

2015

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## Recommended Citation

Scherer, Andrew, "The Price of Equal Justice: How Establishing a Right to Counsel for People Who Face Losing Their Homes Helps Tackle Economic Inequality" (2015). *Articles & Chapters*. 1115.  
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# The Price of Equal Justice: How Establishing a Right to Counsel for People Who Face Losing Their Homes Helps Tackle Economic Inequality

Andrew Scherer<sup>1</sup>

New York City is at the epicenter of the astoundingly large and growing divide between rich and poor in the United States. This wealth gap is a source of major concern, and the current city administration has, with good reason, made tackling economic inequality one of its primary policy objectives. One particularly troublesome result of disparity in wealth is disparity in access to justice. The equation is simple: no money, no counsel;<sup>2</sup> no counsel, no access to justice. This essay argues that the City is well-positioned to guarantee a right to counsel for low-income households that face losing their homes in legal proceedings and that, among other compelling reasons to do so, establishing the right to counsel will significantly further the administration's goal of tackling economic inequality.

The New York City Council and the administration of Mayor Bill de Blasio are considering adopting legislation that would make New York City the first jurisdiction in the United States to guarantee a right to counsel for low-income people who cannot afford legal help and who face loss of their homes in eviction and foreclosure proceedings.<sup>3</sup> For many reasons, it would be sound social and fiscal policy for the City to establish this right. The right to counsel would protect affordable housing and stabilize low-income families and communities. The right to counsel would stem the tide and rising costs of homelessness. And the right to counsel would vindicate the important constitutional rights of due process and equal protection. These and other arguments have been addressed at length elsewhere.<sup>4</sup> However, the literature on the right to counsel has not yet addressed the relationship of the right to counsel to income inequality and wealth-based access to justice.

Establishing the right to counsel in eviction and foreclosure cases will help ameliorate economic inequality, both concretely and symbolically. It will greatly enhance people's ability to avoid

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<sup>1</sup> Policy Director, Impact Center for Public Interest Law at New York Law School, and Distinguished Adjunct Professor, New York Law School.

<sup>2</sup> Or, at best, people without money have severely limited access to counsel through free legal assistance programs.

<sup>3</sup> See Intro. 214 (City of New York 2014), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID>. The Right to Counsel NYC Coalition, a citywide coalition of housing and other advocacy groups, academic institutions, legal services providers and others, was formed in 2014 to advocate for a right to counsel for households facing eviction in NYC and has been actively supporting the legislation.

<sup>4</sup> See, e.g., *Panel Discussion: International, National, and Local Perspectives on Civil Right to Counsel, An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State*, 25 *Touro L. Rev.* 81 (2009); Raymond Brescia, *Sheltering Counsel: Toward a Right to a Lawyer in Eviction Proceedings*, 25 *Touro L. Rev.* 187 (2009); and other articles in the same volume, available at [http://www.tourolaw.edu/LawReview/uploads/pdfs/\\_7\\_WWW\\_PanelDiscussion\\_SM\\_Final\\_12.23.08\\_.pdf](http://www.tourolaw.edu/LawReview/uploads/pdfs/_7_WWW_PanelDiscussion_SM_Final_12.23.08_.pdf); Andrew Scherer, *The Importance of Collaborating to Secure a Civil Right to Counsel*, 30 *N.Y.U. Rev. L. & Soc. Change* 675 (2006), available at <http://courts.state.ny.us/ip/partnersinjustice/right-to-counsel-collaboration.pdf>. The National Coalition for a Civil Right to Counsel also maintains a comprehensive bibliography on the civil right to counsel. *Civil Right to Counsel Bibliographies*, Nat'l Coal. for a Civil Right to Counsel, <http://civilrighttocounsel.org/resources/bibliography> (last visited June 5, 2015).

homelessness and displacement, and it will protect their ability to remain in their homes and communities. A home is, for most of us, and particularly for those with low incomes, our most important material possession. It serves as the center of our lives as family members and community members. It attaches us to schools, work, friends, and health care. It enables us to vote and otherwise participate in the political process. Helping people retain this all-important asset helps them retain whatever wealth they have managed to accrue and gives them a perch from which to access additional wealth. At the same time, guaranteeing a right to counsel addresses the inequitable distribution of justice and conveys a strong and sorely-needed message of respect for the rights and dignity of the city's low-income residents.

The statistical data on growing economic inequality keeps mounting. Between 1979 and 2007, incomes of the wealthiest 1 percent in the United States rose 275 percent, more than fifteen times the increase for households in the poorest 20 percent.<sup>5</sup> Income disparity in New York City is particularly extreme. In 2013, the wealthiest 20 percent of households in the City had incomes more than twenty-six times greater than the poorest 20 percent.<sup>6</sup> In Manhattan, the wealthiest 20 percent had incomes *more than forty-two times* those of the poorest 20 percent, giving Manhattan the dubious distinction of being the county with the highest disparity in income in the United States.<sup>7</sup> And the American wealth divide has pronounced racial and ethnic dimensions. In 2009, the median net worth of White households in the United States was twenty times that of Black households and eighteen times that of Latino households.<sup>8</sup>

Because we have an adversarial system of dispute resolution that contemplates that both sides will be represented by counsel, in most litigation, a litigant needs an attorney to have meaningful access to the court system. Yet meaningful access to justice is denied to those who cannot afford counsel. The importance of counsel to the fair administration of justice has long been recognized by the United States Supreme Court, which said, finding a right to counsel in death penalty cases in 1932, that “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.”<sup>9</sup> And in another context in 1964, the Supreme Court stated that “[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries.”<sup>10</sup>

Access to justice is, in effect, a commodity, and like other commodities, it can be bought if one has the financial resources and can be denied if one does not. In other words, disparities in wealth also dictate disparities in access to justice. This commodification of justice has led to a yawning justice gap that parallels the wealth gap. In 2010, New York State Court of Appeals Chief Judge Jonathan Lippman established The Task Force to Expand Delivery of Legal Services in New York, which has, since it was convened, issued an annual report that tracks the justice gap in New York. The Task Force's 2014 report found, for example, that in 2013 more than 1.8 million people in

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<sup>5</sup> CONGRESSIONAL BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007 ix (2011), available at [https://www.cbo.gov/sites/default/files/10-25-HouseholdIncome\\_0.pdf](https://www.cbo.gov/sites/default/files/10-25-HouseholdIncome_0.pdf).

<sup>6</sup> Andrew Beveridge, *Tackling Inequality: Some Data on Changing Inequality in NYC*, IMPACT CENTER FOR PUBLIC INTEREST LAW AT NEW YORK LAW SCHOOL (APRIL 17, 2015), <http://www.nyls.edu/impact-center-for-public-interest-law/wp-content/uploads/sites/140/2013/07/Income-and-Wealth-CLE.pdf>.

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

<sup>8</sup> Rakesh Kochhar et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks and Hispanics: Twenty-to-One*, PEW RESEARCH CENTER (JULY 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

<sup>9</sup> *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

<sup>10</sup> *Bhd. of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964).

New York State had to litigate without representation, and that in New York City, 99 percent of tenants are unrepresented in eviction proceedings.<sup>11</sup> These local figures reflect the state of access to justice nationally as indicated by an American Bar Association finding that, in 2005, only 1 percent of the lawyers in the U.S. worked in “practice settings” in which they provided civil legal services or criminal defense to low-income people (and that fraction is diminishing: in 1980 the figure was 2 percent).<sup>12</sup>

Wealth-based disparity in access to justice has profound implications, particularly in legal matters involving issues of fundamental human need, such as legal proceedings at which one’s home is at stake. In eviction cases, denial of counsel can, and often does, result in loss of the respondent’s home. Counsel makes a determinative difference in the outcome of eviction proceedings. One study of New York City’s Housing Court found that tenants who were represented by counsel had fewer defaults, fewer judgments and warrants of eviction against them, and greater success in obtaining services and repairs from their landlords.<sup>13</sup> A recent study of the impact of representation in eviction proceedings by the Boston Bar Association found that represented tenants were able to remain in their homes twice as often as unrepresented tenants and that represented tenants received a financial benefit in the litigation that was five times greater than that received by unrepresented tenants.<sup>14</sup>

Evictions, in turn, have devastating short- and long-term consequences for those who are evicted. Low-income households that are evicted in New York City face a housing market that presents them with practically no options because of the severe lack of affordable housing. *Housing New York*, a Five-Borough, Ten-Year Plan for affordable housing, released by the Mayor in May of 2014, reported that “[t]here are nearly one million households who earn less than 50 percent of Area Median Income (AMI), or just under \$42,000 for a family of four,” yet there are only 425,000 housing units available in the City with rents suitable for that income level.<sup>15</sup> No wonder that more than one-third of the families entering the homeless shelter system report “eviction” as the precipitating factor for their homelessness.<sup>16</sup> Families who experience homelessness have a very tough time in life.<sup>17</sup> But families suffer deeply from the experience of eviction as well. One recent study of the consequences of eviction found that:

. . . eviction has negative effects on mothers in multiple domains. Compared to those not evicted, mothers who were evicted in the previous year experienced more material hardship, were more likely to suffer from depression, reported worse health

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<sup>11</sup> THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 20 (2014), available at <https://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS%20TaskForce%20Report%202014.pdf>.

<sup>12</sup> See AMERICAN BAR ASSOCIATION, LAWYER DEMOGRAPHICS 2010 (2011), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/lawyer-demographics-tables-2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2014.authcheckdam.pdf).

<sup>13</sup> See Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 428 (2001).

<sup>14</sup> BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS REPRESENTATION: A REPORT ON THE BBA RIGHT TO COUNSEL PILOTS 2 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

<sup>15</sup> THE CITY OF NEW YORK, HOUSING NEW YORK A FIVE-BOROUGH, TEN-YEAR PLAN 2, available at [http://www.nyc.gov/html/housing/assets/downloads/pdf/housing\\_plan.pdf](http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf).

<sup>16</sup> NEW YORK CITY INDEPENDENT BUDGET OFFICE, ESTIMATE OF THE COST OF LEGAL COUNSEL IN HOUSING COURT AND POTENTIAL SHELTER SAVINGS DUE TO AVERTED EVICTIONS 5 (2014), available at <http://www.ibo.nyc.ny.us/lboreports/2014housingcourtleter.pdf>.

<sup>17</sup> NANCY SMITH ET AL., UNDERSTANDING FAMILY HOMELESSNESS IN NYC, AN IN-DEPTH STUDY OF FAMILIES BEFORE AND AFTER SHELTER (2005), available at [http://www.nyc.gov/html/dhs/downloads/pdf/vera\\_Study.pdf](http://www.nyc.gov/html/dhs/downloads/pdf/vera_Study.pdf).

for themselves and their children, and reported more parenting stress. Some evidence suggests that at least two years after their eviction, mothers still experienced significantly higher rates of material hardship and depression than peers. Our findings indicate that to fully understand the lives of disadvantaged women, we should examine not only events related to work, welfare, and family, but also those related to housing, eviction being among the most consequential of them.<sup>18</sup>

Access to commodities is, to a greater or lesser extent, generally understood to be dictated by the economic marketplace—one can only get what one is able to pay for. However, access to justice is commonly understood—as it should be—in other than market-based terms. “Equal justice for all” is a bedrock principle of our democratic culture and values and a notion that shapes legitimate expectations about fairness and meaningful access in our legal system. This concept that justice is neutral, fair and impartial, and available to all without regard to ability to pay is deeply embedded in the foundation of American jurisprudence. Just recently, Justice Roberts, writing for the Supreme Court majority and upholding restrictions on judicial fundraising in *Williams-Yulee v. Florida Bar*, explained that bedrock ideological, philosophical notion as follows:

Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to the Magna Carta, which proclaimed, “To no one will we sell, to no one will we refuse or delay, right or justice.” [ ] The same concept underlies the common law judicial oath, which binds a judge to “do right to all manner of people . . . without fear or favour, affection or ill-will,” [ ] and the oath that each of us took to “administer justice without respect to persons, and *do equal right to the poor and to the rich*,” [ ](emphasis added and internal citations in endnote).<sup>19</sup>

Wealth-based access to justice presents a jarring contrast between our fundamental ideology and our actual practice. Indeed, when the rhetoric of equality in justice is belied by the inequitable distribution of justice and its relationship to wealth, these lofty principles are defiled. And, this wealth/justice gap is a direct consequence of government policy, both what government does and what it fails to do. Government certainly has the power to foster a more equitable distribution of justice by guaranteeing and funding a right to counsel. In New York, government has done so in a number of areas, including criminal defense (as have all the states following *Gideon v. Wainwright*),<sup>20</sup> civil commitment and child custody matters. In 1993, New York City created a right to counsel for respondents in court proceedings where the City seeks removal or detention due to tuberculosis infection.<sup>21</sup>

Yet, not only does government fail to make access to justice available on an equitable basis, all too often, government exacerbates the inequitable distribution of justice by, in fact, supporting and subsidizing access to the judicial system for the rich to a far greater degree than for the poor. For example, it is clear that tax deductions for the wealthy for legal expenses result in loss of

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<sup>18</sup> MATTHEW DESMOND & RACHEL TOLBERT KIMBRO, *EVICTION'S FALLOUT: HOUSING, HARDSHIP, AND HEALTH* (2015), available at [http://nlhrc.org/sites/default/files/DesmondKimbro\\_Evictions\\_Fallout\\_SF2015.pdf](http://nlhrc.org/sites/default/files/DesmondKimbro_Evictions_Fallout_SF2015.pdf).

<sup>19</sup> *Williams-Yulee v. Florida Bar*, No. 13-1499, 2015 U.S. LEXIS 2983, at \*19-20 (U.S. 2015) (quoting Cl. 40 (1215), in W. McKECHNIE, *MAGNA CARTA, A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 395 (2D ED. 1914); 10 *ENCYCLOPEDIA OF THE LAWS OF ENGLAND* 105 (2D ED. 1908); 28 U. S. C. § 453 (2012)).

<sup>20</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>21</sup> 24 R.C.N.Y. § 11.21(e)-(f) (2015).

government revenues that greatly outweigh government's expenditures on legal services for the poor. Although there is no available disaggregated hard data on the amount of those tax deductions, a very rough approximation of the federal tax system subsidy for legal expenses for the wealthiest 1 percent of the U.S. population can be arrived at by estimating the amount of legal expenses deducted by the wealthiest Americans and the approximate tax deductions taken based on those legal expenses. A conservative estimate of the tax benefit is approximately \$23.6 billion annually. This figure is arrived at by looking at the self-reported revenues of the top 100 revenue-grossing law firms, considering that figure a very rough proxy for the deductions taken by the 1 percent, and applying the income tax rate for earners in the highest income bracket.<sup>22</sup> In contrast to this figure of \$23.6 billion in tax forgiveness for the wealthy, the federal government funds legal services for the poorest 25 percent of the U.S. population at under \$400 million annually.<sup>23</sup> This all translates into a per capita benefit of \$11 for each poor person,<sup>24</sup> contrasted with a (very approximate) per capita tax subsidy for legal assistance for the wealthiest 1 percent of \$754,<sup>25</sup> or—based on these rough, but conservative estimates—almost seventy times as much federal assistance for legal services per person in the top one percent as for each person living in poverty. New York City's taxation of individual and corporate income follows the federal practice of allowing legal expenses to be deducted from income, and, although the disaggregated figures for deductions for legal expenses are not available either, it can be assumed that New York City similarly forgoes enormous amounts of revenue in order to subsidize legal expenses for the wealthy.

Of course, because the integrity of the justice system is a cornerstone article of faith, the dissonance between ideology and practice created by wealth-based access to justice severely undermines faith in the justice system. Faith in the civil justice system is particularly challenged by the experience tenants have in defending themselves, unrepresented, in eviction proceedings in New York City. A significant number of New York City's low-income households are exposed to the civil justice system through their experience with eviction proceedings. About 11.5 percent of the city's low-income households are served with eviction proceedings every year.<sup>26</sup> About a third of the people

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<sup>22</sup> Under the Internal Revenue Code, legal expenses of corporations and other businesses are tax deductible. 26 U.S.C. § 162. According to American Lawyer, gross revenue for the 100 highest grossing law firms in the U.S. in 2010 was 67.42 billion (and 17 law firms grossed over \$1 billion). Available (for charge) at <http://almlegalintelligence.com/>. Using that \$67.42 billion as a very rough (but very conservative) proxy for the legal expenses of the top 1 percent and applying the 35 percent income tax rate for earners in the highest income bracket (<http://www.irs.gov/pub/irs-pdf/i1040tt.pdf>), the U.S. treasury foregoes \$23.6 billion in tax revenue, in effect subsidizing legal assistance for the 1 percent to the tune of \$23.6 billion.

<sup>23</sup> See Legal Services Corporation, Fact Book 2010 (2011), available at [http://lsc.gov/sites/default/files/LSC/pdfs/LSC\\_2010\\_Fact\\_Book.pdf](http://lsc.gov/sites/default/files/LSC/pdfs/LSC_2010_Fact_Book.pdf).

<sup>24</sup> Id. (Dividing the 2010 federal Legal Services Corporation budget of \$394,582,437 by the 36,0013,627 people in poverty, we arrive at a figure of about \$11 per poor person).

<sup>25</sup> U.S. Census Bureau, U.S. and World Population Clock, U.S. Department of Commerce (May 28, 2015), <http://www.census.gov/main/www/popclock.html> (One percent of the U.S. population in 2012 is about 3.13 million people, the \$23.6 billion in tax revenues forgone by the government divided by number of one percenters is \$754.).

<sup>26</sup> This 11.5 percent figure is arrived at as follows: 3,345,154 people in NYC were living below 200 percent of poverty in 2013 (citing U.S. Census Bureau, American Community Survey, 2013, NYC Pop. Data 2013 ACS\_13\_1YR\_B17002). There were 248,732 cases in Housing Court in 2013. See STATISTICAL REPORT OF ACTIVITY OF L & T CLERK'S OFFICE, ST-30-L&T CLERK'S OFFICE (MARCH 6, 2014), available at [http://cwtfhc.org/wp-content/uploads/2014/03/Case\\_Filings\\_2013.pdf](http://cwtfhc.org/wp-content/uploads/2014/03/Case_Filings_2013.pdf). 59.5 percent of the Housing Court litigants are too poor to afford a lawyer. See COMMUNITY TRAINING AND RESOURCE CENTER, HOUSING COURTS, EVICTIONS AND HOMELESSNESS: THE COSTS AND BENEFITS OF PROVIDING A RIGHT TO COUNSEL IV (1993), available at <http://cwtfhc.org/wp-content/uploads/pdf/donaldson.pdf>. There are thus 147,995 Housing Court cases of people too poor to afford counsel (59.5 percent of 248,732). The average number of people per household in NYC (2009-2013) is 2.61, so there are 386,267 people too poor to afford counsel who have housing court cases in one year (147,995 x 2.61), or 11.5 percent of the City's poor population (386,267/ 3,345,154). U.S. Census Bureau, STATE AND COUNTY QUICK FACTS: NEW YORK CITY, NEW YORK, U.S. DEPARTMENT OF COMMERCE (April 22, 2015), <http://quickfacts.census.gov/qfd/states/36/3651000.html>.



served with eviction proceedings each year show up in court to defend themselves,<sup>27</sup> and the vast majority of them are low-income people who are forced to defend their homes without any access to counsel<sup>28</sup> in complex legal proceedings in which the rules of evidence apply and that are governed by a host of substantive and procedural rights. Close to 30,000 families end up evicted each year—one family is evicted about every 4.5 minutes of the workweek.<sup>29</sup> As one low-income tenant put it, describing her Housing Court experience, “what we are asking for is respect and dignity. We want to live like everyone else in the world. We have a right to have housing, to be able to participate in the society as citizens. The question is, do they just want all people of color to pack up and get out of the city?”<sup>30</sup>

The sentiment expressed by Ms. Cortes about her experience with Housing Court echoes a broader current of concern in New York City’s communities and in the country about the justice system in general. The deaths of Eric Garner on Staten Island, Michael Brown in Ferguson, Missouri, and Freddy Gray in Baltimore, among others, have heightened the perception that we have “two systems of justice,” in which race and economic status lead to vastly different treatment. The message to poor litigants (mostly people of color) in Housing Court that they can be removed from their homes by an armed City Marshal, pursuant to an order of a judge, as a consequence of a complex and technical legal proceeding in which they are deprived of the benefit of legal counsel, is unmistakable: Your homes, your families, and your lives don’t really matter.

Studies have shown that most people believe there already is a “right to counsel” in legal matters such as eviction proceedings.<sup>31</sup> This misconception is probably related to the fact that there actually is a right to appear by counsel. The right to appear in court by counsel is a longstanding right that precedes the founding of the nation.<sup>32</sup> People with the financial means to hire counsel can exercise that right. People who do not have the financial means cannot. At best, they can obtain free legal assistance—if and when it is available—not as a matter of right, but rather through government-funded and/or privately-funded programs, or from attorneys who are willing to provide representation on a *pro bono* basis. However, a right cannot be dependent on the largesse of government, the beneficence of the private sector, or the good graces of a volunteer.<sup>33</sup> Legal scholarship confirms what most people intuitively understand: a right is a “claim[] that a

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<sup>27</sup> STATISTICAL REPORT OF ACTIVITY OF L & T CLERK’S OFFICE, ST-30-L&T CLERK’S OFFICE (MARCH 6, 2014), available at [http://cwtfhc.org/wp-content/uploads/2014/03/Case\\_Filings\\_2013.pdf](http://cwtfhc.org/wp-content/uploads/2014/03/Case_Filings_2013.pdf).

<sup>28</sup> *Supra* note 11.

<sup>29</sup> The estimate of an eviction every 4.5 minutes was arrived at as follows: there were 26,857 residential evictions in 2014. NYC DEPARTMENT OF INVESTIGATION, SUMMARY OF EVICTIONS, POSSESSIONS & EJECTMENTS CONDUCTED: JAN. THROUGH DEC. 2014 (2015), available at <http://cwtfhc.org/wp-content/uploads/2015/03/Evictions-by-Marshall-2014--DOI.pdf>. There are 52 weeks and 5 work days per week each year; subtracting an estimated 10 holidays leaves 250 work days, or 2000 hours, or 120,000 minutes. (8-hour days = 2000 hours x 60 = 120,000 minutes in the work days per year). 120,000 minutes divided by 26,857, the number of evictions = 1 eviction every 4.5 minutes.

<sup>30</sup> Maria Cortes, *What the Experts are Saying*, IMPACT CENTER FOR PUBLIC INTEREST LAW AND COALITION FOR A RIGHT TO COUNSEL IN HOUSING COURT, available at [https://d3n8a8pro7vnmix.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1433269447/FINAL\\_expert\\_report.pdf?1433269447](https://d3n8a8pro7vnmix.cloudfront.net/righttocounselnyc/pages/23/attachments/original/1433269447/FINAL_expert_report.pdf?1433269447).

<sup>31</sup> BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS REPRESENTATION: A REPORT ON THE BBA RIGHT TO COUNSEL PILOTS 1 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

<sup>32</sup> See generally Julian Cook, *Rule 11: A Judicial Approach To An Effective Administration Of Justice In The United States*, 15 OHIO N. UNIV. L. REV. 397, 409 (1988).

<sup>33</sup> While there are important measures in New York to expand the availability of *pro bono* resources for delivery of legal services, such as the recently implemented rule requiring fifty hours of *pro bono* work for admission to the New York bar (see 22 NYCRR § 520.16 (2015)), these measures are no substitute for a government guarantee and adequate funding of representation.

government is obligated to respect.”<sup>34</sup> The U.S. Supreme Court has described a statutory right as having three attributes: 1) it must be intended to benefit the claimant; 2) it must create a binding, mandatory obligation on the government; and 3) it must be “sufficiently specific and definite” to be judicially enforceable.<sup>35</sup>

Funding for access to counsel for those who cannot afford to pay, of course, helps. A huge influx of New York City appropriated funds for eviction-prevention legal assistance is expected in 2015, as is passage of legislation creating an Office of the Civil Justice Coordinator. These measures will help enormously by expanding the availability of counsel and placing much-needed focus on the importance of civil legal services. But funding, unaccompanied by a “right,” keeps the funder and the organizations that provide legal services as the gatekeepers to the justice system rather than shifting power to the people who are affected themselves. If there is no right and the money runs out or the funding is reduced, or if nonprofit legal services organizations are without sufficient staff resources to take another case, access can be denied. To truly shift the balance and change the justice paradigm, there must be a right to counsel.<sup>36</sup>

The inequitable distribution of justice is a result of the actions and inactions of all levels of government, and while the federal, state, and city governments all do something to address that inequity by funding civil legal services in fluctuating amounts, no level of government does enough. New York City has the legal authority, compelling policy, and fiscal reasons and the growing political will to do something much more significant—and game-changing—about it. New York City has the power. Its powers are delegated to it from the State, through the New York State Constitution and the Municipal Home Rule Law, both of which grant the City the power to adopt local laws for the “protection, order, conduct, safety, health and well-being of persons or property”;<sup>37</sup> and the right to counsel certainly protects New Yorkers and advances their well-being. New York City has compelling fiscal and policy reasons. Establishing a right to counsel furthers several of the administration’s key objectives: it keeps people out of the shelters and saves money otherwise spent on sheltering people;<sup>38</sup> it mitigates the growing housing crisis by enabling low-income people to stay in affordable housing; and it sends a strong message that we are one New York City that strives to address inequality and matters of fundamental justice. And New York City has the political will to take this action. New York City’s current political leadership—Mayor Bill de Blasio, City Council Speaker Melissa Mark-Viverito, and the members of the City Council—have clearly recognized the importance of access to counsel for those who face losing their homes, in both their words and their deeds. A large majority of the Council has co-sponsored the pending legislation that would create the right to counsel.<sup>39</sup>

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<sup>34</sup> Sarah H. Cleveland, *The Legacy of Louis Henkin: Human Rights In The “Age of Terror,”* 38 COLUMBIA HUMAN RIGHTS L. REV., 499 (2007).

<sup>35</sup> *Wilder, Governor of Virginia, et al., v. Virginia Hospital Ass’n*, 496 U.S. 498, 510 (1990).

<sup>36</sup> A right to counsel would, of course, lose its meaning unless it is implemented through a system that provides high-quality representation. Critiques of state criminal defense systems are instructive on this point. See generally THE JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/system\\_overload\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf).

<sup>37</sup> New York State Constitution Article IX § 2(c)(ii); N.Y. MUN. HOME RULE § 10(1)(iii)(A)(12) (2015).

<sup>38</sup> NEW YORK CITY INDEPENDENT BUDGET OFFICE, ESTIMATE OF THE COST OF LEGAL COUNSEL IN HOUSING COURT AND POTENTIAL SHELTER SAVINGS DUE TO AVERTED EVICTIONS (2014), available at <http://www.ibo.nyc.ny.us/iboreports/2014housingcourtleter.pdf>. (Note that while this IBO report finds that the savings from a right to counsel would exceed the cost of providing counsel, the report assumes that those savings would be shared by the state and federal governments, while the cost of counsel would be solely the responsibility of the City.)

<sup>39</sup> See *supra* note 3. As of publication, Intro 214 had 39 sponsors, including NYC Public Advocate, Letitia James. There are 51 members of the City Council. Council members Mark Levine and Vanessa Gibson have led the legislative push within the Council.



New York City has a rich history of leading the nation in protecting and advancing the rights of its residents, particularly around housing, discrimination, and due process. The list of the City's accomplishments is long and includes the first housing code (1905), the first public housing program (1934), and some of the strongest tenant protection anti-discrimination legislation in the country. New York City's current political leaders now have a unique and timely opportunity to take a bold step, lead the nation, and create a lasting legacy by changing the paradigm around the wealth-based distribution of access to justice and establishing a right to counsel in court proceedings for people who face losing their homes. To paraphrase the much-quoted words of a religious philosopher of more than two millennia ago, "if not now, when, and if not the current New York City leadership, who?" •