

Newark's Right to Counsel: A Proposed System Design for Indigent Tenants Facing Eviction

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Introduction: The Problem of Housing Instability

This memorandum sets forth a path to implementing Newark's Right to Counsel ordinance (18-0673). It is based upon interviews with legal services providers, community coalition members, discussions with officials in the New Jersey judiciary as well as independent policy, best practices and legal research by CLiME, its fellows and Rutgers law students enrolled in the Civil Justice Clinic.

The affordability crisis that ensnares much of Newark's working-class population of almost 300,000 people disrupts the life chances of its most vulnerable citizens. Housing stability anchors a household's ability to plan for productive lives. In contrast, housing instability often overwhelms those lives. Housing instability may be the result of many causes—non-payment arising from lower work hours, a dispute over conditions in the housing unit, unlawful rent increases, building sales and foreclosures, tenant harassment, ejection of unlawful sublets—but it contributes to high risks of displacement. Displacement may lead to serial moves within or away from the city, or to homelessness. Tenants are displaced by a number of informal and formal means. The most formal means is the bringing of an eviction proceeding in Superior Court. Most forms of displacement demonstrate a fundamental power imbalance between landlord and tenant. Nowhere is that imbalance greater than in a courtroom. The simple truth is that most of the time, landlords have lawyers and tenants don't. Newark's Right-to-Counsel ordinance is primarily aimed at changing that imbalance of power for the benefit of all Newarkers.

The problem of housing instability is a problem of intersectionality—meaning, people who face housing insecurity often face multiple forms of insecurity. School placement, physical and mental disabilities, involvement with welfare agencies or criminal justice authorities may all play an overlapping role in what looks at first like a non-payment of rent situation. Since housing ties these threads together, it makes sense to fashion policy that targets housing first. Yet if Newark is to gain the greatest public benefit from its innovative local policies, it's equally important to understand the non-housing aspects of housing instability. Fortunately, the City is endeavoring to develop symbiotic policies aimed at restoring the social and human capital of all of its residents. These efforts are key to any successful policy of non-displacement.

The right to free legal services in eviction proceedings is central to an anti-displacement policy, but it is not the only part. Affordability dynamics are more complicated than that. Many tenants leave their homes before a landlord ever takes them to court. Many have strong legal defenses they're never able to assert, such as complaints about breaches of the warranty of habitability where a landlord has failed to perform necessary repairs or maintain heat and hot water. A lease not only entitles a tenant lessee to use of the premises, but also to safe, decent and sanitary premises. Many of the issues that displace

tenants never reach a judge in an eviction proceeding. For those reasons, this memorandum will describe the basic elements of a right-to-counsel system in Newark, followed by a justification for such a system on multiple grounds. The last section will go beyond eviction to discuss additional elements of a fuller anti-displacement policy consistent with Newark's commitment to fair housing. Recommendations will be entered throughout; the system design section concludes with a summary of recommendations.

I. System Design

A. Tenant Perspective

This section describes a proposed system design from the perspective of tenants and offers basic system logistics for implementation of the right.

New Jersey Eviction Law: Evictions are summary proceedings under NJ law, meaning that tenant-defendants are entitled to trials that are frequently waived; cases are expected to proceed quickly. After landlords file a complaint with the Superior Court (Landlord-Tenant division), tenants receive notice to quit (or notice of summary dispossession) in the mail. (Most, but not all, displacement actions go through Landlord-Tenant division.) By law, tenants are required to receive this notice at least 10 days before the court appearance date on the notice, although the exact notification period depends on the grounds for eviction.¹ Even if the landlord complies with this requirement, a tenant is thereby forced to obtain counsel within an exceedingly narrow window of time before going before a judge. In New Jersey, hearings before the judge are rarely adjourned or postponed (a more common practice in other states). Judges have an incentive not to allow a backlog of cases to develop. Tenants face significant barriers to asserting defenses like the warranty of habitability, because of a New Jersey case, *Marini*,² that allows judges to demand that tenants post a bond in the amount of unpaid rent as a prerequisite to asserting what they believe are their rights to safe and sanitary conditions. This requirement—imposed at the discretion of the judge—prevents the vast majority of Essex County tenant-defendants from raising even legitimate defenses to eviction.³

Unmet need: Based on interviews with Essex-Newark Legal Services (ENLS), we estimate that there are approximately 38,000 eviction actions filed each year in Essex County. (Legal Aid, a much smaller presence for indigent legal services but located at

¹ N.J.S.A. 2A:18-61.2.

² *Marini v. Ireland*, 56 NJ 130, 147 (“It is therefore suggested that if the trial of the matter is delayed the defendant may be required to deposit the full amount of unpaid rent in order to protect the landlord if the prevails.”) (1970).

³ See Paula Franzese, Abbott Gorin & David Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 1 (2016); see also Paula Franzese, *Less Than 1% of N.J. Tenants Know Their Rights. Fix It This Way*, NJ.COM (Oct. 18, 2016, 6:30 AM), http://www.nj.com/opinion/index.ssf/2016/10/property_law_scholar_more_nj_tenants_need_to_know.html [<https://perma.cc/E6TW-9PRK>].

the courthouse, reports 10-15 requests for lawyers each day.) According to officials from the Essex County Trial Court Administrators Office (TCA)⁴, approximately 60-70% of evictions of indigent tenants in Newark are brought by the Newark Housing Authority (“NHA”) against public housing tenants; few of them challenge the eviction and many fail even to appear at their court date. Most defendants come from four municipalities, and Newark’s share is the highest: 20,000. If current legal capacity is about 1,200 cases, **ENLS estimates the remaining unmet need at between 3,000-5,000 cases a year.**

Most eviction cases are brought for non-payment of rent (about 85%). The remainder can be more complex, involving issues such as prostitution, holdovers, drugs, noise and lease violations. Overlapping representation is a common feature of the intersectionality of legal problems for the poor. ENLS estimates that 20-25% of housing cases also involve representation for another set of legal issues, usually welfare which is the “biggest generator” of housing issues because of the inadequacy of grant amounts, sanctions that lead to inconsistency and unemployment benefits.

Representation requires a combination of lawyering and qualitative skills. Lawyers counsel, coordinate with other lawyers and professionals, negotiate with opposing counsel, prepare clients, interact with judges and conduct appeals. Work in the landlord-tenant context on behalf of indigent tenants is often described as a “battle.”

ENLS capacity estimates are the most useful, since the corporation handles by far the most eviction actions per year (Legal Aid handles another 1,000 cases per year, but mostly offering only legal advice rather than full representation). Representations under the Newark ordinance may be either “full” or “partial,” depending on a range of factors. **We estimate that well-trained lawyers that are adequately supervised can manage a full and partial caseload of 200 cases per year.** (More senior lawyers with at least five years experience could manage 300-350 cases a year and require significantly less supervision.)⁵

NOTIFICATION: Since evictions are summary proceedings in New Jersey (unlike New York where tenants are entitled to answer the complaint and multiple proceedings are common), notification of the right to counsel is critical for tenants. However, the City of Newark does not generate notices to tenants that a complaint has been served against them and therefore cannot communicate directly that tenants are entitled to counsel. Essex County controls the Superior Court, which sends notice to defendants. This creates a significant logistical problem. If a tenant only learns of the right to counsel on the day

⁴ We met with Amy Depaul, the Administrator, and Debra Dadic, the Civil Division Manager, and their staff on February 4, 2019.

⁵ Attorney caseloads can vary significantly by practice area and location. For a methodology of determining appropriate levels among public criminal defenders, see American Council of Chief Defenders Statement on Caseloads and Workloads, Aug. 24, 2007, at https://jije.org/wpcontent/uploads/2018/08/lr_sclaid_def_train_caseloads_standards_ethics_opinions_combined.authcheckdam.pdf.

of trial, how can they hope to receive effective assistance of counsel? We are currently working with the TCA to find an equitable solution to this problem.

INTAKE: Intake is the process of meeting prospective clients and determining their eligibility for and assignment to an attorney. It may or may not be conducted by licensed lawyers.

Our analysis indicates that the most effective assistance of counsel for summary proceedings in which tenant-defendants often arrive to court on the same day as they meet a prospective lawyer *and* have their cases heard **requires that intake be located nearest the courtroom—preferably the courthouse**, as opposed to a location off-site. However, even assuming a primary intake center at the courthouse, we recommend exploring the possibility of a second, satellite intake office that may require less travel (e.g., in the West or South Wards or at a nearby public facility such as a library or private one such as community college).

Again, logistics present a problem to be solved. While there is space in the courthouse for Newark-only lawyers, the TCA will only permit lawyers serving all Essex County defendants to have designated space. We are following up with the County to reach an accommodation so that Newark tenants will not face the additional hurdle of having to meet with counsel off site.

ELIGIBILITY: According to the RTC ordinance, Newark residents with incomes below 200% of the federal poverty line—about \$27,000 for a family household of four—are eligible to receive full or partial representation. **Full representation** begins at intake and continues up to a trial-level disposition of the case—meaning, there is a resolution of the case against the tenant either through settlement, arbitration or a judge's disposition of the matter.⁶ *During the demonstration period, the RTC may not guarantee an appeal of rulings adverse to tenants, although the Office of Tenant Legal Services will work with other legal services providers (e.g., law school clinics, pro bono counsel) to offer free appeals.*⁷ **Partial representation** involving legal advice or counseling may be appropriate in some cases at the documented discretion of a covered legal service provider. Under partial representation, tenants who are either capable of resolving a dispute with their landlord with only the advice of counsel or who have no viable recourse in defending the eviction claims against them may receive counseling.

B. System Perspective

Office of Tenant Legal Services. Pursuant to the RTC ordinance, Newark's right to counsel will be organized and coordinated by a new **Office of Tenant Legal Services (OTLS or the "Office")**, coordinated by an executive director ("Director") and with its

⁶ Newark, NJ, An Ordinance to Amend and Supplement Title XIX, of the Revised General Ordinances of the City of Newark, New Jersey, 2000, As Amended and Supplemented, By Creating a New Chapter, Which Establishes Access to Free Legal Representation to Newark's Low-Income Residents Facing Eviction in Landlord Tenant Court by Creating the Office of Tenant Legal Services, 19:3-1a (Dec. 19, 2018) (defining "legal representation").

⁷ *Id.* (defining "designated organization").

executive offices housed in the Division of Housing and Economic Development (“HED”) at City Hall. The OTLS will thereby coordinate housing policy with other directors in HED responsible for housing issues in the City—specifically the Office of Affordability and Sustainability and the Rent Control Office. The free representation objectives of the RTC ordinance will be accomplished through competitively bid public contracts for legal services conducted through an RFP process (described below) and overseen by the Director. The Director’s primary scope of responsibility includes:

- Administration of the RTC’s statutory requirements as contained in 18-0673 and any subsequent amendments;
- Coordination and oversight of the RFP process by which legal services providers contract for grants with the City to serve as designated organization that have the capacity to provide legal services to Newark residents in eviction proceedings;
- Selection of designated organizations, negotiation of individual contract terms and compliance management of all service provider obligations, including enforcement and imposition of penalties and revocation of contracts for substantial non-compliance;
- Information and recordkeeping of all data required by the RTC demonstration period and periodic public reporting of the program’s operations pursuant to the RTC ordinance;
- Management of OTLS staff;
- Communications with the mayor, the deputy mayor for EHD, local government officials, state representative, press and the interested public about Newark’s RTC program as a potential model for adoption by other localities or the state;
- Communication with the Director of the NHA;
- Participation in fundraising efforts to grow the OTLS capacity over time.

Thus, the Director is the chief legal manager and legal policy officer for the administration of Newark’s right-to-counsel demonstration program, responsible for fulfilling all the requirements of 18-0673 as well as the range of policy and operational tasks associated with running a small, but vital public bureaucracy. We recommend that the Director be a licensed attorney with previous experience in both landlord-tenant substantive law practice as well as at least two years law management experience.

RFP Process. The City of Newark will not directly represent its indigent residents in housing court. Rather, lawyers under contract with the City shall provide free representation pursuant to contract terms expressed initially in Requests for Proposals (RFPs) during an open bidding period. The RFPs put out by the OTLS will constitute the framework of expectations, standards and obligations for any legal services organizations seeking to represent eligible clients under the RTC. Key factors in the RFP are as follows:

- Landlord-Tenant litigation experience – Providers should have a track record of practice and management under NJ law;
- Capacity and Quality – Providers must demonstrate the lawyer capacity to handle the relevant legal need and provide the highest possible quality representation;

- Supervision – Providers must demonstrate a service delivery process capable of training and supervision;
- Service coordination – Providers must demonstrate a system for coordinating the legal housing needs of their clients with other relevant legal needs clients may have;
- Reporting – Providers must demonstrate a system for reliable accounting of the many data points required of providers under the RTC law;
- Proximity to the courthouse – Providers should be located as close as possible to landlord-tenant court, if not within the building;
- Inclusive Hiring – Providers must demonstrate the capacity to hire lawyers whose backgrounds and experiences are as diverse as their client population.

Estimated Program Cost: The current estimate of needs versus capacity is 3,000-5,000 cases per year versus an annual caseload of 200 per lawyer. This indicates a need to hire between 15 and 25 additional lawyers in order to meet all the obligations of the ordinance. (More experienced and more expensive lawyers are expected to be able to handle more cases per year, substantially reducing the expected number of lawyer hires.) **Assuming 20 lawyers at \$70,000 per year, the program costs for additional lawyers alone would be \$1.4 million.** The Director’s salary and other administrative costs would be additional.

Funding: The Program will be funded in one three-year cycle –with annual allocations—followed by two one-year cycles for the first five years, or the “demonstration period.” This allows for stability in contracting with providers while allowing for flexibility in the final two years of the Program. If after the first three years, for instance, the City recognizes shortfalls, it can supplement the budget in years four and/or five. Initial funding will be \$ _____ per year with sources as follows:

City of Newark direct appropriation:	\$ _____
Commitment of other agency savings:	\$ _____
CDBG funds:	\$ _____
Attorney fees: ⁸	\$ _____ (estimated)
Fundraising goals:	\$ _____ (estimated)
State contribution:	\$ _____ (estimated)
Total:	\$ _____

The OTLS will work with the Newark Philanthropic Liaison to secure outside funding for the Program from foundations interested in furthering the goals of anti-displacement and equitable growth. Particular aspects of the work might be targets for fundraising, such as funds to provide legal services specifically to the homeless, the disabled, single moms with very young children, undocumented immigrants, domestic violence survivors, young adults who have recently aged out of foster care, and formerly incarcerated persons upon re-entry.

⁸ Under N.J.S.A. 2A: 18-61.66, a tenant who successfully defends an eviction action against a landlord whose lease provides for attorney fees should he or she prevail is entitled to recovery of attorney fees.

Newark Housing Authority Emphasis: According to the TCA, the Newark Housing Authority is the landlord responsible for bringing the greatest number of eviction cases against indigent Newark tenants per year—an estimated 60-70%. In fact, in the Special Civil Part, Landlord-Tenant Division, there is a “Newark Day” every other Wednesday when cases brought by NHA’s outside counsel are exclusively heard. Public housing tenants are among the most vulnerable indigent tenants, having qualified for deeply subsidized housing whose eligibility is verified on a continuing basis. Public housing residency is therefore a valuable and heavily sought-after public entitlement for low-income residents. Its loss may be particularly devastating to a household. Given the tenants’ substantial need, the NHA’s significant and centralized position over eviction rates in Newark and the relative control that NHA has over communications with tenants, we urge a strong early emphasis on NHA evictions in testing system design effectiveness.

Fortunately, the NHA by statutory requirements and according to policy is amenable to strengthening protections for tenants facing eviction risk. We spoke with NHA Executive Director Victor Cirilo and his general counsel, Elio Mena, who agreed to put greater emphasis on:

- a) using the R.A.D. and advisory councils as affirmative means to counsel tenants on financial management as well as to inform them of the availability of the right to free civil counsel; and
- b) using pre-court appearance opportunities for negotiated settlements, such as meetings with site managers and formal hearings, to toll the non-payment clock and reduce eviction risk. At either, tenants have a right to appear with a lawyer.

Importantly, the NHA agreed to streamline the logistics of notifying tenants of the right to counsel. The NHA will consider adopting as a practice the inclusion within its 14-day notice of late payment a bright-colored notice in multiple languages briefly informing the recipient of the right to free counsel. (Even though the 14-day letter precedes the filing of a summons and complaint against the tenant, including notice of a right to counsel in that notice is appropriate because the 14-day letter is notification of an “adverse action” against the tenant, starting the clock and triggering the above meeting options at which a lawyer may be present. If a tenant is entitled to bring a lawyer to a meeting, they should be informed that the City will provide them with a free one.) We hope that experimentation with the means to connect NHA tenants with legal counsel will inform future modifications of the entire RTC program in Newark.

Demonstration Objectives and Requirements: The RTC Program is a five-year demonstration, which will provide invaluable information about the effective delivery of free legal services to the poor. Therefore, a concomitant obligation of program participants and the explicit statutory responsibility of the OTLS is to provide, collect and analyze numerous data points about the system.

Public Engagement: The success of the Right to Counsel Program will turn upon its capacity to communicate to prospective defendants as much as other factors. The purpose is to demonstrably alter outcomes and reduce housing displacement. We

recommend that the OTLS work with other units at City Hall (e.g., press relations, communications, the Rent Control Office) to ensure effective strategies to inform the public and reduce confusion. By year three, every Newarker who needs a landlord-tenant lawyer should be able to get one in a timely manner.

Coordination with non-contracting pro bono legal service providers: The RTC ordinance covers only legal providers serving eligible clients under its specific terms. However, the City recognizes that other legal services providers represent Newark clients in landlord-tenant court, such as law school clinics and *pro bono* counsel. Those providers are not calculated as part of the obligations of the City under the ordinance.

SUMMARY OF RECOMMENDATIONS FOR SYSTEM DESIGN:

The current estimate of needs versus capacity is 3,000-5,000 cases per year versus an annual caseload of 200 per lawyer. This indicates a need to hire between 15 and 25 additional lawyers in order to meet all the obligations of the ordinance. (More experienced and more expensive lawyers are expected to be able to handle more cases per year, substantially reducing the expected number of lawyer hires.) Assuming 20 lawyers at \$70,000 per year, the program costs for additional lawyers alone would be \$1.4 million. The Director's salary and other administrative costs would be additional.

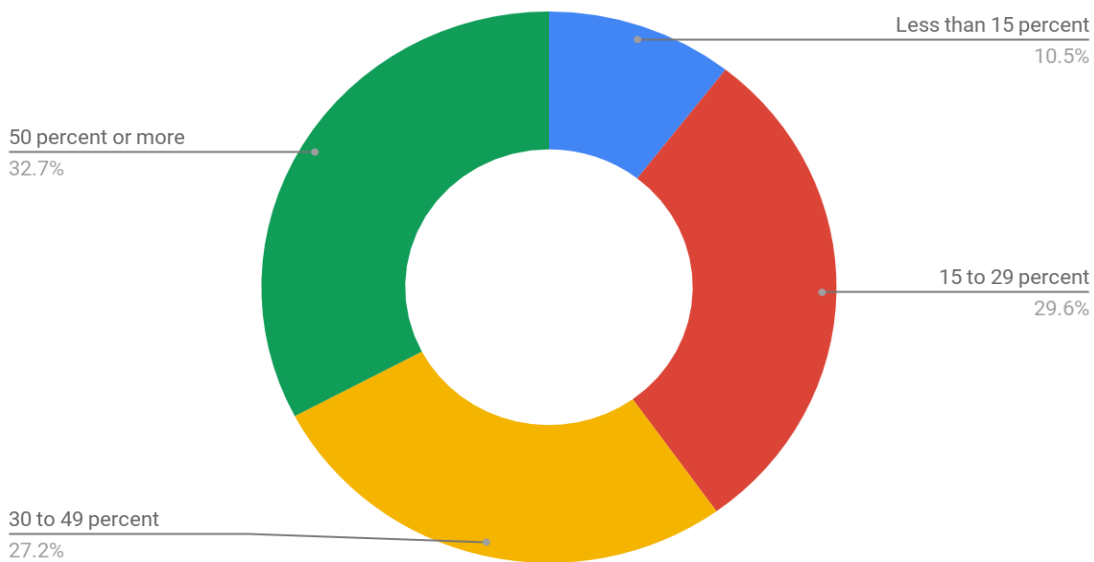
The RTC program should be managed and directed through the Office of Tenant Legal Services, a division of HED, under the leadership of its Director. The Director will determine the precise number of represented cases expected annually whose estimate is a threshold requirement of the RFP process. Pursuant to that process, legal service provider-contractor(s) should be selected. The RFP criteria include the ability to competently manage the expected caseload, the capacity for coordinated services, the capacity to provide specialized services for certain subgroups of tenant-defendants, demonstrated recordkeeping capacity and a demonstrated commitment to hiring and training qualified attorneys from a diverse range of backgrounds.

The logistics of the program should be modeled for maximum probable impact, given the state of landlord-tenant law, the rules of court and the practical realities of life for indigent families. Until notification and meeting space rules can be accommodated at the courthouse, we recommend that the Director actively engage the Director of the Newark Housing Authority to ensure full compliance with the provisions of the ordinance. The NHA is the primary landlord responsible for bringing eviction actions against indigent Newark tenants, and therefore is central to the City's commitment to ensure that tenants are provided meaningful due process and limited housing displacement. In order to maximize the advantage of having two relevant City agencies, the Directors of OTLS and NHA should coordinate the eviction process as much as possible for the benefit of indigent Newark tenants.

II. The Current Context: Justifying Newark's Right to Counsel

The right to counsel for indigent Newarkers facing eviction represents a city government's commitment to policies aimed at advancing fair housing and equitable growth amid a period of increased housing instability, brought about by a longstanding affordability crisis and made worse by new market-rate development. Despite its low median household income—about \$38,000 for a family of four—Newarkers have faced a lack of stable, decent, affordable housing for almost two decades. CLiME's research has shown rising rent burdens in the City, as wages have stagnated relative to asking rents. In 2015, 60 percent of Newarkers paid more than a third of their income on rent. Almost a third paid more than *half* of their income on rent.

Figure 23: Gross Rent as a Percentage of Household Income, 2015



Newark has become hard to afford for many residents.

The rent burdened population increased 23% since 2000. Today, over 22,000 households are paying more than 50 percent of their income towards rent.

Housing insecurity is not greatly reduced for tenants in the 20 percent (23,000 units) that are subsidized by public housing, project-based Section 8 or voucher tenants. Economically vulnerable populations require vigilant fair housing protection against discrimination, exploitation and coerced displacement.

Meanwhile, Newark's reputation for economic growth, the spread of global capitalism and rising housing costs across the New York-New Jersey metropolitan area

have made the City an attractive destination for real estate investment dollars. Without protections against displacement, some landlords and speculators will push housing prices to new highs and, when possible, exert pressure of current tenants to vacate. In 2016, CLiME found that the sharpest rise in median Newark asking rents on popular internet platforms (Trulia and Craigslist) was between \$1,200 and \$1,399. It was over \$1,600 in the East Ward, Newark's neighborhood closest to downtown trends in pre-gentrification.⁹

The consequences of housing insecurity and displacement through eviction are substantial and expansive. The effects ripple across all the lives of a household as well as those who step in to aid people suffering housing loss. Eviction upends all of the routines of daily life, requiring inordinate resources to regain a sense of normalcy. Commutes to work, health care visits, food access and day care arrangements are turned upside down. Eviction sharply contributes to transiency in school populations, disrupting the education of the child who moves as well as the chemistry of the classrooms she vacates. Housing loss is associated with a loss of custody for parents working to reunite with their children in child welfare matters. Sudden neighborhood change may endanger youth and lead to violence or desperate acts to avoid it. For all, the sheer emotional and physical stress of being uprooted is felt in myriad ways by every member of an evicted household (and the countless others with whom they interact) and is reflected in public health statistics. These often intangible costs are borne by both the evicted and the public.

LEGAL JUSTIFICATION

While the foregoing evidence of crisis and governmental responsibility provide the context for the City's action, they do not alone justify the use of public and private funds to provide a right to counsel. As a threshold matter, there may not be a need to justify Newark's program. We have identified no New Jersey state law that prevents a municipality from compensating attorneys for providing representation to the indigent.¹⁰ Even the American Bar Association has created a draft right-to-counsel ordinance in to encourage municipalities around the country to pass one.¹¹ Assuming such legislation required justification, several arguments can be asserted. First, providing counsel against the chronic risk of housing displacement among poor families falls squarely within a municipality's state-delegated police powers to protect the public health, welfare and safety of its residents.¹² Second, since housing—and a stable address—is a precondition to the exercise of so many civil rights (e.g., the right to vote), Newark's right to civil counsel might also be supportable on state substantive due process grounds. The New Jersey state constitution provides that “No person shall be denied the enjoyment of any

⁹ See CLiME's Newark housing study at www.clime.rutgers.edu.

¹⁰ Arguably, New Jersey case law suggests just the contrary. See, e.g., *Madden v. Delran*, 126 N.J. 591, 601 A.2d 211 (1992)(establishing that municipalities may ask attorneys to provide *pro bono* services to indigent defendants in municipal court matters).

¹¹ The ABA Model Act protects all basic human needs, including shelter, see https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf.

¹² NJ Sec. 40:48-2.

civil or military right, nor be discriminated against in the exercise of any civil or military right...”¹³

Third, New Jersey case law on public services owed to vulnerable populations—especially access to free counsel—provides strong support. New Jersey’s courts have for years committed to a policy of regarding the risk of housing displacement as a “consequence of magnitude”. See Appendix to Part VII Guidelines for Determining a Consequence of Magnitude.¹⁴ Under the guidelines, to determine a condition that constitutes a consequence of magnitude, a judge should consider the following:

- 1) any sentence of imprisonment;
- 2) any period of driver’s license suspension, suspension of the defendant’s non-resident reciprocity privileges, or driver’s license ineligibility; or
- 3) any monetary sanction imposed by the court of \$800 or greater in the aggregate.¹⁵

Compared to each of these illustrated conditions, the loss of housing because of eviction—especially where it increases the risk of homelessness, disruption in the lives of children or the daily routines of the elderly or disabled—is clearly a consequence of magnitude. The New Jersey Supreme Court extended the right to free counsel in cases of termination of parental rights¹⁶ as well as for people who face “the substantial loss of driving privileges.”¹⁷ In a case directly recognizing housing loss as a consequence of legal action, the Appellate Division held in *State v. Hermanns* that a consequence of magnitude included the possibility that a lien would be filed against a defendant’s home or potential for foreclosure proceedings.¹⁸ New Jersey courts have indicated a willingness to accept that the list in the guidelines is not exhaustive and to rely on indigent defendants’ requests for appointed counsel as situations arise.¹⁹

Finally, the New Jersey legislature made unmistakably clear in the state’s Anti-Eviction Act its recognition of the magnitude of consequence associated with eviction and the corresponding state interest in avoiding it:

¹³ NJ. Const. art. I, § 5 (1947).

¹⁴ On October 6, 1997, the Supreme Court adopted the Comprehensive Revision of Part VII of the Rules of Court to be effective on February 1, 1998. R. 7:3-2 of that Comprehensive Revision provides for the assignment of counsel “[i]f the court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel....”
<https://www.njcourts.gov/attorneys/assets/rules/r7-3-2.pdf>.

¹⁵ *Appendix to Part VII Guidelines for Determination of Consequence of Magnitude (See Rule 7:3-2)*,
<https://www.njcourts.gov/attorneys/assets/rules/r7-3-2.pdf>.

¹⁶ *J. Div. Youth & Family Servs. v. B.R.*, 192 N.J. 301, 306-07 (2007).

¹⁷ *Rodriguez v. Rosenblatt*, 58 N.J. 281, 295 (1971).

¹⁸ 278 N.J. Super. 19, 30 (App. Div. 1994).

¹⁹ *D.N. v. K.M.*, 216 N.J. 587, 589 (2014); see also *Crespo v. Crespo*, 408 N.J. Super. 25, 45 (App. Div. 2009).

It is in the public interest of the State to maintain for citizens the broadest protections available under State eviction laws to avoid such displacement and resultant loss of affordable housing, which, due to *housing's uniqueness as the most costly and difficult to change necessity of life*, causes overcrowding, unsafe and unsanitary conditions, blight, burdens on community services, wasted resources, homelessness, emigration from the State and personal hardship, which is particularly severe for vulnerable seniors, the disabled, the frail, minorities, large families and single parents. e. Such personal hardship includes, but is not limited to: economic loss, time loss, physical and emotional stress, and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from strain of eviction controversy; relocation search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; employment, education, family and social disruption; relocation and empty unit security hazards; relocation to premises of less affordability, capacity, accessibility and physical or environmental quality; and relocation adjustment problems, particularly of the blind or other disabled citizens.²⁰

Therefore, we believe the City's Program is justified as an exercise of police power and/or home rule power (no express prohibition); state substantive due process; and, the recognition of housing loss for the poor as a consequence of magnitude under state law.

III. Beyond Eviction: Elements of a Broader Non-Displacement Policy

Evictions are clearly a serious problem for Newarkers, but they are symptoms of a much broader problem of housing insecurity. Housing insecurity has many causes—e.g., affordability, weak labor force attachment, incapacity, lease violations. Its consequences are also varied—e.g., displacement, transiency, homelessness. The broader problem of housing insecurity and its displacement consequences reflects longstanding trends in the Newark housing region.²¹ These trends are made worse by the City's growing attractiveness to residential capital. As Newark's real estate market sees more upward pressure on rents, housing insecurity will undoubtedly increase among its poorer and more vulnerable residents. Newark's commitment to a right to counsel will alter the equities of the eviction process and keep many indigent Newarkers in their homes. Newark's commitment to equitable growth should further ensure that greater resources that redevelopment attracts reach the broadest possible distribution of Newarkers. Yet we believe the problem requires more and that Newark adopt additional policies aimed at reducing housing insecurity and its consequences. In this section, we recommend elements of a broader non-displacement policy under the localized rubric of fair housing.

²⁰ The Just Cause for Eviction Act, N.J.S.A. 2A:18-61.1a (emphasis supplied).

²¹ See CLiME Housing in Newark Report at www.clime.rutgers.edu.

Simply put, fair housing policies ensure non-discrimination, promote housing security and discourage racial and economic isolation through an affirmative governmental commitment to the health, safety and welfare of its residents in the context of shelter. They recognize that housing is essential to personhood and the meaningful exercise of most of our civil rights. While versions of fair housing are codified in both federal and state law,²² we believe that local vigilance is required for local conditions. Cities like Newark have unique obligations to their residents, who are poorer than most and have experienced for too long the distinct and challenging consequences of a state and a region with some of the widest economic inequality and greatest racial segregation in New Jersey. In real terms, this history translates into a host of needs that coalesce around housing, including child welfare, underemployment, drug use, racial and economic discrimination, predatory lending and other forms of housing exploitation.

These issues comprise what scholars call the intersectionality of experience. Poor families often suffer substandard housing conditions, which in turn affect respiratory health and other illnesses. Illness requires time off work, which in turn can affect employment tenure and options. These struggles may in turn affect the ability to make rent, which, without rental assistance, may put parents at greater risk of losing children during child welfare proceedings because of a lack of stable housing. In fact, the lack of affordable housing alone can create conditions in which families must share living space with people whom child welfare authorities deem unacceptable risks to children, forcing separations into foster care. Economically vulnerable people are also targets for housing discrimination, forced by the market into temporary and sometimes illegal housing arrangements that can be lost at any time, or denied housing altogether based on source of income, race, ethnicity, gender, disability or the presence of children. These intersecting vulnerabilities leave scars—physical, psychological, financial and often permanent—reflected in the life chances of too many Newarkers, especially children.

What Newark Can Do

We have identified several distinct areas for Newark city government expansion in the name of fair housing that address, but do not solve, the problems of intersectionality and housing insecurity. Here is a list, followed by brief descriptions and specific recommendations.

1. Temporary financial assistance/*Marini* loans
2. Inspections for hazardous conditions
3. Child welfare and family unification
4. Anti-discrimination
5. Rent control enforcement

²² Civil Rights Act of 1968, 42 U.S.C. 3601-3619; New Jersey Fair Housing Act, N.J. Stat. §52:27D-301.

6. Foreclosure prevention

1. **Temporary financial assistance/Marini lending** is necessary as either a displacement prevention policy or a step in eviction intervention. Many landlord-tenant disputes involve relatively small amounts of money, especially when a tenant's shortfall reflects the failure of a timely payment by a government agency or a delay in the payment of a lawful debt owed to the tenant by a third party. People should not lose their homes over a few hundred dollars. Depending on the situation, a tenant may qualify for temporary rental assistance under a program administered by the county, not the City of Newark.²³ In cases where the tenant is not covered by the county, but can show hardship and the necessity of financial assistance to prevent displacement, Newark should have a pool of funds available to assist in facilitating settlement.

Similarly, the *Marini* bond discretionary requirement discussed *infra* is a related situation where housing security is put at risk by the necessity of a sum certain that the tenant no longer has. Most other states do not condition the tenant's right to exercise a habitability defense on the ability to post bond, but New Jersey does. Until the law is changed—and it should be—Newark can offer to loan tenants the amount of the bond.

RECOMMENDATION: The Office of Tenant Legal Services should administer an Emergency Assistance Fund that provides, as funds allow, temporary financial assistance of up to \$500, or, in the case of *Marini* hearings, no-interest loans to defendant-low-income tenants in the amount of money required by the court up to \$1,500.

2. **Inspections for hazardous conditions.** The City of Newark already undertakes home inspections as part of its building code enforcement, but it does not currently prioritize claims by tenants of hazardous and substandard dwellings. Adopting a policy under which such claimants received priority for inspections would accomplish several fair housing goals at once. First, it would improve public health for families suffering from the ill effects of mold, vermin, lead paint and other dangerous conditions. Second, the policy would stimulate landlord compliance and set an important standard of safe and sanitary conditions for landlords to follow—backed up by the genuine threat of enforcement through fines. Third, it would assist tenants in lawsuits against their landlords by substantiating their habitability claims *before* being raised as a defense to eviction actions. If landlords know tenants have a certified inspection report authored by the City that supports their cross-claims, they will be less likely to sue for eviction in the first place.

RECOMMENDATION: The Office of Tenant Legal Services should coordinate with the Rent Control Office and the Department of Buildings to widely publicize a policy of increased enforcement against hazardous housing conditions, giving priority to complaints by low-income Newark tenants.

3. **Child welfare and family unification** has a close relationship to housing affordability and sanitary conditions. In child welfare cases (e.g., neglect, termination of

²³ Rental Assistance Agreements, N.J. Stat. §55:14K-15.

parental rights, separation to foster care), caseworkers frequently cite housing conditions, other tenants in the household or lack of housing security as bases for denying a parent's request for reunification.²⁴ Parents—overwhelming mothers—are left to mount housing hurdles as a condition of getting their children back from foster care placements.²⁵ This causes needless, and often irreparable, psychological trauma to both parents and their dependent children. One intervention available to the City is to recognize the obvious connection between problems of housing affordability and child welfare and to direct services toward those at risk *before* the Department of Child Protective Services (“DCPP”) formally acts to disrupt or sever family bonds on housing-related grounds.

RECOMMENDATION: The Office of Tenant Legal Services should have regulatory authority to assist in housing-related matters brought by the DCPP and to file affidavits with the appropriate court seeking consideration of alternative outcomes in exchange for an offer to accommodate, where possible, a defendant-parent's housing deficiency. Such accommodations may include: stopping the clock on a Section 8 voucher while a parent is in a residential treatment program; adjusting upwards the maximum rent allowance for people with children; returning housing inspections quickly (via priority) for apartments DCPP caseworkers have deemed unsuitable “for safety reasons”; and, clarification of a parent's rights under a shared leasehold; providing interest-of-the-child opinions in cases of ejection where loss of the living arrangement will result in a material change in a parent's custodial rights to their children.

4. *Anti-discrimination.* In New Jersey, a low-income tenant or prospective tenant who believes s/he has been a victim of discrimination by a landlord has recourse either to file an administrative action with the State Attorney General,²⁶ Division of Civil Rights, or seek *pro bono* legal representation from one of a small handful of non-profit advocacy organization and sue in Superior Court. In New York City, by contrast, that same tenant could file a complaint with the city's Human Rights Commission and see their claim investigated and adjudicated. The City of Newark offers no such protections for its tenants. Yet tenants and tenant organizations we talked to in Newark recounted numerous acts of discrimination by landlords—as well as the distinct sense that

²⁴ However, New Jersey law recognizes that poverty or lack of affordability is *not* a sufficient basis for a finding of neglect when a parent cannot provide housing. *New Jersey Div. of Child Protection & Permanency v. L.W.*, 435 N.J. Super 189 (N.J. Super.Ct.App. 2014). *But see New Jersey Div. of Child Prot. & Permanency v. S.R.*, No. A-3802-16T4, 2018 WL 4868287, at *7 (N.J. Super. Ct. App. Div. Oct. 9, 2018).

²⁵ *In re Guardianship of K.L.F.*, 129 N.J. 32, 35 (N.J. 1992)(showing mother was homeless and had trouble finding a shelter so she voluntarily agreed to put her child into temporary custody with DYFS); *see also In re Guardianship of J.C.*, 129 N.J. 1,5 (N.J. 1992); *New Jersey Div. of Child Prot. And Permanency v. R.L.M.*, 236 N.J. 123, 145 (N.J. 2018).

²⁶ According to the New Jersey Attorney General, Division of Civil Rights, the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:15-12, “prohibits discrimination when selling or renting property. The law covers owners, agents, employees and brokers and makes it unlawful to refuse to rent, show or sell property based on a person's race, creed, color, national origin, nationality, ancestry, marital status, domestic partnership or civil union status, familial status, affectional or sexual orientation, gender identity or expression, sex, or mental and physical disability, including AIDS and HIV-related illness. In addition, the LAD prohibits discrimination in the housing context based on one's source of lawful income or rent subsidy.” <https://www.nj.gov/lps/dcr/housing.html>.

discrimination is increasing as Newark's housing market attracts greater demand. Anti-discrimination is the centerpiece of fair housing. Housing can never be fair when a person can lose it or be denied it on the basis of an arbitrary and unreasonable basis, such as race, citizenship status, sexual orientation or source of income. We believe anti-discrimination is a local governmental function. Newark should pass an anti-discrimination ordinance. The OTLS should enforce its housing terms.

RECOMMENDATION: Prior to passage of a fair housing/antidiscrimination ordinance, the Newark Office of Tenant Legal Services should hold itself out as the City's public advocate for housing discrimination claims. Specifically, as a core function, it should establish a public-facing complaint center, record information and advise complainants of their rights under law. Advice may not always result in representation or assignment to an attorney; whether the Office ever holds investigative authority we leave for further study. However, at a minimum, the Office could act as a public advocate, connecting complainants to information about fair housing rights and rules as well as to attorney referrals. (This function might coincide with the Office's responsibility to receive tenants' complaints about housing conditions.)

Following passage of a recommended anti-discrimination ordinance, the City should determine which agency will enforce its terms. The OTLS could be expanded for this purpose, including the provision of administrative hearings for resolution of complaints.

5. ***Rent Control Enforcement.*** We are aware that the City is actively reorganizing and increasing its rent control enforcement and hereby incorporate our earlier recommendations contained in CLiME's October 2017 recommendations report to the mayor. See CLiME's Recommendations to Newark Mayor Ras Baraka at clime.rutgers.edu.

6. ***Foreclosure prevention.*** We are aware that the City is actively increasing its foreclosure activity and hereby incorporate our earlier recommendations contained in CLiME's October 2017 recommendations report to the mayor. See CLiME's Recommendations to Newark Mayor Ras Baraka at clime.rutgers.edu. We reiterate here the critical importance of adequate recordkeeping, the lack of which thwarts efforts to prevent foreclosure on behalf of both homeowners' and the City's interests.

Conclusion

This memorandum has presented CLiME's collected findings on the need for a system of providing access to free legal counsel to indigent Newarkers facing eviction, a design of that system centered around the creation of the Office of Tenant Legal Services, as well as a legal and policy justification analysis. Recognizing that eviction represents the last possible point of intervention on a tenant's path to housing displacement, we concluded with a set of preventive analyses and recommendations for a broader anti-displacement urban policy rooted in fair housing principles.

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