

**Testimony of National Coalition for the Civil Right to Counsel (NCCRC)
to Raquel Rolnik, UN Special Rapporteur on Adequate Housing
Official U.S. Mission
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NCCRC is very appreciative of the opportunity to present testimony to you on behalf of all of our Coalition participants. We also appreciate the efforts of the National Law Center on Homelessness and Poverty in organizing this important visit and inviting us to submit this written testimony.

I. Introduction of the National Coalition for the Civil Right to Counsel

NCCRC is an association formed in 2003 of more than 180 individuals and organizations from 35 states, with participants from legal services organizations, the private bar, public interest law firms, academia, bar associations, and access to justice organizations. In order to ensure meaningful access to the courts for all, NCCRC participants are committed to establishing a right to counsel for indigent litigants in civil cases where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody. NCCRC participants strategize, share information, and engage in planning related to research, public education, legislation, and litigation. NCCRC also works to carefully plan the implementation of any new rights to counsel. NCCRC sees the future success of the movement as innately tied to locally driven efforts.

II. Description of the Problem

It is a truism that establishing procedural fairness is essential to ensuring the enjoyment of substantive rights. Thus, even if the United States were to establish a right to housing, the efficacy of this right would be significantly diminished by any inability to effectively enforce it. However, the “justice gap” is well documented in this country: a 2009 report by the Legal Services Corporation found that less than 20% of the legal needs of low-income individuals in the United States are met,ⁱ with minority litigants being especially disproportionately unrepresented.ⁱⁱ

For housing cases in particular, the representation picture is particularly grim. Between half and two-thirds of homeowners facing foreclosure are going it alone.ⁱⁱⁱ The situation for tenants is even more bleak: in New York, only 10% of tenants are represented, compared to 75% - 90% of landlords,^{iv} while a recent D.C. study found that only 3% of tenants were represented.^v The current financial crisis has magnified the effects of this absence of counsel: the news wire has been rife with reports of servicers trying to foreclose despite lacking standing to do so,^{vi} studies revealing slews of errors in foreclosure filings,^{vii} and complex foreclosure rescue scams^{viii} that even attorneys can have trouble deconstructing.^{ix} Unrepresented litigants in these cases do not have the ability to comprehend and successfully point out these errors and wrongful actions. Conversely, when attorneys are actually present in housing cases, they have enjoyed great success in enforcing housing rights.^x

The lack of representation problem has its roots in federal constitutional jurisprudence and legislative inaction. Under the U.S. Constitution, an indigent litigant who is in danger of losing her home due to eviction or foreclosure has no presumptive right to counsel, as a result of the U.S. Supreme Court's 1981 ruling in *Lassiter v. Department of Social Services*.^{xi} In fact, there is a presumption that she does not have such a right unless her physical liberty (defined too narrowly by courts as incarceration) is at stake, and she must also prove that her personal interests and the risk of error outweigh any contrary interest the state might have. This test applies no matter how meritorious the litigant's defense to the eviction/foreclosure might be, or whether the litigant is elderly or infirm. Additionally, because of multiple Supreme Court rulings suggesting that housing is not a fundamental constitutional right,^{xii} a litigant in a housing case has an especially difficult burden to meet before obtaining a right to appointed counsel. While some state legislatures have acted to protect indigent litigants threatened with a loss of their children or personal liberty, not one has enacted a statute guaranteeing counsel for those in danger of losing their home. The federal government has enacted a few statutes for appointment of counsel in certain limited circumstances (such as those filing complaints under the Americans with Disabilities Act or the Fair Housing Act), but appointments under these statutes are left to the discretion of the judge, and the bar for qualifying for appointed counsel has been set so high as to make such appointments rare.^{xiii}

The United States lags well behind other industrialized nations in terms of the right to counsel. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which applies to dozens of European nations, requires appointment of counsel in civil cases, which includes of course housing disputes.^{xiv} Additionally, an English statute dating all the way back to the 15th century similarly required the appointment of counsel for all indigent parties.^{xv} Advocates have argued strenuously for the provision of counsel in housing cases, noting the great risk of homelessness due to eviction, the significant social consequences on families and children of losing housing,^{xvi} and the empirical evidence demonstrating it is cheaper to provide counsel than to pay for the social services safety net utilized by those who lose their housing.^{xvii}

The adversarial system of justice used in the United States allocates to the parties the primary responsibility for discovering the relevant evidence, finding the relevant legal principles and presenting them to a neutral judge or jury. Discharging these responsibilities requires the knowledge and skills of a legally trained professional; unrepresented litigants in housing cases cannot fulfill this responsibility and should not be forced to assume it. Because lawyers are as essential as judges and courts to the proper functioning of the justice system, the government has just as great a responsibility to ensure counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases.^{xviii}

III. Remedies

Access to justice is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of

law. It also is essential to the public's confidence in the legal system and its ability to reach just decisions. As such, the governments of the states and of the people must assume the duty to guarantee that all indigent Americans have appointed counsel when their primary residences are at stake. Moreover, if those advised, assisted or represented by publicly-funded lawyers are to have fair and equal access to justice those lawyers must be as independent, ethical, and loyal to their clients as those serving clients who can afford to pay for counsel. Finally, there should be judicial recognition of housing as a fundamental right comparable in strength to the right to be free from incarceration.^{xix}

ⁱ Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

ⁱⁱ Report: *Access to Civil Justice: Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases*, Northeastern University 1 (Dec 10, 2007).

ⁱⁱⁱ Melanca Clark and Maggie Barron, *Foreclosures: A Crisis in Legal Representation*, Brennan Center for Justice 12, 14 (Oct 2009), <http://www.brennancenter.org/page/-/Justice/Foreclosure%20Report/ForeclosuresReport.pdf> (estimating half of homeowners go without counsel); Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf (study finding 2/3 of homeowners go unrepresented in foreclosure).

^{iv} Russell Engler, *And Justice For All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987, 2060, 2064 (1999).

^v Report: *Justice For All? An Examination of the Civil Legal Needs of the District of Columbia's Low-Income Community*, District of Columbia Access to Justice Commission 76 (2008).

^{vi} Debra Cassens Weiss, 'Law School 101' Could Help Struggling Owners, *ABA Journal* (Nov 15, 2007) http://www.abajournal.com/news/law_school_101_could_help_struggling_homeowners/; Amir Efratin, *Judges Tackle 'Foreclosure Mills'*, *Wall Street Journal* (Nov 30, 2007), http://online.wsj.com/article/SB119639697577209194.html?mod=home_law_middle.

^{vii} Gretchen Morgenson, *Foreclosures Hit a Snag for Lenders*, *NY Times* (Nov 15, 2007), <http://www.nytimes.com/2007/11/15/business/15lend.html> (describing Katherine M. Porter, *Misbehavior and Mistake in Bankruptcy*, 87 *TEX. L. REV.* 17 (2008)); Gretchen Morgenson, *Dubious Fees Hit Borrowers in Foreclosures*, *New York Times* (Nov 6, 2007), <http://www.nytimes.com/2007/11/06/business/06mortgage.html?ex=1352091600&en=849c5eee4633ac20&ei=5124&partner=permalink&expprod=permalink>

^{viii} Rick Brooks and Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, *Wall Street Journal* (Dec, 3, 2007), http://online.wsj.com/article/SB119662974358911035.html?mod=hpp_us_pageone.

^{ix} Prentiss Cox, *Foreclosure Equity Stripping: Legal Theories and Strategies to Attack a Growing Problem*, 2006 *Clearinghouse Review* 607, 609 (March-April 2006).

^x 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 *LAW & SOC'Y REV.* 419, at 429 (2001); Russell Engler, *Shaping A Context-Based Civil Gideon From the Dynamics of Social Change*, 15 *TEMP. POL. & CIV. RTS. L.REV.* 697, 715 (2006).

^{xi} 452 U.S. 18 (1981).

^{xii} See *Lindsey v. Normet*, 405 U.S. 56 (1972) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which have been construed to hold that there is no fundamental right to housing.

^{xiii} See 28 U.S.C. § 1915; *Wood v. Housewright*, 900 F.2d 1332 (9th Cir. 1990) (discretionary appointment under § 1915 requires “exceptional circumstances”); 42 U.S.C. § 3613(b) (allowing discretionary appointment for litigants with federal Fair Housing Act complaints); 42 U.S.C.A. § 2000e-5(f)(1) (discretionary appointment for person proceeding under ADA “in such circumstances as the court may deem just”).

^{xiv} Report: *Access to Civil Justice: Racial Disparities and Discriminatory Impacts Arising from Lack of Access to Counsel in Civil Cases*, Northeastern University 1 (Dec 10, 2007).

^{xv} 11 Hen. VII ch. 12. Equity practice extended this right to indigent defendants. See e.g. Julian J. Alexander, *British Statutes in Force in Maryland According to the Report Thereof Made to the General Assembly by the Late Chancellor Kilty* (2d ed. 1912) (noting that while the statute "extends only to plaintiffs in civil action . . . the rule is different in Chancery").

^{xvi} Rachel Kleinman, *Housing Gideon: the Right to Counsel in Eviction Cases*, 31 Fordham Urb. L.J. 1507 (2004); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 Cardozo Pub. L. Pol’y & Ethics J. 699 (2006).

^{xvii} See e.g. Community Training and Resource Center and City-Wide Task Force on Housing Court , *Housing Court, Evictions, and Homelessness: The Costs and Benefits of Establishing a Right to Counsel* (1993) (estimating \$66 million savings by providing counsel); NY State Department of Social Services, *The Homelessness Prevention Program: Outcomes and Effectiveness* (1990) (estimating \$8 million annual net savings with provision of counsel).

^{xviii} The language of this paragraph draws heavily upon language from the California Equal Justice Act, http://www.brennancenter.org/page/-/d/download_file_38656.pdf.

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