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## Deepening Lawyer Role Education to Serve Students and Society

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# Deepening Lawyer Role Education To Serve Students and Society

BY DEBORAH WEIMER\*

## Introduction

- I. Educating Students in Role About the Current Crisis and How They Can Make a Difference
- II. Dysfunction in the Civil Court System and Social Consequences Resulting from Widespread Lack of Access to Counsel
- III. Preparing Students for Practice – What Is a Lawyer’s Role When the Opposing Party Is Unrepresented?

## I. INTRODUCTION

The last decade has seen an increase in focus on the plight of the unrepresented, as well as a recognition that these needs are growing dramatically. In 2006, the American Bar Association formally adopted a resolution calling for the provision of counsel to low income individuals in cases involving shelter, sustenance, safety, health, and child custody.<sup>1</sup> The

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1. AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES 2 (2006). With the encouragement of the ABA, many states have created access to justice commissions to help them determine how to address high levels of unmet need.

In 2011 the Maryland Access to Justice Commission published “Implementing a Civil Right to Counsel in Maryland” advocating counsel in basic human needs cases including landlord tenant, domestic violence, child custody and child support. The report includes a fiscal note on the estimated cost of supplying counsel in these situations. MARYLAND ACCESS TO JUSTICE COMMISSION, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 8 (2011) <http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf>.

The National Coalition for a Civil Right to Counsel has a website that keeps track of new

ABA recognized the social costs in each of these areas when counsel is not available.

Nevertheless, access to counsel is still assumed in our codes of professional responsibility, and also in most law school classes. Students can graduate from law school, and many do, without realizing that the majority of people who find themselves in court or before an administrative agency do not have access to counsel.<sup>2</sup>

For generations law schools have educated new lawyers about the virtues of the adversary system, while seldom acknowledging that in many, if not most cases at least one of the litigants is unrepresented. And what is the role of the judge in this situation?<sup>3</sup>

The question of whether our court system can meet the constitutional mandate of due process without the involvement of counsel in the majority of cases is critical to the functioning and credibility of our legal system, and should be discussed in every first year civil procedure class. As Gene Nichol describes it, “any perceptive discussion of access to our justice system with a probing visitor from a distant culture would begin;” not with dissecting the intricacies of federal vs. state jurisdiction of cases, but instead the “strongest and most pervasive transgression against access and equality – the exclusion from the effective use of our civil justice system of that huge portion of the American populace who cannot afford to pay the fare.”<sup>4</sup>

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developments in this area. See [www.civilrighttocounsel.org](http://www.civilrighttocounsel.org)

According to the World Justice Projects’s Rule of Law Index, the United States lags far behind most European democracies in this area. *Rule of Law Index*, WORLD JUSTICE PROJECT, <http://data.worldjusticeproject.org/#groups/USA>. (last visited Feb. 12, 2017).

2. Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. OF LEGAL EDUC., 531, 534 (2013). See DEBORAH L. RHODE, ACCESS TO JUSTICE 82 (2004). LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION, (2009)

3. For the Supreme Court’s most recent commentary on this question. See *Turner v. Rogers*, 131 U.S. 2507, 2516 (2011). Because of the cost of legal counsel for all, other approaches are being advocated. See, e.g., Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLORIDA L. REV. 1227 (2010); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y. & ETHICS J. 659 (2006).

4. Gene R. Nichol, *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE WESTERN L. REV. 325 (2010). “We have constructed, honed and maintained an immensely complicated, arcane, formal, imposing and mystifying structure for the government enforced resolution of civil disputes. Almost no one, unschooled in its specialized practices, could conceivably navigate its corridors. We have, at least on occasion, conceded as much (see, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1962).”

The societal cost of this reality is increasingly being recognized.<sup>5</sup>

The Rules of Professional Conduct state that lawyers and legal professionals have a responsibility to ensure the fair administration of justice.<sup>6</sup> In other words, lawyers have a responsibility to see to it that courts are functioning fairly. Law schools have a responsibility and an opportunity to engage students in understanding the challenge facing our judicial system.<sup>7</sup> They must equip students to join the quest to find solutions, beyond encouraging pro bono representation.<sup>8</sup> Students should understand that the “administration of justice” is not something that can be taken for granted, but something they will need to play a role in after they graduate.

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5. Jonathan Lippman, Matthew Diller & David Udell, *Law Schools Must Focus on Access to Justice*, THE NAT'L LAW JOURNAL, Sept. 26, 2016. <http://www.nationallawjournal.com/id=1202768467294/Law-Schools-Must-Focus-on-Access-to-Justice?slreturn=20170112191053>.

Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. OF SOC., 88 (2012). See also Desmond's new book, MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (Penguin Random House 2016). In “Tipping the Scales in Housing Court,” an op-ed in the *New York Times*, Desmond observes that tenants need lawyers to avoid the devastating consequences of eviction, which include families becoming homeless, losing all their possessions, and children bouncing from place to place. “Residential instability is the enemy of school success.” He also notes that eviction leads to increased levels of depression and had been identified by psychologists as a risk factor for suicide. Matthew Desmond, *Tipping the Scales in Housing Court*, N.Y. TIMES, Nov. 29, 2012. <http://www.nytimes.com/2012/11/30/opinion/tipping-the-scales-in-housing-court.html>.

Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37 (2010).

6. Model Rules and Maryland Rules of Professional Conduct: Preamble: A Lawyer's Responsibilities. (1) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. (6) ... a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. ...A lawyer should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes people who are not poor, cannot afford legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. Maryland Attorneys' Rules of Professional Conduct. 19 MD. CODE ANN. § 300.1 (2016).

7. A variety of options are being considered around the country for addressing the access issue. See, Richard Zorra & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L. J. 1259, 1269 (2014).

8. Eg., Mary Nicol Bowman, *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, 62 J. LEGAL EDUC., 586, 588 (2013). Of course, it is to be commended that a number of law professors have taken steps to facilitate student involvement in pro bono efforts to serve clients. But encouraging lawyers to meet their pro bono obligation cannot be seen as the solution to the current crisis, where most litigants are without access to counsel.

And how should we be educating law students given the current reality that so many people are unrepresented and, as a consequence, the adversary system is not functioning as intended? Or, as Deborah Rhode has stated so well, what are the challenges of practicing in a system that enshrines access to justice in principle, but routinely violates it in practice?<sup>9</sup>

What is a lawyer's role when the opposing party is unrepresented? Current codes of responsibility suggest simply making sure the opposing party is not confused about the lawyer's role!<sup>10</sup> But students about to enter the world of practice need guidance about their responsibility in cases where the opposing party is unrepresented. How far should the idea of zealous advocacy be taken when faced with an opponent who has no ability to retain counsel?

Many if not most law students come to law school with the hope of making a difference in the world.<sup>11</sup> They should be encouraged to maintain a connection to their goals coming into law school. They need exposure to the many challenges facing our legal system, and a sense of how they might play a role in addressing them.<sup>12</sup> This will benefit society as well as the students as students take this sense of responsibility with them into their future leadership roles.

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9. Deborah Rhode, *Legal Ethics in an Adversary System: the Persistent Questions* 34 HOFSTRA L. REV. 641 (2006).

10. *Transactions With Persons Other Than Clients* – Model Rule 4.3: Dealing with Unrepresented Person: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT: TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS. § 4.3 (2016). *See also* Maryland Attorneys' Rules of Professional Conduct. 19 MD. CODE ANN. § 304.3 (2016).

11. Daisy Hurst Floyd, *We Can Do More*, 60 J. OF LEGAL EDUC., 129 (2010).

12. Emily A. Spieler, *The Paradox of Access to Civil Justice: The "Glut" of New Lawyers and the Persistence of Unmet Need*, 44 U. OF TOL. L. REV. 365, 395 (2013). Spieler argues, "we need to teach people how to be lawyers in the markets where they are likely to find themselves, and where they may be key players in addressing issues of access to justice in coming years." Some law school deans are beginning to agree. *See*, Patricia E. Salkin, Ellen Suni, Niels Schaumann, & Mary Lu Bilek, *Law School Based Incubators and Access to Justice – Perspectives from Deans*, 1 J. OF EXPERIENTIAL LEARNING 202 (2015).

## II. Educating Students In Role About the Current Crisis and How They can Make a Difference

Introduction of access to justice issues in the civil procedure classroom is an essential starting point,<sup>13</sup> but the most powerful way to engage students in understanding the failure of our current system is to involve them in representing clients whose rights would go unprotected but for their assistance.<sup>14</sup> This gives students the opportunity to see first-hand the problems that arise when the majority of litigants do not have access to counsel. It also encourages consideration of larger questions that are seldom addressed in law school about the impact of current policies and structures and the lack of access to counsel on society as a whole.

Students see there is a bigger problem here than a simple lack of fairness to individual litigants who do not have lawyers. Courts do not function as they should when lawyers are not available to educate and advocate regarding the current state of the law. In landlord tenant courts where landlords most often have lawyers, and tenants seldom are represented, judges are not fully informed or prepared to enforce the laws protecting tenants. Laws intended both to protect individuals and families but also to prevent the unnecessary deterioration of housing stock are simply not enforced in many cases, which has contributed significantly to the decline of many inner city neighborhoods.

In the Fall of 2013, after many years teaching our year-long Health

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13. Though I am primarily a clinical teacher, for the past three years I have also been teaching Introduction to Civil Procedure and Legal Analysis and Writing, to a group of 25 first-year students. As part of that class, I require students to observe and compare proceedings in federal district court, state circuit court, and city housing court. We discuss their observations in class. Students are often surprised at the manner in which judgment for possession is routinely granted to landlords. The hearings they observe in housing court seldom resemble what they have come to understand as a “fair hearing.” Students also describe the challenges faced by judges in family court when one or both of the litigants is unrepresented, and has no knowledge of the relevant law.

14. Law school clinics have of course played a central role for years at many law schools in encouraging students to consider these issues.

Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 13 (2000).

“The clinical method allows students to confront the uncertainties and challenges of problem solving for clients in fora that often challenge precepts regarding the rule of law and justice.” Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millenium: The Third Wave*, 7 CLINICAL L. REV. 1, 38 (2000).

But as Steve Wizner and Jane Aikin pointed out in their article, “Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice,” the increased pressure on law school clinics to prepare students with the skills needed for practice may leave less time for the law reform educational goals of many clinical programs. 73 FORDHAM L. REV. 997, 1001-02 (2004).

Care Delivery HIV/AIDS Clinic at Maryland Carey Law School, I initiated a new one semester Landlord-Tenant Clinic LTP in part to create a new one semester clinic to enable students to meet their Cardin requirement.<sup>15</sup> The Clinic grew out of the recognition of the critical role safe and affordable housing plays in the wellbeing of people struggling with a serious, life long illness. I had some experience in housing court and was aware of the many housing challenges facing low-income clients in Baltimore City, and knew there was a tremendous need for advocacy. I thought it would be an excellent opportunity for law students to use their newly developing advocacy skills for clients where they could really make a difference, and it would also give us the opportunity to do problem solving and advocacy about the larger issues.

Clinic students represent clients in housing court in Baltimore City District Court in warranty of habitability, rent escrow, retaliatory eviction, termination of lease and rent collection cases. They have also represented clients threatened with subsidized housing voucher termination before administrative agencies. To prepare students for this work in housing court, the Clinic seminar addresses lawyering skills, including client interviewing, counseling and fact finding as well as basic trial skills. Students are asked to observe several different proceedings in housing court at the beginning of the semester. We discuss their court observations in class as part of their preparation.<sup>16</sup> In addition to representing individual clients, students are asked to look critically at this system, and identify the problems that result from current policies and practices.

Students are asked to engage in problem solving and advocacy both with regard to individual cases and with regard to the systemic problems they have observed.<sup>17</sup> Students write a paper on a law reform topic of their

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15. Maryland Carey Law School requires all full-time day students to have a clinical/LTP experience with a client or organization that lacks access to justice.

16. Students must be prepared to advocate in a court setting that moves quickly, with a variety of judges and a host of different styles of “administering justice”. Many of the judges are happy to have student attorneys present representing tenants, and give them time to present an opening argument and do a brief direct examination of their client and any witness. Other judges are less patient and try to push the proceeding along in their usual informal manner. See Steven Keith Berenson, *Preparing Clinical Law Students for Advocacy in Poor People’s Courts*, 43 N. M. L. REV. 363, 364 (2013), for a description of some of the challenges faced by advocates in “small claims” courts. Cf. April Land, “Lawyering Beyond” Without Leaving Individual Clients Behind, 18 CLINICAL L. REV. 47 (2011) (But representing individual clients continues to provide powerful learning experiences for students).

17. Students receive six credits for their clinic experience, which includes a 2-hour weekly seminar. The seminar addresses developing client interviewing and counseling skills, fact finding, developing a theory of the case, negotiation, and a brief introduction to trial skills. Each semester we are fortunate to have attorneys from local legal services

choosing that arose out of their clinic experience. This helps to deepen their understanding of the challenges facing the legal system, but also gives them the opportunity to explore possible solutions through research.

Students see that judges in a court where one side is virtually never represented may cease to function effectively. For example, the law regarding when a section 8 project based housing lease may be terminated is governed by federal regulations. Tenants are often not aware of these regulations, and landlords and their attorneys often do not follow them. As most tenants are not represented by counsel, judges often have no idea when these regulations are applicable.

Students representing clients in landlord tenant cases have the opportunity to help people struggling with serious problems that dramatically affect them.<sup>18</sup> They see that the laws that are on the books to protect tenants are not sufficiently enforced to achieve their purpose. Ground breaking legislative reforms, including those regulating lead paint, are not fully implemented in part because low-income tenants typically have no access to counsel.

For example last year student attorneys represented a client seeking a safe place to live with her 3 year old son. She was informed by a landlord that the apartment she was interested in renting was “lead free.” This language also appeared in the lease she signed. When paint began chipping she had an inspector test it and realized there was a serious lead risk in her apartment. She immediately had her son tested for lead poisoning, and fortunately he was fine. But, the landlord failed to respond to her requests to immediately address the chipping paint issue. Student attorneys were

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programs (e.g. Public Justice Center, Homeless Persons Representation Project) who are working on housing issues, join our seminar to compare notes and strategies for working on behalf of tenants. Students typically work in teams with two to four clients during the semester.

18. Matthew Desmond, a sociologist who spent months in Milwaukee studying the patterns and impact of evictions on individuals in the inner city, found the impact of evictions to be particularly severe on women. “. . . eviction has become typical in the lives of women from these neighborhoods.” MATTHEW DESMOND, UNAFFORDABLE AMERICA: POVERTY HOUSING AND EVICTION, 4 (2015) <http://irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf>. Typical yet damaging, for the consequences of eviction are many and severe: eviction often increases material hardship, decreases residential security, and brings about prolonged periods of homelessness (Crane and Warnes 2000; Burt 2001); it can result in job loss, split up families, and drive people to depression and, in extreme cases, even to suicide (Serby et al. 2006; Desmond 2012); and it decreases one’s chances of securing decent and affordable housing, of escaping disadvantaged neighborhoods, and of benefiting from affordable housing programs. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 156 (2016). In his new book, *Evicted: Poverty and Profit in the American City* (2016), Desmond describes how many landlords profit substantially from renting housing in deplorable condition to poor tenants who are afraid to complain and have no access to counsel.

successful in gathering and presenting evidence to persuade the court to compel the landlord to immediately correct the problems, and also obtained a judgment for retroactive damages for breach of the warranty of habitability as well as full rent abatement. In the process of investigating their client's case, they learned of a child residing in another apartment in the same building who was two years old who had just tested positive for lead, according to his mother. The child had resided in the building for almost a year. Students confirmed the mother's claim by checking the state data base. Unfortunately, due to lax enforcement of existing regulations, children continue to be poisoned by lead in in Baltimore City and around the country. This is a totally preventable and very costly problem.<sup>19</sup>

In addition to the ongoing problem of lead paint in Baltimore, the danger posed by mold growth in housing that is not properly maintained is a serious health hazard that is just beginning to be recognized. Student attorneys have represented several clients where flooding or water seepage that was not adequately addressed by landlords resulted in mold growth which created a health hazard for tenants. In one case, our client and her two daughters were forced to vacate their apartment for months because of the landlord's failure to adequately address the mold issue. The younger daughter had been diagnosed with asthma which was exacerbated by the dampness and mold. Our client had filed an action for rent escrow and the court ordered her rent paid into court. However, three months had passed and the landlord took no action to make appropriate repairs until we entered our appearance. Once we became involved, the landlord did appropriate mold remediation, the money in rent escrow was disbursed to our client and our client and her daughters were able to return to their home.

In another case, a landlord sued to evict his tenant after Section 8 suspended his payments for failure to make required repairs. In his court filing, the landlord did not state that the rental was subsidized by Section 8. The judge in the case suggested that the parties step out to the hallway to settle the case. The tenant agreed to move out, not realizing she had a right

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19. Lead poisoning of children in sub-standard housing continues to be a problem across the country. Emily Benfer, Blame HUD for America's Lead Epidemic, N.Y. TIMES, (Mar. 4, 2016), <https://www.nytimes.com/2016/03/05/opinion/blame-hud-for-americas-lead-epidemic.html>.

The Public Justice Center's investigation found that the majority of landlords did not provide accurate information about lead risk compliance when file a summary ejection petition in the Baltimore City District Court. *Justice Diverted: How Renters are Processed in the Baltimore City Rent Court*, PUBLIC JUSTICE CTR., (Feb. 15, 2017) 25 [http://www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf).

to stay. She later sought our assistance. We brought the case back before the judge and were able to negotiate an agreement enabling her to stay, and the landlord completed the repairs. Because of the lack of attorneys for tenants and the consequent lack of vigorous enforcement of lead paint and warranty of habitability statutes, students see that landlords who own property in low-income neighborhoods have little incentive to make repairs, and that the health of young children is often severely impacted as a result.<sup>20</sup>

Low-income tenants are frequently injured by unscrupulous collection activities by attorneys representing landlords. For example, in one of our recent cases, our client, a grandmother taking care of three grandchildren, was sued by a former landlord after three years had passed for \$7000 in alleged unpaid rent and fees. The landlord and his attorney claimed she had signed a settlement agreement to pay this amount, which she denied. She also denied owing the landlord \$7,000. Ultimately the judge was persuaded by our argument that a photocopy of her signature had been affixed to the purported settlement agreement. But, it is highly unlikely that the client would have prevailed in this case against a represented landlord without the assistance of an attorney.

Students see that even when the tenant has counsel, it can take an extra effort to persuade judges about how the system is supposed to operate. For example, in one case, a judge refused to hear our client's claim for retroactive damages resulting from a breach of the warranty of habitability. The judge said he could only hear the claim to set up a rent escrow account going forward, and a claim for retroactive damages would have to proceed in small claims court. Student attorneys researched the issue and found a case directly on point confirming that both causes of action could be brought together.<sup>21</sup> After being presented with this case law, the judge relented and heard our client's claim, which resulted in a judgment for \$3000.00 in retroactive damages because of the condition of his housing. In addition, tenants who are evicted for non-payment of rent have great difficulty finding new housing. An attorney (or other representative), could help them negotiate an end to the lease agreement without a judgment for eviction being entered on the record.

Thousands of tenants, including children, the elderly, and people suffering chronic health problems are evicted every year in Baltimore City. Many become homeless. In the meantime, the housing stock continues to deteriorate, and buildings are abandoned.

Students leave clinic feeling very good about the experience of being

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20. Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 190, 202 (2009).

21. *See Williams v. Hous. Auth. of Balt. City*, 361 Md. 143, 156 (Md. App. 2000).

able to use their emerging legal skills to help clients in need. At the same time, they are often shocked at the failure of our justice system to give much needed attention to cases involving such huge ramifications for families and communities, and they seek ways in which they can make a difference. Some students enroll as Clinic II students so they can continue to work with current clients or take on new cases, and also serve as mentors to new Clinic students. Others are interested in developing their paper or law reform project ideas for public education purposes.

One of the two student attorneys that represented the family forced to relocate because of extensive mold growth in their apartment wrote an excellent paper after his clinic experience describing the current state of medical understanding with regard to the health effects of mold as well as current legislative efforts to address this issue in rental housing. The paper will be a good resource for tenant advocates.

Another student completed a power point critiquing RAD (HUD's Rental Assistance Demonstration Project) and described the likely outcome of allowing private landlords to purchase and renovate public housing using low income tax credits. She advocates that funding should instead go to support community land trust as a more sustainable and community friendly way to develop more affordable housing.

Fortunately, we have partners in Baltimore who are also interested in actively pursuing meaningful reform in housing court. Just last year, the Public Justice Center published an in depth report of how tenants' housing cases are processed in Baltimore City District Court.<sup>22</sup> Legislation to address many of the issues identified was introduced in December 2015 and was referred to summer study by the legislative committee responsible for the bill.

A new proposal is likely to be submitted for the new session in January 2017, and student attorneys will be prepared to testify on these proposals along with some of their former clients. In addition, current Clinic students are researching other options that could impact the quality of housing for low income tenants and reduce the huge number of cases that end up in housing court in Baltimore City every week.

No matter where their future careers may take them, these students have an insight into some of the challenges facing our justice system that is likely to stay with them. They have experienced first-hand the unmet need in housing court, and how improving the fairness of the system could result in the well-being thousands of tenants each year, and ultimately the health of our communities.

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### III. Dysfunction In Our Civil Court System and Social Consequences Resulting from Widespread Lack of Access to Counsel

The lack of access to counsel is impacting our court system on every level.<sup>23</sup> It makes it difficult for judges to effectively and properly administer the law. It also comes with significant social costs. For purposes of this paper, I have focused on the example of how tenants experience landlord tenant (housing) court, because of the significant adjudicatory and social costs in that setting.<sup>24</sup> A central question is whether the law is being properly enforced in the typical case where a tenant is unrepresented.<sup>25</sup> The answer appears to be a clear “No.” Statutes have been enacted on the state and federal levels to protect the rights of tenants, but without access to counsel, tenants are often either unaware of or deterred from taking advantage of these protections.

For example, after the warranty of habitability decision in *Javins* in 1970,<sup>26</sup> statutes were enacted in most states to address concerns about slums and sub-standard housing posing health and safety risks to inhabitants.<sup>27</sup> However, these warranty of habitability/rent escrow statutes are not enforced as often as they could and should be, particularly in large cities with substantial low income populations.

The majority of tenants in Baltimore, for example, are unaware of these protections.<sup>28</sup> In a recent survey conducted at the District Court of Maryland in Baltimore City, 65% of tenants who reportedly had a serious defect in their home did not know they could raise this issue to the court.<sup>29</sup> In addition,

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23. WILLIAM M. RICHMAN, & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 1* (2012); *see also* SARAH STASZAK, *NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 1* (2015) (Studies in Postwar American Political Development).

24. Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 *CARDOZO PUB. L. POLY. & ETHICS J.* 690, 707 (2006). *See also* Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 *TOURO L. REV.* 187, 235-36 (2009).

25 *Touro L. Rev.* 187 (2009)

25. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 *HOFSTRA L. REV.* 533 (1992) (discussing other descriptions of housing court).

26. *See Javins v. First National Realty Corp.* 428 F.2d 1071, 1082 (1970).

27. Uniform Residential Landlord and Tenant Act (U.R.T.L.A.)

28. Public Justice Center, *Justice Diverted: How Renters are processed in the Baltimore City Rent Court 20* (2015) [www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf).

29. *Id.*

though the statutes typically allow tenants to raise habitability issues as a defense to an action for unpaid rent, tenants are often not permitted raise these issues as a practical matter.

In Baltimore, tenants who are aware of their rights and try to raise these issues as a defense to an action for eviction for non-payment of rent are often told by the presiding judge that they must file a separate, affirmative petition.<sup>30</sup> If the tenant does not have the full amount of the rent, the judge will often grant the landlord's petition for eviction on the spot, meaning the tenant is never able to raise her objection to paying full rent because of the health threatening condition of the home and the failure of the landlord to make repairs. Many judges fail to recognize that under the reasoning in *Javins*, the lease is appropriately treated as a contract, and the tenant's obligation to pay rent is conditioned on the landlord's performance of his obligations.<sup>31</sup>

Only a small percentage of low-income tenants who have reason to raise these habitability issues are aware of their rights and able to pursue them on their own successfully.<sup>32</sup>

Another example arises in the context of the rights of low-income tenants living in subsidized housing. A tenant residing in housing supported by a Section 8 subsidy has legal protections that a landlord must abide by before attempting to evict the tenant and her children.<sup>33</sup> However, tenants are often unaware of these legal regulations, and judges are not aware

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30. Part of the Court's justification for this is the overwhelming number of petitions for summary ejectment that are filed by landlords every week in Baltimore City. There is no doubt that the lack of affordable housing in Baltimore and around the country is a major contributor to the huge caseloads currently faced by housing courts.

31. "In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty." *Javins*, 428 F.2d 1082.

Both the Maryland and the Baltimore City warranty of habitability/rent escrow statutes recognize that tenants should be able to raise housing conditions issues as a defense to an action for unpaid rent as well as in an affirmative petition. *Md. Real Property Code Ann.* 8-211 (i) (2014); Baltimore City Local Law Subtitle 9 Landlord and Tenant 9.9(1)(2) (2012) The statutes also authorize the judge to abate the rent as s/he finds appropriate. *Md. Real Property Code Ann.* 8-211 (k)(2), (m)(3)(2014); Baltimore City Local Law 9.9 (f)(4)(2012)

32. Public Justice Center, *Justice Diverted: How Renters are processed in the Baltimore City Rent Court 20* (2015) [www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf)

33. Entitlement of Tenants to Occupancy, 24 C.F.R. § 247.3 (2017), providing that a tenant in subsidized housing cannot be evicted except for "good cause," and that the landlord must give the tenant notice of an alleged violation prior to pursuing an action for eviction in court.

of their relevance if a party does not bring to their attention.

There is a growing body of support for the conclusion that providing counsel for tenants (or at least some identifiable subset of them) is not only necessary to address fundamental fairness and due process concerns, but also makes sense from a fiscal and community welfare point of view.<sup>34</sup>

In New York City, the social and economic costs of homelessness are huge. In addition, because of rent control and rent stabilization laws there, tenants have very significant rights at stake. When a tenant is evicted from a rent controlled apartment, this affects the supply of affordable housing in the City. The challenge of finding safe, affordable housing in New York City has a particularly severe impact on the welfare of many families and children, people living with disabilities, and the elderly.

To attempt to find ways to address this, in 2005, a coalition of private and public entities came together in the South Bronx to try to identify ways to intervene in eviction proceedings before individuals and families ended up in homeless shelters.<sup>35</sup> They conducted a pilot project in the South Bronx to determine the impact of providing legal representation and social services assistance to tenants at risk for eviction. The program was successful in preventing homelessness in 91% of the cases. A key component to the success of this program was providing interdisciplinary services involving both social workers and attorneys.

A new randomized study conducted by a law professor and statistics graduate students at Harvard Law School reviewing the impact of providing full legal representation to tenants in District Court in Boston supports the conclusion that providing counsel can make a big difference for tenants.<sup>36</sup> Participating tenants were pre-screened, and some were randomized to full representation by an attorney from Greater Boston Legal Services (hereinafter “GBLS”). Others received limited assistance by participating in a “how to represent yourself” clinic administered by GBLS.

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34. Low- income children living in substandard housing have disproportionately higher rates of lead poisoning and asthma. The presence of rodents and mold are recognized asthma triggers. ELIZABETH TOBIN TYLER, *POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP* (Carolina Academic Press, 2011).

See Chapter 8 Housing: The Intersection of Affordability, Safety and Health (2011). “For families who become homeless, child health consequences are even more severe. Homeless children are twice as likely to suffer from respiratory infections and seven times more likely to have iron deficiency and malnutrition than housed children.”

35. LINDSAY HOFFMAN ET. AL. Housing Help Program, South Bronx, New York City: Homelessness Prevention Pilot Final Report 8 (2010), [http://www.nycourts.gov/ip/nya2j/pdfs/HHP\\_Seedco\\_rpt.pdf](http://www.nycourts.gov/ip/nya2j/pdfs/HHP_Seedco_rpt.pdf) at 226.

36. James D. Greiner (et al), *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts Housing Court*, 126 HARV. L. REV. 901, 908-909 (2013) (discussing the impact of providing full legal representation to tenants).

Two thirds of the represented group were able to avoid eviction and stay in their homes. Only one third of the limited advice group were able to avoid eviction. In addition, the represented group was substantially more successful in challenging the landlord's claim of rent due.

In New York City, most low-income tenants have no access to counsel and also face represented landlords in court. Judges there recognize lack of access to counsel for tenants is a huge problem. Retired Judge Emily Jane Goodman stated to a New York Times reporter that "Housing Court is the most unbalanced, unfair and unjust court in our system, and the biggest problem is lack of legal representation."<sup>37</sup> The Chief Judge of the New York State Court of Appeals, Jonathan Lipmann, stated in the same article, "The tenant doesn't know what to say except 'Judge, help me.'" It puts the judge in a very difficult situation because he's neutral."<sup>38</sup> Judge Lipmann has been a leader in the movement for the right to counsel for low income litigants.

In New York City there is growing support for allocating more funds to provide legal services to low income tenants. A bill pending before the New York City Council that would provide counsel to low income tenants has widespread support, but there is ongoing debate about the ultimate costs of such a program, and to what degree they would be offset by helping families avoid homelessness and preserving affordable housing.<sup>39</sup>

The challenges faced by unrepresented litigants in civil cases were recently addressed by the U.S. Supreme Court in *Turner v. Rogers*, a child support case where the father's counsel argued that an attorney should have been appointed to represent him in the trial court because of the threat of loss of liberty and incarceration.<sup>40</sup> (In fact, the father was incarcerated for a

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37. Navarro, Mireya, *Push to Provide Lawyers in New York City Housing Court Gains Momentum*, N.Y. TIMES (Dec. 16, 2014), available at <https://www.nytimes.com/2014/12/17/nyregion/push-to-provide-lawyers-in-new-york-city-housing-court-gains-momentum.html>.

38. Rebecca Davis O'Brien, *New York Officials Push Right to Counsel in Civil Cases*, WALL ST. J. (Apr. 5, 2015, 8:06 PM), <https://www.wsj.com/articles/new-york-officials-push-right-to-counsel-in-civil-cases-1428278799>.

39. Jessica Silver-Greenberg, *For Tenants Facing Eviction, New York May Guarantee a Lawyer*, N.Y. TIMES (Sept. 26, 2016), <https://www.nytimes.com/2016/09/27/nyregion/legal-aid-tenants-in-new-york-housing-court.html>.

40. 131 S. Ct. 2507 (2011). The Court found that the due process clause of the Fourteenth Amendment does not automatically require the state to provide counsel in civil contempt proceedings involving violation of a child support order even where the individual faces incarceration. The Court concluded that there were available a set of "substitute procedural safeguards" that would satisfy due process without incurring potential drawbacks of recognizing a right to counsel in this situation. (*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court applied the factors identified in *Mathews v. Eldridge* in determining what safeguards the due process clause requires. Those factors include" (1) the nature of the 'private interest that will be affected', (2) the comparative 'risk' of an 'erroneous

year before the case was finally remanded on appeal). The Court rebuffed the plea for appointed counsel, and found that the due process clause of the 14<sup>th</sup> Amendment does not automatically require appointment of counsel in these circumstances. The Court concluded that there was available a set of “substitute procedural safeguards” that would satisfy due process without incurring the potential drawbacks of recognizing a right to counsel in this situation. However, the Court recognized that Turner’s hearing had not included these procedural safeguards, and therefore the Court reversed and remanded the case. The Court’s solution was to put additional responsibility on the trial judge to ensure a fair hearing.<sup>41</sup>

The trial judge’s treatment of this case was however very representative of the kind of treatment pro se litigants typically receive in courts across the country. As Jessica Steinberg, an Associate Professor of Clinical Law at George Washington University stated in her recent article regarding *Turner*, “The hearing is, at essence, an example of a routine case, handled by a judge in a routine manner. It is illustrative of the sorts of hurried, slapdash pro se hearings that play out in courthouses across the country on a daily basis. In striking down Mr. Turner’s hearing, the Court took aim, whether intentionally or not, at the constitutional validity of the whole enterprise of pro se litigation, which operates writ large in much the same way as depicted in *Turner v. Rogers*.”<sup>42</sup>

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deprivation’ of that interest with and without ‘additional or substitute procedural safeguards’” and (3) the nature and magnitude of any countervailing interest in not providing ‘additional or substitute procedural requirements(s). The Court found that the critical question in cases of this type is likely to be the defendant’s ability to pay. It concluded that the “substitute procedural safeguards when employed together could significantly reduce the risk of an erroneous deprivation of liberty. The four safeguards the court identified were: notice to defendant that ability to pay was the critical issue, a form should be made available to elicit relevant financial information, there should be opportunity at the hearing for the defendant to respond to statements and questions about his financial and key, the requirement that the judge make an express finding that the defendant has the ability to pay before finding him in contempt.

41. See *Turner*, 564 U.S. at 435. John Pollock, *The case Against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases* 61 DRAKE L. REV. 763, 807 (2013) (discussing the difference it makes to have a right to counsel in civil contempt proceedings).

42. Jessica K. Steinberg, *Demand Side Reform in Poor People’s Court*, 47 CONN. L. REV. 741, 790-791 (2015) (discussing an example of a routine case in housing court).

#### IV. Preparing Students for Practice: What is a Lawyer's Responsibility when the Opposing Party is Not Represented?

Many graduating law students will find themselves in cases where the opposing party is unrepresented, very possibly in housing court! But, the primary message students tend to receive in law school is the importance of zealously representing their client.<sup>43</sup> The issue of how this approach might be modified when the opposing party is unrepresented is seldom addressed.<sup>44</sup> The Rules of Professional Conduct are premised, for the most part, on a lawyer representing a client whose interests are adverse to those of another party who is also represented by a lawyer.<sup>45</sup> And of course, the legal profession has no clear answer to this dilemma. But lawyers do have a responsibility to see that justice is done.<sup>46</sup> Unfortunately, since this goal is not expressed as a rule, it tends to get less attention from teachers of professional responsibility. This omission needs to be rectified. As Gerald Postema put it, law professors “need to spend less time on professional responsibility rules and more time and creative energy to understand the social and institutional conditions of morally responsible professional behavior.”<sup>47</sup>

Confronting and discussing these issues is an essential educational experience for students given the world of unrepresented litigants they will soon encounter.

One way to encourage students to think through the ethics of their roles as advocates is to have them read David Luban's book chapter “The Adversary System Excuse” in the *Good Lawyer* and apply the ideas developed there to their cases.<sup>48</sup> Though his focus was not the situation where one party is not represented, his critique of the justification of reliance on the

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43. Though there is fortunately growing attention to forms of dispute resolution beyond litigation, i.e., mediation, negotiation, etc.

44. In researching this question, it was notable how little has been written on this topic. I did uncover one piece written by practitioner/teacher John M. Burman *Ethically Speaking, Dealing with an Opposing Party who is Proceeding Pro Se*, WYO. L. (June 2008) at 2. Burman teaches professional responsibility at the University of Wyoming College of Law. Professor Burman noted that while in law school he thought facing an unrepresented opponent would be easy, a great thing. In fact, as he realized in practice, everything is harder when facing an unrepresented opponent, for both the lawyer and the presiding judge.

45. *Id.* at 2.

46. Lippman, *supra*, note 5.

47. THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 310 (David Luban ed., 1984).

48. *Id.*

adversary ethic is very relevant here. Luban argues that when professional and moral obligation conflict in a civil case, the existence of the adversary system and the idea of zealous advocacy cannot justify the lawyer's failure to recognize and acknowledge her coexisting moral obligation in the situation.

Luban distinguishes criminal cases where he believes zealous advocacy is justified as a "safeguard for individual liberty against the encroachment of the state."<sup>49</sup>

When lawyers encounter an unrepresented opponent who has been unable to find affordable counsel, is it appropriate to rely on the zealous advocacy model of litigation that is premised on both sides being represented? Or should it be modified in some way? When students are not educated about the appropriate limits of zealous advocacy and their responsibilities to the court, the risk increases that they will take undue advantage of unrepresented opponents.

In one of our Clinic cases described above, the landlord was represented by a young, relatively new attorney from a well-respected medium sized corporate firm. The student attorneys involved in the case developed a good rapport with this opposing counsel, and clearly saw him as a role model of sorts.

However, when we filed an appeal for our client, and the students had the opportunity to review the transcript detailing what had taken place before we entered our appearance, they were surprised and appalled by this young attorney's failure to inform the court that the housing involved was in fact subsidized housing, which was critical to the outcome of the case. He also apparently took advantage of the fact that the case was called a week before the agreed upon reset date. He simply confirmed to the judge that the tenant had failed to appear, without noting that the case was being called a week early apparently without notice to the tenant. He just happened to be in court on other cases.

When the tenant later realized a default judgment had been entered against him without proper notice to him, he filed a request for a new trial on his own. However, at the new trial the attorney did not clarify the history or the legal issue involved for the new judge who heard the case. As a result, the judge simply reinstated the default judgment. This was the point at which the Clinic got involved in the case.

This case involved a formerly homeless man with mental health issues who was in danger of losing his home where he had lived for several years, as well as his housing subsidy. In fact, if he had not been able to post an appeal bond equivalent to full market rent, he would have been on the street

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49. *Id.* at 9.

without any recourse after the hearing described above. When we pursued the appeal of this case in Baltimore City Circuit Court, the judge remanded it for a full hearing on the merits.

As part of our ethical issues class, students saw the relevance of Rule 3.3, candor toward the tribunal<sup>50</sup> to the attorney's actions in failing to identify the property as subsidized housing under section 8. Most felt that 3.3 (d) requiring the lawyer to inform the tribunal of all material facts in the absence of the other party, should apply in this situation. One student argued that the attorney was just being a zealous advocate for his client, the owner of the subsidized property, and was not technically in violation of an ethical rule.

What did the students who took on the appeal in this case learn from this case about dealing with unrepresented opponents? They recognized a slide into unethical behavior by the opposing counsel that surprised and alarmed them. They will be more aware of this danger in their future practice, wherever it may take them. They also gained insight into the corrupting influence of the lack of balance on a court where one side often has lawyers, and the other side almost never does. They have a first-hand understanding of the need to provide counsel to litigants in these situations, or find some other solution.

This case provided a great opportunity to discuss the tension between loyalty to one's client and fairness to the opposing party that often arises in practice.

Of course, the fairness issue also arises for us when we face an unrepresented landlord. These are often the most difficult cases in part because these landlords are frequently in violation of the law and are sometimes not even aware of this. These cases tend to become quite contentious. We are happy to follow the Rules dictate to urge the landlords to obtain counsel, but often they do not do so. There is a need for access to counsel for small scale landlords as well!

## **V. Conclusion**

Law students and law faculties need to be aware of and involved in law reform efforts which will shape the future of our profession and society for decades to come. Today's law students will soon be leaders of the Bar,

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50. Maryland Rules of Prof'l Conduct R. 3.3 (d) (2007) provides "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

legislators, judges, etc., and they should not graduate from law school without a fundamental understanding of their obligations as public citizens and the crisis facing the courts, unrepresented litigants and the legal profession. These issues must be addressed in first year classes as part of the curriculum, as well as in clinical and externship experiences.

Law schools should encourage faculty collaboration with other professionals, such as statisticians, sociologists, etc. to conduct research regarding the impact of access to counsel and how scarce resources can most effectively be used.<sup>51</sup> Research should be conducted to assess other proposed changes in our civil court system, including a more active role for judges, or expansion of the role of non-lawyers. Students should be educated about the implications of these options, and could be involved in helping to conduct this research.<sup>52</sup> Finding ways to reach those in need before they end up in court is critical.<sup>53</sup>

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51. Steven Eppler-Epstein, *Passion, Caution and Evolution: The Legal Aid Movement and Empirical Studies of Legal Assistance*, 126 HARV. L. REV. F. 102, 105 (2013) (discussing the legal impact of access to counsel).

52. For example, Deborah Rhode and Lucy Ricca at Stanford Law School have introduced a practicum this year which involves students in measuring the effectiveness of a limited legal assistance program in Alaska. [www.stanford.edu](http://www.stanford.edu).

53. Deborah J. Weimer, *Providing Interdisciplinary Services to At-Risk Families to Prevent the Placement of Children in Foster Care*, 60, Juv. & Fam. Ct. J., 24, 35, (2009).

Preventative lawyering and the value of medical-legal partnerships could use a great deal more attention. For example, there is evidence that collaboration among medical providers, social workers and lawyers and affected families can be helpful in addressing family needs early on and prevent cases from ending up in court. Medical legal partnerships are developing around the country, and their effectiveness in addressing problems before they spiral out of control and end up in court should be evaluated.

Tina Rosenberg, *When Poverty Makes You Sick, a Lawyer Can Be the Cure*, N.Y. TIMES (July 17, 2014, 9:30 PM), available at [https://opinionator.blogs.nytimes.com/2014/07/17/when-poverty-makes-you-sick-a-lawyer-can-be-the-cure/?\\_r=0](https://opinionator.blogs.nytimes.com/2014/07/17/when-poverty-makes-you-sick-a-lawyer-can-be-the-cure/?_r=0), describing a collaboration between Cincinnati Children's Hospital Medical Center and the Legal Aid Society of Greater Cincinnati.