

# Gideon is in the House: Lessons from the Home-Renters’ Right-to-Counsel Movement

Cassie Chambers Armstrong\*\*

## ABSTRACT

*Before 2017, no jurisdiction had a home renters’ right-to-counsel law. Yet, a mere five years later, three states and fifteen cities afforded renters facing eviction the right to legal representation. This policy intervention, which began in New York, has quickly and decisively swept across America.*

*This article explores the explosion of home renters’ right-to-counsel laws to propose a path forward for the larger Civil Gideon movement. Current Supreme Court jurisprudence largely forecloses litigation-based efforts to create a new Constitutional “right” to an attorney in a civil case. Yet local legislative programs, as modeled by the home renters’ right-to-counsel movement, may offer a viable path for expanding the right to civil counsel. To that end, it is important to critically examine the success of this movement to understand its lessons. This article attempts just that.*

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\* Cassie Chambers Armstrong is an Assistant Professor of Law at the University of Louisville Brandeis School of Law and a former member of the Louisville Metro Council, the legislative local government body in Louisville, KY. She currently serves in the Kentucky State Senate, a role to which she was elected in 2023.

\*\* I would like to thank the many people who contributed to this article: Professors Arianna Levinson and CJ Ryan for their thoughtful comments; Professor Nina Couch for her helpful edits; and John Biggs for his superb research assistance. I am also very grateful to the editors of the Harvard Civil-Rights-Civil Liberties Law Review for their excellent editorial feedback, which greatly improved this paper. Finally, this article is possible because of the many policy-makers, advocates, and impacted who have pushed to expand right to counsel over the years—the biggest thank you goes to those showing up to do this important work every day.

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## INTRODUCTION

I did not enter elected office thinking I was going to pass a home renters’ right-to-counsel ordinance.<sup>1</sup> That was in large part because I had never seen a successful example of such a law. I had begun my career as a legal aid attorney, focused on making sure low-income people had access to effective representation. From this experience, I was acutely aware of how many people face our civil justice system without counsel, and the disparities that the lack of attorney access creates. In law school, I had studied *Gideon v. Wainwright*, the U.S. Supreme Court case holding that low-income litigants do not have a constitutional right to legal counsel in civil cases.<sup>2</sup> I considered myself a champion for the Civil Gideon movement, which seeks to extend attorney access in civil cases.

I also understood how devastating it is to people to have no legal representation in the housing law context, where convoluted laws and fast-moving processes put *pro se* litigants at risk of losing their home without the benefit of a vigorous legal defense. Before 2017, however, when I was practicing as a legal aid attorney, there was no jurisdiction that granted home renters a right to counsel.<sup>3</sup> So I did not consider legislative change—in the form of statewide statutes and local ordinances—a realistic solution.

Over the course of the next few years, that changed. By 2020, seven cities had enacted right-to-counsel laws: New York City, San Francisco, Newark, Cleveland, Philadelphia, Boulder, and Baltimore.

Around that same time, I entered elected office as a Metro Council representative in Louisville, Kentucky. In my role as a member of a local legislative body, I passed policies and allocated funding to address our city’s most urgent needs. Almost immediately, I began to see the impact of eviction in our community.

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<sup>1</sup> Many people refer to these laws as “tenant’s right to counsel.” Some practitioners use the term “home renters” to mirror the language used for those who own property (i.e., “home owner”) and eliminate implicit biases that result from terminology. For that reason, this paper often uses the phrase “home renter” instead of “tenant.” This paper will also use the language of rights and refer to a renter’s “right to counsel.” It is important to note at the outset, though, that many of these laws function as appropriation bills that authorize the government to spend money providing these legal services—without creating any individual right. This issue is discussed at length in Part IV of this article.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335, 799 (1963).

<sup>3</sup> *Current Tally of Tenant Right to Counsel Jurisdictions*, NAT’L COAL. FOR C.R. TO COUNS., [http://civilrighttocounsel.org/highlighted\\_work/organizing\\_around\\_right\\_to\\_counsel](http://civilrighttocounsel.org/highlighted_work/organizing_around_right_to_counsel) [https://perma.cc/Y7HN-BNJS] (last visited Jan. 24, 2023) (hereinafter “Tally”); *The Right to Counsel for Tenants Facing Eviction: Enacted Legislation*, NAT’L COAL. FOR C.R. TO COUNS., [http://civilrighttocounsel.org/uploaded\\_files/283/RTC\\_Enacted\\_Legislation\\_in\\_Eviction\\_Proceedings\\_FINAL.pdf](http://civilrighttocounsel.org/uploaded_files/283/RTC_Enacted_Legislation_in_Eviction_Proceedings_FINAL.pdf) [https://perma.cc/WEN9-D8FL] (last modified July 2023) (hereinafter “Enacted Legislation”).

Even before the pandemic, Louisville's eviction rate was twice the national average.<sup>4</sup> In 2019, property owners filed 17,160 eviction cases.<sup>5</sup> COVID-19 had only further highlighted the depth of our housing instability challenges.

At one of my first budget committee meetings, we voted to allocate millions of dollars in federal pandemic relief to help people pay their rent and stay housed. At that meeting, we discussed how state law allowed a landlord to evict a renter without providing actual notice to that renter. I was shocked. I learned that many people in our community were evicted without ever showing up for court. I knew from my time as a legal aid attorney that, even if they did make it to court, they rarely had legal counsel. The more we discussed it at the budget committee that day, the more we reached bipartisan agreement: Eviction was a pressing public policy problem.

After that meeting, I began thinking about the challenges of our anti-renter state laws and what we, as a city, could do to meaningfully address this crisis.<sup>6</sup> I began to read about other jurisdictions' successes with right-to-counsel legislation, and I decided to introduce a similar bill. It was the first piece of legislation that I sponsored.

I assumed that I would be in for a fight. The seven jurisdictions that had already enacted laws were different from Louisville.<sup>7</sup> For the most part, they were larger cities in more Democratic-leaning states. I knew that non-profits and community groups had pushed for decades in these places to create this legislative change.<sup>8</sup> In New York, the first city to enact a renter's

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<sup>4</sup> Danielle Kaye, *As rental assistance dwindles, Louisvillians are pushed to eviction*, WFPL.ORG, (May 17, 2023) <https://www.wfpl.com/news/2023-05-17/as-rental-assistance-dwindles-louisvillians-are-pushed-to-eviction> [https://perma.cc/4DGB-2M54].

<sup>5</sup> Jamie Mayes, *Leaders in Louisville address eviction rates in the Metro*, WLKY.COM, (Nov. 15, 2022) <https://www.wlky.com/article/leaders-louisville-address-eviction-rates-metro-housing-affordable/41971823#> [https://perma.cc/8QVJ-7DKS].

<sup>6</sup> Like many states, Kentucky enacted its eviction laws to move quickly and favor property owners. Historically, landlords were able to personally remove renters from the landlord's property, a process known as "self-help." Lauren A. Lindsey, *Protecting the Good-Faith Tenant: Enforcing Retaliatory Eviction Laws by Broadening the Residential Tenant's Options in Summary Eviction Courts*, 63 OKLA. L. REV. 101, 103 (2010). These altercations often became violent, though, and property owners viewed the existing legal causes of action as being too slow-moving to be a viable alternative. *Id.* In response, legislatures created modern eviction processes, intended to protect tenants from "self-help" evictions and landlords from overly burdensome legal processes. *Id.* In Kentucky, the eviction process can move extremely quickly. Once an action is filed, the renter against whom the action has been filed does not have to be personally served with the warrant—the sheriff can post the notice on the door of the premises. Ky. Rev. Stat. Ann. § 383.210 (West 1978); Thomas Watson, *Forcible Detainer in Kentucky Under the Uniform Residential Landlord and Tenant Act*, 63 KENTUCKY L.J. 1046 (1975). Furthermore, the law states that a renter is entitled to "at least three (3) days' notice of the time and place of the meeting of the jury"—although nothing in state law guarantees them more time. Ky. Rev. Stat. Ann. § 383.210 (West 1978).

<sup>7</sup> See Enacted Legislation, *supra* note 3.

<sup>8</sup> One of the most comprehensive sources to document the push for a renter's right-to-counsel law is a video produced by the leaders of the New York City movement. *See Our Rights! Our Power! The Right To Counsel Campaign to Fight Evictions in NYC!*, RIGHT TO COUNSEL NYC COALITION (2020), [https://www.righttocounselnyc.org/rtc\\_documentary](https://www.righttocounselnyc.org/rtc_documentary).

right-to-counsel law, the bill sat pending for three years before tenant-led advocacy carried it across the finish line.<sup>9</sup> The movement to bring these protections to Louisville was emerging, but it had not yet fully solidified.<sup>10</sup> I expected a similarly slow timeline in Louisville.

To my surprise, passing the ordinance turned out to be easier than I had expected. The COVID-19 pandemic had focused my Metro Council colleagues' attention on the eviction crisis, and the home-renters' right-to-counsel ordinance was a data-driven solution. I introduced the ordinance on March 21, 2021.<sup>11</sup> It passed out of Budget Committee on April 15, and was approved by the full legislative body on April 22 of that same year.<sup>12</sup> Passing 21-5 with bipartisan support, it became the first renters' right-to-counsel ordinance in the South.<sup>13</sup> In the first twelve months, lawyers funded by the ordinance represented 776 households, leading to a four-fold increase in the number of renters represented by the local legal aid organization.<sup>14</sup>

Since then, the renters' right-to-counsel movement has continued to accelerate. By the end of 2022, three states and fifteen cities offered home renters facing eviction legal counsel.<sup>15</sup> In 2023, other major cities—such as Los Angeles—are moving forward with right-to-counsel laws.<sup>16</sup> Many jurisdictions have decided to use federal pandemic relief funds—such as those provided by the American Rescue Plan—to support these programs,<sup>17</sup> implicitly acknowledging that assisting renters with legal needs is a pressing policy priority as communities recover from the COVID-19 pandemic.

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[https://www.righttocounselnyc.org/rtc\\_documentary](https://www.righttocounselnyc.org/rtc_documentary) [<https://perma.cc/6LW4-3W95>] (hereinafter “Documentary”). This documentary tells the story of the first right-to-counsel jurisdiction in the words of those on the ground fighting for change. *Id.*

<sup>9</sup> Erica Braudy & Kim Hawkins, *Power and Possibility in the Era of Right to Counsel, Robust Rent Laws & Covid-19*, 28 GEO. J. ON POVERTY L. & POL’Y 117, 132 (2021).

<sup>10</sup> It is important to note that many non-profits and advocacy groups had begun important strategic conversations about a renters' right-to-counsel law, and my narrative is in no way meant to discount the thoughtful and important efforts of these groups.

<sup>11</sup> *Legislative History for LMCO 151.99*, LOUISVILLE LEGISTAR, <https://louisville.legistar.com/LegislationDetail.aspx?ID=4922202&GUID=D60DDAD1-DF28-48A2-9C14-399D7B09086A&Options=&Search=> [<https://perma.cc/7679-5HL6>] (last visited Jan. 24, 2023).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; *The Right to Counsel for Tenants Facing Eviction: Developments*, NAT’L COAL. FOR C.R. TO COUNS., [http://civilrighttocounsel.org/major\\_developments/1525#:~:text=Background,child%20and%20are%20income%20eligible](http://civilrighttocounsel.org/major_developments/1525#:~:text=Background,child%20and%20are%20income%20eligible) [<https://perma.cc/7444-Z6HU>] (last visited Dec. 23, 2023).

<sup>14</sup> *Right to Counsel: Eviction Prevention and Defense: Annual Report to Metro Council*, LOUISVILLE LEGAL AID SOCIETY (2022).

<sup>15</sup> *Id.*

<sup>16</sup> City News Service, *LA City Council Oks Motion to Create Tenant Ordinance*, LOS ANGELES DAILY NEWS (Mar. 22, 2023), <https://www.dailynews.com/2023/03/22/la-city-council-oks-motion-to-create-tenant-right-to-counsel-ordinance/> [<https://perma.cc/ZN3C-QP28>].

<sup>17</sup> For example, Minneapolis used \$1 million of its American Rescue Act funds to support this program, and Detroit used \$18 million for this purpose. See Enacted Legislation, *supra* note 3.

Officials in other cities regularly write to tell me that they, too, are considering a right-to-counsel ordinance and ask for my advice.

Access to legal representation can be vital in many types of civil actions, such as domestic violence protective orders, custody and divorce disputes, and cases involving child welfare and parental rights.<sup>18</sup> Although there has been legislative and court-led progress in some of these areas,<sup>19</sup> no recent effort in the civil right-to-counsel movement has been as broad, impactful, and unequivocal as renters' right-to-counsel laws.<sup>20</sup> Similarly, this movement cannot be separated from the larger Civil Gideon movement, with its history, challenges, and victories. Several scholars have written to document the surge in renters' right-to-counsel legislation and offer analysis of this growing movement.<sup>21</sup> But no one, so far, has examined the success of this movement with an eye toward analyzing its lessons for the larger civil right-to-counsel context.

This paper examines the success of renters' right-to-counsel laws<sup>22</sup> so that advocates, impacted people, and the legal community can use the lessons learned to create meaningful, sustainable change in court systems that disadvantage poor people. Part I introduces renters' right to counsel. Part II details the emergence of the civil right to counsel for parents facing parental rights' termination—the first type of civil proceeding in which a right-to-counsel movement succeeded—as a case study to provide context for understanding renters' right to counsel. Part III details how the renters' right-to-counsel movement emerged, and Part IV discusses some of

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<sup>18</sup> See, e.g., American Bar Association, *C.R. to Couns.*, AMERICANBAR.ORG, [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/civil\\_right\\_to\\_counsel1](https://www.americanbar.org/groups/legal_aid_indigent_defense/civil_right_to_counsel1) [<https://perma.cc/54C4-59TG>] (last visited Dec. 23, 2023) (noting that the Civil Gideon movement seeks to grant a right to counsel in cases implicating “basic human needs” including “shelter, sustenance, safety, health, and child custody.”).

<sup>19</sup> For example, California enacted a 2021 law requiring the court to appoint counsel for those who are unrepresented in conservatorship proceedings, Arizona enacted a 2021 law providing children with counsel in termination of parental rights cases, and Indiana enacted a 2022 law requiring appointed counsel for low-income caregivers in parental rights termination cases. See *2021/2022 Federal/State Civil Right to Counsel Bills*, NAT'L COAL. FOR C.R. TO COUNS., [http://civilrighttocounsel.org/legislative\\_developments/20212022\\_bills](http://civilrighttocounsel.org/legislative_developments/20212022_bills) [<https://perma.cc/J3CP-MMEZ>] (last visited Jan. 24, 2023).

<sup>20</sup> See, e.g., *Status Map*, NAT'L COAL. FOR C.R. TO COUNS., <http://civilrighttocounsel.org/map> [<https://perma.cc/DU5U-2L74>] (last visited Jan. 24, 2023) (showing recent activity in the Right to Civil Counsel by jurisdiction) (hereinafter “Status Map”).

<sup>21</sup> See, e.g., Maria Roumiantseva, *A Nationwide Movement: The Right to Counsel for Tenants Facing Eviction Proceedings*, 52 SETON HALL L. REV. 1351 (2022); Natalie D. Fulk, *The Rising Popularity of the Right to Counsel in Eviction Cases: Rationales Supporting It and Legislation Providing It*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325 (2021); Ericka Petersen, *Building A House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63 (2020); Robin M. White, *Increasing Substantive Fairness and Mitigating Social Costs in Eviction Proceedings: Instituting A Civil Right to Counsel for Indigent Tenants in Pennsylvania*, 125 DICK. L. REV. 795 (2021).

<sup>22</sup> Throughout this paper, “right to counsel” will be used as a noun to refer to the specific movement that advocates to extend legal representation in civil cases. “Right-to-counsel” will be used as an adjective to describe particular types of laws, ordinances, or policy decisions.

the factors that have led this movement to become so successful. Part V examines the lessons that renters' right-to-counsel laws can teach other civil counsel movements. Part VI offers a conclusion.

## I. AN INTRODUCTION TO RENTERS' RIGHT-TO COUNSEL

### *The Current State of Right to Counsel*

Many people lack legal representation in civil cases. The National Center for Access to Justice indicates that as many as two-thirds of people across America go through important legal proceedings—such as evictions, foreclosures, custody proceedings, and debt collection cases—without an attorney.<sup>23</sup> Although every state offers some people living in poverty access to attorneys through civil legal aid programs, these organizations can reach only a fraction of people in need. There are a mere 10,479 civil legal aid attorneys in all of the United States.<sup>24</sup> Half of states have fewer than one civil legal aid attorney per 10,000 low-income people.<sup>25</sup>

Data on the number of unrepresented people in civil cases can be difficult to find, as many court systems do not actively measure it. Only six states proactively collect and publish data about the number and types of cases that include an unrepresented party.<sup>26</sup> A lack of active data tracking and analysis make it impossible to articulate the full scope of the problem.

But the data that exists is bleak. A 2004 study of New Hampshire courts found that almost 70% of domestic relations cases in the state's superior courts—including custody and divorce proceedings—involved at least one unrepresented party.<sup>27</sup> That same study found that nearly 97% of domestic violence cases in district courts in New Hampshire had one *pro se* party.<sup>28</sup> Furthermore, an overwhelming 85% of all civil district court cases in the state had at least one party without a lawyer.<sup>29</sup> A study from Washington showed similar results, with incomplete representation in nearly half of divorce cases with children and over 60% of divorces without children.<sup>30</sup>

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<sup>23</sup> *Self-Representation*, NAT'L CTR. FOR ACCESS TO JUST., <https://ncaj.org/state-rankings/2020/self-representation>, [<https://perma.cc/F47N-JGZ6>] (last visited Sept. 30, 2023).

<sup>24</sup> *Attorney Access*, NAT'L CTR. FOR ACCESS TO JUST., <https://ncaj.org/state-rankings/2020/attorney-access> [<https://perma.cc/ZR88-ERWP>] (last visited Sept. 30, 2023) (hereinafter "Attorney Access").

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

<sup>26</sup> *Id.*

<sup>27</sup> Madelynn Herman, *Pro Se Statistics*, NAT'L CTR. FOR STATE CTS. 1 (2006), <https://www.srln.org/system/files/attachments/NCSC%202006%20SRL.%20stats%20summary.pdf> [<https://perma.cc/Z8C3-LBH9>].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Judicial Services Division, *An Analysis of Pro Se Litigants in Washington State*, WASHINGTON STATE ADMIN. OFF. OF THE CTS 3 (2001), [https://www.courts.wa.gov/subsite/wscsr/docs/Final%20Report\\_Pro\\_Se\\_11\\_01.pdf](https://www.courts.wa.gov/subsite/wscsr/docs/Final%20Report_Pro_Se_11_01.pdf) [<https://perma.cc/BG6D-LK93>].

By contrast, parties were represented between 97–98% of the time in tort and commercial cases.<sup>31</sup> These cases involve parties that can pay for attorneys, either because of a contingency fee system (as is the case in many tort cases) or because of the wealth of the litigating parties (as is the case in many commercial cases).

The Legal Services Corporation is the primary means through which low-income individuals can access legal representation. It is an independent 501(c)(3) organization that funds 131 legal aid programs at almost 900 offices across the United States.<sup>32</sup> Created by Congress, the vast majority of the Legal Services Corporation’s funding comes from the federal government.<sup>33</sup> The Corporation, in turn, provides grants to programs “to support delivery of high quality civil legal services and access to justice to low-income people throughout the U.S. and U.S. territories.”<sup>34</sup>

In 2021, the Legal Services Corporation estimated that 53.7 million individuals qualified for its services.<sup>35</sup> Yet, legal aid organizations had the resources to assist only 1.7 million people.<sup>36</sup> Of those, the vast majority (1.5 million) received only legal information or education—not actual representation.<sup>37</sup> That same year, legal aid attorneys closed over 700,000 legal cases, with 35.4% of those cases involving housing needs.<sup>38</sup> The organization estimates that 92% of low-income Americans’ legal claims received either no assistance or inadequate assistance.<sup>39</sup>

The Legal Services Corporation notes that its “efforts have been seriously hampered by chronic underfunding.”<sup>40</sup> In fiscal year 2021, it received \$465 million—a \$25 million increase from the previous year.<sup>41</sup> Yet, the Legal Services Corporation chairman explained that its last budget allocation was only half of what it would have been had its 1994 allocation kept pace with inflation.<sup>42</sup> He further noted that when the Legal Services Corporation was founded, only 12% of Americans met the income and legal

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

<sup>32</sup> *About LSC*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc> [<https://perma.cc/3W-BZ-VKYG>] (last visited Sept. 30, 2023).

<sup>33</sup> *Who We Are*, LEGAL SERVS. CORP., <https://www.lsc.gov/about-lsc/who-we-are/congressional-oversight> [<https://perma.cc/ZB78-HYBE>] (last visited Sept. 30, 2023).

<sup>34</sup> *Grants*, LEGAL SERVS. CORP., <https://www.lsc.gov/grants> [<https://perma.cc/N5ML-SKLC>] (last visited Sept. 30, 2023).

<sup>35</sup> *2021 ANNUAL REPORT*, LEGAL SERVICES CORPORATION 12 (2021), <https://lsc-live.app.box.com/s/8e2dpa9wvbkkg4qj5dsc9cecy6jkzjmd> [<https://perma.cc/M7KF-PHXM>] (hereinafter “LSC Annual Report 2021”).

<sup>36</sup> *Id.*

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

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2.

<sup>40</sup> *Id.*

<sup>41</sup> See LSC Annual Report 2021, *supra* note 35, at 2.

<sup>42</sup> *Id.*

need qualifications for assistance.<sup>43</sup> Today, that number is nearly 20%.<sup>44</sup> Overall, the Chairman concluded that a lack of funding resulted in “a growing disparity between the civil legal needs of low-income Americans and the resources available to meet them.”<sup>45</sup> In short, the justice gap—the disparity between those who can access important legal resources like an attorney and those who cannot—is getting bigger.<sup>46</sup>

Though lacking counsel is the norm in certain jurisdictions and for certain civil matters, representation is more common, even guaranteed, in some circumstances. These outliers tend to be proceedings that implicate important interests, such as parent-child relationships and physical liberty. According to the National Center for Access to Justice, forty-four states recognize a right to counsel for parents in child abuse and neglect cases, and fifty-two jurisdictions (including D.C. and Puerto Rico) grant a person a right to counsel in involuntary commitment proceedings.<sup>47</sup> There are forty-six jurisdictions with a categorical right to counsel in termination of parental rights cases, and the remaining five jurisdictions allow a court to appoint counsel at its discretion.<sup>48</sup>

In contrast, many other categories of civil cases are a mixed bag, with guaranteed representation less uniform from jurisdiction to jurisdiction. This is true even though these proceedings also implicate important rights. There is only one state that provides an alleged domestic violence victim a right to counsel when seeking a protective order.<sup>49</sup> Only one state allows children a categorical right to counsel in contested divorce cases,<sup>50</sup> and a different state is the sole jurisdiction to afford this right to parents.<sup>51</sup> Thirteen states appoint counsel for civil contempt in family law cases, and a mere nine will always appoint counsel when a person faces incarceration for fines or fees.<sup>52</sup> Eleven states appoint counsel to children in cases where the state is attempting to terminate his or her parent’s rights.<sup>53</sup>

Of course, a lack of access to legal counsel matters most if it negatively impacts the outcome of a case. Data on this issue is incomplete; however, there is evidence that having counsel significantly and positively impacts case outcomes – especially for eviction, the focus of this paper. A study conducted by the Legal Aid Society of Cleveland, analyzing that

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<sup>43</sup> *Id.*

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (explaining that the justice gap is the “growing disparity between the civil legal needs of low-income Americans and the resources available to meet them.”).

<sup>47</sup> See Attorney Access, *supra* note 24.

<sup>48</sup> See Status Map, *supra* note 20.

<sup>49</sup> See N.Y. FAM. CT. ACT §§ 262, 1120; See Status Map, *supra* note 20.

<sup>50</sup> See O.R. REV. STAT. ANN. §§ 107.425, 109.072. See also Status Map, *supra* note 20.

<sup>51</sup> See N.Y. FAM. CT. ACT § 262; see also Status Map, *supra* note 20.

<sup>52</sup> See Status Map, *supra* note 20.

<sup>53</sup> *Id.*



city's right-to-counsel-for-eviction program, found that 93% of those with attorneys were able to avoid disruptive displacement and 83% were given more time to move.<sup>54</sup>

A recent meta-analysis of various types of civil cases came to a similar conclusion.<sup>55</sup> There, Rebecca Sandefur found that parties with attorneys in civil cases were, on average, 540% more likely to receive a positive case outcome than an unrepresented person.<sup>56</sup> Similarly, Sandefur concluded that those with lawyers were significantly more likely to be successful than those who had non-lawyer advocates (such as law students, labor union staff, or social workers) assisting them<sup>57</sup>—a finding which she attributed to the greater substantive law knowledge of attorneys.<sup>58</sup> This research indicates that the impact of a trained lawyer goes beyond that of simply having assistance navigating court-related processes.

Further, a randomized controlled trial by James Greiner found that having access to an attorney increased the likelihood that someone would be able to both file and obtain a divorce.<sup>59</sup> Every participant in the study wanted a divorce.<sup>60</sup> But whereas 61% of those with an attorney had filed the divorce paperwork eighteen months after the study began, only 36% of unrepresented individuals had initiated a lawsuit.<sup>61</sup> This finding suggests that having an attorney positively impacts one's ability to take steps to begin court processes. Similarly, 50% of those with attorneys had completed their divorce proceedings at the end of the study, compared with only 25% of those representing themselves. This indicates, again, that an attorney is helpful not only to initiate lawsuits, but to see them through to their completion.<sup>62</sup>

In short, the right-to-counsel landscape is a patchwork. There are only a few types of civil cases in a few states where a person is guaranteed a right to civil counsel. Most of these cases involve massive impacts to family

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<sup>54</sup> The Legal Aid Society of Cleveland, Annual Report on Right to Counsel, THE LEGAL AID SOCIETY OF CLEVELAND (Jan. 31, 2021), <https://lasclew.org/wp-content/uploads/January-2021-report-on-initial-6-months-of-Right-to-Counsel-Cleveland-high-res.pdf> [<https://perma.cc/J9RP-X3DG>]. Not every study has shown that having an attorney impacts the legal outcome. For example, a 2011 randomized controlled trial found that clients who were represented by a student attorney from a law school clinic were no more likely to be successful in a disability law proceeding than were those without legal counsel. D. James Greiner and Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2011). Research also suggest that the type of attorney and the type of proceeding may influence how impactful a lawyer is on the case outcome. See Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impact*, 80 AM. SOCIOLOGICAL REV. 909 (2015).

<sup>55</sup> See Sandefur, *supra* note 54.

<sup>56</sup> *Id.* at 921.

<sup>57</sup> *Id.* at 915, 922.

<sup>58</sup> *Id.* at 922–23.

<sup>59</sup> D. James Greiner et al., *Using random assignment to measure court accessibility for low-income divorce seekers*, 118 PROC. NATL. ACAD. SCI. U.S. (2021).

<sup>60</sup> *Id.*

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

<sup>62</sup> *Id.*

relationships (such as termination of parental rights proceedings) or implicate a person's physical liberty (such as an involuntary mental health commitment proceedings). A court may be vested with the discretion to appoint an attorney in other types of cases, but legal counsel is not required for a court to process a case to conclusion. But the data shows that legal representation matters, with those who have it being more likely to be successful at many stages of the litigation process.

### *The Legal Landscape and Constitutional Requirements*

Part of the reason for the variation in guaranteed representation is the constitutional framework within which right-to-counsel laws operate. For years, advocates hoped to convince the Supreme Court that the federal Constitution guaranteed people the right to legal representation—in the form of an appointed attorney if they could not afford to hire their own lawyer—in certain types of civil cases. The argument initially appeared successful. After the Supreme Court reversed course, however, advocates shifted to a state-based, legislative approach, furthering the variation that we see today. This section explains the Supreme Court's analysis, its impact on the right-to-counsel movement, and how it influences the current landscape for civil representation.

The United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."<sup>63</sup> Historically, courts construed this amendment as granting a right to counsel only in federal prosecutions, where the United States was initiating criminal charges.<sup>64</sup> In fact, courts specifically rejected the idea that anything in the Constitution extended this right to the states and the prosecutions brought by state governments.<sup>65</sup>

In *Gideon v. Wainwright*, however, the Court seemed to reverse course.<sup>66</sup> *Gideon* began as a relatively standard state criminal case: In 1961, someone broke into a Florida poolroom and stole change from the cigarette machine and jukebox, as well as wine, beer, and soda pop.<sup>67</sup> Police charged Clarence Earl Gideon, a low-income man with a prior criminal conviction, based on the identification of an alleged witness who said he saw Gideon exit the poolroom that night.<sup>68</sup> Based solely on that eyewitness testimony, a Florida state jury convicted Gideon of breaking and entering the poolroom with

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<sup>63</sup> U.S. CONST. amend. VI.

<sup>64</sup> See *Betts v. Brady*, 316 U.S. 455, 461 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (noting that "[t]he Sixth Amendment of the national Constitution applies only to trials in federal courts.").

<sup>65</sup> *Betts*, 316 U.S. at 462, *overruled by* *Gideon*, 372 U.S. at 335 (1963) (explaining the "due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment.").

<sup>66</sup> 372 U.S. 335 (1963).

<sup>67</sup> Bruce A. Courtade, *Gideon at 50: A Clarion Call Still Muted?*, 92 MICH. BAR J. 14, 14 nn.1 & 2 (2013).

<sup>68</sup> *Id.*

the intent to commit a misdemeanor—an act that was itself a felony under Florida law.<sup>69</sup> Although Gideon asked the state court to appoint a lawyer to represent him, the judge declined, explaining that state law only authorized the court to appoint counsel in capital cases.<sup>70</sup> Without the benefit of a lawyer, Gideon conducted his defense “about as well as could be expected from a layman”;<sup>71</sup> he called witnesses, cross-examined those of the state, and made a short argument on his own behalf. Despite his efforts, the jury returned a guilty verdict and sentenced Gideon to five years in jail.<sup>72</sup> Gideon appealed, and his case ended up before the Supreme Court.

The Court ultimately held that a state violates the Due Process Clause of the Fourteenth Amendment when it refuses to appoint counsel for a criminal defendant.<sup>73</sup> In doing so, it spoke about the importance of the right to counsel in broad terms. The Court described counsel in a criminal trial as “fundamental,” explaining that “lawyers in criminal courts are necessities, not luxuries.”<sup>74</sup> The Court was unequivocal: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.”<sup>75</sup> On remand, the Florida state court appointed a skilled criminal defense attorney to represent Gideon.<sup>76</sup> The attorney impeached the credibility of the eyewitness who claimed to have seen Gideon exiting the poolroom, and the jury acquitted Gideon.<sup>77</sup>

The decision to root the right to an attorney in the Due Process Clause meant that the Court could decide to extend the new right beyond criminal law. Unlike the Sixth Amendment, which explicitly states that its protections are limited to “criminal prosecutions,” the Fourteenth Amendment does not limit due process in this way. Instead, it indicates that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>78</sup> Civil cases can implicate liberty or property rights—for example, a civil judgment may require a person to pay money, thus depriving them of a protected type of property.<sup>79</sup> Similarly, courts have held that certain civil actions, such as

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<sup>69</sup> *Gideon*, 372 U.S. at 337.

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

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

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 342 (holding that the Court “[a]ccept[s] *Betts v. Brady*’s assumption . . . that a provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the State by the Fourteenth Amendment” and overruling *Betts* holding that a right to counsel is not one of those fundamental rights).

<sup>74</sup> *Id.* at 344.

<sup>75</sup> *Id.* at 344-45.

<sup>76</sup> See Courtade, *supra* note 67, at 14.

<sup>77</sup> *Id.*

<sup>78</sup> U.S. CONST. amend. XIV.

<sup>79</sup> *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571-72 (1972) (noting that the property interest protected by the due process clause includes but “extend[s] well beyond” “actual ownership of real estate, chattels, or money”).

involuntary commitment proceedings, implicate a protected liberty interest.<sup>80</sup> Based on this, advocates began to piece together an argument: If due process requires a person have counsel when a protected right is implicated, due process must also require a state to appoint counsel any time that a person's life, liberty, or property is at stake—not just in criminal cases.<sup>81</sup>

Following *Gideon*, advocates organized to expand the types of cases for which a person has a constitutional, due-process-driven right to legal counsel. The effort to use the rationale of *Gideon* to secure a right to counsel in certain types of civil cases became known as the Civil Gideon movement. In the initial years after the Supreme Court's decision, it seemed like it might be successful, as the justices expanded the right to counsel to other types of criminal proceedings and continued to root this right in the Due Process Clause.<sup>82</sup> Although the cases were scattered and “a bit of a mess,” there was one constant theme: They reaffirmed that the constitutional guarantee of access to an attorney was broader than just the guarantee articulated in the Sixth Amendment.<sup>83</sup>

The Court, however, changed direction in *Lassiter v. Department of Social Services*.<sup>84</sup> There, a divided Supreme Court issued a 5-4 opinion that impeded the path of the Civil Gideon movement.<sup>85</sup> The case concerned a woman named Abby Lassiter. Lassiter was poor, Black, and had little formal education.<sup>86</sup> She lacked any meaningful economic or social support systems, and she may have had an intellectual disability.<sup>87</sup> She became pregnant and had her first child when she was 14.<sup>88</sup> She would have four more children in the following years.<sup>89</sup>

In 1975, the State removed Lassiter's eight-month-old infant from her custody based on allegations that she provided him with inadequate medical care.<sup>90</sup> A court determined that Lassiter had neglected her son, and it placed him in the custody of the Department of Social Services.<sup>91</sup> The next year,

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<sup>80</sup> *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (analyzing a Kansas state law regarding civil commitment under the Due Process Clause).

<sup>81</sup> See Comment, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 548 (1967) (arguing, shortly after *Gideon*, that the reasoning of *Gideon* should apply to civil cases as well as criminal cases).

<sup>82</sup> See Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1239 (2010) (detailing non-Sixth Amendment cases expanding the right to counsel after *Gideon*).

<sup>83</sup> *Id.* at 1241.

<sup>84</sup> *Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N. C.*, 452 U.S. 18, 20 (1981).

<sup>85</sup> *Id.* at 22.

<sup>86</sup> Angela Olivia Burton, *Introduction*, 20 CUNY L. REV. 1, 7 (2016).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Brooke D. Coleman, *Lassiter v. Department of Social Services: Why Is It Such A Lousy Case?*, 12 NEV. L.J. 591, 593 (2012).

<sup>90</sup> *Lassiter*, 452 U.S. at 22.

<sup>91</sup> *Id.* at 20.

a state court sentenced Lassiter to a decades-long prison term in an unrelated murder case.<sup>92</sup> After Lassiter went to prison, the Department moved to terminate Lassiter's parental rights based on allegations that she had not had contact with her child or made attempts to strengthen their relationship—objectives which were, of course, nearly impossible given that Lassiter was an incarcerated person and the State had custody of her young child.

Eventually, a state court scheduled a hearing to determine if it should terminate Lassiter's parental rights. Lassiter represented herself at the hearing.<sup>93</sup> Although the court discussed whether it should delay the termination hearing to allow Lassiter to obtain counsel, the court declined to do so based on its finding that Lassiter “had ample opportunity to seek and obtain counsel . . . and her failure to do so [was] without just cause.”<sup>94</sup> Though Lassiter tried her best to represent herself, the court terminated her parental rights.<sup>95</sup>

After the decision, Lassiter—now represented by lawyers from legal assistance programs, legal aid organizations, and advocacy organizations—petitioned the Supreme Court for relief from the state court's decision to terminate her parental rights.<sup>96</sup> Specifically, she argued that the Due Process Clause required a court to appoint counsel for her. She invoked the *Mathews v. Eldridge* test, which requires courts to balance three factors when determining what process a person is due from the government: the private interests at stake, the government interests at stake, and the risk that a process will lead to an erroneous decision (and the likelihood that an additional procedure will reduce the risk of error).<sup>97</sup> Under *Mathews*, courts are to weigh these factors to determine if they preponderate in favor of granting a constitutional protection to a proposed procedure.

Unsurprisingly, Lassiter's arguments centered around the immensely important private interests at stake, noting that “the right to family integrity has been consistently recognized by this Court as a fundamental right deserving the highest possible degree of constitutional protection.”<sup>98</sup> She also explained that the risk of erroneous termination of rights was high without counsel, as termination cases are “formal, complex, adversarial proceedings

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<sup>92</sup> *Id.* Scholars who have examined the murder charges against Lassiter have described her conviction as “dubious at best,” noting that her inexperienced lawyer “made a number of mistakes” and the prosecution “failed to provide potentially exculpatory evidence during the trial.” See Coleman, *supra* note 89, at 593.

<sup>93</sup> *Lassiter*, 452 U.S. at 22.

<sup>94</sup> *Id.* For Lassiter's arguments on appeal in full, see *id.*

<sup>95</sup> Lassiter cross-examined the state social worker who testified on behalf of the government and gave her own direct testimony. *Id.* at 23. Yet Lassiter struggled to understand the legal requirements; for example the court prohibited the social worker from answering parts of Lassiter's cross-examination “because [the questions] were not really questions, but arguments.” *Id.* at 23.

<sup>96</sup> Brief for Petitioner, *Lassiter v. Dep't of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340033, at \*1.

<sup>97</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>98</sup> Brief for Petitioner, *Lassiter v. Dep't of Soc. Servs. of Durham Cnty, N.C.*, 452 U.S. 18 (1981) (No. 79-6423), 1980 WL 340033., at \*6.

in which the rules of evidence apply, and the court is required to make formal findings of fact and conclusions of law.”<sup>99</sup>

Finally, Lassiter noted the high likelihood that parents undergoing termination proceedings could also face criminal prosecutions based on the same allegations meant that “termination cases implicate the parent’s liberty interest in avoiding imprisonment.”<sup>100</sup> Lassiter stated that she believed the outcome in her case had been impacted by her lack of counsel, as she did not pursue defenses that she later learned were available to her.<sup>101</sup> For example, Lassiter explained, she did not know at the time of the hearing that the court was required to explain why it was terminating her rights instead of placing the child in the custody of her mother,<sup>102</sup> who said she was willing and able to care for this child and was already caring for Lassiter’s other three children.<sup>103</sup> Lassiter argued that her fundamental right to parent her child had been impacted by her lack of legal representation, and that the failure of the court to appoint counsel for her had violated her constitutional due process rights.

The Court disagreed. Justice Stewart, writing for the majority, held that there is a “presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty . . .”<sup>104</sup> This presumption was new,<sup>105</sup> and it created significant barriers for the Civil Gideon movement. For the first time, the Court explained that for any court proceeding that did not involve removing a person’s physical liberty, the presumption would be against a constitutional right to counsel.

The Court did not, however, close the door on a civil right to counsel completely. Instead, the Court noted that the presumption against a right to counsel in cases that do not involve deprivation of physical liberty can be overcome by weighing the *Mathews* factors.<sup>106</sup> If those factors preponderate in favor of a right to counsel, a court can still hold that such a categorical right exists—even if one’s physical liberty is not at stake.

In examining those factors in the context of terminating a person’s parental rights, the Court agreed that a parent’s interest in their legal relationship to their child was “extremely important. . .”<sup>107</sup> This finding was in

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<sup>99</sup> *Id.* at \*7.

<sup>100</sup> *Id.* at \*6.

<sup>101</sup> *Id.* at \*8.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Lassiter*, 452 U.S. at 31.

<sup>105</sup> See, e.g., Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RES. L. REV. 325, 340 (2010) (explaining how the court in *Lassiter* “overlaid the [*Mathews*] balancing inquiry with a hefty presumption against the appointment of counsel where there is no risk of the loss of physical liberty.”); see also Elizabeth Mills Viney, *The Right to Counsel in Parental-Rights Termination Cases: How a Clear and Consistent Legal Standard Would Better Protect Indigent Families*, 63 SMU L. REV. 1403, 1415 (2010).

<sup>106</sup> *Lassiter*, 452 U.S. at 27.

<sup>107</sup> *Id.* at 19.

line with the Court's previous jurisprudence which had determined that the parental relationship was squarely within the bounds of the liberty interest protected by the Due Process Clause,<sup>108</sup> and that this interest was "supplemented by the dangers of criminal liability inherent in some termination proceedings."<sup>109</sup> The Court balanced this strong private interest against the government's "pecuniary" interest in economical resolution and informal procedures, and its view that the incapacity of "[an] uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's right insupportably high."<sup>110</sup> This language acknowledged that the private interest implicated was important, the government's interest in an "accurate and just decision" often supported "the availability of appointed counsel,"<sup>111</sup> and the risk to an uncounseled parent could be significant.

Ultimately, though, the Court declined to issue a categorical rule in its decision. Instead, it noted that "[i]f, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel."<sup>112</sup> The Court also noted, however, that the factors were not always distributed this way, and that it did not believe the Constitution required counsel to be appointed in every parental termination case.<sup>113</sup> It held, based on these specific facts, that the state's failure to appoint Lassiter counsel did not violate the Due Process Clause because "the presence of counsel for Ms. Lassiter could not have made a determinative difference" given "the weight of the evidence..."<sup>114</sup> Instead of issuing a clear rule, the Court "[e]ft] the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by

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<sup>108</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (explaining that due process protects the right to "establish a home and bring up children"); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925) (holding that a law limiting parents' right to send their children to religious schools "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children . . .").

<sup>109</sup> *Lassiter*, 452 U.S. at 31.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 27.

<sup>112</sup> *Id.* at 31.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 32–33; Interestingly, although the Court determined that a lawyer would not have impacted the outcome of the case, the Court also noted that—even without the assistance of counsel—much of the evidence in favor of termination was "controverted." See *id.* at 33. For example, the state argued termination was necessary because Lassiter's mother had previously stated that she could not care for another child—at the hearing, the grandmother denied ever making such a statement. Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The State's Response to Lassiter*, 14 *Touro L. Rev.* 247, 253 (1997).

the trial court,” based on the way the *Mathews* factors applied in a particular case.<sup>115</sup>

In its final paragraph of the *Lassiter* opinion, the Court foreshadowed the next stage of the Civil Gideon movement. It noted that, although it did not violate the Constitution not to appoint Lassiter with counsel, “wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution.”<sup>116</sup> It explained that “informed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well[.]”<sup>117</sup> The Court clarified that its “opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.”<sup>118</sup> In short, the Court left the decision with legislative bodies, and implicitly urged those legislative bodies to adopt standards above the minimal rights guaranteed by the Constitution. Many states heard this invitation and did exactly as the Court urged.

The Court has been largely uninterested in revisiting its civil right-to-counsel jurisprudence since *Lassiter*. In the four decades since it issued its opinion, the Supreme Court has cited *Lassiter* just eleven times.<sup>119</sup> Most recently, the Court discussed it in the 2011 case of *Turner v. Rogers*<sup>120</sup> when determining that the Due Process Clause of the Fourteenth Amendment does not require counsel to be appointed to low-income people in all cases where a person is facing civil contempt for unpaid child support, even though a person may be incarcerated as a result of that proceeding.<sup>121</sup> The Court noted that child

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<sup>115</sup> *Lassiter*, 452 U.S. at 32.

<sup>116</sup> *Id.* at 33.

<sup>117</sup> *Id.* at 34.

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

<sup>119</sup> These cases are: *Turner v. Rogers*, 564 U.S. 431 (2011); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985); *Little v. Streater*, 452 U.S. 1 (1981); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Lewis v. Casey*, 518 U.S. 343 (1996); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Landon v. Plasencia*, 459 U.S. 21 (1982); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Although this lack of litigation around *Lassiter* seems to indicate the highest court is uninterested in revisiting or fleshing out the issues it raised, it is worth noting that some federal district courts have been more active in litigation regarding the bounds and scope of the rights laid out in *Lassiter*. For example, federal district courts in the state of California have collectively cited *Lassiter* 718 times as of January 24, 2023, according to a WestLaw search. This is likely because the Court’s decision in *Lassiter* required lower courts to conduct a case-by-case due process inquiry, resulting in a multitude of opinions addressing this issue.

<sup>120</sup> *Turner v. Rogers*, 564 U.S. 431 (2011).

<sup>121</sup> For those who are curious about how this squares with the *Lassiter* Court’s language suggesting a presumption in favor of appointed counsel where physical liberty is at stake, the Court explained that “where civil contempt is at issue, the Fourteenth Amendment’s Due Process Clause allows a State to provide fewer procedural protections in a criminal case.” *Turner*, 564 U.S. at 442. This is because civil contempt seeks only to “coerce the defendant to do what a court had previously ordered him to do.” *Id.* (internal quotation marks omitted).



support was a “straightforward”<sup>122</sup> matter and that it believed there were another “set of ‘substitute procedural safeguards’”<sup>123</sup> that could be put into place to protect a person’s rights. This opinion suggests that even an overt threat of incarceration is not sufficient to trigger a categorical right to legal counsel in a civil case. Although the Civil Gideon movement continues to move forward, the path to do so no longer realistically includes the option of rooting a right to counsel in the Due Process Clause of the federal Constitution.<sup>124</sup>

## II. EXAMINING THE RISE OF RIGHT TO COUNSEL IN PARENTAL TERMINATION

Before examining the rise of a home renter’s right to counsel, it is useful to first explore the path of parents’ right to counsel in termination cases. This was one of the first civil right-to-counsel movements to succeed, and today nearly every jurisdiction has a law—either legislatively or judicially created—that grants an individual a guaranteed right to counsel in these circumstances.<sup>125</sup> Understanding the nature and contours of this right, as well as how it came to be, can inform how we understand a home renter’s right-to-counsel and provide insight into the larger Civil Gideon movement.

### *Court-Based Rights*

As explained above, in *Lassiter*, the Supreme Court held that the Constitution does not require a court to always appoint counsel to a person whose parental rights the state seeks to terminate.<sup>126</sup> Instead, the Court held that a case-by-case approach was sufficient. So how, then, did we arrive at our current system, where nearly every state affords a categorical right to counsel in parental termination cases?<sup>127</sup>

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<sup>122</sup> *Turner*, 564 U.S. at 446.

<sup>123</sup> *Id.* (quoting *Mathews*, 424 U.S. at 335).

<sup>124</sup> This conclusion is based on the current composition of the Court and the current state of the right-to-counsel jurisprudence. It may be, however, that advocates are able to make small litigation-based changes that could, in the future, create the foundation for new access to justice precedent. Similarly, advocates may wish to consider state-level litigation with the hope of creating wins under due process clauses of state constitutions.

<sup>125</sup> The other successful civil right-to-counsel movement has been the right to counsel for those facing involuntary commitment, and every jurisdiction guarantees counsel in these circumstances. *See* *Attorney Access*, *supra* note 24. These cases, however, involve the loss of physical liberty, and—for that reason—are analyzed differently under *Lassiter*. *See Lassiter*, 452 U.S. at 26-27 (explaining that its precedents lead to “the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty” and noting that “[i]t is against this presumption that all the other elements in the due process decision must be measured”).

<sup>126</sup> *Lassiter*, 452 U.S. at 33 (1981).

<sup>127</sup> The phrase “categorical right” refers to a right that is granted to an entire category of cases. For example, a categorical right to counsel in parental termination cases means that every person whose parental rights are at risks has the right to a lawyer, and the state will provide one to a person who cannot afford to hire their own.

At the time the Supreme Court decided *Lassiter*, thirty-three states already had statutes granting a right to counsel in these proceedings.<sup>128</sup> This likely reflected a strong public sentiment that the parent-child relationship is fundamental, and that people should have legal representation in proceedings that impact this relationship.

State courts, too, had weighed in on the issue. Prior to *Lassiter*, many state courts that addressed whether the federal Constitution required counsel to be appointed in termination cases had found in the affirmative. For example, Oklahoma considered the issue in the *Matter of Chad S.*<sup>129</sup> There, the state terminated the parental rights of a low-income mother, who was unrepresented and not offered legal counsel.<sup>130</sup> After the termination, the mother appealed, arguing that the court violated her due process rights when it failed to appoint counsel to represent her.<sup>131</sup>

The Supreme Court of Oklahoma agreed, holding that “[t]he Supreme Court of the United States holds the relationship of parents to their children to be a fundamental constitutionally protected right” and “the fundamental nature of parental rights requires that the full panoply of procedural safeguards must be applied to child deprivation hearings,” including the right to counsel.<sup>132</sup> It also noted the quasi-criminal nature of parental rights cases, explaining that “while a dependency proceeding is not a criminal proceeding, it is substantially similar.”<sup>133</sup>

Oklahoma was not unique. Prior to *Lassiter*, at least ten jurisdictions had determined that federal due process provided a right to legal representation in termination cases.<sup>134</sup> Most of these utilized similar reasoning in reaching this conclusion. The Supreme Court of Maine, for example, rooted its analysis in liberty and the importance of family relationships.<sup>135</sup> The Supreme Court of Oregon focused on how—in the absence of counsel to stop it—the lower court based its decision to terminate the mother’s rights on “incompetent evidence and evidence that had remote, if any, connection with the issues made up by the petition.”<sup>136</sup> The Supreme Court of Nebraska centered its analysis on the link between termination and criminal charges, as well as the impact of termination on “too fundamental an interest and right[.]”<sup>137</sup>

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<sup>128</sup> See Young, *supra* note 114, at 253.

<sup>129</sup> 580 P.2d 983, *abrogated by Lassiter*, 452 U.S. at 101.

<sup>130</sup> *Id.* at 984.

<sup>131</sup> *Id.* at 985.

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

<sup>133</sup> *Id.*

<sup>134</sup> John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763, 781-83 (2013).

<sup>135</sup> See *Danforth v. State Dep’t of Health & Welfare*, 303 A.2d 794, 796-797 (Me. 1973), *abrogated by Lassiter*, 452 U.S. 18.

<sup>136</sup> *State v. Jamison*, 444 P.2d 15, 17 (1968).

<sup>137</sup> *In Int. of Friesz*, 208 N.W.2d 259, 260 (1973), *abrogated by Lassiter*, 452 U.S. 18.

Given these courts' thoughtful and thorough analyses, it is not surprising that some courts chose to revisit the right to counsel in termination proceedings following *Lassiter*.<sup>138</sup> Oklahoma reconsidered the issue in the case of *Matter of D.D.F.*<sup>139</sup> There, the State sought to terminate a father's parental rights to his adopted children after he was convicted of sexually abusing them.<sup>140</sup> Although the father had legal representation at the trial court level, he alleged that his constitutional rights were violated because that counsel was ineffective.<sup>141</sup> In deciding this claim, the Oklahoma Supreme Court considered the nature and bounds of a right to counsel in termination proceedings. It noted that although the United States Supreme Court had held "the Fourteenth Amendment does not always require that counsel be appointed in termination proceedings,"<sup>142</sup> the Oklahoma Court also "recognized that many states had held the appointment of counsel was always necessary, and encouraged that the higher standard imposed by states, such as that adopted in Oklahoma, be upheld[.]"<sup>143</sup> The Oklahoma Supreme Court went on to hold that "the rights at issue [in a termination case] are those which are fundamental to the family unit and are protected by the due process clause of the Oklahoma Constitution[.]"<sup>144</sup> Other states, too, went on to find a state-rooted categorical constitutional right.<sup>145</sup>

Post-*Lassiter*, states also took legislative and judicial action to create or preserve rights to counsel. Thirty-two of the thirty-three states with statutes on the books at the time *Lassiter* was decided did not repeal them.<sup>146</sup> And legislative bodies in the remaining states continued to consider and adopt legislation conferring a right to counsel. Of the forty-six jurisdictions with a categorical right to counsel today, each one has legislation protecting this right.<sup>147</sup> Even the five jurisdictions without a categorical right have statutes

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<sup>138</sup> It is important to note that some courts had, in holding the right to counsel was protected by the federal Constitution, also made holdings under their state constitutions. See *Danforth*, 303 A.2d at 795 (basing its conclusion on the fact that "the Constitution of the United States and the Constitution of Maine compel such conclusion.").

<sup>139</sup> 801 P.2d 703, 706 (1990).

<sup>140</sup> *Id.* at 704.

<sup>141</sup> *Id.* at 706.

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

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* Interestingly, the Oklahoma Supreme Court held this despite the fact that the language of the Oklahoma due process clause being nearly identical to that of the due process clause in the federal Constitution. See Okla. Const. art. II, § 7 (stating "[n]o person shall be deprived of life, liberty, or property, without due process of law").

<sup>145</sup> See, e.g., *Matter of A.S.A.*, 852 P.2d 127 (Mont. 1993) (holding the due process clause of the Montana Constitution requires appointment of counsel); *J.B. v. Fla. Dep't of Child. & Fams.*, 170 So. 3d 780, 789–90 (Fla. 2015) (reaffirming that the state due process clause requires counsel in termination proceedings).

<sup>146</sup> See *Young*, *supra* note 114, at 262. Mississippi had a statute granting a right to counsel in termination proceedings that was repealed two years before *Lassiter* was decided. *Id.*

<sup>147</sup> See *Status Map*, *supra* note 20.

that allow discretionary appointment of an attorney in these cases.<sup>148</sup> Some jurisdictions have both legislatively and judicially protected the right to counsel in parental termination cases. In these states, there is usually a state law that protects the right legislatively, and a court case that holds that the state constitution's due process clause also affords this right.<sup>149</sup>

Some of these statutes are broad. For example, the New York Family Court Act provides legal counsel to any "parent . . . foster parent, or other person having physical or legal custody of the child" in any termination proceeding.<sup>150</sup> In other states, the statutory right is drafted more narrowly. Alabama provides legal counsel only to a "respondent parent, legal guardian, or legal custodian" who is indigent.<sup>151</sup> North Carolina stipulates that a poor person is entitled to counsel in any "proceeding to terminate parental rights where a *guardian ad litem* is appointed pursuant to [state law]."<sup>152</sup>

Courts have continued to address the nature and scope of the rights afforded by these legislative acts. Recently, the Kentucky Court of Appeals considered the issue in *M.Q.M. v. Cabinet for Health and Family Services*.<sup>153</sup> There, the trial court entered an order terminating a father's parental rights. Although he had counsel at the termination proceedings (and for some of the earlier dependency proceedings), he did not have an attorney represent him at every stage of the process.<sup>154</sup>

In an unpublished opinion, the Kentucky Court of Appeals found that this failure to have counsel throughout the process violated both the state and the federal constitutions. It did so based on the United States Supreme Court's holding in *Santosky v. Kramer*.<sup>155</sup> *Santosky* concerned a New York law which allowed the state to terminate the parent-child relationship based on a preponderance standard.<sup>156</sup> The Court held that this evidentiary threshold was too low to satisfy due process.<sup>157</sup> In making this determination, the *Santosky* Court held that when the state is seeking "to terminate this sacrosanct relationship [between parent and child], parents are entitled to fundamentally fair procedures."<sup>158</sup>

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<sup>148</sup> *Id.*

<sup>149</sup> For example, Florida protects this right to counsel through legislation, *see* Fla. Stat. § 39.807(1)(a), and through the courts, *see* *In Interest of D.B.*, 385 So. 2d 83 (Fla. 1980).

<sup>150</sup> N.Y. Fam. Ct. Act § 262 (McKinney 2012).

<sup>151</sup> Ala. Code § 12-15-305(b) (2009).

<sup>152</sup> N.C. Gen. Stat. Ann. § 7A-451 (2023).

<sup>153</sup> *See* *M.Q.M. v. Cabinet for Health & Fam. Servs.*, No. 2021-CA-1249-ME, 2022 WL 3129960, at \*3 (Ky. Ct. App. Aug. 5, 2022).

<sup>154</sup> *Id.* at \*2.

<sup>155</sup> *Santosky v. Kramer*, 455 U.S. 745 (1982).

<sup>156</sup> *Id.* at 748.

<sup>157</sup> *Id.* at 758.

<sup>158</sup> *M.Q.M.*, 2022 WL 3129960, at \*3 (quoting *A.P. v. Commonwealth*, 270 S.W.3d 418, 420 (Ky. App. 2008)).

It was this language about “fundamentally fair procedures” that the Kentucky Court of Appeals relied on in its ruling. The court noted that although the United States Supreme Court did not believe that an attorney was always necessary for “fundamentally fair procedures,” Kentucky’s legislature seemed to disagree.<sup>159</sup> Since “the Kentucky legislature had codified a parent’s right to counsel during the dependency and termination proceedings,” a “fundamentally fair procedure, as required by the U.S. Constitution and Kentucky statutes” required a “parent [to be] represented by counsel at every critical stage of the proceedings.”<sup>160</sup> In this way, the Kentucky court used the state statute to support a different mechanism for a federal constitutional right to counsel. The Kentucky Supreme Court granted discretionary review of the appellate court’s decision, and an equally divided court issued an order affirming the lower court’s opinion.<sup>161</sup> The Kentucky Supreme Court did not issue an opinion to explain its reasoning.<sup>162</sup>

### *Lessons Learned*

Parents’ right-to-counsel protections are remarkable for several reasons. First, it is interesting that so many jurisdictions have codified this right through legislation given its technical nature. As a legislator myself, I can attest that it is difficult to build coalitions of support for any court-focused legislation. Many laws focused on judicial processes are highly technical and difficult to explain to the public, and—as a result—hard to form advocacy coalitions around.<sup>163</sup>

The second reason the success of parental right-to-counsel legislation is noteworthy is because of its beneficiaries. Those who are hauled before the court for termination proceedings are perceived by the public as less sympathetic defendants. By virtue of the proceeding, they have been found by a court to have abused or neglected their children. At the time the state seeks to terminate a parent’s rights, many individuals may have criminal convictions for this abuse. Providing additional rights and protections for people adjudged guilty of crimes against *any* child—particularly their own child—is a difficult topic to organize around, even if those additional rights and protections are important. Similarly, those who benefit the most from

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

<sup>160</sup> *Id.*

<sup>161</sup> Cabinet for Health & Fam. Servs. v. M.Q.M., No. 2022-SC-0383-DGE, 2023 WL 6452807 (Ky. Sept. 14, 2023).

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

<sup>163</sup> Much research has focused on the relationship between advocacy and effective policy change. In many ways the idea is intuitive: legislative change happens when advocacy groups—who speak for and speak to the public—build support and momentum for particular causes. See Bodille Arensman, *Advocacy Outcomes Are Not Self-Evident: The Quest for Outcome Identification*, 41 AM. J. OF EVALUATION 216 (2020).

parental right-to-counsel laws are low-income people who are struggling—not those with the resources to hire their own attorney should they ever need to.<sup>164</sup>

Nonetheless, one way to understand the success of the parents' right-to-counsel movement is by considering the particular personal liberty implicated: the fundamental right of parents to bring up their children. Rosalie Young argues that society has historically viewed children as “the chattels owned by their parents,” and that many state codes are rooted in “the fundamental right of a parent to raise their own children.”<sup>165</sup> Thus, Young argues that statutes granting parents a right to counsel in termination proceedings are thus rooted in the idea of protecting parents' rights.<sup>166</sup>

Similarly, the success of the parents' right-to-counsel movement can likely be attributed to the important policy outcomes at stake. The implicated policy outcome of parents' right-to-counsel laws is the well-being of children, an outcome which is highly prioritized by communities. In her article, Young argues that communities accept that it is in the best interests of a child to remain with his or her parents whenever possible.<sup>167</sup> This means that the State—as an entity looking out for a child's best interests—should put into place procedures to make sure it does not harm children by terminating a parent-child relationship where termination is not warranted.<sup>168</sup>

Another narrative around these laws that is emerging—although likely was not impactful until recently—is grounded in equity: these statutory protections are especially important for poor parents and parents of color.<sup>169</sup>

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<sup>164</sup> Relatedly, it is hard to evidence of much public-facing advocacy around parental right-to-counsel in termination proceedings. Although some organizations focused generally around the right to civil counsel raise awareness about the issue, none of them are solely focused on this cause. More importantly, many of them were not around during these policy debates. The National Coalition for a Civil Right to Counsel was not founded until 2003. *About the NCCRC*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/about> [<https://perma.cc/76KM-G28D>] (last visited Jan. 24, 2023). Today, there are no public groups or coalitions that advocate specifically for parents who are having or have had their rights terminated. Although there are some news organizations that highlight the injustices faced by particular families, see John Hill, *A Judge Took Away These Kids for Good – Until a Higher Court Found a Mistake*, HONOLULU CIV. BEAT (May 18, 2022), <https://www.civilbeat.org/2022/05/a-judge-took-away-these-kids-for-good-until-a-higher-court-found-a-mistake/> [<https://perma.cc/6QAC-J28S>] (last visited January 24, 2023), these stories do not seem to be a flashpoint for broader community organizing.

<sup>165</sup> See Young, *supra* note 114, at 266, 268.

<sup>166</sup> *Id.* at 266. The concept of “parental rights” has recently risen to prominence as a justification for harmful legislation, such as Florida's “Parental Rights in Education” bill, also known as the “Don't Say Gay” bill. See FL H.B. 1557, 2022 Gen. Sess. (Fla. 2022); see also Dana Goldstein, *Opponents Call It ‘The Don't Say Gay’ Bill. Here's What It Says*, THE N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/us/dont-say-gay-bill-florida.html> [<https://perma.cc/SU32-EH3J>] (describing the legislation and its concerning provisions). Thus, at this moment, it is important to acknowledge the way that this historical view of parental rights can—and currently is being used to—harm children.

<sup>167</sup> See Young, *supra* note 114, at 268.

<sup>168</sup> *Id.*

<sup>169</sup> Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1041 (2003).

Scholars have argued that child protective service professionals tend to mistake poverty for neglect, making them more likely to report low-income families to child protective services.<sup>170</sup> Candra Bullock argues that this data reveals the bias in these systems—bias that leads many parents to be unjustly separated from their children based on their economic status.<sup>171</sup> This makes it especially important for poor people to have a right to counsel in these proceedings.<sup>172</sup> Similarly, a recent article noted that although there are no racial differences in the rates at which children experience abuse, doctors are up to nine times more likely to report Black parents for suspected abuse—a pattern that the authors argue may be undergirded by stereotyping and bias.<sup>173</sup> The authors hypothesize that this stereotyping leads doctors to over-diagnose abuse of Black children and under-diagnose it of white children.<sup>174</sup>

Of course, one also cannot ignore the language of *Lassiter* and its impact on the way states perceive this issue. *Lassiter* held that trial courts have broad discretion to determine whether due process necessitates appointing counsel for parental termination proceedings. Rather than try to guess exactly when and where these cases might constitutionally require a parent to be appointed counsel, many states chose to extend a categorical right. This decision meant that a state was less likely to be subjected to constant litigation from parties claiming that their federal constitutional rights had been violated. When viewed this way, the extension of this right to counsel was in the interest of a state by providing certainty that it was operating within the constitutional requirements of due process, saving on litigation costs, and providing at least an appearance of fairness in its court system.

### III. THE RISE OF HOME RENTERS' RIGHT TO COUNSEL

As explained in the previous section, the right to counsel in parental termination cases is relatively uniform and has been supported by both statutes and judicial decisions. It has taken root over several decades and is now embedded in the fabric of legal systems. State efforts to expand this right appear to have been based on concerns other than public pressure, such as protecting parents' rights and society's perceptions about the best interests of children.

By contrast, the renters' right to counsel is newer, less uniform, and stems exclusively from legislative bodies. At the beginning of 2017, no jurisdiction in America recognized a home renters' right to counsel. At the end of

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<sup>170</sup> *See id.*

<sup>171</sup> *Id.* at 1041.

<sup>172</sup> *Id.* at 1040.

<sup>173</sup> Kimberly Bernstein, Cynthia Najdowski, and Katherine Wahrer, *Racial Stereotyping and Misdiagnosis of Child Abuse*, 51 AM. PSYCH. ASS'N *Monitor on PSYCH.* 35 (2020).

<sup>174</sup> *Id.*

2022, three states and fifteen cities had such a right. As will be explained below, public engagement and targeted advocacy led to much of this progress. That advocacy is largely rooted in a basic premise: Legal representation leads to better outcomes.

This section will examine home renters' right-to-counsel laws, the factors and rationale behind them, and what lessons this movement can teach those interested in expanding the right to civil counsel.

### *Eviction*

Eviction in America is at a crisis level. There are 2.7 million households facing eviction each year.<sup>175</sup> The impacts of eviction are enormous, and eviction is a causative factor in perpetuating the cycle of poverty. To adequately situate the discussion of a right to counsel in the specific context of eviction, this section offers some necessary background.

Principally, it is important to understand eviction as a downstream consequence of America's lack of affordable housing. Data from the National Low Income Housing Coalition shows America needs 6.8 million additional affordable housing units to ensure that low-income families have sufficient housing options.<sup>176</sup> The Coalition also notes that 70% of all extremely low-income families pay more than half of their income in rent and that assistance programs help only 25% of extremely low-income individuals.<sup>177</sup> These cost-burdened families struggle financially, both to pay rent as well as to meet other basic needs. Many cities have commissioned studies or reports to document the affordable housing needs in their community, as well as the downstream consequences.<sup>178</sup>

The lack of affordable housing drives eviction and, relatedly, homelessness. The Eviction Lab—a national leader on eviction research and policy—explains that the lack of affordable housing means that “it has become harder for low-income families to keep up with rent and utility costs, and a growing number are living one misstep or emergency away from eviction.”<sup>179</sup>

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<sup>175</sup> Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Porton, and Matthew Desmond, *Estimating Eviction Prevalence Across the United States*, PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. (Mar. 18, 2022), <https://www.pnas.org/doi/10.1073/pnas.2116169119> [<https://perma.cc/473Q-J6RT>].

<sup>176</sup> *Why We Care: The Problem*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/explore-issues/why-we-care/problem> [<https://perma.cc/8876-DM7D>] (last visited Jan. 24, 2023).

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

<sup>178</sup> See, e.g., Louisville Office of Housing, *Housing Needs Assessment*, LOUISVILLEKY.GOV, <https://louisvilleky.gov/government/housing/housing-needs-assessment> [<https://perma.cc/6NGC-FDFU>] (last visited Sept. 30, 2023) (noting that there are enough affordable units to house less than half of extremely low-income individuals in the city of Louisville).

<sup>179</sup> *Why Eviction Matters*, EVICTION LAB, <https://evictionlab.org/why-eviction-matters/#who-is-at-risk> [<https://perma.cc/U28Z-BCS6>] (last visited Jan. 24, 2023) (hereinafter “Why Eviction Matters”).



Low-income women, domestic violence victims, and families with children are among the groups with the highest risk of experiencing eviction.<sup>180</sup>

An eviction can have a large impact on a person's physical and mental well-being. Research shows that those under threat of eviction experience many negative mental and physical health outcomes such as psychological distress, suicidal ideation, and high blood pressure.<sup>181</sup> Similarly, children born into housing instability and/or homelessness have lower birthweights, respiratory problems, more emergency department visits, and higher annual healthcare costs.<sup>182</sup>

There are other impacts of eviction. Eviction creates a legal record that can be a barrier to housing, as many landlords screen for recent evictions.<sup>183</sup> Since eviction is a civil proceeding, expungement proceedings to erase criminal records do not apply.<sup>184</sup> In many jurisdictions, therefore, a person who experiences eviction will have that eviction on their record for the remainder of their life.

Additional research has shown that eviction is linked to job loss, disruption in a child's schooling (as the child must often move schools), and higher rates of depression experienced as much as two years later.<sup>185</sup> The strength of these correlations has led the Eviction Lab to conclude that "[t]he evidence strongly indicates that eviction is not just a condition of poverty, it is a cause of it."<sup>186</sup>

The relationship between eviction and poverty is particularly salient with respect to one critical element of the eviction process: court appearances. Many people, when their landlord initiates an eviction proceeding, fail to show up for court.<sup>187</sup> When this happens, a default judgment is entered against them, and they are evicted.<sup>188</sup>

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<sup>180</sup> *Id.*; see also Matthew Desmond, Weihua An, Richelle Winkler, & Thomas Ferriss, *Evicting Children*, 92 SOC. FORCES 303, 303 (2013).

<sup>181</sup> Hugo Vásquez-Vera, Laia Palència, Ingrid Magna, Carlos Mena, Jaime Neira, & Carme Borrell, *The Threat of Home Eviction and its Effects on Health through the Equity Lens: A Systematic Review*, 175 SOC. SCI. MED. 199, 205 (2017).

<sup>182</sup> Robin E. Clark, Linda Weinreb, Julie M. Flahive, & Robert W. Seifert, *Infants Exposed to Homelessness: Health, Health Care Use, and Health Spending from Birth to Age Six*, 38 HEALTH AFFAIRS 721, 721 (2019).

<sup>183</sup> See Why Eviction Matters, *supra* note 179.

<sup>184</sup> Jaboa Lake & Leni Tupper, *Eviction Record Expungement Can Remove Barriers to Stable Housing*, CTR. for AM. PROGRESS (Sept. 30, 2021), <https://www.americanprogress.org/article/eviction-record-expungement-can-remove-barriers-stable-housing/> [<https://perma.cc/7HN2-EHYL>]; see also Katelyn Polk, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement As A Model for Effectively Sealing Evictions*, 15 NW. J. L. & SOC. POL'Y 338, 338 (2020).

<sup>185</sup> See Why Eviction Matters, *supra* note 179.

<sup>186</sup> *Id.*

<sup>187</sup> David A. Hoffman & Anton Strezhnev, *Longer Trips to Court Cause Evictions*, 120 PNAS 1, 1 (2023).

<sup>188</sup> *Id.*

Barriers to accessing the court system make it more likely that low-income people will have a default judgment entered against them. A recent study by David Hoffman and Anton Strezhnev found that 40% of those who were forced to leave their residences had to do so simply because they did not show up to court to contest the case against them.<sup>189</sup> That same study showed that the more difficult it was for someone to get to court, the more likely they were to default. Data showed that a one-hour increase in travel time increased the likelihood someone would fail to show up from 3.8% to 8.6%.<sup>190</sup> This is one surprising area where access to legal counsel might have an immediate impact. Attorneys can appear on behalf of clients, connect them to transportation resources, remind them of court dates, and reschedule appearances. Access to an attorney, therefore, may benefit a low-income client in areas outside of navigating the substantive law of eviction.

Because of the Supreme Court's holding in *Lassiter*, advocacy organizations have not seriously argued that there is a federal constitutional right to counsel in eviction proceedings. The few courts who have explicitly considered this issue have rejected it in relatively short order. For example, in *New York City Housing Authority v. Johnson*,<sup>191</sup> a trial-level court held that there is no federal constitutional right to appointed counsel in an eviction. The court first noted the *Lassiter* presumption against a right to appointed counsel in cases where liberty is not at stake, and then explained that this presumption can only be overcome by balancing the *Mathews v. Eldridge* factors: the private interests at stake, the risk of erroneous deprivation without an attorney, and the government interest that the case implicates.<sup>192</sup> The court, in turn, considered these factors, ultimately finding "while tenant's property interest in continued possession is certainly significant, it is not so fundamental an interest mandating a due process right to assigned counsel."<sup>193</sup> It also noted that there was nothing in New York's state law constitution that afforded Johnson such a right.<sup>194</sup>

Given a lack of legal foundation on which to rest, advocacy organizations have instead focused on creating a legislative right to counsel for those facing eviction. It is important to note that although these programs use the language of rights, most of them—as explained in more detail below—do not actually bestow a right in the traditional sense. Instead, many of these programs, as creatures of statute, merely direct cities or states to fund these programs.

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> N.Y.C. Hous. Auth. v. Johnson, 565 N.Y.S.2d 362, 364 (App. Div. 1990).

<sup>192</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 (1976).

<sup>193</sup> *Id.* at 364.

<sup>194</sup> *Id.* It is worth noting that new data showing the ongoing impact of housing instability, displacement, and eviction may change the way courts think about the private interest at stake. Although a thorough due process analysis of eviction is outside the scope of this particular paper, this is a potential area of future scholarship.

*History of Home Renters' Right to Counsel*

New York City was the first major U.S. city to pass a right-to-counsel law.<sup>195</sup> Examining the history of the New York City ordinance is important, as the law—and the process of passing it—laid the foundation that many future jurisdictions built upon.

New York City's journey to become the first city to enact a right-to-counsel ordinance began with establishing a housing-specific court in the 1970s to address cases stemming from poor housing conditions.<sup>196</sup> Advocates hoped this type of specialized court would provide renters with more protections.<sup>197</sup> Specifically, they hoped specialized judges and easy-to-navigate systems would improve outcomes for home renters. Yet, from the beginning, landlords had a distinct advantage. Many property owners were repeat players who knew the judges and had standing legal representation.<sup>198</sup> By contrast, most tenants did not have an attorney.

Not only were landlords likely to win on legal arguments, but they also often won by default when tenants did not show up to court. As is the case nationwide, many renters did not understand the rules of eviction court and the impact of a missed court date.<sup>199</sup> They did not realize that missing a single hearing can result in a court entering a default judgment, and that the one missed date can result in a person being evicted from their home.<sup>200</sup> This lack of awareness was another barrier that made housing court ineffective at achieving its goal of improving home renters' housing options.

It was from here that the right-to-counsel movement was born. Community Action for Safe Apartments (CASA),<sup>201</sup> a community advocacy group organizing renters, began hosting meetings where home renters would share their experience of housing court and its challenges.<sup>202</sup> Organizers

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<sup>195</sup> Much of this discussion of the New York history is drawn from a documentary produced by the organizations that led the efforts for a right-to-counsel law. Although there are other sources that document this movement, this video that tells the story of success from those on the ground working toward it is the most comprehensive and authentic source. See Documentary, *supra* note 8.

<sup>196</sup> *Id.*

<sup>197</sup> Leonard N. Cohen, *The New York City Housing Court—An Evaluation*, 17 URBAN ANN. 27, 28 (1979).

<sup>198</sup> Jan Hoffman, *Chaos Presides in New York Housing Courts*, N.Y. TIMES (Dec. 28, 1994) <https://www.nytimes.com/1994/12/28/nyregion/chaos-presides-in-new-york-housing-courts.html> [<https://perma.cc/4BWF-UTDG>] (noting that “ninety percent of tenants do not have lawyers and—many who many not speak English, much less know their rights—are bullied into signing hallway agreements by landlords’ lawyers brandishing cellular phones, calculators and legal papers”).

<sup>199</sup> See Documentary, *supra* note 8 at 9:14.

<sup>200</sup> *Id.*

<sup>201</sup> CASA is a project of New Settlement, an organization focused on social justice and poverty issues. *Community Action for Safe Apartments*, NEW SETTLEMENT, <https://newsettlement.org/casa/> [<https://perma.cc/59XA-QHTD>] (last accessed Dec. 23, 2023).

<sup>202</sup> See Documentary, *supra* note 8 at 4:00, 9:15.

documented shared issues, and ongoing town halls furthered these conversations.<sup>203</sup> Renters agreed that barriers like inadequate signage, insufficient access to translators, and insufficient access for people with disabilities, had impacted their ability to navigate court processes.<sup>204</sup> Many spoke about the power wielded by landlords' attorneys, who would often approach renters and offer legal settlements.<sup>205</sup> Tenants, not understanding that these attorneys represented only the property owner, would agree to the terms they suggested, in part because they believed the landlords' attorneys were looking out for them.<sup>206</sup> Most renters did not speak with any other attorney. There was only one legal aid attorney available for the 500–1000 eviction cases heard in housing court each day.<sup>207</sup>

In 2014, lawmakers introduced the first legislation to guarantee legal representation to low-income renters facing eviction.<sup>208</sup> After the bill's introduction, advocates built a coalition to move it forward.<sup>209</sup> At first, this coalition involved around fifteen organizations, all committed to building support for the measure.<sup>210</sup> Following a series of city-wide town halls,<sup>211</sup> resolutions by community boards,<sup>212</sup> and increased data-gathering,<sup>213</sup> the coalition of organizations grew to hundreds, and included labor unions, attorneys, and housing advocacy groups.<sup>214</sup>

Over the following months, momentum and public support continued to build. The day the ordinance was heard in committee, advocates arranged for eight hours of testimony from more than seventy individuals.<sup>215</sup> Community organizations utilized social media so effectively that hashtags

<sup>203</sup> *Id.* at 9:15.

<sup>204</sup> See Documentary, *supra* note 8, at 11:25; New Settlement Apartments' Community Action for Safe Apartments and the Community Development Project at the Urban Justice Center, *Tipping the Scales: A Report of Tenant Experiences in Bronx Housing Court*, NEW SETTLEMENT (Mar. 2013) at ii, [https://newsettlement.org/casa/wp-content/uploads/sites/7/2016/02/CDP.WEB\\_.doc\\_Report\\_CASA-TippingScales-full\\_201303.pdf](https://newsettlement.org/casa/wp-content/uploads/sites/7/2016/02/CDP.WEB_.doc_Report_CASA-TippingScales-full_201303.pdf) [<https://perma.cc/557Q-8UTZ>].

<sup>205</sup> See Documentary, *supra* note 8 at 2:10.

<sup>206</sup> *Id.* at 13:45.

<sup>207</sup> *Id.* at 16:10.

<sup>208</sup> *Id.* at 16:02.

<sup>209</sup> *Id.* at 17:30.

<sup>210</sup> *Id.* at 18:10.

<sup>211</sup> See Documentary, *supra* note 8 at 22:50.

<sup>212</sup> *Id.* at 24:20.

<sup>213</sup> *Id.* at 26:00.

<sup>214</sup> *Id.* at 30:45, 40:15; see also Jessica Silver-Greenberg, *For Tenants Facing Eviction, New York May Guarantee a Lawyer*, N. Y. TIMES (Sept. 26, 2016), <https://www.nytimes.com/2016/09/27/nyregion/legal-aid-tenants-in-new-york-housing-court.html> [<https://perma.cc/UR45-MBAH>] (explaining that the "bill has brought together a broad coalition that includes labor unions and the New York City Bar Association, as well as traditional tenant rights advocates").

<sup>215</sup> See Documentary, *supra* note 8 at 28:41.

related to the law trended on Twitter.<sup>216</sup> Shortly after the hearing, the coalition delivered 7,000 signatures in support of the law to the mayor.<sup>217</sup>

This ongoing public pressure had an impact on key decisionmakers. In 2017, Mayor Bill DeBlasio, who had initially been skeptical of the idea, came out in support of the right-to-counsel program.<sup>218</sup> After that, advocacy organizations and community members worked with his administration to draft the details of the legislation and ensure it was adequately funded in the city budget process.<sup>219</sup> Ultimately, the city's legislative body passed the bill in July 2017, and the mayor signed it into law shortly thereafter.<sup>220</sup>

The coalition that won the home renters' right to counsel in New York was well aware that their success could influence other locations, and the structure they built continues to be a framework.<sup>221</sup> Analyzing the success of the New York ordinance can elucidate how it impacted subsequent cities, and how it has shaped the current right-to-counsel movement.

One reason the movement was successful was the way it utilized data. In 2016, a private sector firm conducted a financial impact analysis of the proposed ordinance. This analysis, called the "Stout" analysis (named after the firm that completed it), showed that a right to counsel would save New York City \$320 million per year through reduced displacement, reduced eviction filings, and increased court efficiency.<sup>222</sup> This quantitative data was often cited not just in the New York right-to-counsel movement, but also by similar movements in other cities.

Advocates also believe the actions of other organizations, outside of just the coalition members, impacted the legislation's success. For example, *The New York Times* editorial board endorsed the right to counsel as an effective housing solution.<sup>223</sup> This broadened the platform of the renters' right-to-counsel movement and helped make the proposed policy program more visible. Increased public awareness of right-to-counsel programs was

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<sup>216</sup> *Id.* at 28:35.

<sup>217</sup> *Id.* at 33:45. The original petition is available online at *Petition, RIGHT TO COUNSEL NYC COAL.*, <https://www.righttocounselnyc.org/petition> [<https://perma.cc/PT4H-3JMW>] (last visited May 17, 2023).

<sup>218</sup> *See* Documentary, *supra* note 8 at 36:10.

<sup>219</sup> *Id.* at 38:10.

<sup>220</sup> *Id.* at 42:50; *see also* Office of the Mayor, *Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions*. NYC.Gov (Aug. 11, 2017) <https://www.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for#0> [<https://perma.cc/6YHD-XNZG>].

<sup>221</sup> *Supporting Right to Counsel Campaigns Nationally*, RIGHT TO COUNSEL NYC COAL., [https://www.righttocounselnyc.org/supporting\\_rtc\\_campaigns\\_across\\_the\\_country](https://www.righttocounselnyc.org/supporting_rtc_campaigns_across_the_country) [<https://perma.cc/EDP9-3A3X>] (last accessed Dec. 23, 2023) (“[Y]our fight is our fight and all our fights impact each other”).

<sup>222</sup> *Cost-Benefit Analysis for New York City Right-to-Counsel Legislation*, STOUT, <https://www.stout.com/en/experience/cost-benefit-analysis-for-nyc-right-to-counsel-legislation> [<https://perma.cc/ZAN7-S7FB>] (last visited Sept. 30, 2023); *See* Documentary, *supra* note 8, at 27:41.

<sup>223</sup> *See* Documentary, *supra* note 8, at 28:07.

important in New York because no other city had ever attempted to pass such a law. Citizens had no familiarity with the program, and no examples in other cities to which they could look.

Additionally, organizers credit the large and diverse coalition that supported the legislation for its success. They note that the coalition contained hundreds of organizations with different skills and networks. This meant that the movement had supporters with unique abilities to help them address legal concerns and political issues along the way.<sup>224</sup>

These advocacy efforts produced a right-to-counsel law of astonishing breadth. The right-to-counsel ordinance requires the city to provide legal representation to all New York City residential renters.<sup>225</sup> Foreclosures are included in the definition of covered proceedings, granting individuals going through foreclosure processes a right to legal assistance.<sup>226</sup> The law guarantees low-income individuals full legal representation, and it provides for all other individuals to receive “brief legal assistance.”<sup>227</sup> The law additionally requires that individuals have a lawyer when facing an administrative proceeding to terminate their tenancy, extending the right to counsel to this group as well.<sup>228</sup> The right established by the law attaches early in the eviction process, ensuring renters have access to legal counsel from their first hearing forward.<sup>229</sup> Organizers fought for this breadth and were satisfied that they received “everything [they] wanted” in the final legislation.<sup>230</sup>

Today, New York City’s right-to-counsel law is fully implemented, and the results are impressive. The city advertises the program, and it has established a hotline where anyone with questions about the program can call to find out if they are eligible to receive legal services.<sup>231</sup> Flyers about the program are available in fifteen languages and are posted throughout the city and on its website.<sup>232</sup> YouTube videos in both Spanish and English explain the program and how to pursue representation.<sup>233</sup>

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<sup>224</sup> *Id.* at 28:35.

<sup>225</sup> N.Y.C. ADMIN. CODE §§ 26-1301, 1302 (2023).

<sup>226</sup> N.Y.C. ADMIN. CODE § 26-1301.

<sup>227</sup> *Id.* This brief legal assistance is what many lawyers refer to as “limited representation.” See Michele N. Struffolino, *Limited Scope Not Limited Competence: Skills Needed to Provide Increased Access to Justice Through Unbundled Legal Services in Domestic-Relations Matters*, 56 S. TEX. L. REV. 159 (2014). In these types of programs lawyers will provide limited advice to a home renter, perhaps going so far as to help them negotiate a deal with their landlord or offer guidance on how to file a *pro se* motion. In limited assistance representation, however, an attorney does not enter an appearance in a case (as in full representation), and they do not represent the client in an ongoing way.

<sup>228</sup> *Id.*

<sup>229</sup> N.Y.C. ADMIN. CODE § 26-1302.

<sup>230</sup> See Documentary, *supra* note 8, at 43:02.

<sup>231</sup> *Tenant Support Resources*, NYC Mayor’s PUB. ENGAGEMENT UNIT, <https://www.nyc.gov/site/mayorspeu/resources/right-to-counsel.page> [<https://perma.cc/JVN6-THJC>] (last visited Sept. 30, 2023).

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

Data shows the program is effective at keeping home renters housed and is a cost-effective investment of taxpayer dollars. In FY 2020, 100% of renters with eviction cases had access to legal services, and 71% of those had full legal representation.<sup>234</sup> In FY 2021, the program provided legal assistance to 100,000 New Yorkers.<sup>235</sup> Data shows that 84% of represented renters have remained in their homes, and as the renters in an area gained access to guaranteed counsel, the eviction rate in those areas declined by 30%.<sup>236</sup>

### *Other Early Adopters*

San Francisco was the second city to enact a home renter’s right-to-counsel program, and it took its own unique path. In 2012, the city and county of San Francisco pledged to become the first right-to-counsel city in the U.S.<sup>237</sup> Following that pledge, members of the Right to Counsel Committee—a coalition of advocates—gathered over 21,000 signatures to get a renters’ right-to-counsel initiative on the ballot.<sup>238</sup> In 2018, this ballot initiative passed 56% to 44%.<sup>239</sup>

The text of the ballot initiative—known as Proposition F—cited *Gideon v. Wainwright* and stated that the case stood for the idea that “reason, reflection, and the fair administration of justice require that every person hauled into court on criminal charges shall have the right to be represented by legal counsel . . .”<sup>240</sup> The text went on to note that, in civil cases, “there exists an inherent unfairness if a case goes forward with one side represented

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<sup>234</sup> *New York City’s First-in-Nation Right-to-Counsel Program Expanded Citywide Ahead of Schedule*, OFFICE OF THE MAYOR (Nov. 17, 2021), <https://www.nyc.gov/office-of-the-mayor/news/769-21/new-york-city-s-first-in-nation-right-to-counsel-program-expanded-citywide-ahead-schedule> [https://perma.cc/79P3-KQ6U].

<sup>235</sup> NYC Human Resources Administration Office of Civil Justice, *Universal Access to Legal Services*, NYC.GOV, at 3 (2021) [https://www.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA\\_Annual\\_Report\\_2021.pdf](https://www.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ-UA_Annual_Report_2021.pdf) [https://perma.cc/6CXM-BKN8].

<sup>236</sup> *Legal Representation in Eviction Proceedings*, THE NETWORK FOR PUB. HEALTH L., at 2 (May 2021), <https://www.networkforphl.org/wp-content/uploads/2021/05/Fact-Sheet-RTC.pdf> [https://perma.cc/ADE3-3CCP]. It is important to note that the implementation of the ordinance has not been without its challenges. Recently, resignations by public defenders (who provide the representation) have “strain[ed] the services the agencies provide.” Gregory Schmidt, ‘*At Their Breaking Point*’: *Tenants Fight to Stay in Their Homes*, N.Y. TIMES (June 26, 2022), <https://www.nytimes.com/2022/06/24/business/bronx-housing-court-evictions.html> [perma.cc/FWJ8-5JNH]. Advocates acknowledge that a high number of eviction filings and resource constraints lead “[t]enants [to] fall through the cracks.” *Id.*

<sup>237</sup> *From the Field: San Francisco Voters Guarantee Right to Counsel for All Tenants Facing Eviction*, NAT’L LOW INCOME HOUS. COAL. (June 11, 2018), <https://nlihc.org/resource/field-san-francisco-voters-guarantee-right-counsel-all-tenants-facing-eviction> [https://perma.cc/BE2R-NTFH] (hereinafter “From the Field”).

<sup>238</sup> *Id.*

<sup>239</sup> See Enacted Legislation, *supra* note 3.

<sup>240</sup> S.F., CAL., No Eviction Without Representation Act (2018) (codified at S.F. Admin. Code § 58.4), available at [https://sfelections.sfgov.org/sites/default/files/Documents/candidates/Legal\\_Text\\_No\\_Eviction\\_Without\\_Representation.pdf](https://sfelections.sfgov.org/sites/default/files/Documents/candidates/Legal_Text_No_Eviction_Without_Representation.pdf) [https://perma.cc/D7TB-89C4].

and the other side unrepresented.”<sup>241</sup> In this way, San Francisco positioned Proposition F as a strategic initiative to build the Civil Gideon movement. Of course, the proposition also detailed the need for this policy intervention, noting that data showed 80% to 90% of renters facing eviction did not have access to legal representation.<sup>242</sup>

The program created by the passage of Proposition F was even broader than the initial New York City ordinance. The new law required San Francisco City and County to “fully fund a program to provide legal representation for all tenants within the City and County who are faced with legal proceedings to evict them from their residence.”<sup>243</sup> Unlike New York, which limited the program to people either over sixty or those who earn less than 200% of the federal poverty level, the San Francisco law had no such requirements. This decision was intentional and rooted in the idea that even middle-income families can struggle to afford an attorney.<sup>244</sup>

The fact that the proposition required full funding of the program makes the San Francisco right-to-counsel law one of the more stable in the country. In many other jurisdictions, these programs can cease to exist if lawmakers fail to appropriate funds to adequately run them. Similarly, governments in most places have the option to shrink right-to-counsel programs by cutting their budgets. In San Francisco, by contrast, policymakers lack this discretion, as they are required to fully fund the program.<sup>245</sup>

Initial evaluations of the San Francisco program shows that it, too, has been successful. A report from 2020–2021 showed that 59% of renters who had full representation remained in the same home after the eviction process had concluded.<sup>246</sup> Of those who did not remain in their prior home, 70% reached a settlement that gave them sufficient time and money to move out.<sup>247</sup>

This same data indicates that having access to full representation—an attorney who represents a person comprehensively throughout the entire process—is more effective than brief legal representation, wherein a person only consults with a lawyer sporadically. Data shows that only 19% of those with limited, brief representation retained their housing units, and only 62% of those that did not retain their units reached a settlement agreement with

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<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See From the Field, *supra* note 237.

<sup>245</sup> S.F., Cal., No Eviction Without Representation Act (of 2018) (codified at S.F. Admin. Code § 58.4). (June 5, 2018), available at [https://sfelections.sfgov.org/sites/default/files/Documents/candidates/Legal\\_Text\\_No\\_Eviction\\_Without\\_Representation.pdf](https://sfelections.sfgov.org/sites/default/files/Documents/candidates/Legal_Text_No_Eviction_Without_Representation.pdf) [<https://perma.cc/MR3F-N8YK>].

<sup>246</sup> *Tenant Right to Counsel Data – Outcomes*, EVICTION DEFENSE COLLABORATIVE (Dec. 2021), [http://civilrighttocounsel.org/uploaded\\_files/290/RTC\\_outcomes\\_March\\_2020\\_-\\_Dec\\_2021.pdf](http://civilrighttocounsel.org/uploaded_files/290/RTC_outcomes_March_2020_-_Dec_2021.pdf) [<https://perma.cc/7RZH-97GS>].

<sup>247</sup> *Id.*



favorable terms.<sup>248</sup> These numbers were significantly lower than the outcomes that home renters were able to achieve with full representation, where 59% of clients retained their units and 70% of those who did not retain their units reached a favorable settlement.<sup>249</sup> This data speaks to a possible effectiveness gap between full and limited scope representation, and this gap should be an area of future study.<sup>250</sup>

In 2019, Cleveland became the first city outside of a large coastal community to enact a program.<sup>251</sup> Although the law did guarantee full legal representation in eviction court to anyone covered by the law, it had the most stringent requirements of any program to date: the ordinance limited coverage to those earning less than 100% of the federal poverty level and who had at least one child in the home.<sup>252</sup> Although the city contributed \$1 million over two years to the project, federal funding (\$1 million) and private donations (\$3 million) provided the bulk of the operating budget.<sup>253</sup>

Although its program requirements make Cleveland the most restrictive right-to-counsel program in the country, the program's 2020 annual report showed that it still has been effective. In its first year, over 90% of those represented by the program were able to avoid disruptive displacement, and 83% of renters were able to get more time to move.<sup>254</sup> Program attorneys represented the families of over 700 children.<sup>255</sup> Supporters note

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> There have of course been studies of the effectiveness of limited assistance representation as compared to traditional full service representation. *See, e.g.*, D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Philip Hennessy, *How Effective are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court*, UNIV. OF CHI. SCH. OF LAW (2012). However, some of the data of these studies appears to conflict with the data collected as part of initial right-to-counsel programs. For that reason, more research is needed to understand when full representation is effective, when limited assistance representation can offer the same benefits, and how policymakers can maximize the benefits of providing individuals with access to legal assistance.

<sup>251</sup> *See City of Cleveland Creates Right to Counsel in Cleveland Housing Court*, LEGAL AID SOC'Y OF CLEVELAND (Oct. 1, 2019), <https://laslev.org/20191001/> [<https://perma.cc/D4HD-TKH4>]; Kaylyn Hlavaty, *Legislation Passes to Protect Children in Homes Facing Eviction by Providing Free Legal Help for Low-Income Tenants*, ABC NEWS 5 CLEVELAND (Oct. 1, 2019), <https://www.news5cleveland.com/news/local-news/cleveland-metro/legislation-passes-to-protect-children-in-homes-facing-eviction-by-providing-free-legal-help-for-low-income-tenants> [<https://perma.cc/XC3W-UR2Z>].

<sup>252</sup> CLEVELAND, OHIO, CODE § 375.12 (June 30, 2020), [https://codelibrary.amlegal.com/codes/cleveland/latest/cleveland\\_oh/0-0-0-49335](https://codelibrary.amlegal.com/codes/cleveland/latest/cleveland_oh/0-0-0-49335) [<https://perma.cc/399T-PGEQ>].

<sup>253</sup> *See Enacted Legislation*, *supra* note 3. This reliance on federal funding and private donations perhaps makes the Cleveland program less stable than New York's program, where funding is part of the general budget, or San Francisco's program, where the enacted proposition requires the city to fully fund the program.

<sup>254</sup> Right to Counsel—Cleveland, *Annual Report to Cleveland City Council and courtesy report to Cleveland Mayor's Office* UNITED WAY & LEGAL AID FOR THE CITY OF CLEVELAND (Jan. 31, 2021), <https://laslev.org/wp-content/uploads/January-2021-report-on-initial-6-months-of-Right-to-Counsel-Cleveland-high-res.pdf> [<https://perma.cc/QBZ9-DYSQ>].

<sup>255</sup> *Id.*

the program's importance in a city where eviction disproportionately impacts Black female-headed households.<sup>256</sup>

The legislative record from Cleveland shows the speed with which right-to-counsel ordinances could move through legislative bodies. In contrast to the years spent building support in New York City, the Cleveland ordinance was filed on August 21, 2019, and it passed just over a month later on September 30, 2019.<sup>257</sup> It was implemented as an emergency measure, allowing it to enter into immediate effect upon its passage and signature by the mayor.<sup>258</sup> It passed the city council unanimously.<sup>259</sup>

Cleveland's speed was not unique. After Cleveland, Philadelphia also passed an ordinance in 2019, bringing the total number of jurisdictions with a renters' right to counsel to five. As COVID-19 focused policymakers on housing needs, right-to-counsel ordinances became an established policy intervention.<sup>260</sup> In 2020, Boulder passed a ballot initiative, and Baltimore approved a city ordinance. These laws moved at a similarly fast pace. Lawmakers filed the Philadelphia ordinance in May, and the mayor signed it into law seven months later.<sup>261</sup> Supporters submitted signatures for the Boulder initiative in June, and voters passed the initiative in November. Notably, Boulder's ballot initiative not only approved the program but also approved an excise tax on rental licenses to fund it.<sup>262</sup> The Baltimore ordinance was introduced on October 5, 2020, passed by the city council on November 16, 2020, and signed into law by the mayor on December 7, 2020.<sup>263</sup>

### *More Recent Developments*

In 2021, the pace at which right-to-counsel legislation was passed continued to increase. Louisville, Denver, Toledo, Minneapolis, and Kansas City

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<sup>256</sup> Prior to Covid-19, over half of the 9,000 evictions filed annually in Cleveland involved Black female-headed households with minor children. *Id.*

<sup>257</sup> *Emergency Ordinance Record*, CLEVELAND CITY COUNCIL, <https://cityofcleveland.legistar.com/LegislationDetail.aspx?ID=4138057&GUID=C96C18A7-4516-4439-A9FF-A3766DB6066D> [<https://perma.cc/J5QZ-6TWW>] (last accessed Dec. 23, 2023).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* Two members abstained or were excused from voting. *Id.*

<sup>260</sup> *Lessons from Four Cities Fighting to Stop Evictions with Right to Counsel*, RIGHT TO COUNSEL NYC COAL., [https://d3n8a8pro7vhmx.cloudfront.net/righttocounselnyc/pages/1318/attachments/original/1634920669/Lessons\\_Learned\\_Key\\_Highlights\\_from\\_the\\_National\\_Webinar\\_on\\_RTC-compressed.pdf?1634920669](https://d3n8a8pro7vhmx.cloudfront.net/righttocounselnyc/pages/1318/attachments/original/1634920669/Lessons_Learned_Key_Highlights_from_the_National_Webinar_on_RTC-compressed.pdf?1634920669) [<https://perma.cc/P6F4-N3EP>] (noting key motivating issues driving various cities to enact renters right-to-counsel laws).

<sup>261</sup> Phila., Pa., Bill No. 190386 (May 9, 2019), <https://phila.legistar.com/LegislationDetail.aspx?ID=3943568&GUID=EC5846F5-CECE-414F-A9F4-CA2F49D698B1> [<https://perma.cc/LX89-DENY>].

<sup>262</sup> Boulder, Colo., Municipal Code Ordinance 8412 (Sept. 1, 2020), [https://library.municode.com/co/boulder/ordinances/municipal\\_code?nodeId=1048833](https://library.municode.com/co/boulder/ordinances/municipal_code?nodeId=1048833) [<https://perma.cc/88MP-LVG8>].

<sup>263</sup> Baltimore, Md., Ordinance 20-465, <https://baltimore.legistar.com/LegislationDetail.aspx?ID=4659244&GUID=77F2AE9E-8F22-4DA9-8248-775803D3C766> [<https://perma.cc/YR2R-AQX4>].

all passed local ordinances that year, broadening the types and locations of the cities with these types of programs. Every city except for Toledo was funded by at least some federal dollars made available in the wake of the COVID-19 pandemic.<sup>264</sup> As these one-time dollars are spent, jurisdictions will have to make decisions about whether and how to continue funding these programs. Cities who have not established a dedicated funding stream should draw lessons from those who have.

2021 also saw three states approve right-to-counsel measures: Washington, Maryland, and Connecticut. Although these bills also moved quickly (the Washington bill was introduced in February and passed in March, for example), they garnered more opposition than the local ordinances did.<sup>265</sup> For example, the Washington law passed the House 72-26, squeaked through the Senate 27-22, and was partially vetoed by the Governor.<sup>266</sup> The bill did get some bipartisan support—in 2021, the Washington State House was composed of 57 Democrats and 41 Republicans, and the State Senate was composed of 29 Democrats and 20 Republicans.<sup>267</sup>

Since then, the right-to-counsel movement has continued to gain steam. New Orleans and Detroit passed local ordinances in 2022.<sup>268</sup> Los Angeles passed a right-to-counsel law in 2023.<sup>269</sup> A right-to-counsel bill tracker from the Coalition for a Civil Right to Counsel shows activity in many more jurisdictions.<sup>270</sup> St. Petersburg, Florida, for example, has asked a city agency to study the creation of a right-to-counsel program.<sup>271</sup> South Carolina has a statewide bill pending in its state legislature.<sup>272</sup> Houston is funding a task

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<sup>264</sup> See Enacted Legislation, *supra* note 3.

<sup>265</sup> 2021 Wash. Reg. Sess. Laws S. 5160, 67th Leg., <https://legiscan.com/WA/bill/SB5160/2021> [<https://perma.cc/Q3BH-LLER>]; The Maryland bill SB 662 (2021) passed the Senate and HB 571 (2021) passed the House with respective votes of 95-38 and 93-37 before garnering more support in the Senate. SB662 (2021), <https://legiscan.com/MD/bill/SB662/2022> [<https://perma.cc/SCU9-WJN4>]; HB571 (2021) <https://legiscan.com/MD/bill/HB571/2022> [<https://perma.cc/MZH6-KNM4>]. The Connecticut bill initially passed the House by a vote of 109-38, and the Senate by a vote of 22-13. HB-6531 (2021) Roll Call Votes (2021), <https://www.cga.ct.gov/2021/VOTE/H/PDF/2021HV-00092-R00HB06531-HV.PDF> [<https://perma.cc/B4Q3-JS29>]; <https://www.cga.ct.gov/2021/VOTE/S/PDF/2021SV-00248-R00HB06531-SV.PDF> [<https://perma.cc/5Z3C-96E2>].

<sup>266</sup> 2021 Wash. Reg. Sess. Laws S. 5160, 67th Leg., <https://legiscan.com/WA/bill/SB5160/2021> [<https://perma.cc/Q3BH-LLER>].

<sup>267</sup> 2021 *State and Legislative Partisan Composition*, NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 2021), [https://documents.ncsl.org/wwwncsl/Elections/Legis\\_Control\\_2-2021.pdf](https://documents.ncsl.org/wwwncsl/Elections/Legis_Control_2-2021.pdf) [<https://perma.cc/9BTD-ZE2U>].

<sup>268</sup> *New Orleans and Detroit Extend Right to Counsel to Residents*, NAT'L LOW INCOME HOUS. COAL. (May 16, 2022), <https://nlihc.org/resource/new-orleans-and-detroit-extend-right-counsel-residents> [<https://perma.cc/F8R4-B2TD>].

<sup>269</sup> See *supra* note 16.

<sup>270</sup> See Status Map, *supra* note 20.

<sup>271</sup> *St. Pete Weighs Right To Counsel For Tenants Facing Eviction*, NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL (June 17, 2023), [http://civilrighttocounsel.org/major\\_developments/1555](http://civilrighttocounsel.org/major_developments/1555) [<https://perma.cc/629K-UJ4C>].

<sup>272</sup> *Id.*

force that has recommended establishing a right to eviction counsel in certain Houston courts.<sup>273</sup> The movement is continuing to spread.

#### IV. UNDERSTANDING RIGHT TO COUNSEL'S SUCCESS

Most right-to-counsel legislation functions like an appropriations bill, authorizing the expenditure of government funds for this purpose and appropriating money to cover it.<sup>274</sup> That means that the “right to counsel” created by these programs is not really a “right” at all. Although there are some cities that have created more stable revenue streams and income sources to fund these programs,<sup>275</sup> most are at the mercy of general budget decisions made annually by elected officials.

Notably, nothing in the Louisville ordinance—like other cities’ ordinances—speaks to any “right” created by the program, nor could it. Cities are state-created entities, and the scope of their power is determined by the state within which they sit.<sup>276</sup> Louisville has the power to create this program because the Kentucky General Assembly authorized it to do so.<sup>277</sup> Thus, Louisville—like many cities—is incapable of creating a constitutional “right” in any permanent, meaningful sense. And, as discussed earlier, there is no right to eviction counsel under current U.S. Supreme Court precedent and no state has taken steps to include it in their state constitution.

In this way, right to eviction counsel is quite different than a right to counsel in parental termination proceedings. Both “rights” originate in

<sup>273</sup> *Certain Houston Courts Will Provide Counsel for All Tenants*, NAT’L COAL. FOR A CIVIL RIGHT TO COUNSEL (Mar. 10, 2021), [http://civilrighttocounsel.org/major\\_developments/1464](http://civilrighttocounsel.org/major_developments/1464) [<https://perma.cc/R7KD-AWJ5>].

<sup>274</sup> The Louisville ordinance, for example, is like that of many other cities when it states that “[c]overed individuals may receive access to legal services from designated organizations under a contract, grant, or other services agreement with the lead partner organization.” *Legislation Text*, LOUISVILLE METRO GOV. (2021) at 6, <https://louisville.legistar.com/ViewReport.ashx?M=R&N=Text&GID=370&ID=4300061&GUID=160BF86A-357E-49E8-A8ED-A41B1FE9259C&Title=Legislation+Text> [<https://perma.cc/ML6S-QNG9>] (hereinafter “LMCO 151.99”). It defines “covered individual” as a “person who occupies a dwelling, with at least one (1) child, under a valid lease . . . whose annual gross income is not in excess of one-hundred and twenty-five percent (125%) of the federal poverty guidelines[.]” *Id.* at 5. Similarly, the ordinance explains that “designated organizations” and the lead partner organization are not-for-profits that can “provide legal services . . . to income-eligible individuals facing eviction[.]” *Id.* The ordinance goes on to explain that an individual may receive these services in “[a]ny proceeding in Jefferson County District Court, Eviction Court (“Eviction Court”) to evict, eject, or terminate the tenancy of a covered individual.” *Id.* In addition to setting the parameters of the program, the ordinance also funds it by amending the annual budget ordinance to appropriate money to the program. *Id.*

<sup>275</sup> *See, e.g.*, Boulder, Colo., Municipal Code Ordinance 8412 (Sept. 1, 2020), [https://library.municode.com/co/boulder/ordinances/municipal\\_code?nodeId=1048833](https://library.municode.com/co/boulder/ordinances/municipal_code?nodeId=1048833) [<https://perma.cc/88MP-LVG8>].

<sup>276</sup> For an overview of state preemption, including a discussion of home rule and Dillon’s rule, *see generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113 (2007).

<sup>277</sup> *See generally* Ky. Rev. Stat. § 67(C) (outlining state powers in creating local governments and delineating their powers).

statutes, but the statutes related to parents arose in response to a constitutional right articulated by the Supreme Court. The current state of the law indicates that parents *do* have a right to counsel in some terminations of parental rights, although there are no clear guidelines about exactly which terminations of parental rights might qualify. Thus, it is unsurprising that the Supreme Court’s announcement of this right triggered some states to proactively legislate to protect it.<sup>278</sup> Not doing so generates a great deal of uncertainty for state governments. States would face constant litigation alleging that they have violated parents’ due process rights and be forced to navigate ever-changing legal goalposts.

In contrast, cities and a few states have decided that providing renters facing eviction with legal counsel is a wise policy choice. Even though there is not currently a colorable argument that this is a constitutional right, elected officials have decided that it is an important service to provide. For that reason, they grant this “right” based solely on policy concerns.

With a full understanding of what these laws are (and are not), it is important to examine the factors that have made them so successful so quickly. The first reason is the inherent ambiguity of these programs. Laws that provide legal representation for home renters have the appearance of “rights-creating” laws while actually functioning as appropriations laws. This allows legislators who sponsor them to adopt the terminology that makes the most sense in their political context. Although the movement speaks of a “right to counsel” in eviction proceedings, not all policymakers favor this terminology. Mayor Bill De Blasio’s team spoke of the program as providing “universal access” to legal counsel, and requested that community advocates at the bill signing did not refer to it as a “right.”<sup>279</sup> In Louisville, I emphasized during both the committee and the floor debate that although I referred to the law as a “right-to-counsel ordinance,” the program could be discontinued by simply deciding to remove its funding—it did not bind future legislators.<sup>280</sup>

So why, then, invoke the right-to-counsel terminology? The answer likely varies from jurisdiction to jurisdiction. In Louisville, I decided to use it because it invoked the larger access-to-justice movement in which I wished to situate the ordinance. For other places, it may be that using the term “right” makes it feel more permanent and implies that the ordinance has more authority than a mere appropriation—even if this is not legally

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<sup>278</sup> See Young, *supra* note 114, at 262 (detailing how states had responded to Lassiter and noting that “[s]ix of the states [including Florida, North Carolina, Texas, Vermont, Virginia, and West Virginia] which failed to guarantee counsel prior to *Lassiter* have enacted the most demanding right to counsel statutes”); see also Status Map, *supra* note 20 (showing every state has either a categorical or discretionary right to appointed counsel in parental termination cases).

<sup>279</sup> See Documentary, *supra* note 8, at 44:23.

<sup>280</sup> *Committee Hearing For O-132-21*, LOUISVILLE LEGISTAR, [https://louisville.granicus.com/player/clip/6946?view\\_id=2&meta\\_id=1306817&redirect=true&h=e9f97898bd7179b4d6bd6f-f8a699c9c9](https://louisville.granicus.com/player/clip/6946?view_id=2&meta_id=1306817&redirect=true&h=e9f97898bd7179b4d6bd6f-f8a699c9c9) [https://perma.cc/YY6G-FUQN] (last visited Nov. 9, 2023) at 1:27:30-1:29:00 (explaining that the “right” is contingent upon future decisions to continue to fund).

the case. It is for this reason that cities likely choose to pass legislation that “codifies” the program in their codes of ordinances, even though many could achieve the same result with a line-item appropriation in a spending bill.

The statutory, non-permanent nature of this right may explain why proposed ordinances have moved so quickly: legislators understand that they can revoke funding for it at any time.<sup>281</sup> This creates the ability for legislators to act expediently, knowing that no decisions are permanent. Policymakers can address a pressing political concern—housing, eviction, and homelessness—with no legally binding commitment. They can invest in solving these problems—at least until those investments become too costly.

A second reason why renters’ right to counsel as a policy intervention has become so popular so quickly is obvious: Housing issues are prevalent and all-consuming, particularly for local governments. As explained earlier, America needs 6.8 million affordable housing units to guarantee that people have access to shelter.<sup>282</sup> The lack of affordable housing drives evictions and homelessness. Low-income women, domestic violence victims, and families with children are among the groups with the highest risk of experiencing eviction.<sup>283</sup> The fact that the affordable housing crisis disproportionately impacts already marginalized groups makes it even more important to address. Cities, as the level of government most involved in these issues, have the greatest interest in finding policy solutions.

A third reason for the success of right-to-counsel laws is the unique nature of eviction proceedings. Evictions are fast-moving cases where the presence or absence of an attorney can dramatically impact the cases’ outcome. Data shows that legal representation improves outcomes for home renters.<sup>284</sup> Those facing eviction with the assistance of an attorney are less likely to have a judgment entered against them, pay large sums of money (i.e., back rent), and experience an eviction.<sup>285</sup> These impacts are most pronounced in low-income areas and in areas with a higher percentage of non-citizen residents.<sup>286</sup> A majority of landlords are represented, and a renter having an attorney can help balance the scales.<sup>287</sup>

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<sup>281</sup> As explained above, there is not currently a substantive due process “right” to counsel when a renter is facing eviction, and procedural due process rights apply only to quasi-judicial or adjudicatory settings—not the enactment of legislation. 6B AM. JUR. 2D CONSTITUTIONAL LAW § 907 (1998). There may, of course, be political barriers to taking away a previously conferred benefit, in the way of public outcry and media attention.

<sup>282</sup> See *supra* note 176.

<sup>283</sup> *Id.*; see also Desmond et. al., *supra* note 180, at 321.

<sup>284</sup> Michael T. Cassidy & Janet Currie, *The Effects of Legal Representation on Tenant Outcomes in Housing Court: Evidence from New York City’s Universal Access Program*, NAT’LL BUREAU OF ECONOMIC RESEARCH, at 3 (July 2022) <http://www.nber.org/papers/w29836> [<https://perma.cc/7EQG-WRZW>].

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 1-2.

The fourth reason for the growing popularity of right-to-counsel legislation is just that: its popularity. Enacting a right to eviction counsel has become a trendy thing for cities to do—in part because so many other cities are doing it. Cities reference one another in their ordinances. The Louisville ordinance notes that “a number of cities across America have implemented” this right, and “these cities have found such programs to be cost effective.”<sup>288</sup> The ordinance authorizing the Boulder ballot initiative references the legislation in New York, San Francisco, Newark, Cleveland, and Philadelphia.<sup>289</sup> A spokesperson for the National Coalition for a Civil Right to Counsel acknowledged in a press interview that this type of legislation is “hugely popular” at present and that he “could list to you two dozen jurisdictions we’re in conversations with that want to follow these cities.”<sup>290</sup> The fact that so many cities are using this as a policy intervention gives other cities cover to try it.

The fifth reason for the popularity of these ordinances is that they are self-perpetuating in another way: the more cities that enact these laws, the more resources advocacy organizations dedicate to ensure other cities can do the same. The National Coalition for a Civil Right to Counsel devotes a whole section of its website to resources for cities wishing to learn more about implementing right-to-counsel laws.<sup>291</sup> The Center for American Progress has an easy-to-read policy brief on the issue, designed to give lawmakers information on these types of programs.<sup>292</sup> The National League of Cities has resources on “Right to Counsel as an Eviction Diversion Strategy.”<sup>293</sup> Advocacy organizations are investing significant resources into making it easy for policymakers to implement renters’ right-to-counsel programs.

The sixth reason for the renters’ right-to-counsel success is data. Affordable housing and homelessness are pervasive issues that can be difficult to measure. But right-to-counsel programs are relatively limited, contained, and easy to track. Cities that implement these programs collect data on their effectiveness, and this data shows that they work. The National Coalition for a Civil Right to Counsel has a section of its website devoted to collecting reports from various jurisdictions, including quantitative analyses

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<sup>288</sup> See LMCO 151.99, *supra* note 274, at 4.

<sup>289</sup> See *supra* note 275.

<sup>290</sup> Matt Bloom, *How A Voter-Approved Program in Boulder Could Drastically Reduce Evictions*, NPR FOR NORTHERN COLORADO (Nov. 4, 2022), <https://www.kunc.org/2020-11-04/how-a-voter-approved-program-in-boulder-could-drastically-reduce-evictions> [<https://perma.cc/J8VB-J4V3>].

<sup>291</sup> See Enacted Legislation, *supra* note 3.

<sup>292</sup> Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance*, THE CENTER FOR AM. PROGRESS (Oct. 2, 2019), <https://www.americanprogress.org/article/right-counsel-right-fighting-chance/> [<https://perma.cc/AK46-MP7P>].

<sup>293</sup> John Pollock, *Using Right to Counsel as an Eviction Diversion Strategy*, NAT’L LEAGUE OF CITIES (Oct. 2, 2019), <https://www.nlc.org/article/2021/10/26/using-right-to-counsel-as-an-eviction-diversion-strategy> [<https://perma.cc/5YDR-M6ZE>].

from New York, San Francisco, Cleveland, Boulder, and Kansas City.<sup>294</sup> These numbers tell a compelling story.

Finally, it is impossible to ignore the impact of COVID-19 on the right to counsel's adoption. Of the eighteen jurisdictions with right-to-eviction-counsel legislation, twelve of them implemented these programs after the beginning of the pandemic.<sup>295</sup> Many cities have chosen to initially fund their right-to-counsel programs with federal dollars that were made available because of the pandemic, such as the Emergency Rental Assistance Program<sup>296</sup> and the American Rescue Plan.<sup>297</sup> Cities that have not chosen to establish a full right-to-counsel program often used these funds for pilot projects.<sup>298</sup> Local governments must obligate these federal relief funds by the end of 2024 and spend them by the end of 2026<sup>299</sup>—perhaps teeing up the next wave of the renters' right-to-counsel movement as advocates and policy-makers work to find permanent funding for these programs.

The COVID-19 pandemic and the related eviction moratorium shifted many aspects of a person's life into their home, centering the home's importance in the American consciousness.<sup>300</sup> This coincided with the federal government directing an unprecedented amount of funding towards housing needs. The result was increased adoption of known and proven strategies, of which the right to counsel was at the top of the list.

## V. LESSONS LEARNED FOR THE BROADER CIVIL GIDEON MOVEMENT

Although housing is certainly one of the most important aspects of a person's life that is impacted by the civil legal system, it is in no way the only part. As described earlier, there are still many important aspects of the justice system where a person is not guaranteed legal representation. Very few states provide counsel to either the victim or the alleged abuser in a civil

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<sup>294</sup> See Tally, *supra* note 3.

<sup>295</sup> See Enacted Legislation, *supra* note 3.

<sup>296</sup> See *Emergency Rental Assistance Program*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> [https://perma.cc/2KRV-ABCY] (last visited Jan 31, 2023) (description of the Emergency Rental Assistance Program).

<sup>297</sup> See *American Rescue Plan*, THE WHITE HOUSE, <https://www.whitehouse.gov/american-rescue-plan/> [https://perma.cc/4VTW-RELE] (last visited Jan 31, 2023) (description of the American Rescue Plan).

<sup>298</sup> *Reforming the Eviction System During and After the Pandemic*, OFF. OF POL'Y DEV. & RSCH. (Sept. 20, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-092022.html> [https://perma.cc/8N58-AUJT].

<sup>299</sup> *ARPA State Fiscal Recovery Fund Allocations Database*, NAT'L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/fiscal/arpa-state-fiscal-recovery-fund-allocations>. [https://perma.cc/6U54-7WWA] (last updated July 28, 2023).

<sup>300</sup> See Sara Aridi, *How the Pandemic Has Transformed the Idea of Home*, THE N.Y. TIMES (Mar. 13, 2021), <https://www.nytimes.com/2021/03/13/at-home/pandemic-home.html> [https://perma.cc/5N58-42N8] (noting that "home has taken on an entirely new meaning" after the COVID-19 pandemic and asking readers to reflect on how "the pandemic affected [their] relationship to your home?").



domestic violence case.<sup>301</sup> No state provides a categorical right to counsel in employment discrimination cases.<sup>302</sup> Only nine states have a categorical right (and only twenty-three states have a qualified right) to representation when a person faces incarceration for unpaid fines or fees.<sup>303</sup>

Expanded access to legal representation remains a goal of the Civil Gideon movement. Given the success of right-to-eviction-counsel movements, it is worth analyzing what lessons advocacy groups might take from it. This section attempts such an analysis.

The first broad takeaway is that, given the status of Supreme Court jurisprudence, the next wave of Civil Gideon success is likely to be rooted in legislation as opposed to litigation.<sup>304</sup> Although there may be some arguments for a court to find a state constitutional right, federal courts are unlikely to recognize an unlimited federal constitutional right. That means the most pragmatic way to expand legal representation in civil cases is to implement and fund legislative programs.<sup>305</sup> Naming these programs as a “right” to counsel may well ingrain this idea in the public mind and create pressure for politicians to continue to grant access to it. The language of rights is important, and policymakers should invoke it intentionally.

The second lesson is the importance of data in building the case for particular interventions. The adversarial nature of the legal system makes it relatively easy to track outcomes. A renter is successful at staying in her home, or she is not. A domestic violence survivor obtains an emergency protective order, or she does not. A person is incarcerated on a civil contempt order, or she is not. In the complex world in which we live, it can be difficult to identify clear metrics to track—court systems may be a useful place to look. Advocates should be aware of the role data played in building the right-to-eviction-counsel movement and take steps to track, share, and publicize data about programs. Funding organizations should pursue opportunities to fund pilot projects that can build data to support wider implementation.

A third takeaway is the importance of seizing the moment for key policy pushes. The COVID-19 pandemic offered an opportunity to center housing interventions and the funding to make these programs possible. Other right-to-counsel movements should think strategically about how to focus the spotlight on their issue and use that focus for policy change. Domestic

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<sup>301</sup> See Status Map, *supra* note 20.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* For states with qualified right to representation when a person faces incarceration for unpaid fines or fees, select “right to counsel status” and subject area “Incarceration for Fees/Fines (incomplete).” *Id.*

<sup>304</sup> Mark Brown, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 908 (2011) (discussing Civil Gideon goals broadly and noting that “[l]egislative strategies for achieving a Civil Gideon appear better positioned than judicial strategies”).

<sup>305</sup> *Id.*

violence rates, for example, have risen during the pandemic.<sup>306</sup> Those seeking to advocate for right-to-counsel laws in this area should be thoughtful about how current events can impact political will.

Finally, it is worth examining the initial way the right-to-eviction-counsel movement began and what lessons we can learn from its growth. The right-to-eviction-counsel movement began in large coastal cities, and most programs are in large urban areas. It is likely that other large cities will be the next major players to implement this type of legislation.

Yet, this pattern of policymaking means that some people in need of this type of program will be left out. People living in rural communities are less likely to be covered by these types of programs anytime soon,<sup>307</sup> even though rural evictions exist and can be uniquely challenging.<sup>308</sup> Additionally, many housing nonprofits are based in urban areas, perhaps suggesting that rural people experiencing eviction face further barriers to receiving assistance. Pursuing statewide programs could work to grant access to eviction counsel to people living in rural areas as well. Advocates should think about what strategies might be successful in organizing support in these areas.

Organizations may also want to consider state constitutional amendments to target right-to-eviction counsel and other civil adjudications where they believe legal representation is imperative. The success of ballot initiatives in places like San Francisco may elucidate a viable path for state constitutional amendments.<sup>309</sup> These state constitutional amendments carry

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<sup>306</sup> Scholars hypothesize that increased rates of domestic violence are because stay-at-home orders “increase the amount of time that women [who have experienced interpersonal violence] have to spend home alone with their abusive partners furthering their social isolation.” Clare E. B. Cannon et al., *COVID-19, Intimate Partner Violence, and Communication Ecologies*, 65 AM. BEHAV. SCIENTIST 7 at 992, 993 (Feb. 6, 2021); see also Brad Boserup et al., *Alarming trends in US domestic violence during the COVID-19 pandemic*, 38 AM. J. OF EMERGENCY MED. 2753, 2754 (Dec. 2020); see also Adan Silverio-Murillo et al., *Families Under Confinement: COVID-19 and Domestic Violence*, 28 SOC. OF CRIME, L., AND DEVIANCE 23 (Apr. 6, 2023); Anastasia Kourti et al., *Domestic Violence During the COVID-19 Pandemic: A Systemic Review*, 24 TRAUMA, VIOLENCE, & ABUSE 719 (Apr. 2023) (systemically reviewing studies from various countries); see also Shelby Bourgault et al., *Violence Against Women and Children During COVID-19—One Year On and 100 Papers In: A Fourth Research Round Up*, CTR. FOR GLOB. DEV. 1, 3 (Apr. 2021).

<sup>307</sup> As explained above, most right-to-counsel laws have been passed by cities, and large cities at that. See Enacted Legislation, *supra* note 3. The three states who have enacted laws are categorized as “less rural than average” by the U.S. Census Bureau. See Bill Bishop, *How Rural Are the States*, THE DAILY YONDER (April 3, 2012), <https://dailyyonder.com/how-rural-are-states/2012/04/03/> [<https://perma.cc/3DPZ-F6P5>]. There is no reason to think this trend will not continue.

<sup>308</sup> Sarah Kleiner, *In rural America, an invisible eviction crisis*, THE CTR. FOR PUB. INTEGRITY (Dec. 22, 2021), <https://publicintegrity.org/housing/housing-in-crisis/rural-america-eviction-cases-crisis/> [<https://perma.cc/7LG4-SAAK>]; see also *Housing Need in Rural America*, THE NAT’L RURAL HOUSING COAL., <https://ruralhousingcoalition.org/overcoming-barriers-to-affordable-rural-housing/> [<https://perma.cc/Y7UP-D4Q2>] (last accessed May 18, 2023).

<sup>309</sup> Maria Roumiantseva offers several other areas where advocates might seek to expand renters right-to-counsel programs, such as administrative proceedings, Section 8 subsidy terminations, and affirmative litigation for unsafe housing. See Roumiantseva, *supra* note 21, at 1396.

added benefits. First, they ensure that everyone in a state has equal access to legal counsel. Second, a constitutional amendment is more permanent than a mere ordinance or statute, suggesting a more long-term commitment to this policy intervention—which may be especially important as states consider whether to switch these programs from one-time federal dollars to a permanent part of their budgets. Finally, a constitutional amendment provides a solid framework to build support for other types of right-to-civil-counsel initiatives.

## VI. CONCLUSION

My last legislative act on the Louisville Metro Council mirrored my first: in late 2022, I filed an update to Louisville’s right-to-counsel ordinance. The original ordinance required a person receiving assistance to have a child in the home, and this bill removed that requirement.<sup>310</sup> I had originally limited the scope of the bill because of concerns about how politically feasible it would be to pass a sweeping program. But the local Legal Aid organization told me that the eligibility requirements limited their ability to help people; they were declining to represent people under the program<sup>311</sup> not because they knew those people were not eligible, but because they could not *prove* that they were eligible.<sup>312</sup>

I was worried that, less than two years later, I might receive pushback for expanding the program so soon after it began. I knew that this vote would be a referendum on the law and on my colleagues’ perception of its success. But the update to the ordinance passed quickly and unanimously.<sup>313</sup> It went through the full body on the consent calendar, a special legislative docket reserved for non-controversial items.<sup>314</sup>

For many years, it seemed that the Civil Gideon movement had stagnated. Supreme Court jurisprudence closed the door to a categorical, federal constitutional right to counsel in civil cases. Although many states did grant a right to civil representation in termination of parental rights cases, this decision was rooted in a desire to be overly protective of parental rights and not run afoul of the U.S. Constitution.

Now, the right-to-counsel movement is experiencing new energy in a different form. Legislative right-to-counsel programs—like the right to

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<sup>310</sup> O-373-22; LMCO 151.99 (codified as LMCO 151.61). Jefferson Cnty., La., Ordinance 373-22 (Feb. 7, 2023); LOUISVILLE / JEFFERSON METRO GOV’T CODE OF ORDINANCES, § 151.60.

<sup>311</sup> Although, when a person was ineligible under the city program, the organization did make efforts to represent them by drawing on other sources of funding.

<sup>312</sup> Roberto Roldan, *Louisville Expanding Eligibility for Eviction Assistance Program*, LOUISVILLE PUB. MEDIA (Feb. 5, 2023), <https://www.lpm.org/news/2023-02-05/louisville-expanding-eligibility-for-eviction-assistance-program> [<https://perma.cc/JZA5-BSGN>].

<sup>313</sup> *Action Summary – Final*, LOUISVILLE METRO GOV. (Feb. 2, 2023), [http://louisville.granicus.com/DocumentViewer.php?file=louisville\\_476da50417f0e767d7723496dc5c09a9.pdf&view=1](http://louisville.granicus.com/DocumentViewer.php?file=louisville_476da50417f0e767d7723496dc5c09a9.pdf&view=1) [<https://perma.cc/SC9G-Z4RL>].

<sup>314</sup> *Id.*

eviction counsel—offer a viable way to increase legal representation in targeted ways. Advocacy groups should continue to work with impacted people to organize and build support for these policy changes. Legislators should reach out to advocacy organizations to understand the impact of eviction in their community and how a right-to-counsel law could help. Coalitions should understand that the right-to-eviction-counsel movement is entering a new stage, where federal funding programs are less available. The goal must be to protect the programs that exist, expand the jurisdictions in which such laws exist, and work to ingrain a home renters' right to counsel in our communities.