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Kenneth D. Freid

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# A Pandemic and Evictions: A Dangerous Duo that is Creating an Insurmountable Crisis

Kenneth D. Freid\*

## I. Introduction

In the face of eviction, tenants may presume they have the right to counsel when landlords haul them into court. Unfortunately, New Jersey law does not support that presumption, and thousands of low-income tenants are left having to defend themselves in court. Does this seem right? Does this seem fair? Most people would probably say no; however, that does not change the fact that both federal and state law does not grant tenants the right to counsel in eviction proceedings.

Imagine this: you are a tenant in New Jersey, and you are working a minimum wage job. Every month, you make just enough money to pay your rent and support your family; then, suddenly, a pandemic strikes and you lose your job. Although you cannot control a pandemic, you are now forced to stay home, and because of that, you cannot pay your rent. Even though there are federal and state moratoriums enacted to protect you from eviction, you are not a lawyer, and you do not know what your rights are. Subsequently, you are evicted—not because you did anything wrong, but because you could not afford to pay for counsel to defend you in court. While this clearly seems unfair, this is the reality for thousands of tenants in New Jersey since the coronavirus (“COVID-19”) pandemic began.

In December of 2019, COVID-19, which causes respiratory disease, appeared in Wuhan, China.<sup>1</sup> Although reports first stated that COVID-19 originated in a seafood market in Wuhan, the first case is said to come from an individual that was not at the seafood market.<sup>2</sup> COVID-19

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\* J.D. Candidate, 2022, Seton Hall University School of Law; B.A., *cum laude*, Muhlenberg College

<sup>1</sup> Laura M. Sauer, *What is Coronavirus?*, JOHNS HOPKINS MEDICINE (Sept. 21, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus>.

<sup>2</sup> *Id.*

is caused by a coronavirus called SARS-COV-2, and it has spread globally, including every state in the United States.<sup>3</sup> Among other things, the disease causes “mild to severe respiratory illness” in infected individuals.<sup>4</sup> Some individuals do not show symptoms, but when they do, they often have a “fever, cough, and tiredness.”<sup>5</sup> The virus is spread through droplets that are released into the air when someone coughs and sneezes.<sup>6</sup> Recent studies have concluded that the virus is most likely to spread to individuals that are within six feet of the virus.<sup>7</sup> In March of 2020, the World Health Organization (WHO) officially declared COVID-19 a pandemic.<sup>8</sup> As of September 14, 2020, there were 29,415,168 confirmed cases of COVID-19 in the world; further, there were 932,934 total deaths in the world.<sup>9</sup> On the same day in September, the United States had 6.5 million reported cases of COVID-19, and there were 194,235 deaths.<sup>10</sup>

According to the WHO, “a pandemic is the worldwide spread of a new disease.”<sup>11</sup> Further, the WHO has defined a pandemic as “an epidemic occurring worldwide.”<sup>12</sup> Since the disease is new, most people cannot fight it off because they do not have a built-up immunity. As a result, many people become sick as the disease continues to spread rapidly.<sup>13</sup> The WHO declared

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<sup>3</sup> Nina B. Witkofsky, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, FEDERAL REGISTER (Sept. 4, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf>.

<sup>4</sup> *Coronavirus*, WORLD HEALTH ORGANIZATION, [https://www.who.int/health-topics/coronavirus#tab=tab\\_1](https://www.who.int/health-topics/coronavirus#tab=tab_1).

<sup>5</sup> Pritish K. Tosh, *Coronavirus: What is it and How Can I Protect Myself?*, MAYO CLINIC (July 3, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/novel-coronavirus/faq-20478727>.

<sup>6</sup> Sauer, *supra* note 1.

<sup>7</sup> Tosh, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Coronavirus Death Toll*, WORLD METER (Sept. 21, 2020), <https://www.worldometers.info/coronavirus/coronavirus-death-toll/>.

<sup>10</sup> Sarah Almukhater et al., *COVID in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>11</sup> *What is a Pandemic?*, WORLD HEALTH ORGANIZATION (Feb. 24, 2010), [https://www.who.int/csr/disease/swineflu/frequently\\_asked\\_questions/pandemic/en/](https://www.who.int/csr/disease/swineflu/frequently_asked_questions/pandemic/en/).

<sup>12</sup> Heath Kelly, *The Classical Definition of a Pandemic is Not Exclusive*, WORLD HEALTH ORGANIZATION <https://www.who.int/bulletin/volumes/89/7/11-088815/en/#:~:text=A%20pandemic%20is%20defined%20as,are%20not%20considered%20pandemics.>

<sup>13</sup> Eleesha Lockett, *What is a Pandemic?*, HEALTHLINE (Mar. 25, 2020), <https://www.healthline.com/health/what-is-a-pandemic>.

COVID-19 a pandemic when it became clear that the virus was spreading at an especially swift pace across the country.<sup>14</sup>

This Comment will examine COVID-19 and how it has affected the housing market in New Jersey. Specifically, this Comment will discuss the right to counsel in New Jersey, the Center for Disease Control (CDC) moratorium, and the New Jersey moratorium to demonstrate why the right to counsel in eviction proceedings is needed now more than ever. Part II of this Comment will discuss the stay-at-home order in New Jersey, as well as federal and state law on the right to counsel. Part III will discuss the CDC moratorium as well as the New Jersey moratorium, and it will point to why the right to counsel is so vitally important right now. Part IV will discuss the consequences that tenants face in eviction proceedings as well as research that has proven the right to counsel effective—not just for tenants but communities as a whole. Part V concludes.

## II. New Jersey’s Eviction Crisis: Federal and State Law Protection (or Lack Thereof)

In response to COVID-19, New Jersey Governor Phil Murphy (“Governor Murphy”) issued a stay-at-home order to New Jersey on March 21, 2020.<sup>15</sup> When asked about the order, Governor Murphy stated, “[f]rom day one, we’ve made a commitment to be guided by the facts and take any action necessary to protect the health and safety of New Jersey’s nine million residents.”<sup>16</sup> Per the order, all non-essential businesses were closed indefinitely, and all in-person activities were prohibited.<sup>17</sup> Further, the order allowed essential businesses such as “grocery stores and pharmacies, gas stations, banks and other financial institutions and laundromats” to remain

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<sup>14</sup> *Pandemics*, WEBMD, <https://www.webmd.com/cold-and-flu/what-are-epidemics-pandemics-outbreaks>.

<sup>15</sup> *Governor Murphy Announces Statewide Stay at Home Order, Closure of All Non-Essential Retail Businesses*, STATE OF NEW JERSEY (Mar. 21, 2020), <https://www.nj.gov/governor/news/news/562020/20200320j.shtm#:~:text=NEWARK%20%E2%80%93%20To%20mitigate%20the%20impact,at%20home%20until%20further%20notice>.

<sup>16</sup> *Id.*

<sup>17</sup> Minyvonne Burke, *New Jersey Gov. Phil Murphy Issues Stay-At-Home Order for Nearly All of State’s 9m Residents*, NBC NEWS (Mar. 21, 2020), <https://www.nbcnews.com/news/us-news/new-jersey-gov-phil-murphy-issues-stay-home-order-nearly-n1165661>.

open.<sup>18</sup> Moreover, the order also required that when people are in public, they must socially distance themselves and stay six feet apart. Finally, the order banned all events such as parties and celebrations.<sup>19</sup> While restaurants were not closed because they were considered “essential,” they were only allowed to serve takeout dining.<sup>20</sup> Indoor dining in New Jersey was strictly prohibited.<sup>21</sup> Relatedly, all schools in New Jersey were forced to close.<sup>22</sup>

While the stay-at-home order was going to affect New Jersey negatively, Governor Murphy felt that the best way to prevent COVID-19 was to “limit our public interactions to only the most essential purposes.”<sup>23</sup> To support his decision, Governor Murphy explained that “[t]his is a time for us all to come together in one mission to flatten the curve and slow—and eventually halt—the spread of [COVID-19].”<sup>24</sup>

#### 1. Evictions, Unemployment Rates, and the Stay-at-Home Order—A Travesty

As of July 14, 2020, landlords have filed more than 15,000 eviction cases since April 2020.<sup>25</sup> Although the number of eviction cases filed between April and June was 55% lower than in 2019, housing attorneys believe that a surge of evictions is right around the corner.<sup>26</sup> People that live in New Jersey are especially vulnerable because one-third of all New Jersey residents are renters.<sup>27</sup> Specifically, in Hudson County, more than two-thirds of residents are renters.<sup>28</sup> Some

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<sup>18</sup> *Id.*

<sup>19</sup> Tom Davis, *Gov. Murphy Announces NJ ‘Stay-At-Home’ Order Due to Coronavirus*, PATCH (Mar. 21, 2020), <https://patch.com/new-jersey/moorestown/watch-live-gov-phil-murphy-issues-nj-update-coronavirus>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Governor Murphy Announces Statewide Stay at Home Order, Closure of All Non-Essential Businesses*, STATE OF NEW JERSEY GOVERNOR PHIL MURPHY (Mar. 21, 2020).

<sup>24</sup> Davis, *supra* note 19.

<sup>25</sup> Karen Yi, *NJ Could Face ‘Tidal Wave’ of Evictions if Rent Relief Stalls*, NJ SPOTLIGHT NEWS (July 14, 2020), <https://www.njspotlight.com/2020/07/nj-could-face-tidal-wave-of-evictions-if-rent-relief-stalls/>.

<sup>26</sup> *Id.*

<sup>27</sup> David Cruz, *New Jersey Faces Eviction ‘Tsunami,’* NJ SPOTLIGHT NEWS (July 20, 2020), <https://www.njtvonline.org/news/video/new-jersey-faces-eviction-tsunami/>.

<sup>28</sup> *Id.*

estimates predict that between thirty million and forty million people could face evictions in the next several months. In 2019, the unemployment rate in New Jersey was about 4%.<sup>29</sup> As of August 2020, unemployment rates skyrocketed to about 14% due to the stay-at-home order caused by COVID-19.<sup>30</sup> For thousands of residents now unemployed due to the stay-at-home order, it could be months before they get back to work.<sup>31</sup>

#### A. Evictions in New Jersey: What is the Law?

In New Jersey, almost every tenant is given protections under the Anti-Eviction Act (the “Act”).<sup>32</sup> New Jersey enacted the Act to ensure that “blameless tenants” are protected because there is a housing shortage in New Jersey.<sup>33</sup> There are eighteen different causes for eviction under the Act; however, this Comment will discuss the cause that is most pertinent today: the failure to pay rent.<sup>34</sup> The Act states that upon a ground for good cause, a tenant may be evicted for “fail[ing] to pay rent after a valid notice to quit.”<sup>35</sup> In New Jersey, a tenant cannot be evicted from their premises without a judgment for possession from the New Jersey Superior Court.<sup>36</sup> Further, if a landlord does not have a judgment of possession, then it is illegal for a landlord to throw a tenant out or lock them out of their home.<sup>37</sup> Sometimes, landlords evict tenants using self-help despite

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<sup>29</sup> See Mary K. Cunningham, *The CDC Took an Important Step to Halt Evictions Because of COVID-19. But That’s Only Half the Battle*, URBAN INSTITUTE (Sept. 3, 2020), <https://www.urban.org/urban-wire/cdc-took-important-step-halt-evictions-because-COVID-19-thats-only-half-battle>.

<sup>30</sup> See Erin Duffin, *Unemployment Rate in New Jersey from 1992 to 2019*, STATISTA (Mar. 5, 2020), <https://www.statista.com/statistics/190691/unemployment-rate-in-new-jersey-since-1992/#:~:text=In%202019%2C%20the%20unemployment%20rate,of%209.5%20percent%20in%202010>.

<sup>31</sup> Cruz, *supra* note 27.

<sup>32</sup> *The Tenant’s Right to Court Process*, LSNJLAW, <https://www.lsnjlaw.org/Housing/Landlord-Tenant/Evictions/Pages/Right-Court-Process.aspx> [hereinafter *Tenant’s Rights*].

<sup>33</sup> *Grounds for an Eviction Bulletin*, NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS (Feb. 2008), [https://www.state.nj.us/dca/divisions/codes/publications/pdf\\_lti/grnds\\_for\\_evicti\\_bulltin.pdf](https://www.state.nj.us/dca/divisions/codes/publications/pdf_lti/grnds_for_evicti_bulltin.pdf).

<sup>34</sup> *N.J.S.A. 2A:18-61.1* (2013); see *The Tenant’s Right to Court Process*, LSNJLAW, <https://www.lsnjlaw.org/Housing/Landlord-Tenant/Evictions/Pages/Right-Court-Process.aspx>.

<sup>35</sup> *N.J.S.A. 2A:18-61.1(f)* (2013).

<sup>36</sup> *Tenant’s Rights*, *supra* note 32.

<sup>37</sup> *Information for Tenants*, NEW JERSEY COURTS, [https://www.njcourts.gov/selfhelp/selfhelp\\_landlordtenant.html#tenants](https://www.njcourts.gov/selfhelp/selfhelp_landlordtenant.html#tenants).

such an action being illegal, and therefore, in those instances, the tenant has been illegally evicted.<sup>38</sup> An example of unlawful self-help is when the landlord shuts off the utilities on the premises.<sup>39</sup> Moreover, a tenant is not obligated to move out of their premises simply because their landlord tells them to leave or threatens them.<sup>40</sup>

In New Jersey, there are two ways for a landlord to evict a tenant.<sup>41</sup> First, the landlord can file a “notice to cease,” which means that the landlord is telling the tenant to stop doing something or else they will be evicted.<sup>42</sup> A “notice to cease” is most common when the tenant is accused of disorderly conduct.<sup>43</sup> Second, a landlord can file a “notice to quit” which means that the landlord is ordering the tenant to leave the premises by a certain date and time.<sup>44</sup> If the tenant fails to leave the premises by the date requested, the landlord can then take the tenant to court and initiate an eviction proceeding.<sup>45</sup> In New Jersey, judges can demand tenants to post bond prior to their hearing, and if the tenant does not have the money, they will be unable to raise any eviction defenses in court.<sup>46</sup> Simply, this means that if a tenant goes to court and does not have available the rent money due, it is an automatic win for the landlord.

While landlords are entitled to their rent money, oftentimes, tenants do not have it on hand, as they normally would, because they had to spend it on repairs. Unfortunately, New Jersey courts are unsympathetic, and tenants cannot easily defend themselves.<sup>47</sup> Although New Jersey law is

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<sup>38</sup> *Tenant’s Rights*, *supra* note 32.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Tenant’s Rights*, *supra* note 32.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> David R. Troutt, *Newark’s Right to Counsel: A Proposed System Design for Indigent Tenants Facing Eviction*, NEWARK’S RTC DESIGN MEMO (Apr. 2019), <https://static1.squarespace.com/static/5b996f553917ee5e584ba742/t/5cdb429b41e8bc0001a83b1d/1557873312954/CLiME+Memo+-+Newark%E2%80%99s+RTC+Design+Final.pdf>.

<sup>47</sup> This shows that the landlord’s failure to respond to the tenant’s needs will ultimately cause the tenant to suffer the consequences.

not tenant-friendly in that regard, Governor Murphy enacted an executive order on January 13, 2020, which allows tenants up to three days post-eviction to pay the rent due.<sup>48</sup> The executive order titled N.J. S3124 makes clear that landlords must accept the payment of rent, and subsequently, the tenant is entitled to “file a motion to dismiss the non-payment of the rent action *with prejudice*.”<sup>49</sup> While this is a step in the right direction for New Jersey tenants, three days is a short amount of time, and further, even though the rent action may be dropped, it is *with prejudice*. In that light, the tenant is still negatively impacted in the future irrespective of his/her current situation. Certainly, a tenant with three days to pay their rent is in a better position than a tenant who does not have extra time to pay their rent, but, in reality, most tenants cannot secure rent money in such a short amount of time. And further, for this law to truly be effective and useful to the tenants, their case should be dismissed *without prejudice*.

#### B. Federal Law: What Does it Say About the Right to Counsel?

Under federal law, the Sixth Amendment of the United States Constitution states that in all criminal proceedings, “the accused shall . . . have the [a]ssistance of [counsel for his defense].”<sup>50</sup> In *Strickland v. Washington*, the Court, analyzing the Sixth Amendment, held that its purpose is to ensure that individuals in a court proceeding can rely on the proceeding’s outcome to be justified.<sup>51</sup> In a similar case, the Court held that the Sixth Amendment was created to ensure that those guilty of a crime are convicted while those that are not guilty of a crime can go free.<sup>52</sup> Many of us,

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<sup>48</sup> Jennifer L. Alexander, ESQ., *Bill Passed in New Jersey Regarding When Tenants are Required to Make Payments After Eviction and/or Lockout*, GRIFFIN ALEXANDER P.C. (Jan. 17, 2020), <https://www.lawgapc.com/blog/new-bill-in-new-jersey-signed-into-law-regarding-tenants-having-more-time-to-make-payments-after-eviction-order-or-lockout/>.

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> U.S. CONST. amend VI.

<sup>51</sup> 466 U.S. 668, 691–92 (1984) (stating “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding”).

<sup>52</sup> *Herring v. United States*, 422 U.S. 853, 862 (1975) (stating “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free”).

generally speaking, understand that “we have the right to a lawyer” but that is not necessarily true unless it is in a criminal setting.<sup>53</sup> As a matter of federal law, the right to counsel is only granted to someone when they are facing a “sentence of incarceration.”<sup>54</sup> While the Sixth Amendment always gave defendants the right to counsel in federal prosecutions, it was not until 1963 that the right was given to defendants in state prosecutions for felony offenses.<sup>55</sup>

The case that recognized such a right in state prosecutions was *Gideon v. Wainwright*.<sup>56</sup> In *Gideon*, the defendant was charged with breaking and entering with the intent to commit a misdemeanor.<sup>57</sup> At trial, the defendant did not have counsel so he requested one.<sup>58</sup> Pursuant to traditional federal law, the Court denied the request for counsel because the Court believed that counsel was only awarded to those that committed capital offenses.<sup>59</sup> The defendant was ultimately found guilty at trial, so he petitioned the Florida Supreme Court with a habeas corpus petition stating that the Constitution afforded him the right to counsel.<sup>60</sup> The Court ruled that the Sixth Amendment’s language, which states, “in *all* criminal prosecution[s],” means that all defendants have the right to counsel in criminal trials where the defendant is charged with a serious offense.<sup>61</sup> Further, the Court noted “that America’s criminal justice system is adversarial,” and,

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<sup>53</sup> *Criminal and Civil Rights to Counsel*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL, [http://civilrighttocounsel.org/about/criminal\\_and\\_civil\\_rights\\_to\\_counsel](http://civilrighttocounsel.org/about/criminal_and_civil_rights_to_counsel).

<sup>54</sup> *State Constitutional Right to Counsel*, ACLU NEW JERSEY, <https://www.aclu-nj.org/theissues/criminaljustice/criminaljusticearchives/stateconstitutionalrightto#:~:text=The%20New%20Jersey%20Supreme%20Court,loss%20of%20his%20or%20her.>; *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (stating that a sentence of imprisonment gave the defendant the right to counsel); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (stating that a defendant facing jail time has the right to counsel).

<sup>55</sup> *Right to Counsel*, CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/right\\_to\\_counsel#:~:text=Overview,to%20counsel%20in%20federal%20prosecutions](https://www.law.cornell.edu/wex/right_to_counsel#:~:text=Overview,to%20counsel%20in%20federal%20prosecutions).

<sup>56</sup> *See generally* 372 U.S. 335 (1963).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Alex McBride, *Supreme Court History Expanding Civil Rights*, THIRTEEN, [https://www.thirteen.org/wnet/supremecourt/rights/landmark\\_gideon.html](https://www.thirteen.org/wnet/supremecourt/rights/landmark_gideon.html) (emphasis added).

therefore, states both assume that a defendant is guilty and use “resources to establish the defendant’s guilt before the defendant is proven guilty in a court of law.”<sup>62</sup> On top of this, “even the intelligent and educated layman has small and sometimes no skill in the science of law,” so the Court stressed that the right to counsel is “fundamental and essential to fair trials” in the United States.<sup>63</sup>

### C. Right to Counsel Under New Jersey State Law

New Jersey has attempted to broaden the federal right under the Constitution by awarding the right to counsel to individuals that are facing imprisonment or “other consequence[s] of magnitude” because of “fundamental fairness.”<sup>64</sup> While New Jersey’s law protects more individuals than federal law does, its law does not protect individuals that are facing evictions because “other consequence[s] of magnitude” have been interpreted as a person “facing loss of his or her driver’s license, or a fine of \$1,800.”<sup>65</sup> While New Jersey has not yet recognized “other consequence[s] of magnitude” as pertaining to evictions, in December of 2018, Newark passed an ordinance to guarantee counsel to tenants under 200% of the federal poverty level.<sup>66</sup> The ordinance states that an “emergency exists” in Newark because of frivolous and retaliatory eviction by landlords.<sup>67</sup> In Newark, about 78% of residents are renters, and the frivolous eviction actions posed serious threats to public health, safety, and the general welfare.<sup>68</sup> In response, Newark created the Office of Tenant Legal Services so that Newark residents would have counsel during

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*; *Gideon*, 372 U.S. at 344 (stating “reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him”).

<sup>64</sup> *Supra* note 54.

<sup>65</sup> *Id.*; *Turner v. Rogers*, 564 U.S. 431, 448 (2011) (stating that the Fourteenth Amendment does not require the right to counsel in civil proceedings).

<sup>66</sup> *Newark Becomes Third City to Enact Right to Counsel for Evictions*, NATIONAL COALITION FOR A CIVIL RIGHT TO COUNSEL (June 1, 2019), [http://civilrighttocounsel.org/major\\_developments/1323](http://civilrighttocounsel.org/major_developments/1323).

<sup>67</sup> <https://clerkshq.com/Content/Newark-nj/Books/Code/NewarkT19.htm>.

<sup>68</sup> *See id.*

eviction proceedings.<sup>69</sup> In theory, should tenants have access to counsel, landlords would be less willing to file frivolous and unwarranted eviction suits.<sup>70</sup> Further, providing legal services to tenants will help decrease homelessness.<sup>71</sup>

### III. The CDC and New Jersey Moratorium: What is the Difference?

#### A. What is a Moratorium?

A moratorium is best defined as a temporary suspension of an activity or law because of a short-term crisis that disrupts the way that business is typically conducted.<sup>72</sup> For example, moratoriums have been enacted in past years because of “natural disaster[s] like an earthquake or flood.”<sup>73</sup> The government, regulators, or businesses can enact moratoriums;<sup>74</sup> however, in this Comment, we are concerned with moratoriums enacted by the government. Specifically, we are concerned with the moratoriums enacted by the federal government and New Jersey in response to COVID-19. Usually, a moratorium is enacted because there is an event that is causing financial hardships to individuals.<sup>75</sup> Simply, the goal of a moratorium is to extend deadlines so that individuals have more time to resolve their issues.<sup>76</sup> In this Comment, the moratoriums discussed below were enacted because thousands of individuals are struggling to pay their rent. Further, without a moratorium, landlords would be allowed to evict tenants because of their failure to pay rent. But, as explored below, federal and state moratoriums were enacted to suspend evictions so that individuals have more time to come up with a solution to their financial problems.

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Newark Residents Facing Eviction Can Get Help Through Right-to-Counsel Ordinance First Suggested by Rutgers Law*, RUTGERS L. SCH. (June 27, 2019), <https://law.rutgers.edu/news/newark-residents-facing-eviction-can-get-help-through-right-counsel-ordinance-first-suggested>.

<sup>72</sup> Adam Hayes, *Moratorium*, INVESTOPEDIA (Aug. 22, 2020), <https://www.investopedia.com/terms/m/moratorium.asp>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

## B. The CDC Moratorium: Who Does it Protect and How?

On September 4, 2020, the CDC enacted a federal eviction moratorium in response to the COVID-19 pandemic.<sup>77</sup> The moratorium was enacted to protect millions of Americans that are facing eviction for non-payment of rent—originally, it was in effect until December 31, 2020.<sup>78</sup> Shortly after the moratorium’s enactment, the moratorium was extended to January 31, 2021, and then to March 31, 2021.<sup>79</sup> Simply, the moratorium has halted all residential evictions to prevent the further spread of COVID-19.<sup>80</sup> While the moratorium was enacted to protect tenants facing evictions for non-payment of rent, tenants still owe rent money, and simply, the moratorium just prevents lockouts and removal.<sup>81</sup> It is up to the courts to decide whether eviction hearings will be held, and so far, New Jersey has suspended its court hearings for evictions.<sup>82</sup> The goal of the moratorium is to prevent “mass evictions.” It is important to note, however, that this moratorium does not apply in any state, local, territorial or tribal area with a moratorium on residential evictions that provides the same or greater coverage.<sup>83</sup>

To be eligible for protection under the CDC moratorium, tenants must sign a declaration and submit it to their landlord.<sup>84</sup> A renter who signs the CDC declaration does so under penalty of perjury.<sup>85</sup> Basically, if a person lies, or even fills out the declaration wrong, they could face

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<sup>77</sup> *National Federal Eviction Moratorium*, NATIONAL LOW INCOME HOUSING COALITION, <https://nlihc.org/national-eviction-moratorium>.

<sup>78</sup> *Id.*

<sup>79</sup> *Right to Counsel: Free Eviction Help*, (Jan. 31, 2020), <https://lasclv.org/wp-content/uploads/January-2021-report-on-initial-6-months-of-Right-to-Counsel-Cleveland-high-res.pdf>.

<sup>80</sup> <https://www.govinfo.gov/content/pkg/FR-2020-09-04/pdf/2020-19654.pdf>.

<sup>81</sup> Catherine Weiss et al., *Residential Evictions: What Tenants Need to Know*, LOWENSTEIN SANDLER (Sept. 2, 2020), <https://www.lowenstein.com/news-insights/publications/articles/residential-evictions-what-tenants-need-to-know-weiss>.

<sup>82</sup> *Id.*

<sup>83</sup> Mathew Goldstein, *How Does the Federal Eviction Moratorium Work? It Depends Where You Live*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/16/business/eviction-moratorium-renters-landlords.html>.

<sup>84</sup> *Id.*

<sup>85</sup> Jacob Passy, *CDC’s Eviction Moratorium Doesn’t Automatically Protect Renters – Here Are The Strict Criteria You Must Meet*, MARKETWATCH (Sept. 4, 2020), <https://www.marketwatch.com/story/the-cdcs-eviction-moratorium->

“prosecution, jail time and/or a fine.”<sup>86</sup> This is an issue because most tenants are not going to know that they need to complete the declaration. Further, even if tenants know they need to complete the declaration, it is likely that they will not know how to do it properly, and therefore, they are putting themselves at risk for committing perjury—a serious offense.

### C. The New Jersey Moratorium

On March 19, 2020, Governor Murphy enacted Executive Order 106 in response to COVID-19.<sup>87</sup> The moratorium is in effect until two months after either the end of the Public Health Emergency or the end of the State of Emergency, whichever ends later.<sup>88</sup> Governor Murphy signed Executive Order 180 on August 27, 2020, which extended the Public Health Emergency until September 27, 2020; therefore, tenants are protected until at least November 27, 2020.<sup>89</sup> Simply, this is an “eviction moratorium” that states that no tenant can be evicted from their home while the moratorium is in effect.<sup>90</sup> Although the moratorium protects tenants from eviction, it still requires tenants to pay their monthly rent.<sup>91</sup> Further, landlords can initiate evictions during the moratorium; however, there will be no court hearings until the moratorium ends.<sup>92</sup> This means that although a

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doesnt-automatically-protect-renters-how-to-get-help-11599206271 (“The most important thing for renters to know right now is they are not automatically covered under this moratorium.”).

<sup>86</sup> *Id.*

<sup>87</sup> *Eviction Moratorium Information + Question Form*, NEW JERSEY COVID-19 INFORMATION HUB, <https://COVID19.nj.gov/forms/renter#:~:text=The%20New%20Jersey%20Supreme%20Court,all%20eviction%20proceedings%20for%20now.&text=The%20eviction%20moratorium%20will%20last,Order%20to%20end%20it%20sooner>.

<sup>88</sup> Exec. Ord. No.106.

<sup>89</sup> *Murphy Signs Executive Order Extending Public Health Emergency in New Jersey*, INSIDER NJ (Aug. 27, 2020), <https://www.insidernj.com/press-release/murphy-signs-executive-order-extending-public-health-emergency-new-jersey-2/>.

<sup>90</sup> *Supra* note 86.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

landlord files an eviction complaint, a tenant is not required to leave.<sup>93</sup> While tenants are not actually evicted, many tenants will not know that and may subsequently move out—a real issue.

An example of such was explained by a 25-year-old woman from New Jersey,<sup>94</sup> when she stated that she felt pressured to leave her apartment because she could not afford to pay her monthly rent.<sup>95</sup> Further, the woman stated that the landlord made threats against her and her family.<sup>96</sup> As illustrated, tenants simply do not know their rights, making the right to counsel so vitally important in a time like now. While the number of cases filed between April and June is 55% lower than the cases filed during the same time period in 2019, housing attorneys call it “indicative of what’s to come: a surge of evictions once the moratorium lifts and courts reopen.”<sup>97</sup>

#### D. The “People’s Bill”

In April of 2020, New Jersey created a bill (S2340/A4034); however, after months of negotiations and amendments, the bill has not been signed into law as of January 2021.<sup>98</sup> The bill, also known as the “People’s Bill,” is currently in the Senate and is awaiting approval.<sup>99</sup> Governor Murphy is eager to pass the bill into law, and in November 2020, Governor Murphy “called on lawmakers to pass it so he can sign it into law.”<sup>100</sup> If the “People’s Bill” is passed, it “will help renters avoid eviction, and help homeowners and landlords of single and multi-family homes avoid mortgage default by creating pauses and repayment plans on their rent and mortgage payments.”<sup>101</sup>

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<sup>93</sup> See *Murphy Signs Executive Order Extending Public Health Emergency in New Jersey*, INSIDER NJ (Aug. 27, 2020), <https://www.insidernj.com/press-release/murphy-signs-executive-order-extending-public-health-emergency-new-jersey-2/>.

<sup>94</sup> Yi, *supra* note 25.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Ashley Balcerzak, *NJ COVID Housing Relief Bill has Been Stuck Since April. What Would the ‘People’s Bill’ Do?*, NORTH JERSEY (Nov. 22, 2020), <https://www.northjersey.com/story/news/new-jersey/2020/11/19/COVID-nj-housing-rent-relief-nj-mortgage-relief-bill-stuck-but-what-would-do/6247482002/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Freehold Board Passes Resolution Supporting “The People’s Bill” Authored to Promote Financial Protection to Tenants and Landlords During Pandemic*, INSIDER NJ (Oct. 9, 2020), <https://www.insidernj.com/press->

Simply, this bill ensures that landlords will receive their rent money while also ensuring that tenants are not evicted once the New Jersey moratorium ends—this is not easy for landlords or tenants to agree on, but each side must be willing to negotiate and compromise.<sup>102</sup>

#### 1. How Does the “People’s Bill” Repayment Plan Work?

As of right now, tenants in New Jersey are likely to face immediate evictions if they cannot afford to pay all of their missed rental payments once the moratorium ends.<sup>103</sup> According to the “People’s Bill,” landlords are obligated to give tenants the option of a repayment plan if they missed rent payments since March 9, 2020.<sup>104</sup> Importantly, however, only certain tenants are eligible for the repayment plan option.<sup>105</sup> To qualify for the repayment plan, tenants must show that the pandemic caused financial hardship in one of the following ways: (i) lost income or job due to COVID-19; (ii) payment of funeral costs due to COVID-19; or (iii) having to pay more for child care due to schools being closed or a person that has to care for family members was positive for COVID-19 or quarantined because they were exposed.<sup>106</sup>

If a tenant qualifies for the repayment plan, then, within thirty days of the end of the public health emergency, the landlord must calculate the amount of rent money.<sup>107</sup> The “People’s Bill” gives landlords and tenants the ability to agree on their own repayment plan; however, if an agreement cannot be reached, the default is that a renter has “six months to repay each month of missed rent.”<sup>108</sup> Additionally, if a renter owes five months or more of rent, they are allowed a

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release/freeholder-board-passes-resolution-supporting-peoples-bill-authored-provide-financial-protection-tenants-landlords-pandemic/.

<sup>102</sup> Balcerzak, *supra* note 100.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Balcerzak, *supra* note 100.

maximum of two and a half years to make up the payments.<sup>109</sup> While the “People’s Bill” is undoubtedly needed right now, it is not useful unless tenants know it exists. Simply, tenants need counsel so they can best understand their rights and options. It does not matter how helpful a law is. If tenants do not know it exists—or how to use it—they will be evicted once the moratorium ends. So, while it is great that the “People’s Bill” is close to becoming a law, New Jersey must afford the right to counsel for tenants that are facing evictions so they are protected and not taken advantage of. A law is meant to protect people, but it is only useful if people know it exists.

#### IV. Why the Right to Counsel is Needed Now?

##### A. Unlawful Evictions in New Jersey—The New Norm

While the CDC moratorium and New Jersey moratorium were enacted to protect tenants from eviction, many tenants are experiencing unlawful evictions from their landlords. Unlawful evictions have been occurring for many years; however, due to COVID-19 and financial instability for landlords, many landlords are beginning to take matters into their own hands.<sup>110</sup> This is best illustrated in Hudson County, New Jersey, where unlawful evictions were considered “very rare” in previous years.<sup>111</sup> But given that landlords are losing rental income, they are beginning to evict tenants even though the moratoriums do not give them the right to do so.<sup>112</sup> For example, La’Condria Burley (“Burley”), a renter in Hudson County, stated that her landlord put locks on her doors because she has been unable to pay her rent for the last three months.<sup>113</sup>

In response to the unlawful eviction, attorney Amy Albert (“Albert”) stated, “I think what is happening is [landlords] are running out of money and they’re concerned. They are trying to do

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<sup>109</sup> *Id.*

<sup>110</sup> Joshua Rosario, *Illegal Evictions are Happening in Hudson County Despite Moratoriums, Worrying Local Advocacy Groups*, NJ.COM (Sept. 20, 2020), <https://www.nj.com/hudson/2020/09/illegal-evictions-are-happening-in-hudson-county-despite-bans-worrying-local-advocacy-groups.html>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

what they can to stay afloat and the normal procedures they rely are not available.”<sup>114</sup> Further, it was noted that there had been an “alarming uptick” in incidents of unlawful evictions.<sup>115</sup> On the bright side, Albert was successful in representing Burley and was able to reverse the eviction;<sup>116</sup> however, in reality, these unlawful evictions are happening to more people than just Burley. While Burley was fortunate and overcame the unlawful eviction, thousands of tenants do not have legal representation, and therefore, their unlawful evictions are permanent because they do not have the resources to fight back.

#### B. Eviction: A Consequence of [Extreme] Magnitude

As stated earlier, New Jersey courts award the right to counsel to individuals that are facing “other consequence[s] of magnitude.”<sup>117</sup> Courts in New Jersey have determined that “other consequence[s] of magnitude” are considered when someone “loses their license or faces a fine of \$1,800 or more.”<sup>118</sup> A question still left unanswered, though: Why is the loss of a license or fine recognized as a consequence of magnitude but eviction is not? The effects of eviction are substantial, possibly even greater than the loss of a license or fine, considering that families are forced to double-up, tenants face homelessness, and the blacklist. Due to the consequences of an eviction, it is vitally important that New Jersey courts reconsider what it means for an event to be “a consequence of magnitude.” Subsequently, courts should decide that evictions pose a great enough danger to tenants so that they have the right to counsel.<sup>119</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Rosario, *supra* note 114.

<sup>117</sup> *State Constitutional Right to Counsel*, ACLU NEW JERSEY, <https://www.aclu-nj.org/theissues/criminaljustice/criminaljusticearchives/stateconstitutionalrightto#:~:text=The%20New%20Jersey%20Supreme%20Court,loss%20of%20his%20or%20her>.

<sup>118</sup> *Id.*

<sup>119</sup> See generally Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing Hardship, and Health*, 94 SOC. FORCES 295 (2015) (discussing the consequential effects of evictions on individual's lives); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L.

## 1. Families Forced to “Double-Up”

As the spread of COVID-19 continues, millions of tenants are forced to move into their families’ homes due to loss of income and overdue rental payments.<sup>120</sup> Moving in with family members is also known as “[d]oubling up,” which means that an individual is living in another household temporarily and constantly shifting between homes because of “economic needs.”<sup>121</sup> Because of this, many homes are becoming overcrowded, and therefore, individuals are living in “unsanitary[] and transient conditions” that are causing severe health consequences.<sup>122</sup> For example, when families have to double-up, they “increase their contact with others and limit their ability to social[ly] distance, quarantine, access appropriate health services, or practice recommended hygiene.”<sup>123</sup> This is an enormous issue because many people that have COVID-19 are contagious before they show symptoms, and therefore, a spike in evictions is likely to cause a spike in COVID-19 cases.<sup>124</sup>

## 2. Homelessness

When people are evicted, they not only lose their homes, but they face homelessness, residential instability, and increased emergency room use.<sup>125</sup> In 2017, a study in California found that 14% of homeless people stated that they were homeless because of an eviction.<sup>126</sup> In New

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POL’Y & ETHICS J. 699, 702 (2006) (“Fundamental fairness, the constitutional rights to due process and equal protection of law, and sound policy all require recognition of a right to counsel for tenants facing eviction.”).

<sup>120</sup> Conor Dougherty, *Pandemic’s Toll on Housing: Falling Being, Doubling Up*, N.Y. TIMES (Feb. 6, 2021), <https://www.nytimes.com/2021/02/06/business/economy/housing-insecurity.html?auth=login-facebook>.

<sup>121</sup> Safia Samee Ali, *Homeless but Not Hidden, Some American Families are Disqualified from Crucial Aid*, NBC NEWS (Dec. 18, 2020), <https://www.nbcnews.com/news/us-news/homeless-doubled-families-living-other-households-may-fall-aid-blind-n1251446>.

<sup>122</sup> Sonya Acosta, *Preventing Spike in Evictions Will Help Limit COVID-19’s Spread*, CENTER ON BUDGET AND POLICY PRIORITIES (Dec. 10, 2020), <https://www.cbpp.org/blog/preventing-spike-in-evictions-will-help-limit-covid-19s-spread>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Robert Collinson and Davin Reed, *The Effects of Evictions on Low-Income Households* (Dec. 2018).

<sup>126</sup> *Protect Tenants, Prevent Homelessness*, NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY <https://nlchp.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf>.

York City, 33% of people cited homelessness as the result of an eviction.<sup>127</sup> Further, in New York City, evictions are the second leading cause of homelessness.<sup>128</sup> In 2011, a research study showed that 45% of households that entered a shelter cited an eviction as their reason for homelessness.<sup>129</sup> As shown above, homelessness is not an indirect effect from evictions; rather, evictions directly cause homelessness, and therefore, people subsequently experience difficulties with their jobs and health. While these are alarming statistics, this is an issue that *can be fixed and avoided*. There is ample data that shows how counsel helps tenants to avoid evictions. Not only does counsel help tenants avoid eviction, but “[counsel] provide[s] other assistance that helps [tenants] avoid homelessness . . . . [they] help tenants negotiate settlement agreements that allows tenants to find enough time to find suitable housing.”<sup>130</sup>

When people are homeless, they are often labeled as lazy or uninspired to find a job.<sup>131</sup> What people fail to understand, however, is that many people are not homeless because they are lazy; rather, they are homeless because of events that are out of their control.<sup>132</sup> When someone is homeless, they “may not have an address to put on a resume, a phone number for job call backs, and a safe place to prepare for job interviews.”<sup>133</sup> Not only does homelessness cause someone to struggle with employment, but it causes drastic changes in their health.<sup>134</sup> The CDC has stated that homelessness and physical/mental health are closely related.<sup>135</sup> For example, people that are

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> SCHERER, *supra* note 116, at 706.

<sup>131</sup> Ambar Aleman, *Employment & Homelessness*, HOMELESS HUB (July 11, 2016), <https://www.homelesshub.ca/blog/employment-homelessness>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Homelessness as a Public Health Law Issue: Selected Resources*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 2, 2017), <https://www.cdc.gov/phlp/publications/topic/resources/resources-homelessness.html>; SCHERER, *supra* note 116, at 708 (“Because the housing market is so tight, low-income people who are evicted are likely to become homeless, which severely compounds the trauma of eviction displacement.”).

<sup>135</sup> *Homelessness as a Public Health Law Issue: Selected Resources*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 2, 2017), <https://www.cdc.gov/phlp/publications/topic/resources/resources-homelessness.html>.

homeless experience “higher rates of health problems such as HIV infection, alcohol and drug abuse, mental illness, and other conditions.”<sup>136</sup> Also, homeless people do not have adequate food and protection.<sup>137</sup> The U.S. Department of Housing and Urban Development has stated that homeless people are twice as likely to have a disability.<sup>138</sup> Studies have also shown that homeless people are more likely to die before people that have a home. One study said, “[p]eople who are homeless have higher rates of illness, and die on average twelve years sooner than the general U.S. population.”<sup>139</sup>

Again, based on homelessness alone, evictions should be considered a “consequence of extreme magnitude.”<sup>140</sup> When people are evicted, they do not simply lose their homes and move on with their life. Their entire life is flipped upside down and they are stuck facing an uphill battle forever. With counsel, tenants can fight back against evictions, protect their future, their rights, and most importantly, their health.

### 3. The Blacklist

Regardless of the outcome of an eviction proceeding, tenants are placed on the “blacklist.”<sup>141</sup> When a person is on the blacklist, it means they are listed in a database as “undesirable tenants,”<sup>142</sup> and further, they are denied future housing opportunities and labeled as a bad tenant.<sup>143</sup> Paula Franzese, Peter W. Rodino Professor of Law at Seton Hall Law School,

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Health*, NATIONAL ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/health/>.

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<sup>140</sup> *Homelessness & Health: What's the Connection?*, NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL (Feb. 2019).

<sup>141</sup> Paula Franzese, *A Place to Call Home: Tenant Blacklisting and the Denial of Opportunity*, 45 FORDHAM URB. L.J. 661, 663 (2018).

<sup>142</sup> *Are You Blacklisted?*, APARTMENT RATINGS (Oct. 17, 2005), <https://ohmyapt.apartmentratings.com/blacklisted-tenant.html#:~:text=What%20is%20a%20blacklisted%20tenant%3F&text=The%20landlords%20use%20this%20list,from%20failure%20to%20pay%20rent.>

<sup>143</sup> Franzese, *supra*, note 141.

stated, “Landlords routinely conduct background checks on applicants for rental housing and set a particularly high bar when vetting candidates.”<sup>144</sup> One of the biggest issues with the blacklist is that it does not provide any context of why the tenant was in an eviction proceeding.<sup>145</sup> For example, a tenant can be on the blacklist because their landlord breached a contract; however, the blacklist fails to note this.<sup>146</sup> This is incredibly important right now because, due to COVID-19, thousands of tenants are illegally evicted but the blacklist will not reflect that. Although the tenant’s eviction is illegal, their presence on a blacklist, because they were named in an eviction proceeding, means that they will struggle to find new housing for the rest of their life.

Landlords use the blacklist to report tenants that have complained a lot, had disputes with their landlord, or for being evicted because of a failure to pay rent.<sup>147</sup> The blacklist is known for harming the chances of tenants getting another apartment because landlords use the blacklist to look for reasons to reject someone.<sup>148</sup> Due to this, tenants often find themselves struggling to find future renting opportunities and they are discriminated against in the rental process.<sup>149</sup>

In *A Place to Call Home: Tenant Backlisting the Denial of Opportunity*, there is a story about Maurice Smith, a tenant from New Jersey that successfully defended himself from an eviction but ultimately ended up on the blacklist.<sup>150</sup> After more than one year, Maurice Smith

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 668 (“The reporting system has three major flaws: (1) it provides no context and no mention of the given matters’ surrounding circumstances, including case dispositions; (2) the prospective tenant is afforded no notice; (3) there is no appeal process or assured opportunity for the adversely affected tenant to explain how or why she came on the list.”).

<sup>146</sup> *Id.* at 672 (“Blacklists stigmatize, precluding future renting opportunities and rendering affordable housing options even less accessible.”).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*; Teri Karush Rogers, *Only the Strongest Survive*, N.Y. Times (Nov. 26, 2006), <http://www.nytimes.com/2006/11/26/realestate/26cov.html> (“It is the policy of ninety-nine percent [of landlords] to flat out reject anybody with a landlord-tenant record, no matter what the outcome is.”).

<sup>149</sup> Paula Franzese, *Tenants Shouldn’t be ‘Blacklisted’ for Asserting Their Rights*, NEWJERSEY.COM (July 21, 2017), [https://www.nj.com/opinion/2017/07/tenants\\_shouldnt\\_be\\_blacklisted\\_for\\_asserting\\_thei.html#:~:text=But%20rather%20than%20compel%20landlord,a%20%22tenant%20screening%20report.%22](https://www.nj.com/opinion/2017/07/tenants_shouldnt_be_blacklisted_for_asserting_thei.html#:~:text=But%20rather%20than%20compel%20landlord,a%20%22tenant%20screening%20report.%22).

<sup>150</sup> Franzese, *supra* note 134.

succeeded in removing his name from the blacklist; however, that was only possible because he had counsel.<sup>151</sup> While on the blacklist, Maurice Smith was denied from housing opportunities multiple times,<sup>152</sup> not because he was a bad person, but because he was a party in an eviction proceeding. This goes to show how devastating eviction proceedings are, even when a tenant prevails in court. Due to COVID-19, thousands of tenants, just like Maurice Smith, will face eviction proceedings from their landlord that they can win if they have counsel to defend them. Further, even if tenants are not immediately rejected from a housing opportunity, they are put “to the back of the line,” and sometimes, they wait up to three years to hear back, and therefore, they become homeless.<sup>153</sup>

#### C. The Laws are Confusing to Lawyers and the Courts, So Imagine: What About Tenants?

The CDC moratorium is ambiguous, according to experts.<sup>154</sup> One expert has said that “different judges across the country could choose to interpret the moratorium differently in how they proceed with eviction cases.”<sup>155</sup> Some judges believe that a case cannot proceed, but other judges have allowed cases to move forward against tenants who insist they should be protected.<sup>156</sup> “Confusion has been the number one experience of clients who are facing housing instability during COVID-19.”<sup>157</sup> While confusion does not seem like a huge deal, it is—inconsistent

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<sup>151</sup> *Id.* (stating “Mr. Smith remains mindful that the resources that enabled him to successfully defend the wrongful eviction actions and subsequently secure removal of his name from the dooming ten ant registries are not available to most”).

<sup>152</sup> *Id.*

<sup>153</sup> U.S. Dep’t of Hous. & Urb. Dev., Chapter 8: Housing Search and Leasing, IN HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 8-1, 8-20 (2001), [https://www.hud.gov/sites/documents/DOC\\_11752.PDF](https://www.hud.gov/sites/documents/DOC_11752.PDF) [<https://perma.cc/9E8A-HX5L>]. 18.

<sup>154</sup> Passy, *supra* note 82.

<sup>155</sup> *Id.*

<sup>156</sup> Mathew Goldstein, *How Does the Federal Eviction Moratorium Work? It Depends Where You Live*, N.Y. TIMES (Sept. 17, 2020), <https://www.nytimes.com/2020/09/16/business/eviction-moratorium-renters-landlords.html>.

<sup>157</sup> Passy, *supra* note 82.

interpretations of the moratorium will fail to truly protect tenant's rights.<sup>158</sup> As a society, we cannot overlook this because, after all, the moratorium was enacted to *protect* tenants, not to make them more vulnerable.

The fact that New Jersey has not awarded the right to counsel during such extreme times is a catastrophe for well-intentioned, financially struggling tenants. It is one thing to say that generally, tenants do not have the right to counsel, but it is completely different to say that tenants do not—*full stop*—have the right to counsel, especially when there are lawyers and judges without the know-how to even interpret the moratoriums. Tenants are human, just like you and me, and they deserve protection to the fullest extent during these times. In *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, it was said:

A home is a precious this to lose. One's home is one's place in the world and is crucial to one's well-being. The home is the locus of family life and child development, necessary for accessing education, jobs, and a prerequisite for participating in civil society and exercising political rights. The precipitous of one's home through eviction is a devastating and traumatic experience.<sup>159</sup>

Thousands of tenants cannot afford to pay their rent because of a pandemic. Thousands of tenants who cannot put food on the table for their children. Now, because of confusing laws, eviction proceedings are hauling thousands of tenants into court. In effect, evictions are poised to flood the courts when the moratoriums end, and undoubtedly, there are more important things to worry about than people who cannot afford to pay their rent because of a pandemic that is out of their control. It is bad enough that these tenants are facing evictions, but on top of it, these tenants are going into

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<sup>158</sup> Annie Nova, *The CDC Banned Evictions, But Some Renters are Still Vulnerable*, CNBC (Sept. 10, 2020), <https://www.cnbc.com/2020/09/10/the-cdc-banned-evictions-but-the-protection-might-not-reach-everyone-.html>.

<sup>159</sup> Scherer, *supra* note 116, at 701.

court with no idea of what to expect because the trained professionals in this country do not know how to handle these eviction matters.<sup>160</sup>

#### D. Landlords v. Tenants: An Unfair Fight

There are enormous differences between the number of landlords that have counsel and the number of tenants that have counsel in eviction proceedings. Due to the large disparities between landlords and tenants that have counsel, the courts typically side with landlords so that proceedings go smoothly.<sup>161</sup> As stated by Jessica Steinberg, when judges side with landlords simply because the tenants do not have counsel, “passive judging results in systematic partiality towards represented, or more skilled, parties.”<sup>162</sup> As a matter of morals, this is wrong and goes against everything that America stands for. In America, an individual’s wealth should not determine whether or not a judge is more likely to side with them or someone else when they walk into a courtroom.<sup>163</sup> It is estimated that about 90% of landlords have counsel, and naturally, the majority of tenants lose without putting up a fighting chance.<sup>164</sup> When this happens, justice is not served, and the party without counsel is severely disadvantaged.<sup>165</sup>

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<sup>160</sup> *Gideon*, 372 U.S. at 345 (quoting *Powell v. State of Alabama*, 287 U.S. 45, 68–79 (1932)) (stating that without counsel “though he be not guilty, faces the danger of conviction because he does not know how to establish his innocence”).

<sup>161</sup> Russell Engler, *Shaping a Context-Based Civil Gideon Movement from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 714–15 (stating that data has shown that the courts typically serve the landlords in a better way than tenants so that the “courts operate in a manner that swiftly serves the landlord’s interests”).

<sup>162</sup> Jessica K. Steinberg, *Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice*, 2016 B.Y.U. REV. 899, 908 (2016).

<sup>163</sup> Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 833 (2012) (stating “[i]mplicit biases are discriminatory biases based on either implicit attitudes . . . traits that one associates with a specific group”).

<sup>164</sup> Franzese, *supra* note 132, at 662–63 (“The aims of fairness and justice are frustrated when, with the peril of eviction in the balance, approximately ninety percent of landlords have legal counsel while ninety percent of tenants do not.”); see SCHERER, *supra* note 116, at 706 (“Lawyers are more familiar with the Housing Court procedures and are better equipped to help the court resolve factual and legal issues, such as the amount of rent arrears tenants actually owe, the legal level rent under New York City’s rent regulation laws, or the amount of rent abatements tenants are entitled to when landlords have failed to make repairs.”).

<sup>165</sup> *Id.*; Russell Engler, *Shaping a Context-Based Civil Gideon Movement from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 714–15 (stating that there is “fundamental unfairness in the forum”); SCHERER, *supra* note 116, at 704 (“The direct result of the lack of legal representation is that many tenants are evicted and displaced unlawfully and unnecessarily.”).

## E. The Shriver Study and Cleveland’s Right to Counsel Initiative—Results Matter

In 2009, California passed the “Sargent Shriver Civil Counsel Act” (the “Shriver Study”) that authorized projects to study low-income families and the legal representation that they receive.<sup>166</sup> The Shriver Study is supportive of court services to ensure that “self-represented parties obtain meaningful access to justice and to guard against the involuntary waiver of certain rights.”<sup>167</sup> Most of the programs funding goes towards housing cases, specifically evictions.<sup>168</sup> The Shriver Study funded housing projects in six different counties, and compiled data and findings to determine how much right to counsel matters.<sup>169</sup> Tenants represented by counsel under the Shriver Study were more likely to have long-term housing stability.<sup>170</sup> While 78% of the tenants had to move out of their homes, 16% of tenants were fortunate to keep their homes.<sup>171</sup> Further, the following statistics show how important counsel is even when a tenant is not able to keep their home.

Among the 78% of people that moved out of their homes the following results were acquired: (1) 46% of cases involved an adjusted move-out date; (2) 30% of cases resulted in a reduction in the back owned rent to be paid; (3) 74% of the cases ended without the eviction proceeding on a public record; (4) 53% of the cases did not have the eviction case sent to creditors; and (5) 39% of the cases ended with a neutral rental reference from the landlord.<sup>172</sup>

Like the Shriver Study, Cleveland created a right to counsel initiative on July 1, 2020.<sup>173</sup> The initiative guarantees that individuals who earn below a certain income

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<sup>166</sup> NPC Research, *Evaluation of the Sargent Shriver Civil Counsel Act [AB590] Housing Pilot Projects*, JUDICIAL COUNSEL OF CALIFORNIA (July 2017), <https://www.courts.ca.gov/documents/Shriver-Housing-2017.pdf>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*; SCHERER, *supra* note 116, at 705 (“[L]egal services can prevent evictions at every stage in the eviction process, and that a very small percentage of tenants who obtain representation in Housing Court actually lose their home.”).

<sup>173</sup> Editor, *Cleveland Right to Counsel program Helping Halt Evictions, Provide Aid*, WOSU PUBLIC MEDIA (Feb. 3, 2021), <https://radio.wosu.org/post/cleveland-right-counsel-program-helping-halt-evictions-provide-aid#stream/0>.

threshold receive legal representation from the Legal Aid Society.<sup>174</sup> Within six months of the start of the initiative, Cleveland has seen tremendous results for individuals facing evictions. For example, results from the initiative show that: (1) 93% of individuals seeking to avoid eviction were successful; (2) 83% of individuals seeking more time to move out were successful; and (3) 89% of individuals seeking to mitigate their damages were successful.<sup>175</sup>

Objectively, both studies prove that the right to counsel makes an incredible difference in eviction proceedings. Having counsel is not only about making sure that a tenant keeps their home; rather, having counsel is necessary to make sure that tenant's rights are protected, so they have the best possible outcome in their eviction proceeding.<sup>176</sup> This is exactly why New Jersey needs to support right to counsel for tenants facing eviction. Rental assistance is needed now more than ever, and without legal assistance, many tenants will lack the resources to protect themselves properly.<sup>177</sup>

## V. Conclusion

In light of the current pandemic, the right to counsel in eviction proceedings is needed now more than ever in New Jersey. COVID-19 is a virus that has imposed extreme hardship on thousands of tenants—with many more to come. And even the tenants who notoriously pay their rent on time are now going homeless and losing their homes at alarming rates because of a pandemic they have no control over. Obviously, landlords are entitled to be paid for housing that

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<sup>174</sup> *Id.*

<sup>175</sup> *Right to Counsel: Free Eviction Help*, LEGAL AID SOCIETY OF CLEVELAND (Jan. 21, 2021), <https://lasclv.org/wp-content/uploads/January-2021-report-on-initial-6-months-of-Right-to-Counsel-Cleveland-high-res.pdf>.

<sup>176</sup> See SCHERER, *supra* note 116 (discussing how lawyers affect the lives of tenants in settlement proceedings even when they are evicted).

<sup>177</sup> John Pollock and Emily Benfer, *Congress, States Haven't Ended the Eviction Crisis ... But They Could*, NEWSWEEK (Feb. 4, 2021), <https://www.newsweek.com/congress-states-havent-ended-eviction-crisis-they-could-opinion-1566531>.

they rent, but, at the same time, tenants should be entitled to counsel to safeguard their state and federal constitutional rights. The purpose of this Comment is not to say that no one should ever be evicted; instead, it is to point out that tenants in New Jersey are in the midst of a crisis. Regardless of one's wealth, they should have the right to a fair trial that has a just outcome—one's wealth should not be the determinative factor in the success that one has in a courtroom. Further, just because someone does not have a lot of money, it does not mean that they, or their family, deserve to become homeless because of an eviction.

When people become homeless, their mental and physical health deteriorates substantially, their children suffer, and their future suffers. When an eviction occurs, it is not just a singular event that happens and passes: it follows them for the rest of their lives. Given this, it is vital that New Jersey changes its laws to ensure that individuals in eviction proceedings—especially when they are due to COVID-19—have counsel when they go to court. As discussed, New Jersey grants the right of counsel to individuals that are facing “consequence[s] of magnitude”; however, New Jersey courts do not believe that evictions fall into the category.

Now, more than ever, it is vital for the courts to reconsider their previous views on right to counsel in eviction proceedings so that they ensure that all people, regardless of their wealth, have a fair and just outcome in court. When someone is evicted, they lose *more* than just their home.