HOUSING DEFENSE AS THE NEW *GIDEON*

KATHRYN A. SABBETH*

New York City is the first jurisdiction in the United States to create a right to appointed counsel for poor people facing eviction. This Article is the first to analyze NYC's ground-breaking legislation. The Article draws on NYC's housing defense statute to highlight three ways in which the creation of a civil right to counsel has the potential to build on and expand beyond the Gideon v. Wainwright *model. The right to appointment of criminal defense counsel, as recognized in* Gideon*, was part of the Supreme Court's indirect response to the Civil Rights Movement. In contrast, the NYC legislature openly promotes substantive outcomes, explicitly targeting eviction and its secondary effects. Additionally, the legislature's focus on housing recognizes concerns that disproportionately impact Black women; this echoes the racial equality goal underlying* Gideon *and promotes gender equality. Finally, while the criminal defense model defends individuals against only state power, NYC's right to housing defense counsel includes tenants of private landlords and thereby checks private power. All three of these features are worth attention from legislatures considering expansion of the right to civil counsel.*

The Article also identifies one important way in which the new model of appointment of housing counsel is like the criminal model for appointment: NYC's legislation addresses appointment of defense lawyers, as opposed to lawyers for plaintiffs, potential plaintiffs, or people engaged in non-litigation matters. This Article argues that the focus on defense lawyering limits the impact of appointment of counsel. Defense lawyering suffers from systemic limitations that influence litigation strategy and the potential to collaborate with social movements. With respect to the substantive goal of housing preservation, problems like discrimination, harassment, and dangerous conditions also pose significant threats and could be more robustly addressed through affirmative suits. In spite of recognizing the limits of defense lawyering, this Article concludes that the availability of counterclaims in civil litigation makes civil defense more flexible than criminal defense. As a result, civil defense might be able to do more than criminal defense to challenge the status quo and advance substantive improvements for poor litigants.

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* Associate Professor of Law, University of North Carolina at Chapel Hill. For helpful conversations and comments on earlier drafts, I would like to thank Wendy Bach, Christine Bartholomew, Karen Buck, Salena Copeland, Scott Cummings, Kate Sablosky Elengold, Russell Engler, Navneet Grewal, Ed Josephson, Jennifer Levy, Stephen Loffredo, Lauren Sudeall Lucas, Martha McCluskey, John Pollock, Joy Radice, Anna Roberts, Camille Gear Rich, Aaron Siegel, Zoe Singer, Jessica Steinberg, Eric Tars, Aga Trojniak, David Udell, Erika Wilson, and the participants at ClassCrits VIII at the University of Tennessee, the Faculty Brownbag Workshop at the University of Kentucky, and

TABLE OF CONTENTS

INTRODUCTION

Lawyers and scholars have advocated for decades for an extension of the right to counsel from criminal to civil proceedings,[1] and their efforts have recently gained momentum.[2] Today's civil right to counsel movement

the *Reframing the Welfare Queen: Feminist and CRT Alternatives to Existing Poverty Discourse* conference at the University of Southern California, the last of which provided a supportive forum to test out Part II.B when the ideas were still inchoate. For creative and diligent research assistance, I am grateful to Lindsey Brown, Chris Byrd, Corey Frost, Tony Lucas, Candace Speller, and Tyler Walters.

[1] *See* Gideon v. Wainwright, 372 U.S. 335, 335 (1963) (recognizing right to appointment of counsel for criminal defendants).

[2] *See* Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might*

does not press for an absolute right, whereby counsel would be appointed in all civil matters, but targets select categories of cases in which basic needs or fundamental rights are at stake.[3] Although the U.S. Supreme Court dimmed the prospects of a federal guarantee of civil counsel,[4] advocates have nonetheless achieved successes at the state and local levels. In the political climate of the Trump administration, localities have become the vanguards of progressive legislation on a variety of topics,[5] and civil justice initiatives are no exception.

A number of jurisdictions have considered appointment of counsel in housing litigation,[6] and the City of New York ("NYC" or "New York City") has emerged as the leader among them. In the summer of 2017, NYC enacted Intro 214-B, which mandates appointment of counsel to all income-eligible defendants in eviction proceedings.[7] The legislation picked up steam after a hearing before the City Council's Committee on Courts and Legal Services in September 2016[8] and a press conference outside of City Hall that December.[9] The *New York Times* Editorial Board;[10] the NYC Bar Associa-

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Less Assistance Suffice?, 9 SEATTLE J. SOC. JUST. 97, 98–101 (2010) (summarizing historical developments); Dave Collins, *States Look to Provide Lawyers for the Poor in Civil Cases*, SEATTLE TIMES (Mar. 29, 2016) (describing recent growth of legislation), https://www.seattletimes.com/nation-world/states-look-to-provide-lawyers-for-the-poor-in-civil-cases/ [https://perma.cc/M96F-5W2Q].

[3] *See* David Udell & Laura Abel, *Information for Civil Justice Systems About Civil Right to Counsel Initiatives*, NAT'L COALITION FOR A CIV. RIGHT TO COUNS. (June 9, 2009), http://www.civilrighttocounsel.org/uploaded_files/115/NCCRC_Informational_Memo.pdf [https://perma.cc/6LD4-86S7] (describing campaign for civil right to counsel).

[4] *See* Turner v. Rogers, 564 U.S. 431, 448 (2011) (ruling that persons facing prison for civil contempt not guaranteed counsel although some alternative measures of due process must be in place); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–33 (1981) (ruling that there is no right to appointment of counsel for persons at risk of losing parental rights, although courts may appoint counsel on a case-by-case basis).

[5] *See* Bill Fulton, *Trump Victory Underscores the Important Role of Cities as Laboratories of Democracy*, URBAN EDGE BLOG (Jan. 20, 2017), https://urbanedge.blogs.rice.edu/2016/11/09/trump-victory-underscores-the-important-role-of-cities-as-laboratories-of-democracy/#.WJkcuvIi6io [https://perma.cc/R56K-XW4L]; Claire Cain Miller, *Liberals Turn to Cities to Pass Laws and Spread Ideas*, N.Y. TIMES, (Jan. 26, 2016), at A3.

[6] *See infra* pp. 76–77.

[7] *See* New York, N.Y., Ordinance 0214-2014 (Aug. 11, 2017) (to be codified at N.Y.C. ADMIN. CODE §§ 27-4001 *et seq*.), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80 [https://perma.cc/B6CU-XPNR]. Intro 214-B also provides limited legal services to other tenants facing possible eviction. *See infra* Part I.B.3 (describing the covered proceedings in detail).

[8] *A Local Law to Amend the Administrative Code of the City of New York, in Relation to Providing Legal Counsel for Low-income Eligible Tenants Who Are Subject to Eviction, Ejectment or Foreclosure Proceedings: Transcript of Minutes of Comm. of Cts. & Legal Servs.*, 2014–2017 Sess. 2–8 (2016), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID—Text—&Search=int+214 [https://perma.cc/K7QE-U43J] [hereinafter "*September Hearing Transcript*"].

[9] *See, e.g*., Amanda Mikelberg, *Support Swells for 'Right to Counsel' for Low-Income New Yorkers Facing Eviction*, METRO (Dec. 14, 2016), http://www.metro.us/new-

tion;[11] the Presidents of the Boroughs of Manhattan, Brooklyn, and the Bronx;[12] the former Chief Judge of New York's highest court, Jonathan Lippman;[13] the NYC Comptroller;[14] and numerous faith leaders, community organizations, and medical and legal services providers all voiced support.[15] In February 2017, Mayor Bill de Blasio announced that his administration would provide the necessary funds,[16] and in July 2017, the legislature passed the final version of the bill.[17] NYC became the first government in the

york/support-swells-for-right-to-counsel-for-low-income-new-yorkers-facing-eviction/zsJpln—1TPbXKYZlU9FE/ [https://perma.cc/U3R2-NEL7].

[10] *See* Editorial, *A Right to a Lawyer to Save Your Home*, N.Y. Times, Sept. 23, 2016, at A28.

[11] *See* N.Y.C. Bar Ass'n., Report on Legislation by the Pro Bono & Legal Servs. Comm. & Hous. Ct. Comm. 1 (2015) [hereinafter "Bar Rep."]); *A Local Law to Amend the Administrative Code of the City of New York, in Relation to Providing Legal Counsel for Low-income Eligible Tenants Who Are Subject to Eviction, Ejectment or Foreclosure Proceedings: Testimony Submitted to Comm. on Cts. & Legal Servs.*, 2014–2017 Sess. 78–80 (2016), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=&Search= [https://perma.cc/S82Q-7DET] [hereinafter "*Hearing Testimony*"] (statement of John S. Kiernan, President, NYC Bar Ass'n).

[12] *See September Hearing Transcript*, *supra* note 8, at 64–70 (statement of Ruben Diaz, Jr., President, Borough of the Bronx), 128–35 (statement of Gale Brewer, President, Borough of Manhattan); *Hearing Testimony*, *supra* note 11 (statement of Eric Adams, President, Borough of Brooklyn).

[13] *See September Hearing Transcript*, *supra* note 8, at 19–64 (statement of Jonathan Lippman, formerly Chief Judge of N.Y.).

[14] *See* David Cruz, *Comptroller Stringer, Outside Bronx Housing Court, Backs Right to Counsel Bill*, Norwood News (Feb. 4, 2015), http://www.norwoodnews.org/id=16939&story=comptroller-stringer-outside-bronx-housing-court-backs-right-to-counsel-bill/ [https://perma.cc/6JJT-LFZF].

[15] *See, e.g.*, Right to Counsel NYC Coalition, http://www.righttocounselnyc.org [https://perma.cc/CEB4-45FF]; *Hearing Testimony*, *supra* note 11, at 23–25 (statement of Edward Josephson, Director of Litigation, Legal Servs. NYC), 56–57 (statement of Joseph Rosenberg, Exec. Dir., Catholic Community Relations Council), 58 (statement of Manuel de Jesus Rodriguez, Reverend, Presentation of the Blessed Virgin Mary Roman Catholic Church), 97 (statement of Hilary Exter, Coordinator, Urban Justice Center Anti-Harassment Tenant Protection Program), 105 (statement of Elvis Santa, Member, Banana Kelly Residents Council), 106 (statement of Wanda Swinney, Member, Banana Kelly Residents Council), 109 (statement of Randy Dillard, Leader, Community Action for Safe Apartments), 110 (statement of Luetella Dordon, Member, DC-37), 121–22 (statement of RueZalia Watkins, Member, Banana Kelly Residents Council), 123–24 (statement of Felix Plaza Hernandez, Leader, Three-Quarter House Tenant Organizing Project), 135–36 (statement of Olga Apt-Dudfield, Social Worker, Montefiore Medical Ctr. Lead Poisoning Prevention and Treatment Program), 143–44 (statement of Eduardo Paez, Client, Catholic Migration Services), 178 (statement of Anthony Thomas, Political Director, NYC Central Labor Council, AFL-CIO), 179–84 (statement of Fitzroy Christian, Leader, Community Action for Safe Apartments).

[16] Press Release, Office of the Mayor of the City of N.Y., State of the City: Mayor de Blasio and Speaker Mark-Viverito Rally Around Universal Access to Free Legal Services for Tenants Facing Eviction in Housing Court (Feb. 12, 2017), http://www1.nyc.gov/office-of-the-mayor/news/079-17/state-the-city-mayor-de-blasio-speaker-mark-viverito-rally-universal-access-free [https://perma.cc/KYZ9-SA83].

[17] *See* N.Y. City Council, Legis. History Report (Aug. 15, 2017), http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=id—Text—&Search=int+214 [https://perma.cc/WXE5-VPA9].

United States to guarantee a right to counsel for poor people facing eviction.[18]

Housing defense counsel has attracted interest in part because of a massive eviction phenomenon that scholars and policymakers are just beginning to understand.[19] Millions of Americans are evicted annually,[20] including tens of thousands in NYC.[21] This eviction phenomenon has contributed to a surge in the homeless population,[22] and homeless shelters in NYC are increasingly strained.[23] The NYC City Council has expressed concern about the social and economic impacts of the evictions, not only for individuals and their families, but also for NYC at large.[24]

Representation by counsel decreases eviction rates for tenants,[25] but courts across the country are teeming with unrepresented tenants, the vast majority of whom must defend against lawyers litigating on behalf of the landlords.[26] Historically in NYC, roughly ninety percent of landlords in evic-

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[18] The only prior legislation regarding counsel for people at risk of losing their homes was the Civil Asset Forfeiture Reform Act of 2000, which created protections against federal civil asset forfeiture and included appointment of counsel for certain cases involving government seizure of a primary residence. 18 U.S.C. § 983(b) (2012); *see* Louis Rulli, *On the Road to Civil* Gideon*: Five Lessons from the Enactment of a Right to Counsel for Indigent Homeowners in Federal Civil Forfeiture Proceedings*, 19 J. L. & POL'Y 683, 709–14, 737 (2011) (describing appointment of counsel as part of reforms to prevent government actors from wrongly seizing property).

[19] *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 295–96 (2016) ("[N]ew data and methods have allowed us to measure the prevalence of eviction and document its effects.").

[20] *See id.* at 4–5.

[21] *See* OFFICE OF CIVIL JUSTICE, N.Y.C. DEP'T SOC. SERVS., 2016 ANNUAL REPORT 24–26, https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf [https://perma.cc/TW6H-GFC9] [hereinafter "NYC JUSTICE REP."] (summarizing evictions statistics from 2011 to 2015). As a stop-gap measure short of establishing a right to counsel, NYC approved a major increase in funds for eviction defense in 2014 and, as a result, the pace of evictions slowed in 2015. *Id.* at 2*; see also* FLORALBA PAULINO, NYC DEP'T OF INVESTIGATION, MARSHALS BUREAU, SUMMARY OF EVICTIONS, EJECTMENTS & POSSESSIONS CONDUCTED FOR THE PERIOD JANUARY 1, 2006 THROUGH DECEMBER 31, 2006 (2007), http://cwtfhc.org/wp-content/uploads/2009/06/evictions_marshals_2006.pdf [https://perma.cc/WM8C-95K7] (showing lower eviction rates roughly a decade ago).

[22] *See* GISELLE ROUTHIER, COALITION FOR THE HOMELESS, STATE OF HOMELESSNESS 2016 3, 7–9 (2016), http://www.coalitionforthehomeless.org/wp-content/uploads/2016/04/SOTH-2016.pdf [https://perma.cc/QCE8-S3HV] (summarizing growth figures for homeless population between 1983 and 2016); Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22 FAST FOCUS 4 (2015), https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf [https://perma.cc/VQ63-TVJP] ("Eviction is a leading cause of homelessness, especially for families with children.").

[23] *See, e.g.*, William Neuman, *Confronting Surge in Homelessness, New York City Expands Use of Hotels*, N.Y. TIMES, Dec. 7, 2016, at A23 (describing "strained shelter system").

[24] *See infra* Part II.A.

[25] *See infra* Part II.A.1.

[26] *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L. J. 37, 47 n.44 (2010) (collecting figures of jurisdictions ranging from Arizona to Massachusetts).

tion proceedings have been represented, while ninety percent of tenants have not.[27] New studies suggest that appointing counsel for these pro se tenants would cut the number of evictions dramatically and, even after factoring in the cost of counsel, would save millions of dollars that the City currently spends on homeless shelters, medical care, law enforcement, and other expenses created by housing losses.[28] Given the economic and social costs of evictions, legislators are turning to housing defense counsel as a solution that they see as both morally right and cost-effective.[29]

This Article is the first to analyze NYC's ground-breaking right to housing defense legislation and to use it to draw broader lessons about the creation of a civil right to counsel. Prior literature has advocated for a right to housing defense counsel,[30] but no previous law review article has had the

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[27] *See* PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, Apps. 609 (2014), https://www.nycourts.gov/accesstojusticecommission/PDF/2014%20CLS%20Report_Appendices_Vol%202.pdf [https://perma.cc/T5UU-GN83] [hereinafter "CHIEF JUDGE REP."] (finding one percent of tenants and ninety-five percent of landlords represented); COMTY. TRAINING & RES. CTR. & CITY-WIDE TASK FORCE ON HOUS. COURT, INC., HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL iv (1993) (showing 11.9 percent of tenants and 97.6 percent of landlords represented). Note, however, that the percentage of unrepresented tenants shrank from 99 percent to 72.7 percent between 2013 and 2016, following an unprecedented increase in funding for appointment of housing defense counsel, which many interpreted as the precursor to establishing full funding for a universal right to housing defense counsel. *See* NYC JUSTICE REP., *supra* note 21, at 31–32.

[28] STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A, 3–5 (2016), http://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf [https://perma.cc/HYL6-EYBR] [hereinafter "Ross Report"] (estimating net savings of $320 million from reduced costs of homeless shelters, medical services, law enforcement, construction of affordable housing, and other expenses, after factoring in cost of counsel); Letter from Ronnie Lowenstein, Dir., NYC Independent Budget Office, to Mark Levine, Member, City Council of NYC 6–7 (Dec. 10, 2014), http://www.ibo.nyc.ny.us/iboreports/2014housingcourtletter.pdf [https://perma.cc/WZF2-226R] [hereinafter "NYC Budget Office Ltr."] (estimating reductions in shelter residents and resulting savings). The net financial impact will depend on which governmental entity shoulders which burdens. *See* Andrew Scherer, *The Price of Equal Justice: How Establishing a Right to Counsel for People Who Face Losing Their Home Helps Tackle Income Inequality*, 1 N.Y. L. SCH. IMPACT CTR. FOR PUB. INT. L. FOR RACIAL JUST. PROJECT 29, 35 n.38 (2015) (noting that the cost of counsel will be the responsibility of NYC, although the state and federal governments absorb some of the costs against which it is balanced). Academic studies regarding the effect of representation on housing court outcomes are discussed in Parts I.B.2 & II.A.1 *infra*.

[29] *See infra* Part II.A.2.

[30] *See e.g.*, Risa Kaufman et al., *The Interdependence of Rights: Promoting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 777–83 (2014) (presenting human rights argument in favor of appointment of housing counsel); Ray Brescia, *Sheltering Counsel: Towards a Right to A Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187 *passim* (2009) (making strategic recommendations to advocates); Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1509–18 (2004) (presenting equal protection and due process arguments); Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527,

opportunity to analyze the strengths and weaknesses of actual legislation. This Article compares the development of the right to housing defense counsel with that of the right to criminal defense counsel.[31] Drawing on the example of Intro 214-B, the Article identifies three key ways in which the civil right to counsel has the potential to build on and expand beyond the criminal model.

The Article also identifies one important way in which NYC's model of appointment of housing counsel is similar to the criminal model for appointment: NYC's legislation addresses appointment of defense lawyers, as opposed to lawyers for plaintiffs, potential plaintiffs, or people engaged in nonlitigation matters. This Article argues that the focus on defense lawyering limits the impact of appointment of counsel.[32] Defense lawyering suffers from systemic limitations that influence litigation strategy and the potential to collaborate with social movements. With respect to the goal of preserving housing, problems like discrimination, harassment, and dangerous conditions also pose significant threats and could be more robustly addressed through affirmative suits. In spite of the limits of defense lawyering, however, this Article concludes that the availability of counterclaims in civil litigation makes civil defense more flexible than its criminal counterpart, allowing civil defense to overcome these limits to some degree.[33]

Part I.A will describe why housing is central to people's lives and how the NYC City Council has decided to protect it through appointment of

538–53 (1991) (presenting due process argument); *See generally* Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 421 (1995) (presenting empirical evidence to rebut cost-based critiques); Andrew Scherer, Gideon*'s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988) (presenting due process and statutory arguments).

[31] *See infra* Part I.B.1.

[32] Intro 214-B will provide tenants with lawyers at the first scheduled court appearance "or as soon thereafter as is practicable." *See infra* Part III.A.1.

[33] Immigration is another area in which advocates have pushed for a right to counsel. *See* NATIONAL IMMIGRATION LAW CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 14–23 (2016), https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf [https://perma.cc/YBU3-DXVY] (summarizing advocacy for right to counsel for immigrants). The appointment of counsel in such cases represents a less significant paradigm shift because immigrant removal proceedings are "quasi-criminal." Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 U.C.L.A. L. REV. 1461, 1507 (2011). Each case is initiated by the state against an individual defendant, involves the deprivation of liberty, and provides no opportunity to raise counterclaims. *See id.* at 1506 (noting that the state sometimes detains immigrants awaiting removal proceedings in the same facilities as criminal prisoners); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 338, 346 (2008) (discussing deportation as deprivation of liberty); *infra* Part IV (highlighting significance of counterclaims in civil litigation). While the similarities between immigration and criminal proceedings make appointment of counsel for immigrants compelling, they also make the study of housing defense counsel potentially a richer area for deriving broad lessons about the appointment of counsel in civil proceedings.

counsel. Part I.B will compare the development of the right to housing defense counsel with that of the right to criminal defense counsel.[34] The Justices who decided *Gideon* and the cases leading up to it were motivated by a desire for substantive justice—they sought to protect African American men from abusive states operating under Jim Crow.[35] The Justices, however, pursued their substantive aim indirectly and relied on the language and logic of procedure.[36]

Part II will identify three ways in which NYC's right to housing defense counsel builds on and goes beyond the *Gideon* model. First, the new approach moves beyond the framework of procedural fairness to promote positive substantive outcomes.[37] Explicitly relying on empirical evidence in its discussions, the legislature proposed the appointment of counsel as a method to improve case outcomes, specifically to decrease eviction rates.[38] In so doing, the legislature took a non-neutral position on preferred case outcomes. This is a departure from the jurisprudence on the right to criminal defense counsel, which mentions no preferred outcomes other than accurate ones.[39] Additionally, the NYC legislature made use of sophisticated research on the impacts of legal representation. Social science researchers have encouraged legal scholars to incorporate secondary effects into their studies of lawyers' effectiveness, rather than relying simply on individual case outcomes,[40] and the legislation's proponents did just that. In weighing the costs and benefits, they drew on studies of not only individual case outcomes but also secondary effects on social and economic conditions.[41]

A second key aspect of the new approach is that the focus on housing recognizes a set of concerns that disproportionately impact Black[42] women.[43]

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[34] *See infra* Part I.B.1.
[35] *See infra* Part I.B.1.
[36] *See infra* Part I.B.1.
[37] *See infra* Part II.A.
[38] *See infra* pp. 85–86.
[39] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 691–92 (1984) ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding."); Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").
[40] *See* Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 Wis. L. Rev. 101, 111 (critiquing case outcomes studies and arguing that measurements of "effectiveness" of legal services must include process costs of lost opportunities, mental and physical health impacts, and systemic effects of representation).
[41] *See* NYC Justice Rep., *supra* note 21, at 21; Ross Report, *supra* note 28, at 35; NYC Budget Office Ltr., *supra* note 28, at 6–7; *see also* September Hearing Transcript, *supra* note 8, at 14–19 (referencing empirical studies).
[42] This Article will use the terms "Black" and "African American" interchangeably and will capitalize "Black." *See* Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1332 n.2 (1988) ("I shall use 'African-American' and 'Black' interchangeably. When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like

While the Supreme Court Justices who identified a right to counsel a half-century ago did so in large part to protect Black men,[44] the NYC legislature today addresses a problem disproportionately affecting Black women.[45] As recent books, films, and activist movements have brought to popular attention, huge numbers of Black men in the United States face incarceration.[46] A less well-known reality is that that huge numbers of Black women face eviction, which also results in significant secondary effects. The focus of the new *Gideon* on housing defense builds on the racial equality aims underlying the criminal model of the right to counsel and also promotes gender equality.

Third, the new legislation helps to regulate the conduct of private actors.[47] Whereas the criminal defense model was aimed at, and applies only to, defending against state power, the housing legislation also captures litigation between indigent defendants and private plaintiffs. This approach reflects the reality that today private actors control numerous aspects of poor people's lives. While the dangers of state power remain significant, the new *Gideon* also recognizes the potential for abuses of private power and seeks to safeguard the rule of law in those domains.

Part III offers a critique of NYC's approach to appointment of housing counsel. It highlights the limits of housing defense counsel and, more generally, the limits of seeking substantive justice for poor people through appointment of defense lawyers. Appointment of housing defense counsel addresses only the immediate loss of a home, but not other housing problems—such as discrimination, harassment, and substandard conditions—that disproportionately harm Black women's access to safe and affordable shelter.[48] Additionally, the defense position suffers from inherent weaknesses, both in civil litigation strategy and in terms of potential for collaboration with social movements.[49] To meet the legislature's goals of positive social outcomes and promotion of equality and the rule of law, appointment of affirmative lawyers for tenants is worth consideration.

Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun.").

[43] *See infra* Part II.B.

[44] *See infra* Part I.B.1.

[45] To be clear, local legislators have not expressed an intent to protect Black women other than designing a plan that will have the effect of doing so. The racial and gendered significance of that plan are points emphasized by this author.

[46] Disproportionate numbers of Black women also interact with the criminal justice system, but they are fewer. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); 13TH (Netflix 2016); *see also* THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2015), http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf [https://perma.cc/2SQT-6QYP]. Women are currently the largest growing prison population, but men continue to comprise the overwhelming majority of incarcerated persons, with African American men most acutely overrepresented. *Id.* at 4–5.

[47] *See infra* Part II.C.

[48] *See infra* Part III.A.

[49] *See infra* Part III.B.

Part IV considers responses to this critique. The Article concludes that, despite its limitations, the right to housing defense counsel holds the potential to accomplish many of its aims. The availability of counterclaims distinguishes civil litigation and makes defense lawyering more flexible in the civil context than in the criminal one.[50] Ultimately, civil defense attorneys may be better positioned than their criminal counterparts to disrupt the status quo and create substantive improvements for poor litigants.

I. Housing Defense as the New *Gideon*

Housing is vital to people's lives.[51] Loss of housing visits ripple effects on society.[52] Legal representation is one proven way to protect people against the loss of their homes.[53] Appointment of housing defense counsel also comports with principles of equality and respect for the rule of law. This Part will explain why housing defense is considered important and what the City Council of NYC has done to guarantee it.

A. Housing as Essential to Society

This subpart will identify housing as a primary need, describe the secondary effects that individuals experience with its loss, and highlight the community impact of a massive eviction phenomenon.

1. *Housing as a Primary Need*

Shelter "has always been viewed as one of the necessities of life."[54] It is essential for physical survival. A roof protects inhabitants from cold, rain, and predators. In contrast, a lack of housing can lead to illness or even death.[55]

In addition to its physical importance, a home also plays a vital role in development and maintenance of one's peace of mind.[56] It offers sanctuary

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[50] *See infra* Part IV.

[51] *See* Chester Hartman, *The Case for a Right to Housing*, *in* A Right to Housing: Foundation for a New Social Agenda 177, 180 (Rachel G. Bratt et al, eds. 2006) [hereinafter A Right to Housing] ("Housing has a special character, not only because it consumes so large a portion of the household budget, especially for lower-income families, but because it is . . . the central setting for so much of one's personal and family life as well as the locus of mobility opportunities, access to community resources and societal status.").

[52] Desmond, *supra* note 19, passim.

[53] *See infra* Part II.A1.

[54] Rachel C. Bratt et al., *Why a Right to Housing is Needed and Makes Sense: Editors' Introduction*, *in* A Right to Housing, *supra* note 51, at 1, 2.

[55] *See infra* pp. 66–67 (discussing effects of homelessness).

[56] *See* Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 978–79, 986 (1982) (explaining that property rights tied to personhood give rise to higher moral claims than fungible property rights and that "the home" is a particularly strong case of property tied to personhood).

from the intrusions of public space and allows people the freedom to cast off public personas.[57] People spend most of their time,[58] build memories,[59] and come to define their sense of self at home.[60] Although it is not always a safe environment,[61] home often serves as a symbol of security, a life spent working towards that security, and hopes for a certain future.[62] For these reasons and others, constitutional doctrine has recognized heightened rights of privacy, liberty, and freedom of association in the home,[63] and scholars have identified security in the home as essential to dignity and personhood.[64]

Housing can be equally important for economic prospects.[65] Housing consumes the majority of poor renters' household budgets.[66] For middle income homeowners, the house is their largest financial investment.[67] Home ownership has provided a means for people to move from lower to middle classes, to take out loans, and to accumulate wealth.[68] Access to housing, whether rented or owner-occupied, shapes educational and employment op-

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[57] *See id.* at 978, 997 (highlighting privacy interests in the home).

[58] Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 60 (2016) ("People spend more time in their homes than in any other location.").

[59] *See* Radin, *supra* note 56, at 967 ("continuity of self through memory").

[60] *See id.* at 991–92 ("[Home] is the scene of one's history and future, one's life and growth.").

[61] *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 986 (1991) (highlighting domestic and family violence); *infra* Part II.B.1.d (describing sexual harassment and assault by landlords); *infra* pp. 103–06 (describing dangerous housing conditions).

[62] *See* Bratt et al., *supra* note 54, at 3–4 (collecting sources on emotional security); Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 25 (1998) ("[Home] is the place where we imagine a life that is better than it ever was.").

[63] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) (striking down anti-sodomy statute forbidding sexual activity in the home); Stanley v. Georgia, 394 U.S. 557, 565 (1979) (ruling that rationales for obscenity statutes "do not . . . reach into the privacy of one's home"); United States v. U.S. Dist. Court for the E. Dist. of Mich., 407 U.S. 297, 313 (1972) (noting that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *see also* U.S. CONST. amend. IV.

[64] *See* Radin, *supra* note 56, at 995 (personhood); DESMOND, *supra* note 19, at 296–97 (dignity).

[65] *See* Radin, *supra* note 56, at 987 n.104; Rulli, *supra* note 18, at 712.

[66] *See* DESMOND, *supra* note 19, at 4.

[67] *Cf.* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 669 (2002) ("[M]inorities are disadvantaged with respect to what is for most middle-class households in the United States the greatest source of household wealth."); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1207 (2001) (noting that home ownership is higher for whites than for people of color and that among homeowners, African Americans own homes "of lower value, regardless of their socioeconomic status and family structure").

[68] *See* Bratt et al., *supra* note 54, at 4 (noting that home ownership has allowed people to build assets, despite authors' broader argument that this has been limited for people of color and poor people).

portunities.[69] These opportunities influence income and wealth distribution, making the financial importance of housing even greater.[70]

2. *Secondary Effects of Housing Loss*

Given the centrality of housing to human life, the loss of housing creates significant damage.[71] Loss of a home often leads to relocation to less desirable housing and neighborhoods,[72] loss of possessions,[73] destruction of relationships,[74] disruption of access to schools and jobs,[75] poor educational performance,[76] unemployment, anxiety, and depression.[77] Displacement affects individual families and seeps into the social fabric of neighborhoods. Sociologists have demonstrated that residential mobility associated with housing loss results in neighborhood fragmentation and higher crime rates.[78]

The harms of displacement are exacerbated when housing loss results in homelessness. Living on the streets or in shelters can expose people to extreme weather,[79] theft, contagious diseases, parasites,[80] and physical and sexual assault including rape and even murder.[81] The consequences include

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[69] *See* Roisman, *supra* note 67, at 671 n.22 (collecting literature); Nancy Denton, *Segregation and Discrimination in Housing*, *in* A RIGHT TO HOUSING, *supra* note 51, at 61, 71 (describing impacts on education and employment); *see also* Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1419–20 (2014) (highlighting case of mother who misrepresented her address so she could send her children to a better school).

[70] Housing also widens racial income and wealth gaps. *See supra* notes 67 and 68.

[71] *See generally* Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295 (2015) (describing various impacts of eviction); Gold, *supra* note 58.

[72] *See* Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 118 (2012).

[73] *See* DESMOND, *supra* note 19, at 91, 124, 296 (describing piles of furniture, clothing, and other items discarded on eviction day). Families often cannot keep up with moving costs or storage fees while they search for new homes. *Id*. at 132.

[74] *See id.* at 298.

[75] *See id.* at 296.

[76] *See id*. (noting impacts on school performance and graduation rates).

[77] *See id*. (describing destruction of psychological stability); *see also id*. at 120 (describing suicidal effects).

[78] Desmond, *supra* note 72, at 121.

[79] REBECCA STURGIS, NAT'L COAL. FOR THE HOMELESS, WINTER HOMELESS SERVS.: BRINGING OUR NEIGHBORS IN FROM THE COLD 3, 7 (2010), http://www.nationalhomeless.org/publications/winter_weather/Winter_weather_report.pdf [https://perma.cc/5S3H-ZYC6] (describing cold weather leading to frostbite, hypothermia, and death).

[80] Klyyssa Shay, *Why Don't Homeless People Use Shelters?*, SOAPBOXIE (Jan. 27, 2017), https://soapboxie.com/social-issues/why_homeless_people_avoid_shelters [https://perma.cc/CGN4-3U7S] (describing theft, contagious diseases, and parasites in shelters).

[81] NAT'L COAL. FOR THE HOMELESS, NO SAFE STREET: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2014 & 2015, 1–4 (2016), http://nationalhomeless.org/wp-content/uploads/2016/07/HCR-2014-151.pdf [https://perma.cc/5GUR-55P8]; Lauren Kirchner, *Doubly Victimized: The Shocking Prevalence of Violence Against Homeless Women,* PACIFIC STANDARD (July 22, 2014), https://

psychological trauma, physical injuries, infection, illness, and death.[82] Homeless people also encounter challenges to building and maintaining social and professional networks. Homelessness creates obstacles to employment[83] and educational achievement.[84] In addition to the practical difficulties and social stigma, the instability of homelessness creates significant psychological damage, particularly for children.[85] Finally, eviction and homelessness contribute to a criminalization loop, as evicted tenants may be prosecuted for trespassing if they remain on the premises, and homeless people who sit or sleep on streets may face criminal charges for loitering.[86]

The legal event of eviction also makes it more difficult for a displaced family to find alternative housing. First, the record of eviction marks a tenant as undesirable to potential landlords. Evictions disqualify tenants from public housing subsidies.[87] Private property owners use national "blacklists"[88] of eviction defendants to weed out rental applicants.[89] Together, these public and private exclusions restrict the supply of housing available to people who have lost their homes.

Second, civil judgments damage defendants' credit.[90] Damaged credit then restricts the supply of housing. Landlords use credit scores to evaluate applicants for rental housing.[91] Mortgage lenders depend on credit scores to

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psmag.com/doubly-victimized-the-shocking-prevalence-of-violence-against-homeless-women-11f02ee4ae69#.2g8peo7i8 [https://perma.cc/DD4z-ZPBX].

[82] *See supra* notes 79–81.

[83] Daniel Poremski et al., *Persisting Barriers to Employment for Recently Housed Adults with Mental Illness Who Were Homeless*, 93 J. Urb. Health 96, 101 (2016).

[84] Philip T.K. Daniel & Jeffrey C. Sun, *Falling Short in Sheltering Homeless Students: Supporting the Student Achievement Priority Through the Mckinney-Vento Act*, 312 Educ. L. Rep. 489, 491–92 (2015); Julia C. Torquati & Wendy C. Gamble, *Social Resources and Psychosocial Adaptation of Homeless School Aged Children*, 10 J. Soc. Distress & Homeless 305, 306 (2001).

[85] *See* Torquati & Gamble, *supra* note 84, at 306, 316–17 .

[86] Tristia Bauman, Nat'l L. Ctr. On Homelessness & Poverty, Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities 9–11, 23–24, 31–32 (2016), https://www.nlchp.org/documents/Housing-Not-Handcuffs [https://perma.cc/PM27-WZ5C].

[87] Mary Spector, *Tenant Stories: Obstacles and Challenges Facing Tenants Today*, 40 J. Marshall L. Rev. 407, 415 (2007).

[88] Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 Yale L.J. 1344, 1349 n.20 (2007); *see id.* at 1346 (noting that roughly 650 companies provide lists); *see also* Esme Caramello & Nora Mahlberg, *Combating Tenant Blacklisting Based on Housing Court Records: A Survey of Approaches*, Clearinghouse Cmty News (2017), http://povertylaw.org/clearinghouse/article/blacklisting [https://perma.cc/FV2S-8EX9] (noting that the mere filing of an eviction lawsuit, regardless of its merits, can land a tenant on a private blacklist, and identifying solutions).

[89] *See* Kleysteuber, *supra* note 88, at 1356–64 (describing the tenant screening process and its deficiencies).

[90] Consumer Fin. Prot. Bureau, Key Dimensions and Processes in the U.S. Credit Reporting System: A Review of How the Nation's Largest Credit Bureaus Manage Consumer Data 8–11, 17 (2012), http://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf [https://perma.cc/2SBX-8EPG] [hereinafter Key Dimensions].

[91] Spector, *supra* note 87, at 416.

evaluate applicants for home loans.[92] In both cases, a low credit score can result in a rejection, and the damaged credit interferes with the ability to obtain new housing.

Third, a damaged credit score can harm the ability to generate the income necessary to pay rent in the future. Damaged credit impacts both immediate employment opportunities and educational opportunities that could improve employment prospects. Employers increasingly use credit scores to screen out current and prospective employees.[93] Education, one of the best avenues for boosting credentials and earnings, typically requires loans, which themselves require credit.[94] Attending work and school requires transportation, but the ability to secure car loans and insurance also depends on credit.[95]

The myriad challenges that displaced people face suggest that, as a matter of policy, preserving housing may be more effective than replacing it once lost. This becomes even clearer when such losses are considered in the aggregate.

3. *Community Impact of Evictions*

The problems that individuals experience as a result of losing their homes visit broader social and economic effects on their communities. Due to increased housing costs accompanied by stagnant wages,[96] many cities and towns have witnessed increased evictions and a growth in the homeless population.[97] The proliferation of homeless families strains shelter systems[98]

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[92] KEY DIMENSIONS, *supra* note 90, at 5.

[93] *See* Sharon Goott Nissim, *Stopping a Vicious Cycle: The Problems with Credit Checks in Employment and Strategies to Limit Their Use*, 18 GEO. J. ON POVERTY L. & POL'Y 45, 46–47 (2010).

[94] *See Credit Scores*, FINAID, http://www.finaid.org/loans/creditscores.phtml [https://perma.cc/ZK9F-PH3C].

[95] *See* Imara Jones, *Subprime Loans Are Back with a Vengeance*, COLORLINES (July 24, 2014), http://www.colorlines.com/articles/subprime-loans-are-back-vengeance [https://perma.cc/YPC2-Q894] ("Automobiles remain the no. 1 transportation method in America, so having access to a car is essential. Applicants for low-wage hourly work are often asked in interviews whether they have reliable transportation to and from work."); CHI CHI WU, NAT'L CONSUMER LAW CTR., CREDIT SCORING AND INSURANCE: COSTING CONSUMERS BILLIONS AND PERPETUATING THE ECON. RACIAL DIVIDE 4 (2007), http://www.cej-online.org/NCLC_CEJ_Insurance_Scoring_Racial_Divide_0706.pdf [https://perma.cc/MRE6-QKFS] [hereinafter INSURANCE].

[96] *See* DESMOND, *supra* note 19, at 4.

[97] *See supra* notes 21–22.

[98] *See* Neuman, *supra* note 23 (describing "strained shelter system"). Note that New York City is obligated to provide shelter for those who need it, but some cities are not. The "right to shelter" forces NYC to recognize and absorb the social costs of homelessness. This may influence legislators' analysis of the social and economic cost of providing housing defense counsel. In jurisdictions that lack such a right to shelter, local governments may face different incentives and ultimately less political pressure to recognize a right to housing defense counsel. *See The* Callahan *Legacy,* Callahan v. Carey *and the Legal Right to Shelter*, COALITION FOR THE HOMELESS, http://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-

and adds to the costs of law enforcement.[99] The physical and psychological illnesses that follow homelessness increase the use of medical services and burden emergency rooms.[100] Job losses that result from evictions increase the number of people who must seek public assistance or unemployment insurance, further draining public resources.[101] These impacts on health, education, employment, and economic security reverberate throughout the community.[102]

In jurisdictions covered by rent regulation like NYC, housing losses also deplete the supply of affordable housing. If a tenant in a rent-regulated apartment gets evicted, the landlord can significantly increase the rent for future tenants.[103] Over time, such vacancies can undermine rent regulation, making it difficult for poor and middle-income families to find housing. This creates an additional burden for a locality, which must then create new affordable housing or else experience a change in residential demographics.

The NYC City Council determined that the best way to preserve affordable housing and tackle homelessness was to reduce evictions, and that the best tool for reducing evictions was the appointment of lawyers.[104] Tenants generally have legal defenses they do not know to raise, and they frequently sign settlements that unnecessarily waive any right to remain in their homes.[105] The NYC legislature relied on empirical evidence showing that appointment of housing defense counsel for these tenants would be less costly than treating the myriad social problems that would otherwise occur.[106] Evidence that funding housing defense lawyers is not only morally right but also cost-effective made the creation of a right to counsel particularly compelling.[107]

B. Development of the Right to Housing Defense Counsel

The right to appointment of counsel first developed in the United States in the criminal context, where its justification relied in large part on the

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and-the-legal-right-to-shelter [https://perma.cc/6RLM-VEZA] (outlining the history of the litigation that resulted in the right to shelter in New York).

[99] *See* BAUMAN, *supra* note 86, at 38–39.

[100] *See* Ross Report, *supra* note 28, at 4, 21; Letter of Andrew Scherer, Pol'y Dir., Impact Ctr. for Public Interest Law at N.Y. Law Sch., Paris Balducci, Clinical Professor of Law, Cardozo Law Sch. & Paula Galowitz, Clinical Professor of Law Emerita, NYU Sch. of Law, to Ronnie Lowenstein, Dir., NYC Independent Budget Office 2 (Dec. 16, 2014), http://civilrighttocounsel.org/uploaded_files/217/Joint_letter_to_IBO_re_12-10-14_Intro_214_report.pdf [https://perma.cc/89ED-KXJ5] [hereinafter "Faculty Ltr to IBO"].

[101] *See* Ross Report, *supra* note 28, at 23; Faculty Ltr to IBO, *supra* note 100.

[102] *See* DESMOND, *supra* note 19, at 296.

[103] *See, e.g.*, N.Y. COMP. CODES R. & REGS. TIT. 9, § 2522.8 (2017).

[104] *See infra* Part II.A.2.

[105] *See infra* Part I.B.2.

[106] *See infra* Part II.A.2.

[107] *See infra* Part II.A.2.

criminal defendant's interest in liberty.[108] In fits and starts, the right has since begun expanding to areas of civil litigation where similarly important interests are at stake.[109] The primary rationale for appointment of counsel has been to level the playing field between adversaries as a matter of fairness and to produce decisions that accurately comport with the applicable law.

In the development of the right to appointment of criminal defense counsel, courts emphasized procedural goals even when substantive outcomes provided the true motivation.[110] The Court that recognized the right to counsel in *Gideon* was motivated by a specific desire for substantive justice: to protect African American men from states operating under Jim Crow.[111] Yet it pursued this goal indirectly, with a ruling that relied on the language and logic of procedural fairness.[112]

Today, literature on the role of counsel for civil litigants increasingly focuses on substantive outcomes.[113] Housing is one area in which evidence suggests appointment of counsel is particularly effective at impacting outcomes.[114] Housing is therefore receiving growing attention from advocates and legislators as a prime focus for establishment of a civil right to counsel, and expressions of support have been explicit and direct about the substantive goals underlying the creation of that right.[115]

1. *History of the Right to Housing Defense Counsel*

Like many areas of civil rights,[116] the right to counsel has developed through dialogue between courts and legislatures.[117] In 1938, in *Johnson v. Zerbst*, the Supreme Court ruled that the Sixth Amendment guaranteed ap-

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[108] *See, e.g.*, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25 (1981) ("[I]t is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments . . . which triggers the right to appointed counsel"); Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (ruling that the right to counsel is triggered by sentence of imprisonment); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (ruling that any offense charged with jail time triggers the right to appointed counsel).

[109] *See infra* p. 77.

[110] *See infra* Part I.B.1.

[111] *See infra* Part I.B.1.

[112] *See infra* Part I.B.1.

[113] *See infra* Part II.A.1.

[114] *See infra* Part II.A.1.

[115] *See infra* pp. 85–86.

[116] *See, e.g.*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (amending civil rights statute in response to Supreme Court rulings, including employment discrimination case of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2637 (1995).

[117] *See* Sara Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15, 18–23 (2016) (providing historical account showing that *Gideon* followed majority of states' laws in recognizing right to appointment of counsel, but the Court's decision then revolutionized states' implementation of the right); Russell Engler, *Shaping a Context-Based Civil* Gideon *Movement from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 698–700 (2006) (describing development of civil *Gideon* in state courts and legislatures).

pointment of counsel to indigent criminal defendants.[118] The ruling addressed only federal defendants and left unanswered whether the Bill of Rights (including the Sixth Amendment) applied to the states, but, following the *Zerbst* decision, state legislatures began creating a right to counsel in state proceedings as well. By the time the Court decided *Gideon* in 1963, most states were providing appointed counsel to indigent criminal defendants.[119] The *Gideon* Court aimed to change the practices of outlier states, which were concentrated in the South.[120]

A number of scholars have concluded that the primary purpose of *Gideon* and other criminal procedure decisions of that time was to protect African Americans from the abuses of Jim Crow justice in the South.[121] Corinna Barrett Lain describes this historical context:

> By 1963, however, it was only natural for the Justices to support the provision of counsel for indigent felony defendants as a matter of principle, and not just precedent. At the time, it was considered almost immoral not to. To understand why, one must again turn to the extralegal context in which the Court was operating. . . . Much of what has already been discussed regarding the impact of the civil rights movement on the Supreme Court's decision in *Mapp* [*v. Ohio*, 367 U.S. 643 (1961)] applies with equal, if not more, force to its decision in *Gideon* just two years later. Though the events in Birmingham were still a month away when *Gideon* was decided, the civil rights movement had gained substantial support by the beginning of 1963 and the plight of black defendants in Southern courts had already begun to receive publicity. No doubt, the Supreme Court was thinking about the right to counsel in light of these developments; Gideon happened to be white, but the fact that only Southern states had refused to provide an attorney to in-

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[118] Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

[119] Mayeux, *supra* note 117, at 18–19; *see also* Engler, *supra* note 117, at 702 (noting twenty-two states and commonwealths filed amicus briefs in support of Mr. Gideon). Appointment of criminal defense counsel was already mandated in federal proceedings. *See Johnson*, 304 U.S. at 463.

[120] *See, e.g.*, Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 Wash. & Lee L. Rev. 883, 895 (2013) ("By 1963, only a few states, concentrated in the south, did not appoint counsel for all felony defendants."); Barry Friedman, The Will of the People: How Pub. Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 273 (2009) (describing Chief Justice's motivation in *Gideon* as desire to impose federal right to counsel on "five remaining States, all in the South"); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. Pa. L. Rev. 1361, 1398 (2004) ("In *Gideon*, the Supreme Court validated a well-established national consensus, suppressing Southern states that were out-of-step with the rest of the country[ ]. . .").

[121] *See* Mayeux, *supra* note 117, at 18 (collecting literature). *See generally* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48 (2000) (providing historical account of "birth of criminal procedure" in reaction to Jim Crow justice system).

> digent felony defendants made the connection impossible to ignore. For a Court presumably interested in protecting blacks from Jim Crow justice, extending the right to counsel to the states was attractive for two reasons. First and most obvious, it gave black defendants a sorely needed legal advocate to argue on their behalf. Second, and perhaps less obvious, it increased the opportunities for judicial oversight of suspect Southern courts.[122]

Although Mr. Gideon was white, *Gideon* was in many ways a race case.[123] The *Gideon* decision reflected the Court's "concern over a criminal justice system where white judges and prosecutors processed poor, unrepresented blacks and Hispanics,"[124] a system known for "the selective prosecution of crime"[125] and "treating black suspects and defendants much worse than white ones."[126] Burt Neuborne provides the following account:

> It is hard to overstate the sense of urgency driving the Court's concern over racial discrimination in the enforcement of the criminal law. The perception—and, too often, the reality—was of white police forces applying racially discriminatory standards in daily street encounters with black citizens, the widespread discriminatory use of force, and the selective prosecution of crime. The sense of crisis was particularly acute in the urban ghettos.[127]

In spite of the Court's desire to promote racial equality,[128] its right-to-counsel cases did not explicitly acknowledge this underlying substantive goal, and instead emphasized the importance of fair procedures. *Gideon* ruled that the Fourteenth Amendment incorporates the due process guarantees of the Sixth Amendment, and therefore the right to appointment of

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[122] Lain, *supra* note 120, at 1395–96.

[123] *See, e.g.*, Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2239 (2013) ("*Gideon* . . . was not a case explicitly or obviously about race. Yet, scholars persuasively contend that *Gideon* was part of the Court's response to legal oppression faced by African Americans."); Tracey L. Meares & Dan M. Kahan, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998) ("The need that gave birth to the existing criminal procedural regime was institutionalized racism. Law enforcement was a key instrument of racial repression.").

[124] *See* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 86 (2010).

[125] *Id.* at 85.

[126] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that *the system was treating black suspects and defendants much worse than white ones*. Warren era constitutional criminal procedure began as a kind of antidiscrimination law.") (emphasis added).

[127] Neuborne, *supra* note 124, at 85.

[128] Meares & Kahan, *supra* note 123, at 1157 ("Although rarely acknowledged by the Court, the racial dimension of these cases was not lost on contemporary observers. 'The Court's concern with criminal procedure,' one wrote, 'can be understood only in the context of the struggle for civil rights.'") (quoting A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968)).

counsel applies to state as well as federal defendants.[129] The Court proclaimed, "[I]n our adversary system of criminal justice, 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. This seems to us to be an obvious truth."[130] It concluded that the right to appointed counsel for criminal defendants is "fundamental and essential to fair trials."[131]

The *Gideon* opinion contained no mention of racial equality or social justice. Indeed, its sole reference to "equality" was a statement that U.S. law has always sought to "assure fair trials before impartial tribunals in which every defendant stands equal before the law."[132] While the Court noted that appointment of counsel could improve the accuracy of case outcomes and prevent conviction of the innocent, the language of the opinion revealed no desire to change the substance of outcomes in any particular direction.[133] The Justices expressed no desire to decrease conviction rates, reduce the length of prison sentences, or improve social circumstances beyond the courtroom.[134] Although the Warren Court is known for embracing social change, the pursuit of it in the right-to-counsel cases was "subtextual."[135]

Since the Civil Rights Movement, the Supreme Court has recognized a federal right to appointed counsel for criminal defendants facing incarceration[136] and juvenile defendants in delinquency proceedings[137] but no other categories of people.[138] States and localities meanwhile have pressed ahead,

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[129] *Gideon*, 372 U.S. at 340–41.

[130] *Id.* at 344.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 345 (quoting Powell v. State of Ala., 287 U.S. 45, 68–69 (1932)) ("Without [counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."). *See also* cases cited *supra* note 39 (emphasizing accuracy).

[134] The only acknowledgment of the significance of prison itself appeared in Justice Harlan's concurrence. *Gideon*, 372 U.S. at 351 & n.4 (Harlan, J., concurring). He argued that criminal defendants might not be entitled to appointment in all cases but the "possibility of a substantial prison sentence" constituted "special circumstances" justifying such appointment. *Id.*

[135] David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) (recognizing "the Supreme Court's reluctance to tackle the problem of racism in the criminal justice system explicitly" although "criminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race"). *Cf.* Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (naming and lambasting racial profiling and mass imprisonment).

[136] *See* Scott v. Illinois, 440 U.S. 367, 369 (1979) (ruling that the right to counsel is triggered by sentence of imprisonment); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (ruling that misdemeanor charges for which jail is imposed trigger the right to appointed counsel).

[137] *In re* Gault, 387 U.S. 1, 41 (1967) (recognizing a right to counsel for juvenile defendants in delinquency proceedings, which are technically civil but involve accusations of criminal activity and can result in a loss of liberty).

[138] *See* Turner v. Rogers, 564 U.S. 431, 448 (2011) (ruling that persons facing prison for civil contempt are not guaranteed counsel although some alternative measures of due process must be in place); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (ruling that there is no right to appointment of counsel for persons at risk of losing parental

often leaving the Supreme Court behind. Two decades after *Gideon*, in *Lassiter v. Department of Social Services of Durham County*,[139] the Supreme Court considered whether parents should be entitled to appointment of counsel when the state seeks to terminate their parental rights.[140] Although thirty-three states already recognized such a right,[141] the Court did not.[142] The majority concluded that parental rights, while important, are not as important as liberty.[143] The decision stated that "it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments . . . which triggers the right to appointed counsel."[144] The Court did not seem even to recognize that a loss of parental rights could be interpreted as a threat to personal freedom.[145] It limited the guarantee of appointment of counsel to cases that involved the potential for imprisonment.

In 2011, advocates presented the Court with a civil litigant facing imprisonment.[146] In *Turner v. Rogers*, a father was found guilty of civil contempt after he failed to pay child support, and as a result he was sentenced to jail for one year, a term which he served in its entirety.[147] On appeal, he argued that because of the liberty interest at stake, he should have been appointed counsel for his contempt hearing.[148] The *Turner* Court disagreed and interpreted *Lassiter* to mean merely that the absence of a liberty interest

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rights, although courts may appoint counsel on a case-by-case basis); *see also* Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[The] right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."); Vitek v. Jones, 445 U.S. 480, 497 (1980) (Powell, J., concurring) ("[Q]ualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital" but not necessarily assistance of an attorney).

[139] *Lassiter*, 452 U.S. at 24.

[140] *Id.* at 18.

[141] *See* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 367 (2005).

[142] *Lassiter*, 452 U.S. at 31.

[143] *Id.* at 30.

[144] *Id.* at 25.

[145] *See* Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. L. REV. 889, 910 (2015) (arguing that the Court's definition of liberty is overly narrow); *id.* at 931–32 n.289 (highlighting a gender element discernible in the interests prioritized in the Court's right to counsel jurisprudence). *Cf. infra* Part II.B.2 (arguing that creation of right to housing defense counsel recognizes an issue of importance to women).

[146] *See* Turner v. Rogers, 564 U.S. 431, 435 (2011).

[147] *Id.* at 437–38. Mr. Turner actually spent more than two years in jail as a result of defaulting on the child support order. The one-year term most relevant at the time of his appeal was only the latest in a string of six civil contempt findings due to failures to pay the same child support order. *Id.* at 436. Three of the previous orders resulted in Turner's imprisonment, two for several days each because he was released after paying, and another for six months, which he served in full. *Id.* By the time the Supreme Court issued its decision related to his additional, one-year incarceration, Mr. Turner had been found guilty of civil contempt a seventh time, had served an additional six months in prison, and was scheduled to appear for an eighth contempt hearing. *Id.* at 440.

[148] *Id.* at 438.

creates a presumption against appointment.[149] The majority concluded that a bright-line right to counsel was not appropriate because the question of whether Mr. Turner was able to pay child support was "sufficiently straightforward to warrant determination prior to providing a defendant with counsel";[150] the "person opposing the defendant at the hearing [wa]s not the government represented by counsel but the custodial parent unrepresented by counsel";[151] and due process requirements could be met by "substitute procedural safeguards."[152]

In spite of *Lassiter* and *Turner*, the majority of state courts have recognized a right to counsel under state constitutions in areas where liberty or parental rights are at stake,[153] and state legislatures have filled in additional gaps.[154] Most state courts and legislatures have expanded the right to counsel to protect parents and children in termination, paternity, abuse, and neglect matters, as well as liberty interests in involuntary confinement, conservatorship, guardianship, and civil contempt proceedings.[155] The majority of these rights were recognized around the time of *Lassiter* or in response to it.[156] Activity then died down for the remainder of the twentieth century.[157]

In the past decade, however, the push for a right to counsel in civil proceedings has regained steam. With the celebration of the fortieth and fiftieth anniversaries of *Gideon*, conferences, scholarship, and state commissions

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[149] *Id.* at 443.

[150] *Id.* at 446 (emphasis omitted). *But see generally* Laura K. Abel, Turner v. Rogers *and the Right of Meaningful Access to the Courts*, 89 DENV. U. L. REV. 805 (2012) (questioning the Court's assumptions about the lack of factual complexity and highlighting contrary evidence in the record).

[151] *Turner*, 464 U.S. at 446–47 (emphasis omitted). Note that the Court's analysis collapsed into one factor that which might more properly be separated as two: (1) whether the opposing party was the government or a private party, and (2) whether the opposing party was represented by counsel. *See infra* pp. 99–100 (distinguishing power of represented parties from power based on identities or social relationships).

[152] *Turner*, 464 U.S. at 447 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). *But see* Abel, *supra* note 150 (arguing that the Court should have used empirical evidence to evaluate the adequacy of alternatives). The Court did, however, reverse and remand on the basis that insufficient "procedural safeguards" had been made available to Mr. Turner. *Turner*, 464 U.S. at 449.

[153] *See* John Pollock, *The Case Against Case-By-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases*, 61 DRAKE L. Rev. 763, 781–84 (2013); Clare Pastore, *Life After* Lassiter*: An Overview of State-Court Right-to-Counsel Decisions*, 40 CLEARINGHOUSE REV. 186 (2006).

[154] *See generally* Laura K. Abel & Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006).

[155] *See generally* A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, CIVIL RIGHT TO COUNSEL, http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/resources—information-on-key-atj-issues/civil_right_to_counsel1.html [https://perma.cc/DKY9-A3AR] (compiling state laws governing civil right to counsel); NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, http://civilrighttocounsel.org [https://perma.cc/7JYS-NNSP] [hereinafter NCCRC] (same).

[156] Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 767 (2015).

[157] *Id.*

on a civil *Gideon* blossomed.[158] In light of this activity, combined with increased recognition of the growing numbers of pro se litigants appearing in court, state and local jurisdictions have begun implementing new access-to-justice initiatives to expand the availability of representation.[159] In 2003, the National Coalition for a Civil Right to Counsel was born, strengthening coordination and advocacy efforts.[160] In 2006, the American Bar Association adopted a resolution advocating for the appointment of counsel in civil matters in which "basic human needs" are at stake.[161] The ABA Resolution identified five such needs: shelter, sustenance,[162] safety, access to healthcare, and child custody and parental rights.[163] No jurisdiction guarantees counsel for all of these basic needs, though many have made progress on parental rights and have begun to discuss other areas for expansion.[164] Housing has received special attention.

A number of localities have developed experimental pilot projects to provide counsel in targeted areas for limited periods and to evaluate the results, and housing has been a central focus.[165] In 2009, California passed legislation establishing the most ambitious pilot program yet, a carefully-designed model that funded appointment of counsel in ten different projects across the state.[166] Six of the ten projects focused on housing, while the remaining four were divided between custody, domestic violence, and probate guardianship services.[167] In 2016, California committed to funding the program on a recurring basis.[168] Other jurisdictions have also begun to move forward with providing housing lawyers. The District of Columbia in 2015 funded a pilot project to provide attorneys for tenants facing eviction from subsidized housing, introduced the "Expanding Access to Justice Act of

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[158] *See* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 36 (2013) (summarizing developments).

[159] *See* Steinberg, *supra* note 156, at 748–54, 760–61 (describing growth of pro se litigation and initiatives created in response).

[160] *See Civil Right to Counsel*, PUB. JUSTICE CTR., http://www.publicjustice.org/our-work/civil-right-to-counsel [https://perma.cc/R275-62TQ] (noting date of inception of National Coalition for Civil Right to Counsel); NCCRC, *supra* note 155 (summarizing accomplishments and recent activities).

[161] AM. BAR ASS'N, RESOLUTION 112A (2006) http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc [https://perma.cc/9GKC-P7DP] [hereinafter ABA RES.].

[162] Sustenance is defined as income from various sources including benefits from government agencies and wages from private employment. *Id.* at 13.

[163] *Id.*

[164] *See* NCCRC, *supra* note 155 (showing map of state laws).

[165] *See* Clare Pastore, Gideon *is My Co-Pilot: The Promise of Civil Right to Counsel Pilot Programs*, 17 U.D.C. L. REV. 75, 80–86, 102–14 (2014) (stating that the majority of pilot projects are in the area of housing and describing examples from Massachusetts and California); Engler, *supra* note 158, at 49–50 (listing pilot projects in Massachusetts, California, Texas, and Wisconsin).

[166] *See* Pastore, *supra* note 165, at 86–100 (describing development of program in detail).

[167] *Id.* at 100–01.

[168] CAL. GOV'T CODE § 68651 (2016).

2016" to expand the program, and in 2017 ultimately approved funding for such expansion.[169] Massachusetts in 2009 established the Housing Assistance and Representation Pilot Project, a group of two pilot studies that measured the effect of providing representation to tenants facing eviction.[170] In January 2017, building on the results of those studies, the Mayor of Boston worked with Massachusetts legislators to file a bill to guarantee a right to counsel to tenants facing eviction.[171] In March 2017, the Philadelphia City Council held a hearing regarding the possibility of appointing counsel to such tenants, and in June it committed half a million dollars towards that representation.[172] In the summer of 2017, New York City enacted Intro 214-B and became the first government in the United States to guarantee a right to counsel for tenants at risk of eviction.

2. *Rationale for Housing Defense Counsel*

In one of the earliest Supreme Court cases considering the right to appointed counsel, *Powell v. Alabama*, the Court explained that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."[173] This is because pro se parties lack the knowledge of law and strategy necessary to present a case or negotiate its resolution.[174] Commentators in favor of appointment of housing defense counsel have borrowed the due process rationale from the criminal context, and have emphasized the absurdity of a judicial system in which people with

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[169] *See* D.C. Leg. B21-0879, 21st Council, 2015–2016 Sess. (D.C. 2016); D.C. Leg. B22-0024, 22nd Council, 2017–2018 Sess. (D.C. 2017) (re-introducing bill); *see also* Press Release, Office of Council Member Kenyan R. McDuffie, McDuffie's 'Expanding Access to Justice Act' Included and Funded in Current Budget Report, http://www.kenyanmcduffie.com/press-release-mcduffies-expanding-access-to-justice-act-included-and-funded-in-current-budget-report/ [https://perma.cc/FU5H-Z2WA].

[170] *See* Bos. Bar Ass'n Task Force on the Civil Right to Counsel, The Importance of Representation in Eviction Cases and Homelessness Prevention: A Report on the BBA Civil Right to Counsel Housing Projects 4 (2012), http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf [https://perma.cc/AGU3-GUCY].

[171] *See* S. 694, 190th Gen. Ct., 2017–2018 Sess. (Mass. 2017); *see also* H.R. 3298, 189th Gen. Ct., 2015–2016 Sess. (Mass. 2015).

[172] *See* Pat Loeb, *Lawyers Could Ease Philadelphia 'Eviction Crisis,' Council Members Hear*, CBS Philly (Mar. 20, 2017), http://philadelphia.cbslocal.com/2017/03/20/philly-city-council-eviction-crisis [https://perma.cc/95EU-Y7L8]; Statement, City Council of Philadelphia: Philadelphia Makes Historic Investment to Aid Low-Income Renters Facing Eviction (June 29, 2017), http://phlcouncil.com/philadelphia-makes-historic-investment-fighting-eviction [https://perma.cc/DEJ6-DLEH].

[173] Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

[174] *See* Josh Bowers, *Two Rights to Counsel*, 70 Wash. & Lee L. Rev. 1133, 1134 (2013) ("The tired old adage holds that a good lawyer knows the law, [but] a great lawyer knows the judge . . . [and] the customs and norms of each and every courthouse subcommunity" and other aspects of the job "beyond formal code law."); 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, 702 (2006) (describing tenants' lack of "specialized knowledge").

little understanding of the process are dragged into court, where they confront lawyers arguing against them, and then, in relatively quick fashion, lose any right to their homes.[175]

A major reason housing defense has attracted so much attention is that multiple studies have shown a routine, systemic mismatch of pro se parties against lawyers.[176] The vast majority of landlords in eviction proceedings are represented, while the vast majority of tenants are *un*represented.[177] In an adversary system of justice in which the judge's role is neutral and the parties are expected to compete in presenting their alternative versions of the case,[178] the absence of counsel for one party raises basic concerns ranging from due process, fairness, and equality to accuracy of outcomes[179] and legitimacy.[180]

Landlords' disproportionate representation over time has influenced the law and culture of housing courts to favor the landlords' positions.[181] Judges have become familiar with applying the substantive and procedural law that has been presented to them by landlords' lawyers, and many appear unfamiliar with the rights of tenants, even those rights laid out in the plain language of governing statutes.[182] The landlords and their lawyers enjoy additional advantages as "repeat players" in the Housing Court system.[183] As Marc Galanter's research has shown, advantages for repeat players in a legal system include specialized expertise, bargaining credibility, informal relationships with institutional representatives, the ability to play for rules instead of

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[175] Brescia, *supra* note 30, at 222 (highlighting commentary emphasizing unfairness and illegitimacy); *see also* Engler, *supra* note 26, at 46–48 (summarizing literature on tenants' court experience).

[176] *See, e.g.*, *September Hearing Transcript*, *supra* note 8, at 11, 12, 14 (referencing representation figures and "lopsided" court system).

[177] *See supra* notes 26–27.

[178] In the American court system, the development of the case is largely the responsibility of the parties. The judiciary generally does not conduct its own fact-finding but instead relies on the adversaries to exchange evidence through the discovery process and bring facts and law to the attention of the court. *See* Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in "Small Case" Civil Justice*, 2016 B.Y.U. Rev. 899, 908 (2016) (describing norms of adversary system).

[179] *See* Herring v. New York, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.").

[180] *See* Nourit Zimerman & Tom. R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 Fordham Urb. L.J. 473, 495–96 (2010).

[181] *See* Engler, *supra* note 117, at 714–15 (drawing attention to "the fundamental unfairness in the forum" and collecting empirical data showing that "courts operate in a manner that swiftly serves the landlord's interests").

[182] *See* Steinberg, *supra* note 178, at 49–50 (arguing that "passive judging results in systemic partiality towards represented, or more skilled, parties" and highlighting evidence from housing courts).

[183] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 107, 114 (1974).

individual results, and savings from economies of scale,[184] all of which influence the dynamics of Housing Court.

Research also demonstrates that courts show a systemic bias against tenants. Judges regularly misapply rules of procedure and do not require landlords to prove the basic elements of the prima facie case.[185] Judges routinely elicit information necessary to issue a ruling in the landlord's favor but require no evidence in support of that information, and judges fail to seek full, potentially contradictory information.[186] When tenants try to offer testimony, judges often silence and interrupt them.[187] Evidence suggests that judges, like all of us, suffer from implicit bias, which can predispose even well-meaning people against women and people of color.[188] The majority of tenants in Housing Court are poor women of color,[189] while the majority of landlords and their lawyers are middle or upper-class white men, and the majority of judges are white and middle or upper-class as well.[190] Judges are also more likely to be property owners or landlords than to be tenants, which further increases the potential for judicial bias.[191]

Tenants whose cases are adjudicated by judges are, however, the lucky ones: the majority of cases end in unfavorable settlements, signed in the hallways of court buildings.[192] Housing Court negotiations are infamous for

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[184] *See* Marc Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347, 347 (1975); *see also* Galanter, *supra* note 183, at 119 ("[D]epartures from the passive or reactive stance of legal institutions tend to be skewed along class lines.") (internal punctuation omitted) (citing Donald Black, *The Mobilization of Law*, 2 J. LEGAL STUD. 125, 141 (1973)).

[185] *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 570 (1992); *see also* Engler, *supra* note 26, at 46–51 (summarizing literature).

[186] *See* Bezdek, *supra* note 185, at 570.

[187] *See* Bezdek, *supra* note 185, passim; *see also* Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB L., POL'Y & ETHICS J. 659, 661–62 (2006) (describing silencing of tenants).

[188] *See* Jeffrey J. Rachlinski, et al., *Does Unconscious Racial Bias Affect Trial Judges*?, 84 NOTRE DAME L. REV 1195, 1225 (2009) ("[I]mplicit biases are widespread among judges."); Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 862–63 (2016) (describing why judges may be particularly susceptible to implicit bias); *see also* Robert J. Smith, Justin D. Levinson & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 874–75 (2015) (defining "implicit white favoritism" as "the automatic association of positive stereotypes and attitudes with members of a favored group, leading to preferential treatment for persons of that group"); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012) (" 'Implicit biases' are discriminatory biases based on either implicit attitudes—feelings that one has about a particular group—or implicit stereotypes—traits that one associates with a particular group. They are so subtle that those who hold them may not realize that they do.") (emphasis and citation omitted).

[189] *See infra* Part II.B and accompanying notes (describing race and gender demographics of tenants).

[190] *See* Desmond, *supra* note 72, at 98.

[191] *See* Bezdek, *supra* note 185, at 570 n.131.

[192] Engler, *supra* note 26, at 47.

producing one-sided agreements through coercion and misstatements of the law.[193] Landlords frequently file non-meritorious claims to which tenants have defenses, but tenants sign away their rights, either because they lack the knowledge to make use of the law or because they cannot wait all day to see a judge.[194] Each court visit often involves hours of waiting, which is particularly burdensome for tenants with work or childcare commitments.[195] Landlords' lawyers can take advantage of the timing to extract concessions from tenants desperate to leave.[196] In contrast, when tenants' lawyers are present, they can ensure the speedier handling of the cases or obviate the need for tenants to appear. More substantively, they can negotiate settlements that more fairly protect tenants' legal entitlements.[197]

Not surprisingly, empirical studies have demonstrated that representation of tenants by counsel makes a significant difference in Housing Court outcomes.[198] As will be discussed in Part II, supporters of Intro 214-B embraced the appointment of counsel for this very reason.

3. *NYC's New Right to Housing Defense Counsel*

Eviction cases, also called summary proceedings because of their shortened timeline compared to most civil litigation, concern a landlord's right to recover possession of real property from a tenant.[199] Eviction proceedings fall into two categories.[200] The most common is the non-payment action in which the landlord alleges that the tenant has not paid rent due, and the landlord seeks possession of the property and potentially monetary damages.[201] The second type of eviction proceeding is a "holdover."[202] In a holdover, the landlord alleges the tenant is "holding over" and occupying the property after the tenant's right to occupy it has terminated.[203] In these cases, the landlord seeks to recover possession of the unit regardless of whether any money is owed.[204]

Holdover cases include situations in which a lease has lapsed and the landlord has chosen not to renew it or the lease terminated prematurely due

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[193] Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 103–04 (1997).
[194] *See id.* at 113.
[195] *See id.* at 109.
[196] *Id.*
[197] *See* Scherer, *supra* note 174, at 706 (describing how lawyers for tenants improve settlements).
[198] *See infra* Part II.A.1.
[199] Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2015); *see* N.Y. REAL PROP. §§ 701–767 (McKinney 2017).
[200] *See* NYC JUSTICE REP., *supra* note 21, at 19–20, 26.
[201] *See id.*
[202] See *id.*
[203] *See id.* at 19.
[204] *See id.*

to an alleged breach by the tenant.[205] In NYC, rent-stabilized and rent-controlled tenants are entitled to rent renewals in perpetuity such that holdover cases involving those tenants are never simply a matter of a lease expiring in the natural course.[206] Instead, they might involve a dispute as to whether the occupant is the true tenant of record or a legal successor entitled to a lease renewal.[207] A holdover could also involve a dispute as to whether the tenant breached a lease term and thereby terminated the lease agreement.[208] Such breaches can include anything from criminal activity to keeping a pet.[209] Litigating holdovers generally requires more resources than litigating non-payments because the former tend to be more factually complex and likely to go to trial. Yet even holdover cases move quickly compared to most civil litigation.

Eviction matters in NYC are handled by a special subdivision of the NYC court system, the Housing Court.[210] The Housing Court also has jurisdiction to hear cases regarding landlords' obligation to make repairs and lawsuits that seek to shift control of a building from the landlord to a court-supervised administrator (due to the landlord's mishandling of the property). The Housing Court does not have jurisdiction over any non-housing matters or even all housing matters. Foreclosures and ejectments are generally initiated in New York Supreme Court, the lowest division of the New York State Court System, and claims brought under the Fair Housing Act are typically litigated in federal court. In spite of its limited jurisdiction, Housing Court in NYC processes hundreds of proceedings each day.[211] In the aggregate, it adjudicates more eviction cases annually than the civil cases of "all federal district courts combined [nationwide]."[212]

Intro 214-B creates a right to counsel for income-eligible tenants who are respondents in eviction proceedings in Housing Court. This legislation will "ensure . . . full legal representation" for income-eligible defendants in judicial eviction proceedings and limited legal services for other tenant-respondents.[213] Income eligibility is defined as annual gross household income at or below 200% of the federal poverty guidelines.[214] Income-eligible te-

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[205] *See id.*

[206] *See* N.Y. COMP. CODES R. & REGS. TIT. 9, § 2503.5 (2017) (describing lease renewal).

[207] *See* Ruddick C. Lawrence, Jr., *Bright Lines in the Big City:* Seawall*, Tenant Succession Rights, and the Jurisprudence of Takings*, 91 COLUM. L. REV. 609, 641–42 (1991) (describing succession rights in New York City).

[208] NYC JUSTICE REP., *supra* note 21, at 19.

[209] N.Y. REAL PROP. § 715 (McKinney 2017).

[210] *See e.g.*, Paula Galowitz, *The Housing Court's Role in Maintaining Affordable Housing*, *in* HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE 177, 178 (Michael H. Schill ed., 1999).

[211] NYC JUSTICE REP., *supra* note 21, at 21.

[212] Steinberg, *supra* note 156, at 749.

[213] Int. 214-A, 2014–2017 Sess. (N.Y.C. 2017).

[214] N.Y.C. ADMIN. CODE § 26-1301.

nants will receive "full legal representation,"[215] which "means ongoing legal representation . . . and all advice, advocacy, and assistance associated with that representation . . . including, but not limited to, filing a notice of appearance in [the relevant eviction proceeding]."[216]

In addition to the core right to full legal representation for eligible tenants, Intro 214-B provides more limited services for two other sets of tenants facing potential displacement. One category is tenants facing eviction who are not income-eligible but are otherwise qualified. They will receive "brief legal assistance" such as advice and counsel in a "single consultation" but will not be provided with full representation.[217] In NYC, the provision of brief legal assistance to tenants does not necessarily increase expenditures because, although not mandated prior to the enactment of 214-B, the NYC administration already funds programs providing such assistance.[218]

The second category is tenants facing termination of tenancy from public housing.[219] Termination of tenancy from public housing is determined through an internal administrative proceeding conducted by the New York City Housing Authority (NYCHA), which owns and manages the property. If a tenant loses after the administrative hearing, the tenancy is "terminated," and NYCHA must then file an eviction proceeding in housing court. Intro 214-B provides that public housing tenants facing termination of tenancy will receive "legal services," which is defined as "brief legal assistance or full representation."[220] This means they will receive, at minimum, brief legal services for their administrative proceeding and, should they lose in that proceeding, full legal representation if NYCHA initiates the judicial eviction case.[221]

Notably, the new legislation includes a significant caveat. It states: "Subject to appropriation" the City "shall ensure" the provision of legal

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[215] *Id.* § 26-1302(a)(2).

[216] *Id.* § 26-1301.

[217] *Id.* §§ 26-1301, 26-1302(a)(1).

[218] *See September Hearing Transcript*, *supra* note 8, at 72-85 (statement of Steven Banks, NYC Dep't Soc. Svcs. Comm'r). The de Blasio administration significantly expanded such funding in recent years. *Id.*

[219] N.Y.C. ADMIN. CODE § 26-1302(b).

[220] *Id.* § 26-1301.

[221] The law's coverage does not include all administrative hearings affecting tenants' right to remain in subsidized housing. It covers hearings regarding termination from public housing managed by the New York City Housing Authority, but not, for example, termination of Section 8 vouchers. Yet tenants who lose their Section 8 vouchers will generally be unable to pay their rent without such subsidies, and their landlords will soon commence eviction proceedings for non-payment. Under the new legislation, tenants will become eligible for full representation after the filing of the eviction proceeding. *Compare* N.Y.C. ADMIN. CODE § 26-1302(b) *with* § 26-1302(a)(2). To the extent that the lawyer can obtain reinstatement of the Section 8 benefits, providing counsel for eviction proceedings might solve the problem. In those cases where the termination of benefits cannot be reversed, however, the tenant will face eviction (and will likely have difficulty obtaining and maintaining new housing).

services.[222] Mayor Bill de Blasio negotiated extensively with local activists and legislators to reach an agreement about the amount of funding required to effectuate Intro 214-B, made public statements to position himself as a strong supporter of the legislation, and promised the resources that activists and legislators indicated the bill requires. But a future administration might take a different approach. Once a government provides an entitlement, it is generally more difficult politically to remove, but adequate funding is not guaranteed. Indeed, the statute protects future administrations from any lawsuits challenging failures to fund.[223] It expressly forecloses the possibility that it "create[s] a private right of action on the part of any person or entity against the city or any agency, official, or employee thereof."[224]

II. The New *Gideon* model Improves Upon the Old

The NYC legislature's approach to the right to housing defense counsel reflects lessons learned from decades of criminal defense practice.[225] This approach builds on the criminal defense model in three notable ways. First, the supporters of Intro 214-B moved beyond the language of procedural fairness and explicitly emphasized the goal of positive substantive outcomes. Second, the legislature's focus on housing recognizes a set of concerns that disproportionately impact Black women; this echoes the racial equality goal underlying *Gideon* and, further, promotes gender equality. Third, while the criminal defense model emphasizes the need to counteract the power of the state, the appointment of housing defense counsel acknowledges and contends with the power of private actors.

A. Substantive Outcomes

Intro 214-B openly aims at substantive, not just procedural, change. The legislation is targeted at preventing unjust and costly results: it seeks to prevent displacement from homes, decrease homelessness, and preserve affordable housing. Advocates of the bill relied on and explicitly referenced studies showing that lawyers for tenants decrease eviction rates. In this way,

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[222] N.Y.C. Admin. Code §§ 26-1302(a), 26-1302(b); *see also id.* § 26-1302(c) (requiring review of expenditures).

[223] Recent lawsuits regarding underfunding have been pursued successfully in the criminal defense context, but those suits benefit from the status of the criminal defense right as constitutionally enshrined. *See, e.g*, New York Civil Liberties Union, Lawmakers Pass Major Reforms of Public Defense System (Apr. 10, 2017), https://www.nyclu.org/en/press-releases/lawmakers-pass-major-statewide-reforms-public-defense-system [https://perma.cc/T7L5-H4FS] (describing legislation following settlement of lawsuit).

[224] N.Y.C. Admin. Code § 26-1302(g).

[225] *See* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 Temp. Pol. & Civ. Rts. L. Rev. 527, 538–50 (2006) (reviewing the failures and successes of implementing *Gideon* and making recommendations for ensuring adequate funding and developing good models for civil appointment).

the discussion around Intro 214-B was very different from how the right to criminal defense counsel has been conceptualized. Imagine if appointment of criminal defense counsel were justified by emphasizing decreased conviction rates or lightened sentences. This may seem radical in the criminal context, but NYC legislators have been crystal clear that their primary intent has been to prevent evictions.

This overt focus on substantive outcomes might reflect a difference between legislative and judicial paths to the recognition of rights. The right to criminal defense counsel developed from due process doctrine.[226] It is therefore tethered to the jurisprudence and traditions of constitutional rights.[227] The right to housing counsel, in contrast, has been presented as a statutory creation. It benefits from a clean slate, limited only by the imagination and capital of local representatives. In contrast to the political neutrality expected of courts, legislation can support a program for social welfare based on a conception of the public good.[228] In NYC, the right to counsel reflects the perspectives of local policymakers. It responds to empirical research, economic realities, and long-term community ambitions.

1. *Beyond Procedure: Case Outcomes*

Studies about the effects of housing defense generally suggest that representation by attorneys improves outcomes for tenants.[229] Research has

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[226] *See* Gideon, 372 U.S. at 340–41; Johnson, 304 U.S. at 463 (1938); Powell, 287 U.S. at 71 (1932).

[227] *See* Martha F. Davis, *Participation, Equality and the Civil Right to Counsel: Lessons from Domestic and International Law*, 122 YALE L.J. 2260, 2279 (2013) ("[T]he balancing test of *Mathews* [*v. Eldridge*] . . . tends to reinforce hierarchies of economic privilege and the status quo of access to justice, as what process is due rests on the value of that process to society.") (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 52 (1976)).

[228] One might argue that judges are also influenced by public opinion. Historically, the Supreme Court rarely gets far ahead of popular views on civil rights and instead tends mostly to play catch up. *See, e.g.*, GERALD ROSENBERG, THE HOLLOW HOPE (2d ed. 2008). Examples of this phenomenon range from the right to criminal defense counsel to school desegregation to marriage equality. *Id.* at 42-72, 304-429.

[229] *See* D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court*, 926–31 (Sept. 1, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078 [https://perma.cc/3BTF-KVEK] (showing tenants who receive full representation are more likely to retain possession of homes, and receive greater monetary payments or rent waivers, in comparison with tenants provided with more limited, unbundled legal services); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 L. & SOC'Y REV. 419, 429 (2001) ("Represented tenants are much less likely to have a final judgment and order of eviction against them and more likely to benefit from a stipulation requiring a rent abatement or repair to their apartment."); *see also* Emily S. Taylor Poppe & Jeffrey J. Rachlinksi, *Do Lawyers Matter? The Effect of Representation in Civil Disputes*, 43 PEPPERDINE L. REV. 881, 900–10 (2016) (collecting empirical evidence); Russell Engler, *When Does Representation Matter?*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 75,

shown that tenants who are represented are three, six, ten, or even nineteen times more likely than pro se tenants to prevail.[230] Represented tenants are far less likely to lose by default, they secure significantly more favorable settlements, and they are more likely to win at trial.[231]

In their discussions of Intro 214-B, legislators explicitly expressed the intent to influence case outcomes. They pointed to empirical research showing that lawyers make a difference in case outcomes: specifically, lawyers prevent evictions. At the bill's first hearing before the NYC Council Committee on Courts and Legal Services in September 2016, Committee Chair Rory Lancman explained, "The correlation between representation by counsel and the ability to stay in one's home is crystal clear."[232] Council Member Mark Levine, one of the bill's strongest advocates, made plain the core goal of eviction prevention: "We're here to address a crisis. That crisis is the threat of eviction faced by tens of thousands of tenants."[233] Like his colleagues, Member Levine emphasized empirical evidence demonstrating the direct connection between appointment of counsel and eviction prevention: "We know that when you provide a lawyer to a tenant, their chances of avoiding eviction improve dramatically. Anyone who doubts this only has to look at the numbers."[234] Committee Member Vanessa Gibson also referenced studies showing that appointment of counsel decreases evictions and relied on those studies to express her support for the bill.[235] At the Committee's final hearing on the legislation in July 2017, Member Gibson reiterated these comments.[236] No member expressed a contrary view, and the bill passed out of the Committee unanimously.

When the full City Council conducted its hearing and vote on July 20, 2017, legislators again highlighted the theme of preventing evictions. City Council Speaker Melissa Mark-Viverito stated that the new legislation "will

78–80 (eds. Samuel Estreicher & Joy Radice 2016) (summarizing empirical studies). There is one exception that should be noted: prior to James Greiner and his co-authors' 2013 study, D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 909–11 (2013), indicating a significant difference in tenant outcomes based on representation, they completed an unpublished study suggesting otherwise. *See generally* D. James Greiner et al., *supra* note 229. *See also* Engler, *supra* note 26, at 77–80.

[230] Engler, *supra* note 26, at 48–49 (summarizing studies of housing court outcomes).

[231] *Id*.

[232] *September Hearing Transcript*, *supra* note 8, at 10–11 (statement of Rory Lancman, Chair, NYC Council Comm. on Cts. & Legal Servs.).

[233] *Id*. at 12 (statement of Mark Levine, Member, NYC Council Comm. on Cts. & Legal Servs.).

[234] *Id*. at 13.

[235] *See id*. at 15–19 (statement of Vanessa Gibson, Member, NYC Council Comm. on Cts. & Legal Servs.).

[236] *See Transcript of Minutes of Comm. of Cts. & Legal Servs.*, July 19, 2017, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=id—Text—&Search=int+214 [https://perma.cc/DWA7-YSC6].

keep families together and in their homes."[237] Council Member Laurie Cumbo also emphasized the bill's substantive importance, stating, it will "make a difference in terms of someone staying in their home or being evicted."[238] Supporters of the bill also applauded it for combatting the unfairness and inaccuracy of proceedings in which one side is unrepresented,[239] but they heavily emphasized that this right would "make a difference"[240] in results.

This embrace of counsel as a tool to promote particular results stands in contrast to the development of the right to appointed criminal defense counsel.[241] Although the Supreme Court's recognition of the right to counsel was influenced significantly by the social conditions of the time,[242] its opinions on the topic never emphasized that point directly.[243]

2. *Beyond Legal Outcomes: Secondary Effects*

The sponsors of the NYC housing defense bill based their argument for a right to counsel on the substantive results they expect lawyers to achieve not only in decreased eviction judgments but also in non-legal, secondary effects.[244] The appointment of housing defense counsel seeks not only to prevent evictions but also to improve social and economic conditions for individuals and families. In this way, Intro 214-B reflects a nuanced understanding of the difference that lawyers can make.

NYC legislators emphasized the importance of preventing eviction to prevent families from spiraling into homelessness and avoid related social and economic problems. In a *New York Times* editorial he co-authored, Member Levine argued in favor of the legislation on the basis that housing defense lawyers are "the best" tool to fight homelessness.[245] His colleagues echoed these sentiments in the September 2016 and July 2017 hearings.[246] Member Gibson also emphasized the importance of eviction prevention to

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[237] *Transcript of Minutes of Council Stated Mtg*., July 20, 2017, at 65, http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=id—Text—&Search=int+214 [https://perma.cc/PL6R-ATGB] [hereinafter "*7/20/17 Hearing Transcript*"].

[238] *Id.* at 83.

[239] *Id.* at 69, 71, 81.

[240] *Id*. at 73.

[241] *Cf. supra* Part I.B.1.

[242] *See supra* notes 121–127 and accompanying text.

[243] *See supra* note 128 and accompanying text.

[244] *See infra* notes 245–54 and accompanying text.

[245] *See* Mark D. Levine & Mary Brosnahan, Opinion, *The Homelessness Cure*, N.Y. Times, Oct. 15, 2015, at A23.

[246] *September Hearing Transcript*, *supra* note 8, at 15–19 (statement of Member Gibson); *7/20/17 Transcript*, *supra* note 238, at 81 (statement of Member Chin).

"stabilize families,"[247] while Committee Chair Lancman lamented that the effects of evictions can be "life-altering."[248]

3. *Beyond Individuals: Benefits for Society*

The sponsors of Intro 214-B also emphasized the intended community impact of the legislation. The purpose of the law is to protect not only the individual litigants and their families but also their communities. An eviction affects not only the named defendant but all dispossessed occupants of a home. Radiating outward, secondary effects on health, employment, education, and family bonds impact entire families and, eventually, neighborhoods.[249]

Legislators also identified economic effects on the local housing market and government expenditures. City Council Speaker Mark Viverito described the legislation as a tool to combat "the lack of affordable housing,"[250] while Council Members Laurie Cumbo spoke of preventing "gentrification"[251] and Margaret Chin of "leading the fight against displacement."[252] In a jurisdiction like NYC with rent regulation, the vacancy of a rent-regulated unit can bring the rent rate closer to market value.[253] In a rapidly gentrifying city, this squeezes an already tight supply of housing available to poor and middle-income people. When low-income people lose their homes, this sets off a series of financial challenges from which they may not recover. It also visits detrimental effects on the neighborhood. Member Levine summarized these ripple effects during the September 2016 hearing:

> It costs around 2,500 dollars to provide a tenant a lawyer, but if that same tenant were to have no lawyer and would be evicted, and as happens in so many cases when families are evicted were to wind up homeless, it would cost the City tens of thousands of dollars in shelter costs, in extra services in schools, in extra emergency room visits, and increased applications for unemployment benefits, and increased mental health services and more. And since over half of evictions [are] in rent regulated units, and we know those units often go market rate after they're vacated, when we invest in lawyers to prevent evictions, we save thousands of affordable apartments, which otherwise the City would have to spend millions of dollars to replace.[254]

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[247] *7/20/17 Transcript*, *supra* note 237, at 69–70.
[248] *September Hearing Transcript*, *supra* note 8, at 10.
[249] DESMOND, *supra* note 19, at 298.
[250] *7/20/17 Hearing Transcript*, *supra* note 237, at 65.
[251] *Id.* at 83.
[252] *Id.* at 81.
[253] *Id.*
[254] *September Hearing Transcript*, *supra* note 8, at 13–14.

On the aggregate level, the appointment of housing defense lawyers seeks to counter these forces—to prevent judgments of eviction and their secondary effects on individuals and families, and to protect the local stock of affordable housing while saving government resources.[255]

Supporters of the right to housing defense counsel also expect that the legal and non-legal effects of representation will be mutually reinforcing. The presence of housing defense lawyers will likely alter the behavior of actors inside and outside the court system.[256] Benefits that accrue to members of the public beyond the named parties could include broad impacts on the justice system—education of judges, increased perceptions of legitimacy, and deterrence of conduct by bad actors.[257] The presence of lawyers for tenants may deter frivolous suits by landlords and may discourage courts and administrators from "cutting corners or favoring more powerful parties."[258] It may embolden tenants to exercise their rights outside of court, for example withholding rent when living in substandard conditions.[259] Back in court, a new cadre of housing defense lawyers could shape precedent, defining and potentially expanding tenants' rights for the future.[260] Evaluating the effectiveness of representation will require considering not only the circum-

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[255] One might ask why the legislation includes all housing and not just rent-regulated housing. In unregulated housing, the landlord has no obligation to renew the lease or charge an affordable rent, such that keeping people in these homes does not necessarily preserve affordable housing. The answer seems to be that in addition to preserving affordable housing, the legislature aims to prevent abrupt displacements and their secondary effects.

[256] *See* Abel, *supra* note 225, at 539, 555. One might argue that in a jurisdiction with fewer tenant protections, lawyers would make less of a difference. On the other hand, advocates provide knowledge and services beyond delivery of formal law. *See, e.g.*, Bowers, *supra* note 174, at 1133–39. Moreover, legal representation influences how case law gets presented and interpreted, thereby influencing the extent to which tenant protections in the law will be acknowledged and potentially expanded or, conversely, ignored and allowed to wither away.

[257] *See* Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 830–31 (2009 (describing role of litigation in furthering enforcement of public rights and deterrence of bad conduct).

[258] *See* Albiston & Sandefur, *supra* note 40, at 109.

[259] Some commentators might suggest that overzealous repair of conditions will drive up housing prices. This argument fails both normatively and descriptively. First, evidence indicates that this is simply not the case: rent rates remain stable regardless of substandard conditions, because landlords can usually find tenants without other options. *See* DESMOND, *supra* note 19, at 76. Second, to suggest that minimum housing standards should not be enforced because of how the market will respond is to suggest that regulation cannot or should not control the market. The opposite is true. Just as a decent society prohibits child labor and sets a minimum wage, it must demand basic safety in living conditions. Private parties cannot be permitted to contract around such mandatory minimums. As for the concern about market prices escalating, the government maintains the ability to limit that; it can enact rent control statutes to limit the private market or expend public resources to build public housing.

[260] This role of housing defense counsel in many ways resembles that of criminal defense attorneys. Criminal defense counsel protects the client's rights not only to uphold the procedures for their own sake, but also to discourage extra-legal abuse by government actors. The point is not that housing lawyers are uniquely suited to serve broader social goals, but that the frank embrace of these social goals offers an opening for crafting a

stances of represented parties as independent agents but also the dynamics between these parties and other actors, as well as broader social effects.

B. Expanding Equality for Gideon*'s Sister*

By enacting Intro 214-B, the NYC legislature aimed to create substantive change in an area of particular importance to African American women. The creation of a right to housing defense counsel builds on the racial equality aims underlying the right to criminal defense counsel and expands them to incorporate gender equality. While recent books and films have brought to popular attention the large and disproportionate numbers of men of color in the U.S. criminal justice system,[261] the frequency of eviction and the fact that housing court defendants and evicted people are disproportionately *women* of color is not as well known.[262] In his new book, *Evicted*, Harvard sociologist Matthew Desmond combines quantitative and qualitative analysis to develop a deeper understanding of the phenomenon.[263] He confirms that, in Milwaukee, Wisconsin, women of color are overrepresented among evicted tenants.[264] Moreover, eviction is extremely widespread for Black and Latina women, and eviction plays a major role in creating and maintaining poverty for their families.[265] Desmond concludes that in poor Black and Latino communities "eviction is to women what incarceration is to men."[266] Given the enormous impact of incarceration,[267] this is a profound statement.

In Desmond's quantitative sample, the average annual number of women evicted from Black neighborhoods was *more than double* that of men from the same neighborhoods and *almost triple* that of women from white neighborhoods.[268] The eviction rate was 5.55 percent of women and 2.94 percent of men in Black neighborhoods, 2.51 percent of women and 1.16 percent of men in Latino neighborhoods, and 2.05 percent of women and 1.14 percent of men in white neighborhoods.[269] Not only were tenants of color evicted at higher rates than white tenants, but in those communities

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meaningful right. Perhaps some of these observations could be imported back into the criminal context as well.

[261] *See supra* note 46.

[262] *See, e.g.*, DESMOND, *supra* note 19, at 97–98; Bezdek, *supra* note 185, at 535, 540 nn.21–22 (observing that 71% of tenant-defendants in Baltimore were female and 87% were Black, while 13% were white); *see also* Gunn, *supra* note 30, at 393 (finding that in New Haven, Connecticut, nearly 80% of the tenant-defendants were women); Karas, *supra* note 30, at 534 (asserting that in New York Housing Court two-thirds of tenant-defendants were single women).

[263] *See generally* DESMOND, *supra* note 19.

[264] *Id.* at 98.

[265] *Id.* ("If incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women. Poor black men were locked up. Poor black women were locked out.").

[266] *Id.* at 88, 98–100.

[267] *See generally* ALEXANDER, *supra* note 261.

[268] Desmond, *supra* note 72, at 98–99.

[269] *Id.* at 99–100.

where eviction was most common, the phenomenon was concentrated for women. Latina women were evicted at a rate of 1.78 to 1 compared to Latino men,[270] and evictions of Black women outnumbered those of Black men at a rate of 2.5 to 1.[271]

These figures show a dramatic racial and gender gap in eviction rates, particularly for Black women. The racial gap reflects the overrepresentation of African Americans among the urban poor,[272] as well as the racial segregation of residential neighborhoods, both of which have been the subject of extensive literature.[273] The gender gap in evictions, however, requires further explanation.

1. *Explaining the Gender Disparity*

Several factors explain why women make up the majority of evicted tenants. Various economic and cultural variables are at play, but the fact that caring for the home and its occupants remains disproportionally women's work is particularly significant. Women are more likely than men to live with children, and women with children are even more likely than women without to face eviction.[274]

a. Presence of Children

The very presence of children in a household increases the potential for eviction.[275] This occurs for several reasons. Children can make noise or damage property, which a landlord may claim to be a nuisance.[276] Children also attract negative attention through no fault of their own. Police engage disproportionately with Black and Latino children, and the neighborhood disruptions caused by police activity can lead to their mothers' eviction.[277]

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[270] For simplicity, this Article refers to people in Latino neighborhoods as "Latino" and people in Black neighborhoods as "Black," although Desmond's study was not granular enough to confirm the race of every individual tenant represented in the quantitative analysis. Desmond, *supra* note 72, at 98–99. Desmond did aggregate data on a block-by-block scale, so each neighborhood was identified carefully. *Id.*

[271] *Id.*

[272] Like much academic literature about poverty, Desmond's study focuses on urban phenomena. Existing studies of eviction defense lawyers suffer from the same limitation. The demographics and dynamics of eviction in rural areas would be a valuable area for future research, particularly because of how housing access relates to the politics of place. *See generally* Lisa Pruitt, *Law Stretched Thin: Access to Justice in Rural America*, 59 S. Dakota L. Rev. 466 (2014) (describing rural obstacles to access to justice); Lisa Pruitt, *Toward a Feminist Theory of the Rural*, 2007 Utah L. Rev. 421 (describing how cultural presumption of urbanism overlooks hardships of rural women).

[273] Desmond, *supra* note 72, at 104.

[274] *Id.* at 110; Desmond et al., *Evicting Children*, 92 Social Forces 319 (2013) (finding higher eviction rates in neighborhoods with higher percentages of children, controlling for female-headed households).

[275] Desmond, *supra* note 72, at 110.

[276] *Id.*

[277] *Id.* at 109.

Substandard housing conditions pose particular dangers for children, increasing liability for landlords and conflict for tenants.[278] Women are more likely than men to report substandard conditions to relevant agencies, and such reports often result in retaliatory eviction.[279] Women report substandard conditions at higher levels than men at least in part because women more frequently live with children, and children require increased vigilance and protection. These reports rarely result in negative consequences for landlords but do for tenants because the landlords retaliate by filing for eviction.[280] For many landlords, it is cheaper to evict tenants who complain than to maintain safe and habitable properties. For many women, ensuring the safety of the home is an aspect of caring for their children, and they seek correction of conditions as part of that act of care-taking, but too often the direct result of this performance of their role as mothers is eviction.

Mothers are also disproportionately likely to be evicted because some landlords refuse to rent units to tenants with multiple children and some mothers respond by underrepresenting the size of their families.[281] The misrepresentation about family size, like any other on a rental application, can make women with children especially vulnerable to eviction.[282] Landlords can commence eviction proceedings upon learning of the discrepancy[283] or choose to hold off, using the discrepancy as a form of leverage and initiating eviction proceedings when women request repairs or refuse sexual advances.[284]

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[278] *Id*. at 109–10; Kathleen C. Engel, *Moving Up the Residential Hierarchy: A New Remedy for An Old Injury Arising From Housing Discrimination*, 77 WASH. U. L.Q. 1153, 1183 (1999) (arguing that laws requiring landlords to remove lead paint from units occupied by children create an "incentive to discriminate" against families with children).

[279] Desmond, *supra* note 72, at 115. Most states do have anti-retaliatory provisions embedded in their eviction statutes, but litigating the defense of retaliatory eviction is difficult, particularly without legal representation. *See* Brian D. Casserly, *Insuring the Effectiveness of Indiana's Landlord-Tenant Laws: The Necessity of Recognizing the Doctrine of Retaliatory Eviction in Indiana*, 46 IND. L. REV. 1317, 1319, 1345 (2013).

[280] *See, e.g.*, *September Hearing Transcript*, *supra* note 8, at 215–18 (identifying evictions in retaliation for reporting lead paint).

[281] Desmond, *supra* note 72, at 110.

[282] *Id.* Women downplay the size of their families in part so landlords will not steer them to larger, more expensive apartments than they can afford. *Id*. Additionally, women may be forced to misrepresent their familial composition to overcome the barrier of discrimination because some landlords refuse to rent to families with multiple children. *See* 42 U.S.C. § 3604 (2012) (prohibiting housing discrimination based on familial status); 42 U.S.C. § 3602 (k) (2012) (defining familial status to include a parent living with one or more children under age 18); Engel, *supra*, note 278, at 1155–56 (summarizing empirical evidence of discrimination against families with children).

[283] *Id*.

[284] DESMOND, *supra* note 19, at 72, 75–76. *See infra* Part II.B.1(d) and accompanying notes (describing sexual harassment by landlords); Part III.A.1 (describing substandard conditions, sexual harassment, and retaliation).

b. Greater Monthly Expenses

Women's monthly expenses tend to be higher than men's because women are more likely than men to serve as the primary caretaker for children.[285] Single women generally maintain primary responsibility for shelter, food, clothing, medical care, school supplies, and other needs of their children.[286] Rent competes with children's other needs for a share of the budget. Further exacerbating the gender disparity, a single mother's rental amount will likely be higher than that of her children's father, because she is more likely to live with the children. A noncustodial father can rent an individual room or stay on the couch of a friend or family member, but a woman with children requires a larger, more stable space.[287] These factors, individually and combined, make it more difficult for women with children to cover the rent.

c. Budget Shortfalls Hit Harder

Women also enjoy fewer opportunities than men to compensate for budget fluctuations and shortfalls.[288] A household budget must sometimes accommodate sudden changes, such as a loss of income due to reduced work hours or increased expenses due to a medical event or something as simple as a child requiring a larger shoe size. For any poor tenant, rent costs eat up the vast majority of monthly income and leave little room for such unplanned events.[289] When emergencies occur, poor tenants sometimes work overtime, rely on social contacts, or make additional money in underground economies. These options, however, are more readily available to men than women.

Men have more expendable income and more opportunities to generate supplemental income. Among those employed full-time, men of all races and education levels generally earn more than similarly situated women, and women of color fare the worst.[290] Child care responsibilities also leave women without extra time to perform overtime work, and paying a third party

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[285] *See* Desmond, *supra* note 72, at 106.

[286] *See id.*

[287] *See id.* at 105–06 (elaborating that men are more likely than women to occupy full-time positions and earn more).

[288] *See id.* at 108.

[289] *See e.g.*, Lucie E. White, *Subordination, Theoretical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990) (describing lawyer's subordination of client's voice and agency).

[290] *See* Am. Ass'n of U. Women, The Simple Truth About the Gender Pay Gap 10–11 figs.3 & 4 (2017), http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap [https://perma.cc/8AMA-N5QU] (showing median annual earnings are higher for men than women within every racial category); Inst. for Women's Pol'y Res., The Gender Wage Gap by Occupation 2015 and by Race and Ethnicity 6 tbl.3 (2016), https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/C440.pdf [https://perma.cc/8UMX-4XGC] (showing gender and race disparities in median weekly earnings, across and within occupational groups).

for child care would likely cost more than mothers could earn with the additional hours. Among employed poor people, women are also less likely than men to occupy full-time positions[291] that include overtime opportunities.[292] With respect to earning money through underground economies, women are often limited to prostitution,[293] and they worry that participation in such illegal activities could result in intervention by Child Protective Services and loss of their children.[294] Women receiving public assistance or other forms of fixed income face the added hurdle of rules forbidding supplemental income sources.[295] Women with children are more likely to rely on public assistance and face these restrictions.[296]

When men are unable to make up income shortfalls on their own, they sometimes avoid eviction by offering their labor directly to landlords. After receiving an eviction notice, many men negotiate with their landlords to "work off the rent" through cleaning or repair work.[297] Women are far less likely to do so, perhaps because the majority of landlords are men[298] who may not believe such activities to be women's work.[299] When women approach landlords to negotiate, landlords often interpret the overtures as offers of sex.[300]

d. Sexual Harassment

Sexual harassment in rental housing is remarkably common,[301] and sexual harassment further compounds the gender disparity in eviction.[302] Landlords' sexual harassment of their tenants includes conduct ranging from abusive or threatening remarks to rape.[303] Property owners and managers use keys to gain unauthorized access to apartments and corner tenants in hallways and laundry rooms.[304] When women refuse sexual activity, they are

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[291] *See* Desmond, *supra* note 72, at 105.
[292] *See id.* at 108.
[293] *See id.*
[294] *See id.*
[295] *See id.* at 108–09.
[296] *See id.* at 105.
[297] *See id.* at 112–13.
[298] *See id.* at 98.
[299] *See id.* at 113.
[300] *See* DESMOND, *supra* note 19, at 129. Particularly given the prevalence of sexual harassment in housing, it is understandable that female tenants might want to steer clear of any conduct that could be misinterpreted or used as an opening for such harassment. *See infra* Part II.B.1(d) and accompanying notes (describing sexual harassment by landlords).
[301] *See* Maggie E. Reed et al., *There's No Place Like Home: Sexual Harassment of Low Income Women in Housing*, 11 PSYCHOL., PUB. POL'Y, & L. 439, 439 (2005).
[302] Not all but the majority of sexual harassment is conducted by men and directed at women. *See* Reed et al., *supra* note 301, at 440 n.2. This Article will focus on male-female harassment because of its prevalence and its impact on the gender disparity in access to housing.
[303] *See* Regina Cahan, *Home is No Haven: An Analysis of Sexual Harassment in Housing*, 1987 WIS. L. REV. 1061, 1062–65.
[304] *See* Adams, *supra* note 62, at 34–35.

often met with retaliation in the form of higher rent charges, the deprivation of basic services such as heat or water, or eviction.[305] Some landlords explicitly threaten physical or sexual assault of tenants' children if mothers reject sexual overtures[306] and intentionally harass tenants in front of their children.[307] Tenants often tolerate abuse and even comply with sexual demands to protect their families and avoid eviction.[308] When tenants object or complain, landlords are quick to exact punishment.[309]

Landlords often keep a basis for eviction in their back pockets.[310] Most poor tenants are perpetually behind on their rent, and landlords decide when and when not to let it slide.[311] Similarly, landlords may prefer not to enforce occupancy rules, such as those regarding children or pets, but then seize on those rules for ammunition. As one landlord explained, "If I give you a break, you give me a break."[312] While some women "trade their dignity and children's health for a roof over their head," for those who resist, landlords too often respond with eviction.[313]

e. Gendered Tenant Eligibility

A final reason that women are more likely than men to be evicted is that women are more likely than men to qualify as tenants when they apply for housing. Women are more likely to work in the formal economy or to receive public assistance, and they are less likely to carry criminal records.[314] In this way, the increased eviction of women mirrors the increased incarceration of men.[315] Because women can more often document their income sources and otherwise demonstrate eligibility, landlords are more likely to approve them for leases.[316] Because of their eligibility, women become overrepresented as named tenants on leases and, should there be an eviction later on, overrepresented as defendants in eviction proceedings.[317]

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[305] *See* Cahan, *supra* note 303, at 1067.
[306] *See id.*
[307] *See* Kate Sablosky Elengold, *Structural Subjugation: Theorizing Racialized Sexual Harassment in Housing*, 27 YALE J.L. & FEMINISM 227, 268 (2016).
[308] *See* Cahan, *supra* note 303, at 1067.
[309] *See id.* at 1067 n.20.
[310] *See* DESMOND, *supra* note 19, at 75–76.
[311] *See id.*
[312] *Id.* at 76.
[313] *Id.*
[314] Desmond, *supra* note 72, at 105.
[315] Criminal records create direct and indirect obstacles to housing eligibility, because landlords and employers often screen out applicants with convictions. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491–92 (2010). It is worth noting however, that many landlords screen out tenants with prior evictions, and if women disproportionately carry eviction records, they too may find themselves disqualified from housing. *See supra* notes 87–95 and accompanying text.
[316] *See* Desmond, *supra* note 72, at 105.
[317] *See id.*

f. Gendered Impact of Eviction

Mothers suffer doubly from eviction because they experience the suffering it causes their children.[318] As mentioned briefly above, eviction creates significant harms for children.[319] It interferes with their education by disrupting attendance, increasing truancy, and causing transfers to lower quality schools. It harms their emotional, physical, psychological, and intellectual development by destroying relationships with friends, family, and service providers, and it adds significant stress and instability. If children become homeless, these harms are compounded. Because they tend to be the primary caretakers for their children, women experience these secondary effects more than men. To the extent that eviction causes children to suffer or to need increased resources, the burden falls disproportionately on women.

2. *Housing Defense for* Gideon*'s Sister*

The gendered and racialized aspects of the eviction phenomenon imbue the right to housing defense counsel with particular significance. Eviction disproportionately affects Black women. To suggest that the potential loss of a home is a legal event important enough to warrant appointment of counsel[320] is to suggest that Black women's problems deserve full recognition as legal claims.[321] The appointment of counsel to help tenants articulate their claims also supports democratic equality by strengthening Black women's participation in the civil justice system.[322]

The creation of a right to housing defense counsel could be interpreted as an expression of feminist principles. Caretaking work, which is disproportionally performed by and associated with women, has historically been devalued, with that of Black women devalued the most.[323] Yet feminist scholars

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[318] *See* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 93, 113–17 (2010) (describing gendered impact of "bystander" harm).

[319] *See supra* Part I.A.2.

[320] *Cf. supra* notes 108, 136 (collecting sources that indicate only incarceration warrants appointment of counsel as a federal constitutional right).

[321] *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC'Y REV. 631, 633, 636–37 (1981) (discussing recognition of injuries and injustices that can be transformed into legal claims, and highlighting need to attend to equality in "naming, blaming, and claiming" of grievances).

[322] *See* Davis, *supra* note 227, at 2263–64 ("While participation in a community has many facets, one of the most important is certainly participation in civic institutions such as the judicial system"); *id.* at 2268 (highlighting "the Court's intuitive understanding that inequality in access to the courts might distort the checks and balances underlying our democratic system").

[323] *See* BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 96–107 (2d ed. 2000); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 45–68, 173–200 (2d. ed. 2000); Dorothy Roberts, *The Value of Black Mothers' Work*, *in* CRITICAL RACE FEMINISM 312, 313–14 (Adrien Katherine Wing ed., 1997); Gwendolyn Mink, *The Lady and the Tramp: Gender,*

have argued that equality requires designing public policy that supports caretaking work,[324] and in recent decades, advocates and academics have highlighted the importance of caretaking work for the economic and democratic functioning of society.[325] The appointment of housing defense counsel follows this trend. It lends state support to caretaking work by bolstering tenants' efforts to protect their homes.[326] Public funding of housing defense counsel demonstrates recognition of the centrality of the home to the economy[327] and underscores the value of Black women's care-taking work.

Promotion of equality has always been central to the right to counsel. As discussed in Part I, the Supreme Court that decided *Gideon* did so with acute awareness that they were operating during the height of the Civil Rights Movement,[328] and scholars have demonstrated that the Court was motivated by the desire to protect African Americans from the abuses of the Jim Crow legal system.[329] The Justices sought to prevent poor Black men from appearing alone in a dangerous criminal justice system.[330] While there may be many rationales for appointment of criminal defense counsel, as a matter of legal history, racial equality has been a key motivation.[331] To the extent that appointment of counsel aims to serve the goal of equality, the principle of *gender* equality should also inform which segments of the population will enjoy the right. It is therefore fitting that the new *Gideon* seeks to support poor Black women appearing in the civil justice system.[332]

Race, and the Origins of the American Welfare State, *in* WOMEN, THE STATE, AND WELFARE 92, 92–122 (Linda Gordon ed., 1990).

[324] *See, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 1–2 (2008).

[325] *See, e.g.*, MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 149 n.42 (2010); Charlie Sabatino & Caroleigh A. Newman, *The New Status of Home Care Workers Under the Fair Labor Standards Act*, 36 BIFOCAL 130, 130–33 (2015) (describing historical exclusion of home care workers from overtime protections of Fair Labor Standards Act and recent revision to recognize them); Paula Span, *Caregivers Must Sacrifice Their Careers*, N.Y. TIMES, Dec. 8, 2015, at D5 (summarizing recent proposed legislation expanding employment protections for people engaged in caregiving for family).

[326] *See* EICHNER *supra* note 325 at 31 ("[L]imiting the anti-discrimination inquiry to securing women equal terms and conditions with men . . . undercuts the goal of substantive sex equality. . . . [T]he state might require that other interests be considered . . . including the welfare of children and future children.").

[327] *See, e.g.*, ROSS REPORT, *supra* note 28 (evaluating financial impacts of preventing evictions); DESMOND, supra note 19, at 9–11, 111–32, 144–47, 295–99, 302–03 (describing economic effects of evictions); *see also* JOAN C. TRONTO, CARING DEMOCRACY: MARKETS, EQUALITY, AND JUSTICE 3–4 (2013) (describing perception of homes as economic assets, not places of comfort).

[328] *See* Lain, *supra* note 120, at 1395–96.

[329] *See* Mayeux, *supra* note 117, at 18.

[330] *See supra* notes 123–135 and accompanying text.

[331] *See id.*

[332] To further equality, lawyers will need to engage in behaviors that support their clients' empowerment. *See* Alibston & Sandefur, *supra* note 40, at 112. Appointment of counsel could be disempowering if it involves white lawyers subordinating the agency of clients of color. *See, e.g.*, Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI. L. REV. 983, 987–93 (1994); Lucie E. White,

C. Balancing the Power of Private Actors

While the recognition of the right to appointment of criminal defense counsel served to protect defendants from abusive state actors, NYC's housing law seeks also to protect defendants from abusive private actors. Much of the dialogue regarding the right to counsel suggests that the primary purpose of lawyers is to ward off the intrusion of the state.[333] Borrowing the language and philosophy of criminal defense, some believe a civil right to counsel should be extended only in cases involving potential abuses of state power.[334] Such an approach, however, minimizes the dangers of private, economic power.[335]

As I have emphasized in previous work,[336] individuals require protection from private actors who exert control over their everyday lives, and attorneys have a role to play in providing that protection. Private actors control access to basic necessities, such as food, water, and heat.[337] Just a handful of private corporations control almost all of the information and communication mechanisms that facilitate participation in democratic society.[338] Private entities have taken over portions of the criminal justice system, including policing and incarceration, and even national security.[339] In such an environment, lawyers serve not only as a shield against regulation by the state but also as a tool to protect people from dangerously powerful private actors.[340]

Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 BUFF. L. REV. 1, 45–48 (1990).

[333] *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 60 (1988) ("[W]e believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ex ante,* our political and civil liberties are jeopardized."); Herbert L. Packer, *Two Models of the Criminal Process,* 113 U. PA. L. REV. 1, 16, 21 (1964) (stating that "because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, [in the due process model,] be subjected to controls and safeguards that prevent it from operating with maximal efficiency" and checking the state's power in this forum depends entirely on "the availability of counsel").

[334] *See, e.g.*, Turner v. Rogers, 564 U.S. 431, 446–47 (2011) (deciding that Mr. Turner was not entitled to appointment of counsel in part because the opposing party was "not the government"); Rulli, *supra* note 18 (describing legislation to appoint counsel for people losing their homes only when subject to government seizure).

[335] *See* Sabbeth, *supra* note 145, 924–27.

[336] *See id.* at 924–31.

[337] *See* Craig Anthony Arnold, *Water Privatization Trends in the United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 791–93 (2009); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–94, 1396 (2003).

[338] *See* Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787–90 (1987) (highlighting the power of corporate media to shape public debate).

[339] *See generally* PRINCETON PROJECT ON NAT'L SEC, THE PRIVATIZATION OF NATIONAL SECURITY (2004), https://www.princeton.edu/~ppns/conferences/reports/privatization.pdf [https://perma.cc/8N63-6ZZU]; Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

[340] *See* Sabbeth, *supra* note 145, at 929–31.

The NYC statute applies to all income-eligible tenants, public and private.[341] This is noteworthy because the majority of states that have recognized a right to counsel in civil proceedings have done so in contexts in which the state initiates the proceedings or is otherwise heavily involved.[342] These matters include termination of parental rights or determination of paternity; adjudication finding a person to be sexually violent or dangerous; forcible quarantine, sterilization, or inoculation; involuntary commitment or medical treatment; guardianship; and civil contempt.[343] Such cases concern liberty or parental interests. No state has recognized a right to counsel in a proceeding regarding economic needs controlled by private parties.[344] Yet, Intro 214-B does just that.

Appointment of counsel in the criminal and civil contexts serves to counteract power imbalances that might otherwise interfere with the fair application of the rule of law. Both criminal defendants and tenant-defendants face opposing parties that possess more power and can overwhelm them if they appear pro se. In the criminal context, the prosecutor will be an attorney, and the criminal defendant will usually be a layperson. In the housing context, tenants are frequently unrepresented laypersons, while public housing agencies are always represented, and private landlords usually are as well. Studies have shown that, in the vast majority of cases in Housing Court, landlords are represented while tenants are not.[345] Regardless of whether the plaintiff is a private party or a government actor, to leave the defendant unrepresented will result in a mismatch between a lawyer and a pro se party. If the goal of the new right to counsel law is to prevent the harms that flow from the mismatch of lawyers against pro se adversaries, it makes sense to include protection not only for public housing tenants but also for occupants of privately-owned property.[346]

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[341] For more detail on the legal services the legislation provides to public housing residents, *see infra* pp. 82–83.

[342] *See* NCCRC, *supra* note 155 (map of state laws). New York is in the minority in that it not only appoints counsel in custody proceedings between private parties but it also provides counsel to both complainants and defendants in domestic violence proceedings. *See id*. *See also* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 97–98 (2011) (highlighting state entanglement in child support proceedings that appear to involve only private parties).

[343] *See* NCCRC, *supra* note 155. Judicial bypass for minors' abortion is an outlier because it is rather a unique type of case in which appointment of counsel is available in the majority of states. *See id*. It may be interpreted to involve fundamental rights related to both liberty and parenting.

[344] *See* Davis, *supra* note 227, at 2272–73 (summarizing cases).

[345] *See supra* notes 26–27.

[346] One might argue that the legislation should screen out the ten percent of cases in which the landlord is pro se. This might be worth consideration, but evidence suggests landlords enjoy many advantages even without counsel. *See* Engler, *supra* note 26*,* at 48 (stating why representation of landlords does not affect outcomes); Galanter, *supra* note 184 (describing systemic advantages of "repeat players").

In addition to the disparity created by attorneys battling pro se defendants, another reason for appointment of counsel is the power imbalance inherent in certain relationships. While the power imbalance between the state and the individual informs the criminal context,[347] certain categories of private relationships also carry inherent power imbalances.[348] In the housing context, a landlord generally has far more power than a low-income tenant.[349]

The power differential between the landlord and the tenant is based first and foremost on the tenant's dependence on the landlord for shelter.[350] The tenant's access to a basic necessity of life hinges on the landlord's willingness to provide it.[351] The landlord controls the tenant's ability to access her home and reside there in peace and security, and this gives the landlord a special physical and psychological power over the tenant and all other occupants.[352]

The power differential between landlords and tenants is exacerbated in Housing Court. Both private and public landlords enjoy far more expertise in handling housing litigation than the average tenant-defendant.[353] Indeed, studies of housing court confirm that landlords enjoy advantages even in the minority of cases in which they appear without counsel.[354]

A large quantity of residential property is privately-owned, and the systemic advantages of landlords over tenants stem more from the nature of the landlord-tenant relationship than the public or private nature of the landlord. Therefore, if legislators aim to promote the rule of law, they are right to design the legislation to reach adjudication regarding private property.

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[347] *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731–36 (1993).

[348] *See* Metzger, *supra* note 337, at 1396 (describing "relations of dependence" in which one party maintains "control over vital resources").

[349] *See* Adams, *supra* note 62, at 32–38 (explaining why landlords hold disproportionate power over tenants and how this impacts sexual harassment); Galanter, *supra* note 183, at 109 n.31 (highlighting "asymmetrical relationship" and "'differential dependence' between landlord and low-income tenant") (citing Ted Vaugh, *The Landlord-Tenant Relationship in a Low-Income Area*, 16 SOC. PROBS. 208, 210 (1968)).

[350] *See* Reed et al., *supra* note 301, at 440 ("As the shortage of affordable housing becomes more acute . . . those who control these resources become increasingly powerful and those who lack them become correspondingly more vulnerable.").

[351] *See* DESMOND, *supra* note 19, at 129 ("The power to dictate who could stay and who must go; the power to expel or forgive: it was an old power, and it was not without caprice."); *supra* Part II.B.1.d (describing how "[l]andlords often keep a basis for eviction in their back pockets" and use it coercively).

[352] *See, e.g.*, Elengold, *supra* note 307, at 268–69 (describing how laws governing landlord-tenant relationship give landlords physical access and "coercive power" that exacerbate sexual harassment).

[353] *See supra* notes 180–184 and accompanying text.

[354] Engler, *supra* note 26, at 48 (explaining why representation of landlords does not affect outcomes).

III. The Limits of Housing Defense

An expanded cadre of housing defense lawyers could make a significant mark on the law and culture of Housing Court, but it is necessary to recognize that the appointment of defense lawyers is just one form of the right to a housing lawyer, and other approaches might be worth consideration. NYC's legislation will provide lawyers for named defendants facing eviction. Yet it will not address the legal needs of people whose problems with their homes are not yet or will never be addressed in formal legal pleadings. Some evictions could be prevented most effectively by intervention in advance of the lawsuit, and others occur without any such suit even getting filed.

"Informal evictions" that involve no court action make up approximately half of forced tenant moves.[355] When landlords take steps toward filing an eviction proceeding, such as serving a tenant with a Notice to Quit, tenants often abandon the property before the landlord files a complaint with the court. In some cases, landlords give tenants financial incentives to move in exchange for saving the landlord the time and money that the formal eviction process would require. In other cases, landlords unilaterally skip the process and lock the tenant out unlawfully.

Such informal evictions are more difficult to track, but offering tenants preventative advice, counsel, and transactional assistance could potentially make a difference. As wealthy clients know, lawyers do much more than provide representation once disputes reach the courts. Perhaps even more valuable are the lawyers' services in planning for and preventing such disputes.[356] Yet Intro 214-B assists only those tenants whose disputes have escalated into formal legal proceedings.

To the extent that Intro 214-B does provide for brief services like advice and counsel, it does so only for defendants in covered proceedings. Rather than expand the legislation's reach beyond litigation, this part of Intro 214-B expands to cover a larger category of defendants, specifically higher

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[355] Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 Demography 1751, 1754, 1761–62 (2015); Desmond, *supra* note 72, at 95.

[356] *See* Robert Lefcourt, *Lawyers for the Poor Can't Win*, *in* Law Against the People: Essays to Demystify Law, Order and the Courts 123, 127 (Robert Lefcourt ed., 1971) ("[T]he [legal] professional offers legal services to the upper classes for every conceivable reason—preventive research, preparing contracts, and insuring many other legal advantages."); Richard Abel, *Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?*, 1 Law & Pol'y Q. 5, 19 (1979) (summarizing ways in which socially advantaged parties use legal services to increase their advantages); *cf.* Lefcourt, *supra*, at 127 ("[T]he [legal] profession . . . generally assumes that the problems of the poor are basically non-legal . . . . An assigned counsel system supports this belief since, by its nature, it is neither continuous nor preventive, but simply remedial."); Abel, *supra* at 15 ("But it is inconceivable that we would ever subsidize lawyers to perform for [disadvantaged parties] all the roles they presently perform for [advantaged parties].").

income tenants facing eviction.[357] Whether brief advisory services affect litigation outcomes is unclear. Empirical research has evaluated "unbundled" services like pro se clinics, self-help centers, and hotlines that offer limited advice or assistance with discrete tasks.[358] The evidence on the effectiveness of these alternatives, however, has been scant. Existing data suggests that limited legal assistance might make the processes feel fairer to litigants but still produce no difference in substantive outcomes.[359]

This is precisely what Gary Blasi warned against more than a decade ago when he highlighted that parties' "subjective sense of justice can be largely independent of outcomes."[360] He argued that subjective perceptions of justice should not be used to assess access to justice. Pointing out that self-reported satisfaction can result from decreased expectations or people feeling responsible for their misfortunes, he argued that mechanisms to achieve perceived legitimacy should not be a public policy goal.[361] Instead, he advocated for an "objective" measure of justice, specifically empirical evaluation of interventions and measurement of their influence on outcomes.[362]

To be sure, legal outcomes ought not to be the only measure of the value or success of lawyers. Representation by counsel impacts other rele-

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[357] N.Y.C. ADMIN. CODE §§ 26-1301, 26-1302(a)(1).

[358] *See* Steinberg, *supra* note 156, at 774–86 (summarizing alternatives).

[359] *See id.* at 779–82 (collecting literature); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO J. POVERTY L. & POL'Y 453, 488–90 (2011) (providing empirical data showing litigants who received unbundled assistance fared no better than those who received none, and fared worse than those who received full representation); Greiner et al, *supra* note 229 (2013), at 908–09 (providing empirical data showing significant difference in outcomes between limited scope representation and full representation). One recent possible exception can be found in REBECCA SANDEFUR & THOMAS CLARKE, ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS 3–6 (2016) http://www.americanbarfoundation.org/uploads/cms/documents/new_york_city_court_navigators_report_final_with_final_links_december_2016.pdf [https://perma.cc/LHQ9-57LZ] (showing positive outcomes from pilot program in which trained, supervised, non-lawyer "Navigators" "provide information, assist litigants in accessing and completing court-required simplified forms, attend settlement negotiations and accompany unrepresented litigants into the courtroom"). Interestingly, Sandefur and Clarke suggest that the success of the program may in part be attributable to unique features of NYC's judicial and legal environment and the availability of government funds for rent shortfalls, all of which they interpret as potentially more favorable to tenants than the environment in most jurisdictions. *See id*. at 7–8, 50–51.

[360] Gary Blasi, *How Much Access? How Much Justice?* 73 FORDHAM L. REV. 865, 870 (2005); *see* Engler, *supra* note 26, at 83 (underscoring that "customer satisfaction" and "litigants' understanding of the court process" are not necessarily indicative of where counsel is most needed); *see also* Engler, *supra* note 26, at 88 ("If tenants expect to lose in housing court, and landlords expect to win, advice to the tenant that explains the process but fails to affect the outcome might lead to satisfied landlords and tenants.").

[361] Blasi, *supra* note 360, at 869–71.

[362] *Id*. at 875–77.

vant considerations, including broader legal impacts and non-legal effects.[363] As Catherine Albiston and Rebecca Sandefur have argued, legal scholars tend to neglect non-legal factors,[364] but research would benefit from consideration of health outcomes, employment prospects, and other secondary effects.[365] An attorney preventing eviction does more than provide a litigation win for the defendant: the lawyer helps to prevent the harms that flow from displacement. Legislators in favor of appointment of housing defense counsel recognize this reality.

Yet it remains to be seen what the effects of expanded availability of brief legal services will be. Some evidence has even indicated that limited services can be detrimental to the outcome if the person wielding the legal tools lacks the strategic knowledge to employ them properly.[366] Indeed commentators who favor non-lawyer alternatives in other contexts generally acknowledge that housing litigation is an area in which full representation is needed.[367]

Intro 214-B captures one specific category of housing litigation: that which involves a potential, imminent loss of the tenant-defendant's home. The legislation does not address housing threats that operate slowly or indirectly and does not apply to plaintiffs or potential plaintiffs. While there may

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[363] *See* Sabbeth & Vladceck, *supra* note 257, at 827–33 (critiquing literature that focuses on win-loss rates in arbitration and litigation but ignores aggregate social benefits).

[364] *See* Rebecca Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 51–52 (2010); *see also* Albiston & Sandefur, *supra* note 40, at 111–13 (critiquing studies of individual case outcomes and calling for studies to account for health outcomes, sense of empowerment, and other non-legal effects).

[365] *See* Sabbeth, *supra* note 145, at 911–14 (collecting literature on collateral consequences of criminal convictions and making analogy to consequences of civil proceedings).

[366] Colleen Shanahan et al., *Lawyers, Power, and Strategic Expertise*, 93 DENV. U. L. REV. 469, 513 (2016) (analyzing results of empirical study).

[367] *See* Lauren Sudeall Lucas, *Issue Brief: Deconstructing the Right to Counsel*, AMERICAN CONSTITUTION SOCIETY, 11–12 (2014) (identifying housing as an area that may require full representation); Engler, *supra* note 26, at 67–70 ("Existing data showed more promise [for pro se clinics in the family area than the housing area]. . . . [A]t least two other programs concluded that their clinics, in which tenants were advised how to handle their cases pro se, were largely ineffective unless paired with assistance in court."). *But see* Steinberg, *supra* note 156, at 794–803 (suggesting "demand side" reform of procedure, evidence, and judicial role could potentially decrease need for skilled representatives in poor people's courts); *but see generally* Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845 (2013) (arguing for simplification of court processes as access to justice solution). Housing and family law comprise the two areas with the largest numbers of unrepresented litigants, and between the two, unrepresented litigants face a represented adversary more often in housing cases. Engler, *supra* note 117, at 711–12. As a result, while non-lawyer alternatives might be fruitful in family law matters between two unrepresented parties (assuming no domestic violence or other significant power inequality), in housing, the mismatch between lawyers and pro se parties indicates a more acute need for appointment of counsel. *See* Shanahan et al., *supra* note 366 ("[C]ourts with drastically unequal balances of power are likely to be legal contexts that require full representation because limited representation or nonlawyer court assistance does not provide enough expertise to offset an imbalance in power between parties.").

be good reasons for this, problems like discrimination, harassment, and dangerous conditions also pose significant threats to safe, affordable housing. Affirmative litigation challenging such problems could potentially have an equal if not greater impact.

A. Housing Law as Eviction Law

Intro 214-B focuses on appointing lawyers to enforce tenants' housing rights in eviction proceedings, but there are major categories of housing cases that it leaves out. This subpart will identify three such categories. It will suggest that their exclusion may have a detrimental impact on the achievement of the core goals that underlie the legislation, in particular producing positive social outcomes and promoting equality and the rule of law.[368]

1. *Housing Conditions, Discrimination, and Harassment*

The major contribution of Intro 214-B is that it will create a right to counsel for income-eligible tenants who are defendants in judicial eviction proceedings. Yet eviction laws are not the only, nor necessarily the most powerful, statutory provisions whose enforcement preserves safe and affordable housing. While eviction results in the formal, public loss of a home, access to housing faces other significant threats, such as dangerous conditions, discrimination, and harassment. These problems are forbidden by laws on the books but rarely challenged.

The legislators behind Intro 214-B seek substantive changes in social outcomes, but there remains a gap between avoiding homelessness and promoting a robust right to safe and affordable housing. Some commentators might argue that such a right would require a shift in substantive laws and that appointment of counsel is a solution to a different problem. Cynics might insist that a substantive right to housing is far from our political reality. Yet such critiques would miss the point. Substandard conditions, discrimination, and harassment are already prohibited, but the prohibitions are rarely enforced.

Substandard conditions abound.[369] These include toxic mold, insect and vermin infestation, the absence of heat or running water, faulty electrical wiring, and lead paint and dust.[370] As discussed further in Part III.A.2, these conditions lead to physical, emotional, and intellectual harms including infection, respiratory disease, insomnia, anxiety, depression, developmental

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[368] While the priorities guiding legislatures are likely to differ from those guiding legal services offices, an interesting theory for developing an order of priorities can be found in Paul Tremblay, *Acting "A Very Moral Type of God": Triage Among Poor Clients*, 67 Fordham L. Rev. 2475 (1999).

[369] Bratt et al. *supra* note 54, at 3.

[370] *Id.*

damage in children, and even death.[371] They also result in economic harms ranging from increased medical expenses to decreased productivity and reduced educational and employment prospects.[372]

These substandard conditions could be challenged under existing law. Substandard rental housing is prohibited by the implied warranty of habitability that accompanies residential rental agreements.[373] Most state statutes or city codes also codify this warranty.[374] A landlord's failure to keep housing in decent condition can also trigger rights based in tort law[375] and potentially consumer protection statutes.[376] A lawyer who investigated a typical case of substandard housing would likely identify numerous tort claims, from negligence to the duty to warn, and, in some cases, negligent or even intentional infliction of emotional distress.[377] Demanding rent for substandard property can also violate statutory prohibitions on unfair debt collection or unfair and deceptive trade practices.[378] Yet the application of many of these laws to substandard conditions is unfamiliar to courts, and to the public, because the vast majority of tenants are unrepresented. The problem is not the absence of law but the absence of enforcement.

Under-enforcement also occurs in the area of discrimination. Housing discrimination traditionally takes the form of flat refusals to engage in business, misrepresentations about availability, and disadvantageous adjustments of terms.[379] For decades, discrimination on the basis of race, color, sex, familial status, national origin, religion, or disability has been forbidden in the sale, rental, or financing of housing.[380] Yet numerous studies document that it remains a significant phenomenon.[381]

One type of discrimination common in low-income housing is sexual harassment. As discussed in Part II, sexual harassment in housing deprives women of their equal right to quiet enjoyment of rental properties.[382] Harassment can include unwanted sexual contact or demands accompanied by

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[371] *See infra* pp. 107–08.

[372] *See, e.g*, David Mudarri & William J. Fisk, *Public Health and Economic Impact of Dampness and Mold*, 17 INDOOR AIR 226, 228 (2007).

[373] *See* Paula Franzese et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord Tenant Reform*, 68 RUTGERS L. REV. 1, 7 (2017).

[374] *Id.*

[375] *See, e.g*., CHAMALLAS & WRIGGINS, *supra* note 318, at 139 (describing tort litigation regarding lead paint in homes).

[376] *See, e.g*., Travieso v. Gutman, Mintz, Baker & Sonnenfeldt, P.C., No. 94 CV 5756 (JBW), 1995 WL 704778, at *7 (E.D.N.Y. Nov. 16, 1995) (ruling that tenants may raise consumer protection claims against landlords and their counsel).

[377] Students of this author regularly identify such claims on behalf of clinic clients.

[378] *See Travesio*, 1995 WL 704778, at *7. *But see* Jagger v. Katz Park Ave. Corp., No. 570911/10, 2011 WL 5865241, at *1 (N.Y. App. Term Nov. 22, 2011) (dismissing claims based on water and mold damage as outside the scope of consumer protection statute).

[379] Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 804–05 (1996).

[380] *See* 42 U.S.C. §§ 3601–06 (2012).

[381] *See* Denton, *supra* note 69, at 67.

[382] *See supra* Part II.B.1.d.

threats of retaliation.[383] Some women reject their landlords' advances and are evicted, contributing to the gender disparity in eviction rates,[384] but others meet different fates. Landlords can retaliate in a variety of ways aside from eviction, such as rent raises or the deprivation of utilities or repairs,[385] or women can suffer the harassment in silence.[386] Housing defense lawyers can assist harassment victims whose landlords initiate eviction proceedings, but the victims who do not face eviction also need legal representation to preserve their access to safe and affordable housing.[387]

In addition to harassment that constitutes discrimination, many landlords engage in harassment for financial gain. In gentrifying cities with rent regulation like NYC, landlords have harassed regulated tenants in the hope of forcing them out and raising the rent.[388] This harassment takes various forms, ranging from withholding heat or repairs, to engaging in vandalism and making threats of violence.[389] NYC enacted legislation prohibiting this kind of harassment roughly a decade ago,[390] but tenants have not initiated many suits under the legislation because few lawyers are available to represent them.[391] Appointment of housing defense counsel might support enforcement of this anti-harassment law to a limited degree. To the extent that landlords harass tenants by filing frivolous eviction suits,[392] housing defense

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[383] Cahan, *supra* note 303, at 1062–65.

[384] *See supra* Part II.B.1.

[385] *Id.*; *see also* Reed et al., *supra* note 301, at 441 (noting landlords can make false allegations of criminal activity). Landlords can also threaten to report undocumented tenants to immigration authorities, raising the possibility of detention and deportation. *See, e.g.*, Mallory Moench, *Queens Landlord Pushes DHS Tip Line to Scare Immigrants Out of Rent-Controlled Units, Residents Say*, N.Y. Daily News (June 12, 2017), http://www.nydailynews.com/new-york/queens/queens-landlord-pushes-dhs-tip-line-scare-immigrants-tenants-article-1.3237351 [https://perma.cc/FZN9-NFC9].

[386] Poor tenants may put up with harassment because of the limited availability of affordable housing. Reed, *supra* note 301, at 440. This dynamic may be worse for women of color because race discrimination constricts the housing market. Adams, *supra* note 62, at 35–36.

[387] *See* Adams, supra note 62, at 29 (noting absence of counsel to prosecute sexual harassment claims); *see also* Elengold, *supra* note 307, 242–45 (arguing that sexual harassment of Black tenants gets trivialized). The Fair Housing Act does, however, authorize federal courts to appoint counsel on a discretionary basis for persons filing discrimination claims. 42 U.S.C. § 3613(b)(1).

[388] Louis W. Fisher, *Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartments*, 50 Harv. C.R.-C.L. L. Rev. 491, 493 (2015).

[389] N.Y.C. Justice Rep., *supra* note 21, at 11.

[390] N.Y.C. Admin. Code §§ 27-2004, -2005, -2115 (2016); *see also* Prometheus Realty Corp. v. N.Y.C., 80 A.D.3d 206, 213 (N.Y. App. Div. 2010) (upholding anti-harassment statute against a due process challenge, explaining that "[p]reventing landlords from forcing tenants out . . . so they can deregulate their buildings" is rationally related to "maintaining rent-regulated housing").

[391] Telephone Interview with Aga Trojniak, Flatbush Tenant Coalition Coordinator, Flatbush Dev. Corp. (Nov. 11, 2016).

[392] *See* N.Y.C. Justice Rep., *supra* note 21, at 11.

counsel could challenge those evictions. Yet defense lawyering leaves the other forms of harassment unaddressed.[393]

All of these obstacles to safe and affordable housing could be challenged in court. Tenants could initiate litigation to improve their access to safe, affordable housing through affirmative lawsuits seeking monetary damages and injunctive relief requiring landlords to repair properties and refrain from discrimination, harassment, and retaliation.[394] Yet tenants rarely can, or do, pursue such suits without counsel.[395]

2. *Impact on Substantive Outcomes and Equality*

While slower to result in displacement than eviction, substandard conditions, discrimination, and harassment also result in significant harms. Like eviction, discrimination results in negative social outcomes. The economic effects of housing discrimination are particularly well-documented.[396] Race discrimination depresses wealth accumulation for people of color.[397] Housing segregation reduces access to employment and educational opportunities.[398] Discrimination and harassment force families to accept homes of lower quality or in less desirable neighborhoods.[399] Such neighborhoods can be dangerous[400] and lack access to transportation,[401] decent schools,[402] and clean air and water.[403]

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[393] Following another approach, the New York Attorney General has sought to address harassment through government prosecution. *See* Press Release, N.Y. State Office of the Att'y Gen., A.H. Schneiderman Announces Legislation to Crack Down on Tenant Harassment (April 12, 2017), https://ag.ny.gov/press-release/ag-schneiderman-announces-new-legislation-criminally-crack-down-tenant-harassment [https://perma.cc/T869-MDMF] (summarizing Schneiderman's efforts).

[394] *See, e.g.*, N.Y. Real Prop. § 223-b (McKinney 2017) (prohibiting retaliation against tenants who exercise legal rights).

[395] *See* Franzese, *supra* note 373, at 3–6 (noting that few tenants raise warranty of habitability claims and suggesting one reason is the absence of representation); David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 Cal. L. Rev. 389, 405 (2011) (stating most poor tenants lack resources to pursue affirmative litigation regarding conditions); *cf.* Jessica Steinberg, *Informal, Inquisitorial, and Accurate: An Empirical Look at a Problem-Solving Housing Court*, Law & Soc. Inquiry 1, 1–7, 12–18 (2016) (describing unique inquisitorial model of Housing Conditions Court in District of Columbia, where pro se tenants have achieved some success in obtaining repairs).

[396] *See* Engel, *supra*, note 278, at 1156–58 (explaining how housing discrimination harms potential for social mobility); *see generally* Douglas Massey & Nancy Denton, American Apartheid: Segregation and the Making of the Underclass (1996) (demonstrating that intentional, systematic segregation of African Americans creates underclass of people living in poverty).

[397] *See* Denton, *supra* note 69, at 71.

[398] *See id.*

[399] *See* Engel, *supra* note 278, at 1156–57.

[400] *See* Denton, *supra* note 379, at 810.

[401] *See* Denton, *supra* note 69, at 71.

[402] *See* Denton, *supra* note 379, at 810.

[403] *See, e.g.*, Dorceta Taylor, Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility *passim* (2014); David Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice as Equal Protection*, 111 Nw.

Discrimination also results in physical, psychological, and intellectual harms.[404] These include anxiety,[405] depression,[406] headaches, difficulty sleeping, and exacerbation of other ailments.[407] Communities that experience stressors like discrimination disproportionately suffer from hypertension, diabetes, and heart failure.[408] Children of women facing discrimination show increased anxiety and depression, and reduced academic abilities.[409]

The effects of substandard housing conditions are no less troubling.[410] Harms include injuries from falls;[411] burns and even deaths from electrical fires;[412] respiratory disease, developmental delays, brain damage, and death of children exposed to lead paint dust;[413] headaches, dizziness, fevers, lightheadedness, itching, rashes, coughing, difficulty breathing, and development of asthma due to air saturated with mold;[414] influenza, colds, and other illnesses associated with lack of heat or running water;[415] allergic reactions including anaphylaxis and infections from insect bites, and sleep deprivation from insects or vermin running over beds at night;[416] anxiety; and depression.[417] The anxiety and depression caused by living night and day with these conditions[418] is worsened by social reverberations, such as isolation or shame

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U. L. Rev. Online 93, 93–94 (2017); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. Colo. L. Rev. 921, 926 tbl.1 (1992).

[404] *See, e.g.*, Cahan, *supra* note 303, at 1073–75 (summarizing effects of sexual harassment).

[405] *See* American Psych. Ass'n, Stress in America: The Impact of Discrimination 6 (2016), https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf [https://perma.cc/9JYS-U9ST].

[406] *See id.*

[407] *See* Victor M. Good & Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 Fordham U. L.J. 1143, 1157 (2003) (identifying physical and psychological symptoms).

[408] *See* Sandeep Jauhar, *When Blood Pressure is Political*, N.Y. Times, Aug. 7, 2016, at SR6.

[409] *See* Denton, *supra* note 67, at 1205–06; Katharine H. Zeiders et al., *Discrimination and Acculturation Stress: A Longitudinal Study of Children's Well-Being from Prenatal Development to 5 Years of Age*, 37 J. Developmental & Behav. Pediatrics 557, 562 (2016).

[410] *See generally* Emily A. Benfer & Allyson E. Gold, *There's No Place Like Home: Reshaping Community Interventions and Policies to Eliminate Environmental Hazards and Improve Population Health for Low-Income and Minority Communities*, 11 Harv. L. & Pol'y Rev. S1, S2-S15 (2017).

[411] *See* Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 Am. U. L. Rev. 275, 292 n.75 (2015).

[412] *See id.*; Desmond, *supra* note 19, at 199–201.

[413] *See* Chamallas & Wriggins, *supra* note 318, at 139–40.

[414] *See* Mudarri & Fisk, *supra* note 372, at 227, 229, 232–35.

[415] *See* Benfer, *supra* note 411.

[416] *See* Joint Statement on Bed Bug Control & Prevention in U.S. from CDC & EPA 2 (2010), https://stacks.cdc.gov/view/cdc/21750 [https://perma.cc/MV7P-VYDV].

[417] *See id.*; Desmond, *supra* note 19, at 199–201.

[418] *See* Desmond, *supra* note 19, at 298.

about hosting visitors,[419] difficulty concentrating, and poor school performance.[420]

Economic impacts of substandard conditions are also significant. Out-of-pocket expenses include costs of repairs, which many tenants cover after landlords refuse;[421] replacement of furniture, clothing, and other possessions destroyed by mold or water damage;[422] and medical expenses.[423] Substandard conditions also lead to longer-term economic damage, namely diminished productivity and reduced academic and employment prospects.[424]

In the aggregate, substandard conditions, discrimination, and harassment restrict the supply of safe, affordable housing; decrease health, education, and employment outcomes; and increase poor people's need for medical and social services. The individual effects are visited most harshly upon women of color, exacerbating existing patterns of social and economic inequality.

These problems also undermine the legislative aim of promoting the rule of law in poor people's everyday lives. Less visible than evictions, the ordinary interactions accompanying the landlord-tenant relationship are rife for abuse because of the parties' close proximity, gross disparity in power, and strong financial pressures. Public housing agencies face some measures of public accountability, but private landlords often lack sufficient incentives to respect the laws in the absence of aggressive enforcement.[425]

To the extent that the NYC legislature seeks to further positive social outcomes and promote equality and the rule of law, it may be worth considering appointment of *affirmative* housing counsel who could take on cases of substandard conditions, harassment, and discrimination.[426] Recognition of

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[419] *See* Ernie Hood, *Dwelling Disparities: How Poor Housing Leads to Poor Health,* 113 ENVTL. HEALTH PERSP. A311, A313 (2005) (noting relationship between social isolation and substandard housing).

[420] *See* Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEATH 733, 733 (2002) (noting neurological, psychological, and behavioral problems); Rebekah Levine Coley et al., *Relations Between Housing Characteristics and the Well-Being of Low-Income Children and Adolescents,* 49 DEVELOPMENTAL PSYCH. 1775 (2013) (noting emotional and behavioral problems in children and poor school performance in teens, and suggesting conditions may prevent concentration).

[421] *See* DESMOND, *supra* note 19, at 72–74.

[422] Mold for example, cannot always be removed from porous items and in many cases the requisite professional remediation will be more expensive than replacement. *See* EPA, A BRIEF GUIDE TO MOLD, MOISTURE, AND YOUR HOME 7 (2010), http://www.mc2homeinspections.com/uploads/2/6/8/1/26814367/homeowners_guide_to_mold_and_moisture_in_the_home.pdf [https://perma.cc/KL2Y-8CXH].

[423] One study estimates that "there is an economic consequence from dampness and mold due to asthma alone that is in the range of billions of dollars per year." Mudarri & Fisk, *supra* note 372, at 228.

[424] *See* Bashir, *supra* note 420; Coley et al., *supra* note 420.

[425] *See, e.g.*, OFFICE OF PUB. ADVOC. OF N.Y.C., THE 100 WORST LANDLORDS IN NEW YORK CITY, http://landlordwatchlist.com [https://perma.cc/UXL2-Y42R].

[426] The District of Columbia recently proposed a housing counsel initiative that would cover affirmative proceedings related to substandard conditions and rent overcharges. *See* B22-0024, 22nd Council, 2017–2018 Sess. (D.C. 2017), http://

the necessity of legal counsel for such claims would underscore their importance and legitimacy.[427] Notably, the original purpose of Housing Court was to provide a means for tenants to compel their landlords to repair substandard property,[428] although the forum became an eviction mill instead.[429] Intro 214-B does not fundamentally challenge this development. The legislation accepts the narrative of Housing Court as a place where tenants will be defendants and the majority of the docket will be evictions. The next subpart will consider the procedural implications of tenants occupying this defensive position.

B. Housing Lawyers as Defense Lawyers

One major feature of the criminal model of appointment of counsel that the new *Gideon* adopts is the procedural position. Like most right to housing counsel initiatives, NYC's right to counsel statute provides defense lawyers. In the criminal context, the effectiveness of providing defense lawyers to poor people has been questioned.[430] Beyond lamenting insufficient funding,[431] "*Gideon* skeptics" suggest that criminal defense lawyers cannot perform their functions, not because of resource shortages, but because of the very structure of the criminal justice system.[432] Some critical scholars argue that subsidizing criminal defense lawyers legitimizes the enforcement of poor people's obligations and does nothing to challenge the status quo.[433] Yet

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lims.dccouncil.us/Download/37180/B22-0024-Introduction.pdf [https://perma.cc/5QBM-FEU6]. Should this program go forward, its results will be worth studying.

[427] *See* Albiston & Sandefur, *supra* note 40, at 112 (describing how claiming legal rights can be empowering); Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (arguing that enforcement of rights conveys moral force); *supra* notes 321–322 (highlighting importance of "naming, blaming, and claiming" and democratic role of courts). Too often, the legal system fails to validate the affirmative housing claims of women of color. *See, e.g*, CHAMALLAS & WRIGGINS, *supra* note 318, at 141–44, 150–51 (describing how courts attribute children's negative health and educational outcomes to genetics or parental failings instead of lead poisoning).

[428] Galowitz, *supra* note 210, at 177.

[429] *Id.* at 194.

[430] *See* Mayeux, *supra* note 117, at 86–87 ("Scholars, advocates, and journalists have published thousands of articles exposing *Gideon*'s 'failed promise' or 'muted trumpet.'")

[431] *See id.* at 86 n.352 (collecting literature). Note that for the new *Gideon*, borne out of legislation instead of constitutional rulings, this problem can be solved by legislators considering their budgets. In the NYC case, the legislature relies on evidence that appointment of housing defense counsel could actually save resources.

[432] Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1067–70 (2013); Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2183 (2013) ("The criminal law deliberately ignores the social conditions that breed some forms of law-breaking. Deprivations associated with poverty are not usually 'defenses' to criminal liability . . . ."); Chin, *supra* note 123, at 2238, 2254 ("[T]he right to counsel as articulated by the Court has not been and likely cannot be a remedy for systematic racial disproportionality in the criminal justice system. . . . Ordinarily, it is impossible for a lawyer in a criminal case to attack the war on drugs or other broad government policies or priorities.").

[433] *See* Butler, *supra* note 432, at 2201 ("[P]rocedural rights may be especially prone to legitimate the status quo, because 'fair' process masks unjust substantive outcomes and

recent scholarship has not explored whether these concerns translate from the criminal to the civil context.

The defensive position brings inherent limits.[434] First, the defensive posture is necessarily reactive, which can put the defendant at a disadvantage. The defendant does not choose whether to use litigation or a different method to solve the underlying social problem. The plaintiff selects the time for commencement of the litigation and generally controls the speed of the litigation.[435] The timing or speed may be difficult for the defendant.[436] Control over these factors can be used to put pressure on an opposing party. In an eviction proceeding, the imminent threat to the home makes the tenant-defendant vulnerable. These dynamics decrease the tenant-defendant's leverage in negotiations.

Second, in civil litigation, the plaintiff selects the forum when filing the lawsuit, and though in some cases defense counsel can try to change the forum by moving for removal or abstention, defense attorneys do not generally enjoy the benefit of choosing the court. Criticized as "forum shopping" by adversaries, good plaintiffs' lawyers will craft complaints so that the court they prefer, and only the court they prefer, can maintain jurisdiction over the matter.[437] Forum selection can potentially decide the rules of evidence and procedure that will cover the proceeding.

While perhaps not a factor considered by landlords' lawyers, forum selection could make a difference for tenants. Although NYC landlords must file eviction cases in Housing Court, tenants have the opportunity to bring their own claims in other courts, and they lose that opportunity if they raise the claims only defensively. For example, a tenant could file an affirmative discrimination suit in federal or state court, but if she raises discrimination

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makes those outcomes seem more legitimate."); Chin, *supra* note 123, at 2258 ("*Gideon* formally and perhaps more broadly legitimates . . . racially disparate results because convictions obtained against defendants who had counsel are presumptively valid."); LEFCOURT, *supra*, note 356, at 130 ("In a legal system which arrests and convicts underclass individuals more often than the criminals of the higher classes . . . [t]he class and race basis of the legal system has been more firmly cemented, rather than weakened, by the growth of public defender systems.").

[434] *See* Thomas M. Hilbink, *You Know the Type. . .: Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 687 (2004) ("It is when clients are defendants (rather than the initiators of legal action) that the stakes are highest and the limits of grassroots cause lawyering are most evident. . . . [Scholars] raise serious questions as to whether such legal work constitutes cause lawyering at all.").

[435] The plaintiff must request court dates for the case to progress. Traditionally in civil litigation, plaintiffs prefer to move cases quickly toward judgment, while defendants seek to slow the process by filing motions to dismiss or engaging in lengthy discovery.

[436] Defendants might not be ready to present their case, while plaintiffs had the opportunity to gather evidence before initiating the action. A defendant could be in a period of personal or professional turmoil; for example, non-payment eviction proceedings might occur right after defendants have lost their jobs.

[437] Although a defendant in state court may in some cases file a motion for removal to federal court, the plaintiff can generally prevent removal by drafting the complaint to avoid all bases for federal jurisdiction. *See* 28 U.S.C. § 1441 (2007) (defining removal jurisdiction).

only as part of an eviction defense, she may be limited to Housing Court with its particular approach to rules of evidence and procedure. Housing Court judges may be ill-prepared for full discovery and impatient with aggressive, robust litigation.[438] The difference in forum can support or undermine due process and be outcome-determinative.[439]

Third, defensive litigation tends to address issues individually, not collectively. A tenant-defendant challenges the landlord on a case-by-case basis, whereas tenants as plaintiffs can bring their claims together. The collective approach may be more effective for the plaintiffs and the justice system overall. A group of plaintiffs can paint a fuller, more accurate picture of the facts with respect to the credibility of the individual tenants, any bad faith of the landlord, and the scope and scale of harm caused by any unlawful conduct. Aggregating parties also increases the monetary value of suits, which may cause the opposing party, and the court, to take them more seriously.[440]

Fourth, affirmative litigation is generally better suited than defensive litigation for collaborating with social activists. While the position of defendants may connote passivity, taking the landlord to court allows tenants to be agents of change. Bringing claims collectively can create opportunities to organize with other activists, provide the emotional support of a community, and potentially achieve more sustainable change.[441] On a local and national level, affirmative litigation can support direct action campaigns and appeals for legislative solutions.[442] Although scholars have debated the utility of litigation as a tool for social movements, many movements have successfully collaborated with lawyers and used affirmative litigation to strengthen their activism.[443]

IV. Overcoming the Limits of Defense Lawyering

The above analysis of NYC's approach to appointment of housing counsel yields important lessons regarding the effectiveness of appointment of

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[438] In NYC Housing Court, discovery is not even permitted unless a party moves to conduct it and the judge grants the request. In many other jurisdictions, evictions are conducted in small claims court, where discovery is relatively uncommon. *See* N.Y. County Laws.' Ass'n., Report: The N.Y.C. Housing Court in the 21st Century: Can it Better Address the Problems Before It? 26 (2005), https://www.nycla.org/siteFiles/Publications/Publications195_0.pdf [https://perma.cc/HH43-49G3].

[439] *See* Bezdek, *supra* note 185 and accompanying text (describing how Housing Court process tilts in landlords' favor).

[440] *See, e.g.*, Howard M. Erichson, *Doing Good, Doing Well*, 57 Vand. L. Rev. 2087, 2094 n.28 (2004) (describing aggregate tort litigation).

[441] *See* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 Harv. C.R.-C.L. L. Rev. 407, 440, 447 (1995).

[442] *See* Scott Cummings & Ingrid Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 491–93 (2001).

[443] *See id.*

defense lawyers. The appointment of defense lawyers for poor people is limited as a means of achieving a just and equal society. Appointment of affirmative lawyers is a promising possibility that should be investigated further. At the same time, some of the limits of civil defense can be overcome with creative and zealous lawyering. Indeed, the availability of counterclaims in civil litigation makes civil defense potentially more powerful than criminal defense for challenging the status quo.

A. Civil Defenses and Counterclaims

In spite of the advantages of the affirmative posture, some of the goals of affirmative litigation can be pursued defensively. In an eviction case, substandard conditions can provide a defense to non-payment of rent. The tenant can argue that the landlord's breach of the warranty of habitability negates the tenant's duty to pay rent because the two obligations are mutually dependent. Alternatively, the tenant can argue that even if the landlord is entitled to collect some rent, the amount should be reduced to reflect the substandard conditions. Resolving the question of how much the tenant owes would require the court to assess the condition of the premises. This might discourage landlords from filing evictions if they have failed to maintain apartments and might encourage landlords to maintain the apartments so they can collect full rent. Professor Paula Galowitz argues that representation by housing defense counsel has resulted in successes obtaining repairs.[444] In this way, assertion of defenses could address some of the same issues that could be litigated affirmatively.[445]

Further, the defendant can raise counterclaims regarding issues she might otherwise pursue affirmatively.[446] Counterclaims are claims the defendant raises as if in the position of the plaintiff: they require pleading sufficient facts to show that the opposing party violated the counterclaimant's legal rights, and they generally provide for the same types and degree of relief as if the counterclaimant initiated the litigation.[447] A defendant may

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[444] *See* Galowitz, *supra* note 210, at 190.

[445] Vigorous defense of eviction cases might also decrease harassment to the extent that the harassment takes the form of filing frivolous suits. *See supra* p. 106. Such harassment is a common practice in gentrifying areas. *Id.*

[446] *See* FED. R. CIV. P. 13 (defining counterclaims); N.Y. C.P.L.R. § 3019 (McKinney 1966) (same); NYC Civ. Ct. Act § 208 (McKinney 2017) (defining NYC Civil Court's jurisdiction over counterclaims). The discussion above focuses on the breadth of permissive counterclaims, but note also that some counterclaims related to the subject of the original lawsuit are compulsory; they must be raised as counterclaims in the original suit or will be waived. *See* Fed R. Civ. P. 13(a) (A "compulsory counterclaim . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . .").

[447] This may, however, be limited by a court's jurisdiction. *See* James A. Hobbs, *Trials and Tribulations: Small Claims Defendants with Over-the-Limit Counterclaims*, DAILY REC. (Dec. 5, 2012), http://nydailyrecord.com/2012/12/05/trials-tribulations-small-claims-defendants-with-over-the-limit-counterclaims [https://perma.cc/V3Z7-

raise as counterclaims any claims he or she might have against the other party, even those seemingly unrelated to the subject of the lawsuit.[448] For example, in a holdover eviction action based on allegations that the lease terminated, in addition to raising defenses disputing the termination of the lease, a tenant could also raise counterclaims regarding substandard conditions. In addition to resolving the lease termination issue, the final court order could potentially include monetary relief for the tenant and an injunction requiring the landlord to repair the property.

Counterclaims can be used quite aggressively.[449] Defenses can deny the plaintiff a judgment and leave both parties in the same position as before the litigation, except for the costs of the litigation process itself, which the plaintiff already planned to incur. Counterclaims, however, do more. A counterclaim can result in a monetary judgment or injunctive order against the plaintiff, thereby putting the plaintiff in a worse position than at the start of the lawsuit, while improving the position of the defendant. This feature makes counterclaims a powerful tool.

The assertion of counterclaims can shift power and economic resources from the plaintiff to the defendant. In this sense, while a successful defense might preserve the status quo of relations between the parties, counterclaims can result in redistribution. This can follow from a court order in favor of the counterclaimant-defendant or, more likely, through a settlement entered into because of the implicit threat of such an order. Zealous use of counterclaims can increase a defendant's leverage in negotiation and potentially improve a poor tenant's bargaining power both inside and outside the courtroom.

Counterclaims can also deter initiation of future litigation. Although in some contexts defense lawyers abuse this opportunity to intimidate vulnerable plaintiffs with meritorious claims,[450] counterclaims could be raised more often in the civil defense of poor clients. This would be particularly useful for dealing with landlords who regularly initiate non-meritorious eviction cases as a form of harassment. Aggressively pleading and litigating counterclaims against that plaintiff could potentially save other tenants from eviction and preserve affordable housing by deterring that landlord's attempts at unlawful displacement. Beyond evictions, in other civil cases in which poor people appear as defendants,[451] zealous use of counterclaims could potentially have a significant impact.

RY55] (discussing strategic choices available to defendant when counterclaims exceed jurisdictional limit).

[448] *See* FED. R. CIV. P. 13; N.Y. C.P.L.R. § 3019.

[449] *See, e.g.*, Tarik F. Ajami et al., *Retaliatory Counterclaims: Turning the Tables on the Overly Aggressive Defendant*, OUTTEN & GOLDEN LLP, https://www.outtengolden.com/sites/default/files/retaliatory_counterclaims.pdf [https://perma.cc/RY8V-UC85] (describing overly aggressive use of counterclaims by employers and how lawyers for plaintiffs-workers can respond).

[450] *See, e.g.*, *id.*

[451] For example, creditors regularly sue in state courts of general jurisdiction, and deterring abusive litigation by creditors without meritorious claims could be an important result of using aggressive counterclaims. *See, e.g.*, Gretchen Morgenson, *Borrowers, Be-*

Counterclaims in civil litigation have no corollary in criminal defense. In a criminal proceeding, the scope of remedies for violations of the law by the police is quite limited. Police misconduct, if challenged by defense counsel, can result in a lighter sentence by a sympathetic judge, acquittal of charges where evidence in support of those charges was obtained improperly, or, if no evidence remains untainted, dismissal. While these results might avoid or lessen the harm of the state's intrusion, they do not generally make positive improvements in poor people's lives.[452] They do not necessarily achieve more than preservation of the status quo. Civil defense, in contrast, can use counterclaims to shift resources from the property owner to a poor tenant.

B. Lessons for Defense Lawyering

The availability of counterclaims in civil litigation has the potential to broaden the scope of the problems that defense lawyers address.[453] Although Intro 214-B on its face addresses only eviction, housing defense counsel can challenge discrimination, harassment, substandard conditions, and other housing problems to some degree. More broadly, although the counterclaim device does not fully address the procedural limits of the defense position,[454] creative and zealous lawyering might be able to overcome some of these limits.

The first limit—that the plaintiff chooses *when* to file the action—might be unavoidable. This creates a significant disadvantage for defendants who might not be fully prepared to litigate their counterclaims at the time the plaintiff chooses to file the complaint. This is true with respect to both the gathering of evidence and the underlying facts. For example, a tenant who is behind in the rent at the moment the landlord files an eviction action will face a risk of displacement even if the tenant usually pays rent on time and asserts meritorious counterclaims related to conditions, discrimination, or harassment. Similarly, if the tenant has paid rent but has not yet had an opportunity to obtain all supporting evidence, that risk remains.

The second limit of defense lawyering—that the plaintiff chooses *where* to file the action—is significant, but there may be cause for cautious optimism. Admittedly, the law and culture of poor people's courts tend to be

ware: The Robosigners Aren't Finished Yet, N.Y. TIMES, Nov. 16, 2014, at BU1 (describing infamous foreclosure abuses); Gretchen Morgenson & Geraldine Fabrikant, *Florida's High-Speed Answer to a Foreclosure Mess*, N.Y. TIMES, Sep. 5, 2010, at BU1 (describing state courts handling foreclosures).

[452] *See* sources cited *supra* notes 432–438.

[453] *Cf.* Butler, *supra* note 432, at 2196 ("*Gideon* diffuses solidarity among the 2.3 million people in the United States who are incarcerated. It changes the subject from mass incarceration and racial subordination to private entitlement.").

[454] *See supra* Part III.B. The potential power of the counterclaim tool will vary by jurisdiction and forum. For example, in New York, counterclaims are available in small claims court so long as they do not exceed $5,000, while tenants facing eviction in California may not raise counterclaims at all.

inherently restrictive.[455] Housing Court judges are likely to be unfamiliar and impatient with complex counterclaims, like those of discrimination. Yet it remains to be seen what a new crop of tenants' lawyers can accomplish. It may be that repeated discovery requests, counterclaims for significant amounts, and tenacious advocacy to enforce orders to repair will provide sufficient incentives to obtain settlements that address tenants' interests.[456] The problem of inhospitable judges could be addressed through judicial education and adjustments in judicial guidelines. Education could include structured, formal trainings, and simply the experience of adjudicating cases in which both sides enjoy lawyers advocating their positions could alter judicial attitudes.[457] Tenants' lawyers could also improve precedent, thereby restricting judicial discretion. These efforts could counteract current forces and shift the culture of Housing Court back toward its original purpose.[458]

Changes in culture would also make it easier to address the third and fourth limitations, which are directly related to each other. Recall the third limitation is that defendants are generally individuals, not groups, and the fourth is that defense lawyering can be more difficult to collaborate with activists than affirmative actions. Both of these could potentially be transformed through increased use of counterclaims, in combination with joinder of claims,[459] and intentional efforts to connect with activists. Although housing defense lawyers generally litigate cases individually, many tenants face the same repeat landlords, and those landlords engage in identical practices throughout their properties.[460] Although uncommon, defensive class actions are theoretically possible and might be available in some of these instances.[461] Even when defendants do not meet the requirements for class cer-

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[455] Removal is not as easily available from poor people's courts as it is in other state courts. In eviction proceedings in particular, judges tend to give significant weight to the interests of landlords in obtaining speedy resolution. *See* Hobbs, *supra* note 447 (summarizing judicial attitudes in small claims courts); c*f.* 28 U.S.C. § 1441 (describing general rule for removal of civil actions).

[456] For a less optimistic view, *see* Steinberg, *supra* note 359, at 499 ("[I]t is also entirely possible that an increase in full representation would catalyze a retrenchment in favorable outcomes rather than spurring an expansion of positive results. . . . [It may be that] the infrequency of such representation is artificially inflating the outcomes for the lucky few who obtain it.").

[457] *See, e.g.*, Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 299 (1996) (highlighting examples of focused case pressure strategy that successfully changed practices of local welfare officials and housing court judges); Gary Bellow & Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633 at 1659–63 (1995) (describing focused-case approach to changing climate for evictions).

[458] *See* Galowitz, *supra* note 210, at 196 (explaining that NYC Housing Court was originally created as a forum for tenants to initiate substandard conditions claims against landlords).

[459] *See* N.Y. C.P.L.R. § 601 (McKinney 1966) (defining joinder).

[460] *See, e.g.*, Travieso v. Gutman, Mintz, Baker & Sonnenfeldt, P.C., No. 94 CV 5756 (JBW), 1995 WL 704778, at *1 (E.D.N.Y. Nov. 16, 1995) (tenant class action).

[461] *See* Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73 *passim* (2010).

tification, parties in special instances might be able to join their cases and have them heard by the same judge.

Grassroots organizations have identified the need for safe, affordable housing as among their chief concerns, and have built successful campaigns to challenge the practices of particularly egregious landlords.[462] Housing activists are already organizing around defensive lawsuits by picketing outside the homes of landlords engaged in bad-faith evictions.[463] Although lawyers have a more established history of collaborating with activists on affirmative litigation, they are increasingly working with organizers and community groups on a wide array of activities,[464] and housing defense lawyers could commit to coordinating eviction defense litigation with local tenant activism.

In light of procedural tools like counterclaims, which are uniquely available in civil defense, appointment of housing defense lawyers holds significant potential for advancing positive social outcomes, perhaps even more than appointment for criminal defense. The question remains whether affirmative representation might also be necessary to fully realize the goals of the new *Gideon*.[465]

Conclusion

A key area of attention in today's civil *Gideon* movement is the right to housing defense counsel. This Article has examined new legislation in NYC that will provide appointed counsel to tenant-defendants at risk of losing their homes. This case study offers several insights into the potential of appointing civil defense counsel in housing cases and beyond.

The NYC housing defense statute borrows an emphasis on defense counsel from the old *Gideon* model, but it also introduces important new considerations. First, its creators explicitly aim to improve substantive outcomes, not just procedural rights. Second, it embraces interests of particular importance to Black women, expanding on the equality principle underlying the right to counsel. Third, it seeks to ensure that the rule of law is respected by private, not just government, actors.

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[462] *See, e.g.*, NYU/Wagner Res. Ctr. for Leadership in Action, *Engaging Traditionally Disenfranchised Residents in Community Development* 6, https://wagner.nyu.edu/files/leadership/FAC.pdf [https://perma.cc/J9UH-TCMA] (describing demonstrations by non-profit organization, Fifth Avenue Committee); Community Action for Safe Apartments, https://casapower.org [https://perma.cc/3MA6-QHEP] (describing local, tenant-led campaigns).

[463] *Id.*

[464] *See* Cummings & Eagly, *supra* note 442.

[465] One might argue that public agencies, rather than appointed counsel, should pursue affirmative litigation. Indeed, some agencies already do. Yet public enforcement brings its own limitations. *See, e.g.*, Eugene R. Gaetke & Robert G. Schwemm, *Government Lawyers and Their Private "Clients" Under the Fair Housing Act*, 65 Geo. Wash. L. Rev. 329 (1997) (highlighting how triangular relationship between government lawyers, agencies, and private individuals can result in inadequate representation of the individuals).

Despite moving beyond the old *Gideon* model, the new version still reveals limits of appointment of defense lawyers as a solution for social problems. Intro 214-B prioritizes preventing immediate housing losses over tackling other pervasive housing threats such as discrimination, harassment, and substandard conditions, which could potentially be addressed through affirmative litigation. In spite of the limits of defense lawyering, procedural devices uniquely available in civil litigation make the civil right to counsel particularly promising.