

THE RISING POPULARITY OF THE RIGHT TO COUNSEL IN EVICTION CASES: RATIONALES SUPPORTING IT AND LEGISLATION PROVIDING IT

NATALIE D. FULK*

INTRODUCTION

The right to counsel in housing cases is one that many Americans have written off as either unnecessary or something which could never be obtained. Recently, however, the right has gained popularity on a local, state, and national scale. Cities and states have been experimenting with providing the right to counsel in housing cases through a variety of means. There are two federal bills that have been introduced in Congress that would create funds for providing the right to counsel in housing cases. Even some of the 2020 Democratic primary presidential candidates, such as Bernie Sanders,¹ Elizabeth Warren,² and Amy Klobuchar,³ had endorsed the right to counsel in housing procedures as a part of their plans for their presidencies. This issue has been gaining momentum throughout the country. This Note will argue that the federal government should encourage the right to counsel in eviction cases and state and local governments should require and implement the right.

Understanding the history of the right to counsel can give context to where the civil right to counsel movement for housing procedures is today. The right

* Candidate for Juris Doctor, Notre Dame Law School, 2021. Natalie would like to thank Professor Judith Fox for her guidance throughout the writing process and Professor Christian Bursat for his mentorship.

1. Bernie Sanders would have “[p]rovide[d] \$2 billion in federal matching grants for states and localities to provide a right to counsel for persons in eviction or foreclosure proceedings, or at risk of losing their Section 8 rental assistance.” *Issues: Housing for All*, BERNIE SANDERS, <https://berniesanders.com/issues/housing-all/>.

2. Elizabeth Warren would have created a “national housing right-to-counsel fund which would provide grants to cities to guarantee access to counsel for low- and middle-income tenants who are facing eviction or taking their landlord to court” and a Tenant Protection Bureau as part of the Department of Housing and Urban Development to “enforce tenants’ rights, take on bad actors, and make sure landlords keep affordable housing affordable for working families.” *Plans: Protecting and Empowering Renters*, ELIZABETH WARREN, <https://elizabethwarren.com/plans/protecting-empowering-renters>.

3. Amy Klobuchar would have “create[d] a new federal grant program with the goal of eliminating the unmet need when it comes to providing access to counsel in civil cases involving basic human needs . . .” Amy for America, *Senator Klobuchar’s Housing Plan*, MEDIUM (July 25, 2019), <https://medium.com/@AmyforAmerica/senator-klobuchars-housing-plan-761e9f93f3a4>.

to counsel was first guaranteed in the Sixth Amendment to the United States Constitution, which guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”⁴ However, for a long time this only applied to the federal court system. In the landmark case *Gideon v. Wainwright*, the Supreme Court overruled precedent and held that the Sixth Amendment requires counsel be provided for indigent persons in criminal proceedings in state court.⁵ The Court determined that the right to counsel in criminal proceedings is a fundamental right in the Bill of Rights, since “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,” and thus the right is “safeguarded against state action by the due process of law clause of the Fourteenth Amendment.”⁶ The Court recognized the importance of having a lawyer in a trial, stating:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant’s need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁷

Gideon v. Wainwright reinforced the importance of having the right to counsel in criminal cases and ensured that states provided it.

In the civil context, however, the Supreme Court has rejected attempts to guarantee the right to counsel. The main example of this was in *Lassiter v. Dept. of Social Services*, where the Court held that due process under the Fourteenth Amendment (as applied to the states) did not require the appointment of counsel in a parental rights case and urged courts to evaluate the need for counsel on a case-by-case basis.⁸ In the case, the North Carolina Department of Social Services had brought suit against Abby Gail Lassiter to terminate her parental rights for her son.⁹ Ms. Lassiter was in prison at the time and did not retain counsel prior to the hearing, and the lower court refused to

4. U.S. CONST. amend. VI.

5. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court overruled *Betts v. Brady*, which in 1942 had determined that the right to counsel as guaranteed by the Sixth Amendment was not a fundamental right incorporated to the states by the Fourteenth Amendment. 316 U.S. 455 (1942).

6. *Gideon*, 372 U.S. at 343 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 243–44 (1936)).

7. *Id.* at 344–45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

8. See *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981).

9. See *id.* at 20–21.

appoint counsel to her for the proceeding.¹⁰ Ms. Lassiter thus conducted her own defense, arguing that she should retain her parental rights and her mother should take custody of her son.¹¹ The lower court terminated her parental rights, and Ms. Lassiter appealed the judgment, arguing that the Due Process Clause of the Fourteenth Amendment provided her the right to the assistance of counsel because she was indigent.¹²

The Supreme Court ruled that the due process clause of the Fourteenth Amendment did not require counsel be appointed to Ms. Lassiter because “such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”¹³ The Court reasoned that a “defendant’s interest in personal freedom” triggers the right to counsel in criminal cases provided by the Sixth and Fourteenth Amendments, and there is only a presumption that an indigent litigant has a right to counsel if the litigant “may be deprived of his physical liberty.”¹⁴ With this presumption in mind, it determined that the right to counsel in the termination of parental rights should be evaluated on a case-by-case basis and conducted a *Mathews v. Eldridge* due process clause analysis of the parties’ interests.¹⁵ The Court found that Ms. Lassiter did not have the right to a court-appointed attorney in her parental rights case.¹⁶

After *Lassiter*, some lower courts had “believ[ed] *Lassiter* created a ‘positive presumption’ in favor of appointing counsel when physical liberty is threatened”¹⁷ However, in 2011, the Supreme Court held in *Turner v. Rogers* that the Due Process Clause does not automatically provide the right to counsel in civil contempt proceedings concerning a child support order, even if the litigant could face up to a year of imprisonment.¹⁸ The Court stated that, “where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards,” the state is not required to appoint counsel to the

10. *See id.* at 21–22.

11. *See id.* at 23.

12. *See id.* at 24.

13. *Id.* at 25.

14. *Id.* at 25, 27.

15. *See id.* at 31. The Court described the *Mathews v. Eldridge* test as follows:

Mathews v. Eldridge propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

Id. at 27 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

16. *See id.* at 34.

17. John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763, 765 (2013).

18. *See Turner v. Rogers*, 564 U.S. 431, 448 (2011).

defendant.¹⁹ Therefore, the Supreme Court controverted the lower courts' presumption of appointing counsel when personal liberty is at stake.

Since the federal government does not guarantee the right to counsel in civil cases, many states and localities have taken up the mantle by providing the right to counsel in certain types of cases. They have done so by passing statutes providing the right to counsel in cases regarding public benefits, child custody, parental rights, protection orders, guardianship, and more.²⁰ State courts have also "identified a categorical right to counsel in various types of civil proceedings involving basic human needs" based on the state constitutions and their guarantees.²¹ However, these efforts by states are sporadic and only for certain, specific case types. As of 2020, no state legislature has passed a law guaranteeing the right to counsel in eviction cases, nor has a state court guaranteed a right to counsel in housing procedures in general.²²

There has recently been growing momentum in the right to counsel movement. The ABA Task Force on Access to Civil Justice made a report to the ABA House of Delegates in 2006 which gave a detailed account of the history and policy reasons for the right to counsel in civil cases involving basic human needs. The Task Force recommended that the bar "take a leadership role in educating the general public and policymakers about the critical importance of this step and the impossibility of delivering justice rather than injustice in many cases unless both sides, not just those who can afford it, are represented by lawyers."²³ The ABA adopted the report and made a resolution to encourage governments to provide the right to counsel to indigent persons in proceedings where "basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each

19. *Id.*

20. See Standing Comm. on Legal Aid & Indigent Defendants, *Introduction*, in ABA DIRECTORY OF LAW GOVERNING APPOINTMENT OF COUNSEL IN STATE CIVIL PROCEEDINGS 5 (2014),

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sc_laid_judges_manual_prefatory_info.pdf [hereinafter ABA DIRECTORY]. The ABA provides a directory of reports "detailing existing authority for appointment of counsel in various types of civil proceedings" for every state, which can be found at Standing Comm. on Legal Aid & Indigent Def., *Civil Right to Counsel*, ABA, https://www.americanbar.org/groups/legal_aid_indigent_defendants/civil_right_to_counsel1/ (last visited Feb. 14, 2021). This directory enumerates statutes, court rules, and court decisions for each state, providing if and how the state provides for the appointment of counsel in five categories of civil cases: shelter, sustenance, safety and/or health, child custody, and miscellaneous. See ABA DIRECTORY, *supra* note 20, at 2–5.

21. Pollock, *supra* note 17, at 766.

22. See *Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/map> (last visited Feb. 14, 2021) [hereinafter *Status Map*, NCCRC] (click on "Right to Counsel Status" and choose the Subject Area "Housing – Evictions" to see the status of the right to counsel in eviction proceedings in each state).

23. TASK FORCE ON ACCESS TO CIVIL JUSTICE, RESOLUTION 112A, at 16 (2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sc_laid_resolution_06a112a.pdf.

jurisdiction.”²⁴ In 2010, the ABA created a Model Access Act to help legislatures introduce the right to counsel to their jurisdictions.²⁵ The ABA also adopted principles and policies with regard to the civil right to counsel that same year.²⁶ In addition to the ABA, the National Coalition for a Civil Right to Counsel (“NCCRC”) is an organization that was founded in 2003 that works with states, localities, and advocates to expand the civil right to counsel in cases where basic human needs are at risk by providing research, resources, and literature to these groups on the topic.²⁷

This Note will focus on the growth of the right to counsel in eviction cases. Part I will outline several rationales in support of the right to counsel in eviction proceedings. Part II will highlight some recent legislative developments in the right to counsel in eviction proceedings on a city, state, and national scale. Finally, Part III will evaluate these efforts with the previously-mentioned rationales in mind to compare the methods amongst each other. While it would be best for the federal government to provide the right to counsel nationally, the federal government is very hesitant to provide the right to counsel outright, as landlord-tenant law is typically an issue of state and local law. Therefore, the next best way to provide for the right to counsel is for state and local governments to legislate the right to counsel and the federal government to support the right financially.

I. RATIONALES FOR THE RIGHT TO COUNSEL IN HOUSING

Supporters of the right to counsel argue that having a lawyer represent indigent clients would greatly improve the outcomes of cases and the judicial system more generally. In eviction cases, lawyers would not only help tenants avoid being evicted; lawyers are often instrumental in settlement agreement negotiations which can help tenants have enough time to find other housing or include stipulations requiring landlords to make repairs.²⁸ Additionally, tenants who were represented by lawyers in evictions are more likely to follow settlement agreements, meaning that they will be less likely to be sued for eviction again.²⁹ Providing for the right to counsel in evictions helps protect tenants and improve the eviction process. There are many different reasons for the government to provide for the right to counsel in eviction cases, such as human rights concerns, constitutional concerns, and societal concerns.

24. *Id.* at 1.

25. See ABA MODEL ACCESS ACT 104, at 6 (2010), https://inns.innsocourt.org/media/50002/november_2010_temple_inn_program.pdf.

26. See ABA BASIC PRINCIPLES OF A CIVIL RIGHT TO COUNSEL IN CIVIL LEGAL PROCEEDINGS 105 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sc_laid_105_revised_final_aug_2010.authcheckdam.pdf.

27. See NAT’L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/>.

28. See 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, 706 (2006).

29. See *id.*

A. Human Rights

One of the most compelling reasons promoting the right to counsel in housing procedures is the assurance and protection of basic human rights. One human right that is widely accepted by the international community is the right to adequate housing. The United Nations defines the right to adequate housing as “the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity.”³⁰ It lists six essential criteria for the right to adequate housing to be met at a minimum: “security of tenure,” “[a]vailability of services, materials, facilities and infrastructure,” “[a]ffordability,” “[h]abitability,” “[a]ccessibility,” “[l]ocation,” and “[c]ultural adequacy.”³¹ These are accompanied by the requirement of protecting people against forced evictions.³² Even if an eviction is justified, ensuring that an eviction is “carried out in a lawful, reasonable and proportional manner, and in accordance with international law” is crucial to protecting the right to adequate housing.³³ This required procedure includes providing for the “[a]vailability of legal aid to those in need to be able to seek judicial redress.”³⁴ The right to adequate housing is an essential human right which the United Nations has defined and promoted.

The right to adequate housing has been expressed in the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, and the International Covenant on Civil and Political Rights.³⁵ The Universal Declaration of Human Rights (“UDHR”), announced by the United Nations General Assembly in 1948, provides in Article 25(1) that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and

30. *The Right to Adequate Housing Toolkit*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/issues/housing/toolkit/pages/righttoadequatehousingtoolkit.aspx> (last visited Feb. 27, 2020).

31. *The Right to Adequate Housing: Fact Sheet No. 21/Rev. 1*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. 3–4, https://www.ohchr.org/documents/publications/fs21_rev_1_housing_en.pdf (last visited Feb. 27, 2020) [hereinafter *Fact Sheet 21/Rev. 1*].

32. *See id.* at 4–5. A forced eviction is the “permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.” *Id.* at 4 (quoting *General Comment 7*, U.N. COMM. ON ECON., SOC. AND CULTURAL RTS. (1997)).

33. *Fact Sheet 21/Rev. 1*, *supra* note 31, at 5.

34. *Id.* at 6.

35. *See* Bret Thiele, *The Human Right to Adequate Housing: A Tool for Promoting and Protecting Individual and Community Health*, 92 AM. J. PUB. HEALTH 712, 712 (2002). Other treaties providing for the right to housing include the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. *See id.*

medical care”³⁶ The International Covenant on Economic, Social and Cultural Rights (“ICESR”), which was adopted by a General Assembly resolution in 1966 and currently has 170 parties, provides for the right to housing in Article 11:

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 States Parties will take appropriate steps to ensure the realization of this right³⁷

The International Covenant on Civil and Political Rights (“ICCPR”), also passed in the General Assembly in 1966 and with 173 current parties, recognizes the right to housing in Article 17(1): “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”³⁸ These international proclamations are but a few examples of the international community valuing the right to housing.

One might argue that these international resolutions and treaties are not binding on the United States for many reasons: the UDHR is not a binding treaty, the United States signed but did not ratify the ICESR, and the United States made several reservations to the ICCPR making it virtually ineffective.³⁹ However, the right to adequate housing, through these three documents and others, has become customary international law. Customary international law, as defined by the Statute of the International Court of Justice, is “international custom, as evidence of a general practice accepted as law.”⁴⁰ Customary international law is seen as having two elements: one that is objective and is demonstrated through “sufficient state practice” and one that is subjective and characterized by “*opinio juris*, which requires that the practice be accepted as

36. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

37. *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION: DEPOSITARY, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last visited Jan. 18, 2020); *International Covenant on Economic, Social and Cultural Rights*, art. 11(1), Dec. 16, 1966, 993 U.N.T.S. 3.

38. *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION: DEPOSITARY, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en (last visited Jan. 18, 2020); *International Covenant on Civil and Political Rights*, art. 17(1), Dec. 16, 1966, 999 U.N.T.S. 407.

39. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (stating that “the Declaration does not of its own force impose obligations as a matter of international law”); *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION: DEPOSITARY, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en (last visited Jan. 18, 2020); see, e.g., *International Covenant on Civil and Political Rights*, art. 17(1), Dec. 16, 1966, 999 U.N.T.S. 407 (United States of America Declaration 1: “That the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing.”).

40. Statute of the International Court of Justice, art. 38, ¶ 1.

law or followed from a sense of legal obligation.”⁴¹ Since all of three of these documents have been in effect for over fifty years with widespread signature, ratification, and acceptance by many countries, the standards espoused by these documents meet the qualifications of customary international law and are thus considered legal norms of international law for all countries. The United States should follow customary international law and support the right to adequate housing.

When human rights must be protected, providing counsel has become more readily supported in international law.⁴² While the ICCPR specifically requires the right to counsel in criminal matters in Article 14, it does not mention the right to counsel in civil matters.⁴³ However, the Human Rights Committee, which monitors countries’ compliance with the ICCPR, has read Article 14 as applying to civil proceedings and encourages countries “to provide free legal aid in [noncriminal cases], for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.”⁴⁴ It also requires criminal and civil procedures be “fundamentally fair.”⁴⁵ The HRC will additionally inquire into countries’ compliance with the ICCPR if they do not provide a right to counsel in civil cases, and it has valued the equal right to counsel in criminal and civil cases in the disputes that it hears.⁴⁶

The United Nations Human Rights Council of the General Assembly recently received a report from the Special Rapporteur on Adequate Housing. The report focuses on ensuring the access to justice for the right to housing.⁴⁷ The Special Rapporteur wants to safeguard the right to housing by ensuring that there is equality in people’s access to justice, where “legal assistance should be provided through community outreach, combined with community legal education about the right to housing and how to claim it.”⁴⁸ In an earlier, separate report creating a how-to guide for countries to provide for the right to housing, the Special Rapporteur advised states to ensure access to justice by making “necessary legal assistance and other support . . . available to guarantee access to courts and to ensure fair hearings.”⁴⁹ The United Nations and

41. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT’L L. 115, 123 (2005).

42. See Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 156 (2009).

43. See International Covenant on Civil and Political Rights art. 14, Dec. 19, 1966, 999 U.N.T.S. 171.

44. Davis, *supra* note 42, at 162 (quoting United Nations, Human Rights Committee—General Comment No. 32 (90th sess. 2007) CCPR/C/GC/32, ¶ 10).

45. *Id.*

46. See *id.* at 164–68.

47. See Leilani Farha (Special Rapporteur on Adequate Housing), *Access to Justice for the Right to Housing*, ¶ 6, U.N. Doc. A/HRC/40/61 (Jan. 15, 2019).

48. *Id.* at ¶ 45.

49. Leilani Farha (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*,

international community support the right to housing, which must be protected by the access to justice through counsel.

The world has also shown support for the right to counsel in civil cases more generally. This was first shown in the Universal Declaration of Human Rights in Article 10, which states that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁵⁰ While the Declaration does not mention the right to counsel specifically,⁵¹ the international community has shown support for this matter with the European Convention for the Protection of Human Rights and Fundamental Freedoms providing for it, the Inter-American Court of Human Rights declaring it to be a right, United Nations committees focusing on providing it, and nations individually improving access.⁵² The idea is that counsel will protect the right to adequate housing, which would create fairer and more just eviction proceedings that align with international law standards.

B. Constitutional Concerns

1. Due Process

As discussed above, the argument that the right to counsel will guarantee due process emerged first with *Gideon v. Wainwright* in the criminal context and was limited in the civil context by *Lassiter* and *Turner v. Rogers*.⁵³ Many supporters of the civil right to counsel argue that the lack of counsel in eviction cases violates due process. Using the *Mathews v. Eldridge* three-factor test, they balance the private interests at stake, the governmental interests, and the risk of error in the current procedure to determine what procedure due process requires and find that the right to counsel is necessary.⁵⁴

For example, Andrew Scherer argues that the right to counsel in eviction proceedings meets the *Mathews* test, first by focusing on the tenants’ property

and on the Right to Non-Discrimination in this Context, ¶ 111, U.N. Doc. A/HRC/37/53 (Jan. 15, 2018).

50. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948).

51. As Martha Davis explained:

Earlier drafts of the Universal Declaration . . . explicitly stated that everyone in both civil and criminal matters ‘shall have the right to consult with and to be represented by counsel,’ . . . [but] because the national delegations on the drafting committee agreed that such detailed language belonged in a treaty rather than in the Universal Declaration, the General Assembly of the United Nations ultimately adopted the more general, final version of Article 10.

Martha F. Davis, *In the Interests of Justice: Human Rights and Right to Counsel in Civil Cases*, 25 *TOURO L. REV.* 147, 150 (2009).

52. *See id.* at 150–51.

53. *See supra* notes 5–19 and accompanying text.

54. *See* Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187, 212–13 (2009) (describing the *Mathews* argument that many proponents make).

and liberty interests at stake in an eviction.⁵⁵ There is a property interest in continuing to inhabit a residence, which is especially highlighted by a shortage of affordable housing and a real possibility of homelessness with landlords often being unwilling to rent their properties to tenants with evictions on their records.⁵⁶ In addition, there is a liberty “right of the citizen . . . to use [his faculties] in all lawful ways, to live and work where he will;”⁵⁷ there is also a liberty interest at stake if tenants become homeless and live on the streets, because they “are potentially subject to the loss of their physical liberty through incarceration and institutionalization.”⁵⁸

Next, he argues that there is a large potential risk of error in eviction proceedings, because the laws regulating the landlord-tenant relationship originate at every level of government and include many complex rights and responsibilities concerning rental rates, lease obligations, housing habitability, governmental subsidies, and more.⁵⁹ This is further complicated by numerous procedural rules and the swift nature of summary proceedings.⁶⁰ Every state uses a summary proceeding for eviction, meaning that generally only the issue of possession is presented and “[t]he question is usually answered within six to ten days after the action is commenced.”⁶¹ This can be problematic when landlord-tenant law has moved from a property law model to a more contract law-based model, with a lease or agreement providing both the landlord and tenant rights and responsibilities.⁶² Not all rights may be addressed in the quick proceeding, especially if tenants are unrepresented and unaware of their rights.

Finally, Scherer argues that the “government’s interest in the administration of justice, the just and equitable distribution of finite financial resources, and its interest in the health, safety and welfare of its citizens” would be benefitted by a right to counsel in eviction proceedings.⁶³ The right to counsel for tenants would provide for these interests in creating more equal and fair proceedings, and the costs associated with providing counsel would be “balanced against . . . the heavy governmental costs associated with eviction and homelessness.”⁶⁴ Therefore, since the rights at stake are high, the risk of

55. See Andrew Scherer, *Gideon’s Shelter: The Need to Reorganize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 564, 566 (1988).

56. See *id.* at 564–66. Scherer referred to the Supreme Court case *Greene v. Lindsey* as an example of a recognition of tenants’ property rights, where the Court recognized the tenants’ due process rights to adequate proceeding notices and found that “appellees have been deprived of a significant interest in property[:] . . . the right to continued residence in their homes.” *Id.* at 564 (quoting *Greene v. Lindsey*, 456 U.S. 444 (1982)).

57. *Id.* at 567 (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

58. *Id.*

59. See *id.* at 569–70.

60. See *id.* at 570.

61. Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

62. See generally *id.*

63. Scherer, *supra* note 55, at 576.

64. *Id.* at 578; see *id.* at 576–79.

error is high, and governmental interests would actually be furthered, proponents such as Scherer argue that due process requires the right to counsel in eviction cases. This analysis using the tenants' property and liberty interests is persuasive, but it is not the only aspect of due process which must be considered.

Another aspect of due process is that tenants need dignified participation in the proceeding. Stan Keillor, James H. Cohen, and Mercy Changwasha argue that the *Mathews* test is an inadequate mechanism to value the due process necessary in civil proceedings, because it "ignores entirely the dignitary value of additional process, treating procedural due process as merely of utilitarian benefit."⁶⁵ They claim that the due process holdings using the *Mathews* test "ignore the broader context of American government and its frequent reliance on adversarial court proceedings to decide individual interests. . . . American government is lawyer-dominated and litigious to a degree that makes the right to counsel not just an incremental additional procedural safeguard."⁶⁶ The administration of justice in these housing cases is largely up to the courts, and how lawyers present complex arguments about personal, societal, and governmental interests plays a large factor in the outcome, to the detriment of low-income tenants who are unable to afford lawyers to argue on their behalf and do not have the right to have them provided for them.⁶⁷ If lawyers are provided to these tenants, they will be able to fully participate in the proceedings in a dignified way.⁶⁸ In addition to ensuring due process, full participation in judicial proceedings is an important part of "democratic citizenship" in society.⁶⁹ This participation will also help improve the fundamental fairness and equality present in the judicial system.⁷⁰

2. Equal Protection

Additionally, supporters of the civil right to council have argued that low-income litigants have the civil right to counsel under the Fourteenth Amendment's Equal Protection Clause.⁷¹ When evaluating laws under the Fourteenth Amendment, a court will use a rational basis test to determine whether a law is rationally related to a legitimate government end; a court will employ a strict scrutiny test if a law "burdens a fundamental right or discriminates based on a suspect classification."⁷² Generally, the argument is

65. Stan Keillor, James H. Cohen, & Mercy Changwasha, *The Inevitable, If Untrumped, March Toward "Civil Gideon,"* 64 SYRACUSE L. REV. 469, 480 (2014).

66. *Id.* at 474.

67. *See id.* at 475–77.

68. *See id.* at 477.

69. Martha F. Davis, *Participation, Equality, and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2263 (2013).

70. *See id.* at 2268 (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

71. *See* Rachel Kleinman, Note, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1509 (2004).

72. *Id.* at 1509–10.

that a right to counsel should be provided in civil cases, or specifically in housing cases, to ensure everyone is equally protected under state law, because the current system disfavors tenants who are unable to afford attorneys. Some scholars argue for strict scrutiny because the right to counsel is a fundamental right. They argue it ensures “access to justice,” however, the bar for determining a right is fundamental is hard to meet, as the right must be guaranteed by the Constitution.⁷³ There have also been arguments that indigency is a suspect class requiring stricter scrutiny, but the Supreme Court rejected this classification in 1973 in *San Antonio v. Rodriguez*.⁷⁴

Another equal protection argument is that the lack of a civil right to counsel disparately impacts racial minorities and thus violates the Equal Protection Clause. This argument, however, is not often brought forward because the case *Washington v. Davis* established that discriminatory intent must be present “to establish a violation of the equal protection clause based on disparate racial impact.”⁷⁵ Therefore, it is unlikely that a court would apply strict scrutiny in the civil *Gideon* context, and thus uphold state procedures that do not provide a right to counsel. However, the equal protection argument is still worth considering when evaluating how the lack of the right to counsel in housing procedures affects indigent tenants and tenants who are racial minorities.

C. Individual and Societal Benefits of Providing the Civil Right to Counsel

More generally, there are many individual and social benefits associated with the right to counsel in housing cases that outweigh the potential costs of providing this right. There are many negative consequences related to evictions. The Eviction Lab, which gathers eviction statistics from across the country, has found that between 2000 and 2016, one in seventeen renting households had evictions filed against them and one in forty renting households was evicted.⁷⁶ In 2016, 898,479 renting households were evicted.⁷⁷ When people are evicted, an eviction goes on their record, which “disqualif[ies] tenants from public housing subsidies.”⁷⁸ Additionally, “[p]rivate property owners use national ‘blacklists’ of eviction defendants to weed out rental applicants.”⁷⁹ This makes it very difficult to find another affordable place to live after being evicted,

73. *See id.* at 1510.

74. *See id.* at 1511 (citing *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973)).

75. Martha F. Davis, *Race and Civil Counsel in the United States: A Human Rights Progress Report*, 64 SYRACUSE L. REV. 447, 449 & n.9 (2014) (citing *Washington v. Davis*, 426 U.S. 229, 246 (1979)).

76. *See* The Eviction Lab: Princeton Univ., *National Estimates: Eviction in America*, EVICTION LAB (May 11, 2018), <https://evictionlab.org/national-estimates/>.

77. *See id.*

78. Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 67 (2018).

79. *Id.*

especially with the rising costs of housing and the income of the poor declining.⁸⁰

An eviction increases a renter's likelihood of being homeless. Robert Collinson and Davin Reed found in their research examining the social effects of eviction in New York City from 2007 to 2016 that eviction made a household nineteen percent more likely to apply to a homeless shelter in the year following the eviction filing.⁸¹ These numbers could be even worse if one includes those tenants who move out of their homes after receiving legal documents and before an eviction takes place, either because they think they have been evicted or do not think they have a good defense.⁸² Losing shelter can be dangerous, as people are "expose[d] . . . to extreme weather, theft, contagious diseases, parasites, and physical and sexual assault including rape and even murder."⁸³ In addition, it is difficult to obtain or maintain employment while homeless, which can contribute to a "criminalization loop" of eviction and homelessness for charges such as trespassing and loitering.⁸⁴ It is in society's best interest to decrease the occurrence of homelessness and the personal and societal costs that accompany it.

Additionally, evictions negatively impact the health of tenants, where "eviction increases the number of emergency room visits by about 0.38 visits in the 1–2 years after filing, an increase of about 70 percent over the mean for non-evicted households."⁸⁵ Collinson and Reed say this is largely because of the increase in mental health hospitalization, where tenants who have been evicted are 68% more likely to be hospitalized for mental health in the one to two years after eviction than non-evicted tenants.⁸⁶ In addition, they found that "eviction is associated with an approximately 3,000 dollar reduction in total earnings in the 1–2 years after filing, or about 13 percent of the mean earnings of non-evicted households."⁸⁷ Evictions also damage the renters' credit scores, which makes it difficult for them to obtain new housing and loans.⁸⁸ These results have an especially negative impact on low-income renters.

Providing lawyers to low-income tenants and decreasing the amount of evictions will help alleviate these societal problems. The benefits of decreasing the number of evictions would outweigh the costs of providing attorneys. Skeptics of providing a civil right to counsel are concerned with the

80. See Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1, 11 (2015).

81. See Robert Collinson & Davin Reed, *The Effects of Evictions on Low-Income Households* 25 (Working Paper, 2019), https://robcollinson.github.io/RobWebsite/jmp_rcollinson.pdf.

82. See Scherer, *supra* note 28, at 708.

83. Sabbeth, *supra* note 78, at 66.

84. *Id.* at 67.

85. Collinson & Reed, *supra* note 81, at 25.

86. See *id.* at 26.

87. *Id.* at 27.

88. See Sabbeth, *supra* note 78, at 67–68.

governmental costs of providing attorneys. They argue there would be a high cost to provide for salaries, benefits, and other costs associated with ensuring there are enough attorneys for indigent tenants.⁸⁹ However, these costs could be offset by a decreased cost in providing shelter to the homeless and the other governmental costs of caring for those who have been recently evicted.⁹⁰

There is also a concern that court costs could rise because more tenants would be represented. Raymond Brescia offers several reasons why this might not necessarily be the case. If indigent renters are represented in their defense of evictions, landlords may bring less cases which have “questionable or borderline merit” where they might lose.⁹¹ Additionally, landlords and tenants may reach settlement agreements out-of-court and more quickly if the parties are both represented by attorneys, thus decreasing the strain on the court system which would have ordinarily overseen more litigation and made a judgment.⁹²

Finally, people worry that landlord costs could increase as providing counsel could create delays in receiving possession of the property, rent is withheld during the time of the litigation, and landlords could have increased attorney costs.⁹³ However, these costs are often overstated, and, when due process and access to housing are at stake, it is important to ensure that the eviction process is truly adversarial and fair in nature.⁹⁴ Plus, as stated earlier, landlords could avoid costs if they bring less questionable cases and are able to settle more quickly. There are many costs to consider when providing the right to counsel in eviction cases, but paying these costs is worth the benefits that will be gained by individual renters and society at large.

II. RECENT DEVELOPMENTS IN LEGISLATING THE RIGHT TO COUNSEL IN EVICTIONS⁹⁵

The above reasons for providing the right to counsel in eviction cases have been recognized by many legislators. Recently, local and state governments have taken steps towards guaranteeing the right to counsel in housing procedures. They have been approaching the right to counsel in various ways, differing in the procedures to provide representation, the types of services provided, and the people who may receive services. Additionally, the federal

89. See Brescia, *supra* note 54, at 230–31.

90. See Scherer, *supra* note 55, at 578–79 (stating that in 1987, maintaining “a family of four in a New York City welfare hotel can cost up to \$25,000 and the average length of stay for these families is thirteen months”); see *supra* notes 76–88 and accompanying text for the costs associated with evictions.

91. Brescia, *supra* note 54, at 231.

92. See *id.* at 232.

93. See Kleinman, *supra* note 71, at 1521–22.

94. See *id.* at 1522–23 (citing Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL’Y REV. 385 (1995)).

95. The developments discussed in Parts II and III are current through June of 2020. For the present legislative standing of the right to counsel in eviction cases, see *Status Map*, NCCRC, *supra* note 22.

legislature has two pending bills concerning the right to counsel in eviction cases. This Part will highlight current legislation on a city, state, and federal level to later analyze which governmental bodies should be legislating the issue and which methods could be more effective than others in providing the right to counsel in eviction cases.

A. City Ordinances

1. New York City

The mayor of New York City signed Local Law 136, known as the Universal Access Law, into effect on August 11, 2017.⁹⁶ The Universal Access Law requires the establishment of a program to provide legal representation to tenants in housing proceedings with an income level of 200% of the federal poverty level or below, brief legal assistance to tenants in housing proceedings of any income level, and legal services in administrative proceedings for terminating tenancy in New York City Housing Authority buildings.⁹⁷ The Office of Civil Justice of the New York City Human Resources Administration supplies funding to legal services organizations throughout the city to provide legal services to tenants in housing proceedings.⁹⁸ The Universal Access program began in the fiscal year of 2018 (June 2017 to June 2018), and during the first phase, it provided legal representation to income-eligible tenants in fifteen ZIP codes of New York City (the UA ZIP codes) and legal assistance in other ZIP codes.⁹⁹ The second year it added five more ZIP codes to the UA ZIP code list; by 2022 the program will reach the entire city.¹⁰⁰

This program has had immediate results in the UA ZIP codes, with higher rates of represented tenants and lower rates of evicted tenants. In 2013, only 1% of tenants in the city were represented in court.¹⁰¹ In the last quarter of fiscal year of 2019, 32% of tenants citywide were represented, and 62% of tenants were represented in the twenty UA ZIP codes.¹⁰² The rates of eviction filings, eviction warrants, and evictions have fallen significantly, and the number of evictions in the UA ZIP codes has decreased over five times the amount in

96. See UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR TWO OF IMPLEMENTATION IN NEW YORK CITY I (Office of Civil Justice, New York City Human Resources Administration, 2019) [hereinafter REPORT ON YEAR TWO].

97. See N.Y.C. Admin. Code § 26-1302.

98. See REPORT ON YEAR TWO, *supra* note 96, at 11.

99. See UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR ONE OF IMPLEMENTATION IN NEW YORK CITY I, 10–11 (Office of Civil Justice, New York City Human Resources Administration, 2018) [hereinafter REPORT ON YEAR ONE].

100. See REPORT ON YEAR TWO, *supra* note 96, at 1, 14.

101. See *id.* at 4.

102. See *id.*

non-UA ZIP codes: 11% less evictions in 2018 than in 2017 for UA ZIP codes and 2% less in non-UA ZIP codes.¹⁰³

2. San Francisco

San Francisco's right to council legislation became law through a ballot initiative, Proposition F, which city voters passed in June of 2018, and services started on July 11, 2019.¹⁰⁴ The Eviction Defense Collaborative ("EDC") is the lead partner carrying out the San Francisco Right to Counsel initiative, and the program will provide \$5.8 million over two years to several non-profit organizations to facilitate the provision of legal representation to tenants.¹⁰⁵ The EDC matches tenants with these different organizations based on characteristics of the tenant and the location of the eviction, and the program offers representation to tenants in eviction cases regardless of their income.¹⁰⁶

3. Newark

Newark was the third city to implement a right to counsel law with the passage of Ordinance 18-0673 on December 19, 2018, which was codified in Title 19, Chapter 3 of the municipal code.¹⁰⁷ The code chapter, entitled "Provision of Legal Services in Eviction Proceedings," provides funding to create a city-directed Office of Tenant Legal Services which would create a program to provide access to legal services and select non-profit organizations to serve as designated organizations.¹⁰⁸ The Office of Tenant Legal Services and the participating organizations would then provide legal representation to income-eligible individuals, meaning those whose household income is under

103. See Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, CMTY. SERV. SOC'Y OF N.Y. (Mar. 25, 2019), <https://www.cssny.org/news/entry/nyc-right-to-counsel>.

104. See *Tenant Right to Counsel*, EVICTION DEFENSE COLLABORATIVE, <http://evictiondefense.org/services/right-to-counsel/> (last visited Sept. 26, 2020).

105. See Laura Waxmann, *Tenant Advocacy Groups Set to Receive Funding Under 'Right to Counsel' Program*, S.F. EXAM'R (Nov. 28, 2018), <https://www.sfexaminer.com/news/tenant-advocacy-groups-set-to-receive-funding-under-right-to-counsel-program/>.

106. See Martin Kuz, *Meet the Eviction Defenders Helping to Keep Tenants at Home*, CHRISTIAN SCI. MONITOR (July 30, 2019), <https://www.csmonitor.com/USA/Society/2019/0730/Meet-the-eviction-defenders-helping-to-keep-tenants-at-home>.

107. See Rebecca Panico, *After Some Delay, Newark's Office of Tenant Legal Services Opens Tomorrow*, TAP INTO NEWARK (June 4, 2019), <https://www.tapinto.net/towns/newark/sections/law-and-justice/articles/after-some-delay-newark-s-office-of-tenant-legal-services-opens-tomorrow>; Newark, N.J., Ordinance 18-0673 (Dec. 19, 2018) (recognizing an emergency of "homelessness and/or [people] resid[ing] in uninhabitable living conditions . . . created, in part, by the filling [sic] of frivolous and/or retaliatory eviction actions by landlords renting residential property" in the city which warrants the use of the city's "police powers" to provide legal services to tenants).

108. See NEWARK, N.J., CODE § 19:3-2.

200% of the federal poverty level.¹⁰⁹ The Office of Tenant Legal Services began providing legal services on June 5, 2019, and the attorneys there provide brief legal advice and full legal representation to tenants, depending on the nature of the tenants' cases.¹¹⁰ The Office of Tenant Legal Services also coordinates with other non-profit organizations in the city in its services efforts.¹¹¹

4. Recent Actions in Other Cities

Other cities are also attempting to provide the right to counsel in eviction cases. Cleveland, for example, passed an ordinance that went into effect on June 30, 2020 and provides the right to legal counsel to tenants living at 100% of the federal poverty guidelines with at least one child in their household.¹¹² Additionally, in Philadelphia, a bill that would provide legal representation to tenants with income at or below 200% of the federal poverty level in judicial and administrative proceedings was passed by the city council in mid-November of 2019.¹¹³ In Los Angeles County, the county supervisors passed a motion on September 10, 2019, which will create five pilot or test locations throughout the county to provide full legal representation to low-income tenants facing eviction.¹¹⁴ In Detroit, the city council was considering a proposed right-to-counsel ordinance for low-income individuals

109. NEWARK, N.J., CODE § 19:3.

110. See Panico, *supra* note 106; Kate M. Kelly, *City of Newark's Office of Tenant Legal Services Protects Low Income Tenants From Eviction*, MONARCH HOUS. ASSOCS. (Nov. 6, 2019), <https://monarchhousing.org/2019/11/06/city-of-newarks-office-of-tenant-legal-services-protects-low-income-tenants-from-eviction/>.

111. See Kelly, *supra* note 110.

112. See *City of Cleveland Creates Right to Counsel in Cleveland Housing Court*, LEGAL AID SOC'Y OF CLEVELAND (Oct. 1, 2019), <https://laslev.org/20191001/>; Kaylyn Hlavaty, *Legislation Passes to Protect Children in Homes Facing Eviction by Providing Free Legal Help for Low-Income Tenants*, ABC NEWS 5 CLEVELAND (Oct. 1, 2019), <https://www.news5cleveland.com/news/local-news/cleveland-metro/legislation-passes-to-protect-children-in-homes-facing-eviction-by-providing-free-legal-help-for-low-income-tenants>; Joe Pagonakis, *Cleveland Right to Counsel Program Looks to Help with Growing Evictions*, ABC NEWS 5 CLEVELAND (July 2, 2020), <https://www.news5cleveland.com/news/local-news/cleveland-right-to-counsel-program-looks-to-help-with-growing-evictions>.

113. See Jake Blumgart, *'Everyone Deserves an Attorney': City Council Advances Bill Guaranteeing Legal Aid to Renters Facing Eviction*, WHYY (Oct. 29, 2019), <https://whyy.org/articles/everyone-deserves-an-attorney-city-council-advances-bill-guaranteeing-legal-aid-to-renters-facing-eviction/>; Caitlin McCabe, *Philly Bill Moves Forward to Provide Free Legal Counsel for Low-Income Tenants Facing Eviction*, PHILA. INQUIRER (Oct. 29, 2019), <https://www.inquirer.com/real-estate/housing/city-council-right-to-counsel-bill-helen-gym-philadelphia-eviction-landlord-tenant-committee-20191029.html>; Michael D'Onofrio, *City Council Passes Bill [Sic] Right to Counsel Bill for Low-Income Tenants*, PHILA. TRIB. (Nov. 14, 2019), https://www.phillytrib.com/news/local_news/city-council-passes-bill-right-to-counsel-bill-for-low-income-tenants.

114. See Marissa Wenzke & Wendy Burch, *L.A. County Supervisors Vote 5-0 for Permanent Rent Control Measure Affecting 100,000 Tenants in Unincorporated Areas*, KTLA 5 (Sept. 10, 2019), <https://ktla.com/2019/09/10/vote-expected-on-controversial-rent-control-measure/>.

which would provide representation to 20% of people facing evictions each year for the next five years.¹¹⁵ Additionally, in Santa Monica, the city council voted in December of 2019 to develop a city ordinance to provide free legal counsel to tenants facing evictions, focusing on tenants who earn too much to qualify for legal aid and undocumented tenants.¹¹⁶

Relatedly, in Indianapolis, Mayor Joe Hogsett and the city county council proposed and passed a tenant protection and legal assistance program which would, among other things, require landlords to notify tenants of their rights, create a “Tenant Legal Assistance Project” to connect pro bono attorneys with tenants who have civil legal claims against their landlords, and provide additional funds for Indiana Legal Services’ Eviction Avoidance Project, which provides tenants in eviction cases consultations and free representation.¹¹⁷ The Mayor signed the ordinance into effect on February 26, 2020.¹¹⁸ In response to this ordinance, the Indiana Legislature amended and passed a bill that would prohibit local governments from regulating the landlord-tenant screening process, security deposits, lease applications, lease terms and conditions, disclosures in the leasing process, rights and obligations in the landlord-tenant relationship, and landlord fees.¹¹⁹ This Act would greatly limit the ability of cities in Indiana to regulate landlord-tenant relationships and has been criticized as partisan and stemming from those in the legislature who have interests in the rental property industry.¹²⁰ As this controversy between the local and state government continues to develop, interesting questions about Indiana city and state powers in landlord-tenant law will need to be answered.

115. See Kat Stafford, *Detroit City Council Aims to Address Big Issues Facing Detroiters with ‘People’s Bills,’* DETROIT FREE PRESS (Sept. 30, 2019), <https://www.freep.com/story/news/local/michigan/detroit/2019/09/30/detroit-city-council-water-affordability-plan/3814833002/>.

116. See Madeleine Pauker, *Universal Legal Representation for Renters Would Cost Up to \$1 Million*, SANTA MONICA DAILY PRESS (Dec. 17, 2019), <https://www.smdp.com/universal-legal-representation-for-renters-would-cost-up-to-1-million/184016>.

117. See Ind. Bus. J. Staff & Samm Quinn, *Hogsett Unveils Tenant Protection Initiative, Aims to Cut Down Evictions*, IND. LAW. (Jan. 16, 2020), <https://www.theindianalawyer.com/articles/hogsett-unveils-tenant-protection-initiative-aims-to-cut-down-evictions>.

118. See Mary Milz, *Mayor Signs Renter Rights Ordinance as State Lawmakers Look to Gut It*, WTHR (Feb. 28, 2020), <https://www.wthr.com/article/mayor-signs-renter-rights-ordinance-state-lawmakers-look-gut-it>.

119. See Matt McKinney, *Controversial Landlord-Tenant Preemption Passes Legislature; Would Nullify Indy’s Ordinance*, WRTV INDIANAPOLIS (Mar. 11, 2020), <https://www.theindychannel.com/news/politics/despite-bipartisan-opposition-landlord-tenant-preemption-passes-legislature>. See also S. 148, 121st Gen. Assemb., 2d Reg. Sess. (Ind. 2020), <http://iga.in.gov/legislative/2020/bills/senate/148>.

120. See Ryan Martin, *Indiana Lawmakers Advancing Landlord-Friendly Legislation Have Ties to Real Estate*, INDY STAR (Feb. 28, 2020), <https://www.indystar.com/story/news/politics/2020/02/28/indianapolis-renters-landlord-bill-lawmakers-have-real-estate-ties/4881756002/>.

B. Proposals in the State Legislatures

In addition to city ordinances, several state legislatures have pending bills guaranteeing the right to counsel in various housing proceedings.

1. Connecticut

On June 10, 2016, the Connecticut Senate approved a special act creating a “task force to study the nature, extent and consequences of unmet legal needs of state residents in civil matters . . . [by] examin[ing], on a state-wide basis, the impact that the lack of access to legal counsel in civil matters is having on the ability of state residents to secure essential human needs.”¹²¹ The Task Force to Improve Access to Legal Counsel in Civil Matters submitted its final report on December 15, 2016.¹²² Regarding evictions, the Task Force found that:

Without counsel, tenants face tremendous obstacles to defend their rights in eviction proceedings, such as the power imbalance between the parties, tenants’ lack of information about their rights, and barriers such as low literacy, mental illness, and limited English proficiency. As a result, tenants without counsel do not fare well in the Court process.¹²³

The Task Force recommended that the legislature: “establish statutory right to civil counsel in . . . [the] [d]efense of residential evictions;” “[e]nact fee-shifting statutes in . . . eviction . . . actions;” and “[e]nact a statute establishing an accredited representative pilot program allowing trained non-lawyers to assist in matters ancillary to eviction defense proceedings.”¹²⁴

As a result of this report, Senator Mae Flexer introduced a bill in the Connecticut Senate on January 25, 2019, which would provide counsel in summary proceedings to tenants with an income of less than \$50,000 a year.¹²⁵ The bill was referred to the Joint Committee on Judiciary, and no action has been taken on it since. The committee is now *adjourned sine die*, meaning its session has been ended without scheduling the next session, and the bill died in committee.¹²⁶

2. Massachusetts

In Massachusetts, three bills looking to establish the right to counsel for evictions cases were introduced in both the state House and Senate in January

121. Conn. Spec. Act No. 16-19 (2016), <https://www.cga.ct.gov/2016/ACT/sa/2016SA-00019-R00SB-00426-SA.htm>.

122. See CONN. GEN. ASSEMBLY JUDICIARY COMM., REPORT OF THE TASK FORCE TO IMPROVE ACCESS TO LEGAL COUNSEL IN CIVIL MATTERS, Conn. Spec. Act. No. 16-19 (2016).

123. *Id.* at 12.

124. *Id.* at 4.

125. See S.B. 652, 2019 Gen. Assembly, Jan. Sess. (Conn. 2019).

126. See *Connecticut Senate Bill 652*, LEGISCAN (adjourned sine die), <https://legiscan.com/CT/bill/SB00652/2019> (last visited Feb. 14, 2021); *Adjournment Sine Die*, BLACK’S LAW DICTIONARY (10th ed. 2014).

of 2019.¹²⁷ There were hearings on the bills in July of 2019 and they were all reported out of the Joint Committee on the Judiciary, however all three bills ultimately failed.¹²⁸ These bills would create a right to counsel for indigent individuals (those receiving certain public benefits, are at 125% or less of the federal poverty level, or who would be unable to pay for an attorney without the deprivation of certain “necessities of life”) involved in eviction proceedings and create a task force to organize and monitor the provision of legal services.¹²⁹ Interestingly, H. 1537 would provide legal services to both indigent tenants and landlords, but the other two bills would provide it solely to tenants.¹³⁰

These bills were gaining traction, as they were initially submitted to the legislature by the mayor of Boston, Martin Walsh, in 2017 with sponsorship by legislators.¹³¹ Additionally, the Massachusetts Supreme Judicial Court Chief Justice Ralph Gants recently endorsed them, stating: “I know that there are legislative efforts afoot here in Massachusetts to provide legal counsel for all indigent parties in eviction proceedings, . . . and I hope that by next year, these efforts may finally come to fruition.”¹³² He recently wrote an opinion for the Supreme Judicial Court that, while deciding against foreclosed homeowners who were alleging bias against them in Housing Court, included an appendix explaining the process and rules of eviction proceedings to pro se litigants.¹³³ In his support, he noted “the difficulty tenants can face navigating a fast-moving court process when they are being evicted.”¹³⁴

127. See S.913, 191st Gen. Court (Mass. 2019); H.1537, 191st Gen. Court (Mass. 2019); H.3456, 191st Gen. Court (Mass. 2019).

128. See *Bill S.913 (191st (2019-2020): An Act to Ensure Right to Counsel in Eviction Proceedings*, THE 192ND GEN. CT. OF THE COMMONWEALTH OF MASS., <https://malegislature.gov/Bills/191/S913> (last visited Feb. 14, 2021); *Bill H.1537 (191st (2019-2020)): An Act Establishing a Right to Counsel in Certain Eviction Cases*, THE 192ND GEN. CT. OF THE COMMONWEALTH OF MASS., <https://malegislature.gov/Bills/191/H1537> (last visited Feb. 14, 2021); *Bill H.3456 (191st (2019-2020)): An Act to Ensure Right to Counsel in Eviction Proceedings*, THE 192ND GEN. CT. OF THE COMMONWEALTH OF MASS., <https://malegislature.gov/Bills/191/H3456> (last visited Feb. 14, 2021).

129. See S.913, 191st Gen. Court (Mass. 2019); H.1537, 191st Gen. Court (Mass. 2019); H.3456, 191st Gen. Court (Mass. 2019).

130. See S.913, 191st Gen. Court (Mass. 2019); H.1537, 191st Gen. Court (Mass. 2019); H.3456, 191st Gen. Court (Mass. 2019).

131. See *Mayor Walsh Unveils Anti-Displacement Legislative Agenda*, CITY OF BOS. (Jan. 13, 2017), <https://www.boston.gov/news/mayor-walsh-unveils-anti-displacement-legislative-agenda>.

132. Shira Schoenberg, *SJC Chief Justice Ralph Gants Endorses Right to a Lawyer for Tenants and Landlords in Eviction Cases*, MASSLIVE (Oct. 30, 2019), <https://www.masslive.com/news/2019/10/sjc-chief-justice-ralph-gants-endorses-right-to-a-lawyer-for-tenants-and-landlords-in-eviction-cases.html>.

133. See *id.*

134. *Id.*; see *Adjartery v. Cent. Div. of the Hous. Court Dep't*, 120 N.E.3d 297 (Mass. 2019).

3. New York

New York had two bills pending in its legislature. The first is Assembly Bill 1095, which was introduced to the New York General Assembly on January 14, 2019.¹³⁵ This bill would establish a requirement that a petitioner (landlord) in an eviction case file an affidavit showing that the respondent (tenant) was not a senior citizen (sixty-two years or older) after the court has entered a default judgment against the respondent.¹³⁶ If a senior citizen is a party to an eviction proceeding, the court can appoint an attorney to the senior citizen and make an order to protect their rights.¹³⁷ This bill was referred to the Committee on Housing, but failed to pass.¹³⁸

The other bill that was pending was the New York Civil Gideon Act; it was introduced on March 4, 2019, and referred to the State Judiciary Committee where it failed to pass.¹³⁹ This bill would create the right to legal representation in many civil matters, including evictions.¹⁴⁰ The representation would be facilitated through a lead legal services agency, which would then send referrals to other approved legal agencies.¹⁴¹ The bill would also establish a Civil Gideon Defense Fund to finance the programs created by the Act, which would create no burden on the taxpayer; it would receive its funds from “lawyers admitted to practice in the State of New York, and the fund may accept federal, state or local grants and donations.”¹⁴²

C. Federal Legislature

As of June 2020, there were two federal bills which would encourage the right to counsel in eviction and housing cases. Both these bills were introduced in 2019.¹⁴³ The similarities and differences between these two bills will be analyzed in Part III of this Note.

135. See A. 01095, Gen. Assemb., Reg. Sess. (N.Y. 2019).

136. See *id.*

137. See *id.*

138. See *Bill No. A01095 Actions*, N.Y. STATE ASSEMBLY, https://assembly.state.ny.us/leg/?default_fld=&bn=A01095&term=2019&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y (last visited Feb. 14, 2021).

139. See A. 06273 Memorandum in Support of Legislation, N.Y. Gen. Assembly, Reg. Sess. (N.Y. 2019) [hereinafter A. 06273 Memorandum]; *Bill No. A06273 Actions*, N.Y. STATE ASSEMBLY, https://assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=A06273&term=2019&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y (last visited Feb. 14, 2021). The bill had been introduced twice before, once in 2015 and once in 2016, and each time it was referred to the Judiciary Committee. See *id.*

140. See A. 06273 N.Y. Gen. Assembly, Reg. Sess. (N.Y. 2019).

141. See *id.*

142. A. 06273 Memorandum, *supra* note 139.

143. The Eviction Crisis Act of 2019 was also introduced in 2019. S. 3030, 116th Cong. (2019). However, it will not be included in this analysis. The bill would create many programs to help prevent evictions and provide consumer protections related to this, but it does not mention providing or encouraging the right to counsel in eviction cases. See *id.*

1. A Just Society: A Place to Prosper Act of 2019

On September 25, 2019, Rep. Alexandria Ocasio-Cortez announced a bill package entitled “A Just Society,” which includes six bills attempting to address many poverty issues and economic inequality in the United States.¹⁴⁴ The Place to Prosper Act, one of the bills in the package, was introduced to the House of Representatives on November 13, 2019, with the stated purpose of creating “an equitable and stable rental housing market.”¹⁴⁵ Ocasio-Cortez said on the House floor that one of the reasons she introduced the Act is that housing is a human right and not just a “for-profit commodity,” so affordable housing should be accessible to all working-class Americans.¹⁴⁶

Section 3 of the Act, “Funding for Access to Counsel,” which is relevant to this Note, reads as follows:

(a) GRANT PROGRAM.—The Secretary of Housing and Urban Development is authorized to make grants to State and local governments to establish a right to counsel for tenants in eviction proceedings.

(b) APPLICATION.—The chief executive officer of a State or unit of local government seeking a grant under this section shall submit an application to the Secretary of Housing and Urban Development at such time, in such manner, and containing such information as the Secretary may reasonably require, including an assurance that the funds will be used in accordance with subsection (c).

(c) USES OF FUNDS.—A State or unit of local government receiving a grant under this section shall use not less than 85 percent of such funds to provide counsel for tenants in eviction proceedings.

(d) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated \$6,500,000,000 for each of fiscal years 2021 through 2030 to carry out this section.¹⁴⁷

The Act would encourage the development of the right to counsel in eviction proceedings in states and cities by using federal funding through the Department of Housing and Urban Development. The Act was being considered in the House Committee on Financial Services, House Committee on the Judiciary, and House Committee on Transportation and Infrastructure.¹⁴⁸

144. See Lola Fadulu, *Alexandria Ocasio-Cortez's Next Big Effort: Tackling Poverty*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/us/politics/alexandria-ocasio-cortez-poverty.html>.

145. H.R. 5072, 116th Cong. (2019).

146. 165 CONG. REC. H9284 (daily ed. Dec. 5, 2019) (statement of Rep. Ocasio-Cortez).

147. H.R. 5072 § 3, 116th Cong. (2019).

148. See *H.R. 5072 – A Just Society: A Place to Prosper Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/5072/all-actions-without-amendments?KWICView=false> (last visited Feb. 14, 2021).

2. Eviction Prevention Act of 2019

In addition, on December 4, 2019, Rep. Rosa DeLauro introduced the Eviction Prevention Act of 2019.¹⁴⁹ DeLauro said in a press release for the Act that it would provide “a safety net that can help keep [tenants] in their home,” especially those tenants facing “wrongful or disputed evictions.”¹⁵⁰ Section 2 of the Act, “Grants for States and Units of General Local Government to Provide Access to Counsel in Civil Actions Related to Eviction,” subsections (a)–(d) read as follows:

(a) **AUTHORIZATION.**—The Attorney General is authorized to make grants to States and units of general local government to provide eligible individuals access to counsel in civil actions related to eviction.

(b) **USE OF FUNDS.**—A State or unit of general local government that receives a grant under this section shall use such funds to hire attorneys in positions that are dedicated solely to providing counsel described in subsection (a).

(c) **APPLICATION.**—A State or unit of general local government seeking an application under this section shall submit an application to the Attorney General at such time, in such manner, and containing such information as the Attorney General may reasonably require, including—

(1) the rate of eviction for that State or unit of general local government;

(2) during the previous year, the number of individuals subject to eviction in that State or unit of general local government who were not represented by an attorney in eviction proceedings;

(3) a plan for how the State or unit of general local government will use amounts from a grant under this section to increase access to counsel; and

(4) the status with respect of the right to counsel in civil actions related to eviction in the State or unit of general local government and, if the State or unit of general local government does not have in effect laws providing a right to counsel, such evidence as the Attorney General may require that is sufficient to demonstrate that substantial progress has been made to enact laws providing such a right.

(d) **AMOUNT OF GRANT.**—Subject to the availability of appropriations, a grant under this section shall be in an amount that is not less than \$1,000,000, and which amount is determined based on—

149. See H.R. 5298, 116th Cong. (2019).

150. Press Release, DeLauro Introduces Eviction Prevention Act (Dec. 4, 2019), <https://delauro.house.gov/media-center/press-releases/delauro-introduces-eviction-prevention-act>.

- (1) the rate of eviction in the applicant State or unit of general local government, compared to the national average rate of eviction, as determined by the rates of eviction included with each application under subsection (c);
- (2) the plan submitted by the applicant State or unit of general local government in accordance with subsection (c)(3);
- (3) the status of right to counsel in applicant State or unit of general local government; and
- (4) during the previous year, the number of individuals subject to eviction in the applicant State or unit of general local government who were not represented by an attorney in eviction proceedings.¹⁵¹

The Act would permit the Attorney General to make grants to states and local governments to provide counsel to indigent tenants in eviction cases, with those who guarantee a right to counsel in eviction cases receiving an advantage in the consideration.¹⁵² In addition to Section 2, the Act would also authorize the Attorney General to collect eviction data and to create a Government Accountability Office report evaluating the effects of the Act.¹⁵³ The Act was being considered in the House Committee on the Judiciary.¹⁵⁴

III. ANALYSIS OF METHODS OF GUARANTEEING RIGHT TO COUNSEL

A. Methods by Cities and States

Cities and states varied distinctly in who the right to counsel was provided to and how this representation would be provided. Most programs would restrict the right to counsel to indigent renters, measuring indigency by looking at the tenant's income compared to the Federal Poverty Guidelines. This tracks the criminal defense right to counsel, where states create their own financial eligibility standards for providing defense counsel by meeting certain criteria, usually looking to a certain income percentage of the Federal Poverty Guidelines.¹⁵⁵ Some scholars have critiqued the use of the Federal Poverty Guidelines in criminal defense appointment as arbitrary and not reflective of true living costs.¹⁵⁶ The Federal Poverty Guidelines are based on food costs,

151. H.R. 5298 § 2, 116th Cong. (2019).

152. See Press Release, DeLauro Introduces Eviction Prevention Act, *supra* note 149.

153. See H.R. 5298 §§ 5, 6, 10 116th Cong. (2019).

154. See *H.R.5298 – Eviction Prevention Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/5298/actions?KWICView=false> (last visited on Feb. 14, 2021).

155. See Susan L. Wynne & Michael S. Vaughn, *Eligibility for Court-Appointed Counsel in State Criminal Cases: An Analysis of State Indigency Statutes*, 5 TENN. J. RACE GENDER & SOC. JUST. 166, 176, 182 (2016).

156. See, e.g., John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1218 (2013).

and “do not take into account the cost of housing, child care, health care, transportation, . . . specific family composition or geographic location.”¹⁵⁷

However, the use of the Federal Poverty Guidelines may be helpful in this civil context, especially where there is not a federal constitutional mandate to provide the service as there is in the criminal context.¹⁵⁸ Cities and states can understandably have more leeway in establishing the eligibility of tenants for services, especially as these programs are in their beginning stages. They are choosing to protect tenants’ rights and provide these services and will need to bear the costs. San Francisco chose to not have an income eligibility requirement in its program, so the city has chosen to bear a larger cost in ensuring that every tenant is represented and give lawyers to tenants who would not be eligible in other jurisdictions.¹⁵⁹ However, not every jurisdiction may be able to afford to do this right now. In the future, as the right to counsel becomes more accepted and cities and states are willing to provide more funds to provide it (possibly including federal funds), then these cities and states could ideally expand the provision to more people to ensure their rights and housing are also protected.

Unlike the other programs, all of the Massachusetts bills would, in addition to the federal poverty level, consider whether the party receives public benefits or whether the party could be deprived of basic necessities in determining whether the tenant should be appointed an attorney.¹⁶⁰ This provides more flexibility to state officials in the appointment process, but it could involve problems with discretion in deciding who will be unable to afford basic necessities. Additionally, one of the Massachusetts bills would provide a lawyer to both tenants and landlords who are eligible.¹⁶¹ This could have been a choice by the sponsor to favor due process and dignified participation rationales for the right to counsel in eviction proceedings, where the litigation is fair and equal on both sides in terms of representation.

Cities and states also differed in how they would provide legal services. Some chose to funnel money and resources exclusively through already-existing non-profit organizations and some chose to establish legal services offices while working with non-profit organizations.¹⁶² It is difficult to compare the success of these programs as they are just beginning or may even still be in the legislatures, even though we do have preliminary statistics and results in New York City from certain counties.¹⁶³ In examining the plans more generally, though, state-created programs could possibly create more uniformity in services across the jurisdiction and be more accessible to tenants,

157. *Id.* at 1205 (internal citation omitted).

158. U.S. CONST. amend. VI.

159. *See supra* Part II.A.2.

160. *See* S. 913, 191st Gen. Court (Mass. 2019); H. 1537, 191st Gen. Court (Mass. 2019); H. 3456, 191st Gen. Court (Mass. 2019).

161. *See* H. 1537, 191st Gen. Court (Mass. 2019).

162. *See supra* Part II.A.

163. *See supra* Part II.A.1.

as it would be easily understood to be the organization to go to when facing an eviction. On the other hand, funding already-existing non-profits would probably be easier and faster to implement, as these organizations are already established, and the attorneys are well-trained in the relevant law and proceedings. They would also already have professional experience and relationships with the courts, opposing counsel, and community resources. We will see in the future how well these different programs perform their functions, but as of right now, it seems as though pre-existing non-profits may be better suited to lead the way in this endeavor, with the government providing funds and overarching guidelines.

B. Cities vs. States

When examining city and state right-to-counsel provisions, one may wonder whether it is better for states to regulate and provide for the right to counsel at the state level or whether cities can and should act on their own accord. This question is demonstrated by the situation which unfolded between Indianapolis and the Indiana State Legislature.¹⁶⁴ While the regulations in question were about tenant rights and the provision of counsel more generally, not the right to counsel, the question is still the same: Which jurisdiction should be regulating the landlord-tenant relationship? The Indiana Legislature has reasoned that regulations of this sort should be made at a state-wide level to benefit all state residents, which the bill's supporter, the Indiana Apartment Association, reiterated when it said that regulations should occur at the state level to ensure uniform landlord tenant laws across the state.¹⁶⁵ Mayor Hogsett, on the other hand, criticized the bill, saying:

It is . . . clear that the problems facing cities and towns across Indiana are unique to each jurisdiction and the solutions must be as well. Instead of allowing local governments to address these challenges head on, Senate Bill 148 would take that power away and place the burden on our most vulnerable residents to navigate the legal system – without the benefit of being educated on their rights. If Senate Bill 148 is ultimately signed into law, we will not waver in our commitment to continue helping Indianapolis tenants in need.¹⁶⁶

These parties were making arguments over the extent of state and city authority and what happens when they overlap.

This brings into issue the question of state preemption and home rule. Generally, “[c]ities derive their power to determine their own policies as well as the contours of their independence through what is known as home rule” and states have preemption powers in certain circumstances; both of these powers are based in individual state constitutions.¹⁶⁷ Cities rely on their “[r]egulatory

164. See *supra* notes 117–20 and accompanying text.

165. See McKinney, *supra* note 119 (quoting the Indiana Apartment Association).

166. *Id.* (quoting Indianapolis Mayor Joe Hogsett).

167. Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 *ADVANCE* 3, 4–5 (2017).

power” to govern “for the health, safety, welfare, and morals of the community.”¹⁶⁸ The extent of the ability of states to preempt this authority and the possibility of states to abuse this preemptive authority is a salient issue in states across the country.¹⁶⁹

In the right to counsel in eviction cases, it may make more sense to allow cities to govern the right to counsel on an individual level, since there are usually large differences between rural areas and cities regarding landlord-tenant relations. Cities will know exactly what problems they wish to address and will be able to pass ordinances into effect more quickly. One concern is that this could create difficulties for large landlords and property managers in complying with different regulations in different cities. However, the large landlord should be used to dealing with different regulations in different cities in other areas of the law, so it should be able to do this in the landlord-tenant law context as well. In the same vein, if states wish to provide for the right to counsel on a statewide level, it would be beneficial to allow cities and jurisdictions some flexibility in the structure and process of providing lawyers to renters. In this way, states should develop overarching guidelines providing the right to counsel, but allow cities and counties to tailor procedures and structures individually to fit the needs of their communities.

C. States vs. the Federal Government

The question of state and local preemption raises the concern of state and federal preemption. The federal bills addressed above do not attempt to provide for a national right to counsel in eviction proceedings; rather, they both would encourage states and localities to provide the right and give them funding to do so.¹⁷⁰ This has to do with the nature of landlord-tenant law and federal preemption. The federal legislators may have been hesitant to preempt state law in landlord-tenant law, as it is “traditionally a local matter.”¹⁷¹ Courts will generally adhere to “a presumption ‘against finding preemption of state law in areas traditionally regulated by the States.’”¹⁷² While there are some federally-regulated housing laws, this area is for the most part left to states and cities which can create complex codes and laws.¹⁷³ Focusing on funding and not providing the right to counsel itself also probably would make it easier to pass the bill, as the argument could be made that the federal government was not forcing states and cities to provide for the right to counsel, just rewarding those that do. It is a way to further human rights, encourage due process, and reduce the societal consequences of eviction without intruding on a historically state and local domain. The federal government could encourage state and local

168. *Id.* at 5.

169. *See generally id.*

170. *See supra* Part II.C.

171. Dickinson, *supra* note 80, at 23 (quoting *Jaffe v. Clarke*, 566 F. Supp. 1500, 1502 (S.D.N.Y. 1983)).

172. *Id.* (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)).

173. *See id.* at 23–24.

governments to provide the right to counsel by removing the cost barrier associated with this right, but ultimately allow them to make this choice themselves. Ideally, the federal government would ensure that everyone had the right to counsel in eviction cases, but that seems unlikely with the current legislative and judicial climate in this field.

D. Federal Bill Methods

Finally, there are differences between the two federal bills which bear mentioning. First, the Place to Prosper Act would organize the funding source through HUD, while the Eviction Prevention Act would provide the funding through the Attorney General. This choice is perplexing, as HUD seems to be the more sensible choice since it already handles other housing and rental assistance matters.¹⁷⁴ On the other hand, the Attorney General could be a good choice if the federal government ever expanded funding the right to counsel in other areas of the law outside of housing, such as child custody cases. In that case, the fund could become a more general federal civil Gideon fund. Whatever the reasons behind this difference, it is something to take note of. Additionally, in the Eviction Prevention Act's detailed guidance to the Attorney General on what to consider in making a grant, the status of the right to counsel is one of many factors worth considering. In contrast, the Place to Prosper Act's grant's principal purpose is to fund the right to counsel in eviction cases, although it leaves discretion to the executive branch in determining what that more specifically entails. These distinctions may simply be differences in drafting, or they could offer a perspective in the purposes of the acts: The Place to Prosper Act focuses on providing the right to counsel to decrease evictions, while the Eviction Prevention Act focuses less on the methods and more on ensuring a decrease in the number of evictions. Both these bills offer interesting insights on how the federal government can play a role in providing the right to counsel in eviction cases.

CONCLUSION

This Note highlights the dynamic landscape of the local, state, and federal provision of the right to counsel in eviction proceedings. In the past few years, the public has become more concerned with the issue of the right to counsel in eviction cases, which is reflected in the continuing push in cities, states, and the federal government to provide for and encourage this right. In considering the efficacy of certain methods over others, it will be helpful for governments to examine the reasons for providing counsel in the first place. This will ensure that the federal government encourages the right to counsel in eviction cases and states and cities implement it. These recent changes and proposals are an encouraging step on the road to the right to counsel in eviction cases, but there is still a long way to go before achieving the right to counsel on a national scale.

174. See *What We Do*, DEP'T OF HOUS. & URB. DEV., <https://www.hud.gov/topics> (last visited Mar. 20, 2020).