fundamental right required by both the due process and equal protection clauses.¹⁰³ In, *M.L.B. v. S.L.J.*, the Court held that the State of Mississippi cannot deny a person, because of their poverty, appellate review of a decision finding the person to be an unfit biological parent.¹⁰⁴ Correspondingly, in *Boddie v. Connecticut*, the Court struck down the state of Connecticut requirement for filing fees

⁹⁹ See generally Abel & Rettig., supra note 90.

¹⁰⁰ *Lassiter*, 452 U.S. at 38 (dissenting).

¹⁰¹ Nelson Mandela, supra note 74.

¹⁰² ABA, supra note 6, at 13.

¹⁰³ See generally *Boddie v. Connecticut*, 401 U.S. 371 (1971). See also generally *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

¹⁰⁴ 519 U.S. 102 (1996).

for divorce proceedings, in holding that equal protection and due process requires that all persons be afforded an opportunity to obtain a divorce.¹⁰⁵ These cases clearly demonstrate the proposition that “equal protection” requires that a person should not be denied a meaningful opportunity to be heard because of their income status. Based on this principle, advocates argue that “equality before the law cannot exist unless both litigants in a case have access to the court system on equal terms.”¹⁰⁶

A study conducted in New York City has revealed that the majority of tenants who face eviction are not only racial minorities, but also low-income individuals.¹⁰⁷ Many of these individuals, because of their poverty, are forced to represent themselves in a complex eviction proceeding against a landlord who usually has far more financial and legal resources.¹⁰⁸ In order to be victorious in such a proceeding, a party must have comprehensive knowledge of not only the jurisdictional rules of evidence, and procedure, but also of the applicable housing codes.¹⁰⁹ It is unlikely that indigent tenants have access to this type of knowledge or have the time to educate themselves of such knowledge before they appear in court.¹¹⁰ It is, thus, this lack of equal knowledge and standing in the courtroom which results in non-represented indigent tenants to be more prone to final judgments entered against them than those who are represented by counsel.¹¹¹ Thus, while a tenant is technically granted his right to “access to the courts” by being allowed to appear pro se in an eviction proceeding, this access is not “equal” or even

¹⁰⁵ 401 U.S. 371 (1971)

¹⁰⁶ Rachel Kleinman, *Comment: Housing Gideon: The Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507, 1509 n18 (Nov. 2004).

¹⁰⁷ Scherer, supra note 3, at 708.

¹⁰⁸ Kleinman, supra note 106, at 1515.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See e.g. Seron et al., supra note 77.

“meaningful.”¹¹² Accordingly, advocates make the argument that the fundamental right to access the courts is worthless, unless litigants are put on an “equal footing” with their adversaries.¹¹³

The Supreme Court has refused to acknowledge this “equal access” argument by adhering to their long established rule that government actions which results in disparate impact on individuals based on their economic or racial statuses does not violate the Equal Protection Clause of the Constitution.¹¹⁴ Moreover, under the Equal Protection analysis, a government regulation is presumed valid as long as it is “rationally related” to a proper legislative purpose. This “rational basis” test is difficult for a challenger to overcome as the regulation challenged is under minimal scrutiny by the court.

In a small number of cases, a court will apply heightened scrutiny to a government regulation known as “strict scrutiny.” Under the “strict scrutiny” test, a government regulation will be upheld as constitutional only if it is narrowly tailored and furthers a compelling state interest. For an equal protection challenge to warrant “strict scrutiny,” the party challenging the government regulation must allege that either a “fundamental right” is being burdened or a “suspect class” is being targeted.

Many scholars, such as Leonard Schroeter, argue that the right to counsel is a fundamental right.¹¹⁵ Schroeter asserts that to determine what constitutes a fundamental right, one must turn to natural law and the document that was “[...] the creative and juridic basis of our existence,” the Declaration of Independence.¹¹⁶ Schroeter states that this document contains language of natural law and asserts the “[...] fundamental and self-evident truths of individual

¹¹² See *e.g. Id.*

¹¹³ ABA, *supra* note 6, at 2-3.

¹¹⁴ See *San Antonio Independent School Dist v. Rodriguez*, 411 U.S. 1 (1973) and *Washington v. Davis*, 426 U.S. 229(1976). See also Scherer, *supra* note 3, at 719.

¹¹⁵ See generally Leonard W. Schroeter, *Civil Gideon: If Not, Why Not?*, ATJ Jurisprudence (June 1990), available at <http://www.wsba.org/atj/committees/jurisprudence/civgid.doc>.

¹¹⁶ *Id.* at 63.

dignity, the right to be treated equally, and rights that cannot be taken from us [...] life, liberty and the pursuit of happiness.”¹¹⁷ The “gatekeeper” and most “fundamental” of these aforementioned rights is the “thousand-year-old concept of access to the justice system.”¹¹⁸ This essential fundamental right, Schroeter argues, cannot be recognized without also recognizing a right to counsel.¹¹⁹

Although Schroeter’s “fundamental right” argument has been highly praised by many legal scholars, it must be understood that proving that a right is “fundamental” in court is extremely difficult.¹²⁰ There have been very few fundamental rights recognized by the Supreme Court.¹²¹ For a right to be recognized as fundamental, it must be shown that the right is one that is explicitly or implicitly guaranteed by the constitution.¹²² Thus, it is very doubtful that the right to counsel in civil cases would be considered such a right under Supreme Court review.¹²³

Alternatively, many argue that the Equal Protection Clause warrants the recognition of a right to counsel for indigents in eviction proceedings because those living in poverty constitute a “suspect class” which requires “strict scrutiny” by the courts.¹²⁴ Just as unequal treatment based on race constitutes impermissible discrimination, scholars argue that the same is true in regards to unequal treatment based on economic status.¹²⁵ The Supreme Court recognized this proposition in *Griffin v. Illinois* in noting that, “In criminal trials a State can no more

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Kleinman, *supra* note 106, at 1510.

¹²¹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the right to purchase and use contraceptives is a fundamental right); *Zablocki v. Redhail*, 434 U.S. 378 (1978) (holding that the right to marry is a fundamental right); and *Troxel v. Granville*, 530 U.S. 57 (2000) (holding that the right for a parent to control their child’s upbringing is fundamental).

¹²² Schroeter, *supra* note 115, at 20.

¹²³ Kleinman, *supra* note 106, at 1510.

¹²⁴ *Id.* at 1511.

¹²⁵ ABA, *supra* note 6, at 9.

discriminate on account of poverty than on account of religion, race, or color.”¹²⁶ This position held by the Court, however, was expressly overturned in the 1973 *San Antonio v. Rodriguez*. In this case, the Court overturned the position they took in *Griffin* in holding that government regulations making wealth-based distinctions are subject only to the rational basis test and, thus, the poor is not a suspect class warranting strict scrutiny.¹²⁷ The court noted that “[...] at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”¹²⁸ The Court’s holding is damaging to the hopes of many in trying to gain recognition of the poor as a suspect class.

It is evident from the above discussion that an argument for the right to civil counsel based on the Equal Protection Clause is unlikely to prevail because of the Supreme Court’s reluctance in recognizing a new fundamental right or suspect class.¹²⁹ As a result, many have justified the necessity for this right based on economic and public policy principles.

C. Economic Justification for Civil Right to Counsel

Metropolitan cities expend significant resources in providing emergency shelter and services to the poor.¹³⁰ In 2003 alone, New York City spent \$700,000,000 in providing homeless shelter and services. A significant amount of these resources are exhausted by recently-evicted households who seek emergency shelter.¹³¹ Advocates argue that the right to counsel in eviction

¹²⁶ 351 U.S. 12, 17 (1956).

¹²⁷ 411 U.S. 1, 28 (1972) (upholding Texas school program scheme after finding that the right to obtain an education is not a fundamental right under the constitution).

¹²⁸ *Id.* at 24.

¹²⁹ Kleinman, *supra* note 106, at 1510.

¹³⁰ Scherer, *supra* note 3, at 708.

¹³¹ *Id.*

proceedings will forestall homelessness and, thus, alleviate the financial burden on city homeless shelter systems.¹³²

A 2003 study conducted in New York City revealed that 25,000 households were evicted through the legal process in that year.¹³³ Of those households, 1,439 of them sought emergency shelter through the city’s Department of Homeless Service.¹³⁴ These households constituted 19% of the total emergency shelter population.¹³⁵ The New York City Marshall reported that in 2003, approximately 30,000 individuals and 8,200 families were housed in the city shelter system.¹³⁶ Concurrently, the cost of providing emergency shelter for each family was approximately \$36,000 a year, while the cost of providing shelter to an individual adult was approximately \$23,000.¹³⁷ This staggering financial burden on city resources begs for a solution to reduce dependency on city homeless shelter systems. Accordingly, advocates argue that the right to counsel for eviction proceedings is the most adequate solution.

Advocates argue that recognition of the right to counsel in eviction proceedings will ultimately lead to cost-savings for local governments in the context of expenditures on homeless services.¹³⁸ Although recognition of such a right will require a significant amount of funding by the government, this cost will be offset by the significant cost savings associated with the aversion of homelessness.¹³⁹ For example, a 1996 study of New York’s Emergency Assistance Funds program revealed that funds used for “anti-eviction” legal services helped to keep 6,000

¹³² *Id.* at 711-12.

¹³³ New York City Department of Investigation, New York City Marshals, *available at* <http://www.nyc.gov/html/dhs/html/doi/html/marshals/marshalmain.html> (Oct. 24, 2006).

¹³⁴ Scherer, *supra* note 3, at 709.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 710-11.

¹³⁹ *Id.* at 711.

low-income families in their homes.¹⁴⁰ This resulted in the city saving approximately \$27,000 million dollars which it would have otherwise spent in providing these families with shelter services.¹⁴¹ Another New York City study conducted in 1993 concluded that providing counsel for low-income families facing evictions would result in annual cost-savings for the city government of approximately \$67,000,000.¹⁴² Finally, a study conducted in 1990 by the New York City Department of Homeless Services revealed that every dollar spent on “eviction-prevention” would result in four dollars of cost-savings to the city’s homeless shelter system.¹⁴³

Not only will the recognition of a right to counsel lead to cost-savings for the local government, but also will significantly reduce the huge case-load in housing courts.¹⁴⁴ If a landlord is aware that an indigent tenant will be appointed counsel in an eviction proceeding, he or she may think twice before filing an eviction which lacks merit.¹⁴⁵ Moreover, in order to avoid prolonged litigation costs, landlords may opt to settle the dispute out of court or through alternative dispute resolution, such as mediation or arbitration.¹⁴⁶ Recognition of a right to counsel will also encourage legislators and policymakers to come up with mechanisms to settle eviction matters outside of the court system in order to avoid long and complex litigation costs.¹⁴⁷

The recognition of the right to counsel can prove to be financially beneficial as well as streamlining the housing court system. Advocates argue, however, societal costs can be saved as

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* See also Community Training and Resource Center and City-Wide Task Force on Housing Court (hereinafter Task Force), *Housing Court, Eviction and Homelessness: The Cost and Benefits of Establishing a Right to Counsel* iv, (1993).

¹⁴³ Scherer, *supra* note 3, at 711. See also Task Force, *supra* note 142, at iv.

¹⁴⁴ *Id.* at 711.

¹⁴⁵ Conrad Johnson, *Conference Report: The New York City Housing Court in the 21st Century: Can it Better Address the Problems Before It?*, 3 *Cordozo Pub. L. Pol’y & Ethics J.* 601, 621 (2006).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

a result of the recognition of such a right and the sound policy that it provides for the nation must also be considered ¹⁴⁸

D. Public Policy

As the above discussion indicates, low-income families who face the risk of eviction, also face the risk of homelessness. With the loss of a permanent shelter, the risk of family separation, child trauma and dissociation with the community heightens. Thus, it is argued that in addition to the financial benefits and judicial efficiency that the recognition of a right to counsel in eviction cases may bring, such a right will also provide for the well being of our underprivileged children and help allow low-income families to stay together.

When a recently-evicted family seeks homeless shelter in the city system, there is a high probability that the children will be separated from the rest of the family.¹⁴⁹ A 1996 survey conducted in Chicago city homeless shelters revealed that 91% of the parents in such shelters were separated from their children upon entry.¹⁵⁰ These children were sent either to foster care, other homeless shelters which housed children, or forced to live with other relatives or friends.¹⁵¹

Undoubtedly, the forced separation of a family causes emotional trauma for both the children and parents of families who encounter such separation.¹⁵² As a report by the Boston Medical Center Children's Hospital revealed, homeless children are far more likely to suffer from behavioral, emotional and developmental problems than children with homes.¹⁵³ Hence, it

¹⁴⁸ Scherer, *supra* note 3, at 714.

¹⁴⁹ National Coalition for the Homeless, *Homeless, Families with Children: NCH Fact Sheet #7* (Jun. 2001), available at <http://www.nationalhomeless.org/families.html>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Boston Medical Center Children's Hospital, *The Doc4Kids Project, Not Safe at home: How America's Housing Crisis Threatens the Health of its Children* 14 (Feb. 1998), available at <http://www.bmc.org/pediatrics/research/Doc4kids/docs4kidsreport.pdf>.

¹⁵³ *Id.*

seems that keeping a family together is a core ingredient to a child’s developmental and psychological well being. In fact, the Supreme Court has traditionally recognized that the right to a keep a family together is a fundamental right which cannot be infringed upon by the government without sufficient justification.¹⁵⁴ Accordingly, the recognition of the right to counsel in eviction cases will help safeguard this fundamental right by ensuring families a “meaningful” opportunity to keep their families together before encountering the grim consequences of homelessness.

The loss of a home for a low-income family not only threatens separation of the family, but also threatens the loss of several other individual liberty interests.¹⁵⁵ For example, the fundamental right for an individual to vote is not questioned. However, without a permanent address, it makes it difficult for an individual, such as a homeless one, to exercise this right.¹⁵⁶ Similarly, our society believes that individuals should be able to seek employment and “earn a living.” However, these aspirations for a homeless individual are hollow due to our society’s intolerance of the homeless population.¹⁵⁷ This view is personified by many states’ adoption of anti-begging or anti-panhandling statutes.¹⁵⁸ Moreover, Urban Development Secretary Henry Cisneros has also been cited expressing concern about the public’s attitude of the homeless in

¹⁵⁴ See e.g. *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977) (holding that both immediate and extended family members have the fundamental right to live together under the constitution). The Supreme Court has also held that it is a fundamental right for parents to control the upbringing of their children. See e.g. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that parents have a fundamental right to allow the teaching of foreign language to their children).

¹⁵⁵ Kleinman, supra note 106, at 1514.

¹⁵⁶ *Id.*

¹⁵⁷ See e.g. National Resource Center on Homelessness and Mental Illness (hereinafter “NRCHM”), *Legal Remedies to Address Discrimination Against People Who Are Homeless and Have Mental Illness* 1 (U.S. Dept. of Health and Human Services, 1998), available at http://www.nrchmi.samhsa.gov/pdfs/publications/Legal_Remedies.pdf. This article argues that discrimination against homeless individuals is a direct result of negative societal views of the homeless population. *Id.* at 4-5. The article then examines various legal remedies that may address discrimination against homeless individuals. *Id.* at 6-10.

¹⁵⁸ *Id.* at 5. 26 states have adopted such statutes. *Id.* at 4-17.

stating that “ ‘A backlash is growing. What I believed was an almost universal compassion has given way to an impatience, a frustration, an anger toward the homeless.’ ”¹⁵⁹

It is this “anger” and “frustration” which has caused this social disconnect between our homeless population and the rest of society.¹⁶⁰ Once an individual becomes homeless, they lose their community ties as well as the social and economic support system that comes with it.¹⁶¹ Society views them as people who are merely “down on their luck.” This lack of compassion makes it almost impossible for homeless individuals to subsequently re-enter society, earn a living, and support themselves.¹⁶² Surely, this was not envisioned by our nation’s founding forefathers who proclaimed in the Declaration of Independence that “all men are created equal.” This should be read to mean that one’s economic status should not determine whether a person is accepted by society or is a “social outcast.” Presumably, each individual should be afforded their right to vote, earn a living, or otherwise exercise their other fundamental rights afforded to them by our constitution, without regard to their social standing or economic status. However, the harsh reality is that homeless individuals rarely are given a “meaningful opportunity” to exercise these fundamental rights or to re-integrate themselves into the rest of society.

The federal government has made strong efforts to keep the homeless population, “off-the-streets” and attempt to re-integrate them into society.¹⁶³ More specifically, the U.S. Department of Veteran Affairs has funded a variety of special programs which help homeless veterans and their dependants gain employment, medical care, and long-term shelter.¹⁶⁴

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *See e.g. id.*

¹⁶¹ Kleinman, *supra* note 106, at 1514.

¹⁶² *See generally NRCHM*, *supra* note 157. The article states that prospective employers discriminate against homeless people and are reluctant to hire them because of our society’s anger, frustration, and lack of tolerance for such individuals. *Id.* at 4-5.

¹⁶³ United States Department of Veterans Affairs Webpage, *at* <http://www1.va.gov/homeless> (2006).

¹⁶⁴ *Id.*

However, these programs are usually available only to veterans.¹⁶⁵ Also, due to great demand, these programs are often under-funded and undermanned, and, thus, unavailable to many qualified individuals who need the assistance.¹⁶⁶ Many argue that while public funding for the homeless is, in theory, necessary and desirable, the real solution for this social epidemic is to avert homelessness in the first place.¹⁶⁷ One way to do this, advocates argue, is to provide a right to counsel in civil eviction proceedings.¹⁶⁸ As discussed above, the statistics show that a represented indigent tenant facing an eviction is less likely to lose an eviction case than an unrepresented indigent tenant.¹⁶⁹ Accordingly, there is a high likelihood that a recently-evicted indigent tenant will be unable to find alternative housing, due to rising housing costs, and, thus, will be left homeless and disconnected from his community.¹⁷⁰ This disconnect, and the subsequent costs that will have to be incurred in order to “re-connect” with society could have been avoided if the evicted individual was afforded counsel and, thus, “meaningful opportunity” to be heard in the eviction proceeding.

III. Social and Economic Concerns Associated with the Recognition of a Right to Appointed Counsel in Eviction Proceedings.

Although, as discussed above, the recognition of a right to appointed counsel in eviction proceedings can seemingly be justified in a legal, economic, and public policy sense, there has been some opposition in the recognition of such a right. Critiques of the right do not question its wisdom, but its feasibility as well as the other social and economic problems that recognition of

¹⁶⁵ *Id.*

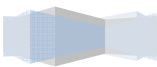
¹⁶⁶ See House Committee on Veterans' Affairs, *Statement of Gary Kurpius, Commander-In-Chief, Veterans of Foreign Wars of the United States Before the Committee of Veteran's Affairs* (Wash. D.C. 2006), available at <http://www.house.gov/va/hearings/schedule109/sep06/9-20-06/GaryKurpius.html>.

¹⁶⁷ Kleinman, *supra* note 106, at 1514.

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* note 87 and accompanying text.

¹⁷⁰ Scherer, *supra* note 3, at 708.



such a right can create. Critiques point to government costs, increased incentive to litigate, and increased financial burdens on poor people as reasons for not recognizing a right to council in the eviction proceedings. Each of these arguments will be thoroughly examined below.

A. The Funding Problem

Critiques argue that recognition of such a right will result in a huge financial burden on the government, which is already in a significant deficit. The U.S. National Debt as of October 31, 2006 was approximately at \$8.5 trillion dollars.¹⁷¹ Moreover, other socially useful programs, such as Social Security, are already projected to be in shortfall in over \$11 trillion in 2006.¹⁷² If the government is to financially support this right, where will the money come from? Either the government will need to raise taxes in order to support the funding of such a right or, instead, will need to divert money away from other socially helpful programs in order to support this one. It is doubtful that citizens would support a tax increase, so this would not be a viable option. If, instead, money was to be diverted away from another federally funded program in order to support this right, which program should be chosen to be short-changed? Clearly, many federally funded programs which are socially useful are already under-sized and under-budgeted.¹⁷³ Diverting money away from these already under-funded programs will further hinder their effectiveness and may lead them to extinction. Thus, the funding problem is a clear obstacle for the recognition of such a right.

Advocates of this right rebut this “funding-problem” argument by stating that the government cost can be justified because of the importance of the right at stake.¹⁷⁴ Moreover,

¹⁷¹ U.S. National Debt Clock, at http://www.brillig.com/debt_clock (accessed Oct. 31, 2006).

¹⁷² FactCheck.org, *Does Social Security Really Face an \$11 trillion Deficit?* (Jan. 2005), at <http://www.factcheck.org/article302.html> (Oct. 31, 2006).

¹⁷³ *Id.*

¹⁷⁴ Kleinman, *supra* note 106, at 1511-12.

they argue that under the due process analysis, also discussed in the preceding section, the importance of personal interests at stake outweigh the government's financial interest.¹⁷⁵ The problem with this counter-argument is that the U.S. Supreme court has yet to recognize that the right to civil counsel is warranted under the Due Process Clause or even that it is a fundamental right that should be constitutionally protected.¹⁷⁶ And despite this, the fact remains that funding will have to come from some source for this right to be meaningful and effective. If it does not come from the government, it will have to come from the private sector, which will be, needless to say, a daunting task.

B. Financial Burden on the Poor

The second argument made in opposition of the recognition of this right is that it imposes increased costs on landlords, which ultimately will be passed on to other tenants in the form of substandard housing conditions and increased rents.¹⁷⁷ This argument is based on a result of a 1973 study conducted by two scholars, John Bolton and Stephen Holtzer.¹⁷⁸ Bolton and Holtzer conducted a study in the city of New Haven concerning the effects of legal representation for low-income individuals.¹⁷⁹ Bolton and Holtzer concluded, based on the results of their study, that providing an indigent with counsel in an eviction proceeding would actually impose increased financial hardship on low-income individuals.¹⁸⁰

Bolton and Holtzer's study consisted of comparing eviction cases in which tenants received free legal aid from the New Haven Legal Assistance Association with those tenants who

¹⁷⁵ *Id.*

¹⁷⁶ *See supra* text, at 11-14.

¹⁷⁷ John Bolton & Stephen Holtzer, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 *Yale L.J.* 1495 (1973).

¹⁷⁸ *Id.*

¹⁷⁹ Kleinman, *supra* note 106, at 1521.

¹⁸⁰ *Id.*

litigated pro se.¹⁸¹ The results of the study indicated that the presence of counsel for the indigent prolonged the eviction process and increased the amount of time it would take to bring the case to completion.¹⁸² Bolton and Holtzer argue that the reason for such time increase was because of delay tactics and zealous advocacy employed by tenant’s counsel.¹⁸³ This prolonged process, Bolton and Holtzer argue, results in increased legal fees for landlord. Since the landlords are not re-compensated by way of the tenant paying their rent or otherwise, they must then pass on their costs to the tenant in the form of increased rents and cutbacks on spending on building maintenance.¹⁸⁴ This in turn results in higher housing costs and poor quality living conditions for the lower-income segment of our society.¹⁸⁵

Although, Bolton and Holtzer may be correct in their argument that recognizing of right to counsel in eviction proceedings will financially burden low-income individuals, it may nevertheless be the cost that must be incurred in order to guarantee “meaningful” access to justice for our poor. If this right is truly a “fundamental” one, as many advocates argue that it is, then costs consideration, while influential, should take a back seat to the overriding ideal that justice should be equal in both “substance and availability.”¹⁸⁶ Economic status, therefore, should not be determinative.¹⁸⁷

Bolton and Holtzer’s study can also be criticized based on its hasty conclusion that the presence of legal counsel generally does not alter the result of an eviction case.¹⁸⁸ Bolton and Holtzer argue in their article that a high number of indigent tenants face eviction because of non-

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See e.g.* Bolton and Holtzer, *supra* note 177.

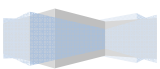
¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ ABA, *supra* note 6, at 2.

¹⁸⁷ *Id.*

¹⁸⁸ Kleinman, *supra* note 106, at 1522.



payment of rent, a clear breach of lease with limited defenses.¹⁸⁹ Thus, they argue that eviction is inevitable and that all legal representation will do is prolong the process while adding needless costs to the landlord. Although this argument may seem plausible on its face, it has been heavily contradicted by recent studies. For example, a 2001 experimental evaluation of a New York City legal aid program indicated that indigent tenants represented by counsel in eviction proceedings were more likely to avoid final judgments against them than those who proceeded pro se.¹⁹⁰ More specifically, only 22% of represented tenants had final judgments against them, as opposed to 51% of tenants without legal representation.¹⁹¹ Thus, the presence of counsel can make a determinative impact in the final decision of an eviction case. When a landlord is aware that an indigent tenant cannot afford counsel, they see it as an opportunity to receive an easy eviction judgment which will allow the landlord to vacate an under-valued housing unit and re-rent it at the market rate. The presence of tenant counsel, however, will bring resistance and legitimacy to the eviction process and presumably fend off any frivolous eviction efforts by the landlord.

C. Increased Incentive to Litigate

Finally, critics argue that the recognition of this right will unnecessarily encourage tenants to make unmeritorious defenses and counter-claims, thus needlessly delaying case resolution while also adding to a housing court's overwhelming case load.¹⁹² Scholars Deborah Rhode and David Luban query that "If parties had a right to subsidized lawyers in any civil case, what would deter them from pursuing unmerited claims and inflicting unwarranted costs, not only on the state [...] but also on innocent individual opponents?"¹⁹³

¹⁸⁹ See e.g. Bolton and Holtzer, supra note 177.

¹⁹⁰ Seron et al., supra note 77.

¹⁹¹ *Id.*

¹⁹² Kleinman, supra note 106, at 1523.

¹⁹³ Deborah L. Rhode & David Luban, Legal Ethics 253 (2001).

It is true that, in representing their clients, attorneys are expected to consider and bring forth all possible defenses and claims which are relevant to the client's situation.¹⁹⁴ They are expected to represent their clients with zeal.¹⁹⁵ This does not mean, however, that an attorney should make a claim or defense for which he reasonably believes has no merit. While the recognition of this right may result in the filing of frivolous claims or defenses, the problem is not the recognition of this right, but the attorneys themselves making such claims or defenses. An attorney should be responsible in making claims and defenses by ensuring that the claim or defense has evidential support. The recognition of a "fundamental" right should not be suspended because of the apprehension of an attorney's ethical conduct. Furthermore, if the recognition of the right to counsel is limited to the eviction context, it would not increase the number of cases being brought to court because tenants do not initiate eviction proceedings.¹⁹⁶

Although critiques rightfully make light of the several problems associated with the recognition of the right to counsel in eviction proceedings, these problems can seemingly be reconciled by the overriding importance of the individual interests at stake at these proceedings. Although funding problems, increased housing costs, and increased incentives to litigate may be the negative byproducts of the recognition of these rights, they are overshadowed by society's need for equal access to justice for all.

IV. Methods of Implication for the Right to Appointed Counsel in Eviction Proceedings.

Before states can recognize the right to counsel in eviction proceedings, they must first implement an effective method for which the increased demand for attorneys can be met.

¹⁹⁴ See Model Rules of Prof'l Conduct R. 1.3 (2004).

¹⁹⁵ *Id.*

¹⁹⁶ Kleinman, *supra* note 106, at 1523.

Advocates of this right have suggested three possible options. The first suggestion for how a state can meet the demand for attorneys is to expand and increase funding of current legal aid programs run by states. The second option is for states to institute a system of mandatory pro bono service for attorneys and law students. The final option is the expansion of the current state systems which appoint attorneys for criminal defendants to include attorneys for civil cases. The benefits and fallbacks for each of these options will be addressed below.

A. Expansion of Current Legal Aid Services

Currently every state has some form of legal aid program which is designed to provide legal assistance to those individuals who qualify economically.¹⁹⁷ These programs are partially federally funded as well as funded by other state funding sources such as IOLTA programs.¹⁹⁸ Advocates argue that the increased demand of attorneys caused by the recognition of this right can be simply addressed by expanding these current legal aid programs through increased funding.¹⁹⁹ Furthermore, these legal aid organizations are an attractive candidate for the assignment of the task because they already have some experience and expertise in defending tenants in eviction proceedings in their regular course of duties.²⁰⁰

The problem with this suggestion, however, is that these legal aid programs are already vastly under-funded.²⁰¹ A 1993 nationwide study by the ABA suggests that legal aid programs were addressing only 30% of the “serious legal problems” encountered by poor people.²⁰² Almost a decade later in 2000, this “access gap” has not improved as it was reported that only

¹⁹⁷ See supra text, at 7-9.

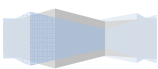
¹⁹⁸ *Id.*

¹⁹⁹ Kleinman, supra note 106, at 1518-19.

²⁰⁰ *Id.*

²⁰¹ See supra text, at 7-9.

²⁰² ABA, supra note 6, at 5.



28% of the legal needs of California’s poor and lower-income residents were being met.²⁰³ The reason for this shortage of legal assistance is mostly due to decrease of federal funding and state trust fund support.²⁰⁴ Thus, for these legal service organizations to meet the demand for representation in eviction proceedings, there will need to be a significant increase of funding as well as expansion of current infrastructure of the program.²⁰⁵ Advocates question however, whether legislature would agree to order such a substantial amount of funding for these programs, since they have refused to do so in the past.²⁰⁶

B. Mandatory Pro-bono Service

The second option for providing attorneys for indigents is for states to institute a system of mandatory pro bono service for attorneys and law students.²⁰⁷ The system will require each attorney to devote a certain portion of their time to pro bono work for the poor.²⁰⁸ Attorneys may be assigned cases by the courts based on their field of expertise.²⁰⁹ If the attorney fails to meet this annual requirement, however, they will be subject to fines or possible suspension from the state bar.²¹⁰ Law students could also be forced to participate in the program, under supervision, as a pre-requisite for their J.D. degree.²¹¹ Although this option is a seemingly attractive solution, the debates surrounding this issue go well beyond the recognition of the right to counsel in eviction cases.²¹² The issue of “mandatory pro-bono service” has been hotly contested in the

²⁰³ California Commission on Access to Justice, *supra* note 66, at 3.

²⁰⁴ *Id.* at 3 and 58.

²⁰⁵ *See e.g.* ABA, *supra* note 6. The ABA reports that the U.S. is currently providing an average of less than \$20 of civil legal aid per eligible poor person. *Id.* at 14. The ABA concludes, based on recent studies, that full civil legal need for the poor could be met if the U.S. raised the average to \$100 per eligible poor person. *Id.*

²⁰⁶ Kleinman, *supra* note 106, at 1518.

²⁰⁷ *Id.* at 1519.

²⁰⁸ Ritchey, *supra* note 10, at 330.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

legal community during the last ten years.²¹³ States which have pushed for the mandatory pro bono service have had their efforts vehemently attacked by private sector attorneys.²¹⁴ Moreover, the ABA has adopted a Model Rule of Professional Responsibility which calls for a lawyer to render at least 50 hours of pro bono legal service a year.²¹⁵ However, no state or federal government has adopted such a provision, in the mandatory sense, and it is unlikely that they ever will due to all the controversy it draws.²¹⁶

C. Expansion of Current State Systems which Appoint Attorneys for Criminal Defendants

The final suggestion which has been advanced for providing attorneys in the civil context is for states to expand current systems which provide for the appointment of attorneys to criminal defendants to include attorneys for civil cases, or more specifically eviction cases.²¹⁷ The problem of such expansion is that the current problems faced in the criminal defense system will be replicated in this proposed civil defense context.²¹⁸ Currently, in states where lawyers volunteer themselves to be included in the pool for representation of criminal defendants, the compensation earned for representing such clients can be as little as \$2 per hour.²¹⁹ These extremely low wages limits the number of “qualified” attorneys willing to work on these cases, and causes those that do, to take on more cases than they can manage in order to earn a living.²²⁰ This, in turn, leads to a supply of unqualified and low quality legal services for the client.²²¹ This epidemic is also seen in states which have a system where any member of the bar can be

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Model Rules of Prof'l Conduct R. 6.1 (2004).

²¹⁶ Kleinman, *supra* note 106, at 1519.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Rhode & Luban, *supra* note 193.

²²⁰ *Id.*

²²¹ *Id.*

appointed by the court to represent an indigent defendant.²²² Often, the attorneys which are appointed in such a system do not have the expertise in the particular field of law for which the client requires assistance.²²³ This is a clear problem for an indigent tenant facing eviction who requires an attorney who is familiar with the complex eviction process and the applicable house codes at issue. The recognition of a right to counsel is meaningless if the counsel provided is not qualified or competent in the area of law in which they are representing the client. Thus, the suggestion of expanding the current state criminal defense system to also include eviction defense does not seem to be the optimal solution for providing competent and adequate legal assistance for indigent tenants facing eviction.

Each of the options discussed above have their own benefits and shortcomings. While a state solution for meeting the demand of attorneys required by the recognition of a right to counsel in eviction cases should be financially efficient, it should also be effective. Cost considerations, while important to state financial planners, should not supersede the overriding goal of providing “competent” and “experienced” attorneys who are familiar with state eviction laws. It is the representation by “competent” and “experienced” counsel which will allow indigent tenants to have a “meaningful opportunity” to prevent the risk of losing their home.

Conclusion

The importance of the fundamental interests in one’s home or shelter cannot be questioned. Everyone needs, as Nelson Mandela has expressed, protection and security from the elements. Without such protection, not only is one’s physical well being at stake, but their social

²²² Kleinman, *supra* note 106, at 1519.

²²³ *Id.*

dissociation from their community is almost guaranteed.²²⁴ Thus, shelter is a basic human need which safeguards an individual's physical as well as social well being. Without special protection provided by the government, indigent tenants stand no chance in protecting this "basic human need." Thus, it seems only necessary that an indigent tenant be afforded counsel in order to have a "meaningful opportunity" to protect such an important interest. Although there are several concerns, financial or otherwise, associated with the recognition of such a right, they should not overshadow the overriding goal of our society: providing each individual, "equal" and "meaningful" access to justice, without regard to economic status.

²²⁴ Nelson Mandela, *supra* note 74.