

**Testimony of National Coalition for the Civil Right to Counsel (NCCRC)¹
to Raquel Rolnik, UN Special Rapporteur on Adequate Housing
Official U.S. Mission
Presented by Jonathan M. Smith, Legal Aid Society of the District of Columbia**

November 8th, 2009

There is a crisis in decent, affordable and accessible housing in the District of Columbia and throughout the United States. The causes of the crisis are many -- failed government programs, income inequality, the impact of urban redevelopment and poverty. The legal system is also a contributing factor. To the extent that people living in poverty have inadequate access to courts, administrative tribunals, regulatory agencies and legislatures, existing rights remain unenforced and the prospect of new rights are beyond reach.

While not a complete solution, increased access to counsel and a reduction of barriers to judicial proceedings are essential to improving housing conditions and the quantity of affordable housing. Lawyers are essential for both individuals and communities to ensure that housing issues are addressed. An individual can rarely successfully fight an avoidable eviction or foreclosure with out the benefits of counsel. Communities need lawyers to prevent displacement caused by economic development or to assist in the creation of affordable and accessible housing.

The shortage of affordable housing is part of a wider problem of chronic, concentrated and often generational poverty. The burden of poverty in the United States, and especially in urban centers like the District of Columbia, is not equally distributed. Poverty is disproportionately experienced by women, children, African Americans, Latinos and recent immigrants. These communities also bear the burden of the housing crisis in vastly disproportionate numbers.

I. Description of the Problem

Lawyers and the Crisis in Safe, Affordable and Accessible Housing

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. Procedural

¹ 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.

fairness is essential to ensuring the enjoyment of substantive rights and judicial proceedings must be open for all litigants to resolve their disputes. The American legal system is rule bound, complex and often requires experience and training to navigate effectively. Lawyers hold an exclusive franchise on the process and unrepresented litigants are at a significant disadvantage in the courtroom and before administrative agencies.

Individuals, families and communities living in poverty face high barriers in getting legal assistance. Between one-half and two-thirds of homeowners facing foreclosure do not have a lawyer.ⁱ The situation for tenants is even more bleak: in New York, only 10% of tenants sued for eviction are represented, compared to 75% - 90% of landlords,ⁱⁱ while a recent D.C. study found that only 3% of tenants in eviction action have counsel.ⁱⁱⁱ The current recession has magnified the problem. Loan servicers try to foreclose despite lacking standing to do so,^{iv} foreclosure filings are riddled with errors,^v complex foreclosure rescue scams^{vi} that even attorneys can have trouble deconstructing are common^{vii} and tenants are being evicted when their landlord fails to pay the mortgage. Unrepresented litigants have neither the knowledge nor training to identify the errors or enforce their rights in Court.

The jurisprudence of every state contains protections for low-income tenants and home owners. These protections go unenforced in many cases because lawyers are not available to help people living in poverty to resolve their disputes. The result is that persons living in poverty are forced from their homes and affordable housing is lost when converted for use by higher incomes.^{viii}

In 2009, the Legal Services Corporation found that less than 20% of the legal needs of low-income individuals in the United States are met,^{ix} with minority litigants being especially disproportionately unrepresented.^x When attorneys are present in housing cases, tenants and homeowners are more frequently successful in enforcing their rights.^{xi}

Jurisprudence Limiting the Right to Counsel

Federal constitutional jurisprudence has yet failed to recognize a right to counsel. Under the U.S. Constitution, an indigent litigant who is in danger of losing her home due to eviction or foreclosure can not force the state to provide her with a lawyer. See *Lassiter v. Department of Social Services*.^{xii} There is, by contrast, a presumption that she does not have a right unless her physical liberty (defined 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 regardless of the merits of the litigant's defense to the eviction or foreclosure, or whether the litigant is elderly or infirm. Additionally, multiple Supreme Court rulings suggest that housing is not a fundamental constitutional right,^{xiii} resulting in an especially high burden for litigants in housing cases to obtain 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 small number of 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.^{xiv}

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.^{xv} Additionally, an English statute dating all the way back to the 15th century similarly required the appointment of counsel for all indigent parties.^{xvi} 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,^{xvii} 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.^{xviii}

Race and Gender Inequality

Unequal access to justice contributes to inequality based on race and gender, in housing and other basic human needs. The burden of poverty is born disproportionately by children, women, African Americans, and Latinos.^{xix} There are more than 37 million poor persons in the United States, comprising 12.7 percent of the total population.^{xx} Whites are less likely to be poor than the population as a whole, with a poverty rate of just 8.6 percent. African Americans and Latinos are more than twice as likely to be poor. Twenty-two percent of African Americans or Latinos have incomes below the federal poverty line, which is more than one in every five persons. The picture is starker for female heads of households: 30 percent of families with only the mother present live in poverty. For white households headed by women, the rate of poverty is 21 percent, more than twice the average for all whites. Families headed by African American or Latino women are poor at a rate of nearly 40 percent.

There are many poor white families that experience poverty, need counsel, and cannot get help. Even though the rate of poverty among whites is significantly lower, they make up nearly 50% of the poverty population. By contrast, African Americans and Hispanics make up less than 25 percent of population and Blacks and Hispanics make up more than 50 percent of people living in poverty.

As a result of this disparity, racial minorities and women are significantly less likely to have a lawyer when needed.^{xxi} The result of this denial of access is that they have more vulnerable housing situations and are at greater risk for homelessness.

In addition, low-income mothers are vulnerable to intimate partner violence because of economic factors. Support from an abuser might be food, rent or clothes for their children.^{xxii} A right to housing strategy needs to account for the feminization of

poverty and to intertwined affects of secure housing, economic security and access to counsel and the courts.

II. Remedies

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. Lawyers are as essential as judges and courts to the proper functioning of the justice system and 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.^{xxiii}

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.

ⁱ 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).

ⁱⁱ 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).

ⁱⁱⁱ 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).

^{iv} 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.

^v 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&exprod=permalink>

^{vi} 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.

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

^{viii} The experience in the District of Columbia offers an illustration of how the failure to have access to the courts has exasperated concentrated poverty. Throughout the 1990's, the District lost 6% of its rental housing stock, largely from low-income neighborhoods. "Housing in the Nation's Capital, 2002," Fannie Mae Foundation and the Urban Institute at 31. At the same time, rents have dramatically increased. The fair market rent for a two bedroom apartment in the District is almost \$1300 per month, an increase of 41% from the year 2000. To afford this rent without an unreasonable rent burden, a family must earn more than \$50,000 per year. <http://www.nlihc.org/oor/oor2006/data.cfm?getstate=on&state=DC>. While the pace of the loss of affordable units may be slowing, the impact of the last decade of development is still being felt. In 2004 alone, 12,000 units of affordable housing were lost and replaced by high cost rentals or high value homes. As a result, the neighborhoods in which poor and moderate income families can live has shrunk, economic integration has declined and the concentration of poverty has increased.

^{ix} 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.

^x 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).

^{xi} 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).

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

^{xiii} 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.

^{xiv} 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").

^{xv} 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).

^{xvi} 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").

^{xvii} 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).

^{xviii} 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).

^{xix} The federal poverty line probably understates the real scope of poverty especially in urban areas where housing costs in recent years have risen so quickly. See, Patrick Simmons, “A Tale of Two Cities; Growing Affordability Problems Amidst Rising Home Ownership for Urban Minorities” Fannie Mae Foundation (June 2004) Appendix A (available at http://www.fanniemaefoundation.org/programs/pdf/census/notes_14.pdf) and Out of Reach 2005, National Low-Income Housing Coalition (available at <http://www.nlihc.org/oor2005>) The poverty numbers are useful to examine not as an absolute measure, but as a convenient tool to compare the differing experience of whites, African Americans, Latinos and women.

^{xx} U.S. Census Bureau, Historical Poverty Tables, www.census.gov/hhes/www/poverty/histpov/hstpov2.html.

^{xxi} The adverse impact on women and racial minorities might have relevance to equal protection arguments currently being advanced under state constitutional law and should be a critical element of the public policy debate to create a right legislatively or for increased funding. In *Frase v. Barnhart*, for example, the appellant advanced as one argument that the due process protections in the Maryland Constitution are broader than those in the U.S. Constitution. Thus, she urged that the Maryland court find that counsel must be appointed where the case involves a challenge to the parent-child relationship, and not be bound by the presumption against a right to counsel found in *Lassiter v. Department of Social Services*, 425 U.S. 18 (1981), see Brief of Appellant at 62.

^{xxii} <http://new.vawnet.org/category/Documents.php?docid=2187>

^{xxiii} See, California Equal Justice Act, http://www.brennancenter.org/page/-/d/download_file_38656.pdf.