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THE INTERDEPENDENCE OF RIGHTS: PROTECTING THE HUMAN RIGHT TO HOUSING BY PROMOTING THE RIGHT TO COUNSEL

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[S]ubstance and procedure are often deeply entwined.
-Justice John Paul Stevens, *MacDonald v. Chicago*¹

This Article trains the lens of international human rights to explicate the relationship between the right to counsel in civil cases and a right to housing. A strength of the human rights framework is its recognition of the interrelationship of rights: civil, political, economic, social and cultural. Just as the right to housing is a lynchpin to the realization of other rights, so, too, is the right to counsel. This article first sets forth the international human rights framework for understanding the U.S.'s obligation to provide a civil right to counsel when basic human needs, including housing, are at stake. It then offers client stories from a legal services organization in Wisconsin, alongside quantitative research, as a way to better understand the impact that legal counsel has on individuals' ability to secure and protect their housing, and, finally, discusses the implications of advocacy efforts to link a housing rights strategy to efforts to secure the civil right to counsel.

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1. 130 S. Ct. 3020, 3090 (2010) (dissenting).

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I. INTRODUCTION

Julia had a right to housing.² Living in public housing with her young daughter, she was entitled to a rent reduction after she lost her job. With no other income, the family relied solely on child

2. This story, like the other profiles in this Article, is based on the experiences of individuals represented by Legal Action of Wisconsin, a statewide legal services organization. Names have been changed to protect client confidentiality.

support payments, but even so, Julia could have afforded the minimal \$50/month rental charge for which she was eligible. However, the local housing authority refused to adjust her payments. The family faced eviction and Julia's landlord sued her in small claims court for her unpaid rent.

Julia had a right to housing. But it took the intervention of legal counsel to make that right a reality. Legal Action of Wisconsin intervened on Julia's behalf, and the court dismissed the eviction. Legal Action reported the problem to the U.S. Department of Housing and Urban Development (HUD), who directed the landlord to accept an affordable payment plan for amounts Julia actually owed. Most importantly, Julia and her young daughter were able to stay in their public housing unit paying an affordable rent amount.

For Julia, as for most individuals, substance and procedure were intertwined. While there is no recognized federal constitutional right to housing, several federal statutes protect aspects of the right, including the Protecting Tenants at Foreclosure Act,³ the Fair Housing Act,⁴ Section 8 of the Housing Act of 1937,⁵ and the Violence Against Women Act.⁶ Numerous state laws offer complementary protections. Without a lawyer, however, people facing a loss of housing are often unable to avail themselves of these protections.

3. Pub. L. No. 111-22, §§ 701-04, 123 Stat. 1661 (2009), *clarified and amended* by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1484, 124 Stat. 1376 (2010).

4. 42 U.S.C. §§ 3604, 3605 (prohibiting discrimination in the sale, rental, and financing of housing and housing related transactions).

5. 42 U.S.C. § 1437f (authorizing rental payment assistance for low-income households). The Section 8 rent assistance program was established “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a). Public housing agencies (PHAs) issue Section 8 vouchers to program participants to obtain housing in the private rental market. Once a participant's application for rental housing is approved by the prospective landlord, the PHA enters into a housing assistance payment (HAP) contract with the landlord, which among other terms, sets forth the contract rent, the tenant contribution to the rent and the amount subsidized by the Community Development Agency (CDA) with HUD funds. The rent contribution for Section 8 households is based on the adjusted monthly household income, which approximates 30% of the income. Tenant participants may be terminated from the rent assistance program for substantial program violations. Prior to termination of the rent assistance, the participant is entitled to notice and the opportunity for a hearing to dispute the proposed termination in accordance with due process requirements.

6. 42 U.S.C. § 14043e-11 (providing housing protections for domestic violence survivors).

Although legal representation is fundamental to safeguarding human rights, millions of people in the United States lack representation when facing a crisis such as eviction or foreclosure. In the United States, only a small fraction of the legal problems experienced by low-income people—fewer than one in five—are addressed with the assistance of legal representation.⁷ State and county level data indicate that a high percentage of defendants—in some places over ninety percent—are unrepresented in proceedings involving foreclosure.⁸ Similarly, tenants are overwhelmingly unrepresented in housing courts, in stark comparison to landlords.⁹

Like the right to housing, a categorical right to counsel in civil cases is not recognized under the federal Constitution.¹⁰ And federal programs providing civil counsel to people who are poor or low-income

7. Legal Servs. Corp., Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 1 (2009), available at http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

8. See Melanca Clark & Maggie Barron, Brennan Ctr. for Justice, Foreclosures: A Crisis in Legal Representation 12, 14 (2009), available at <http://www.brennancenter.org/page/-/Justice/Foreclosure%20Report/ForeclosuresReport.pdf> (examining data from various states which suggests that large numbers of homeowners are unrepresented in foreclosures); Legal Servs. Corp., *supra* note 7 (finding that the number of unrepresented litigants is increasing rapidly).

9. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 2063–64 n. 339 (1999) (10% of tenants sued for eviction in New York City are represented by counsel, while 75–90% of landlords are represented); Dist. of Columbia Access to Justice Comm'n, *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia's Low-Income Community* 76 (2008) (finding 3% of tenants represented by legal counsel in eviction cases before the court).

10. The U.S. Supreme Court has established a right to counsel in criminal cases. *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamelin*, 407 U.S. 25, 37 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges). However, the U.S. Supreme Court has not established a similar protection for individuals in the civil context. In fact, the Court has created a presumption against appointing counsel in any civil case where physical liberty is not in the balance. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981) (finding no categorical right to counsel when termination of parental rights is at stake). And it has refused to find a categorical right to counsel even in some civil cases where lengthy jail sentences are, in fact, imposed. *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011) (finding no categorical right to counsel for indigent contemnors facing jail time for failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

are under-funded and severely restricted.¹¹ The result is a crisis in unmet legal needs which disproportionately harms racial minorities and women, and which seriously jeopardizes the right to housing for millions living in the United States.

Thus, a rigorous effort to protect the right to housing in the United States must also seek to secure the right to counsel in civil cases. This is a key insight offered by international human rights law. As the U.N. expert on poverty and human rights recently noted, “access to justice is a human right in itself, and essential for tackling the root causes of poverty. . . . Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes [and] eviction decisions.”¹² The U.N. Special Rapporteur on Adequate Housing has written that legal remedies against forced evictions are only effective where civil legal aid is also provided.¹³

This Article explores the relationship between the right to housing and the right to counsel through the lens of international human rights, and urges an integrated advocacy approach. A strength of the human rights framework is its recognition of the interrelationship of rights: civil, political, economic, social and cultural. Just as the right to housing is a lynchpin for the realization of other rights, so, too, is the right to counsel. Part II of this Article sets forth the international human rights framework supporting the right to counsel when basic human needs, including housing, are at stake. Part III details the impact that legal representation has on individuals’ ability to protect their right to housing, offering client stories from a legal services organization in Wisconsin, alongside quantitative research to illustrate the link between the right to legal counsel and the right to housing. Part IV explores the challenges to securing legal counsel when basic human needs such as housing are at stake. Part V details advocacy efforts to expand the right to counsel, particularly in cases where basic needs such as housing are at stake, and Part VI concludes by discussing the implications of

11. See Part IV, *infra*.

12. Special Rapporteur on Extreme Poverty and Human Rights, *Report on Access to Justice for People Living in Poverty*, Human Rights Council, ¶ 62, U.N. Doc. A/67/278 (August 9, 2012) (by Maria Magdalena Sepúlveda Carmona).

13. Special Rapporteur on Adequate Housing, *Report of the Special Rapporteur on Adequate Housing as a*

Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Human Rights Council, ¶ 69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012) (by Raquel Rolnik).

tying advocacy for the right to housing to a strategy that promotes the right to counsel, explicating the importance and ancillary benefits of pairing the two in a nuanced and intentional way.

II. INTERNATIONAL LAW RECOGNIZES THE IMPORTANCE OF LEGAL COUNSEL IN CIVIL CASES IMPLICATING BASIC NEEDS.

International law recognizes what is reflected in the client experience recounted above, and that of others confronting a potential loss of housing: Legal representation is fundamental to safeguarding fair, equal, and meaningful access to the legal system as a whole, and is critical to safeguarding other human rights, including the right to housing.¹⁴

14. The right to adequate housing is firmly rooted in international human rights law. *See, e.g.*, Universal Declaration of Human Rights, Art. 25, ¶ 6, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing [...]”). The International Covenant on Social, Economic, and Cultural Rights (ICESCR), ratified by 160 countries, further enshrines housing as a universal human right. The relevant provision, Article 11.1, states: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The provision is similar to Article 25 of the Universal Declaration, but contains an operational clause stating “[t]he States Parties will take appropriate steps to ensure the realization of this right” Int’l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3 [hereinafter ICESCR]. The Committee on Economic, Social, and Cultural Rights, the committee of experts charged with overseeing the implementation of ICESCR, has made it clear that the right to adequate housing is fundamental, not secondary, to other social and economic rights. Comm. on Economic, Social, and Cultural Rights, General Comment 4, *The Right to Adequate Housing*, U.N. Doc. E/1992/23 (Dec. 13, 1991) [hereinafter General Comment 4]. The right to housing is enshrined in other core human rights conventions, as well. *See, e.g.*, The Convention on the Elimination of All Forms of Racial Discrimination art. 5, 21 Dec. 1965, 660 U.N.T.S. 195 [hereinafter Race Convention] (placing an obligation on States Parties to ensure that all citizens, regardless of race, have an equal opportunity to enjoy the right to housing, along with several other fundamental civil, political, economic and social rights); The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art. 14.2h, Dec. 18, 1979, 1249 U.N.T.S. 13 (requiring state parties to ensure that women in rural areas, “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”); The Convention on the Rights of the Child art. 27.1, Nov. 20, 1989, 1577 U.N.T.S. 3 (recognizing the right of the child to “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development”); The Convention on the Rights of the Child art. 27.3, Nov. 20, 1989,

The International Covenant on Civil and Political Rights (ICCPR), ratified by the United States in 1992, requires member states to ensure meaningful access to justice, including meaningful access to counsel in civil cases where the interests of justice so require. Article 14 of the ICCPR guarantees procedural fairness, providing, in relevant part, that “[a]ll persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”¹⁵

Article 2 of the ICCPR establishes that each state bound by the treaty must undertake to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy”¹⁶ Article 26 reiterates the guarantee of non-discrimination.¹⁷

As articulated by the Human Rights Committee, these protections extend to the right to counsel in certain civil cases. General Comment 32 clarifies that Article 14’s guarantee of equality before the law encompasses access to the legal system, including access to counsel in civil cases:

Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way States are encouraged to provide free legal aid in

1577 U.N.T.S. 3 (requiring that “States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”); American Declaration on the Rights and Duties of Man art. 11, OEA/Ser.L.V/II.23, doc. 21, rev. 6 (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82, doc. 6, rev. 1 at 17 (stating that, “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources”).

15. Int’l Covenant on Civil and Political Rights, art. 14, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

16. *Id.* art. 2.

17. *Id.* art. 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”).

[non-criminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.¹⁸

The Human Rights Committee has on several occasions noted concern over states' failure to provide counsel in various types of civil cases, including those implicating the right to housing.¹⁹

Concerned with the United States' human rights record in this regard, prior to its 2014 review of the United States' compliance with the treaty, the U.N. Human Rights Committee asked the United States to provide it with information on steps the country has taken to improve legal representation in civil proceedings. In particular, the Committee expressed concern for litigants belonging to racial, ethnic and national minorities,²⁰ and the lack of legal representation for women victims of domestic violence.²¹

18. U.N. Human Rights Comm., *General Comment 32: Article 14, Right to Equality before Courts and Tribunals and To a Fair Trial*, ¶ 10, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

19. For example, in its Concluding Observations regarding the Czech Republic's compliance with the Covenant, the Committee noted with concern that, in order to rectify the problem of discrimination in housing faced by the Roma, the Czech Republic should "provide legal aid for victims of discrimination." U.N. Rep. of the Human Rights Comm., *Concluding Observations—Czech Republic*, ¶ 16, U.N. Doc. CCPR/C/CZE/CO/2 (2007). In commenting on Sweden's treatment of its indigenous Sámi population, the Committee recommended that the government provide adequate legal aid to Sámi villages in land rights disputes. U.N. Rep. of the Human Rights Comm., *Concluding Observations—Sweden*, ¶ 21, U.N. Doc. CCPR/C/SWE/CO/6 (2009). See also U.N. Rep. of the Human Rights Comm., *Concluding Observations—Chile*, ¶ 14, U.N. Doc. CCPR/C/CHL/CO/5 (2007) (commenting on restrictions on trade unions by the government in Chile, the Committee recommended that the government make legal aid available to workers in order for their complaints to be heard successfully). The Committee has made similar recommendations with regard to treatment of asylum seekers by the governments in Switzerland and El Salvador. With regard to Switzerland, Committee recommended that "[t]he State party should review its legislation in order to grant free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary." U.N. Rep. of the Human Rights Comm., *Concluding Observations—Switzerland*, ¶ 18, U.N. Doc. CCPR/C/CHE/CO/3 (2009). With regard to El Salvador, the Committee recommended that the government "ensure that persons subject to deportation proceedings benefit from an effective right to be heard, to have an adequate defence and to request that their case be reviewed by a competent authority." U.N. Rep. of the Human Rights Comm., *Concluding Observation—El Salvador*, ¶ 17, U.N. Doc. CCPR/C/SLV/CO/6 (2010).

20. U.N. Human Rights Comm., *List of Issues in Relation to the Fourth Periodic Report of the United States of America Adopted by the Committee at its 107th Session*, ¶ 8(e), U.N. Doc. CCPR/C/USA/Q/4 (Apr. 21, 2013). In its response

The Convention on the Elimination of All Forms of Racial Discrimination (“Race Convention”), which the United States ratified in 1994, likewise protects the right to counsel in civil cases, particularly where the absence of counsel has a disparate impact on racial, ethnic and national minorities. Articles 5 and 6 of the Convention address fair procedure and adjudication, requiring that States take positive steps to ensure effective access to the apparatus of the State’s justice system, including in civil matters.²² The Committee on the Elimination of All Forms of Racial Discrimination (CERD), which monitors implementation of the Race Convention, has issued General Recommendation 31, which highlights the importance of making it easier for victims of racism to seek civil redress in the courts by, *inter alia*, providing free assistance of counsel.²³ More generally, General Recommendation 29 recommends that State Parties “take the necessary steps to secure equal access to the justice system for all members of descent-based communities, including providing legal aid, facilitating group claims and encouraging non-governmental organizations to defend community rights.”²⁴

The CERD has taken particular notice of the United States’ failure to provide counsel in civil cases. During its 2008 review of the United States, the CERD expressed concern that the lack of civil counsel for persons living in poverty disproportionately and

to this questions raised in the Committee’s List of Issues, the United States cited the work of the Department of Justice’s Access to Justice Initiative, which was established in 2010 “to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.” U.S. Written Responses to the Questions from the U.N. Human Rights Comm. Concerning the Fourth Periodic Report, ¶ 29, July 3, 2013, *available at* <http://www.state.gov/j/drl/rls/212393.htm> [hereinafter U.S. Written Responses].

21. U.N. Human Rights Comm., *supra* note 20, ¶ 20. In its response to this question raised in the Committee’s List of Issues, the United States cited to increased services for domestic violence victims under the Violence Against Women Act and the Family Violence Prevention and Services Act. United States Written Responses, *supra* note 20, ¶ 106-07.

22. Race Convention, *supra* note 14, arts. 5–6, at 220–22.

23. Comm. On the Elimination of Racial Discrimination, *General Recommendation XXXI on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System*, Rep. on its 66th and 67th Sess., Feb. 21–March 11, Aug. 2–19, 2005, ¶ 17, U.N. Doc. A/60/18 (2005).

24. Comm. On the Elimination of Racial Discrimination, *General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent)*, ¶ 21, U.N. Doc. A/57/18 (Nov. 1, 2002).

negatively affects racial minorities in the United States,²⁵ and recommended that the United States “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake.”²⁶

Numerous independent international human rights experts have likewise emphasized the importance of ensuring access to counsel in civil cases, particularly where counsel is necessary to secure basic human needs. Specific to the right to housing, in 2012, the U.N. Special Rapporteur on the right to adequate housing noted that legal remedies are an important procedural protection against forced evictions, but that such remedies are only effective where provision is made for the supply of civil legal aid.²⁷ Similarly, U.N. Special Rapporteurs have noted that civil counsel can play a significant role in vindicating and protecting the rights of racial minorities,²⁸ women,²⁹ and migrants.³⁰ As these experts note,

25. Comm. on the Elimination of Racial Discrimination, *Concluding Observations—United States of America*, ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

26. *Id.* In its next periodic report to the CERD, filed in June 2013, the United States acknowledged that “the United States faces challenges in . . . its provision of free and affordable civil legal services to the poor and middle class. We recognize that these challenges are felt acutely by members of racial and ethnic minorities.” Periodic Report of the United States of America to the United Nations Committee on the Elimination of Racial Discrimination, Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, June 12, 2013, ¶ 62. The United States then cited to the work of the Department of Justice’s Access to Justice Initiative as addressing these disparities. *Id.* ¶¶ 63–64.

27. U.N. Special Rapporteur on Adequate Housing, *supra* note 13, ¶ 69.

28. U.N. Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance on the Implementation of General Assembly Resolution 65/199*, Annual Report to the Human Rights Council, ¶¶ 10, 35, U.N. Doc. A/HRC/18/44 (July 21, 2011) (by Githu Muigai).

29. See U.N. Special Rapporteur on Violence Against Women, Its Causes & Consequences, *Integration of the human Rights of Women and the Gender Perspective: Violence Against Women*, Annual Report to Comm. on Human Rights: International, Regional and National Developments in the Area of Violence against Women (1994–2003), ¶ 90, U.N. Doc. E/CN.4/2003/75 (Jan. 6, 2003) (by Radhika Coomaraswamy) (“States should establish, strengthen or facilitate support services to respond to the needs of actual and potential victims, including . . . legal aid”); U.N. Special Rapporteur on Violence Against Women, Its Causes & Consequences, *Annual Report to Comm. on Human Rights:*

meaningful access to civil counsel is often a critical precursor to exercising many other rights. The U.N. Special Rapporteur on extreme poverty recently commented in the context of people living in poverty, “[l]ack of legal aid for civil matters can seriously prejudice the rights and interests of persons . . . for example when they are unable to contest tenancy disputes, eviction decisions, immigration or asylum proceedings, eligibility for social security benefits, abusive working conditions, discrimination in the workplace or child custody decisions.”³¹

Most recently, in a 2013 report to the U.N. General Assembly, the U.N. Special Rapporteur on the independence of judges and lawyers noted that “legal aid is an essential component of a fair and efficient justice system founded on the rule of law . . . it is also a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights”³² including the right to a fair trial, the right to an effective remedy, the right to liberty and security of person, the right to equality before the courts and tribunals and the right to counsel.³³

The right to counsel in civil cases implicating basic needs has been established by other human rights tribunals, as well. The European Court of Human Rights (ECtHR) and the Inter-American Commission on Human Rights have both articulated states’ obligation to provide counsel in civil cases. In 1979, the ECtHR ruled in *Airey v. Ireland* that the right to fair trial may demand that a state

The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, ¶ 83, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (by Yakin Ertürk) (“States must ensure that quality physical and psychological health services and legal assistance are provided to victims of violence.”).

30. Special Rapporteur on the Human Rights of Migrants, *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Development*, Human Rights Council, ¶ 46, U.N. Doc. A/HRC/7/12 (Feb. 25, 2008) (by Jorge Bustamante); *see also* Special Rapporteur on the Human Rights of Migrants, *Specific Groups and Individuals: Migrant Workers*, Comm. on Human Rights, ¶ 24, U.N. Doc. E/CN.4/2003/85 (Dec. 30, 2002) (by Gabriela Rodríguez Pizarro) (“When the migrant must take the initiative for such [administrative] review, lack of awareness of the right to appeal and lack of access to free legal counsel can prevent the migrant from exercising his/her right in practice.”).

31. *See* U.N. Special Rapporteur on Extreme Poverty and Human Rights, *supra* note 12, § 62.

32. U.N. Special Rapporteur on the Independence of Judges and Lawyers, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, ¶ 20, U.N. Doc. A/HRC/23/43 (Mar. 15, 2013) (by Gabriela Knaul).

33. *Id.* ¶ 28.

provide free legal assistance to those unable to obtain it when that assistance is necessary to provide effective access to the court.³⁴ The ECtHR later expanded on this statement, suggesting that the countries within the Council of Europe are required to provide free legal assistance as a human right where there is an inequality of arms and counsel is necessary to ensure a fair hearing.³⁵ Today, all forty-seven countries in the Council of Europe provide legal aid, including free or low-cost counsel, in civil and administrative matters implicating basic human rights, such as housing, family, employment, and public benefits—although some discretion is left to each state in developing eligibility criteria, and the former Soviet states have lagged behind the Western European countries in implementing this right.³⁶

The Charter of the Organization of American States, of which the United States is a member, contains explicit support of the civil right to counsel, stating a goal to “dedicate every effort” to “[a]dequate provision for all persons to have due legal aid in order to secure their rights.”³⁷ The Inter-American Commission on Human Rights has reinforced this view, noting that states can be obligated to provide free civil legal services to those without means in order to prevent a violation of their right to fair trial and judicial protection.³⁸

34. “[The right to fair trial] may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.” *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, ¶ 24–6 (1979).

35. See *Steel & Morris v. United Kingdom*, 22 Eur. Ct. H.R. 403 (2005).

36. See Raven Lidman, *Civil Gideon: A Human Right Elsewhere in the World*, Clearinghouse Rev. J. Poverty L. & Pol’y, Vol. 40, Nos. 3–4. (July–August 2006) 288, 291. Lidman cites a comprehensive list of resources providing further information on specific Council of Europe member states. See *id.* at ¶ 291.

37. Charter of the Org. of Am. States art. 45, *opened for signature* Apr. 30, 1948, 1609 U.N.T.S. 119, *amended* by Protocol of Buenos Aires, O.A.S.T.S. No. 1-A (1967), *further amended* by Protocol of Cartagena, O.A.S.T.S. No. 66 (1985), *further amended* by Protocol of Washington, OEA/Ser.A/2 Add. 3 (SEPF) (1992), *further amended* by Protocol of Managua, OEA/Ser.A/2 Add. 4 (SEPF) (1993).

38. Inter-Am. Comm’n on Human Rights, *Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, at 1–2, OEA/Ser.L.V/II.129 Doc. 4 (September 7, 2007).

III. LEGAL REPRESENTATION SIGNIFICANTLY IMPACTS THE RIGHT TO HOUSING

The lesson drawn from the international standards and findings explored above is that the right to housing and the right to counsel are interdependent and intertwined. Research and real-life stories confirm the importance of counsel in protecting the human right to housing.

A. Quantitative Data Suggests that Legal Representation Is Critical to Protecting the Right to Housing.

Though more research in this area is needed,³⁹ studies indicate that, as a general matter, lack of legal representation dramatically impairs the ability of low-income people to navigate the court system effectively and attain successful outcomes.⁴⁰ Represented parties enjoy statistically more favorable results in family law,⁴¹ domestic violence,⁴² and small claims cases.⁴³ Those who are represented by an attorney before administrative agencies

39. See Alan Houseman, *The Justice Gap: Civil Legal Assistance Today and Tomorrow*, Center for American Progress, 15 (June 2011), <http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/justice.pdf> (last visited Feb. 2, 2014) (recommending that the Justice Department or Legal Services Corporation house permanent research units to study ways to improve the delivery of civil legal aid); see also Rebecca L. Sandefur & Aaron C. Smyth, Am. Bar Found., *Access Across America: First Report of the Civil Justice Infrastructure Mapping Project 22* (2011) (noting that the most recent national survey of civil legal need took place in 1994 as a service project of the American Bar Association Consortium on Legal Services and the Public).

40. See *Documenting the Justice Gap*, *supra* note 7, at 26; see also Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 2010 Fordham Urb. L.J. 37, 47–49 (discussing reports on the poor outcomes of unrepresented tenants in housing court); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987 (1999) (proposing a revised role for judges, mediators, and clerks to better address the needs of unrepresented litigants and improve their outcomes in court).

41. See Engler, *supra* note 40, at 51–55; see also Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated with the Provision of Civil Legal Aid*, 9 Seattle J. Soc. Just. 139, 150–53 (2010) (discussing how legal aid for the indigent dramatically improves outcomes, increasing the probability of family reunification as well as the odds of legal success for the poor).

42. See Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 Contemp. Econ. Pol'y 158, 164–65 (2003).

43. See Engler, *supra* note 40, at 55–58.

governing such vital issues as social security, unemployment benefits, and immigration also have a higher success rate—in some cases up to two or three times higher—than those who are unrepresented in comparable cases.⁴⁴

Numerous studies have found that legal representation particularly impacts outcomes in housing court. A study in Maricopa County, Arizona, found that while approximately 87 percent of landlords were represented in the County Justice Courts, virtually no tenants were represented, and most eviction cases took less than a minute to be heard by the court—with many heard and considered in less than twenty seconds.⁴⁵ Unrepresented tenants rarely had their eviction cases dismissed.⁴⁶

A recent pilot study in Massachusetts found that extensive assistance from lawyers is essential to preserving tenants' housing in eviction cases,⁴⁷ confirming earlier findings in a study of summary process eviction cases in Massachusetts courts.⁴⁸

44. *Id.* at 58–59; see also N.H. Citizens Comm'n on the State Courts, *Report and Recommendations*, 10–11 (June 1, 2006), http://www.courts.state.nh.us/press/2006/cc_report.pdf (last visited Feb. 2, 2014) (unrepresented individuals typically do an inadequate job of self-representation, resulting in compromised justice). *But see* James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 *Yale L.J.* 2118, 2124–25 (2012) (discussing a recent randomized study that reached a different conclusion, finding that a particular clinic staffed by law students did not yield positive results). This study has been subject to critical scrutiny. See *Symposium on What Difference Representation Makes*, *Concurring Opinions*, <http://www.concurringopinions.com/archives/category/representation-symposium> (last visited Feb. 2, 2014).

45. William E. Morris Inst. for Justice, *Injustice In No Time: The Experience of Tenants in Maricopa County Justice Courts 2* (2005), available at <http://morrisinstituteforjustice.org/docs/254961Finalevictionreport-P063.06.05.pdf>.

46. *Id.*

47. Boston Bar Ass'n Task Force on the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention* (March 2012), <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf> (last visited Feb. 2, 2014); see also generally D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *Harv. L. Rev.* 901 (2013) (finding that providing legal counsel to indigent tenants doubled their chances of success in eviction cases).

48. Mass. Law Reform Inst., 2005 Summary Process Survey 3, 8 (2005), available at http://webcache.googleusercontent.com/search?q=cache:FIqmqP9PhJ4J:www.masslegalservices.org/system/files/library/2005_summary_process_survey.pdf+massachusetts+law+reform+institute+summary+process+survey+1995&cd=1&hl=en&ct=clnk&gl=us (finding that landlords were represented

A study of evictions in New Haven, Connecticut, concluded that tenants represented by legal services lawyers were more than three times more likely to avoid eviction than tenants without lawyers.⁴⁹ Even where legal services lawyers were unable to defeat their clients' evictions, they were able to substantially delay the evictions.⁵⁰

A study of landlord/tenant courts in Washington, D.C., found that approximately 3 percent of tenants who appeared in landlord/tenant court were represented by counsel.⁵¹ Of the cases filed in landlord/tenant court, approximately 75 percent were closed due to dismissals or default judgments in the favor of the landlord.⁵² Of the remaining 25 percent, two-thirds were closed by confessions of judgment or consent agreements, notwithstanding tenants' claims or defenses.⁵³ In contrast, tenants who were represented by counsel rarely entered consent judgments.⁵⁴

A New York City study found the impact of legal counsel for poor tenants statistically significant: while 28 percent of the tenants in control group cases (without a lawyer) defaulted or failed to appear in housing court, only about 16 percent of those tenants provided with lawyers did, and while 52 percent of control group cases had judgments issued against them, only 32 percent of tenants provided with lawyers had judgments issued against them.⁵⁵

by lawyers in 66% of the cases and were awarded possession in 76% of the cases, while tenants had legal representation in 6% of the cases and were awarded possession in only 2% of cases).

49. See Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385, 413 (1995).

50. *Id.*

51. See Distr. of Columbia Access to Justice Comm'n, *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia's Low-Income Community* 8, 73-74 (2008), available at <http://www.dcaccessstojustice.org/files/CivilLegalNeedsReport.pdf>.

52. *Id.*

53. *Id.*

54. *Id.*

55. See Carroll Seron, Gregg Van Ryzin & Martin Frankel, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 Law & Soc'y Rev. 419, 426-27; see also generally Kira Krenichyn & Nicole Schaefer-McDaniel, *Results from Three Surveys in New York City Housing Courts* 7, 22 (2007), available at <http://www.civilrighttocounsel.org/pdfs/NYCHousingCourts.pdf> (reporting that in a total of 1787 surveys conducted in New York City housing courts, 392 respondents had their own lawyer); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L. Pol'y & Ethics J. 699 (2006) (arguing that "people who face losing their homes

Moreover, lack of access to civil counsel disparately impacts racial minorities, women, and other vulnerable groups. Racial minorities and women are overly represented among people who qualify for civil legal assistance,⁵⁶ and access to justice studies indicate that such groups make up a disproportionate number of litigants without representation. In New York City family and housing courts, for example, the vast majority of litigants without representation are racial minorities.⁵⁷ Similarly, in Pennsylvania family courts, most low-income litigants, which include a disproportionate number of racial minorities and women, lack representation.⁵⁸ Further illustrating the intersection of race and gender, a California study found that about 85% of litigants appearing in family court without an attorney were women, the majority women of color.⁵⁹ The U.N. Committee on the Elimination of Racial Discrimination recognized this problem when it expressed concerns over the disparate impact that lack of counsel in civil cases has on racial and ethnic minorities in the United States.⁶⁰

in legal proceedings must have a right to be represented by counsel in those proceedings, whether or not they can pay for counsel"); Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 *Geo. J. on Poverty L. & Pol'y* 87 (2010) (arguing that affording tenants in New York City Housing Court legal representation is a step towards realizing the court's original goal of better serving the city's dynamic population); N.Y. Cnty. Lawyers' Ass'n, *The New York City Housing Court in the 21st Century: Can It Better Address the Problems Before It?*, 12 n.1 (2005) *available at* http://www.nycla.org/siteFiles/Publications/Publications195_0.pdf (noting that practitioners have estimated "that 90 to 95 percent of tenants are unrepresented by counsel, whereas 85 percent of landlords are represented").

56. See *Documenting the Justice Gap*, *supra* note 7, at 27; Alemayehu Bishaw & Jessica Semega, *Income, Earnings, and Poverty Data from the 2007 American Community Survey*, U.S. Census Bureau, 20 (Aug. 2008), *available at* <http://www.census.gov/prod/2008pubs/acs-09.pdf>.

57. Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services: The Results of Two Surveys*, 3 (2005), *available at* http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf.

58. Penn. Supreme Ct. Comm. on Racial and Gender Bias in the Justice System, *Final Report*, 457 (2003), *available at* http://www.painterbranchcommission.com/_pdfs/FinalReport.pdf.

59. Cal. Judicial Council Advisory Comm. on Racial and Ethnic Bias in the Cts., *Final Report*, 13 (Jan. 1997), *available at* <http://www.courts.ca.gov/documents/rebias.pdf>.

60. Comm. on the Elimination of Racial Discrimination, UNHCR Subcomm, *Concluding Observations—United States of America*, Feb. 18–Mar. 7, 2008, 72d Sess., ¶ 22, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008).

B. Client Stories from One Legal Services Organization Illustrate the Impact of Counsel on the Right to Housing.

The findings outlined above are reflected in the lived experiences of people confronting a threatened loss of housing. This section explores the impact of counsel on the right to housing through the lens of Legal Action of Wisconsin, a Legal Services Corporation-funded organization.⁶¹ Every jurisdiction faces unique challenges and these cases are not intended to cover exhaustively the types of housing cases encountered by legal services offices around the country. Rather, these client stories offer illustrative examples of how at least one legal services office typically functions to protect and promote the component parts of the right to housing for its clients,⁶² underscoring the interrelationship between the rights to access to legal representation and housing.

1. Protecting Legal Security of Tenure

Legal security of tenure is an integral component of the right to adequate housing.⁶³ Security of tenure means that the state must protect tenants from arbitrary involuntary removal from their land or residence. A key element of security of tenure is thus legal protection from forced eviction, the threat of eviction, and harassment.⁶⁴

The bulk of the work of the legal services attorneys at Legal Action of Wisconsin, Inc. is protecting the security of tenure of its clients, specifically homelessness prevention. The security of a client's tenure, and the ability of an applicant for legal services to obtain representation, is dependent on the type of situation. Not all tenures are equally secure. In Wisconsin, in most ordinary landlord-tenant relationships, there is no right to continued occupancy upon the

61. The Legal Services Corporation (LSC) was created by Congress in 1974 as an independent nonprofit corporation to promote equal access to justice and provide grants for civil legal assistance to low-income Americans. Legal Servs. Corp. Act, 42 U.S.C. § 2996(2) (2008).

62. General Comment 4, *supra* note 14, at ¶8 (stating that under international law, adequate housing must include the following seven components: (1) legal security of tenure; (2) availability of services, materials, facilities and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy); *see also* U.N. Office of the High Comm'r for Human Rights, Fact Sheet No. 21 (Rev.1), *The Right To Adequate Housing*, (2009), available at http://www.ohchr.org/Documents/Publications/F21_rev_1_Housing_en.pdf (explaining that adequate housing must "at a minimum" satisfy these seven identified criteria).

63. General Comment 4, *supra* note 14, at ¶ 8(a).

64. *Id.*

completion of a lease term or the non-renewal of a periodic tenancy; that is, there is no good cause or just cause requirement for termination of tenancy at the end of a term.⁶⁵

Nevertheless, some federal and state laws do provide security of tenure for Wisconsin residents in certain situations, including good cause protections for mobile home park tenants;⁶⁶ additional notice and time to vacate for tenants in foreclosure under the federal Protecting Tenants at Foreclosure Act of 2009;⁶⁷ protections for domestic violence victims under Wisconsin's Open Housing Law,⁶⁸ Safe Housing Act,⁶⁹ and the federal Violence Against Women Act;⁷⁰ and good cause protections for tenants in federally assisted housing.⁷¹

65. See Wis. Stat. Ann. §704 (West 2013). This is Wisconsin's landlord-tenant law for private housing, which outlines the required procedures for lease termination and eviction. The law covers periodic tenants as well as those who have a fixed-term lease. See, e.g., Wis. Stat. §704.19(2) (2013) ("A periodic tenancy or a tenancy at will can be terminated by either the landlord or the tenant only by giving to the other party written notice complying with this section . . ."); Wis. Stat. §704.25(1) (2013) ("If a tenant holds over after expiration of a lease, the landlord may in every case proceed in any manner permitted by law to remove the tenant and recover damages for such holding over.").

66. See Wis. Stat. Ann. §710.15 (West 2013); see also Wis. Admin. Code ATCP § 125 (1998) (outlining fair trade practices for manufactured home communities).

67. 12 U.S.C. § 5201 (2009). The Act mandates that tenants of landlords whose buildings are in foreclosure be given 90 days' notice of the termination of their lease in the event that the building is sold and tenants are required to vacate the premises. See, e.g., American Law Reports, *Construction and Application of Protecting Tenants at Foreclosure Act of 2009*, 65 A.L.R. Fed. 2d 217 (2012) (explaining the application of the 90 days' notice provision).

68. See Wis. Stat. Ann. § 106.50 (West 2013) (providing a tenant who is a victim of domestic abuse a defense to an action for eviction brought by a landlord if the landlord knew or should have known that the basis for the action for eviction is conduct that related to the commission of domestic abuse and the tenant has appropriately notified the landlord of the circumstances).

69. See Wis. Stat. §704.16 (West 2013) (allowing a landlord to terminate the tenancy of a renter who causes another resident in the same rental community to face an imminent threat of physical harm, even if the offending renter's tenancy has not reached the end of a rental period).

70. See Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54, 102 (2013) (to be codified at 42 U.S.C. § 14043e-11) (providing that an applicant to or a tenant of a public housing program covered under the Act may not be evicted from or denied participation in the public housing program based on his or her status as a victim of domestic violence).

71. See 24 C.F.R. § 880.607 (2013). This chapter of the Code of Federal Regulations, effective November 26, 2010, governs "termination of tenancy and modification of lease" procedures for all federal public housing, including Section 8 subsidized housing, which is available to low-income families. Section

Yet, even when tenants have these rights, they may not be aware of them. And when they are, they lack the legal training to raise defenses and claims when facing the loss of housing. The assistance of counsel in these situations is therefore critical to enforcement of the limited number of protections promoting security of tenure for low-income tenants. The following are a handful of typical cases handled by Legal Action attorneys working to protect the right to housing.

a. Enforcing the Good Cause Protection for Mobile Home Tenants

Susan was elderly and disabled and receiving long-term supportive care to live independently in her mobile home, which contained many expensive modifications for her disability to facilitate her independent living. She enjoyed spending time with her two cats and loved to garden. Susan contacted Legal Action when facing eviction from the mobile home park when the park owner decided not to renew her lot lease. As mentioned above, the tenancy of mobile home park tenants cannot be terminated, during or at the end of a lease term, absent good cause.⁷² The attorney for the park owner did not allege the good cause requirement under state law and Legal Action prevailed on the court to dismiss the case against her. Then the park tried to buy Susan out of her lease, but, with the support of counsel, she refused the offer and the park owners did not renew the effort to terminate. Due to Legal Action's intervention, the court dismissed the eviction action, allowing time for the intervention of supportive services, which assisted Susan with cleaning her yard, the primary concern of the park owner. Susan has since passed away but she was able to finish out her life in her home, living independently, enjoying her cats and her garden.

b. Protecting Tenants in Foreclosed Properties

Karen called Legal Action after the Sheriff posted a notice on her door stating that it had a writ to remove her from her rental unit due to an eviction. Legal Action advised Karen on how to file a motion to re-open the eviction judgment and stay the writ of restitution of

880.607(b)(1) lists the permissible grounds for terminating a tenancy, which are: material noncompliance with the lease (e.g., non-payment of rent); criminal activity or alcohol abuse by a tenant; and other "good cause," "which may include the failure of a family to accept an approved modified lease form." *Id.*

72. Wis. Stat. Ann. § 710.15 (West 2013).

the premises. Legal Action appeared at the motion hearing and prevailed upon the court to dismiss the eviction action because the eviction plaintiff had already lost the property in foreclosure and no longer was entitled to possession of the premises. Karen's attorney informed Karen of her right to stay on the premises under the federal Protecting Tenants at Foreclosure Act⁷³ and to negotiate a new lease with the new owner. Maintaining her housing was critical to Karen's ability to maintain her state social services job.

c. Good Cause and Right to Cure Notices for Subsidized Housing Tenants

Matthew and his wife Renee are elderly and disabled. Matthew cannot read or write and Renee relies on a wheelchair for mobility and also has some cognitive disabilities. Matthew and Renee called Legal Action when they were facing eviction from their subsidized housing unit for allegedly selling drugs. It was alleged that Matthew sold his prescription morphine pills to a police informant. Matthew and Renee both denied the charges. Yet the landlord attempted to terminate their tenancy without providing them with an opportunity to cure the alleged lease violation, which is required under state law for leases of one year or less.⁷⁴ Recognizing the relationship between Matthew's disability and the threatened eviction, Legal Action worked with supportive services available through the county to ensure that Matthew's medication was properly delivered, organized and secured so he could protect himself from persons who tried to take advantage of him and his access to prescription opiates. With the intervention of Legal Action, the court dismissed the case on grounds of deficient notice and the couple was able to remain in their subsidized housing unit.

d. Protecting Victims of Domestic Violence

Toya was homeless with eight children when she called Legal Action seeking help. She had recently returned to her former home to retrieve her children from their father, who had tried to rape her and had severely beaten her on previous occasions. When she returned to the home, she realized that her children's father had removed her from the family's federally subsidized Section 8 voucher.⁷⁵ Toya called

73. See 12 U.S.C. § 5201 (2009).

74. Wis. Stat. Ann. § 704.17(2)(a)–(b) (West 2013).

75. Federal law provides that a new Section 8 voucher may be issued when a family has moved out of a public housing unit "in order to protect the health or

Legal Action from the shelter where she and her children were staying. As a victim of domestic violence, Toya has certain protections from the loss of housing benefits if it relates to her being a victim of domestic violence.⁷⁶ Legal Action intervened and made a successful argument to the public housing agency to issue the family's Section 8 voucher to Toya, who had obtained a domestic abuse injunction against the children's father and secured placement rights for the children. She was able to convince her prior landlord to rent to her with the Section 8 voucher and the children were able to return to the neighborhood where they had gone to school and made friends.

2. Ensuring Affordability

Affordability is another key component of the human right to adequate housing. This requires that "personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised."⁷⁷ If the cost of rent accounts for so much of a family's income that they do not have enough resources for adequate food, education, health care, and other basic needs, then the housing is not affordable, and the right to adequate housing has not been fulfilled.

a. Recovering Rent Assistance

Angela and her children were evicted from their apartment in Madison after they stopped receiving assistance from the federal Section 8 program, which had helped the family pay their rent. Angela's Section 8 payments were taken away after she was sued by a former landlord, who claimed she owed more than \$1,400 for an unpaid water bill and property damage. Angela disputed the amount she owed the landlord. She said that a leaking pipe in the ground was the reason her water bill suddenly ballooned to more than \$800. Nevertheless, she started making regular payments on the debt to her former landlord, but the payments ended when Angela lost her job. Angela said she made a deal with the landlord to stop paying while she was unemployed. But soon she got a letter saying her Section 8 benefits were being terminated because of the past-due

safety of an individual who is or has been the victim of domestic violence, dating violence, or stalking and who reasonably believed he or she was imminently threatened by harm from further violence if he or she remained in the assisted dwelling unit." See 42 U.S.C.A. § 1437(f) (West 2013).

76. See *supra* notes 68–70 and accompanying text.

77. General Comment 4, *supra* note 14.

debt. Without Section 8, Angela couldn't afford rent, was evicted and lost all of her property because she had nowhere to store it. She and her children, who range in age from three to fifteen, were homeless and sleeping on the floor of her mother's small apartment. Trying to fix the situation herself, Angela went to the initial administrative grievance hearing, where, without an attorney to represent her, she lost. A supervisor with the Section 8 program suggested she seek the help of a lawyer. Angela called Legal Action and a staff attorney filed a challenge to the termination decision in circuit court. The judge ruled that Angela's Section 8 assistance had been improperly terminated and should immediately be restored. Several weeks later, Angela was able to obtain a lease with her Section 8 voucher and once again provide stable, affordable housing for her family.

3. Accessibility, Habitability, and Services for Persons with Mental Health Challenges

The human right to housing requires more than a "building with four walls and a roof." Housing is habitable only if residents are guaranteed physical safety and provided with adequate space, as well as protection against the natural elements and "other health hazards."⁷⁸ Housing must also be accessible to those entitled to it, with "some degree of priority consideration" given to disadvantaged groups, including the elderly and persons with mental illness. Under international law, "both housing law and policy should take fully into account the special housing needs of these groups."⁷⁹

The Legal Action office routinely represents tenants, usually the elderly and/or disabled, in eviction proceedings initiated due to the tenants' hoarding behavior—which landlords argue is a lease violation. These cases demonstrate the need for counsel to intervene to enforce tenants' right to a reasonable accommodation of a mental health disability that directly relates to the basis for eviction, to slow down the eviction process to allow sufficient time for therapeutic and supportive services to intervene, and to preserve tenants' housing.

Henry is a 75-year-old man who lives in a rental unit in a complex in rural Wisconsin. For many years, he delivered newspapers for a living and met many people in his community through that service. He liked to go through the papers, especially the obituaries, and cut out articles related to persons he knew. He kept many of these papers stacked in his apartment. He also took pride in an

78. U.N. Office of the High Comm'r for Human Rights, *supra* note 62, ¶ 4.

79. General Comment 4, *supra* note 14, ¶ 8(e).

extensive library of church hymnals and had several pet cats. Henry called Legal Action when he was sued for eviction because his landlord said he was not maintaining his unit and the clutter was making it hard to treat for an infestation. Legal Action requested a reasonable accommodation on behalf of Henry to allow time for him to correct the conditions in his unit. Legal Action was able to work with the county public health department for follow-up inspections, which targeted the most concerning areas of the unit, to allow Henry to dispose of refuse, move excess items into storage, and get his unit in compliance with the applicable property maintenance and health codes. His tenancy was secured through the intervention of counsel and cooperation with local government entities.

IV. THE CHALLENGES OF OBTAINING COUNSEL TO PROTECT THE RIGHT TO HOUSING

As the data and client stories reflect, legal representation significantly impacts individuals' ability to secure and protect the right to housing. Yet with no recognized right to counsel in civil cases, and because of budget constraints and federal restrictions on federally funded legal services providers, the vast majority of civil legal needs go unmet, including when basic needs such as housing are at stake.

A. No Recognized Right to Counsel in Civil Cases Where Basic Needs Are at Stake

A categorical right to counsel in civil cases is not recognized under the federal Constitution. Although the U.S. Supreme Court has found a right to counsel in criminal cases,⁸⁰ the Court conducts a stringent case-by-case due process analysis in civil cases to determine whether the Constitution requires the appointment of counsel.⁸¹ Indeed, the Court has refused to find a categorical right to counsel

80. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963) (requiring counsel be appointed for indigent defendants in state court facing imprisonment due to felony charges); *Argersinger v. Hamelin*, 407 U.S. 25, 35 (1972) (requiring counsel for indigent defendants in state court facing imprisonment due to misdemeanor charges).

81. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 35 (1981) (finding no categorical right to counsel when termination of parental rights is at stake).

even in some civil cases where lengthy jail sentences are, in fact, imposed.⁸²

The lack of federal constitutional protection notwithstanding, all fifty states have various statutory provisions that require the state government to provide at least a limited right to counsel in some subset of civil matters, primarily in family law matters, involuntary commitment, and medical treatment.⁸³ In addition, there are a number of smaller categories in which states provide a right to counsel in civil cases, such as civil arrest or the release of mental health records.⁸⁴ However, no state provides a general right to counsel for all civil cases, including for housing cases.⁸⁵

B. Funding Constraints

With no comprehensive right to counsel in civil cases, the primary safety net for civil counsel is the Legal Service Corporation (LSC), a federally funded independent non-profit corporation that funds civil legal services for people who are poor and low-income.⁸⁶ Yet, over the past several years, LSC has been hit with massive cuts to its congressional appropriations. Its budget steadily decreased from \$420 million in 2010 to \$341 million in 2013.⁸⁷ These decreases

82. *Turner v. Rogers*, 131 S. Ct. 2507, 2602 (2011) (finding no categorical right to counsel for indigent contemnors facing jail time for failing to pay child support, at least where the plaintiff is neither the state nor represented by counsel).

83. Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 *Clearinghouse Rev. J. of Poverty L. & Pol'y* 245, 245–48 (2006).

84. *Id.*

85. Until 2001, Indiana had a statute that stated, “If the court is satisfied that a person who makes an application [for in forma pauperis status] does not have sufficient means to prosecute or defend the action, the court shall . . . (2) assign an attorney to defend or prosecute the cause.” Ind. Code § 34-10-1-2 (1998). As one court put it, the statute as it read at that time “mandates that courts appoint counsel for indigent civil litigants in all situations The threshold determination of indigency is a matter within the sound discretion of the trial court Once indigency is established, a trial court has no discretion under the statute to determine whether to grant a request for appointed counsel.” *Dickson v. D’Angelo*, 749 N.E.2d 96, 99 (Ind. Ct. App. 2001). The statute was amended in 2001 to say that a court “may, under exceptional circumstances, assign an attorney to defend or prosecute the cause.” Ind. Code § 34-10-1-2 (2001).

86. *See supra* note 61 and accompanying text.

87. *LSC Funding*, Legal Servs. Corp. (July 15, 2013), <http://www.lsc.gov/congress/lsc-funding>. In September 2012, Congress allocated \$350 million to the Legal Services Corporation for Fiscal Year 2013. This was eventually reduced to \$341 million due to sequestration in late March 2013. *Id.*

are of particular concern as they come at a time of economic crisis, when more and more Americans are falling below federal poverty guidelines and are in more need of civil legal services than ever before.⁸⁸

The recession has also affected LSC grantees' non-federal sources of funding, leaving major holes in the budgets of LSC-funded organizations.⁸⁹ Interest on Lawyer Trust Account (IOLTA) programs are the largest national source of civil legal funding after LSC grants, amounting to 13 percent of funding for LSC-funded organizations in 2008 and serving as an even more critical source for programs that do not receive LSC funds.⁹⁰ The latest economic recession resulted in a significant decline in interest rates and a consequent decrease in revenues which IOLTA uses to fund legal services organizations. From 2007 to 2009, IOLTA revenues decreased 75 percent, from \$371 million to just \$92 million.⁹¹

These funding decreases cripple the budgets for civil legal services organizations, impacting the number of cases they pursue and the resources they provide. Due to funding reductions between 2010 and 2013, LSC organizations were forced to eliminate more than 1,000 staff positions and close more than 30 offices.⁹²

As a result, LSC and its grantees have been unable to meet the demand for civil legal services. According to the LSC's 2009 report *Documenting the Justice Gap in America*, "for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources."⁹³ LSC-funded organizations reject nearly one million cases because they lack the funding to handle them.⁹⁴ State legal needs studies conducted from 2000 to 2009 indicate that less than 20 percent of legal problems experienced by low-income persons are addressed with the assistance of legal representation.⁹⁵

88. *Civil Legal Services: Low Income Clients Have Nowhere to Turn Amid the Economic Crisis*, Brennan Ctr. for Justice, 1 (June 25, 2010), http://brennan.3cdn.net/ed5d847dfcf163a02a_exm6b5vya.pdf.

89. *Id.* at 2.

90. *Id.*

91. *Id.*

92. John G. Levi, Opening Remarks at the 2013 White House Forum on Increasing Access to Justice (April 16, 2013), *available at* <http://www.lsc.gov/board-directors/chairmans-page/statements/lsc-chairman-john-levis-remarks-2013-white-house-forum>.

93. Legal Servs. Corp., *supra* note 7, at 1.

94. *Id.* at 9–11.

95. *Id.* at 3.

The funding situation for Legal Action of Wisconsin is illustrative. Over the last few years, “basic field” money from LSC (which can be used for any civil case consistent with LSC Regulations) has declined and Legal Action has become more dependent on specific grants to maintain staff and conduct core services, including representation in housing cases.⁹⁶ Indeed, one of the authors is the only full time housing attorney in Legal Action’s Madison office, which covers nine counties in southern Wisconsin.

A 2007 study by the Wisconsin State Bar found that Wisconsin’s primary legal service providers, Legal Action of Wisconsin and Wisconsin Judicare, only had resources to handle 16,000 cases per year—about 20 percent of individuals who qualify for help through their programs.⁹⁷ Some who qualify are not aware that these services exist and do not come to them for help, but many others are turned away. This means that in Wisconsin, over half a million people who faced significant legal problems were left to represent themselves.⁹⁸ In fact, these statistics may underestimate the civil justice gap in Wisconsin, as they predate the latest economic recession, which pushed an ever-growing number of people into poverty.

Moreover, in the last few years much of the funding of Legal Action’s housing work has come not from basic field LSC money, but from HUD homelessness prevention and homelessness assistance grants.⁹⁹ These grants have specific requirements that limit the work Legal Action can do, where it can do it, and the timeliness of its intervention.¹⁰⁰

96. E-mail from John F. Ebbott, Exec. Dir. Legal Action of Wis., to Heidi M. Wegleitner (Mar. 18, 2014) (on file with the author).

97. See State Bar of Wis., Access to Justice Committee, Bridging the Justice Gap: Wisconsin’s Unmet Legal Needs, Final Report 7 (March 2007), available at <http://www.nlada.org/DMS/Documents/1173539417.81/WIreportfinalATJ.pdf>.

98. *Id.*

99. Legal Action received around \$3.23 million in LSC grants in 2013, compared with \$4.36 million in 2010. LSC grants accounted for 42 percent of Legal Action’s funding in 2012. *Program Profile: Legal Action of Wisconsin, Inc., Legal Servs. Corp.*, <http://www.lsc.gov/local-programs/program-profile?RNO=550010> (last visited February 10, 2014).

100. See, e.g., U.S. Dep’t of Housing and Urban Dev. Emergency Shelter Program Desk Guide 21–34 (2001), available at <https://www.onecpd.info/resource/829/emergency-shelter-grants-program-desk-guide/>.

C. Federal Restrictions on LSC Funding

As a general matter, LSC-funded organizations everywhere are subject to restrictive federal rules governing who may receive their legal services and the kinds of legal services they may provide. Some of these restrictions impact the availability of legal services for all cases.¹⁰¹ Others directly impact the ability of legal services lawyers to engage in housing-related matters. For example, LSC-funded organizations are prohibited from representing the vast majority of undocumented and other categories of immigrants,¹⁰² with some narrow exceptions.¹⁰³ Federal restrictions also prohibit LSC-funded organizations from defending individuals in public housing eviction cases if the person threatened with eviction has been charged or convicted with a drug crime related to the sale, distribution or manufacture of a controlled substance and the public agency asserts that this drug charge or conviction threatens the health or safety of other tenants or employees.¹⁰⁴

101. For example, LSC bases its eligible population on the federal poverty level threshold as established by the federal poverty guidelines and thus serves clients who are at or below 125 percent of the poverty line, which for a family of four amounts to an income of \$27,938 a year. Legal Services Corporation: Income Level for Individuals Eligible for Legal Assistance, 77 Fed. Reg. 4909, 4910 (Feb. 1, 2012) (codified at 45 C.F.R. § 1611 (2012)).

102. Restrictions on Legal Assistance to Aliens, 45 C.F.R. § 1626 (2011); see also Alan W. Houseman & Linda E. Perle, Center for Law & Social Policy, What Can and Cannot Be Done: Representation of Clients by LSC Funded Programs 5 (Jan. 22, 2009), available at www.clasp.org/admin/site/publications/files/0524.docx.

103. LSC-funded organizations may represent immigrants who are lawful permanent residents, who are married to, the parent of, or the unmarried minor child of a U.S. citizen, or who have been granted a certain recognized status. 45 C.F.R. § 1626.4 (2011). The Trafficking Act and the reauthorization of the Violence Against Women Act also permit organizations to use non-LSC funding to represent undocumented individuals who have been battered or subjected to extreme cruelty by a spouse or parent as well as undocumented individuals whose children have been battered or subjected to extreme cruelty. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2979, § 104(a)(C) (2005). However this representation must be “directly related to the prevention of, or obtaining relief from, the battery or cruelty.” 45 C.F.R. § 1626.4(2) (2011).

104. Restriction on Representation in Certain Eviction Proceedings, 45 C.F.R. § 1633 (2011). In addition, LSC funded organizations may not engage in the political process through advocacy or representation before legislative bodies on pending or proposed legislation, nor may they represent clients or client interests in front of administrative agencies that direct rulemaking. Restrictions on Lobbying and Certain Other Activities, 45 C.F.R. § 1612 (2011); see also Houseman & Perle, *supra* note 101, at 3–4 (describing the one exception where, if

The LSC appropriations legislation further restricts and limits the activities of LSC grantees by extending the federal restrictions to all the grantees' activities, even those fully financed with non-LSC funding.¹⁰⁵ Known as the "poison pill," this provision restricts the legal tools and activities available to organizations that take a single dollar of LSC funding.¹⁰⁶ According to a 2009 report, nationwide, this restriction annually inhibits over \$490 million of state, local and private funding, which is fifty-eight percent of the resources of LSC grantees.¹⁰⁷ It also potentially deters non-federal spending on legal services by extending federal restrictions to funding provided by state, local, and private funders.¹⁰⁸ In order to escape these federal restrictions on non-federal funding sources, LSC recipients must set up affiliate or separate entities and transfer the non-LSC funds to these new organizations for use in federally restricted activities.¹⁰⁹ Commentators have noted that these efforts to "unrestrict" non-federal money waste scarce resources by requiring the creation of inefficient, duplicative organizations, further limiting the funding available to civil legal services.¹¹⁰

approached by a government body with the request, an LSC-Funded organization may use non-LSC funds "to respond to a written request for information or testimony" regarding legislation or rule-making and may "participate in public comment in a rulemaking proceeding"). Federal restrictions also forbid conducting or participating in grassroots lobbying and prohibit LSC-funded groups from establishing training programs that "[a]dvocate particular public policies" or "political activities" or to "[t]rain participants to engage in activities prohibited by the Act . . ." 45 C.F.R. § 1612 (2011). Moreover, LSC-funded organizations cannot initiate, participate, or engage in class actions. 45 C.F.R. § 1617 (2011).

105. See 45 C.F.R. § 1610 (2011); see also Houseman & Perle, *supra* note 101, at 4 (noting that recipients of LSC funds cannot use "funds from non-LSC sources to undertake the activities that are subject to the restrictions" placed on LSC funds).

106. *FY 2011 Appropriations Process for Civil Legal Services*, Brennan Ctr. for Justice (March 11, 2011), <http://www.brennancenter.org/analysis/fy-2011-appropriations-process-civil-legal-services>.

107. Rebecca Diller & Emily Savner, Brennan Ctr. for Justice, *A Call to End Federal Restrictions on Legal Aid for the Poor*, i (2009), http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf.

108. *Id.*

109. Houseman & Perle, *supra* note 101, at 4.

110. Diller & Savner, *supra* note 106, at i.

V. EFFORTS TO EXPAND THE RIGHT TO CIVIL COUNSEL AS A MEANS OF PROTECTING BASIC HUMAN NEEDS

Given the limitations described above, and recognizing the importance of access to counsel to protect the right to housing, advocates have sought to ensure broader protections for the right to counsel in civil cases as a means of securing basic needs, including where the right to housing is at stake. These strategies include litigation efforts to expand state constitutional protections, legislative and other policy efforts to establish pilot projects, and advocacy with international human rights mechanisms.

A. Domestic Advocacy Efforts to Expand the Right to Counsel

One strategy for establishing the right to counsel seeks to establish the right in categories of cases implicating basic needs on a state-by-state basis, through litigation to recognize state constitutional protections. Indeed, state courts have issued decisions recognizing a right to counsel in cases involving orders of protection for domestic violence, abuse and neglect proceedings, paternity proceedings, civil commitment, civil contempt, and civil forfeiture.¹¹¹ This strategy has not yet yielded success as a means to protect the right to housing.

More successful are efforts by policy makers, bar associations, and Access to Justice Commissions seeking legislative and policy changes to promote a right to counsel in civil cases where basic human needs, including housing, are at stake. In 2006, the American Bar Association (ABA) unanimously approved a resolution urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”¹¹² Four years later, in 2010, the ABA adopted the ABA Basic Principles for a Right to

111. See John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Cases*, 61 Drake L. Rev. 763 (2013).

112. Howard H. Dana, Am. Bar Ass'n, Resolution 112A, 13 (2006), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf (identifying the basic needs “most critical for low income persons and families”).

Counsel in Civil Legal Proceedings,¹¹³ and the ABA Model Access Act, providing language for state legislators seeking to implement a statutory right to counsel.¹¹⁴

State and local legislatures, Access to Justice Commissions, and bar associations recently have instituted innovative pilot programs and other efforts to explore whether providing counsel in certain civil cases leads to more accurate outcomes, cost savings, and/or greater judicial efficiency. Several of these touch on the right to housing. California established a pilot program to examine the provision of civil legal representation for indigent parties through the Sargent Shriver Civil Counsel Act in 2009. The program provides roughly \$9.5 million per year for six years to seven organizations in order to provide civil legal representation for indigent parties in claims involving basic human needs such as housing, guardianship, and child custody cases.¹¹⁵ In 2011, the Maryland Access to Justice Commission released a detailed list of implementation strategies for the civil right to counsel.¹¹⁶ In 2013, the Maryland General Assembly passed a bill creating a Task Force, staffed by the Commission, to study implementing a civil right to counsel in basic human needs cases.¹¹⁷ The Texas Access to Justice Commission has also taken steps to support “right to civil counsel” pilot programs, creating in 2009 a new category of grant for precisely that purpose.¹¹⁸ In

113. Am. Bar Ass’n, Resolution 105 (Revised), (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_105_revised_final_aug_2010.authcheckdam.pdf.

114. Am. Bar Ass’n, Resolution 104 (Revised), 1 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

115. Press Release, Legal Aid Found. of L.A., Los Angeles Legal Groups Receive \$8.4 Million to Assist Individuals and Families in Housing Cases (April 29, 2011), *available at* <http://www.lafla.org/pdf/Final%20Shriver%20Release%204.29.pdf>. For the list of grantees, see *Sargent Shriver Civil Counsel Act Pilot Projects*, California Courts, <http://www.courts.ca.gov/15703.htm> (last visited Feb. 10, 2014).

116. Maryland Access to Justice Commission, *Implementing a Civil Right to Counsel in Maryland* (2011), *available at* <http://www.courts.state.md.us/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf>.

117. Maryland Judiciary Committee, Senate Bill 262/House Bill 129: Task Force to Study Implementing a Civil Right to Counsel in Maryland (Mar. 18, 2013), <http://mgaleg.maryland.gov/2013RS/bills/hb/hb0129t.pdf>.

118. Press Release, Texas Access to Justice Foundation, Texas Access to Justice Foundation Awards New Grants for Pilot Projects Impacting the Texas Legal Delivery System (Dec. 15, 2009), *available at* <http://www.teajf.org/news/releases/Special-Board-Impact-Grants.aspx>. Similarly, the North Carolina Access to Justice Commission sponsored two pieces of

addition, the Boston Bar Association's Civil Right to Counsel Task Force conducted pilot programs in two different housing courts to ascertain the impact of counsel in eviction cases,¹¹⁹ and recently received money from the Massachusetts Attorney General to conduct a second round of eviction pilots.

In Wisconsin, Legal Action has been engaged in a unique effort to establish a right to counsel in civil cases implicating basic needs through litigation and an administrative rulemaking petitions. The litigation strategy has sought to establish a right to counsel primarily in family court proceedings, using claims based on sections of the Wisconsin Constitution and *Griffin v. Illinois*.¹²⁰ In *Kelly v. Warpinski*,¹²¹ Legal Action pursued declaratory relief directly with the Wisconsin Supreme Court on behalf of two mothers, each in a custody dispute with the fathers who were represented by attorneys.¹²² Legal Action did not have the resources to represent the women in their disputes, so it pursued a declaratory judgment seeking attorneys for them, naming the two trial court judges as respondents and moving to include the Wisconsin Counties Association as well. Despite compelling arguments from the petitioners and several *amici*, the state supreme court denied the case

legislation in 2009 and 2011 (ultimately unsuccessful) that would have appropriated funds for small pilot projects. See House Bill 1915, Session 2009 (as referred to the Judiciary II Subcommittee, May 20, 2011), available at <http://www.ncleg.net/Sessions/2009/Bills/House/PDF/H1915v1.pdf>; House Bill 895, Session 2011 (as referred to the Appropriations Committee, April 21, 2011), available at <http://www.ncga.state.nc.us/sessions/2011/bills/house/pdf/h868v1.pdf>.

119. See Boston Bar Ass'n Task Force on the Civil Right to Counsel, *supra* note 47.

120. In *Griffin*, the U.S. Supreme Court held that Illinois violated Griffin's Fourteenth Amendment rights to due process and equal protection when it denied his appeal of his criminal conviction because he could not afford the cost of the transcription of the trial record and requested it be paid at the public's expense. *Griffin v. Illinois*, 351 U.S. 12 (1956). For a detailed discussion of this litigation strategy, see John F. Ebbott, To Gideon via Griffin: The Experience in Wisconsin, *Clearinghouse Rev.* 223 (2006).

121. *Kelly v. Warpinski*, No. 2004 AP00 2999-OA (Wis. Apr. 26, 2005), available at <http://wscca.wicourts.gov/pdfs/0F9966B13F13E10C338D35C97B4B74D5/caseDetails2644744588181141068.pdf>.

122. One of the mothers had previously signed a stipulation giving primary placement to the father if she moved more than 25 miles from the city where the father lived; the other mother had joint custody and placement with the father but was concerned that the father was abusing their two young children. Ebbott, *supra* note 119, at 224.

without issuing an opinion.¹²³ The strategy has now shifted to the circuit court level, where petitioners pursue the right to counsel argument in individual cases, appealing denials of the right to counsel by trial court judges.¹²⁴ These cases have thus far failed to yield a decision affirming the right to publicly funded counsel in civil cases, although some dissenting opinions in the appellate courts have been sympathetic.¹²⁵

In addition to this litigation strategy, Legal Action of Wisconsin has sought to establish the right to counsel through an administrative rulemaking proposal. In 2010, Legal Action of Wisconsin's Executive Director filed a petition with the Supreme Court of Wisconsin requesting that the court add a section to Supreme Court Rule 11.02, requiring publicly funded civil counsel appointments.¹²⁶ The petition was based on the inherent authority of the courts to appoint counsel for indigent persons in civil cases.¹²⁷ The Wisconsin Supreme Court declined to adopt the petition (and a supplemental petition to establish a pilot "right to counsel" project for domestic violence victims) on the grounds that they did not fit within

123. See Ebbott, *supra* note 119, at 225; Kelly v. Warpinski, No. 2004 AP00 2999-OA (Wis. Apr. 26, 2005).

124. See Ebbott, *supra* note 119, at 225–26 (citing Garcia v. Cir. Ct. of Milwaukee Cnty., 2005 AP00 1696-LV and 2005 AP00 1699-W (Wis. Ct. App. Jun. 29, 2005); Paternity of K.J.P.: Jerome E.P. v. Diana R.M., No. 2005AP1957-LV (Wis. Oct. 19, 2005); Paternity of K.J.P.: State ex rel. Diana M. V. Richland County, 2005 AP 1958-W (Wis. Oct. 19, 2005); Marriage of Olson, 2005 AP 2087-LV (Wis. Oct. 19, 2005); State ex rel. Olson v. Sauk County, 2005 AP 2088-W (Wis. Oct. 19, 2005); and State ex rel. Diana M./Lyle Olson v. Circuit Courts for Richland and Sauk Counties, 2005 AP 2609-W (Wis. Oct. 19, 2005)).

125. See Ebbott, *supra* note 119, at 225.

126. The petition provided:

(2) Appearance by attorney. PROVIDED. Where a civil litigant is indigent (defined as below 200% of the federal poverty guidelines), the court shall provide counsel at public expense where the assistance of counsel is needed to protect the litigant's right to basic human needs, including sustenance, shelter, clothing, heat, medical care, safety and child custody and placement. In making the determination as to whether the assistance of counsel is needed, the court may consider the personal characteristics of the litigant, such as age, mental capacity, education, and knowledge of the law and of legal proceedings, and the complexity of the case.

Petition to the Supreme Court of Wisconsin to Establish a Right to Counsel in Civil Cases (Sep. 30, 2010), available at <http://www.wicourts.gov/supreme/docs/1008petition.pdf>.

127. Piper v. Popp, 167 Wis. 2d 633, 638 (1992); Joni B. v. State, 202 Wis. 2d 1, 8 (1996).

the scope of the rule and because the “parameters of the proposal are difficult to discern and the effect of the proposal on circuit courts and counties is largely unknown but may be substantial.”¹²⁸ On September 30, 2013, Legal Action filed a similar petition with the Wisconsin Supreme Court, calling for a rule to provide guidance to circuit courts as to when attorneys should be appointed for low income litigants and requesting that the state Supreme Court fund an appointment of counsel pilot program for indigents in selected categories of civil cases involving basic human needs.¹²⁹ That proposal is currently pending.

B. International Advocacy Efforts Urging a Right to Counsel

Advocates are also actively engaging international human rights mechanisms to build recognition of the importance of a right to counsel in the United States, particularly in cases where basic human needs, such as housing, are at stake. In 2007, when the United States was being reviewed for its compliance with the International Covenant on the Elimination on All Forms of Racial Discrimination (the “Race Convention”), a coalition of groups spearheaded by Northeastern University School of Law’s Program for Human Rights in the Global Economy (PHRGE) submitted a shadow report to the CERD, the committee of human rights experts monitoring compliance with the treaty, highlighting the disproportionate impact of the absence of civil counsel on racial minorities in the United States.¹³⁰ PHRGE representatives and other advocates then attended the formal review of the United States in Geneva, Switzerland in 2008 and spoke directly with CERD delegates, urging the Committee to address the United States’ failure to meet its obligations. As a direct result of these efforts, the Committee’s concluding observations included a strong admonition of the United States’ failure to provide civil counsel to low-income individuals. The Committee noted “with

128. In the matter of the petition to establish a right to counsel in civil cases, No. 10-08, 2012 WI 14 (Feb. 24, 2012). The court was careful to point out, however, that the decision on the petition did not undermine previous holdings that recognize the court’s inherent authority to appoint civil counsel. Thus, it is still possible for indigent litigants to receive a publicly funded attorney in a civil case. Legal Action has accordingly developed pro se motion packets to facilitate pro se litigants’ pursuit to legal representation and equal access to justice.

129. Petition to the Supreme Court of Wisconsin to Establish Pilot Project and Create Rule Governing Appointment of Counsel in Civil Cases, 13–15, available at <http://www.wicourts.gov/supreme/docs/1315petition.pdf>.

130. Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *Touro L. Rev.* 147 (2009).

concern the disproportionate impact [of existing practice] on indigent persons belonging to racial, ethnic and national minorities.”¹³¹ The Committee further urged the United States to “allocate sufficient resources to ensure legal representation of [these persons] in civil proceedings, [particularly] where basic human needs, such as housing, health care, or child custody, are at stake.”¹³² PHRGE made extensive reference to the Committee’s findings in a U.S. Senate Judiciary Committee hearing on American compliance with international human rights treaties in December 2009.¹³³

Similarly, during the 2013-14 review of the United States for its compliance with the International Covenant on Civil and Political Rights (ICCPR), advocates, this time led by Columbia Law School’s Human Rights Clinic and Institute, lobbied the U.N. Human Rights Committee to include in its agenda for the review questions about access to counsel in civil cases. As a result, in advance of the review, the Committee asked the United States what steps it had taken to improve legal representation for civil proceedings, in particular for defendants belonging to racial, ethnic, and national minorities,¹³⁴ and to ensure legal representation for women victims of domestic violence.¹³⁵ The advocacy groups then submitted a detailed shadow report for the Committee’s consideration during the review, highlighting the civil justice gap and offering recommendations for federal reform, including establishing a right to counsel in federal civil cases where basic human needs, including housing, are at stake.¹³⁶ As with the CERD review in 2008, advocates traveled to

131. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, 72d Sess., Feb. 18–Mar. 7, 2008, U.N. Doc. CERD/C/USA/CO/6, ¶ 22 (May 8, 2008).

132. *Id.*

133. *The Law of the Land: U.S. Implementation of Human Rights Treaties Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 111th Cong. 431 (2009) (statement of Northeastern University School of Law).

134. Human Rights Comm., List of Issues In Relation to the Fourth Periodic Report of the United States of America (CCPR/C/USA/4 and Corr.1), adopted by the Committee at its 107th Session (March 11–28, 2013), U.N. Doc. CCPR/C/USA/Q/4, 109th Sess., (April 29, 2013).

135. *Id.* at ¶ 20.

136. Columbia Law School Human Rights Clinic, Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases, Response to the Fourth Periodic Report of the United States to the United National Human Rights Committee (August 2013).

Geneva for the ICCPR review in March 2014 to meet with Committee members and urge the Committee to make specific recommendations with regard to the right to counsel in civil cases.

U.S. advocates have engaged with other U.N. experts to highlight the importance of a right to counsel in civil cases, as well. In 2009, the U.N. Special Rapporteur on the right to adequate housing, Raquel Rolnik, made an official visit to the United States. In conjunction with the visit, the National Coalition for a Right to Civil Counsel¹³⁷ submitted testimony for Rolnik's consideration, highlighting both the civil justice gap in the United States, particularly in cases involving housing, and the importance of legal representation in securing the right to housing.¹³⁸ In 2013, the coalition responded to the Special Rapporteur's solicitation for civil society input on a thematic report on the security of tenure of the urban poor, and in written comments urged the Special Rapporteur to include a recommendation explicitly calling for a right to counsel in housing cases.¹³⁹ While the resulting draft guidelines did not explicitly call for a right to counsel, they did emphasize the importance of fully operational legal aid systems to ensure that people's rights are protected.¹⁴⁰ The Coalition submitted a second round of comments to the Special Rapporteur, again urging her to make an explicit call for a right to counsel.¹⁴¹

137. In 2003, advocates seeking to establish a right to counsel in civil cases formed the National Coalition for a Civil Right to Counsel, which has grown to over 240 participants from 35 states. The Coalition's mission is to "encourage, support, and coordinate advocacy to expand the recognition and implementation of a right to counsel in civil cases." *About the Coalition*, Nat'l Coal. for a Civil Right to Counsel, http://www.civilrighttocounsel.org/about_the_coalition/coalition_basics/ (last visited Mar. 6, 2014). Through the Public Justice Center, the coalition provides technical support and collects and coordinates model pleadings, legal research, and pro bono and amicus support for litigation and other advocacy efforts to establish a right to counsel in civil cases. *Id.*

138. Testimony of National Coalition for the Civil Right to Counsel to Raquel Rolnik, UN Special Rapporteur on Adequate Housing, Official U.S. Mission, Nov. 8, 2009 (on file with author).

139. E-mail from John Pollock, Coordinator, National Coalition for a Civil Right to Counsel, to Risa Kaufman, Exec. Dir., Columbia Law School Human Rights Institute (October 5, 2013) (on file with the author).

140. Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Draft for Consultation, Recommendations on Security of Tenure of the Urban Poor (Sept. 30, 2013) (by Raquel Rolnik), available at <http://www.ohchr.org/Documents/Issues/Housing/SecurityTenure/DraftRecommendationsSep2013.pdf>.

141. E-mail from John Pollock to Risa Kaufman, (October 5, 2013).

VI. IMPLICATIONS OF PAIRING A RIGHT TO HOUSING WITH THE RIGHT TO COUNSEL

There is no denying the practical truth of the insight derived from international human rights law that rights are indivisible and interdependent—that is, that civil and political rights, such as the right to fair procedures, are inseparable from economic and social rights, such as the right to housing.¹⁴² The above examples from Wisconsin confirm this, and underscore the importance of a strategy that pursues a right to housing *alongside* a right to counsel, rather than one which considers the two as alternative, or even opposing, strategies. Indeed, in the scenarios described above, the individual clients—Angela, Toya, Karen, Susan, Mathew, and Henry—did have a right to housing, however circumscribed. But that substantive right was unrealized until they obtained the assistance of Legal Action of Wisconsin. Access to counsel and to the courts—nominally procedural rights—were critical to the realization of, and enforcement of, individuals' rights to housing. The housing rights would have been illusory without accompanying procedural rights and, in these cases, availability of counsel.

By the same token, procedural assistance is of little ultimate value if there are no underlying rights to enforce or protect. Procedural rigor, including appointment of counsel, may delay the resolution of a matter, and as Henry's situation demonstrates, delay may be helpful for many clients.¹⁴³ Procedural protections can also have dignitary value for the affected individual.¹⁴⁴ However,

142. See Part III, *supra*. The indivisibility of rights is directly addressed in the Vienna Declaration and Programme of Action. World Conference on Human Rights, June 14–25, 1993, *Report of the World Conference on Human Rights, Report of the Secretary-General*, 48th Sess., 22d plen. mtg., part I, ¶ 5, U.N. Doc. A/CONF.157/24 (1993), reprinted in 32 I.L.M. 1661 (1993). For a critical examination of how the rhetoric of indivisibility has been used in different political contexts, see Daniel J. Whelen, *Indivisible Human Rights: A History* (2010).

143. The professional ethics rules in a number of jurisdictions acknowledge that seeking delay for a client may be ethically permissible, so long as the delay is not unreasonable. See, e.g., Texas Disciplinary Rules of Prof'l Conduct, Rule 3.02 ("Because such tactics are frequently an appropriate way of achieving the legitimate interests of the client that are at stake in the litigation, only those instances that are unreasonable are prohibited"); D.C. Rules of Prof'l Conduct, Rule 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.").

144. For two classic discussions of the dignitary value of procedure, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative*

procedural assistance is surely hollow if the end result is invariably just a more gradual loss of housing for the individual litigant rather than vindication of a right to housing.

Instead of treating advocacy for the right to counsel and the right to housing as mutually exclusive pursuits, pairing these two goals expands the strategic palette for advocates while creating the potential for new alliances. This pairing, which draws on human rights approaches, makes particular sense in the U.S. context, where both state and federal courts tend to view their plenary authority over substantive rights narrowly.¹⁴⁵

A. Shaping Judicial and Legislative Strategies

As United States-based advocates press for an expanded right to housing, they do so from within a federal legal system that, as a constitutional matter, generally eschews economic and social rights, and a state-level system that is currently not much more open.¹⁴⁶ Compounding this is the fact that domestic courts are reluctant to intervene in substantive areas with financial implications for the state because of separation of powers concerns.¹⁴⁷ Even in New York State, where the state constitution explicitly provides for “aid, care, and support of the needy,”¹⁴⁸ courts have moved cautiously, sometimes preferring to engage in a prolonged dialogue with the state legislature rather than issue judicial mandates that directly extend government benefits.¹⁴⁹

Adjudication in Mathews v. Eldridge, 44 U. Chi. L. Rev. 28, 49–52 (1976); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights-Part I*, 1973 Duke L.J. 1153, 1172–76 (1973).

145. Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Rationality Review*, 112 Harv. L. Rev. 1131, 1153–54 (1999) (observing that both federal and state courts use a deferential rationality standard for reviewing the constitutionality of social and economic legislation and urging that state courts rely on state constitutional provisions to depart from the federal approach).

146. *Id.*; see also Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Social Rights*, 39 Colum. Hum. Rts. L. Rev. 351, 391–92 (2008) (noting that “[f]ew consider the United States a source of models for the judicial enforcement of [social and economic rights.]”).

147. See, e.g., *Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528 N.E.2d 40, 44 (Ind. 1988) (“The separation of powers doctrine forecloses the courts from reviewing political, social and economic actions within the province of coordinate branches of government.”).

148. N.Y. Const. art XVII, § 1.

149. See, e.g., Mathew Mozian, *Reining In Interim Relief's Cottage Industry: A Call to Resolve Jiggetts*, 64 Alb. L. Rev. 397 (2000) (describing 13 years of

In contrast to this cautious approach in the area of economic and social rights, courts have often seen procedural protections as their special bailiwick. For example, when construing state or federal due process protections—as opposed to constitutional provisions concerning the general welfare—both state and federal courts have been much more ready to set standards for government. This generalization holds true even when meeting those procedural standards will entail significant government expenditures.¹⁵⁰ Given the courts' relatively favorable orientation toward procedural protections, pairing the right to housing and the right to counsel can help facilitate a nuanced strategy for housing advocates that takes advantage of the particular capacities of, and constraints on, the federal and state judiciaries as well as legislatures.

The Wisconsin experience is illustrative of this theory. In 2010, in their first petition to the Wisconsin Supreme Court, the Wisconsin advocates sought to have the Court encourage trial courts to appoint counsel “where the assistance of counsel is needed to protect the litigant’s rights to basic human needs, including sustenance, shelter, clothing, heat, medical care, safety and child custody and placement.”¹⁵¹ This was thus in the nature of an appeal to promote the general welfare, including “shelter,” or housing.

In their administrative conference discussions of the petition, the Justices focused on the Wisconsin due process precedents, which held that an indigent civil litigant is entitled to an individualized determination of the constitutional necessity of appointed counsel in her case.¹⁵² In their second petition to the Wisconsin Supreme Court,

litigation involving back and forth between the New York courts and legislature regarding the required level of shelter allowances under Article 17).

150. Both of the Supreme Court’s iconic cases addressing procedural fairness, *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Goldberg v. Kelly*, 397 U.S. 254 (1970), had the effect of mandating significant government expenditures to provide appointed counsel and extend fair hearings, respectively.

151. In the Matter of the Petition to Establish a Right to Counsel in Civil Cases, No. 10-08, 2012 WI 14 (Wis. Sup. Ct. Feb. 24, 2012).

152. See *Piper v. Popp*, 167 Wis. 2d 633 (1992); *Joni B. v. State*, 202 Wis. 2d 1 (1996). These cases held that a court must determine on a case-by-case basis whether to appoint counsel by weighing the three *Mathews v. Eldridge* elements against the *Lassiter* presumption against appointed counsel. If the *Mathews v. Eldridge* due process elements suffice to rebut the presumption against appointed counsel, then due process requires the appointment of counsel. Following these decisions, in 2000 the Wisconsin Court of Appeals held, in *In the Interest of Xena X. D.-C. v. Tammy L.D.*, 2000 WI App 200 (2000), that when a party requests counsel or when the circumstances otherwise raise a reasonable concern that the party will not be able to provide meaningful self-representation, the court must

filed on September 30, 2013, the Wisconsin advocates thus changed the language of their requested rule to target these due process standards: “where the appointment of counsel is necessary *to ensure a fundamentally fair hearing* in a court proceeding which will affect the litigant’s basic human needs, including . . . shelter”¹⁵³ The Wisconsin advocates also changed the legal memorandum in the “motion packet” which they provide to *pro se* litigants to file requesting counsel to focus on the Court’s prior due process standards: “In each case, the circuit court must determine what constitutes as meaningful opportunity to be heard and whether that requires appointment of counsel in the particular instance.”¹⁵⁴ The Wisconsin advocates believe that this “zeroing in” on due process protections and requirements strengthens the argument for appointment of counsel, which will in turn strengthen low-income individuals’ ability to retain or obtain housing. Because of this, they are optimistic about the current efforts to use procedural protections to enhance economic and social rights.¹⁵⁵

B. A Differentiated Strategy

It is a given that housing advocates in the United States will continue to use a variety of creative mechanisms to expand substantive housing rights for their constituencies. For example, twenty states already provide legislative mechanisms to protect gays and lesbians experiencing discrimination in housing; advocacy work is ongoing in the remaining jurisdictions to expand those protections.¹⁵⁶ Also notable is recent work by the National Law

exercise the discretion conferred by *Joni B.* whether to appoint counsel. The Wisconsin Supreme Court and Court of Appeals thus set due process appointment-of-counsel standards for the Wisconsin trial courts.

153. Petition To Establish A Rule Guiding Courts In The Exercise Of Their Inherent Power To Appoint Counsel In Civil Cases, at 23, No. 13-15, (Wis. Sup. Ct. Sept. 30, 2013), *available at* <https://www.wicourts.gov/supreme/docs/1315petition.pdf> (emphasis added).

154. Legal Action of Wis., *Memorandum in Support of Motion Seeking Appointment of Counsel*, in Civil Gideon Motion Packet 4, *available at* <http://www.legalaction.org/data/cms/Civil%20Gideon%20Motion%20Packet.pdf> (citing *Joni B. v. State*, 202 Wis. 2d 1, 13 n.7 (1996)).

155. E-mail from John F. Ebbott, Exec. Dir. Legal Action of Wis., to Heidi M. Wegleitner (Dec. 5, 2013).

156. *See Study Finds Housing Bias Against Same-Sex Couples*, U.S.A. Today (June 18, 2013, 4:44 PM), <http://www.usatoday.com/story/news/nation/2013/06/18/housing-bias-same-sex-couples/2435417/> (describing HUD study); *LGBT Rights*, Am. Civil Liberties Union, <https://www.aclu.org/lgbt-rights> (last

Center on Homelessness and Poverty to incorporate progressive standards into local reporting processes on homelessness.¹⁵⁷ As a strategic matter, it makes sense to continue focusing efforts to expand substantive housing protections on the legislative branches, where real gains are possible in many jurisdictions.

At the same time, the right to counsel can be a part of that legislative/executive agenda. For example, armed with data, advocates for expansion of housing anti-discrimination measures to address sexual orientation discrimination can make the case that any proposed changes should include an expanded right to appointed counsel for those who cannot otherwise afford representation. This is not simply an add-on to a housing rights agenda; access to counsel is critical to the successful expansion of the underlying right to be free of discrimination.

If the legislative will is sufficient to support expansion of housing rights, it may also be sufficient to support their protection and enforcement through appointed counsel for low-income individuals. However, at the same time that advocates pursue a legislative strategy, there will be opportunities to engage courts in reviewing the adequacy of existing protections.

In some states, it may make sense to press directly for recognition of broader rights to housing. For example, the Ohio state constitution's language offers some promise of housing rights, and the aforementioned provision of the New York State constitution, Article XVII, suggests the possibility of a minimum level of housing protection in the state.¹⁵⁸

More often, however, the federal constitutional due process clause or its state analogues will offer the best opportunity to expand housing rights through the courts. In general, these claims will arise from situations of grave inequality—for example, between a housing authority's legal representation in a complex Section 8 case and the

visited Mar. 6, 2014) (describing advocacy to end housing discrimination against LGBT individuals).

157. See, e.g., Amien Essif, *A Bill of Rights for the Homeless*, In *These Times* (July 29, 2013), http://inthesetimes.com/article/15227/a_bill_of_rights_for_the_homeless (describing Rhode Island Homeless Bill of Rights and other similar state measures).

158. See Ohio Const. art 8 § 16, available at <http://www.legislature.state.oh.us/constitution.cfm?Part=8&Section=16> (noting that it is in the public interest of the state to provide housing); see also Bradley R. Haywood, *Right to Shelter as a Fundamental Interest under the New York State Constitution*, 34 Colum. Hum. Rts. L. Rev. 157 (2002) (arguing that the right to shelter should be seen as a fundamental right protected by the state constitution).

lack of representation available to the low-income tenant. In these sorts of cases, there is ample opportunity to present classic due process arguments based on, *inter alia*, the need to maintain equality in access to the courts as a part of the integrity of the judicial system.¹⁵⁹ Courts at both the state and federal levels have recognized their competence to address such claims.¹⁶⁰ In some state court cases involving such inequalities, in fact, access to court-appointed counsel has been identified as one of the remedies appropriately ordered by the court.¹⁶¹

In the international sphere, where the indivisibility of rights is well recognized, this sort of differentiated strategy might be considered antithetical to the spirit of the human rights treaties governing this area. But in the domestic context, recognition of the indivisibility of rights leads in a different direction—to a strategy that pairs the right to housing with the right to counsel in a nuanced approach that takes into account the strengths of different targets of advocacy.

C. Expanded Alliances

A housing rights strategy that pairs direct housing rights advocacy with the right to counsel may also provide a basis for building new alliances and broadening supportive coalitions.

In recent years, the American Bar Association has called for both a right to counsel in civil cases implicating basic human needs¹⁶²

159. See, e.g., Oscar Vilhena Vieira, *Inequality and the Subversion of the Rule of Law*, 4 Sur: Int'l J. Hum. Rts. 26 (2007) (examining “the effects of the polarization of poverty and wealth on the legal system, especially in relation to one of the core ideals of the Rule of Law: that people should be treated impartially by the law and by those responsible for its implementation”).

160. Courts have, for example, used the due process clause to require the state to affirmatively address inequality in access to medically necessary abortion. See, e.g., *Moe v. Sec’y of Admin. & Fin.*, 417 N.E. 2d 387 (Mass. 1981); *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986). For discussion in federal court, see *Villegas v. Concannon*, 742 F. Supp. 1083 (D. Or. 1990) (ordering the state, under the due process clause, to provide expedited hearings to food stamp recipients in certain circumstances).

161. See *Flores v. Flores*, 598 P.2d 893 (Alaska 1979) (noting inequality between parties when one was represented and the other was not); see generally William L. Dick Jr., *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 Wm. & Mary L. Rev. 627 (1989).

162. See Am. Bar Ass’n, Task Force on Access to Civil Justice, Report to the House of Delegates 9–10 (2006), available at <http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf> (resolution urging governments to provide legal counsel as of right in certain civil cases, including housing cases);

and government support for the human right to adequate housing.¹⁶³ Other bar groups, however, have offered strong support for procedural protections (perceived to be neutral in nature), yet virtual silence on the substantive protections (perceived to be inherently political).¹⁶⁴ Incorporating the due process arguments into the housing rights agenda, then, invites broader participation in the right to housing coalition by groups that are primarily concerned with procedural fairness and recognizes that, as a practical matter, housing rights are worth little if enforcement mechanisms perpetuate inequalities.

By the same token, pairing the right to housing with the right to counsel may have the effect of muting some of the political opposition to expanded housing rights. Unequal access to procedural protections is a particularly hard status quo to defend. It goes to the fundamental fairness of our judicial system, an issue on which most people are unwilling to compromise.¹⁶⁵ While this pairing will certainly not have the effect of completely overcoming opposition to expanded housing rights, it has the potential to disarm and diffuse some of the staunchest opposition.

A danger with this strategy would be, as with any dilution of issues, that advocates might be tempted to “settle” for expanded rights to counsel in housing matters and lose both their momentum and their focus on the underlying substantive right to housing. However, as discussed below, the ancillary strategic benefits of this pairing suggest that the likelihood of such an outcome is minimal.

Am. Bar Ass’n, ABA Model Access Act (2010), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

163. Am. Bar Ass’n, Comm. on Homelessness & Poverty et al., Report to the House of Delegates 117 (2013), available at <http://nlchp.org/content/pubs/Resolution117%20Revised%20by%20RC%20FINAL8-13-131.pdf>.

164. See, e.g., Alaska Bar Ass’n Pro Bono Comm., http://civilrighttocounsel.org/pdfs/alaska_bar_resolution_9_2_2008.pdf; see also Pennsylvania Bar Ass’n Access to Justice Comm., http://www.pabar.org/public/committees/LEG04/Resolutions/Resolution%20to%20Cosponsor%20ABA%20Model%20Act%20approved%20_2_.pdf; San Francisco “Right to Civil Counsel City,” <http://www.sfbar.org/jdc/legal-services/rtcc/right-to-civil-counsel-pilot-program.aspx>.

165. See, e.g., Opportunity Agenda, Talking Immigration Issues Today: Due Process and Basic Rights 1 (2013) (“Most audiences believe that protecting basic rights like due process in the legal system are central to preserving and upholding American values of security, fair treatment, and freedom from government persecution”), http://opportunityagenda.org/files/field_file/2013.05.22_immigrationnarrative_twopager.pdf.

D. Ancillary Strategic Benefits

An advocacy strategy that pairs the right to housing with the right to appointed counsel in housing cases would have a number of ancillary benefits that could potentially strengthen the effort to expand substantive protections and maintain momentum on those issues.

First, expanding procedural protections for housing, including a right to counsel, will necessarily involve recognition of the importance of housing as a component of individual and family well-being. The *Goldberg v. Kelly* line of cases is instructive in this regard.¹⁶⁶ In *Goldberg*, the plaintiffs argued that welfare was an entitlement and therefore subject to constitutional due process protections; the defendants agreed, but disagreed with the level of process required.¹⁶⁷ While the Supreme Court stopped short of requiring appointed counsel for cases involving welfare denial, it did mandate a new and broader range of protections through the fair hearing system and, in doing so, recognized that welfare is more like an entitlement than a gratuity.¹⁶⁸ As the majority recognized in *Goldberg*, welfare was necessary as a means to live.¹⁶⁹ The constitutional status accorded welfare in this case has had a lasting impact on the protections afforded individuals navigating the welfare system.¹⁷⁰ A strategy seeking to establish procedural protections around housing might similarly be a vehicle for greater recognition of the need for stable housing and the impact of its absence.

Second, to the extent that due process-based claims have traction and the right to counsel in housing matters is expanded on the federal or state level, the voices of those affected by housing instability will be amplified in the courts and consequently in other

166. *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003) (en banc) (citing *Goldberg*, invalidating fee requirement imposed on indigent workers seeking to challenge termination of temporary disability benefits); *Welfare Rights Org. v. Crisan*, 661 P.2d 1073 (Cal. 1983) (citing *Goldberg* to extend privilege to communications between welfare recipient and lay representative in administrative welfare termination proceeding).

167. *Goldberg*, 397 U.S. at 261.

168. *Id.* at 263.

169. *Id.* at 265.

170. See, e.g., Charles A. Reich, *Symposium: The Legacy of Goldberg v. Kelly: A Twenty Year Perspective: Beyond the New Property: An Ecological View of Due Process*, 56 Brook. L. Rev. 731, 731 (1990) (referring to *Goldberg* as a “landmark in the evolution of social justice”); Lynn Slater & Kara R. Finck, *Social Work Practice and the Law 66* (2012) (exploring continued relevance of *Goldberg* for welfare recipient clients).

policy-making institutions. The judicial system is currently distorted by low-income persons' lack of equal access. As low-income individuals are increasingly in a position to access the legal system and bring their claims forward, these distortions will begin to ease, and both courts and policymakers will have a more complete and accurate picture of the impacts of current policies.

Finally, every advocacy campaign needs a starting point, preferably one that has broad appeal and some chance of early successes that will sustain it over the long haul. Pairing the right to counsel with the right to housing provides such a starting place and the possibility of building from one domestic legal theory—namely due process—to the next, a right to housing. Rather than stymie the advocacy campaign, this paired approach holds the possibility of building a higher profile and building up momentum over the course of the long campaign.

VII. CONCLUSION

International conceptions of the indivisibility of rights have profound implications for domestic advocacy strategies concerning the right to housing. History demonstrates that domestic courts are more open to remedying procedural unfairness than ordering direct reallocation of funds to address human needs. Yet the insights of international law as well as the practical experiences of individual clients make clear that the “procedural” right to counsel and the “substantive” claim to adequate housing are deeply intertwined. Recognizing these connections, and building alliances across organizations that address these issues, can yield a powerful and nuanced strategy for change.