

# LEVELING THE PLAYING FIELD

Legal, Economic and Policy Considerations in Establishing  
an Access to Counsel Program for Tulsa's Eviction Docket

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# I. Introduction

Oklahoma faces a surge of evictions in 2021. The federal eviction moratorium is currently set to end on Jan. 31, but the economic effects of the COVID-19 crisis continue. While evictions are calamitous for those who are displaced, their effects are felt throughout the community. They also cost the city money. The social and financial costs of evictions are particularly pronounced in a city like Tulsa, which had the 11th highest eviction rate in the country prior to the pandemic.<sup>1</sup> In 2016, the city's eviction rate stood at 7.77%, outpacing the state's overall rate of 4.24%.<sup>2</sup> Tulsa's eviction rate has remained high since then, with 14,315 eviction filings in 2019.<sup>3</sup> In the first two-and-a-half months of 2020, prior to COVID-19, the city had already reached 2,936 eviction filings.<sup>4</sup> Tulsa's high eviction rate places an additional burden on a population struggling with poverty. One in three households are rent burdened, meaning they spend over 30% of their income on rent.<sup>5</sup> These conditions have only worsened during the pandemic.

With an average docket size hovering around 90 cases per day,<sup>6</sup> Tulsa's forcible entry and detainer (FED) or eviction docket displaces a significant number of individuals and families every week. Evicted individuals, particularly children, experience severe short and long-term effects from displacement. These effects reverberate throughout communities and cities, creating both tangible and intangible costs on public health, safety and resources. Yet, despite the dire effects of evictions, no jurisdiction in Oklahoma provides a right to counsel for tenants in eviction proceedings. Instead, tenants are routinely evicted without a hearing before an impartial tribunal or an opportunity to present any legal defenses.

From a rule of law perspective, a right to counsel facilitates due process and ensures that individuals are not unlawfully evicted. From a broader societal perspective, access to counsel prevents many negative public health, education and safety effects. These benefits also save taxpayer money. Costing studies show that a right to counsel program has a net cost benefit, offsetting many of the costs associated with evictions.

This report outlines the legal, social, and cost issues associated with a prospective right to counsel program on the FED docket. The first section lays out the due process concerns necessitating access to counsel in the eviction process. The next section describes the effects of evictions and outlines relevant social and policy considerations. The report then

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<sup>1</sup> Eviction Lab (Princeton University), *Eviction Rankings*, <https://evictionlab.org/rankings/#/evictions?r=United%20States&a=0&d=evictionRate&lang=en> (last visited December 16, 2020).

<sup>2</sup> *Id.* (view in map for city and state comparison).

<sup>3</sup> Terry West Civil Legal Clinic (Joel Auringer, Sage Martin, Joshua McCann, Alex Myers, & Vic Wiener), *Advancing Housing Justice in Tulsa: An Examination of the FED Docket*, 1 (June 8, 2020).

<sup>4</sup> *Id.*

<sup>5</sup> Michael Overall, *Pandemic may have slowed evictions in south Tulsa, but new wave may be coming*, TULSA WORLD, Nov. 16, 2020, [https://tulsa-world.com/news/local/pandemic-may-have-slowed-evictions-in-south-tulsa-but-new-wave-may-be-coming/article\\_b39b8280-253c-11eb-ae37-6f6b23a44117.html](https://tulsa-world.com/news/local/pandemic-may-have-slowed-evictions-in-south-tulsa-but-new-wave-may-be-coming/article_b39b8280-253c-11eb-ae37-6f6b23a44117.html).

<sup>6</sup> Terry West Civil Legal Clinic, *supra* note 3, at 3.

describes the cost considerations around a right to counsel program and examines existing right to counsel models. The last section outlines some key considerations in setting up a right to counsel program.

## **II. The FED Docket and the Legal Landscape**

Faced with the daunting task of going to court on their own, roughly two-thirds of tenants in Tulsa County do not appear for their eviction hearings, resulting in the issuance of default judgments against them.<sup>7</sup> In Jan. 2020, this amounted to 600 individuals or families losing their homes without a court hearing.<sup>8</sup> Those who did show up in court did not fare much better, with only 2 out of 1,395 cases that month ending in a judgment for the tenant.<sup>9</sup>

### **A. Background on Small Claims Courts**

In Oklahoma, as in many states, eviction proceedings take place in small claims court. Historically, states created small claims court as an arena to settle low stakes cases with limited monetary awards.<sup>10</sup> Individuals could participate without an attorney and avoid taking time off work for a lengthy trial.<sup>11</sup> Despite the location of eviction proceedings in what has historically been deemed a low-stakes arena of conflict resolution, evictions cannot be characterized as low-stakes events. Evictions can lead to homelessness, loss of personal property, work instability, physical and mental health problems, and significant negative educational outcomes for children.

The impact of an eviction extends beyond the small monetary amounts envisioned in small claims court. Moreover, eviction proceedings do not fit the small claims vision of attorney-free spaces where conflict resolution replaces legal argument. In practice, the majority of landlords in eviction proceedings are represented, while the majority of tenants are not. In the Jan. 2020 Tulsa FED docket, 82% of landlords had representation. In contrast, only 11% of those tenants who appeared in court did, or 3.5% of tenants in eviction proceedings overall.<sup>12</sup>

### **B. Right to Counsel and Due Process**

Access to counsel for tenants in eviction cases is essential for ensuring their constitutional right to due process.<sup>13</sup> Rooted in the principle of fundamental

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<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 11.

<sup>10</sup> See David L. Ganz, *Small Claims Court Defense*, 121 AM. JUR. TRIALS 189 (2011). See also 12 O.S. § 1751 (OSCN 2020).

<sup>11</sup> See Ganz, *supra* note 10.

<sup>12</sup> Terry West Civil Legal Clinic, *supra* note 3, at 11.

<sup>13</sup> U.S. Const. amend. XIV § 1.

fairness,<sup>14</sup> the due process clause includes both an opportunity to be heard<sup>15</sup> and the right to an impartial tribunal.<sup>16</sup>

In the landmark decision *Gideon v. Wainwright*, the Supreme Court relied on the due process clause to determine that defendants could not receive a fair trial without access to legal representation to present a proper defense.<sup>17</sup> The *Gideon* decision was limited to cases where physical liberty was at stake. Since then, the Court has rejected a wholesale application of *Gideon* to all civil cases. But in *Mathews v. Eldridge*, it outlined three factors to guide judicial considerations of whether the absence of counsel implicates due process: the private interest at stake, the government's interest, and the risk that the procedures will lead to erroneous decisions.<sup>18</sup>

## 1. Fair and Impartial Tribunal

The right to a fair and impartial tribunal advances due process by preventing “unjustified or mistaken deprivations” while promoting “participation and dialogue by affected individuals in the decisionmaking process.”<sup>19</sup> It ensures that decisions are not based on errors of fact or law and guarantees that “no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”<sup>20</sup>

Data from Tulsa's eviction court calls this principle into question. Tulsa's high eviction rate places significant demand on the eviction court that makes it impossible to hold individual hearings for all cases on the docket. The judicial process depends both on the fact that a significant proportion of tenants do not appear, and that those who do are forced into agreements through imbalanced negotiations with landlords or, more often, with their attorneys. To function efficiently, in other words, the system relies on the fact that tenants are uninformed about and unable to exercise their rights.

In *Gideon*, the Court pointed to the prospect of defendants facing attorneys on the other side as an important factor in considering due process and the right to counsel.<sup>21</sup> The imbalance between landlord and tenant representation on Tulsa's FED docket highlights the unfairness that can result when only one side is represented. Nationwide, represented tenants achieve better outcomes than unrepresented tenants,<sup>22</sup> a trend that holds true in Tulsa County. In Jan. 2020,

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<sup>14</sup> *Lassiter v. Dept. of Social Services of Durham County, N.C.*, 452 U.S. 18, 18 (1981).

<sup>15</sup> *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

<sup>16</sup> *See, e.g., Marshall v. Jerrico*, 446 U.S. 238, 242 (1980).

<sup>17</sup> *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963).

<sup>18</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>19</sup> *Jerrico*, 446 U.S. at 242.

<sup>20</sup> *Id.*

<sup>21</sup> *Gideon*, 372 U.S. at 344.

<sup>22</sup> Ericka Petersen, *Building a House for Gideon: the Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 77 (2020).

Tulsa landlords won eviction judgments against unrepresented tenants 79% of the time, compared to only 43% of the time against represented tenants.<sup>23</sup>

Representation also had a significant effect on whether landlords received money judgments, and on the amount of these judgments. The court issued money judgments against represented tenants at almost half the rate (34%) as against unrepresented tenants (78%). Where tenant attorneys negotiated money awards, these amounts were on average \$800 less than for unrepresented tenants.<sup>24</sup> The disparate outcomes offer evidence that unrepresented tenants are disadvantaged on the eviction docket.

Representation levels the playing field in negotiated agreements and in trials, preventing landlords and their attorneys from taking advantage of power imbalances in the current system. These imbalances allow plaintiffs to rely on the knowledge that they can obtain favorable judgments without meeting significant evidentiary burdens. By countering this situation, tenant representation promotes more impartial and fair outcomes. Additionally, the knowledge that tenant lawyers will challenge previously unopposed evictions may remove incentives for filing unfounded cases and ultimately ease pressures on the court.

## 2. Opportunity to be Heard

The U.S. Supreme Court has characterized the opportunity to be heard and raise relevant defenses as an integral part of due process.<sup>25</sup> Similarly, the Oklahoma Supreme Court has held that the right to be heard includes the opportunity to raise defenses as part of guaranteed due process.<sup>26</sup> Without an attorney, tenants in eviction proceedings lack sufficient knowledge to exercise their right to be heard, including their right to raise relevant defenses.

The majority of tenants who appear in eviction court settle their cases through informal hallway negotiations. Often, they are left to advance their claims against landlord attorneys who are well-steeped in courtroom practices and law. Many tenants do not know that they have a right to appear before the judge, or how to exercise this right. Additionally, unrepresented tenants are unfamiliar with the legal defenses available to them. As a result, tenants are significantly disadvantaged during these hallway negotiations and often sign agreements whose terms they do not fully understand, including the fact that they are forgoing their right to appear before the court.<sup>27</sup> If they do make it in front of a judge, they remain disadvantaged by their ignorance of relevant defenses or the evidentiary standards necessary to effectively raise them.

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<sup>23</sup> Terry West Civil Legal Clinic, *supra* note 3, at 11.

<sup>24</sup> *Id.* at 12.

<sup>25</sup> *See, e.g., Gideon*, 372 U.S. at 344-5.

<sup>26</sup> *Hauschildt v. Collins*, 4 P.2d 99, 101 (1931).

<sup>27</sup> Terry West Civil Legal Clinic, *supra* note 3, at 6-7.

### 3. Additional Due Process Factors: *Matthews v Eldridge*

#### a. *Private interest at stake*

Tenants hold an important private interest in eviction actions because of the dire consequences stemming from the loss of one's home. Displacement can lead to homelessness, a move into substandard housing, and the loss of personal belongings.<sup>28</sup> Evictions often result in long-term housing instability because landlords screen out tenants with an eviction record. The screening process forces tenants with an eviction record into neighborhoods with higher crime, more concentrated poverty and fewer educational or employment opportunities.<sup>29</sup> This disrupts community ties, impedes employment stability and impairs children's education and well-being.<sup>30</sup> The severity of the consequences arising from an eviction create a strong private interest in a right to counsel.

#### b. *Government interest*

Although eviction proceedings generally involve private actors, the government bears associated costs and administrative burdens.<sup>31</sup> Tulsa's high eviction rate creates a significant administrative burden on the court system. As described above, the court cannot adequately manage this burden while maintaining the core requirements of due process. At the same time, the court system is forced to devote significant resources to managing this high demand.

Providing access to counsel can alleviate this burden. Access to counsel programs in eviction court have reduced overall costs for participating jurisdictions.<sup>32</sup> These programs significantly decrease administrative demands on the judge and court clerk by removing the need to walk unrepresented litigants through the complexities of the court process.<sup>33</sup> They also may reduce overall filings if

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<sup>28</sup> See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY*, Crown Publishers, 2016. See also Matthew Desmond, Op-Ed., *The Eviction Economy*, N.Y. TIMES, Mar. 6, 2016, at SR5, available at <https://www.nytimes.com/2016/03/06/opinion/sunday/the-eviction-economy.html>.

<sup>29</sup> *Id.* See also Matthew Desmond, Carl Gershenson & Barbara Kiviat, *Forced Relocation and Residential Instability among Urban Renters*, 89 SOC. SERVICE REV. 227 (2015); Matthew Desmond & Tracey Shollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751 (2015).

<sup>30</sup> See Gerald S. Dickinson, *Towards a New Eviction Jurisprudence*, 23 GEO. J. ON POVERTY L. & POL'Y 1, 12 (2015) (explaining that residential mobility produces a "loss of neighborhood ties"); Matthew Desmond & Carl Gershenson, *Housing and Employment Insecurity Among the Working Poor*, 63 SOC. PROBS. 46, 49–50 (2016) (arguing that forced moves can lead to job instability because, among other reasons, workers often relocate to less convenient locations, increasing the likelihood that they will be late or miss work entirely); Courtney Lauren Anderson, *You Cannot Afford to Live Here*, 44 44 FORDHAM URB. L.J 247, 271–72 (2017) (describing how housing instability, due to poor housing conditions and evictions, can cause high turnover rates in local school districts).

<sup>31</sup> See *Mathews*, 424 U.S. at 321.

<sup>32</sup> To access some of these studies, see Stout, *Eviction Right to Counsel Resource Center*, <https://www.stout.com/en/services/transformative-change-consulting/eviction-right-to-counsel-resources> (last visited December 16, 2020).

<sup>33</sup> For a description of some of these complexities, see National Housing Law Project, *Procedural Due Process Challenges to Evictions During the Covid-19 Pandemic* (May 22, 2020), <https://www.nhlp.org/wp-content/uploads/procedural-due-process-covid-evictions.pdf>.

plaintiffs know they are operating in a system where tenants can raise relevant defenses and challenge the plaintiff's version of events. Thus, a system of tenant representation can deter plaintiffs from filing invalid claims that increase demand on the court.

In Tulsa, serial evictors file hundreds of evictions in a year.<sup>34</sup> Some of these involve repeat evictions against the same individual, suggesting the use of eviction filings to pressure tenants to pay late rent and fees rather than to remove tenants. Plaintiff requests for dismissals provide further evidence that eviction filings are used as a mechanism for fee collection.<sup>35</sup> A system of tenant representation reduces incentives to file unfounded evictions or to use eviction filings as a pressure tactic and also stands to reduce the number of default judgments.

c. *Risk of Erroneous Decisions*

The disproportionate levels of representation between landlord and tenant and the minimal evidentiary burden for default judgments<sup>36</sup> increase the risk of erroneous decisions, a factor weighing in favor of a right to counsel.<sup>37</sup> As described, eviction proceedings are not informal areas of dispute resolution. Instead, pro se litigants with no understanding of the process face legal actors who are familiar with court processes and law. Tenants are left to navigate the complexities of landlord-tenant law and the legal process on their own. This creates a significant risk of erroneous decisions, substantially disfavoring unrepresented litigants whose evictions may be unlawful.

Many tenants with no understanding of the legal process are inhibited from showing up in court. In these cases, landlords receive a default judgment without having to provide evidence of their claims. Even where tenants do appear for their hearings, their lack of knowledge of the system and the prevalence of hallway negotiations serve to negate the landlords' evidentiary burden. Tenants in these negotiations are generally unaware of the process through which they can contest a landlord's claims.

The current system results in eviction judgments in situations open to legal challenge. Without access to counsel, these challenges do not get raised. In Jan., 2020, for example, landlords obtained eviction judgments in 22 cases where they did not state a claim specifying the basis for the eviction.<sup>38</sup> From Jan. to March 2020, 507 companies with invalid limited liability company (LLC) status filed evictions, despite lacking capacity to bring suit in Oklahoma.<sup>39</sup> In the absence of tenant representation, 34% of those cases filed by an invalid LLC (174 cases)

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<sup>34</sup> Terry West Civil Legal Clinic, *supra* note 3, at 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 4, 11.

<sup>37</sup> *Mathews*, 424 U.S. at 321.

<sup>38</sup> Terry West Civil Legal Clinic, *supra* note 3, at 4.

<sup>39</sup> *Id.* at 5-6; Okla. Stat. tit. 18, § 2055.2 (F).

resulted in default judgments.<sup>40</sup> Even tenants who are present for their eviction hearings are unlikely to understand the law around LLCs, the process for checking LLC status, or its availability as a defense, underscoring the need for representation.

Without a right to counsel, and with approximately two-thirds of tenants missing their eviction hearings, unlawful evictions often move forward unhindered in Tulsa County. Tenant representation can ensure that landlords meet filing and evidentiary requirements. This prevents unlawful evictions from succeeding, decreases the risk of erroneous legal outcomes, and alleviates the dire consequences stemming from a loss of housing.

### **C. COVID-19 and the Eviction Process**

The fallout from the COVID-19 pandemic has further highlighted the importance of representation to ensure fairness in the eviction process. Tenants who sought to take advantage of rental assistance programs tied to eviction proceedings faced landlord attorneys who rejected the terms of the rental assistance.<sup>41</sup> The federal Centers for Disease Control and Prevention (CDC) eviction moratorium provided protection from eviction, but a confusing and intimidating process prevented many tenants from accessing it.<sup>42</sup> Filings continued to rise in Tulsa County as landlord attorneys sought workarounds to the CDC order that tenants lacked the knowledge to challenge.<sup>43</sup> The unused protections highlight the uneven playing field in eviction court. The effects of this imbalance, however, extend far beyond the court.

## **III. Social and Policy Arguments for Access to Counsel**

Housing is a basic human need. Displacement has wide-ranging effects on individuals and on communities. The loss of one's home can harm immediate physical and mental health, employment stability and long-term well-being. Children also suffer short and long-term effects on their mental and physical health, as well as on their education. Cumulatively, these effects have societal consequences, including increasing expenditures on health care, mental health, foster care, unemployment benefits and social programs. Displacement also disrupts community stability, which displaces neighborhood bonds and investments and increases reliance on the city for resources and public

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<sup>40</sup> Terry West Civil Legal Clinic, *supra* note 3, at 6.

<sup>41</sup> Brenda Wintrode, *Tulsa Landlords Offered Rent to Not Evict, Few Took the Deal*, Howard Center for Investigative Journalism (Sept. 2, 2020), <https://homeless.cnsmaryland.org/2020/09/02/tulsa-landlords-were-offered-rent-if-they-didnt-evict-few-took-the-deal/>.

<sup>42</sup> Michael Overall, *As Evictions Increase, Help Still Available for Tulsa Tenants Facing Difficult Choices*, TULSA WORLD, Oct. 11, 2020, [https://tulsaworld.com/news/local/as-evictions-increase-help-still-available-for-tulsa-tenants-facing-difficult-choices/article\\_bee9625a-08be-11eb-ad68-2bdc3209ec3b.html](https://tulsaworld.com/news/local/as-evictions-increase-help-still-available-for-tulsa-tenants-facing-difficult-choices/article_bee9625a-08be-11eb-ad68-2bdc3209ec3b.html).

<sup>43</sup> *Id.*

safety.<sup>44</sup> Tenant representation could alleviate these individual and societal costs by reducing evictions and their associated harms.

## A. Health Impacts of Eviction

The threat of eviction creates multiple stressors that can harm mental and physical well-being. Losing one's home, seeking alternative housing or confronting homelessness, as well as facing a potential court proceeding, are significant stressors. Individuals not yet in eviction proceedings also experience hardships as they try to avoid losing their home. A recent report in *Time* magazine described the detrimental effects that can result when individuals who are struggling to maintain their housing sacrifice food, utility and health care needs.<sup>45</sup> Balancing these needs not only risks physical health, but the stress of the decision-making process itself compromises mental health.<sup>46</sup>

Eviction increases depression rates in both the short and long terms.<sup>47</sup> In one study involving urban, low-income mothers, one in two reported depression after being evicted, compared with one in four among those not facing eviction.<sup>48</sup> The mental health effects of eviction persisted beyond the time period of the eviction itself.<sup>49</sup> The study found the increased rates of depression for mothers who were evicted lasted several years past the eviction event.<sup>50</sup> Eviction is a form of trauma that can have lasting impacts on mental health.<sup>51</sup>

Evictions also create physical risks connected to homelessness or a loss of stable housing. A lack of shelter, exposure to the elements, irregular sleep and limited access to food, nutrition or water have both temporary and lasting impacts on physical health.<sup>52</sup> Those who manage to avoid homelessness may be forced into substandard housing that can cause serious health problems.<sup>53</sup> This may mean living with conditions such as mold, lack of heat or an unsafe water supply. It also may mean "relocate[ing] to neighborhoods with even higher levels of poverty and violent crime,"<sup>54</sup> heightening the negative effects on both physical and mental well-being.

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<sup>44</sup> See, e.g., Matthew Desmond and Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295 (2015).

<sup>45</sup> Alejandro De La Garza, 'How Am I Going To Make It?' Months of Eviction Uncertainty Are Taking A Toll on Millions of Families, TIME, Sept. 21, 2020), <https://time.com/5890184/evictions-mental-health-crisis/>.

<sup>46</sup> *Id.*

<sup>47</sup> Desmond, *supra* note 44, at 300.

<sup>48</sup> Amy McCaig, *Eviction can result in depression, poorer health and higher stress, according to new Rice and Harvard study*, Rice University News and Media Relations Office of Public Affairs (Mar. 9, 2015), <https://news.rice.edu/2015/03/09/eviction-can-result-in-depression-poorer-health-and-higher-stress-according-to-new-rice-and-harvard-study/>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Desmond, *supra* note 44, at 300.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

## **B. Employment Impacts of Eviction**

Eviction directly affects an individual's ability to gain and maintain employment. A Harvard University study investigating the effects of housing insecurity noted a strong correlation between eviction and job loss.<sup>55</sup> This was true independent of work history and previous employment stability.<sup>56</sup>

The stressors of eviction can also affect job performance.<sup>57</sup> Once they are in eviction proceedings, individuals without flexible work hours may have to choose between missing work or appearing in court or other proceedings,<sup>58</sup> putting them at risk of lost income, work penalties or job loss.

Following an eviction, an individual's new living situation may create barriers around getting to work or maintaining consistent work hours. The limited housing options following an eviction may force individuals to relocate to areas less accessible to their work, increasing the likelihood of being late or missing work. As the quality of their work or their ability to maintain stable work hours suffer, individuals increasingly risk precarious employment status. Individuals who experience an eviction are 11% to 15% more likely to lose their jobs.<sup>59</sup>

## **C. Impact of Eviction on Children's Health and Education**

The loss of housing may have still greater and longer-lasting effects on children, persisting throughout childhood and even into adulthood. A study by the American Academy of Pediatrics of children up to 48 months found that unstable housing is "associated with adverse mental health, educational and behavioral outcomes in children, and diminished mental and physical capacity in adulthood."<sup>60</sup> Children who experience homelessness face "multiple adverse health outcomes," including developmental risks.<sup>61</sup> One in five mothers who experienced eviction characterized their child's health as poor, a significantly higher rate than the one in 10 among mothers who had not experienced eviction.<sup>62</sup>

Unstable housing affects school performance and attendance.<sup>63</sup> School absences deprive children of school feeding programs and other forms of support. Additionally, the lack of a consistent relationship with an educational institution may have short and long-term mental and emotional effects. This is particularly true for children in

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<sup>55</sup> Desmond, *supra* note 30, at 47.

<sup>56</sup> *Id.* at 59.

<sup>57</sup> *Id.* at 50.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 55.

<sup>60</sup> Megan Sandel, et. al., *Unstable Housing and Caregiver and Child Health in Renter Families*, 141 PEDIATRICS 1, 2 (Feb. 2018)

<https://pediatrics.aappublications.org/content/pediatrics/141/2/e20172199.full.pdf>.

<sup>61</sup> *Id.*

<sup>62</sup> McCaig, *supra* note 48.

<sup>63</sup> See United States General Accounting Office, *Elementary School Children: Many Change Schools Frequently, Harming Their Education* (Feb. 1994), <https://www.gao.gov/assets/220/219151.pdf>.

their key developmental years.<sup>64</sup> The mental and emotional stress for children in unstable housing affects both high school graduation rates and lifetime earning potential.<sup>65</sup>

Evictions have widespread mental, economic and health effects on adults and children. Legal support in the eviction process can help to alleviate these effects. Even where a lawyer cannot prevent an eviction, they can nonetheless manage the eviction process, making it less disruptive by providing more time to secure alternative housing. This increases the prospects of keeping one's personal property, finding safe housing and maintaining health, work and educational stability. Access to counsel also may reduce some of the mental or emotional stresses of eviction by managing an otherwise daunting court process. These benefits ultimately accrue not just to the affected families, but also to the communities in which they live.

## **IV. Right to Counsel Programs in Eviction Court**

Tenant access to counsel programs provide social benefits, but they also provide significant economic benefits. Evictions generate costs to the locality as well as to the individual. The previous section described the wide-reaching individual and social costs and their reverberations in the wider community. This section focuses on the resulting public costs to the city and its taxpayers.

### **A. Cost Benefits from Right to Counsel Programs**

Evictions may give rise to unexpected public costs. For example, when Boston limited access to emergency shelters, homeless populations turned to hospital emergency rooms for temporary shelter.<sup>66</sup> Boston's policy change was intended to reduce spending on emergency shelters. Instead, spending levels increased as the turn to hospital emergency rooms used more than 8,500 hours of emergency department resources and \$200,000 of state Medicaid funds.<sup>67</sup>

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<sup>64</sup> McCaig, *supra* note 48.

<sup>65</sup> De La Garza, *supra* note 45.

<sup>66</sup> City of Boston, *An Action Plan to Reduce Evictions in Boston* (December 2019), [https://www.boston.gov/sites/default/files/file/2019/12/An%20Action%20Plan%20to%20Reduce%20Evictions%20in%20Boston%20for%20Web\\_0.pdf](https://www.boston.gov/sites/default/files/file/2019/12/An%20Action%20Plan%20to%20Reduce%20Evictions%20in%20Boston%20for%20Web_0.pdf).

<sup>67</sup> *Id.* at 16.

Costing studies of access to counsel programs have concluded that these programs save money.<sup>68</sup> A 2018 study by the global advisory firm Stout Risius Ross identified several quantifiable costs that a right to counsel program could reduce:<sup>69</sup>

- Increased services for homeless children, including education, juvenile justice and welfare
- Increased reliance on public benefits from eviction-related job loss
- Increased homelessness and associated costs, including emergency health care, sanitation, shelter provisions, foster care and, in cities that criminalize homelessness, additional law enforcement and incarceration costs
- Costs stemming from family and community instability

Costs shouldered by individuals also generate broader societal costs by increasing community instability, which, in turn, increases reliance on public resources. Costs to the individual include:

- Negative impact on credit score, ability to re-rent and access to housing subsidies or vouchers
- Loss of financial and personal assets

Stout Risius Ross also identified quantifiable benefits from access to counsel programs:

- Maintenance of affordable housing stock
- Enforcement of rental laws and regulations
- Reduced eviction filings freeing city and court resources

All of these factors lead to net cost reductions from access to counsel programs. Stout Risius Ross has identified returns on investment for right to counsel programs in several cities. In Philadelphia, the firm estimated that every dollar invested in a right to counsel program would yield a benefit of at least \$12.74, for an annual cost of \$3.5 million and a savings of over \$42 million.<sup>70</sup> In Baltimore, Stout Risius Ross estimated a savings of approximately \$3.06 for every dollar spent on representation

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<sup>68</sup> See American University, The Justice in Government Project, *Key Studies and Data About How Legal Aid Improves Housing Outcomes* (July, 3, 2020) <https://www.american.edu/spa/jpo/toolkit/upload/housing-7-30-19.pdf> (containing a summary of various costing studies). See also Stout Risius Ross, *The Economic Impact of an Eviction Right to Counsel* in Baltimore City (May 8, 2020), [https://abell.org/sites/default/files/files/Baltimore%20RTC%20Report\\_FINAL\\_5\\_8\\_2020.pdf](https://abell.org/sites/default/files/files/Baltimore%20RTC%20Report_FINAL_5_8_2020.pdf); Stout Risius Ross, *Right to Counsel: The Nationwide Movement to Fight the Eviction Crisis* (Oct. 14, 2019), <https://www.stout.com/en/insights/article/right-to-counsel-nationwide-movement-fight-eviction-crisis#LosAngeles>.

<sup>69</sup> Stout Risius Ross, *Economic Return on Investment of Providing Counsel in Philadelphia Eviction Cases for Low-Income Tenants* (Nov. 13, 2018), <https://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/PhiladelphiaEvictionsReport.pdf>.

<sup>70</sup> *Id.*

for low-income tenants.<sup>71</sup> In New York City, estimates showed a net cost savings of \$320 million based on reductions in service costs for children in families experiencing homelessness, less expenditures to support job loss, reduced rental law enforcement activity, and reduced eviction filings.<sup>72</sup> Following the program's implementation, eviction filings there decreased by 20% in 2019, freeing up city and court resources.<sup>73</sup>

Given Tulsa's high eviction rate, the city may see similar cost reductions from a right to counsel program. A cost analysis could provide Tulsa-specific data on the potential return on investment of a right to counsel program.

## B. Existing Right to Counsel Programs

This section examines three city programs: New York City, San Francisco and Newark. Each program differs along a few key factors: 1) the process for creating the program, 2) the source of staffing for the program and 3) the scope of eligibility for accessing the program's services. The table below sets out some of these differences.

|   | New York City | San Francisco | Newark |
|---|---------------|---------------|--------|
| Reliance on private law firms for representation        |               |               | X      |
| Reliance on non-profit organizations for representation | X             | X             | X      |
| Created by city ordinance or legislature                | X             |               | X      |
| Created by ballot initiative                            |               | X             |        |
| Income eligibility requirement                          | X             |               | X      |
| Free legal advice for non-eligible persons              | X             | X             | X      |

### 1. New York City

New York City's city council established its right to counsel program in 2017, with a five year implementation plan through 2022.<sup>74</sup> The program started with select zip codes in each borough and has expanded to new zip codes each year.<sup>75</sup> New York's budget for the first phase of the program was \$15 million.<sup>76</sup> The

<sup>71</sup> Stout Risius Ross, *The Economic Impact of an Eviction Right to Counsel in Baltimore City*, *supra* note 68.

<sup>72</sup> Heidi Schultheis and Caitlin Rooney, *A Right to Counsel is a Right to a Fighting Chance*, Center for American Progress (Oct. 2, 2019) at 8.  
<https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance/#:~:text=A%202016%20cost%2Dbenefit%20analysis,the%20cost%20of%20providing%20counsel.>

<sup>73</sup> Office of Civil Justice, New York City Human Resources Administration, *New York City Office of Civil Justice Annual Report* (2019) at 8,  
[https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ\\_Annual\\_Report\\_2019.pdf](https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf).

<sup>74</sup> Office of Civil Justice, *supra* note 73, at 19-22.

<sup>75</sup> *Id.*

<sup>76</sup> Oksana Mironova, *NYC Right to Counsel: First Year Results and Potential for Expansion*, Community Service Society (March 25, 2019), <https://www.cssny.org/news/entry/nyc-right-to-counsel#:~:text=This%20law%20will%20give%20tenants,the%20city's%20200%2B%20zip%20codes.>



eviction.<sup>86</sup> It allocated \$5.8 million for the first two years.<sup>87</sup> San Francisco's right to counsel program has no income cap for representation. Like New York City, San Francisco uses non-profit organizations to provide representation. Eligible tenants go through an intake process and are assigned to a non-profit legal services organization.<sup>88</sup> Data from the program, which went into effect in July 2019, is not yet available.

### 3. Newark

Newark passed a city ordinance in late 2018 directing \$400,000 to create a right to counsel program effective June 2019. As in New York, eligibility is limited to those with incomes under 200% of the federal poverty level.<sup>89</sup> The ordinance created a nonprofit organization to connect eligible tenants with representation, but it did not specify the organization's responsibilities or funding source. It may be funded, at least in part, by the city of Newark.<sup>90</sup>

The first stage of implementation applied to about 10,000 people, specifically seniors, those with disabilities, and undocumented immigrants. Newark aims to have the program fully implemented within 3-5 years.<sup>91</sup> It will rely in part on pro bono attorneys and private firms.<sup>92</sup> Data on the program's effectiveness is not yet available.

## V. Next Steps: Considerations in Establishing a Right to Counsel Program

As the previous section illustrates, right to counsel programs vary across a range of factors. Programs must be tailored to the city's particular needs and legal landscape. This concluding section lays out some factors for consideration in designing an access to counsel program. These factors fall within four general categories: A) costs and funding,

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<sup>86</sup> Eviction Defense Collaborative, *Tenant Right to Counsel* (2019)

<https://evictiondefense.org/services/right-to-counsel/#:~:text=In%20November.%20of%202018%2C%20San,counsel%20in%20an%20eviction%20matter.>

<sup>87</sup> Laura Waxmann, *Tenant advocacy groups set to receive funding under 'Right to Counsel' program*, SAN FRANCISCO EXAMINER (Nov. 28, 2018), <https://www.sfexaminer.com/news/tenant-advocacy-groups-set-to-receive-funding-under-right-to-counsel-program/>.

<sup>88</sup> Eviction Defense Collaborative, *supra* note 86.

<sup>89</sup> National Coalition for a Civil Right to Counsel, *Newark Becomes Third City to Enact Right to Counsel for Evictions* (June 1, 2019), [http://civilrighttocounsel.org/major\\_developments/1323](http://civilrighttocounsel.org/major_developments/1323).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Rutgers Center on Law, Inequality and Metropolitan Equity, *Newark's Right to Counsel: A Proposed System Design for Indigent Tenants Facing Eviction* (April 2019) at 9, <https://static1.squarespace.com/static/5b996f553917ee5e584ba742/t/5cdb429b41e8bc0001a83b1d/1557873312954/CLiME+Memo+-+Newark%E2%80%99s+RTC+Design+Final.pdf>.

B) organizational structure, C) tenant eligibility and D) outreach to the target community.<sup>93</sup>

## **A. Costs and Funding**

This category includes the costs of a right to counsel program, cost offsets from the program and funding sources. Relevant costs to consider include:

- Training: including supervisors, staff lawyers, potential volunteers and other support services
- Staffing: including supervisors, staff lawyers and possibly community organizers and support services, such as social workers and paralegals
- Roll-out and implementation<sup>94</sup>
- Sustaining the program
- Eligibility thresholds, non-legal services and limited services to individuals who do not meet the eligibility requirements
- Courthouse resources: the possible need to expand judges and court staff, as well as the expansion of physical spaces for eviction court as the cases become more involved<sup>95</sup>

## **B. Organizational Structure**

Staffing needs depend on the levels and scope of service provision. For example, if phasing a program in over several years, additional attorneys will be needed each year as the program expands. Salary levels will affect the ability to obtain and retain staff and the related training costs. While pro bono programs and law schools can alleviate staffing needs, this may also increase training needs and costs.<sup>96</sup>

## **C. Eligibility Requirements**

### **1. Income Threshold**

Eligibility for a right to counsel program can be universal, as in San Francisco, or income-based, as in New York City and Newark. A right to counsel program may also provide limited scope services for those who do not meet income eligibility requirements.

### **2. Eligibility Screening**

Implementation of the eligibility threshold raises questions around the screening process and whether non-attorneys should have access to personal income information. New York City is eliminating non-attorneys from the screening

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<sup>93</sup> For more on these factors, see NYU Furman Center, *supra* note 77, at 9-18.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.* at 16-17.

<sup>96</sup> *Id.* at 10-11.

process after determining that income eligibility discussions should be subject to attorney-client privilege.<sup>97</sup>

#### **D. Service Provision, Tracking and Outreach**

To be effective, an access to counsel program must reach the intended recipients. An implementation plan should consider how tenants will be made aware of this program and whether these efforts target individuals before or only on the day of the hearing.<sup>98</sup> Should judges or court attorneys be required to confirm that the tenant knows about the availability of counsel and record when a tenant declines assistance? Are flyers at the courthouse sufficient notification?

The stage at which counsel is assigned can have a significant effect on the success of a right to counsel program. In-court assignment of counsel limits an attorney's time to assess eligibility and evaluate the client's case. This can lead to more adjournments, which ultimately slows down the court system.<sup>99</sup> Although challenging, cities should explore ways to reach affected tenants earlier to avoid these delays.

Accordingly, cities should consider how to promote awareness of a right to counsel program. In cities with short notice periods for eviction filings, it can be more difficult to connect with potential clients beforehand, but door-knocking campaigns, linkages with utility notices, providing information on court summonses and holding educational meetings regarding tenant rights and the right to counsel program can help spread the information. Creating and maintaining an accessible website can also spread the information about the program.<sup>100</sup>

Finally, cities weighing a right to counsel program should consider landlord engagement and potential repercussions. While tenant representation can discourage frivolous litigation, some landlords may turn to informal evictions through lockouts, harassment and utility shutoffs.<sup>101</sup> Cities should target both landlord buy-in for an access to counsel program and measures to counter unlawful evictions, such as a tenant hotline.

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<sup>97</sup> *Id.* at 13-14.

<sup>98</sup> *Id.* at 11-13.

<sup>99</sup> *Id.* at 13.

<sup>100</sup> *Id.* at 12.

<sup>101</sup> *Id.* at 17-18.

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FOR MORE INFORMATION

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