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Personal Safety or Homelessness: The Choice a Domestic Violence Victim has to Fight an Eviction Proceeding Without Counsel

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**PERSONAL SAFETY OR HOMELESSNESS: THE
CHOICE A DOMESTIC VIOLENCE VICTIM HAS TO
MAKE WHEN SHE HAS TO FIGHT AN EVICTION
PROCEEDING WITHOUT COUNSEL**

Amanda Anna Saber*

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* J.D., Santa Clara University School of Law; B.A. Economics and Political Science, UC Santa Barbara. I thank the International Human Rights Clinic at Santa Clara Law School for giving me the opportunity to work on issues related to violence against women, domestic violence, and the interplay between domestic violence and homelessness. To the Santa Clara Law Review Volume 58 Board, I thank you for your tireless work, not only on this Note, but for all the articles we have had the pleasure of publishing together. It has been an honor serving as your Senior Managing Editor. An eternal thank you to my Dad, Mom, Mina, and Ryan for their unwavering support throughout law school and of my career aspirations.

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INTRODUCTION

“You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to an attorney. If you cannot afford an attorney, one will be provided for you.”¹

Without ever taking a law school course, the *Miranda* warnings—adapted from the case of *Miranda v. Arizona*²—are known to most, likely due to its use in crime-drama television and film.³ These words enshrine constitutional protections granted to criminal defendants who face the potential loss of liberty.⁴ Since *Miranda* was decided in 1966, the law mandates that all criminal defendant be read the *Miranda* warning upon arrest so that they are advised and informed of their rights, including their right to an attorney.⁵ Beyond the right to an attorney during a custodial interrogations, criminal defendants have a right to an attorney during trial.⁶ These rights ensure that an individual who is faced with a potential loss of liberty is given certain protections. Beyond criminal proceedings, courts have held that the subject matter of certain civil proceedings involve rights so sacred⁷ that their loss can feel like a loss of liberty. Nevertheless, despite the comparison, these indigent civil litigants are not entitled to the same protections.

Because this right is limited to the criminal context, the National Coalition for A Civil Right to Counsel (NCCRC)⁸ has modified the

1. *What are Your Miranda Rights?*, MIRANDAWARNING.ORG, <http://www.mirandawarning.org/whatareyourmirandarights.html> (last visited Apr. 29, 2018).

2. *Miranda v. Arizona*, 384 U.S. 436, 504 (1966).

3. *See e.g.*, 21 JUMP STREET (Columbia Pictures 2012).

4. *See* U.S. CONST. amend. V.

5. *History of Miranda Warning*, MIRANDAWARNING.ORG, <http://www.mirandawarning.org/historyofmirandawarning.html> (last visited Dec. 29, 2016) (*Miranda* warnings developed to ensure that a defendant who is in a weaker position than the state is not intimidated into making statements against his or her interest).

6. U.S. CONST. amend. VI.

7. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that parental rights are considered sacred and “essential to the orderly pursuit of happiness by free men”); *see also* *May v. Anderson*, 345 U.S. 528, 533 (1953) (confirming that parents’ rights are “far more precious . . . than property rights”).

8. *The Civil Right to Counsel*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/about> (last visited Jan. 5, 2017). The NCCRC is funded by the

Miranda warning to more accurately portray the right to appointed counsel: “If you cannot afford an attorney, one will be appointed for you, unless you are losing your children, or your home, or your healthcare.”⁹ A criminal defendant faces jail time and a conviction. A housing eviction defendant faces homelessness, the loss of safety and security, and a potentially endless cycle of poor health and the inability to maintain employment.¹⁰ Both indigent individuals likely feel helpless and hopeless in defending themselves; the only difference is that a criminal defendant receives the benefit of appointed counsel.

This Note addresses the problem that arises when a victim of domestic violence is being evicted based on repeated incidences of domestic violence and is forced to fight her¹¹ eviction proceeding without the assistance of counsel. Part I discusses the right to housing, the Supreme Court case which rejected a blanket right to counsel in civil cases,¹² the origins of the right to civil counsel movement, existing United States law that grants the right to counsel in a limited civil setting, and a first-of-its-kind New York City ordinance addressing the right to counsel in housing eviction cases.¹³

Part II discusses the current law as it relates to victims of domestic violence, as well as existing protections for such victims.¹⁴ Part III illustrates the stark disadvantages faced by victims of domestic violence who are forced to defend their eviction cases pro se, while the landlord is represented by counsel.¹⁵ Part IV analyzes why pro bono and legal aid

Public Justice Center, and is an organization whose mission is to “expand recognition and implementation of a right to counsel for indigent litigants in civil cases involving basic human needs.” *Id.*

9. *Home Page*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS., <http://civilrighttocounsel.org/> (last visited Jan. 5, 2017).

10. Fact Sheet, *Homelessness & Health: What’s the Connection?*, NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL (Jun. 2011),

http://www.nhchc.org/wp-content/uploads/2011/09/Hln_health_factsheet_Jan10.pdf. A person with a long bout of illness may become unemployed after being unable to maintain work. In some cases, the unemployment may force the individual to drain her savings account, and eventually, after unemployment continues or a sustained period, the person cannot pay rent, is evicted, becomes homeless, and health problems are exacerbated. This may lead to an endless cycle of homelessness. *Id.*

11. *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <http://ncadv.org/learn-more/statistics> (last visited Jan. 7, 2017). The trend shows that more victims of domestic violence are female. As such, this comment employs the feminine pronoun when referring to the victim. The author recognizes that men can also be victims of domestic violence.

12. *Lassiter v. Dep’t of Soc. Servs. of Durham City, N.C.*, 452 U.S. 18, 28-29 (1981) (holding that appointment of counsel in civil cases will be determined based on a case-by-case analysis).

13. See *infra* Part I.

14. See *infra* Part II.

15. See *infra* Part III.

are not sufficient, the existing support for the right to counsel in civil cases, and explain the main arguments opponents of the right to appointed counsel in civil cases employ.¹⁶ Finally, Part V proposes a framework for adopting a right to counsel in such circumstances.¹⁷ This proposal will focus on: 1) the eligibility criteria of the victim seeking to receive appointment of counsel; 2) the funding mechanism; 3) provisions designed to protect the rights of victims; and 4) safeguards in place to prevent scraping the bottom of the attorney fund created.

I. BACKGROUND

During my second year at Santa Clara University School of Law, I participated in the International Human Rights Clinic. One of the projects I worked on was data collection for a report examining homelessness in Santa Clara County through a gender-based lens that the clinic was preparing for the Santa Clara County Office of Women's Policy. The goal of this report was to supplement the *Home Not Found* National Report¹⁸ by focusing on the causes of homelessness that are unique to women. The data for the report came primarily from 1) conducting a survey with the survey population being women who were formerly homeless but currently placed in semi-permanent or permanent housing; 2) conducting focus groups with currently homeless women; 3) interviewing the local organizations that provide services to the homeless population.¹⁹ A common theme amongst the three sources of data was that domestic violence is the leading reason women become homeless.²⁰

A victim of domestic violence who is living with her partner is faced with two choices: leave her abuser or stay and take the abuse.²¹ Leaving the abuser is likely to result in subsequent homelessness, especially if the house is in her abuser's name or if she cannot afford to pay rent without the income of her abuser.²²

Furthermore, domestic violence-focused service providers emphasize that landlords are reluctant to accommodate victims of

16. *See infra* Part IV.

17. *See infra* Part V.

18. Daniel Flaming et al., *Home Not Found: The Cost of Homelessness in the Silicon Valley*, ECON. ROUNDTABLE (2015), http://destinationhomescc.org/wp-content/uploads/2015/05/er_homenotfound_report_6.pdf.

19. *See, e.g.*, Interview by Santa Clara L. Int'l H.R. Clinic with Andrea Urton, Chief Executive Officer, Home First Services of Santa Clara Cty., in San Jose, Cal. (Oct. 21, 2016) [hereinafter Interview with Andrea Urton].

20. *Id.*

21. *Id.*

22. *Id.*

domestic violence.²³ From the interviews, I learned: either the landlord does not want to rent to a victim out of worry that the abuser will constantly show up to the apartment and cause chaos or the landlord wants to evict a victim because the domestic violence incident disturbs the peace of the other tenants.²⁴ This means that once she becomes homeless due to domestic violence, the victim will find it difficult to find a new place to live.

When asked how this problem could be controlled, the service providers focused on some mechanism where a victim of domestic violence would not be treated as a tenant who failed to pay rent, but rather as a victim of violence.²⁵ Further, access to legal counsel, who at minimum, could inform the victims of their rights as a tenant-victim would mean that these women could have a chance to win the fight against their landlord.²⁶

When a landlord's solution to domestic violence is an eviction, these victims must make the difficult choice of incurring abuse or becoming homeless. This appalling choice showcases the need for victim protection and inspired this Note topic.

A. The Right to Housing

“While the Constitution of the United States ensures many rights, housing is not one of them.”²⁷ Comparatively, public international law recognizes the right to housing through various human rights' treaties.²⁸ Despite the presence of these international treaties, the United States is not a party to these treaties.²⁹ As such, these provisions are not binding

23. *Id.*

24. *Id.*

25. Interview with Andrea Urton, *supra* note 19.

26. *Id.*

27. Chester Hartman, *The Case for a Right to Housing*, SHELTERFORCE: THE VOICE OF CMTY. DEV. (2006), https://shelterforce.org/2006/11/23/the_case_for_a_right_to_housing/ (last visited Apr. 6, 2018).

28. See International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3, at art. 11(1) [hereinafter ICESCR]; Convention on the Elimination of Discrimination Against Women, Sept. 3, 1981, 1249 U.N.T.S. 13; International Convention on the Elimination of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195; Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3.

29. *United States Ratification of International Human Rights Treaties*, H.R. WATCH (Jul. 24, 2009, 12:24 PM), <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties>. The United States has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women; or the Convention on the Rights of Child, all of which include provisions guaranteeing the right to adequate housing. *Id.*; see also *Status of Ratification Interactive Dashboard*, United Nations Human Rights Office of the High Commissioner <http://indicators.ohchr.org/> (last visited May 28, 2018) (follow “Select a Country to View Profile” hyperlink; then select “United States of America” subject area)

on the United States.³⁰ Nevertheless, despite an absence of a national right to housing, localities have progressed toward adopting ordinances influenced by international human right treaties which include the right to housing.³¹

The International Covenant of Economic, Social, and Cultural Rights acknowledges the right to adequate housing.³² Adequate housing has been interpreted by the UN Committee tasked with ensuring compliance with the treaty as including: security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, and location.³³ Security of tenure ensures that the individual is entitled to “legal protection against forced eviction, harassment and other threats.”³⁴

The international framework discusses that the right to housing should not be interpreted narrowly, but rather the right to adequate housing “should be seen as the right to live somewhere in peace, security, and dignity.”³⁵ This broad interpretation is urged because the right to housing is linked to other fundamental human rights.³⁶ Under this framework, adequate housing can be considered to be a basic need. It is important to frame housing as a “basic need” because there is a stronger argument in favor of counsel in civil matters when a “basic need” is impugned. This Note specifically focuses on the right to counsel

Additionally the United States has not ratified the International Covenant on Economic, Social, and Cultural Rights which also guarantees the right to adequate housing. *Id.*

30. States are only bound by the treaties that that state has ratified. See Convention on the Rights of the Child, *Signature, Ratification, and Accession: The Process of Creating Binding Obligations on Governments*, UNICEF (May 19, 2014), https://www.unicef.org/crc/index_30207.html.

31. See, e.g., Mark Noack, *Council Votes to Make Mountain View a Human Rights City*, MOUNTAIN VIEW VOICE (Dec. 20, 2016, 1:41 PM), <https://www.mv-voice.com/news/2016/12/20/council-votes-to-make-mountain-view-a-human-rights-city>; *Convention on the Elimination of all Forms of Discrimination Against Women, Background*, CITIES FOR CEDAW, <http://citiesforcedaw.org/background/> (last visited Jan. 5, 2017) (Cities for CEDAW is a national movement to encourage cities to adopt ordinances incorporating the rights from the Convention on the Elimination of Discrimination Against Women); *County of Santa Clara to Unveil the CEDAW Women’s Bill of Rights*, CTY. OF SANTA CLARA (Aug. 23, 2017, 1:00 PM), <https://www.sccgov.org/sites/opa/newsroom/Pages/WomenBillofRights.aspx>.

32. ICESCR art. 11(1).

33. U.N. Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), U.N. Doc. E/1992/23 (Dec. 13, 1991), <http://www.refworld.org/docid/47a7079a1.html> [hereinafter General Comment No. 4].

34. Off. U.N. High Comm’r H.R. & U.N. Habitat, *The Right to Adequate Housing*, U.N. Fact Sheet No. 21/Rev.1 (May 2014), http://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf.

35. General Comment No. 4, *supra* note 33.

36. Off. U.N. High Comm’r H.R. & U.N. Habitat, *supra* note 34.

in eviction proceedings, where a forced evictee is at risk of losing their home—a basic need.

B. Origins of the Right to Civil Counsel: The Lassiter Decision

The right to counsel in criminal cases is derived from an established body of law.³⁷ Comparatively, the right to appointed counsel in civil proceedings is one without robust support.³⁸ Specifically, the United States Supreme Court has previously rejected a blanket right to counsel in civil cases, adopting, instead, case by case review.³⁹ In *Lassiter*, after Ms. Lassiter was convicted of second degree murder, the Department of Social Services petitioned to terminate Ms. Lassiter’s parental rights.⁴⁰ During the hearing to contest the termination, the trial court held that Ms. Lassiter had ample time to find counsel prior to the hearing, and thus there would be no postponing of the hearing.⁴¹ Thus, Ms. Lassiter defended against termination of child custody without the assistance of counsel.⁴² On appeal, after her child custody rights were terminated, Ms. Lassiter argued that because she was indigent, the “Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her.”⁴³ The appellate court denied review.⁴⁴ The United States Supreme Court affirmed the lower court’s holding that appointment of counsel in civil cases would be done by a case-by-case basis when the issue was termination of parental rights.⁴⁵ Interestingly, despite rejecting a blanket right to counsel in such cases, the Court held that parental rights were “important.”⁴⁶ The dissent criticized the

37. See *Powell v. Alabama*, 287 U.S. 45 (1932) (holding that the right to appointed counsel only applied in capital cases); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (holding that the right to appointed counsel extended to all federal criminal cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the sixth amendment does not distinguish between the capital and non-capital cases); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the accused cannot be subjected to actual imprisonment unless provided with counsel); *Alabama v. Shelton*, 535 U.S. 654 (2002) (holding that a suspended prison sentence cannot be imposed if the underlying conviction did not involve counsel representation).

38. See *infra* Part IV.E (while there is general support for *Gideon* rights, the disagreement concerning the need for civil right to counsel means that the development has been slower).

39. *Lassiter v. Dep’t of Soc. Servs. of Durham City, N.C.*, 452 U.S. 18, 28–29 (1981).

40. *Id.* at 20–21.

41. *Id.* at 21–22.

42. *Id.* at 22.

43. *Id.* at 24.

44. *Id.*

45. *Lassiter*, 452 U.S. at 28–29.

46. *Id.* at 27 (acknowledging that “the companionship, care, custody and management of his or her children” is an important interest that “undeniably warrants deference and, absent a

majority for concluding that even though parental rights were important, the “deprivation [of counsel] somehow [was] less serious than” cases in which the appointment of counsel was required simply because the parent’s personal liberty was not at stake.⁴⁷

The *Lassiter* cases created a presumption against the appointment of counsel in civil cases where the defendant’s “physical liberty” was not at risk.⁴⁸ As such, there is no blanket right to counsel in civil cases involving child custody or housing evictions, because the defendant in those types of cases does not face a loss of physical liberty, as traditionally defined.

The *Lassiter* case arguably served as a catalyst to action for those supporting the right to counsel in civil cases. While *Lassiter* was pending before the Supreme Court, the American Bar Association (ABA) submitted an amicus brief⁴⁹ wherein the ABA focused on the disadvantages pro se defendants⁵⁰ face in a system where, “skilled counsel is needed to execute basic advocacy functions: to delineate the issues, investigate and conduct discovery, present factual contentions in an orderly manner, cross-examine witnesses, make objections and preserve a record for the appeal.”⁵¹ In other words, a pro se litigant who is unfamiliar with the legal system is immediately disadvantaged against the lawyer representing the opposing side regardless of the case’s merit. The *amicus brief* further argued that access to counsel is necessary to ensure litigants receive a fair trial that comports with the demands of procedural due process.⁵² The brief also cited to a century-long robust tradition of European common law that provided legal assistance to indigent defendants in civil cases.⁵³ By comparison, the United States has traditionally treated access to counsel as a luxury⁵⁴ with limited

powerful countervailing interest, protection” (quoting *Stanley v. Illinois*, 405 U.S. 645, 651(1972)).

47. *Lassiter*, 452 U.S. at 40.

48. *Id.* at 31.

49. Lora J. Livingston, *Report to the House of Delegates*, 114 A.B.A. COMM. ON LEGAL AID & INDIGENT DEFENDANTS (2018), http://www.abajournal.com/images/main_images/Resolution114.pdf [hereinafter *Report to the House of Delegates* 2018].

50. Pro se means “for one’s own behalf” A pro se litigant is one who chooses to represent him or herself in the court proceeding. “*Pro Se*,” WEST’S ENCYCLOPEDIA OF AMERICA LAW, 2D EDITION (2008) <https://legal-dictionary.thefreedictionary.com/Pro+Se> (last visited May 28, 2018).

51. Howard H. Dana, *Report to the House of Delegates*, 112A A.B.A. H.D. 3 (2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf [hereinafter *Report to the House of Delegates* 2006].

52. *Id.*

53. *Id.* at 3–4.

54. See *People are Talking . . .*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/about/people_are_talking (last visited Mar. 1, 2018).

access to appointed counsel in civil cases.⁵⁵ For example, where states have passed legislation granting a statutory right to counsel, the right is most often limited to parents in dependency proceedings and to prospective wards in guardianship proceedings.⁵⁶ Beyond these two instances, there are certainly other types of proceedings that threaten the loss of “basic needs” and therefore similarly warrant a right to counsel.⁵⁷

Since *Lassiter*, the civil right to counsel movement which originated as the “Civil Right to Gideon” movement⁵⁸ has strived to “provide legal counsel, as a matter of right and at public expense, to low-income persons in civil legal proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”⁵⁹ Currently, the NCCRC spearheads the civil right to counsel movement.⁶⁰ NCCRC’s mission statement is to “support, develop, and coordinate advocacy to expand recognition and implementation of a right to counsel for indigent litigants in civil cases involving basic human needs.”⁶¹ The NCCRC has been instrumental in advocating for and developing what form the civil right to counsel takes.⁶² Central to NCCRC’s efforts is advocating for the right to counsel in proceedings where an individual’s basic needs are at stake.⁶³

C. Post *Lassiter* and the Push for the Right to Counsel

Following the *Lassiter* decision, the American Bar Association has taken an active role in advocating for the right to counsel in civil cases and State Legislatures have followed suit, enacting regulations governing the right to counsel.

On August 7, 2006, the American Bar Association House of

55. *See id.*

56. *Report to the House of Delegates 2006*, *supra* note 51, at 7.

57. *Id.*

58. The original name of the movement is in reference to the United States Supreme Court case of *Gideon v. Wainwright*, which held that the Sixth Amendment right to counsel does not only apply to capital cases. 372 U.S. 335 (1963).

59. *Philadelphia Bar Association’s Civil Gideon Corner*, PHILA. BAR ASS’N, <http://www.philadelphiabar.org/page/CivilGideon> (last visited Jan. 8, 2017).

60. *A Civil Right to Counsel: What We are Fighting for*, NAT’L COAL. FOR THE CIVIL RIGHT TO COUNSEL, <http://civilrighttocounsel.org/about> (last visited Jan. 4, 2017).

61. *Civil Right to Counsel*, PUB. JUST. CTR., <http://www.publicjustice.org/our-work/civil-right-to-counsel> (last visited Jan. 1, 2017).

62. *See* John Pollock & Mary Deutsch Schneider, *A Retrospective on the National Coalition for a Civil Right to Counsel*, 47 CLEARINGHOUSE REV. J. OF POVERTY L. & POL’Y 35, 39 (2013). http://civilrighttocounsel.org/uploaded_files/38/Retrospective_on_NCCRC_Pollock_.pdf.

63. *Report to the House of Delegates 2006*, *supra* note 51, at 7. The ABA has continued to support the right to counsel in cases based on the “basic needs” framework. *Report to the House of Delegates 2018*, *supra* note 51.

Delegates unanimously passed Resolution 112A.⁶⁴ The resolution states:

[T]he American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low-income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.⁶⁵

This resolution was passed following a report submitted by the Task Force on Access to Civil Justice who recommended the passage of such resolution as the appropriate next step to further the ABA's support of "achieving equal justice in the United States."⁶⁶ Furthermore, the unanimous passing of the resolution has led to increased publicity and support for civil right to counsel.⁶⁷

Despite the ABA's unanimous resolution, states have not shared the ABA's commitment and have been slow to enact legislation pertaining to the civil right to counsel. As shown by the NCCRC Status Map, a small number of states have adopted provisions granting the right to counsel in civil cases, and even then the right is restricted to limited circumstances.⁶⁸ As the map depicts, the most prevalent type of civil proceeding in which a defendant is entitled to counsel is child custody disputes.⁶⁹ This Note, however, will focus on legislation specific to domestic abuse victims and housing evictions.

1. Laws Pertaining to Victims of Domestic Violence

Ten states and Washington D.C. have adopted legislation that pertains to granting some form of guaranteed counsel to victims of domestic violence.⁷⁰ New York, specifically, has adopted a categorical

64. *Report to the House of Delegates 2006*, *supra* note 51, at 1.

65. *Id.*

66. *Id.* at 1–2.

67. Pollock & Schneider, *supra* note 62, at 39.

68. *Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., <http://www.civilrighttocounsel.org/map> (last visited Jan. 2, 2017) [hereinafter *Status Map*]. This interactive map allows the development of civil right to counsel laws in various jurisdictions relating to various subject matters where the civil right to counsel has been relevant.

69. *Id.* (follow "Right to Counsel Status" hyperlink; then select "Custody Disputes – Children" subject area).

70. *Id.* (follow "Right to Counsel Status" hyperlink; then select "Domestic Violence – Alleged Victim" subject area). The map shows that Alaska, California, Idaho, Illinois, Nebraska, New Jersey, New York, Texas, Washington, and Wyoming, as well as Washington D.C. have legislation which grants the right to counsel of provides for the appointment of counsel in some fashion. *Id.*

right to counsel with respect to the alleged victim of domestic violence.⁷¹ Under New York law, Article 8 provides a right to counsel for either party in a domestic violence proceeding in family court, including during the appeal.⁷² When the proceeding takes place in civil, rather than in family court, the parties have the same rights as they do in family court.⁷³

Four jurisdictions, California, Idaho, Wyoming, and Washington D.C. have discretionary appointment of counsel for victims of domestic violence.⁷⁴ California law states that it is in the court's discretion to appoint counsel in cases relating to the enforcement of protective orders in a domestic violence case and the court may also order the party violating the protective order to pay counsel fees.⁷⁵ In Idaho, the court can discretionarily order assistance of counsel if the judge finds that it is necessary for both parties to be represented by counsel.⁷⁶ Similar to Idaho, Wyoming's law allows the court discretion in ordering counsel in a hearing for a protective order due to domestic abuse.⁷⁷ This counsel is designated to "assist and advise" the petitioner.⁷⁸ Furthermore, the Wyoming statute permits the judge to require the respondent to bear the burden of the attorney's fees.⁷⁹ Lastly, in Washington D.C., the Attorney General may discretionarily provide counsel in cases dealing with civil protection orders.⁸⁰

Finally, six states, Washington, Nebraska, Illinois, New Jersey, Texas, and Alaska, grant a qualified right to appointment of counsel.⁸¹

In Washington, when a victim of domestic violence alleges a violation of a protective order and is unable to afford private counsel, if the victim requests assistance, the prosecuting attorney "shall initiate and

71. See N.Y. FAM. CT. ACT § 262(a)(ii) (LexisNexis 2012); see also N.Y. FAM. CT. ACT § 1120(a) (LexisNexis 2010).

72. N.Y. FAM. CT. ACT § 1120(a) (LexisNexis 2010).

73. N.Y. JUD. LAW § 35(8) (LexisNexis 2017) (providing for fees to be paid to appoint counsel when the supreme court exercises jurisdiction over family court matter "whereby, if such proceedings were pending in family court, such court would be required by [section 262] of the family court act to appoint counsel").

74. *Status Map*, *supra* note 68 (follow "Right to Counsel Status" hyperlink; then select "Domestic Violence – Alleged Victim" subject area).

75. CAL. FAM. CODE § 6386 (West 2018).

76. IDAHO CODE ANN. § 39-6306(1) (West 2018).

77. WYO. STAT. ANN. § 35-21-103(e) (West 2018).

78. *Id.*

79. WYO. STAT. ANN. § 35-21-103(h) (West 2018).

80. D.C. CODE § 16-1003(a)(3) (West 2018).

81. *Status Map*, *supra* note 68 (follow "Right to Counsel Status" hyperlink; then select "Domestic Violence – Alleged Victim" subject area). The State of Texas has a right to counsel for petitioner of protective orders. See *Striedel v. Striedel*, 15 S.W.3d 163, 167 n.2 (Tex. App. 2000). Because the state of Texas's right focuses on the alleged abuser rather than the alleged victim, the Texas statute will not be addressed in this note. *Id.* at 167.

prosecute a contempt proceeding if there is probable cause to believe that the violation occurred.”⁸² Nebraska, a unique state in terms of its statute, requires the department⁸³ to provide emergency crisis intervention services to victims including “emergency legal counseling and referral.”⁸⁴

In Illinois, counsel must be appointed for the estate of the domestic violence victim when the alleged abuser is the individual who has been the prior guardian, executor, or administrator of the estate.⁸⁵ The Illinois statute does not provide counsel to the victim herself, however, its funding mechanisms for the court-appointed lawyer for the estate of the victim can be used as a template for how other jurisdictions can fund its own appointed counsel systems.⁸⁶ The Domestic Relation Legal Funding Act allows court fees to be used to set up a fund to pay for the appointment of counsel for the victims in protective order cases.⁸⁷

Under New Jersey Law, a minor who is a victim of domestic violence shall be granted appointment of counsel, particularly when the perpetrator of the domestic violence is an adult who has retained an attorney.⁸⁸ Specifically, the imbalance in legal expertise between the two parties necessitates the appointment of counsel.⁸⁹

Lastly, the Alaskan statute grants the court discretion to appoint an attorney to represent a minor during a protective order proceeding in which the minor is the alleged victim.⁹⁰

Many of the statutes that relate to domestic violence, whether they are categorical, discretionary, or qualified, pertain to the limited scenarios of a protective order proceeding or when the victim of the alleged violence is a minor. This is because most proceedings that are brought by a private person allege a violation of a protective order.

82. WASH. REV. CODE § 26.50.120 (West 2018).

83. NEB. REV. STAT. § 42-903(2) (West 2018) (the department refers to the Department of Health and Human Services).

84. NEB. REV. STAT. § 42-907(4) (West 2018) (requiring the department to provide 72 hours of crisis intervention services).

85. 750 ILL. COMP. STAT. 60/227(d) (LexisNexis 2018).

86. *See, e.g.*, 705 ILL. COMP. STAT. 130/15(a) (LexisNexis 2018).

87. *Id.*

88. *J.L. v. G.D.*, 29 A.3d 752, 759 (N.J. Super. Ct. App. Div. 2010).

89. *Id.* at 756 (finding compelling that, “at one table is an adult defendant, standing next to an experienced and privately retained defense attorney of his choice. At the other table is a minor plaintiff, standing next to an empty chair. There is no basis for this court to conclude that this minor plaintiff is in any way equipped to conduct this legal proceeding by herself, all alone against a represented adult. She has no legal experience with concepts such as direct and cross examination, introduction of evidence, or legal objections in a domestic violence case.”).

90. ALASKA STAT. § 18.66.100 (1996) (West 2017).

2. Law Pertaining to Housing Evictions

Unlike domestic violence cases, far fewer states have enacted legislation requiring the appointment of counsel in housing cases.⁹¹ Thus far, only Massachusetts and New York have legislation related to housing evictions.⁹²

In July 2017, New York City became the first jurisdiction granting a categorical right to housing when the Intro 214-b bill was approved by city council and signed by the mayor.⁹³ This bill requires that the city provide counsel for all low-income tenants who are at two-hundred percent of the poverty line and are facing eviction proceedings.⁹⁴ In March 2014, Intro 214-b was introduced by City Council Members Mark Levine and Vanessa Gibson.⁹⁵ In June 2014, the Right to Counsel NYC Coalition was formed and began advocating for the enactment of Intro 214-b.⁹⁶ This bill is in its early stages of implementation, but pledges to not only assist tenants who face homelessness as a result of an eviction,⁹⁷ but to be cost-saving for taxpayers as well, saving the city approximately \$320 million annually.⁹⁸ This savings is likely premised on the fact that if a tenant has counsel, more tenants will win in eviction proceedings, which would reduce the overall amount of homelessness. As such, the city will be able to save money because it will not have to expend as many resources on shelters and will not have to deal with the secondary costs associated with homelessness. For example, it is anticipated that

91. *Status Map*, *supra* note 68 (follow “Right to Counsel Status” hyperlink; then select “Housing – Evictions” subject area).

92. *Id.*; see also *MA Trial Court Issues Historic Right to Counsel Decision*, NAT’L COAL. FOR THE CIV. RIGHT TO COUNS. (Dec. 17, 2017) http://www.civilrighttocounsel.org/major_developments/1288 (discussing a recent trial court decision where Judge Fein appointed an attorney to serve as guardian ad litem for a tenant in an eviction proceedings based on the judge’s conclusion that “nothing short of appointing counsel suffices to protect the tenant’s rights under the federal and state constitutions).

93. *NYC is First Place in Country to Provide Right to Counsel to Tenants in Housing Court*, NAT’L COAL. FOR THE CIV. RIGHT TO COUNS. (Aug. 11, 2017) http://www.civilrighttocounsel.org/major_developments/894.

94. Abigail Savitch-Lew, *City Tackles Roll-Out of Right to Counsel in Housing Court*, CITYLIMITS.ORG (Jan. 17, 2018) <https://citylimits.org/2018/01/17/city-tackles-roll-out-of-right-to-counsel-in-housing-court/>.

95. *About*, RIGHT TO COUNS. N.Y.C. COAL., <http://www.righttocounselnyc.org/about> (last visited Jan. 11, 2017).

96. *Id.*

97. *Housing Justice: New Yorkers Should Have a Right to Counsel in Eviction Proceedings*, RIGHT TO COUNS. N.Y.C. COAL., https://d3n8a8pro7vhm.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1481217027/RTC_FACT_SHEET.pdf?1481217027 (last visited Jan. 10, 2017). For more than twenty-five percent of individuals and families within the New York City shelter system, eviction was listed as the “immediate, triggering cause” of homelessness. *Id.*

98. *Id.*

legal representation will cost between \$1,600 and \$3,200 per case.⁹⁹ By comparison, a single bed in a New York City shelter costs \$34,000 per year to maintain and the cost of building a single affordable housing unit is over \$250,000.¹⁰⁰

Outside of New York City which has a categorical right to counsel, the State of New York currently has a limited, qualified right to counsel in housing eviction cases.¹⁰¹ For example, the court in *444 W. 54th Street Tenants Association v. Costello* exercised its discretion and inherent power to “assign counsel in a ‘proper case’” to appoint counsel for defendant Costello on the basis that he was an active duty member of the armed forces.¹⁰² The *Costello* court found that being evicted from a home is the type of civil litigation that “drastically affect[s] indigent litigants” and thus, it was appropriate to conduct a due process balancing as required in *Lassiter*.¹⁰³ Ultimately, the court in *Costello* found that the *Lassiter* presumption had been rebutted, and thus appointment of counsel was required.¹⁰⁴

Beyond New York City’s categorical ordinance, New York’s qualified right, and the single trial court decision from Massachusetts, the right to counsel in housing eviction matters is sparse. Certainly, there is no state that has adopted legislation that speaks to the intersection between domestic violence victims and soon-to-be evicted tenants.

D. Domestic Violence Victims and the Need for Special Protections

The tenant-landlord relationship is often tenuous. It is only natural that the tenant feels restricted by the landlord and that the landlord must balance the needs of all the tenants to effectively run a rental property. This tension is only exacerbated when incidents of domestic violence occur on the premises. The landlord, understandably, wants to ensure that such an incident does not adversely affect other tenants. But that cannot come at the cost of the safety of the tenant who is a survivor of domestic violence.

99. *Id.*

100. *Id.*

101. *Status Map, supra* note 68 (follow “Right to Counsel Status” hyperlink; then select “Housing – Eviction” subject area). While the passing of the New York City ordinance has elevated the right to counsel to “categorical,” the rest of the State of New York has not followed suit and thus, the State’s right to counsel is still a qualified, limited right. *Id.* As such, reference’s to New York’s limited or qualified right refers to the protections afforded by New York state law.

102. *444 W. 54th Street Tenants Ass’n. v. Costello*, 523 N.Y.S.2d 374, 377–79 (Civ. Ct. 1987).

103. *Id.* at 379.

104. *Id.* at 381.

Some jurisdictions have ordinances that can negatively impact both the tenant and the landlord when the tenant victim of domestic violence calls 911.¹⁰⁵ For example, in Norristown, Pennsylvania, a local ordinance makes a landlord responsible for a tenant's "disorderly conduct."¹⁰⁶ Specifically, the ordinance states that if a tenant makes three 911 calls within a four-month span, then she can be evicted and the landlord's rental license may be suspended.¹⁰⁷ This ordinance requires landlords to become tangled with the affairs of a tenant and essentially police the tenant. Furthermore, the tenant, who knows that she can be evicted for calling the police, has to make the choice between calling the police for help and or remaining silent to keep her tenancy.¹⁰⁸

The horrible consequences of the Norristown ordinance came to fruition on June 23, 2012 for tenant Lakisha Briggs.¹⁰⁹ Ms. Briggs, a tenant of subsidized rental housing in Norristown, was a repeat victim of her boyfriend's many beatings.¹¹⁰ During these beatings she called the police for help.¹¹¹ Unfortunately for Ms. Briggs, the police warned her of the consequence of calling again.¹¹² Thus, on June 23, 2012, Ms. Briggs did not call the police—she did not call the police even though her boyfriend had "hit her in the head with a glass ashtray and then stabbed her in the neck with a piece of broken glass."¹¹³ It was a neighbor who ultimately called 911 even though Ms. Briggs begged her not to do so because she knew what the consequence would be.¹¹⁴ After she was airlifted to the hospital and her boyfriend sent to prison following a guilty verdict for assault, her landlord was faced with a choice: either evict Briggs within ten days or lose his rental license.¹¹⁵ He chose to evict her.¹¹⁶ In the aftermath, the American Civil Liberties Union brought a claim on Briggs' behalf, arguing that the ordinance violated her First Amendment rights and the Violence Against Women

105. Dahlia Lithwick, *Public Nuisance: What Happens When Calling 911 Could Cost You Your Home*, SLATE MAGAZINE (Sept. 26, 2013, 6:26 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/09/an_aclu_lawsuit_fights_against_treating_abused_women_who_call_911_as_a_nuisance.html.

106. NORRISTOWN MUN. CODE No. 245-3 (2008), *rev'd* as of Aug. 6, 2014.

107. *Id.*; *see also* Lithwick, *supra* note 105.

108. NORRISTOWN MUN. CODE No. 245-3 (2008), *rev'd* as of Aug. 6, 2014.

109. Lithwick, *supra* note 105.

110. *Id.*

111. *Id.* (according to the article she had called the police 10 times between January—May 2012).

112. Lithwick, *supra* note 105.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Act (VAWA).¹¹⁷ Even though the town of Norristown ultimately repealed the ordinance as part of the settlement with Ms. Briggs,¹¹⁸ other cities throughout the nation continue to punish victims of domestic violence who call law enforcement for help.¹¹⁹

I. Protections for Victims

Some jurisdictions have enacted statutory provisions to protect tenants who are victims of domestic violence. For example, California has robust protections for tenants who are victims of domestic violence: a landlord cannot refuse to rent or evict on the basis of the tenant being a domestic violence victim,¹²⁰ a victim has the right to early termination,¹²¹ the victim has the right to have the apartment lock changed,¹²² and the victim can use domestic violence as an affirmative defense to an eviction proceeding.¹²³

Anti-discrimination statutes mean that the landlord cannot discriminate against a potential tenant simply because she is a victim of domestic violence.¹²⁴ Without such protections, a landlord who is preemptively trying to avoid any issues a domestic violence incidence on the premises may raise, might avoid renting to a known victim. If a lease is for a fixed terms, breaking the lease early may subject the tenant to liability for paying the rent for the remainder of the term. A domestic violence victim, particularly one who wishes to escape her abuser, may want to break her lease. States with early-termination statutes provide a mechanism for victims of domestic violence to break their lease early without consequence, so long as there is notice and proof of domestic violence (such as a protective order).¹²⁵

The 2005 Violence Against Women and Department of Justice Reauthorization Act waived some of the Section 8 Housing program eligibility requirements for women who were victims of domestic

117. *Id.* By precluding Ms. Briggs from contacting law enforcement, her First Amendment right to petition the government was impugned. Furthermore, the ordinance violated VAWA—which protects victims of domestic violence by preventing landlords from evicting victims who had violence committed against them. *Id.*

118. *Briggs v. Borough of Norristown et al.*, ACLU (Sept. 18, 2014), <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al> (last visited Jan. 5, 2017).

119. Lithwick, *supra* note 105.

120. CAL. CIV. PROC. CODE § 1161.3(a) (West 2018).

121. CAL. CIV. CODE § 1946.7(a) (West 2018).

122. CAL. CIV. CODE § 1941.5 (West 2018).

123. Marcia Stewart, *Legal Protections for Tenants who are Victims of Domestic Violence*, NOLO, <https://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter9-6.html> (last visited Jan 3, 2017).

124. *Id.*

125. Stewart, *supra* note 123.

violence.¹²⁶ Ordinarily, Section 8 tenants who wish to move are at risk of losing their right to public assistance, unless the tenant provides notice to the local housing authority, terminates the lease in accordance with lease provisions, and moves into housing that qualifies for Section 8.¹²⁷ Under the Violence Against Women Act provisions, a domestic violence victim who moves out of her Section 8 housing to protect herself from future abuse can seek waiver of these requirements as long as she “reasonably believed” that she was “imminently threatened” by further violence.¹²⁸

2. *Protections for Landlords*

Not only did the Norristown ordinance hurt Ms. Briggs, the landlord was also punished.¹²⁹ Because the landlord’s rental business may be hurt by incidents of domestic violence, some states have enacted landlord protections in cases of domestic violence. For example, California gives landlords the right to receive proof that the victim is a domestic violence victim¹³⁰ and the limited right to evict a domestic violence victim.¹³¹ To protect the landlord, states such as Arizona impose a penalty against an individual who falsely reports domestic violence or uses a false claim to terminate the lease early.¹³² Other laws further protect the landlord by holding the perpetrator of domestic violence liable to the landlord for damage caused by the incidents of domestic violence.¹³³

II. THE LEGAL PROBLEM: VICTIM TO EVICTED TO HOMELESS

The disparity in legal prowess between a tenant who has no legal experience and the landlord who has an attorney means that based on legal skill alone, the landlord has a better chance of receiving a judgment in favor of eviction. Victims of domestic violence who are being evicted because of a domestic violence-related incident face a similar unlikelihood of success.

126. Violence Against Women and Dep’t of Just. Reauthorization Act of 2005, 42 U.S.C. § 1437f(r)(5) (2012).

127. Stewart, *supra* note 123.

128. *Id.*

129. Lithwick, *supra* note 105.

130. CAL. CIV. CODE § 1946.7(b) (West 2018).

131. CAL. CIV. PROC. CODE § 1161.3(b) (West 2018). Under this narrow provision, the landlord can refuse to renew or terminate the lease if the victim-tenant allows the abuser to visit the property or the landlord believes the presence of the abuser poses a physical threat to other tenants or guests. *Id.*

132. ARIZ. REV. STAT. ANN. § 33-1318(H) (West 2018).

133. ARIZ. REV. STAT. ANN. § 33-1318 (I) (West 2018).

The following anecdote, uses a fictitious victim, Jane, to describe how a victim of domestic violence goes from being a victim, to evicted, to homeless. Jane lives with her boyfriend in an apartment where he is the only listed lessee. Jane is a victim of intra-partner violence, as her boyfriend hits Jane regularly when he is angry. Once, after a particularly violent incident, she calls the police. Even if the actual incident was relatively quiet—meaning that other tenants did not hear the incident—the arrival of police officers, flashing lights, sirens, witness statements, etc., can cause a disturbance amongst the apartment complex. Additionally, if the incident involved high levels of yelling by either party, then the neighbors may be further disturbed. If her boyfriend is not arrested that night, or if he and Jane are still living in the same apartment pending his court dates, the incident is not likely to occur in isolation—given the repetitive nature of domestic violence incidents.¹³⁴ Therefore, over time, the tenants are likely to get irritated by the loud fights, the knowledge of the violence occurring in the apartment next-door, and the frequency with which police respond to a 911 call. By simply being a victim and calling the police when her safety is threatened, the other tenant's enjoyment of the property is also threatened, and the landlord wants to avoid future problems with other tenants.¹³⁵ As a result, the landlord sees Jane not as the victim, but as a non-tenant and the root cause of the disturbances.

An easy solution, in the landlord's mind, is to order Jane to move out. Jane is now in a dire position. She is a victim of abuse and she has been kicked out of her home, regardless of how unsafe living with her abuser was. Coupled with the lack of resources victims like Jane often face,¹³⁶ a victim's right to counsel in this situation may mean the

134. Domestic violence is thought to be a cycle. There is a period of abuse, and the abuser may go to jail or the victim may leave the abuser. Then the abuser "wins" his victim back by promising to change and not hit her anymore. After a period of upholding his promise the abuse begins again. Nancy Salamone, *Domestic Violence and Financial Dependency*, Forbes.com (Sep. 2, 2010 12:00 PM) <https://www.forbes.com/2010/09/02/women-money-domestic-violence-forbes-woman-net-worth-personal-finance.html#6c42170c1047>.

135. For example, in California tenants are entitled to benefit from the implied covenant of quiet enjoyment of the property. See CAL. CIV. CODE § 1927 (West 2018) "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring, against all persons lawfully claiming the same." Continual domestic disturbances on the premises may interfere with other tenants' rights to quiet enjoyment and may subject the landlord to liability. A landlord who must deal with continual disturbances on the premises may be worried that other tenants' right to quiet enjoyment will be impaired.

136. One thing I learned in my interviews with the local service providers is that the abuser will isolate the victim during periods of abuse. This means that the victim does not know about any support resources to help her. Furthermore, as a method of control the abuser may restrict the victim's ability to work, making her entirely dependent on him. See Interview

difference between having a place to live and becoming homeless. Rather than face these consequences, a person in Jane's position may choose to avoid calling the police altogether because she is concerned that a police presence could cause a neighborhood disturbance sufficient to warrant an eviction.¹³⁷

A variant of this issue arises in cases where the victim is financially dependent on her abuser.¹³⁸ If our fictitious victim Jane is like many similarly situated women, she remains in the relationship because she is not financially dependent to live on her own. If Jane is one of the lucky ones whose partner is in custody pending trial or receives a jail sentence,¹³⁹ Jane faces the challenge of paying rent without the financial support of her abuser. If Jane is unable to make her rent payments, the landlord may legally evict her for failure to pay rent, just as any landlord has authority to do with any non-paying tenant.¹⁴⁰ When Jane's landlord serves her with an eviction notice, the fact that she is a victim of domestic violence does not lead to any special accommodations.¹⁴¹ Thus, once again, Jane has a difficult decision to make: she can either report her abuser—a choice that keeps her safe but ends with a criminal prosecution and possibly an imprisonment of her only source of financial support; or she can stay silent—a choice that puts her life at risk, but means that she will have financial support.

For our victim Jane, it does not matter what state she lives in; none of the states have any laws that speak to the intersection between domestic violence protections and the right to counsel in eviction cases. If Jane is lucky, she lives in New York City where she can be appointed counsel in her eviction proceeding under Intro 214-b and is categorically given the right to counsel in her domestic violence proceeding under New York State law.¹⁴² For the non-NYC-resident victims, the lack of existing law means that Jane not only has to face pending criminal action against her abuser, but she also has to face a potential eviction without the aid of counsel.

with Angela Urton, *supra* note 19.

137. See Lithwick, *supra* note 105.

138. Financial dependency is very prevalent for domestic violence victims. This is often the reason a victim will take the abuser back or retract testimony against abuser at trial. See Salamone, *supra* note 134.

139. See, e.g., CAL. PEN. CODE § 243 (2016) (designating the punishment for misdemeanor battery as \$2,000 or a six-month imprisonment in county jail).

140. Stewart, *supra* note 123.

141. *Id.*

142. See *supra* note 69 and accompanying text.

III. ANALYSIS

A. *The Unrepresented Tenant*

“It’s supposed to be hard. If it were easy, everyone would do it.”¹⁴³ If being a lawyer was easy, nearly all who were involved in the court process would choose to proceed pro se. Yet we do not have a system where people proceed lawyer-less. For those who can afford a lawyer—or are appointed one in a criminal proceeding—having legal representation is the logical choice.¹⁴⁴ There is a reason why parties choose to have their interest represented by someone who has gone to law school, sat for and passed the bar exam, and is a licensed practitioner of law.¹⁴⁵ The nuanced procedural requirements, evidentiary rules, local rules of court, and filing deadlines are complex enough to confuse any non-lawyer.¹⁴⁶ Add the requisite knowledge of the substantive law needed to competently argue the cases’ merits, and the benefit of being represented by a lawyer is apparent.¹⁴⁷ Thus pro se litigants squaring off against experienced lawyers are disadvantaged from the moment the case is filed—before either party makes its first appearance.¹⁴⁸ Studies show that having representation versus not having representation is an extremely indicative factor for success of the case.¹⁴⁹

State and federal judges, who witness firsthand the uphill battle faced by unrepresented litigants, have become strong advocates in favor of the right to civil counsel.¹⁵⁰ These judges are particularly sensitive to the issue because they have observed the “helplessness of unrepresented parties appearing in their courtrooms and the unequal contest when those litigants confront well-counseled opponents.”¹⁵¹ This helplessness can be alleviated, some judges believe, through a civil right to counsel. As

143. A LEAGUE OF THEIR OWN (Columbia Pictures, 1992).

144. *Top Ten Reasons to Hire a Lawyer*, FINDLAW, <https://hirealawyer.findlaw.com/do-you-need-a-lawyer/top-ten-reasons-to-hire-a-lawyer.html> (last visited May 28, 2018).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. See generally Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in the Legal Process*, 20 HOFSTRA L. REV. 533 (1992); see also Robert J. Derocher, *Access to Justice: Is Civil Gideon a Piece of the Puzzle?*, 32 BAR LEADER 6, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2007_08/3206/gideon.html (concluding that the legal needs for every four of five civil cases were not being met).

150. *What Do Judges Think of Civil Right to Counsel?*, NAT’L COAL. FOR A CIV. RIGHT TO COUNS., http://civilrighttocounsel.org/about/what_do_judges_think#judgesthink (last visited Jan. 15, 2017).

151. *Report to the House of Delegates 2006*, *supra* note 51, at 7.

one judge describes, “we need a civil Gideon, that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system.”¹⁵²

B. Legal Aid & Pro Bono are Not Enough

Legal aid services generally receive both public and private funding, with a majority of the funding coming from private sources.¹⁵³ Yet even with this dual source of funding, resources are still limited, and it is impossible for legal aid services to accept every pro bono case that comes its way. For example, even though the Nationwide Legal Services Corp is able to provide legal services to approximately one million indigent individuals, the same system has turned away one million people per year.¹⁵⁴ Across the board, this lack of resources means that, according to a 1993 survey, approximately seventy percent of the serious problems faced by poor people did not receive legal aid.¹⁵⁵ More recently, the Brennan Center for Justice at the New York University School of Law reported that the lack of resources diminished the efficiency of legal aid services, as the services face “chronic funding shortages, state and federal restrictions, shortfalls in pro bono help, and a rollback of financial incentives for attorneys in private practice to bring critical cases.”¹⁵⁶

C. Support for the Civil Right to Counsel

1. Parallels Between Civil & Criminal Cases

In *Gideon v. Wainwright*,¹⁵⁷ the Supreme Court famously stressed that the mere fact that the “government hires lawyers to prosecute, and defendants who have the money hire lawyers to defend are the strongest indicators of the widespread belief that lawyers in criminal courts are necessities, not luxuries.”¹⁵⁸ The same is true in civil cases; a civil defendant who has the means, will usually choose to retain counsel. Furthermore, according to Walter Mondale, the former Vice President of the NCCRC, the distinction between criminal cases and civil cases is largely theoretical:

152. Robert Sweet, *Civil “Gideon” and Justice in the Trial Court (The Rabbi’s Beard)*, 42 THE RECORD 915, 924 (1997) (internal citations omitted).

153. *Report to the House of Delegates* 2006, *supra* note 51, at 4.

154. *Id.* at 4.

155. *Id.* at 5.

156. Derocher, *supra* note 139.

157. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

158. *Id.* at 344.

In truth, the criminal / civil distinction is often of wholly theoretical interest when you're about to be deprived of your children, committed to a mental institution, foreclosed from your home, fired from your job, or a vast range of other civil proceedings, many of which are being pressed by the economic crisis that is hitting poor people, and all of us today—that could have life or death consequences, even though they're called just civil.¹⁵⁹

Additionally, a pro se litigant, whether in in civil or criminal court, will be unfamiliar with basic procedures, inexperienced in the law, and will most likely be facing the opposing side with its lawyers. In both situations, the overwhelming inexperience means the case is likely lost even before getting to the cases' merits.¹⁶⁰

Due process guarantees the right to counsel whenever the State seeks to impose any in-custody punishment for a crime.¹⁶¹ At its core, it is fundamentally unfair to force a criminal defendant to navigate the criminal justice system's intricacies without representation and then imprison him at the end of his single interaction with the legal system. By way of analogy the same can be said for the civil defendant who faces losing child custody, eviction, or deportation and must defend her case without representation. Although the loss of child custody, eviction, and deportation are not considered to be a "loss of liberty" in the same way that prison time has been held to be, these defendants are still facing incredible losses. The similarities between these cases and criminal cases with appointed counsel overwhelm any differences, and thus incorporating the right to counsel in these civil cases is logical.

2. Robust ABA Support for Civil Right to Counsel

People of all socioeconomic statuses face legal trouble. Why should that individual's socioeconomic status determine the ability to access legal resources. Why should the difference between successfully

159. MINN. ST. BAR ASS'N CIV. GIDEON TASK FORCE, ACCESS TO JUSTICE: ASSESSING IMPLEMENTATION OF CIVIL GIDEON IN MINNESOTA, at ii (2011), [https://www.mnbar.org/docs/default-source/atj/msba-civil-gideon-task-force---access-to-justice---assessing-implementation-of-civil-gideon-in-minnesota-\(final\)6565E5B78320.pdf?sfvrsn=2](https://www.mnbar.org/docs/default-source/atj/msba-civil-gideon-task-force---access-to-justice---assessing-implementation-of-civil-gideon-in-minnesota-(final)6565E5B78320.pdf?sfvrsn=2); see also *50 Years Later: The Legacy of Gideon v. Wainwright, PT2*, U.S. DEP'T OF JUST. (March 15, 2013), <https://www.justice.gov/atj/video/50-years-later-legacy-gideon-v-wainwright-pt2> (featuring Vice President Mondale speaking in support of a right to counsel in civil cases).

160. There is no denying that an individual with no legal skill will be hugely disadvantaged against a lawyer who has had formal training and practical experience. Undeniably, even recent graduates who have minimal experience would be overwhelmed if asked to first chair a case. A person without any legal training is guaranteed to be lost.

161. See *supra* note 35.

defending against eviction and becoming homeless turn on the amount of money a tenant has to invest in a lawyer?

The words “Equal Justice Under Law” are inscribed on the facade United States Supreme Court building.¹⁶² Carrying out these famous words, the ABA has a long tradition of promoting equal access to justice,¹⁶³ and has focused on ensuring access to counsel for indigent defendants.¹⁶⁴ Since the 1920s, the ABA has been committed to expanding legal aid in the United States.¹⁶⁵ In 1965, after realizing that charitable donations alone were not sufficient to fund legal aid programs, the ABA House of Delegates endorsed a program to federally fund legal services to indigent defendants.¹⁶⁶ The program’s four objectives reinforce the principle of providing access to the justice system regardless of economic status: (1) increasing funding for legal services programs for indigent litigants,¹⁶⁷ (2) establishing a mechanism for clearly conveying information about the availability of affordable legal services,¹⁶⁸ (3) providing effective, quality representation to the individual, regardless of the individual’s ability to pay for legal services,¹⁶⁹ and (4) modifying the procedural contours of the legal system to make the system easier to understand.¹⁷⁰

3. Arguments Against a Civil Right to Counsel

Unlike the right to counsel in criminal cases, the civil right to counsel is not constitutionally enshrined.¹⁷¹ As such, there is an opposition to the civil right to counsel that focuses on the taxpayer burden, the belief that pro bono is enough, and concerns of system abuse.¹⁷²

With appointed counsel for indigent litigants in civil cases, the question arises as to how the appointed counsel is to be paid and who is responsible for such payment. Opponents to the civil right to counsel

162. *Building Features, Supreme Court Building, About the Court*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/buildingfeatures.aspx> (last visited May 28, 2018).

163. *Report to the House of Delegates 2006*, *supra* note 51, at 2.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Report to the House of Delegates 2006*, *supra* note 51, at 2.

168. *Id.*

169. *Id.*

170. *Id.*

171. Ted Frank, *The Trouble with the Civil Gideon Movement*, 3 AM. ENTERPRISE INST. PUB. POL’Y RES. 1 (2008), https://www.aei.org/wp-content/uploads/2011/10/20080807_23374LOAugustg.pdf.

172. *Id.*

argue that by requiring the state to foot the bill, the state will increase taxes to subsidize the cost.¹⁷³ While taxpayers are willing to incur the public defender cost because of the constitutional protections granted to criminal defendants, taxpayers may not be willing to do so in civil cases.¹⁷⁴ Furthermore, if there is free—for the defendant—counsel available in civil cases, under basic economic theory the demand for counsel in civil proceedings will increase, causing an even greater tax burden.¹⁷⁵

Despite evidence showing that legal aid services are resource strapped and pro bono cannot cover all the cases, opponents to the civil right to counsel believe that legal aid and pro bono should take on the role of representation in lieu of appointed counsel.¹⁷⁶ For example, Ted Frank argues, “there is little evidence that poor people with meritorious civil cases could not be served by the current legal system of legal aid societies and pro bono work by attorneys.”¹⁷⁷

Additionally, paying for a lawyer is a way to signal the merit of the individual claims.¹⁷⁸ If a person believes her claim has merit, she should be willing to invest resources into the case, including the cost of retaining a lawyer. By comparison, when the court appoints counsel, the litigants receive representation regardless of the cases’ merits and the litigants lose a valuable signaling mechanism.¹⁷⁹

Finally, there is concern that a New York City-like ordinance would encourage abuse. For example, a tenant could intentionally violate the lease and then defend the case on the government’s dime as the state pays for appointed counsel.¹⁸⁰ Such ordinances, however, would not subvert existing laws that protect the landlord.¹⁸¹ Landlords would retain their right to evict when a tenant violates the lease agreement; the only difference is that the tenant would be represented by counsel in the eviction case.¹⁸² If the tenant is found to have intentionally violated the lease or if a victim makes a fraudulent claim of being a domestic violence victim to take advantage of a right to early termination, that tenant could still be subject to fines for the tenant’s bad faith.¹⁸³

173. Frank, *supra* note 171, at 1.

174. *Id.*

175. *Id.* at 2.

176. *Id.*

177. *Id.* 2–3.

178. *Id.* at 2.

179. Frank, *supra* note 171, at 2.

180. *See id.*

181. *See supra* Section I.D.2.

182. *Id.*

183. *Id.*

IV. PROPOSAL

There is no doubt that a domestic violence victim who faces eviction due to abuse has limited resources and has great need for assistance. Without the aid of counsel, she is almost guaranteed to lose an eviction proceeding if her landlord is represented by an attorney. As such, this Note advocates for the right to counsel in eviction proceedings where the evictee is a victim of domestic violence who is being evicted based on an incident of domestic violence. The proposed solution to this legal problem is a template to be used by the Court and the involved parties (landlord, tenant-victim) to determine the eligibility for the appointment of counsel. The template addresses the eligibility requirements and the necessary evidentiary showing, how the victim is made aware of her right to counsel, attorney compensation, and the provisions specific to the financially-dependent victim.

Additionally, this template is designed to keep the victims safe, which means that a Norristown-like ordinance is prohibited under the proposed framework. This also means that the landlord would not be stripped of his or her rental license based on a tenant calling the police for matters outside the control of the landlord's lessor duties. If the threat of losing the rental license is not hanging over the landlord's head, the landlord would not use the calling of 911 as a means to threaten eviction. This means the victim would have the actual ability to call to the police instead of worrying about her security of the housing.

A. Eligibility

Prior to the appointment of counsel, the evicted-victim must affirmatively demonstrate that she is indeed a victim of domestic violence.¹⁸⁴ This would mitigate system-abuse concerns raised by opponents.¹⁸⁵ If the victim fakes the domestic violence incident to terminate the lease early or has a phony defense to the landlord's lawful eviction, then the victim must: 1) pay the lawyer fees herself and 2) will be subject to additional fines and/or sanctions, or 3) may be subject to criminal liability. This consequence is *only* applicable when the tenant

184. Under the proposal, A victim can satisfy this requirement through obtaining a protective order against her abuser or by showing that there is a criminal prosecution pending against her abuser in which she is a named victim.

185. The author realizes that in some instances there may be a fine line between what is considered "faking" the domestic violence incident and the allowable victim recanting her earlier statement. Under the proposed system, in these close cases, the appropriate procedure would be a pre-trial hearing with the judge weighing the evidence and then determining whether the victim made the incident up or if the victim recanted a truthful statement.

makes up an entire domestic violence incident.¹⁸⁶

If a victim has completed a combination of the following actions: reporting an incidence of domestic violence, calling 911 for help, requesting the offender move out, or obtaining a protective order, there will be a presumption that the victim is being honest in her claim. However, the presumption can be rebutted by evidence proffered by the landlord showing that the victim is scamming the system.¹⁸⁷

Once there is proof that the defendant in an eviction proceeding is a victim of domestic violence, the judge would then inquire into the victim's financial status using a similar inquiry criminal judges use to determine a defendant's income eligibility.¹⁸⁸ In our case, a similar colloquy would occur after the judge first determines whether the defendant is a victim of domestic violence in order to see if she would qualify for the appointment of counsel based on her income.

During the first court appearance, the tenant-victim would be presented with a "Know Your Rights" checklist, which would include the jurisdiction's applicable victim-tenant protections. The checklist would clearly state that she may be entitled to appointed counsel based on income, the likelihood of success based on having counsel versus not having counsel, and other statutory rights, such as the right to ask for new locks.¹⁸⁹

*B. The "Domestic Violence Victim Eviction Legal Defense Fund:"
How the Right will be Funded*

As discussed, the funding issue is one of the main arguments put

186. These consequences do not apply in cases where the victim retracts statements she made in her 911 call or to the police. It is very common for a victim to retract in domestic violence cases, particularly if she is dependent on the offender for her livelihood. Furthermore, this does apply to scenarios when the verdict of the charge is found not guilty, as that does not preclude the fact that the offender still did something.

187. See *supra* note 171 and accompanying text. A landlord for instance could rebut the presumption with evidence that the victim has recanted her statement or that the victim is still living with the abuser during the criminal trial.

188. During her time in law school, the author has interned at various local District Attorney's offices. Through her experience at the DA's offices, she has observed the typical colloquy that occurs between the Judge and the Defendant prior to the appointment of the public defender. The following is a summary of what such colloquy generally looks like: In criminal proceedings, counsel is usually appointed at arraignment. The judge first inquires as to whether the defendant is represented by counsel. If the defendant is not represented by counsel, the judge inquires about the defendant's financial status. Based on the answers provided, the judge determines if the criminal defendant is eligible for appointment of counsel. If the defendant is eligible, a public defender is appointed and he or she begins the representation of the Defendant.

189. See *supra* note 120 and accompanying text.

forth by opponents of the civil right to counsel.¹⁹⁰ The concern of the increased tax burden is valid and thus, creative financing is needed. Currently in California a criminal defendant, upon conviction, is obligated to pay various court fees, fines, and money into the general restitution fund.¹⁹¹ Illinois State Law, which provides for the appointment of counsel to represent the estate of a deceased victim of domestic violence, authorizes the use of court fines and fees to supply funding for the appointment of counsel.¹⁹² Similarly, under this proposed framework, the main source of funding would come from court fines and fees. Specifically, any time there was a domestic violence-related criminal proceeding, a fixed percentage of the fines and fees a defendant would have to pay, would be allocated to the “Domestic Violence Victim Eviction Legal Defense Fund” (the Fund).

Additionally, a fixed, but smaller, percentage (such as one to two percent) of all the fines and fees collected from the state’s criminal proceedings, regardless of subject matter, would be earmarked for the Fund. If the Fund is not sufficient to cover the cost of appointed counsel, then the state would step in and pay the appointed counsel similar to the way public defenders are paid. This, of course, does result in the degree of the aforementioned tax burden. Rather, the burden would be less significant due to the allocation of money to the Fund.

C. The Financially Dependent Victim

Also protected by this framework is a tenant who is not evicted because of incidences of violence, but who is financially dependent upon her abuser. When the abuser is in custody, the financially dependent victim does not have the means to maintain rent payments. As a result, the landlord has the authority to evict her if she becomes delinquent in her payments. Under this proposal, in addition to the “Know Your Rights” checklist and the right to the appointment of counsel, this victim is afforded additional protections, specifically a forty-five day rent grace period.

In addition to proving the victim is indeed a domestic violence victim and is financially eligible for counsel, to receive the benefit of the grace period, she would also have to prove financial dependency. Once she proves eligibility, the victim has a forty-five day grace period in which she does not have to pay the rent. This grace period is designed

190. See *supra* note 166–68 and accompanying text.

191. CAL. PEN. CODE 1202.4(B)(1) (West 2018). “Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss. *Id.*”

192.. 750 ILL. COMP. STAT. 60/227(d) (West 2018).

to enable her to adjust to the sudden change in finances. At the end of forty-five days, she must resume paying the regularly schedule rent. In addition to resuming payment of her regularly scheduled monthly rent, she will have to pay fifteen percent of the rent she skipped during the forty-five day grace period until the balance is paid off. The purpose of this grace period is for the victim to have a chance to get herself on her feet after a domestic violence incident, rather than immediately being evicted because she was unable to pay rent.

The following anecdote illustrates how the grace period would work. Jane and Joe rent an apartment for five-hundred dollars a month. The rent for this apartment is due on the first of the month. At the beginning of June, Jane calls the police after a particularly bad bout of abuse and Joe is taken into custody. On July 1st, Jane pays the five-hundred dollars rent, but realizes she will not be able to make the August 1st payment. She seeks court review of her case and makes a showing that she is eligible for the grace period. From July 2nd through August 15th, Jane will not have to pay rent, skipping the August 1st payment. Once the forty-five days are up, she will resume the ordinary payment schedule. Thus, on September 1st, she will have to pay five-hundred dollars of rent plus seventy-five dollars (fifteen percent of the five-hundred dollars due on August 1st). Until she pays off the rent payment that she skipped during the grace period, she will have to pay five-hundred and seventy-five dollars per month.

V. CONCLUSION

“To become the country we perceive ourselves to be, we must make access to justice a reality by providing a right to counsel for civil cases where basic human needs are at stake.”¹⁹³ Despite the United States not being a party to international treaties granting the right to housing, this Note posits that housing is, nevertheless, a basic human need. Much of the international community considers a basic standard of living, which includes the right to adequate housing, necessary to the furtherance of other rights. A person whose right to housing is violated is also denied the right to privacy and safety. For the domestic violence women who become homeless as a result of eviction, their safety and health is negatively affected, and they are at risk of becoming chronically homeless.

193. Report, *You are the Public Justice Center*, PUB. JUST. CTR. 12 (2016), http://www.publicjustice.org/uploads/file/pdf/PJC%20AnnualReport_2016_WEB.pdf#page=8 (quoting John Pollock, Coordinator, Nat'l Coalition for a Civ. Right to Couns., Opinion, AM. LAW. (Oct. 1, 2015)).

The consequence of an eviction is not simply finding new housing accommodations. For indigent evictees, the consequence implicates the very basic human needs necessary for survival. With these ramifications, a protection for these indigent women in the form of appointed counsel must not be the extraordinary exception, but the basic process to ensure fairness.