



## SYMPOSIUM ESSAY

**Lawyers Aren't Rent**

Juliet M. Brodie and Larisa G. Bowman\*

**Abstract**

Most low-income tenants facing eviction do not need a lawyer. They need rent money. Recent policy emphasis on right to counsel obscures the real injustice at play in our eviction courts: the monetization of residential housing, the protection of property and profit at the expense of the poor, and the exploitation of the human need for shelter as a mechanism to line the pockets of the real estate industry. Three-quarters of eviction cases are based on nonpayment of rent. If we want to reduce evictions, tenant lawyers are not the best tool. Rental assistance could resolve, or even help avoid the filing of, most eviction cases. Unprecedented government investment during the COVID-19 pandemic proved this concept, with millions of on-the-brink tenancies saved by \$46 billion in public relief funds. The housing justice movement needs to insist that this lesson be learned, and advocate for enduring, meaningful rental assistance (better understood as “landlord subsidies”), if only as a stopgap while we solve the larger crisis of rental affordability in the U.S. If nonpayment cases were diverted to rental assistance programs and non-attorney advocates were available to facilitate the flow of the money, lawyers could devote their energy to the subset of evictions where legal training really makes a difference—those with factual disputes or novel questions of law. Unless and until we recognize a right to affordable housing in this country, what tenants really need is access to rent money, not access to a lawyer.

---

\* Juliet M. Brodie is a Professor of Law at Stanford Law School, Director of the Stanford Community Law Clinic, and the Peter E. Haas Faculty Director of the Haas Center for Public Service at Stanford University. In her capacity as clinic director, she has represented hundreds of tenant families in San Mateo, Santa Clara, and San Francisco counties in California, the last of which is home to one of the nation’s signature right-to-counsel programs. That program exists side-by-side with public and private rental assistance funds, including a city-wide program called RADCo. See *infra* note 21. The authors thank the other participants in the Symposium for their valuable comments and conversation, Jack Schelhaas for helpful editing assistance, and the editors of the Stanford Law Review for their thoughtful contributions. Larisa G. Bowman is a Visiting Associate Professor of Law at the University of Iowa College of Law. Previously, she was Deputy Director of the housing unit of a legal services organization in New York City. She held this position during the implementation of New York City’s “universal access to counsel” for low-income tenants facing eviction, the first legislation of its kind in the nation. See *infra* note 27. New York City also has generous publicly funded rental assistance available for tenants at risk of eviction. See *infra* note 21.

## Introduction

“This is what we do while we’re waiting for the world to change.”  
– Dr. Jim O’Connell<sup>1</sup>

The rent is too damn high and has been for neoliberal decades.<sup>2</sup> In a typical year in the United States, nearly 2.7 million tenant households face eviction, most for nonpayment of rent<sup>3</sup>—the byproduct of a rental market fueled, with very limited exceptions, by an unchecked profit motive. This is indeed an eviction crisis,<sup>4</sup> demanding a robust policy response. However, in our view, the right-to-counsel movement that conceives of a lawyer in every eviction case as the best response is misguided. We applaud the right-to-counsel movement for shedding light on the unequal world of eviction proceedings.<sup>5</sup> And if the aim is

- 
1. Tracy Kidder, *You Have to Learn to Listen: How a Doctor Cares for Boston’s Homeless*, N.Y. TIMES (Jan. 5, 2023), <https://perma.cc/TZ2Z-JWQW>.
  2. We use the term “neoliberal” somewhat casually, to loosely invoke a policy environment that conceives of shelter as a commodity. The Stanford Encyclopedia of Philosophy defines neoliberalism as follows: “Neoliberalism holds that a society’s political and economic institutions should be robustly liberal and capitalist, but supplemented by a constitutionally limited democracy and a modest welfare state. Neoliberals endorse liberal rights and the free-market economy to protect freedom and promote economic prosperity.” Kevin Vallier, *Neoliberalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta & Uri Nodelman eds., 2022), <https://perma.cc/2D48-8FNK>.
  3. See Ashley Gromis, Ian Fellows, James R. Hendrickson, Lavar Edmonds, Lillian Leung, Adam Porton & Matthew Desmond, *Estimating Eviction Prevalence Across the United States*, 119 PROC. NAT’L ACAD. OF SCIENCES 1, 3 (2022), <https://perma.cc/27XR-Q3E8>.
  4. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 5 (2016); Terry Gross, *First-Ever Evictions Database Shows: ‘We’re in the Middle of a Housing Crisis’*, NPR (Apr. 12, 2018, 1:07 PM ET), <https://perma.cc/46N9-PBUE>.
  5. See generally Kathryn A. Sabbeth, *Eviction Courts*, 18 UNIV. ST. THOMAS L.J. 359, 382-83 (2022) [hereinafter Sabbeth, *Eviction Courts*]; Kathryn Ramsey Mason, *Housing Injustice and the Summary Eviction Process: Beyond Lindsey v. Normet*, 74 OKLA. L. REV. 391, 415-19 (2022); Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 68 (2020); Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 98-99 (2018); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 78-79 (2010); Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 251-52 (2009); Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might Less Assistance Suffice?*, 9 SEATTLE J. SOC. JUST. 97, 121-22 (2010); Carroll Seron, Gregg Van Ryzin, Martin Frankel & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 L. & SOC’Y REV. 419, 429 (2001); 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, 719-21 (2006); Andrew Scherer, *Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 561-62 (1988) (outlining many of the main arguments for,  
*footnote continued on next page*

to cure the intrinsic imbalance between a represented landlord and an unrepresented tenant in eviction litigation, right to counsel goes a long way.<sup>6</sup> But we should not confuse this aim for one that addresses housing instability and its catastrophic social effects. Even universal tenant representation will not do the job there. The problem isn't that tenants don't have lawyers; it's that under current economic conditions, tenants don't have defenses to landlords' lawful demands for unregulated rent. In the absence of a radical re-thinking of the commodification of housing, most tenants facing eviction need rent money, not lawyers.

The COVID-19 pandemic enabled a grand national experiment in preventing eviction with public investment in rental assistance. An unprecedented \$46 billion investment in rental assistance, coupled with a moratorium on eviction proceedings in court, saved millions of tenancies during the COVID-19 pandemic.<sup>7</sup> A permanent version of such an investment (admittedly, this would constitute a profound shift in American housing policy)<sup>8</sup> would do more than right to counsel to stabilize at-risk households and would liberate eviction defense lawyers to litigate cases where they can be of greater use. Assuming that neither a substantive right to housing nor a price-curve-shifting moonshot investment in building affordable residential units is imminent, for now, we should train our sights on enduring rental assistance instead of universal representation. By doing so, we can reserve lawyer resources for those cases where counsel can make a difference—cases about

---

and implementation strategies regarding, the establishment of a right to counsel for tenants in addressing the problem of unjust eviction proceedings).

6. Andrew Scherer, *The Case Against Summary Eviction Proceedings: Process as Racism and Oppression*, 53 SETON HALL L. REV. 1, 8 (2022).
7. Jennifer Ludden, *Eviction Filings Are up Sharply as Pandemic Rental Aid Starts to Run Out*, NPR (May 4, 2022, 8:00 AM ET), <https://perma.cc/6WA9-FZAG>; see Jasmine Rangel, Jacob Hass, Emily Lemmerman, Joe Fish & Peter Hepburn, *Preliminary Analysis: 11 Months of the CDC Moratorium*, EVICTION LAB (Aug. 21, 2021), <https://perma.cc/44RF-A4PS>.
8. Claire Cain Miller & Alicia Parlapiano, *The U.S. Built a European-Style Welfare State. It's Largely Over*, N.Y. TIMES (Apr. 6, 2023), <https://perma.cc/5Y9W-WNM4> (describing the federal government's rapid fortification of the social safety net, including emergency rental assistance, as "previously unimaginable").

issues other than nonpayment of rent<sup>9</sup> with complicated factual disputes or novel questions of law.<sup>10</sup>

## I. An Eviction Story

Consider the following prototypical story<sup>11</sup>:

Ronald Castro and Emilia Rosas<sup>12</sup> live with their two children in a two-bedroom apartment in Redwood City, a small municipality just north of Palo Alto, California. Their rent is \$2,450 USD per month, somewhat lower than what HUD reports as the fair market rent for San Mateo County.<sup>13</sup> In the economic downturn, Ronald lost his job as an Amazon warehouse employee and

- 
9. Drawing a hard line between nonpayment and everything else invariably would miss some cases that would benefit from tenant representation. Nonpayment is such a straightforward, simple cause of action that landlords sometimes wait for a missed or late payment to evict their habitual “problem” tenants. Litigating a fact-intensive lease violation or nuisance case can be costly and protracted. In our experience, landlords avoid this by waiting for, or even baiting, the tenant’s nonpayment and then bringing suit.
  10. *But see* Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 786-87 (2015) (arguing in favor of reforming court processes rather than maintaining lawyer-centric systems); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977 (2004) (arguing that judges should become “active umpires” responsible for correcting process failure to counteract market-driven inequality in access to counsel); Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2028 (1999) (arguing that judges providing “vigorous assistance to unrepresented litigants” is “necessary for the system to maintain its impartiality”).
  11. This story is based on California law, which is understood to be among the most tenant-protective of state statutory eviction regimes. New America, a “think and action tank,” has created a National Housing Loss Index based upon state and county renter, eviction, homeownership, and foreclosure data. *See Housing Loss in the United States: Our National Rankings and Maps*, in Tim Robustelli et al. *DISPLACED IN AMERICA: MAPPING LOSS ACROSS THE UNITED STATES* (2020), <https://perma.cc/2Y5B-QZWG>. In the (pre-pandemic) period from 2014 to 2016, the three states with the highest rates of housing loss were Arizona, Nevada, and Florida. *Id.* In contrast, according to RealWealth.com, a membership-based real estate investment firm, the least landlord-friendly states based on metrics including ease of eviction are Vermont, Nebraska, and New York. *See* Agnes A. Gadis, *Top 20 Most and Least Landlord Friendly States of 2023*, REALWEALTH, <https://perma.cc/9NFX-ZMBZ> (last updated Feb. 27, 2023).
  12. While Ronald and Emilia are not based on real clients, we use Latinx surnames out of respect for the fact that people of color disproportionately suffer the harms of capitalism, including its manifestation in evictions for nonpayment of rent. *See* Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 653-56 (2020); *see also* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1246-47 (2022).
  13. U.S. DEP’T HOUSING & URBAN DEV., FY 2023 SCHEDULE OF METROPOLITAN & NON-METROPOLITAN FAIR MARKET RENTS 4 (2022), <https://perma.cc/55LN-PW78>.

now drives for Uber and Lyft. Emilia works part-time in a local nail salon, but because one of their children is not yet old enough for preschool, and they cannot afford private daycare, she only works when Ronald's schedule accommodates it.

Ronald and Emilia were not able to pay their rent in November and December 2022, nor in January 2023. On January 17th, they received a three-day notice to pay rent or quit; it stated that their tenancy would be terminated and they would be subject to a lawsuit for eviction<sup>14</sup> unless they paid the full rent owing (\$7,350) by January 20th. They called the property manager and tried to work out a payment plan but were refused. On January 23rd, they were served with a summons and complaint for eviction. The lawsuit sought possession of the apartment, the rent demanded in the notice, additional rent calculated on a *per diem* basis through the date of actual eviction, and court costs and attorney's fees.<sup>15</sup>

Ronald and Emilia went to their local legal aid office, where an attorney advised them that they had five days to file an answer to the lawsuit.<sup>16</sup> The attorney agreed to represent them and to prepare and file the necessary papers. The attorney interviewed Emilia and Ronald to determine possible legal defenses<sup>17</sup>: Had the landlord or its agent done anything that might constitute a

---

14. CAL. CIV. CODE § 1946.2 (West 2022); CAL. CIV. PROC. CODE § 1161(2) (West 2022). Eviction is a creature of state statute. All states have summary process, giving owners of Blackacre priority in the civil trial calendar. *See* Mason, *supra* note 5, at 393; *see, e.g.*, Lindsey v. Normet, 405 U.S. 56, 72-73 (1972). The purpose is to resolve possessory disputes that otherwise could result in public safety problems—think landlord and tenant fist-fighting on the front lawn—if the process were not quick. *See* Lindsey, 405 U.S. at 71-72.

15. *See* Complaint—Unlawful Detainer (Judicial Council of California Form UD-100), <https://perma.cc/Z7Z3-82JZ> (revised Sept. 1, 2020). With the notable exception of “no fault,” or “no cause,” evictions, the legal claim in an eviction lawsuit is that the tenant has done something that constitutes a basis for terminating their possessory interest in the property. Generally, the bases for termination of a tenancy are nonpayment of rent, holding over after expiration of the lease term, breach of another lease term (e.g., having a dog in violation of the no-pets policy), nuisance (e.g., disturbing the quiet enjoyment of other tenants by playing loud music), and criminal activity (e.g., distributing illegal drugs). CAL. CIV. CODE § 1946.2(b)(1) (West 2022). The relief sought is restoration to the landlord of the possessory right to the property. CAL. CIV. PROC. CODE § 1174(a) (West 2022). But even in a case not ostensibly about nonpayment, the landlord may include a claim for unpaid rent for days that the tenant holds over beyond termination of the tenancy. CAL. CIV. CODE § 1951.2 (West 2022).

16. CAL. CIV. PROC. CODE § 1167(a) (West 2022).

17. Defenses and counterclaims are limited to those arising from, or bearing some close relationship to, the allegations in the complaint. *See, e.g.*, Cal. Code of Civ. Proc. § 1174.2 (West 2022) (defense of breach of implied warranty of habitability considered affirmative defense to nonpayment of rent because “untenantable” state of housing unit affects its rental value). Discovery is available but truncated. CAL. CODE CIV. PROC. § 1170.8 (West 2022). Trial is quick, typically scheduled mere days after service of the summons and complaint, and the hearing itself is even swifter. *Id.* § 1170.5; *see* Sabbeth, *footnote continued on next page*

waiver of the termination notice? Had the landlord or its agent accepted any rent corresponding to any days following January 20th? Had Emilia and Ronald attempted to pay the full \$7,350 within the three days and been turned away? As is typical, the answer to each of these questions was no. The attorney then turned to the most standard defense to nonpayment: Were there conditions of disrepair in the apartment that violated the warranty of habitability?<sup>18</sup> Emilia reported inadequate heat. In fact, last winter they had to put the kids to bed in sleeping bags because the heat never really warmed the bedrooms. Had they told the landlord about it? Yes; he acknowledged that the system was old and said there was nothing to be done.

The attorney prepared the answer, asserting the habitability defense and asking a factfinder to determine the actual value of the premises in light of the inadequate heat.<sup>19</sup> But the lawyer knew that habitability law, while certainly a colorable defense, was unlikely to solve the tenants' problem. First, there were doctrinal wrinkles: Does a defect from the winter of 2021 carry forward to the present case? Does "inadequate" heat constitute a breach? Second, and more importantly, the lawyer understood that winning those doctrinal battles would not constitute a meaningful victory. If the tenants were to prevail on the defense at trial, they would win the right to stay in their home conditioned on their paying within five days the amount of rent the factfinder determined was lawfully owed (that is, the \$7,350, less whatever diminution in value factfinder established).<sup>20</sup> What might the value of the weakened heat be? Ten percent of

---

*Eviction Courts*, *supra* note 5, at 376-385 (explaining how eviction procedures—including limited defenses and counterclaims, shortened timeframes, and minimal discovery—are designed to be "quick and cheap"); Ramsey Mason, *supra* note 5, at 416 (reporting that, in 2021, more than seventy percent of eviction hearings took under one minute in Memphis); 'Case Dismissed! What Does This Mean for Tenants in Eviction Hearings, TEXAS HOUSERS (Jun. 14, 2022), <https://perma.cc/Y996-9K7V> (finding that the majority of eviction hearings in Harris County, Texas, where Houston is located, are over in less than two minutes).

18. CAL. CIV. PROC. CODE § 1174.2(a) (West 2022); CAL. CIV. CODE §§ 1941-1941.4 (West 2022).

19. In almost every jurisdiction, the tenant's obligation to pay rent is dependent upon the landlord fulfilling its duty to maintain the premises in habitable condition. Tenant lawyers commonly raise habitability as a defense to nonpayment, yet few litigate it successfully. See Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 205 (2020) (finding that rent abatements are not the norm in cases with meritorious habitability claims even where tenant was represented).

20. The tenant who prevails on a habitability defense in California wins a conditional judgment, giving them five days to pay the rent owed minus the reduction awarded for the conditions of disrepair. CAL. CIV. PROC. CODE § 1174.2(a) (West 2022). Failure to pay results in the judgment being flipped in the landlord's favor, followed by issuance of the writ of possession. *Id.* In our experience, few tenants have the money needed to satisfy a conditional judgment on such a short timeframe. It takes weeks, even months, to secure rental assistance; five days would require a miracle. Eviction defense attorneys, acting in their clients' best interest, regularly settle cases for the amount of time it realistically takes for rental assistance to be approved and paid.

the rent? Twenty percent? Ronald and Emilia were no closer to having 90% or 80% of the rent owing than they were to having the full \$7,350.

And yet, despite these barriers, Emilia and Ronald's attorney would very likely be able to rescue this tenancy. How? Because while the government's COVID-19 rental assistance monies have timed out, the nonprofits in their community have pots of private rental assistance to dole out, courtesy of generous and politically liberal philanthropy. Assuming they had not partaken in it within the last twelve months, and that they could convince administrators that they would be able to make rent moving forward ("Emilia's mom is moving to town to take care of the toddler! More work hours for Emilia!"), they would be eligible for an infusion of this private rental assistance money.<sup>21</sup> With that money in hand, the tenants' attorney would offer the landlord's attorney an agreement that would make the landlord whole,<sup>22</sup> perhaps over a few months if

---

21. Typical eligibility criteria include the sustainability of the housing (Does the tenant have sufficient income to afford it going forward?), the priority of the housing (Is it subsidized or rent-stabilized?), and the hardship of the tenant (Do they have a disability? Do young children reside in the home? Is the tenant a senior?). Assistance is usually limited to once a year and is capped at a certain amount (usually in the range of \$5,000 to \$7,000, in the authors' experience), though there is flexibility for exigent circumstances. See *2023 CZI Community Fund*, CHAN ZUCKERBERG INITIATIVE, <https://perma.cc/GM2U-GPZ6> (archived July 4, 2023); *Emergency Assistance / One Shot Deal*, N.Y.C. HUM. RES. ADMIN., <https://perma.cc/J2CM-BXNG?type=image> (archived July 4, 2023). In New York City, the Family Homelessness and Eviction Prevention Supplement (FHEPS) program will pay up to \$20,000 in unpaid rent for a tenant family, or even more on a discretionary basis. See *Family Homelessness & Eviction Prevention Supplement (FHEPS) Fact Sheet*, N.Y.C. HUM. RES. ADMIN. (Feb. 14, 2023), <https://perma.cc/9FVA-Q9US>. Often, the money is a grant, but when public dollars are used, it may be a loan.

During the COVID-19 pandemic, the federal government put a total of \$46 billion dollars toward rental assistance—an initial \$25 billion through the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260 § 501, 134 Stat. 1182, 2069-78, and a second round of just over \$21 billion in Section 3201 of the American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 3201, 135 Stat. 4, 54-58. But rental assistance as a solution to eviction predates the pandemic in a range of forms—public funds in liberal cities like San Francisco and New York City, for example, but also private philanthropic funds. See, e.g., Alec Goodwin, *Did the Pandemic Affect the Number of One-Time Emergency Grants Made by the City?*, N.Y.C. INDEP. BUDGET OFF. (July 2021), <https://perma.cc/HA9J-VC73> (comparing pre-pandemic one-shot deals to ones paid during the pandemic); Rental Assistance, EVICTION DEF. COLLABORATIVE, <https://perma.cc/38S2-QFPQ> (archived July 4, 2023); see also City & Cnty. of S. F. 2015-2019 Consolidated Plan And 2015-2016 Action Plan for Program Year July 1, 2015-June 30, 2016at 141 (2015), <https://perma.cc/5LMS-8A7N> (making reference to "expanding" RADCo as example of eviction prevention back rent payments).

22. One unintended consequence of robust rental assistance might be the incentivizing of landlords to game the system by elevating rents above pure market rates on a theory that private or public rental assistance will pay the contract rent regardless of its market reasonableness. But in the authors' experience, rental assistance programs generally require the tenant to demonstrate an ongoing ability to afford the rent, which, in fact, incentivizes landlords to keep rents to reasonable levels. Rent regulation also helps

*footnote continued on next page*

installment payments are necessary. In exchange, Emilia and Ronald would be able to stay in the apartment. The agreement would have strict mechanisms of enforcement: If the tenants were to renege on a payment—a day late or a dollar short—the landlord would get judgment, and the sheriff would come and evict them.<sup>23</sup> (If the tenants were to fulfill their obligations, the case would be dismissed, and under governing California state law, record of the case would be shielded from public view.)<sup>24</sup>

To achieve this outcome, Ronald and Emilia's attorney would put them in contact with the nonprofit that administers the rental assistance funds.<sup>25</sup> The funds would likely be provided with certain conditions, like a maximum grant amount, and Emilia and Ronald would have to provide copies of documents, such as paystubs, bank statements, and the settlement agreement with the landlord.<sup>26</sup> Emilia and Ronald's attorney would be transparent with the landlord's attorney that some of the funds were coming from rental assistance and would ask that the landlord provide a W-9 or other tax identification demanded by the program. Once the nonprofit cut the check, the tenants'

---

mitigate the concern about landlords gaming the system. The federal Housing Choice Voucher Program ("Section 8") limits subsidized rents to those comporting with "payment standards." 24 C.F.R. § 982.4(b) (2022). Jurisdictions with rent stabilization limit the annual allowable increase in rent for lease renewals of stabilized apartments. *See, e.g.*, S.B. S6458, 2019-2020 Assemb., Reg. Sess. Pt. H, § 1 (N.Y. 2019).

23. If judgment is entered for the landlord, the clerk of court issues a writ of possession (known as a warrant of eviction in other jurisdictions) that directs law enforcement to remove all tenants and their belongings from the premises. CAL. CIV. PROC. CODE § 1170.5(a) (West 2022); *id.* §§ 512.020-512.090.
24. CAL. CIV. PROC. CODE § 1161.2 (West 2022). However, in most other states, eviction records are public, which has devastating, lasting effects on evicted tenants' future housing, job, and civic life opportunities. *See* Kathryn A. Sabbeth, *Erasing the "Scarlet E" of Eviction Records*, APPEAL (Apr. 12, 2021), <https://perma.cc/W99K-RQNK>.
25. Generally, the local welfare agency and a handful of nonprofits administer the funds. Funding may come from the government or sizable philanthropic organizations; often a nonprofit administrator will have more than one source at its disposal. Even some legal aid offices control the purse strings—which poses interesting conflict-of-interest questions when lawyers choose among "deserving" clients.
26. Notably, while the funding flows to landlords, there are generally no eligibility criteria for landlords, whose "deservingness" of assistance is *sui generis* in the authors' experience. *See* Marika Dias, *Paradox and Possibility: Movement Lawyering During the COVID-19 Housing Crisis*, 24 CUNY L. REV. 173, 192-93 & n.71 (2021) (noting that "[r]ent relief always amounts to relief for landlords" and that it would be more efficient to require landlords to seek rental assistance "than make millions of already-struggling tenant households apply for it"); *cf.* Cea Weaver, *The Promises and Failures of the "Cancel Rent" Movement*, N.Y. FOCUS (July 30, 2021), <https://perma.cc/8ZY2-YG4L> (calling rental assistance "ultimately a subsidy for landlords" and arguing that COVID-19 rental assistance should have required landlords, not tenants, to demonstrate financial need based on "the rental income they received during the pandemic and the overall health of their portfolio").



attorney would pick it up and hand-deliver it to the landlord's attorney when they see each other in court on the next case. Rent paid, tenancy saved.

## II. Lawyers as Rental Assistance Brokers, and Alternatives

Given the stakes in an eviction case, it is no wonder tenant advocates have pressed for defense lawyers, and that well-intentioned government entities have funded pilot and permanent right-to-counsel programs.<sup>27</sup> Facing eviction can be daunting to the uninitiated, unrepresented tenant.<sup>28</sup> It can go from daunting to overwhelming when the opponent in court is an experienced landlord's attorney.<sup>29</sup> Tenants know better than anyone that housing displacement has catastrophic public health, safety, educational, economic, and other social effects.<sup>30</sup> The eviction system badly needs reform. We support right to counsel, as well as other coherent, process-oriented reforms<sup>31</sup> designed to level the proverbial courtroom playing field between tenants and landlords and,

- 
27. In 2017, New York City became the first jurisdiction in the U.S. to adopt a right to counsel in eviction cases. N.Y.C. ADMIN. CODE §§ 26-1301 to 26-1306; *Implementing New York City's Access to Counsel Program: Lessons for Other Jurisdictions*, N.Y.U. FURMAN CTR. (2018), <https://perma.cc/MWV8-GBQ7>. By the end of 2022, three states and fifteen cities had adopted a right to counsel in eviction cases. Nat'l Coal. for a C.R. to Couns., *The Right to Counsel for Tenants Facing Eviction: Enacted Legislation 1 (2022)*, <https://perma.cc/69EE-S67U>. See generally *FY 2021 Eviction Protection Grant Program*, U.S. DEP'T HOUS. & URB. DEV., <https://perma.cc/C372-RC97> (archived July 5, 2023).
28. *Adjartey v. Cent. Div. of the Hous. Ct. Dep't*, 120 N.E.3d 297, 302 (Mass. 2019) (“[W]e recognize that the complexity and speed of summary process cases can present formidable challenges to individuals facing eviction, particularly where those individuals are not represented by an attorney.”).
29. Landlords are overwhelmingly represented by counsel, while tenants facing eviction rarely are. HEIDI SCHULTHEIS & CAITLIN ROONEY, CTR. FOR AM. PROGRESS, *A Right to Counsel Is a Right to a Fighting Chance 1* (2019), <https://perma.cc/4HFH-BV4V> (stating that in eviction lawsuits across the country, it is estimated that 90 percent of landlords are legally represented by an attorney, while only 10 percent of tenants are represented); Nat'l Coal. for a C.R. to Couns., *Eviction Representation Statistics for Landlords and Tenants Absent Special Intervention (2022)*, <https://perma.cc/CT2R-J4ME> (finding that in studied jurisdictions, on average, only 3 percent of tenants have counsel, compared to 82 percent of landlords).
30. See Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 316-17 (2015).
31. See, e.g., *infra* note 40 (expanded role of non-attorney advocates); *infra* note 42 (eviction diversion programs). “Problem-solving” housing courts could also foment change. See generally Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2019). For instance, New York City's Red Hook Community Justice Center has pioneered procedural justice-oriented reform of eviction hearings. See Nate Rosenfield, *Could This Be a Model for Justice in New York City's Housing Courts?*, COLUM. NEWS SERV. (Jan. 12, 2023), <https://perma.cc/QFP7-QV6D>.

arguably, to promote housing stability in the community.<sup>32</sup> What's often overlooked, however, is how these initiatives are typically accompanied by robust rental assistance programs—money to pay the rent.<sup>33</sup> In our experience, this cashes out (so to speak) with tenant lawyers functioning more as brokers of rental assistance than as attorneys for their clients.

While right to counsel is heralded as reducing evictions, we suspect the reduction is better attributed to the investment of government or philanthropic dollars. The federal government's COVID-19 pandemic response of allocating \$46 billion to assist millions of tenants who were behind on the rent (really, to bail out their landlords) was proof of concept. The funds helped prevent mass homelessness at a time when stay-at-home orders were in effect. But while the pandemic was profound with regard to how many people it affected at once, low-income tenants have faced housing instability for decades as rents have far outpaced wages.<sup>34</sup> A missed paycheck, car troubles, or unexpected medical bills can cause the rent to go unpaid. Rental assistance could save those tenancies, too.

Rental assistance assures landlords what the current American bargain promises them: rent-earning units at profit-making rates.<sup>35</sup> This is not housing justice as we would conceive it, but neither is right to counsel when the system is built for profit, not people. Rental assistance works precisely because it upholds the system's "steadfast commitment to maintain tenants' obligation to pay rent, and landlords' entitlement to collect it."<sup>36</sup> While we question whether

---

32. See Larisa G. Bowman, Esme Caramello & Nicole Summers, *Remembering Chief Justice Gants as a Champion for Housing Justice*, 62 B.C. L. REV. 2840, 2842 & n.5, 2849-51 (2021) (noting that Massachusetts' Justice for All project adopted the impartial framework of "promoting housing stability" for its proposed reform of housing court because community-wide stability in residential housing benefits both tenants and landlords).

33. See, e.g., Jack Newton, Paula Arboleda, Michael Connors & Vianca Figueroa, *Civil Gideon and NYC's Universal Access: Why Comprehensive Public Benefits Advocacy Is Essential to Preventing Evictions and Creating Stability*, 23 CUNY L. REV. 200, 225-26 (2020).

34. See *Displaced in America: Housing Loss in Forsyth County, North Carolina*, NEW AM., <https://perma.cc/5KTA-BLXT> (archived July 5, 2023) ("The COVID-19 pandemic may have elevated the urgency of eviction and foreclosure, but housing loss is a scourge even in times of relative calm. We must develop long-term policies to combat this systemic ill.").

35. See Sabbeth, *Eviction Courts*, *supra* note 5, at 375 (arguing that in pandemic relief policies, "making the owner financially whole has been treated as a first principle"); cf. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (explaining that eviction protects landlords "against confiscation of private property or the income therefrom").

36. Sabbeth, *Eviction Courts*, *supra* note 5, at 374; see Lauren Sudeall, Elora Lee Raymond & Philip M.E. Garboden, *Disaster Discordance: Local Court Implementation of State and Federal Eviction Prevention Policies During the COVID-19 Pandemic*, GEO. J. POVERTY L. & POL'Y (forthcoming 2023) ("[W]here federal and state eviction prevention [pandemic relief] policies aligned with metrics and values inherent in the typical eviction court structure—for example, facilitating quick case resolution and protecting property rights—courts were more willing to implement changes . . . . This was most true in the  
*footnote continued on next page*

landlords in the increasingly financialized rental market “deserve” the subsidy of rental assistance, tenants remain housed when the rent is paid. Ronald and Emilia’s story is thus a common one, at least in some liberal jurisdictions (and during the COVID-19 pandemic, nationwide). In these nonpayment cases, tenancies are saved not by the pressing of legal defenses but by the marshaling of third-party dollars to line landlords’ pockets.

Eviction defense attorneys do play a role in this environment—just not the one you might think. Tenant lawyers develop relationships with the government and nonprofit caseworkers who process their clients’ applications for assistance. They draft affidavits to document earned income or childcare expenses that aren’t usually documented. They memorize which day of the month each agency closes applications or has the checks cut and ready for pick-up. When the process is delayed—and it commonly is—they know which landlords’ attorneys they can beg not to schedule the sheriff’s execution of the writ or warrant *just yet*. Because this collection dance happens in the theater of civil litigation, lawyers’ legal training is of some value. For example, lawyers explain and effectuate pleading burdens, and discuss trial risks and settlement parameters with their clients. But the skills most lawyers aspire to use to advance their clients’ positions—fact development, legal argument, strategic thinking, negotiation skills, and option creation—are largely orthogonal to an eviction defense attorney’s day-to-day.<sup>37</sup> In settings where rental assistance is available, the tenant lawyer is predominantly an agent of the rental assistance system. Just like they understand how to navigate the summary process,<sup>38</sup> they also understand that rental assistance, more so than the assertion of legal defenses, saves their clients’ tenancies.<sup>39</sup>

---

case of rental assistance, where additional funds injected into the eviction process helped courts to move cases through more efficiently and satisfy landlords’ needs.”).

37. Assuming the case reaches their desk in time to raise certain procedural defenses, eviction defense attorneys can be effective at identifying service or pleading defects that result in dismissal of the landlord’s complaint. But almost always the complaint will be dismissed without prejudice, leaving the door open for the landlord to refile. The merit to this tack by tenant lawyers is that it affords their clients additional time to catch up on the rent. However, to the extent that the tenant needs rental assistance, the funding sources we have encountered turn away applicants who do not have a notice to pay or quit, pending case, or settlement agreement to prove the urgency of the situation. The tenant ends up waiting to be sued again, and the extra time afforded by dismissal of the first complaint goes to waste.
38. See Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 73 VAND. L. REV. 1365, 1405 (2021) (“From the perspective of court stakeholders, lawyers seem to add value less because of their substantive legal expertise (in their view, the issues are fairly simple) and more because of their appreciation for the process and efficiencies of the court.”).
39. Arguably, eviction defense attorneys play this role even in cases that are not ostensibly about the rent. Preservation of a private-market tenancy always protects the landlord’s right to profit from rent. Even settlement of a case for the tenant to move out peacefully,  
*footnote continued on next page*

By contrast, in eviction cases brought for reasons other than nonpayment of rent, such as a lease violation or nuisance, tenant lawyers can add significant “legal” value.<sup>40</sup> For example, envision a case in which a family is threatened with eviction based on an allegation that a member of the household got into a heated argument with a property manager, constituting a breach of the lease. In such cases, testing the landlord-plaintiff’s *prima facie* case (e.g., threatening language) with investigation, discovery, and legal analysis is vital: Motions for summary judgment might lie, and cross-examining landlord-witnesses at trial could be a game-changer. In cases like Ronald and Emilia’s—the vast majority of eviction cases filed in the U.S.—these tools are not available. There are no facts warranting development, no defenses warranting research. Tenant lawyers

---

without the aid of law enforcement, only paves the way for the landlord to secure a new tenant who will pay the rent. Behind every eviction for every cause, or even for no cause at all, is the landlord’s profit motive. *See* Dias, *supra* note 26, at 177.

Burnout is very real in this environment. Most public interest lawyers didn’t go to law school to play this role. Indeed, many nonprofit legal service agencies in right-to-counsel jurisdictions are perennially hiring, as young public interest lawyers who dreamed of advancing housing rights come to understand the role they are asked to play in “defending” nonpayment evictions under capitalist conditions. *See* Max Parrott, *Where Are All the Free Attorneys NYC Promised to Tenants Facing Eviction?*, HELL GATE (Oct. 17, 2022, 3:56 PM EDT), <https://perma.cc/8L85-HB2U>.

Moreover, the role of payment broker need not be played by an attorney. *See* Newton, Arboleda, Connors & Figueroa, *supra* note 33, at 226-27 (calling for funding for “paralegals or advocates to do the bread-and-butter anti-eviction work” of connecting clients to public benefits, including but not limited to emergency rental assistance); REBECCA L. SANDEFUR, AM. BAR FOUND. & THOMAS M. CLARKE, NAT’L CTR. FOR STATE CTS., ROLES BEYOND LAWYERS: SUMMARY, RECOMMENDATIONS, AND RESEARCH REPORT OF AN EVALUATION OF THE NEW YORK CITY COURT NAVIGATORS PROGRAM AND ITS THREE PILOT PROJECTS (2016), <https://perma.cc/H8UL-9658> (finding that tenants assisted by non-attorney court navigators were significantly more likely to tell their side of the story in court, have their defenses recognized, have repairs made, and retain possession); Bruce A. Green & David Udell, Opinion, *What’s Wrong with a Getting a Little Free Legal Advice?*, N.Y. TIMES (Mar. 17, 2023), <https://perma.cc/7RT7-5A44> (arguing that states should allow low-income people to get advice from trusted, non-lawyer sources for simple legal problems). *See, e.g.*, BAR RULES r. 43.5 (ALASKA BAR ASS’N 2023) (describing waiver of “unauthorized practice of law” (UPL) rules for non-attorneys trained and supervised by Alaska Legal Services Corporation to provide limited legal assistance in civil matters); *Upsolve, Inc. v. James*, 604 F.Supp.3d 97, 111-12 (S.D.N.Y. 2022), *appeal docketed*, No. 22-1345 (2d Cir. June 22, 2022) (holding that New York’s UPL statutes infringed free speech rights of pastor trained by non-profit to offer free completion of one-page court form for low-income debtors).

40. *See* Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *Lawyerless Law Development*, 75 STAN. L. REV. ONLINE 64, 65 (2023) (arguing that minimal appellate activity in state civil courts, including housing cases, suggests law is not developing in the way traditionally assumed); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 302 (2018) (observing that “the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop” where claims are seen as “simple” and undeserving of resources necessary to develop them).

broker rental assistance in this debt-collection scenario designed to make the landlords whole.<sup>41</sup>

We can envision a more efficient system worthy of public and private investment. Based on our experience—specific to liberal jurisdictions with both right to counsel and robust rental assistance—nonpayment of rent cases should be resolved with programs, subject to parameters beyond the scope of this Essay, where non-attorney advocates connect delinquent tenants and their landlords (we would include landlord hardship among the parameters<sup>42</sup>) with rental assistance funds. We would fund housing inspectors within such a program too, to assess habitability claims and landlords' entitlement to full contract rent.<sup>43</sup> The best practice would be to require landlords alleging nonpayment of rent to avail themselves of this program before filing a lawsuit. Attorneys would be necessary in this environment to ensure the timely tapping of the program, as well as the propriety and enforceability of legal instruments effectuating the flow of the funds. This is not “right to counsel.” It is a more efficient way of delivering what current right-to-counsel programs deliver. And while the money flows, the attorneys can dedicate themselves to breach-of-lease, nuisance, and other eviction cases where defense advocacy is crucial to the just adjudication of actual disputes.

### Conclusion

Given the fast timeline and complexity of the summary process and the reality that landlords tend to be represented, tenants should have access to counsel to minimize the risks of forced displacement and homelessness. But what keeps most tenants housed at the end of that court proceeding is having someone step in to pay the rent. The driver of right-to-counsel success stories in

---

41. Alternatively, tenants and landlords could be diverted away from court altogether in favor of rental assistance programs. *See, e.g.*, Press Release, Dep't of Plan. & Dev., City of Phila., Eviction Diversion Program Now Includes Targeted Financial Assistance Component (Jan. 31, 2023) (requiring mediation, coupled with access to rental assistance, before a landlord may file an eviction case in court); Jessica Blatt Press, *How Philly's Eviction Diversion Program Became a Model for Cities Around the U.S.*, NEXT CITY (Dec. 27, 2022), <https://perma.cc/3WS7-HQVA>.

42. With respect to COVID-19 rent relief, housing advocates called for its distribution only to those landlords who could demonstrate financial hardship. *See, e.g.*, Miriam Axel-Lute, *What Would It Mean to Cancel Rent?*, SHELTERFORCE (May 4, 2020), <https://perma.cc/74E6-AWJU> (commenting on tenant organizers' hostility to large corporate landlords receiving rent relief); Weaver, *supra* note 26 (“Property owners, not tenants, would have to apply for aid; their eligibility would be determined by the rental income they received during the pandemic and the overall health of their portfolio.”).

43. *See* Kathryn A. Sabbeth & Sophie House, Opinion, *When the Home Is the Hazard: Pandemic Responses Must Address Housing Conditions*, NEXT CITY (Mar. 4, 2021), <https://perma.cc/PAY4-TXLF> (recommending rental assistance for landlords who demonstrate need and provide safe, affordable housing).

liberal jurisdictions is rental assistance. Access-to-justice proposals that focus on right to counsel in eviction cases fail to account for the real housing justice problem: the unregulated rental housing market that promotes profit-generating rents, and the vanishingly small government support for subsidized alternatives.<sup>44</sup> The crisis of affordability needs a political economic solution, not a legal process one. The COVID-19 eviction moratoria and subsidies demonstrated what can happen when we collectivize a response to rents that tenants—who have done nothing wrong—cannot sustain.<sup>45</sup> If we are going to maintain a residential housing market that entitles landlords to profit from rental housing, the burden for sustaining that profit must be shared, either through the public coffers or, alternatively, through robust and enduring private aid. Absent radical social reform, the answer is rent money. Let's not call it right to counsel, and let's not confuse it with housing justice.<sup>46</sup> Having a lawyer doesn't pay the rent, and, as the placards at tenants' rights protests read, the rent is too damn high.

---

44. In reality, the government spends three times as much subsidizing housing for overwhelmingly upper-middle-class households through the mortgage interest tax deduction as it does for low and moderate-income households through programs like Section 8. Erik Sherman, *How Government Aid Focuses on the Wealthy First, the Poor Last*, FORBES (May 26, 2023, 12:12 AM EDT), <https://perma.cc/P8FV-5Y8N>; see also Matthew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES (May 9, 2017), <https://perma.cc/278H-E2LP>; Matthew Desmond, *The High Cost of Being Poor*, N.Y. REV. BOOKS (Apr. 20, 2023), <https://perma.cc/MED2-8YMQ>. See generally MARK P. KEIGHTLEY, CONG. RSCH. SERV., R46429, AN ECONOMIC ANALYSIS OF THE MORTGAGE INTEREST DEDUCTION (2020).

45. Juliet Brodie & Larisa Bowman, Opinion, *The Eviction Ban Should Remain in Effect Long After the Pandemic Is Over*, CNN (Jan. 22, 2021, 12:25 PM EST), <https://perma.cc/Y3QA-Q8BP>.

46. See Rebecca L. Sandefur, *Access to What?*, 148 DAEDALUS 49, 50-51 (2019) (“Resolving justice problems lawfully does not always require lawyers’ assistance.”).