

WHY A RIGHT: The Right to Counsel and the Ecology of Housing Justice

Andrew Scherer¹

“[T]he good we secure for ourselves is precarious and uncertain . . . until it is secured for all of us and incorporated into our common life.”

– Jane Addams²

Introduction

There are many reasons why establishing a right to counsel for low-income tenants who face eviction in New York City would change the lives and communities of its low-income residents for the better and be good for the city. The right to counsel would help people keep their families together and stay in their homes and communities. The right to counsel would stem the loss of affordable housing. It would keep people out of homeless shelters and save them from the trauma and long-term consequences of eviction and homelessness. The right to counsel would address growing economic inequality. And the right to counsel would save government money because the cost of legal assistance would be greatly offset by the savings in keeping families together, preserving communities and preventing homelessness. These points have been made by others, as well as by me, in law review articles and in other writings.³ Arguably, many of these benefits could be achieved, albeit in the short term and to a lesser degree, by increasing the availability of counsel and not guaranteeing a right. However, this essay addresses the question of why it is so important to establish a *right* to counsel in eviction proceedings.

The context for this essay is the very real possibility that the New York City Council and Mayor will adopt legislation that would make New York City the first jurisdiction in the United States to

¹ Policy Director, Impact Center for Public Interest Law, New York Law School and Director of the Impact Center’s Right to Counsel Project as well as author, *RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK* (Thomson-Reuters 2015-2016). The author wishes to thank the following tenant leaders from Community Action for Safe Apartments (CASA) for their thoughtful contributions to the ideas that are discussed in this essay: Joseph Cepeda, Fitzroy Christian, James Fairbanks, Paulette Hew, Althea Matthews, Evelyn I. Rivera, Sigilfredo Roman, Aaron Scott and Gwynn Smalls. These ideas, expressed at a group consultation/focus group conversation that was videorecorded at CASA on November 17, 2015, are quoted and referenced throughout this essay. And this essay is dedicated to these individuals as well as the other tenant leaders and activists at CASA and other organizations throughout New York City who are advocating for a right to counsel in eviction proceedings for themselves and their fellow New Yorkers.

The author also wishes to thank the law firm Orrick for transcribing the November 17 discussion.

² Social and political activist, author and lecturer, community organizer, public intellectual (b.1860, d.1935). Jane Addams, *The Subjective Necessity for Social Settlements*, in JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE WITH AUTOBIOGRAPHICAL NOTES* 113, 116 (1912), available at <http://digital.library.upenn.edu/women/addams/hullhouse/hullhouse.html>.

³ A number of articles making these points can be found on the website of the Right to Counsel Project of the Impact Center for Public Interest Law at New York Law School. Right to Counsel Project, *IMPACT CENTER FOR PUBLIC INTEREST LAW*, <http://www.nyls.edu/impact-center-for-public-interest-law/projects-and-institutes/right-to-counsel-project/>. An even more comprehensive listing of articles, reports and other documents related to the civil right to counsel can be found on the website of the National Coalition for a Civil Right to Counsel. *Civil Right to Counsel Bibliographies*, NATIONAL COALITION FOR A RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org/resources/bibliography> (last visited Mar. 9, 2016).

guarantee a right to counsel for low-income tenants who face eviction.⁴ Proposed legislation to that effect has been pending before the New York City Council since 2014,⁵ and, as of the time of this writing, the legislation has the support of 41 of the Council's 51 members. While the legislation has not yet been adopted, the City has responded to the advocacy for a right to counsel by vastly increasing funding for eviction prevention legal assistance. In 2016, the City will quintuple its funding for eviction prevention legal assistance, and a great many more low-income tenants will be able to receive legal help in eviction cases in New York City than ever before.⁶

This vast expansion of funding for eviction prevention legal assistance has led some to question why we need to make access to counsel a “right,” when the City is willing to expand funding and make it easier for low-income New Yorkers to obtain representation. The central point of this essay is that, while an expansion of funding for legal assistance to people facing eviction is enormously helpful, it is not enough to simply increase funding; there are many important and compelling reasons why access to counsel should be a *right*. A *right* protects right-holders against government error and unfairness and advances the rule of law. A *right* protects right-holders’ well-being, security and stability. A *right* reinforces right-holders’ dignity and respect. A *right* fosters equality. And perhaps most importantly, a *right* fundamentally shifts power to the right-holder. And, by increasing fairness in the operations of the Court, improving the status and treatment of tenants, fostering equality and altering the balance of power, the right to counsel would disrupt the existing ecology and bring about concrete changes in the practices of New York City’s Housing Court and the relations between landlords and tenants.

What is a right?

Any discussion of the importance of a right must begin with a working definition of the term, “right.” While the concept of a “right” is commonly understood and, in the United States especially, deeply embedded in history and the national psyche,⁷ it’s important to be explicit about the meaning of the term, “right.” The Merriam-Webster Dictionary defines a “right” as including “something to which one has a just claim.”⁸ Merriam-Webster defines a “legal right” as “a claim recognized and delimited by law for the purpose of securing it,” and “the interest in a claim . . . for the infringement of which claim the state provides a remedy in its courts of justice.”⁹

It is that enforceability of a remedy in a “court of justice” for violation of a right, that enables a right-holder to derive power from a right, and what distinguishes it from a privilege or a benefit. Thus, while funding an expansion of the availability of counsel to those facing eviction confers an

⁴ Mireya Navarro, *Push to Provide Lawyers in New York City Housing Court Gains Momentum*, N.Y. TIMES, Dec. 16, 2014, http://www.nytimes.com/2014/12/17/nyregion/push-to-provide-lawyers-in-new-york-city-housing-court-gains-momentum.html?_r0.

⁵ Int. No. 214-A-2014, NEW YORK CITY COUNCIL, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80>.

⁶ See *Text of Mayor de Blasio's State of the City Address*, N.Y. TIMES, Feb. 3, 2015, <http://www.nytimes.com/2015/02/04/nyregion/new-york-mayor-bill-de-blasios-state-of-the-city-address.html>.

⁷ See, e.g., James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 AM. J. JURIS. 185, 186 (1994) (“They assume that the people who stepped off the Mayflower and the Susan Constant brought with them the idea of a right and understood the concept much as we do today. In a typical scholarly assessment two constitutional experts claimed in 1987 that ‘from the beginning, it seems, the language of America has been the language of rights.’”).

⁸ *Right*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/right> (last visited Mar. 9, 2016).

⁹ *Legal Right*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/legal%20right> (emphasis added).

important benefit, it does not confer a right or an entitlement, and the benefit can be denied or terminated at will and with impunity.

When access to counsel is dependent on funding, as it is for people who cannot afford to pay for counsel, the true “gatekeeper” for access is the provider of funding for the service. The City of New York has now become the primary funder of legal assistance to low-income tenants who face eviction in the City and in the absence of a right, can choose to continue to provide the funding and continue the service or not. The city and other government and nonprofit funders of legal assistance delegate the gatekeeping task to the nonprofit legal organizations that provide the service, so that when low-income tenants facing eviction are turned away and denied services by the nonprofit providers, they experience the providers as the gatekeepers because they hear the word “no” directly from them. But the providers are merely the instruments; they can only do as much as their available resources allow. The real control over access is held by the funder(s). When legal assistance becomes a governmentally-recognized-and-provided “right,” a “court of justice,” and not the city or the provider becomes the gatekeeper, and the beneficiary of the right can compel government to provide the assistance or, as in this context, compel the government to fund the provision of the service. This ability to enforce thus represents a fundamental shift of power to people who previously lacked it.

The right to counsel is a “civil right” in the sense that it is a right that pertains to an aspect of our justice system that is understood to be “civil” as opposed to “criminal.” It is also a “civil right” in the sense that it is a right deeply connected to the movement for civil rights, equality and human dignity for all the reasons set forth below. As one legal dictionary definition states, “[a] civil right is an enforceable right or privilege, which if interfered with by another gives rise to an action for injury. Examples of civil rights are freedom of speech, press, and assembly; the right to vote; freedom from involuntary servitude; and the right to equality in public places.”¹⁰ A right not to be deprived of a meaningful opportunity to defend one’s home in the courts because of one’s poverty fosters equality and, in protecting the ability to have a home, protects the ability to exercise many other of the important civil rights, such as the right to vote and the right to equal opportunity in work and education.

Fairness has long been seen as a core element of what constitutes a “right” and there is certainly a general intuitive sense of fairness about having a right to counsel in a civil legal matter with as significant a consequence as eviction from one’s home. When polled, many Americans simply assume that there is a right to counsel in such cases as there is in criminal proceedings.¹¹ Under the theory of natural rights, the rights we believe we are entitled to as members of society are the rights entitled to recognition. According to the French legal philosopher, Maurice Villey, “[t]o give someone his right (*suum jus*) meant in the classical world to give him ‘what he deserved,’ ‘his due.’ What was due to the individual in society? His just share (*‘le part juste,’ ‘le bon partage’*). Here, said Villey, was the meaning of classical natural right: a just or fair share for every individual of society’s benefits and burdens.”¹²

¹⁰ Cornell University Law School, *Civil Rights*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/Civil_rights (last visited Mar. 9, 2016).

¹¹ BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS REPRESENTATION 1 (2012), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

¹² Hutson, *supra* note 7, at 189–90.

This notion that rights are rooted in the human expectation of fair and equitable treatment can be seen in economic terms as well; a framing that is particularly relevant to the right to counsel in eviction matters, where the court conflict balances economic interests and the fundamental need for a roof over one's head. In the United States, the conventional wisdom, or at least the national mythology, is that we operate with a free market economy, but the reality is quite different. A huge number of interventions by government are constantly at play, affecting economic markets and reapportioning rights and values. This is particularly true with respect to housing, where, among other areas of government intervention, zoning, taxation, banking regulation, transportation policy and rent regulation all profoundly affect real estate value and the ability to have a home. In any event, in theory, to work fairly and equitably, a free market economy depends on "rational cooperation, full information and zero transaction costs."¹³ Yet, none of these essential elements is even minimally present in eviction proceedings in New York City's Housing Court. To the contrary, Housing Court is well recognized as being a difficult, hostile environment in which most landlords are represented by counsel who are familiar with the law and the court and most tenants appear without legal help, and where the "transaction cost" for those unrepresented tenants in lost wages, child-care costs, stress and anxiety are exceedingly high.¹⁴ Under an economic approach, legal rights are intended to correct market failures such as these by allocating entitlements.¹⁵ In Housing Court, a right to counsel would foster "rational cooperation, full information and zero transaction costs."

At a time of increasing economic inequality, seismic transformation of communities through gentrification, rising homelessness and racial tensions, the movement for a right to counsel in eviction proceedings in New York City should come as no surprise.¹⁶ The claim for rights often "percolates up" from communities and movements of people who perceive injustice and lack of fairness in their lives.¹⁷ People thus have an intuitive sense of justice and rights in circumstances in which their lives are affected. This theory is certainly borne out in the right to counsel context in New York City. Scholarly analysis of what it means to have a right is echoed by the sentiments of tenant leaders:

The right to counsel means living in dignity and being treated as a human being, which they don't do at all. And also, mental well-being. You know, the right to counsel gives you mental well-being. How do you get that? You have a home, you go to sleep and you get peace of mind and you're able to think out what problems you had the day before and what you're going to face tomorrow. So that's a big plus. Also, the right to counsel will stop all the hostile tactics of eviction, of harassment, of overcharging, of the multiple, you know, multiple MCIs, nonservices, cutting down on services, you know, turning off the elevator, not picking up the garbage. It goes on and on, and the right to

¹³ See, e.g., Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1336 (1986).

¹⁴ See, e.g., NEW SETTLEMENT APARTMENTS' COMMUNITY ACTION FOR SAFE APARTMENTS (CASA) & COMMUNITY DEVELOPMENT PROJECT (CDP) AT THE URBAN JUSTICE CENTER, *TIPPING THE SCALES: A REPORT OF TENANT EXPERIENCES IN BRONX HOUSING COURT* (2013), available at http://cdp.urbanjustice.org/sites/default/files/CDPWEB.doc_Report_CASA-TippingScales-full_201303.pdf.

¹⁵ Coleman & Kraus, *supra* note 13, at 1336.

¹⁶ See generally Susanna Blankley, *The Fight for Justice in Housing Court: From the Bronx to a Right to Counsel for all New York City Tenants*, appearing in this volume of IMPACT.

¹⁷ For an in-depth discussion of this notion – referred to as "jurisgenesis" – and its adherents, see Michael McCann, *The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era*, 48 LAW & SOC'Y REV. 245, 248, 256 (2014) (discussing the views of Robert Cover and others about "the persistent proliferation of claims about justice and rights that percolate up from communities and movements in civil society").

counsel would empower people to be human beings again and stop being abused the way they are. And also, the right to counsel will stop big money from doing gentrification and creating homelessness in the city and the right to counsel will save the city a lot of money by addressing all of these issues because you have shelters, you have all kinds of other mental issues that can go on with people not being able to live in a home. So the right to counsel means peace of mind and well-being and living in dignity as a human being and that's why we need it.¹⁸

What does it mean for people to have a right?

Making something a “right” is transformative in a number of respects. It transforms government behavior by protecting against error and unfairness. It fosters the right-holder’s sense of security and well-being. It grants the right-holder greater dignity and respect. It conveys greater equality. And it transfers greater power to the right-holder.

A right provides protection against government error and unfairness

I saw where even when tenants were right they still had a very good chance of being evicted or might have been evicted for [not] paying a debt that they already paid because they did not know how to present their defenses properly. They did not know their rights, so were not able to win very winnable cases that would’ve been easily won if they had an attorney.¹⁹

Rights are generally seen as providing protection against government error and unfairness. Rights cause government to act in a manner that is more deliberative, less arbitrary, more thoughtful; and in so doing, rights foster the rule of law. Due to their common nature, rights affect others around them as well as government actors. As one scholar put it, “[b]y definition, the creation of a right alters not only the status of one individual but also the status of the government and all individuals that the right holder comes into contact with.”²⁰

This alteration of status would certainly be true with the introduction of a right to counsel in eviction proceedings in New York City’s Housing Court. In Housing Court, there are a number of regular players who interact on a daily basis in a relatively closed environment – Judges, court officers, housing agency and other city and state government representatives, landlords, landlord’s lawyers (who represent most of the landlords who appear in court), unrepresented tenants and tenant lawyers (who represent a fraction of the tenants who appear in court). That environment is not only closed, it is relatively static, with patterns of behavior and mutual understandings that have evolved over many years. The ecology of that environment will be greatly disrupted with the introduction of a right to counsel and the resultant changed expectations and understandings and cadre of tenant lawyers who will be there to implement the right.

¹⁸ Joseph Cepeda, CASA focus group, Nov. 17, 2015.

¹⁹ Fitzroy Christian, CASA focus group, Nov. 17, 2015.

²⁰ David McKennett, *Who Can Create Your Rights? On Save Our Valley v. Sound Transit, the Inability of Agencies to Create Personal Rights, and the Implications on the Non-Delegation Doctrine*, 15 GEO. MASON U. C.R. L.J. 179, 209 (2004). See also Holiday Hunt Russell, *The Search For a Section 1983 Right Under the Dormant Commerce Clause*, 15 NOVA L. REV. 263 (1991) (“Rights are all things which inure to the person upon which that person can claim to be free of governmental action”).

Under New York law, “self-help” eviction is illegal; a landlord must use a court in order to evict.²¹ When tenants appear in court without counsel, they generally do not have the capacity to convey sufficient and relevant information in an acceptable form to enable the court to make a fair decision on the law and the facts. Thus, the right to counsel is a right that checks the power of government by assuring that government has sufficient and relevant information on which to make a decision.

In this sense, rights limit government authority and “the creation of a new individual right might so much affect the power of the Government and strengthen the status of particular individuals that their creation might be fundamentally different than the mere creation of a law.”²²

I was evicted one time. I lived up on Mosholu Parkway and I did not understand “stipulation.”

[Did you have a lawyer?]

I did not. I thought I knew what I was doing, but it’s not just the money that you have to pay, if they tell you “you have to pay it on Tuesday the 10th,” you do not pay it on Thursday the 14th.

[Right.]

And when they want you out, they want you out.²³

A right protects the individual’s well-being, security and stability

Rights also serve to protect an individual’s well-being, security and stability,²⁴ and a right to counsel in eviction cases would make an important contribution to the well-being and sense of security and stability of low-income tenants in New York City. The devastating and destabilizing effects of both eviction and the threat of eviction cannot be overstated. In his recent book, *Evicted: Poverty and Profit in the American City*, Professor Matthew Desmond of Harvard University describes in great detail the impact eviction has on low-income households in Milwaukee – homeless shelters and the streets, dilapidated housing and dangerous neighborhoods, depression and illness, and long term developmental consequences for traumatized children.²⁵ All the evidence shows that representation by counsel prevents evictions.²⁶ Thus, while the right to counsel will not extinguish evictions entirely, it will reduce them significantly and create a buffer of protection for tenants between having and not having a home. For low-income people, the awareness of that protection would be a relief that fosters their sense of security, stability and well-being. Tenant leaders know this very well:

Everybody that I grew up with, that grew up in that neighborhood, that went to grammar school with me, they have all moved out because of harassment, and they told

²¹ See generally ANDREW SCHERER, RESIDENTIAL LANDLORD-TENANT LAW IN NEW YORK §§ 7:1-7:39 (2015-2016) (concerning “Origins of Summary Proceedings and Need for Judicial Process”).

²² McKennett, *supra* note 20, at 209.

²³ Gwynn Smalls, CASA focus group, Nov. 17, 2015.

²⁴ Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 353–54 (1993).

²⁵ See generally MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

²⁶ See BOSTON BAR ASSOCIATION TASK FORCE ON THE CIVIL RIGHT TO COUNSEL, *supra* note 11; 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 (2001).

me personally “I’m moving out because of harassment.” Not because my rent is \$1400 for one bedroom, or my rent is \$2400 for a three bedroom, it’s not because of that. I can afford it. It’s just, can’t take harassment. . . .

People won’t be stressed out economically, psychologically, okay, if they have the right to counsel. They won’t miss a day of work, like they do. The right to counsel, you know, will give you the right to be represented correctly and cannot be taken away. A right is a right, okay? . . . It would take away the fear, the ignorance, and the feeling of despair and failure that people have when they go to housing court. Right to counsel would give me peace of mind to live with dignity and even the unfair playing field that landlords play with in Housing Court.

The sanctity of a home where you can have, you know, your sanctity when you come home, unwind and think about how attacking tomorrow’s, you know, problems that are going to confront you and then you could pursue, okay, happiness, and that’s what we’re about, we want to be happy.²⁷

and:

I believe that if you have a basic need, if you don’t provide food, shelter, and clothing for your children they will take your children away or your child away. So the right to counsel is built on having those principles to protect not only your children but yourself, as well. And so I believe that with the right to counsel it would be more of a battlefield with knowledge against knowledge. Not one that is crippled by not knowing. This way it would keep more people from being tossed out to the street.²⁸

An important component of one’s sense of well-being is the interest in agency or autonomy, particularly in situations that are difficult or stressful or that are fraught with risk.²⁹ When people feel they have the ability to make decisions and assert their will, as they would with a right to be represented by counsel when their homes are in jeopardy, they have a greater feeling of agency and autonomy:

I was in housing court at one point back in 2013, two years after my mother had passed away where she was living in NYCHA³⁰ and I was her primary care provider, and we was going to court because my name wasn’t on the lease. And after going back and forth with the other people that was living in the apartment, I had decided to just leave the apartment and I think it was more stressful with the people than with the Housing Court, but at that time, though, I did not have an attorney to represent me. I did know of succession rights and stuff like that, little things you know, that I tried to educate myself to fight my own battle. However, with NYCHA we don’t have succession rights, I found that out, because the NYCHA has their own set of rules. . . . But I decided just to leave the apartment and I’ve just been floating around and trying to get my head above the water It would have made a difference if I’d had an attorney. It would have helped me better educate myself and know my rights to how to keep the apartment and get rid of the other people that was in the apartment, as well...³¹

²⁷ Joseph Cepeda, CASA focus group, Nov. 17, 2015.

²⁸ Althea Matthews, CASA focus group, Nov. 17, 2015.

²⁹ Fallon, *supra* note 24, at 353–54.

³⁰ The New York City Housing Authority.

³¹ Althea Matthews, CASA focus group, Nov. 17, 2015.

A right reinforces the right-holders' dignity and respect

The notion that rights confer dignity upon and respect for the rights-holder became a focal point for human rights law in the aftermath of the horrors of World War II. Countries like Germany and, more recently, South Africa, given their history in particular, have focused on the importance of the “dignitary” aspect of rights.³² However, that notion is very relevant to the movement for a right to counsel in eviction matters.

In the contemporary United States, growing activism in low-income communities of color is drawing attention to incidents of police brutality that reflect that the system of justice is unequal and that the members of those communities are not treated with the dignity and respect they deserve. Much of this activism centers around the police and the criminal justice system, and the “Black Lives Matter” movement has emerged out of that activism as a call for respect and dignity. But a parallel critique can be made of the civil justice system, particularly in Housing Court, where people are effectively denied their right to be heard when they face losing their homes simply because of their poverty and, as a consequence, the brunt of evictions, displacement and homelessness falls disproportionately on low-income communities of color. A right to counsel in eviction proceedings would convey a strong message to those communities of color that their lives, homes and communities matter and will be treated with the dignity and respect they deserve.

Treating all people with dignity and respect is an important social value and an important element of human rights.

Contemporary constitutional law draws from the religious and Kantian conceptions of human dignity and embraces the inherent dignity of all individuals as a legal principle. This modern form of “dignity” necessarily conflicts with and rejects the traditional social view of dignity as a mark of distinction for particular individuals and groups. The endowment of human dignity entitles everyone in modern society to demand equal respect and consideration for his personality from the government as well as from other individuals. The claims of equal dignity are largely normative and serve to ground human rights. Therefore, regardless of whether individuals actually possess equal dignity in some traditional or social sense of being “dignified,” there may be practical reasons for asserting the equality of dignity in order to support basic human rights and avoid the most egregious violations of human rights.³³

The need for a new order of dignity and respect by establishing a right to counsel is well understood by tenants whose lives are directly affected:

When I went to court I wanted to talk to the judge. The lawyer from the other side, they said “Why would I have to talk to the judge?” I say “I want to talk to the judge. I want to tell my story to the judge.”, and they say “No, you cannot talk to the judge.” So I asked the clerk if I can talk to the judge and he go like this, like yes you could do. So, I mentioned that I was missing time from my job and they were putting overcharge in my rent also. I had an overcharge, for long time.³⁴

For me, [the right to counsel] is knowing that when you're about to go before the judge, that you're not alone. There's somebody there that can interpret for you, that's not working

³² See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 202 (2008).

³³ *Id.* at 207.

³⁴ Evelyn Rivera, CASA focus group, Nov. 17, 2015.

for the lawyer, that is not working for the court, that won't have an attitude if you say "I can't read." That won't have an attitude if you say, "These numbers don't figure out. You're going too fast." . . . it means that you're guaranteed somebody for you when you go before that judge and when you come back, and that will help you understand why you're there in the first place. Because sometimes you just really don't know.³⁵

With the right to counsel it's not all about the tenants going up against the landlord in a negative way, it's going up against the landlord in a positive way and letting the landlord know that we are aware of what the rules and regulations are and we both can abide by those rules, not just that we're fighting the landlord to try to get on. Some people might think that that's what the right to counsel is. No. . . . The right to counsel, let's face it, they went to school for this. We did not go to school for this. So it has nothing to do with being ignorant. It has a lot to do with how they were educated in that field. So as tenants we have to have a right to counsel and that right to counsel, attorney, have to be really for the tenants, not siding with landlords.³⁶

A right fosters equal treatment

Ronald Dworkin, the renowned legal scholar, has argued that there is a moral right to be treated as an equal in decision-making processes. While external preferences and political pressures inevitably influence decision-making processes, "our legal system should and does counteract their influence by identifying in advance the interests these preferences are most likely to infringe upon and then providing these interests with special protection. These interests thereby become rights."³⁷ Dworkin's thesis is highly relevant to eviction proceedings in which the vast imbalance in money, power, influence and, most importantly, access to counsel or legal firepower, cries out for the special protections required to secure equality in the decision-making process.

The inordinate imbalance in resources, power, influence and access to counsel in Housing Court gives rise to the widely held perception of a need to "level the playing field."

Well I went to court and then this guy showed up, you know, I'm representing myself and I thought he was gonna help me and he's like, "Oh, I'm here to help you" and then lo and behold when I get into court it's him against me.

[So you didn't have your own lawyer then?]

No, no. At that point I did not have a lawyer, and if I had a lawyer, I would not have been evicted...³⁸

A right fundamentally shifts power to the right-holder

Ultimately, as discussed above, the creation of rights shifts power to the rights-holder and away from government. This concept has been recognized as far back as the Romans.³⁹ When low-income tenants facing eviction have a right to counsel at government expense, they gain power.

³⁵ Gwynn Smalls, CASA focus group, Nov. 17, 2015.

³⁶ Paulette Hew, CASA focus group, Nov. 17, 2015.

³⁷ R. Lea Brilmayer & James W. Nickel, *Taking Rights Seriously*, 77 COLUM. L. REV. 818, 819 (1977)(reviewing RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977)).

³⁸ Joseph Cepeda, CASA focus group, Nov. 17, 2015.

³⁹ Hutson, *supra* note 7, at 192.

In a very real sense, they gain a power that government gives up when it gives up its discretion to grant or deny legal assistance for any or no reason at all. But they not only gain power within the eviction proceeding itself. The security of knowing that they will have a meaningful opportunity to be heard and that their interests will be protected if they should be brought to court in an eviction proceeding empowers them to organize and assert their rights in their homes and communities. And that empowerment could very well produce results that avert court proceedings altogether by enabling pre-litigation resolution of disputes over housing conditions, rent levels and the like.

You know, we have a right to organize, now we need the right, the human right, of free lawyers in housing court to back up the work of low income people who are organizing.⁴⁰

A right to counsel, I think would be a very good thing. It would be one step towards empowerment in this great, big city that is about regentrification and it would mean that people could have and feel comfortable about organizing to stay in their homes.⁴¹

A right will disrupt the ecology of housing justice

By increasing fairness in the operations of the Court, improving the status and treatment of tenants, fostering equality and altering the balance of power, the right to counsel would disrupt the existing ecology and bring about concrete changes in the practices of New York City's Housing Court and in the relations between landlords and tenants. The current ecology is based on well-established and long-standing expectations and understandings about how things work. Attitudes, behavior and decisions of the tenants, landlords, managing agents, community organizers, landlords' lawyers, tenants' lawyers, Housing Court Judges, court clerks, court attorneys and others who participate in the system of housing justice are based on a current set of expectations and understandings. As the core expectations and understandings change, the behavior, attitudes and decisions will change.

We can only speculate as to the kinds of changes that would result from the advent of a right to counsel, but there is broad consensus among those most familiar with Housing Court – the attorneys who practice in the court on behalf of landlords and tenants and the judges who preside in the court – as to at least some of those changes that would affect the court. I did an informal and unscientific poll of about 200 landlord and tenant attorneys as well as Housing Court Judges at the 2015 Jack Newton Lerner Landlord-Tenant Institute at the New York County Lawyers' Association on October 15, 2015 and there was general agreement among members of the audience that a right to counsel would bring about at least the following changes: with attorneys on both sides, the role of judges would become easier, there would be more decorum in the court and there would be less stress over the complicated role of judges when presiding over proceedings in which one side has legal representation and the other does not; settlements of cases would be more permanent and less likely to be vacated because they would be negotiated between attorneys, leading to fewer "repeat" cases brought and fewer applications for emergency stays (orders to show cause) sought; and there would be greater attempts by landlords and tenants to resolve cases before they result in litigation, and expanded efforts to address public policies that impact on landlord-tenant litigation such as, for example, the availability of government benefits to pay rent.

⁴⁰ Jim Fairbanks, CASA focus group, Nov. 17, 2015.

⁴¹ Althea Matthews, CASA focus group, Nov. 17, 2015.

Conclusion

No doubt, expansion of funding for eviction-prevention legal assistance is a good thing, and New York City's huge and growing investment in legal services for tenants will bring positive results. But expansion of funding is a short term measure with doubtful sustainability and it will not cause a fundamental shift in power, attitudes or culture. As one tenant leader put it:

It is good that the city is now providing some funding to protect tenants in areas where landlords may be using methods to push them out and displace them. But that funding can be taken away at the will of the legislature. A right cannot be taken away. It can, but it is a whole lot more difficult to lose that right. So a right to counsel means that the same way people accused of criminal activity automatically have the right to an attorney at their arraignment and they will have one during their trial, the right to counsel in housing court has to do the same thing and this is what we have been asking for. Something that can't be taken away. Something that can't be changed with a change of administration that says listen we are not going to fund this program. Because it is a right that will always be financed, will always be funded, will be there always so that the right is protected at all times.⁴²

Moreover, increased funding for a benefit cannot bring about the shift in power dynamics, the change in the ecology of the court, the security and sense of well-being that would be generated by establishing the right to counsel. Increased funding does not treat people as equals, and does not convey the message of dignity and respect that is so sorely-needed in the city's low-income communities. For government officials, as for all of us, giving up a power and flexibility is not an easy thing to do; it takes strength and courage. The bold step of establishing a right to counsel would shift power to low-income people from government and would generate a long-overdue recalibration of the balance of power between landlords and tenants in Housing Court and elsewhere. It would have a lasting and transformative effect on the ecology of housing justice.

You know what? They talking about bringing a panda from what country? To come over here...

From China.

From China, for \$1 million a year? What? You know, they get money [for that] and an animal is more important than a human life, and that's sad.⁴³ •

⁴² Fitzroy Christian, CASA focus group, Nov. 17, 2015.

⁴³ Althea Matthews, CASA focus group, Nov. 17, 2015.