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New York City's "Universal Access" Legislation: One Giant Leap for the Civil Right to Counsel

By Andrew Scherer¹

On July 20, 2017, forty-eight years to the day after Neil Armstrong and Buzz Aldrin took the first human steps on the moon, the New York City Council passed



Intro 214-B. The bill, signed into law by New York City Mayor Bill de Blasio on August 11, 2017, adds a new chapter to Title 26 of the Administrative Code of the City of New York that makes New York City the first jurisdiction in the United States to commit to providing legal representation

to all low-income tenants who face eviction. Chapter 13, entitled "Provision of Legal Services in Eviction Proceedings,"² provides that the city "shall" establish a program to provide access to legal services in housing court proceedings, "and shall ensure that, no later than July 31, 2022" . . . "all income eligible individuals (i.e., those with gross household income not in excess of 200 percent of the federal poverty guidelines³) receive access to full legal representation no later than their first scheduled court appearance in a covered [summary eviction] proceeding in housing court, or as soon thereafter as is practicable."⁴ (Emphasis added.)

Adoption of Chapter 13, generally referred to in NYC as the "Right to Counsel" law, is a Big Deal. By guaranteeing legal representation for people who cannot afford counsel and whose homes are at stake in legal proceedings, Chapter 13 breaks new ground and marks a major step forward for the civil right to counsel movement. The magnitude of this measure is striking. Implementing the new law will be a major undertaking that will involve years of build-up, an enormous commitment of resources and a huge shift of expectations and culture. When fully implemented in 2022, the City of New York projects that it will be spending \$155 million a year in provision of counsel for tenants facing eviction in New York City.⁵ That sum is almost half the size of the current annual budget

of the federal Legal Services Corporation for all sorts of civil legal services in all of the fifty states.⁶ Under the legislation, legal assistance will be provided by nonprofit legal services organizations, including LSC-funded Legal Services NYC and non-LSC-funded organizations like the Legal Aid Society and more than a dozen other smaller legal services organizations. Those organizations will be expected to hire hundreds of new staff attorneys, as well as supervisors and other personnel to implement the statute. There are over 250,000 eviction proceedings on the docket of New York City's Housing Court each year⁷ and it is estimated that 82% of the tenants facing eviction are income-eligible for assistance.⁸

Moreover, in addition to guaranteeing full representation in eviction proceedings to households at or below 200% of federal poverty guidelines, the legislation commits New York City to "ensuring" that all tenants who face eviction proceedings, regardless of household income, "receive access to brief legal assistance no later than their first scheduled appearance in a covered proceeding in housing court, or as soon thereafter as is practicable."⁹ This "brief legal assistance" is defined in the statute as "individualized legal assistance provided in a single consultation by a designated organization . . ."¹⁰ And a "designated organization," under the statute, "means a not-for-profit organization or association that has the capacity to provide legal services and is designated by the [NYC Civil Justice Coordinator]. . ."¹¹ Thus, New York City's nonprofit legal services providers are being asked to contract with the City to provide these consultations to over-income individuals as well as to provide full representation to eligible low-income individuals.

Most of the work of implementation will fall on the city's civil legal services providers. The providers have already been building up their capacity to provide legal assistance in eviction defense cases because in the lead-up to passage of the legislation, the City had

increased its funding for eviction defense ten-fold over the past few years, from about \$6 million to \$62 million in annual appropriations.¹² This funding increase has already enabled the providers to hire over 250 new housing attorneys, enormously increasing the number of attorneys representing tenants. The providers will now be expected to continue to expand over a period of five years as the funding expands and the services get phased in. Hiring scores of new attorneys, promoting supervisors, finding office space and developing a service delivery infrastructure may be enviable challenges, but they are significant challenges for the providers nonetheless. When *Gideon v. Wainwright* was decided in 1963,¹³ the states were immediately forced to confront the monumental task of establishing systems for implementing the constitutionally mandated right to counsel in criminal proceedings and that experience was, by all accounts, chaotic and complicated.¹⁴ New York City's commitment to providing representation in eviction cases is statutory and, recognizing the realistic need to expand capacity over time in order to assure quality assistance, as well as the need to manage expectations of a population with immediate needs that simply cannot all be addressed immediately, the NYC Council wisely wrote a five-year phase-in period into the legislation.

A confluence of factors led to this enormous victory for equal justice. First and foremost is the fact that a large and very active coalition aggressively advocated for passage of the bill. Led by Community Action for Safe Apartments (CASA), a tenant-led community-based organization in the South Bronx, the Right to Counsel NYC Coalition¹⁵ is made up of tenant advocacy groups, community organizations, legal services providers, labor unions, and faith-based organizations. The Coalition has been supported by the Impact Center for Public Interest Law at New York Law School and other academic institutions; reports, analysis and resolutions by the NYC Bar and other bar associations; pro bono legal research and advice from major law firms;¹⁶ extensive research and other assistance from the National Coalition for a Civil Right to Counsel; communications guidance from Voices of Civil Justice; and the efforts of prominent individuals, including most notably, Hon. Jonathan Lippman, the former Chief Judge of the New York State Court of Appeals (New York's highest court) who provided a tireless and highly visible voice throughout the effort to get the legislation passed. The bill's lead sponsors, City Council members Mark Levine of Upper Manhattan and Vanessa Gibson of the South Bronx, devoted relentless

energy in advocating passage and were able to convince forty-three of the City Council's fifty-one members to sign on as co-sponsors of the bill.

In the period between introduction of the bill and passage, the Coalition held a major public forum, rallied, testified at public hearings, met with countless city officials, obtained support resolutions from most of the city's community and borough-wide planning boards, garnered an enormous amount of press attention, including an editorial supporting the bill in the *New York Times*, organized a letter of support from over 100 faith leaders, and generally made the right to counsel for tenants facing eviction a prominent public policy issue. Ultimately, the support of a progressive Mayor with a strong commitment to tackling income inequality and the support of his top administrators, including HRA Commissioner Steven Banks (the former Attorney-in-Chief of the NYC Legal Aid Society), whose agency is charged with administering the city's legal services contracts, made passage inevitable.

While an extraordinary organizing effort and a receptive city administration were the primary reasons for the bill's passage, extrinsic factors worked in our favor as well. New York City is facing a persistent and seemingly intractable increase in homelessness¹⁷ and we were able to make an effective case that spending money on a right to counsel in eviction cases would in the long run save the city money in homeless shelter costs.¹⁸ Widespread concern about NYC's rapidly escalating rents and the accelerating rate of displacement due to gentrification of neighborhood after neighborhood lent further urgency to the call for establishing a right to counsel as a measure to stem rampant displacement. Finally, and perhaps counter-intuitively, national politics seemed to play in our favor as well. Localities like NYC have been emboldened to take stands — e.g., the sanctuary cities movement — that set themselves apart from the national trend, following the November 2016 election, of growing threats to hard-won human and civil rights and an atmosphere of xenophobia and divisiveness. Guaranteeing counsel in eviction cases is an excellent way for government to convey to low-income people (who are disproportionately people of color) that their lives, homes and communities matter.

So, what happens next? What kinds of changes can we expect to happen as a system is put in place to ensure legal representation for all of New York City's low-income tenants who face eviction? We know some things for certain and we can speculate as to others. We know that over the next few years access to justice in one of life's most important spheres — home and

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community — will be made universally available in NYC. Indeed, a summer 2016 report by the NYC Civil Justice Coordinator's office found that with the pre-statute build up of city funding for tenant representation, 27% of the tenants in Housing Court were already being represented, as opposed to a mere 1% a few years prior.¹⁹ We know that for many, the trauma of eviction will be prevented. That same report found that increased representation had already reduced evictions by 24%.²⁰ We know anecdotally, from Housing Court judges and practitioners, that with increased tenant representation, the culture and folkways of Housing Court are changing. The court, known for its one-sided power imbalance and its crude hallway negotiations between landlords' lawyers and unrepresented tenants, was once compared to Calcutta on bazaar day by a then-New York State Chief Judge.²¹ Now, there is more decorum; there are more written pleadings; there are more motions filed; and there is more attention paid to the strictures of the law.

We can assume that, with greater representation of tenants, there will be more opportunities for judges to engage in the traditional judge's role of interpreting the law and thereby developing the body of the law that applies to landlord tenant relations and to the eviction process. We can speculate that, as the expectations about the eviction process evolve and people begin to view the Housing Court as a more balanced forum that dispenses justice rather than a forum that issues and enforces judgments based on one-sided negotiations, landlords will bring fewer frivolous proceedings, there will be less need to bring emergency "orders to show cause" to stay imminent evictions, fewer settlements will need to be reopened, and fewer cases will return to court presenting repeating issues. And perhaps most important, we can anticipate that, as low-income tenants become aware that someone will have their back and they will have a fighting chance to save their homes should they face eviction, they will become more willing to organize to stand up for their rights and to demand reforms in the courts and in the legislature.

The NYC legislation is not perfect. The Council and Mayor's legal staff inserted language that thrusts a measure of ambiguity into the legislation. Implementation of the program to "ensure" universal access to counsel is "subject to appropriation"²² and the legislation states that it shall not be "construed to create

a private right of action on the part of any person or entity against the city or any agency, official, or employee thereof."²³ However, in spite of these clauses, all indications are that, when fully implemented, Chapter 13 will create a right to counsel. It is clear that the current mayoral administration and Council are committed to fully implementing the legislation's commitment to "ensure" legal representation for all low-income tenants facing eviction and to ensure that legal consultations are provided to all tenants who are over-income.²⁴ Since, apparently, the Mayor will get re-elected to another four year term commencing in January of next year that will last until 2022,²⁵ and the phase-in period set forth in the legislation is intended to be completed by 2022, any legal conflict over the enforceability of the city's commitment to ensuring counsel will likely not arise for a number of years. Meanwhile, the legislation is being widely heralded and referred to in the press and by politicians as creating a right to counsel.²⁶ There is every reason to expect that, as the system of universal access to counsel takes root throughout the city, people will justifiably believe they have a right to counsel when they face eviction. Thus, if some future administration tries to refuse to fund the program or repeal the legislation, it will face a political firestorm.

We face an exciting, but no doubt rocky, road ahead as Chapter 13 gets implemented. The city and the legal services providers will need to negotiate contracts that assure that the providers receive compensation for their work that is sufficient for them to provide high quality legal assistance with adequate supervision and support. Low-income New Yorkers will need to be educated that we are at the dawn of a new era in Housing Court and that, over time, they can expect to be able to get counsel if they face eviction. Of course, expectations will need to be managed in the short run, because not everyone who needs counsel will be able to get counsel for several more years as services are phased in. Systems will need to be set up that enable people to get easy and timely access to services. And a new generation of housing lawyers will need to be hired and trained to provide high quality legal assistance to individuals and groups, to work closely with community based organizations in advocating for tenants' rights, and to see their roles as transformative and expansive.

This breakthrough in NYC is inspiring other jurisdictions to take similar measures. Philadelphia appropriated \$500,000 this year for attorneys to provide eviction defense; Washington, D.C. appropriated \$4.5 million for eviction defense; and legislation to create

an eviction defense program has been introduced in Baltimore.²⁷ Just as the moonwalk almost a half-century ago demonstrated what science could accomplish, New York City's new program of universal access to counsel is a breakthrough of monumental proportions that demonstrates how activism and advocacy by a broad coalition, led by community leaders and widely supported, can substantially advance social justice. Stay tuned.

- 1 Andrew Scherer is the Policy Director of the Impact Center for Public Interest Law at New York Law School, a Distinguished Adjunct Professor at the law school and the Director of the Impact Center's Right to Counsel Project. He is also the author of *Residential Landlord-Tenant Law in New York*, the principal of Andrew Scherer Consulting and the former Executive Director of Legal Services NYC (2001-2010), where he had worked in a variety of capacities since 1978. Andrew may be reached at ascherer@nyls.edu.
- 2 Admin. Code of the City of NY § 26-1301 et seq. Also known as NYC Local Law 136 of 2017, the legislation can be found here: <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80>
- 3 § 26-1301
- 4 § 26-102(2)
- 5 <http://www1.nyc.gov/office-of-the-mayor/news/079-17/state-the-city-mayor-de-blasio-speaker-mark-viverito-rally-universal-access-free>; last checked Aug. 31, 2017
- 6 At time of publication, the LSC budget for federal FY'18 was expected to be somewhere between \$300 million and \$385 million. ABA Journal, June 30, 2017, http://www.abajournal.com/news/article/proposed_budget_would_increase_funds_for_law_enforcement_and_immigration_bu
- 7 <http://housingcourtanswers.org/wp-content/uploads/2016/05/CIV-ST-30-term-1-13-citywide-.pdf>
- 8 Stout Risius and Ross, *The Financial Cost and Benefits of Establishing a Right to Counsel in Eviction Proceedings Under Intro 214-A*, 2016 ("SRR Report"), p. 3, http://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf
- 9 § 26-1302(1)
- 10 § 26-1301
- 11 *Id.* The office of the New York City Civil Justice Coordinator was created by an amendment to the New York City Charter that was adopted in 2015. The amendment, Local Law 61 of 2015, can be found here: <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2253270&GUID=023D2B73-AEF0-4B03-AE14-61167A8431C8&Options=ID|Text|&Search=736>
- 12 NYC Mayor's office press release, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2253270&GUID=023D2B73-AEF0-4B03-AE14-61167A8431C8&Options=ID|Text|&Search=736>
- 13 372 U.S. 355 (1963)
- 14 *See, generally, Richardson and Mandell, Fairness over Fortuity: Retroactivity Revisited and Revised*, 1989 *Utah L. Rev.* 11
- 15 righttocounselnyc.org
- 16 Law firms that contributed to the effort included Skadden Arps, Debevoise and Plimpton, and Orrick.
- 17 Alex Taylor, *Homelessness in New York City is on the Rise*, *N.Y. Post*, July 23, 2017.
- 18 The SRR report, at page 3 (*supra* fn. 8) found that implementation of a right to counsel for low-income tenants who face eviction would result in net cost savings to New York City of \$320 million. The report was produced on a pro bono basis for the Pro Bono and Legal Services Committee of the New York City Bar Association.
- 19 NYC Office of Civil Justice 2016 Annual Report, https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ%202016%20Annual%20Report%20FINAL_08_29_2016.pdf
- 20 *Id.*
- 21 Civil Court of the City of New York, *A Decade of Change and Challenge in the People's Court, 1997-2006*, <https://www.nycourts.gov/courts/nyc/civil/pdfs/10year.pdf>
- 22 § 26-1302(a)
- 23 § 26-1302(g)
- 24 In signing the new law, Mayor de Blasio stated, "New York City will be the first city in country to ensure anyone facing an eviction case can access legal assistance thanks to this new law. New Yorkers should not lose their homes because they cannot afford a lawyer and stopping wrongful evictions from happening makes both ethical and economic sense." <http://www1.nyc.gov/office-of-the-mayor/news/547-17/mayor-de-blasio-signs-legislation-provide-low-income-new-yorkers-access-counsel-for/#/0>
- 25 *See, e.g., J. David Goodman, De Blasio is in Unfamiliar Territory in Second Run: Way out Front*, *NYT*, June 13, 2017
- 26 *See, e.g., Andrew Denney, Is Housing Step One Toward Civil Gideon?*, *NYLJ*, Aug. 10, 2017; Jimmy Tobias, *These Cities are About to Make it Harder for Landlords to Evict People*, *The Nation*, Aug. 28, 2017
- 27 *These Cities Are About to Make it Harder for Landlords to Evict People*, *supra*.