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DEPORTATION WITHOUT REPRESENTATION
THE ACCESS-TO-JUSTICE CRISIS FACING
NEW JERSEY’S IMMIGRANT FAMILIES

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Working Group on Immigrant Representation in New Jersey
June 2016
The Working Group on Immigrant Representation in New Jersey

The Working Group on Immigrant Representation in New Jersey (“Working Group”), assembled and chaired by Judge Michael Chagares of the Third Circuit Court of Appeals, brings together judges, legal service providers, law school clinics, law firms, and bar association representatives to increase access to quality free and low-cost immigration legal services in the state of New Jersey. Entities represented in the Working Group currently include the United States Department of Justice Executive Office for Immigration Review, American Friends Service Committee, Casa Esperanza, Catholic Charities of the Archdiocese of New Jersey, Kids in Need of Defense, Gibbons, Harvard Immigration and Refugee Clinical Program, Human Rights First, Law Offices of Daniel L. Weiss, Law Office of Thomas E. Mosley, Legal Services of New Jersey, Lowenstein Sandler, Make the Road New Jersey, McCarter & English, Rutgers University--Camden Immigrant Justice Clinic, Rutgers University-Newark Immigrant Rights Clinic, the Immigrants’ Rights/International Human Rights Clinic at Seton Hall University School of Law Center for Social Justice, and the Young Center for Immigrant Children’s Rights.

Authors and Acknowledgements

This report was drafted by the Seton Hall University School of Law Immigrants’ Rights/International Human Rights Clinic, including law students Branka Banic, Justin Condit, Holly Coppens, Amy Cuzzolino, Jamie DeBartolo, Anthony D’Elia, Danielle King, Victoria Leblein, and Vani Parti, under the supervision of Professors Lori A. Nessel and Farrin R. Anello. David Hausman, a recent law school graduate and Ph.D. Candidate at Stanford University, generously shared and analyzed data he obtained from the Executive Office for Immigration Review through the Freedom of Information Act.¹

This report draws inspiration and guidance from reports of the Study Group on Immigrant Representation in New York, chaired by Second Circuit Judge Robert Katzmann (“Katzmann Study Group”), and of the Stanford Law School Immigrants’ Rights Clinic, writing on behalf of the Northern California Collaborative for Immigrant Justice. The Northern California report analyzed an earlier and geographically distinct dataset from David Hausman’s FOIA request. The authors thank Professors Peter L. Markowitz and Andrea Saenz of Cardozo Law School for sharing the Katzmann Study Group’s survey instrument, and Oren Root of the Vera Institute of Justice for helpful advice.

¹ David Hausman assisted in preparing this report from the beginning of the process until July 2015.

The authors also thank the organizations that participated in the survey of legal service providers, the Executive Office for Immigration Review, and all members of the Working Group. The authors thank Professor Brian Sheppard of Seton Hall University School of Law, Catherine Weiss of Lowenstein Sandler, and other members of the Working Group for their invaluable feedback on earlier drafts. The authors express their gratitude to Judge Michael Chagares for his leadership in improving access to justice in New Jersey and to Immigration Judges Leo Finston, Annie S. Garcy, Dorothy Harbeck, Amiena Khan, and Robert Weisel for their commitment to increasing pro bono representation for immigrants in New Jersey.
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The state of New Jersey, like the United States as a whole, has drawn strength and character from generations of immigrants. One in five New Jersey residents is an immigrant, and about half are naturalized citizens. The federal government forcibly removes hundreds of thousands of immigrants from the United States each year, and thus many of New Jersey’s immigrant residents must navigate complex immigration court proceedings that will determine whether they will be expelled from the United States or permitted to remain. These individuals include men, women, and children. They include longtime lawful permanent residents, many of whom have U.S. citizen children or other family members in the United States, as well as asylum seekers and survivors of human trafficking and torture.

Many people in removal proceedings have no access to legal representation. Although the landmark case of *Gideon v. Wainwright* requires state courts to provide counsel in criminal cases for defendants who cannot afford lawyers, courts have not recognized this right to appointed counsel in immigration proceedings. Individuals in removal proceedings are allowed to hire counsel at their own expense if there is no delay to the government, but many cannot afford representation. Thus, both children and adults find themselves facing trained government counsel in immigration court without a lawyer to speak on their behalf, gather evidence, or analyze the exceedingly complex laws that govern their cases.

This study analyzes newly available empirical data on access to representation for individuals in removal proceedings in New Jersey’s immigration courts. The first part of the study examines data obtained pursuant to a Freedom of Information Act request from the Executive Office for Immigration Review (EOIR) to analyze the relationship between representation and removal proceeding outcomes in the New Jersey immigration courts. This study shows that – in New Jersey, as in other states – having a lawyer during removal proceedings correlates with success in

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5 See 8 U.S.C. § 1229a(b)(4)(A) (providing that immigrants have a right to representation “at no expense to the Government”); *but see* Executive Office for Immigration Review, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions*, *The Department of Justice* (Apr. 22, 2013), (providing for a limited exception, and appointed counsel, in the case of immigrants with mental health conditions rendering them incompetent to represent themselves), available at www.justice.gov/oir/press/2013/SafeguardsUnrepresentedImmigrationDetinees.html.
defending against deportation. Fourteen percent of people in removal proceedings who did not have counsel prevailed in avoiding removal from the United States, compared to forty-nine percent of those who had legal counsel.

The second part of the study describes the results of a new survey of nonprofit organizations that provided low- or no-cost representation to individuals in removal proceedings before the New Jersey immigration courts in 2013 and 2014. The survey results show that nonprofits have been offering valuable services, but that their capacity is limited and that most organizations represent few or no people in detention. As a result of its very limited number of *pro bono* or low-cost legal service providers and their limited funding, and despite several very promising new developments discussed below, New Jersey lacks sufficient capacity to meet the legal services needs of adults, children, and families in removal proceedings.
Key Findings

✓ **Represented individuals (detained and non-detained) appearing in New Jersey immigration courts were more likely to prevail in seeking relief from removal than those who were not represented.**

Within each detention category, individuals who had legal representation were at least three times more likely to obtain a successful outcome than those who were unrepresented. This disparity was even more pronounced for individuals in detention during their removal proceedings.

✓ **Represented immigrants were more likely to file for relief from removal than unrepresented individuals.**

Among the group of people who were detained throughout their proceedings, those who were represented were more than four times as likely to apply for relief as those who were not represented. Among those not detained at any time, represented individuals were nearly eight times as likely as unrepresented individuals to apply for relief. Among those who were detained but later released during the course of proceedings, represented individuals were more than five times as likely as unrepresented individuals to apply for relief.

✓ **Detained individuals in removal proceedings before the New Jersey immigration courts were far less likely to be represented by counsel than non-detained individuals.**

Approximately two-thirds of individuals detained throughout their proceedings had no legal representation at any point in their removal proceedings.

✓ **Nonprofit organizations with New Jersey clients represented significantly fewer detained than non-detained clients, regardless of their overall caseload.**

Even organizations with a relatively high volume of cases reported extremely low numbers of detained clients during the study period. Two of the organizations surveyed reported that they did not represent any detained clients in 2013 or 2014 and an additional two organizations reported that they did not represent any detained clients in 2013.

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6 For the purposes of this study, “successful outcome” is defined as any outcome that did not result in the immigrant (1) being ordered removed from the country; or (2) accepting voluntary departure. Please see Appendix A, ¶¶ 4-5.
Background

Individual Consequences of Deportation and Access to Counsel

Immigration judges are charged with deciding whether to order the deportation (currently known as “removal” for immigration law purposes) of individual immigrants. Such proceedings have extremely high stakes. Removal proceedings often result in permanent banishment from the United States and the separation of families across borders, leading to extreme financial and emotional hardship. Moreover, many people facing removal are seeking asylum or protection under the Convention Against Torture (CAT) and can face great personal danger or death if deported.

Despite these grave consequences, removal proceedings are technically civil, not criminal, in nature. The judges hearing these proceedings oversee extremely overloaded dockets, and removal proceedings do not afford individuals many of the procedural protections that are well-settled in other contexts. Perhaps most notably, whereas well-established Sixth Amendment precedent requires government-appointed counsel for indigent defendants in most criminal proceedings, the courts have not yet recognized a parallel right in immigration proceedings. This means that adults and even unaccompanied children who cannot afford to hire counsel must argue on their own against trained government prosecutors.

Litigating a removal case typically presents challenges for even highly educated attorneys. It requires significant factual investigation and documentary evidence, and analysis of a complex web of federal and state laws that affect removal decisions.

Considering the potentially life-threatening consequences of a removal order and the very limited process available in immigration court, experts have likened removal proceedings to trying “death penalty cases in traffic court.”

How Deportations Affect New Jersey

New Jersey is a state of vibrant immigrant communities, and deportation orders have reverberating effects on these communities, their families, and the state economy.

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Background

Over 21 percent of New Jersey residents are immigrants, compared to just 12.9 percent of all U.S. residents. More than half of New Jersey’s immigrant residents are naturalized United States citizens, meaning they are eligible to vote. Immigrants and the children of immigrants account for 18.8 percent of New Jersey voters.

Accordingly, immigrant residents drive New Jersey’s economy, creating jobs and technological innovations that spark economic growth. In 2011, 29 percent of business owners in New Jersey were foreign-born immigrants. Immigrant workers contributed at least $47 billion to the gross state product in 2006. Immigration to New Jersey increased the wages of native-born workers without a high school diploma by 3 percent between 1990 and 2000. Moreover, a recent report estimated that the two new Deferred Action programs contained in President Obama’s Executive Order of November 20, 2014, but not implemented as of this writing, could create 1,500 new jobs in New Jersey each year and boost New Jersey’s economy by $11.9 billion over the next decade.

Deportations also affect the well-being of New Jersey’s communities because the families of those deported often lose their primary breadwinner or caregiver. Although specific figures are not yet available for New Jersey, one-third of all U.S. citizens with immigrant parents live with at least one undocumented family member. If a parent is deported, his or her children often enter the child welfare system. This results in lasting psychological harm and social and economic costs. The Applied Research Center has estimated that from 2011 to 2016, at least 15,000 additional

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12 American Immigration Council, supra note 2.
13 Id.
15 American Immigration Council, supra n. 2.
16 American Immigration Council, supra n. 2 at 1; Ira N. Gang and Anne Morrison Piehl, Destination, New Jersey: How Immigrants Benefit the State Economy, Rutgers University Eagleton Institute of Politics (Dec. 2008), at 16-17.
children will face threats to reunification due to the detention or deportation of parents, leaving them to be placed in foster care.\(^{20}\) Deportation of immigrants also has far-reaching demographic and economic consequences that cannot be easily quantified, but an analysis by the Bipartisan Policy Center estimated that removing all immigrants from the United States would reduce the labor force by 6.4 percent, resulting in a decrease of approximately 11 million workers by 2034.\(^{21}\)

Breaking up families through deportation has serious non-economic consequences as well. Immigrant parents of citizen children risk being detained, in some cases indefinitely, and thus lose the ability to spend time with or otherwise care for their children.\(^{22}\) Watching a parent undergo removal proceedings is often highly traumatic to a child.\(^{23}\) In addition, in situations in which one parent has been deported and the other remains in the United States, some families reunify in their native country even if the children are U.S. citizens; such an abrupt and drastic lifestyle change can cause irreparable harm to children.\(^{24}\) Furthermore, the forced separation of parents can lead to the dissolution of marriages and to long-term family separation.\(^{25}\)

\(^{20}\) Applied Research Center, *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, CONSORTIUM FOR LATINO IMMIGRATION STUDIES (Nov. 2011), available at www.sph.sc.edu/cgi/word_pdf/ARC_Report_Nov2011.pdf (estimating conservatively that 5,100 children in foster care in November 2011 had parents who were either detained or deported, and that in the following five years, 15,000 children would face similar threats to reunification due to detained or deported parents).


\(^{25}\) Id.
Background

Immigration Court Backlogs and Efficiency

Lack of representation also negatively influences the court system and adjudication process.\(^\text{26}\) Because data from the Department of Justice shows that many of the delays in immigration court arise when unrepresented individuals ask for more time to seek counsel or to prepare their cases, providing representation for immigrants can significantly reduce the delays and associated costs of the adjudication process.\(^\text{27}\) The National Association of Immigration Judges has noted that providing guaranteed representation would help lower court costs, lessen backlogs in the legal system, and prevent miscarriages of justice by protecting people from deportation who have a right to stay in the country.\(^\text{28}\)

New Jersey has only two immigration courts: one in Elizabeth that hears almost entirely detained cases and another in Newark that hears non-detained cases (and during the time period covered by this study, heard both detained and non-detained cases).\(^\text{29}\) Like other immigration courts around the country, the New Jersey immigration courts are currently expediting detained cases and the cases of recently arrived families and unaccompanied children.\(^\text{30}\) Other non-detained cases are


\(^{29}\) United States Department of Justice, EOIR Immigration Court Listing, Nov. 2015, available at www.justice.gov/eoir/sibpages/!Cadr.htm#NJ. (Seven Immigration Judges hear cases in Newark, NJ, and two regularly hear cases in Elizabeth, NJ. During the time period covered by this study, several fewer judges sat at the Newark court. By comparison, New York has six courts and thirty-eight judges).

likely to take years to be completed due to tremendous court backlogs. As of fiscal year 2015, the average time an immigrant in New Jersey had to wait before his or her first removal hearing was 721 days, or about two years, significantly longer than any other year recorded in the same study, and this wait time appears to be increasing. Moreover, whereas both Newark and Elizabeth Immigration Courts previously heard detained cases, in recent months the Elizabeth Immigration Court has absorbed all of the Newark court’s detained cases. Although comprehensive data is not yet available, advocates and unrepresented detained immigrants in removal proceedings at Elizabeth Immigration Court at the time of this writing report that court delays have increased significantly for people in detention in New Jersey following this docket change.

Increased court delays also significantly increase agency detention costs. Those appearing in court without a lawyer often need continuances to seek counsel, prepare applications, and/or determine whether they have any viable means of challenging removal.

**Immigration Detention**

More than 60 percent of immigrants in removal proceedings in New Jersey will spend at least part of those proceedings in detention. Although the law formally labels such detention as civil, U.S. Immigration and Customs Enforcement typically detains people in facilities that “were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons.” Detained immigrants are often forced to wear prison uniforms, locked in concrete and barbed-wire enclosures, held in remote areas, subjected to correctional disciplinary rules, and allowed very limited contact with family members or others in the community. Detention continues for an

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31 Human Rights First, *In the Balance: Backlogs Delay Protection in the U.S. Asylum and Immigration Court Systems* ii (2016) (“On average, people whose cases are before the immigration courts can expect to wait over three years. In many courts, the wait time can be much longer, five or six years.”).

32 TRAC Immigration, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/ (tracking wait times since fiscal year 1998; the average number of days has increased dramatically from 278 days in 2009 to 721 days in 2015).

33 E.g., Email from Amelia Wilson, Detention Attorney, American Friends Service Committee, to Danielle King, Seton Hall University School of Law Student (Mar. 23, 2016, 14:29 EST) (on file with authors); Interview by Farrin Anello of unrepresented man at Delaney Hall Detention Center (Apr. 22, 2016) (final hearing in asylum case scheduled to take place 7 months after initial detention).


35 Id.

36 See EOIR data analysis infra.


indeterminate length of time, pending the conclusion of removal proceedings or removal from the United States. As this study and the prior studies in New York and Northern California suggest, detention also serves as a formidable practical barrier to obtaining counsel or challenging deportation, both because the prospect of further detention coerces people into abandoning viable challenges and because detention makes it difficult for people to find counsel or otherwise support their claims.  

**Removal Proceedings**

Without representation, immigrants are left to navigate a web of immigration laws that have been described as “second only to the Internal Revenue Code in complexity” and as comparable to “King Minos’s labyrinth in ancient Crete.” After being served with a Notice to Appear (NTA), an individual respondent begins removal proceedings with a master calendar hearing, which can be similar to an arraignment, before an immigration judge. Some individuals are detained at the time of this hearing, while others are not. The prosecuting agency (U.S. Immigration and Customs Enforcement, or ICE) typically makes a discretionary decision as to whether to detain an individual in removal proceedings. However, some individuals, including those with virtually any past convictions, are subject to mandatory custody. If the judge determines the person is not subject to mandatory detention, the individual may ask the immigration judge to grant release on bond of no less than $1500, or on their own recognizance (“conditional release”).

In the removal proceedings themselves, which are formally separate from the bond hearing, the individual can then either contest or concede the Department of Homeland Security’s assertion

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*available at https://afsc.org/sites/afsc.civicactions.net/files/documents/23%20Hours%20in%20the%20Box_2.pdf (reporting on use of solitary confinement to punish people in immigration detention).*


41 8 C.F.R. § 1239.1.


43 See 8 U.S.C. § 1226(c) (mandatory custody for people removable on specified grounds relating to convictions or national security).


45 8 U.S.C. § 1226(a) ; Rivera v. Holder, 307 F.R.D. 539 (D. W.D.WA 2015) (held that under 8 U.S.C. § 1226(a), an immigration judge is allowed to release immigrants on conditions other than monetary bond and can grant immigrants release based on a “conditional parole” or monetary bond.)
Background

that s/he is removable or inadmissible. The noncitizen may then ask for a form of discretionary relief. The burden is on the immigrant to establish her/his eligibility for the form of relief s/he seeks. Each piece of the immigrant’s legal case must be supported by substantial factual evidence, some of which must come from the country of origin. Compiling this evidence is particularly difficult when the immigrant is detained. If s/he does not succeed before an immigration judge, s/he can appeal to the Board of Immigration Appeals (BIA).\(^4\) Appeals are usually conducted solely in writing, with no opportunity to speak to the decision-makers. Failing there, an immigrant may be able to pursue judicial review in the corresponding federal circuit court, but only if s/he can overcome highly technical statutory bars to judicial review.\(^4\)

Recent Studies in Other Regions

Recent studies from New York and Northern California and a recent nationwide study have documented positive correlations between representation and the likelihood of success in removal proceedings, as well as a disproportionate lack of representation and much higher rates of removal for people who are detained during these proceedings.\(^4\)

Based on two reports by a study group led by Second Circuit Judge Robert Katzmann,\(^4\) the New York City Council funded a program that now provides attorneys for every indigent New York City resident who is detained while in removal proceedings, as well as a fellowship program that now places highly qualified new attorneys at immigration legal services organizations throughout New York City and neighboring areas, now including New Jersey.\(^5\)

\(^4\) 8 C.F.R. § 1003.38.
Methodology

Executive Office for Immigration Review (EOIR) Data Set

This study uses data obtained from the EOIR through a Freedom of Information Act (FOIA) request covering all removal cases in which an immigration judge made a final decision at the Newark or Elizabeth Immigration Courts between February 1, 2014 and January 31, 2015.\textsuperscript{51} Researcher David Hausman, a Ph.D. candidate at Stanford University, obtained this data and collaborated with Seton Hall University School of Law on its analysis. The section of the present study that analyzes data from the immigration courts employs methodology based upon that used in the Northern California report, which analyzed data from an earlier response to the same FOIA request. Appendices A and B accordingly draw from the comparable appendices found in the Northern California reports.

This study analyzes historical EOIR data. Because it is not a randomized experiment, it does not aim to provide specific evidence of causation, but merely associations or correlations. This study also does not account for other factors (such as the strength of individual cases) that have a causal effect on case outcomes. The EOIR data also relies on the immigration court’s definition of “represented”: the court marks cases as “represented” as long as a representative puts in at least one appearance, even if the individual immigrant appeared in immigration court at other times without counsel.\textsuperscript{52} As a result, this study (along with any other study relying on information from the immigration court) may overestimate the number of clients who receive “true” representation (in other words, in which an attorney is present for all critical stages of litigation).

Nonprofit Survey Data Set

The data on the representation of immigrants in removal defense cases by nonprofit organizations is based upon information voluntarily reported by these organizations in response to a survey authored by Seton Hall University School of Law Immigrants’ Rights/International Human Rights Clinic, with guidance from Professor Brian Sheppard, modeled in part on the survey created by the New York Study Group on Immigrant Representation. The survey was designed to solicit information that would provide a comprehensive picture of each organization’s capacity to provide legal services for New Jersey immigrants in removal defense proceedings. Participants were asked about the number of removal defense cases handled by their organization in 2013 and 2014. They were also asked to indicate the number of detained cases, the number of juvenile cases, and the

\textsuperscript{51} This study also gathered EOIR data from the time period of March 1, 2013 through February 28, 2014 to compare 2013 and 2014 data. [hereinafter EOIR 2013 Data].

\textsuperscript{52} See Appendices A and B infra for detailed information.
types of relief sought. The respondents were then asked to provide information on funding: how much they receive, the sources that provide it, and how it is allocated for different types of cases. Organizations were then asked about any selection criteria used to assess clients. Finally, the survey solicited information about the staff who worked on the organization’s cases and how they apportioned their time.

The organizations from which this survey solicited information provided low or no-cost legal services to immigrant clients in New Jersey in 2013 and 2014. Most of these organizations have offices in New Jersey, and a few have offices in New York and not in New Jersey. The survey requested information only about legal services provided in New Jersey, even if the organizations also provided services in other regions. The responses were received between December 2014 and May 2015.\textsuperscript{53}

\textsuperscript{53} See Appendices D and E for detailed information.
Analysis

**EOIR DATA**

This study examines the EOIR data for the most recent year in the data set to determine how many individuals in New Jersey are able to obtain representation – either by paying for representation or finding a nonprofit or *pro bono* provider – and the success rate of those with and without counsel.

The EOIR data set consists of 3,868 cases and includes all removal cases in which an Immigration Judge (IJ) made a final case-related decision in the New Jersey Immigration Courts (Elizabeth and Newark) between February 1, 2014 and January 31, 2015. This data set includes only cases resolved in New Jersey and not cases that were transferred to other jurisdictions.

The cases in this time period can be broken into three categories.

**Cases in which individuals were…**

<table>
<thead>
<tr>
<th>Never detained in their removal proceedings</th>
<th>Initially detained but later released during proceedings</th>
<th>Detained throughout their proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1441</td>
<td>853</td>
<td>1574</td>
</tr>
</tbody>
</table>

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54 Reinstatement of removal cases, in which DHS alleges that an immigrant is subject to a prior order of removal, are only in the data set if the immigrant contends that he or she has a reasonable fear of persecution if returned to his or her home country. See 8 U.S.C. § 1231(a)(5) (governing reinstatement generally); 8 C.F.R. § 1208.31 (governing reasonable fear determinations). When the immigrant is able to convince a DHS official that her fear is reasonable, or where the immigrant challenges the official’s decision that it is not, an immigration judge has jurisdiction over the immigrant’s case. 8 C.F.R. § 1208.31. Such cases appear in EOIR’s database as “Reasonable Fear” or “Withholding Only” cases.

55 Since most denials are not appealed, this study does not examine representation or outcomes when the immigrant or DHS appealed an immigration judge’s decision to the Board of Immigration Appeals (BIA), or when the immigrant subsequently petitioned for review of the BIA decision.
DETAINED IMMIGRANTS WERE LESS LIKELY TO HAVE REPRESENTATION THAN NON-DETAINED IMMIGRANTS

As of January 2015, approximately 33 percent of those individuals detained throughout their proceedings had representation at some point in their cases, while 79 percent of individuals who were not detained at any point during proceedings had attorneys at some point in their cases. Thus, detention is negatively correlated with representation.

Figure 1:

Figure 1 shows the percentage of cases in which immigrants in removal proceedings had representation, within each of the following categories: those detained throughout their proceedings, those detained but later released, and those never detained.
DETAINED INDIVIDUALS WITH REPRESENTATION WERE THREE TIMES MORE LIKELY TO PREVAIL IN THEIR REMOVAL CASES THAN THOSE WITHOUT REPRESENTATION

Within each of the three groups identified in Figure 1, those with legal representation were far more likely to prevail in their cases. Among people who were detained throughout their proceedings, those with counsel avoided deportation 49 percent of the time, whereas those who were unrepresented avoided removal only 14 percent of the time (more than a three-fold difference). This disparity paralleled that found in the Northern California Report.

Figure 2:

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56 As detailed in Appendices A and B, these results reflect immigrants who avoided removal in some way, not solely those who won asylum or other forms of relief.
57 The Northern California Report found a 22-percentage-point increase (from 11 to 33 percent) in successful outcomes. See Northern California Report, supra note 4, at 18 Fig. 2.
Figure 2 compares the outcomes of cases in which individuals were represented by counsel at least at some point in the proceedings with those who were never represented by counsel.

The results also show that both detention and lack of representation are associated with a higher probability of removal at the end of an individual’s proceedings. As Figure 2 shows, 92 percent of represented, never-detained individuals avoided removal. By contrast, never-detained individuals who were unrepresented succeeded only 31 percent of the time. Those who were represented but detained at the time of case completion had only a 49 percent chance of prevailing. The combination of not having representation and being detained at the time of case completion drove the success rate down to about 14 percent.58

Thus, people who were represented and never detained were:

- Almost twice as likely to obtain a successful outcome as those who were represented but detained throughout;
- Three times as likely to obtain a successful outcome as those who were never detained but also never represented;
- Nearly seven times as likely to obtain a successful outcome as those who were unrepresented and detained throughout their proceedings.

Therefore, lack of representation and detained status are strongly associated with removal.59

**IMMIGRANTS WHO HAVE LAWYERS ARE MORE LIKELY TO FILE APPLICATIONS FOR RELIEF THAT COULD ALLOW THEM TO STAY IN THE UNITED STATES, AS COMARED TO THOSE WHO DO NOT HAVE LAWYERS**

Immigrants who would otherwise be “removable” from the United States can sometimes file applications for forms of relief that would allow them to stay in the United States, whether with a permanent status such as asylum or a green card, or a potentially temporary “withholding” or “deferral” of removal. For example, some immigrants argue that the immigration court should let them stay because they require government protection from persecution or torture abroad.

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58 EOIR 2013 data comparison shows that non-detained individuals are 6% less likely to succeed. However, detained non-represented immigrants are more likely to succeed in 2014 (14% chance) as compared to 2013 (8% chance).

59 Those who made no application for relief, but who obtained a successful outcome, generally had their cases terminated either by showing that DHS could not prove that they were removable or by obtaining status by making some sort of benefit application to U.S. Citizenship and Immigration Services (U.S.C.I.S.). The EOIR database does not report on applications for benefits submitted to U.S.C.I.S. (e.g., U visas, T visas, or green card applications).
Winning relief from removal typically requires not only completing an application form, but also providing extensive evidence and testimony, and often arguing complex questions of law.

This study reveals that immigrants with lawyers were dramatically more likely to file relief applications than those who did not have attorneys. Detained immigrants were more than four times as likely to request relief if represented; non-detained immigrants were almost eight times as likely to request relief if represented; and initially detained immigrants were more than five times as likely to request relief if represented.  

For asylum seekers, the significance of deportation is severe: they may face persecution, torture, rape, and even death upon return to their countries of origin. A 2007 report on the immigration court system found that the most crucial factor affecting an asylum seeker’s case is the availability of representation. Because of the complicated law governing asylum applications, attorneys are critical in helping immigrants file and support such applications.

From 2009 to 2014, more than 3119 asylum applications were filed with the New Jersey Immigration Courts. Of these, fewer than fifty percent were granted (approximately 1461).

As Figures 3 and 4 below illustrate, in the data for the year ending in January 2015, a represented immigrant in any of the three detention categories was at least four times more likely to apply for one or more forms of immigration relief (and for asylum or other claims based on fear of persecution or torture) as compared to an unrepresented immigrant. Very few unrepresented individuals applied for asylum or any other form of relief. Although this study does not permit conclusions as to the precise reason for this severe disparity, lawyers play an undeniably important role in identifying potential avenues of relief and preparing the required applications, as well as advising clients on their best course of action.

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60 See Appendix B infra for a more detailed breakdown of these disparities by relief type.
62 See Srikanthia et al., supra note 4; Northern California Report, supra note 4; BLAZING A TRAIL, supra note 41; York Immigrant Family Unity Project (2016) (on file with author).
64 Id.
Figure 3 addresses the percentage of people who applied for at least one form of relief from removal, contrasting this figure among groups defined by detention status and representation.

It is important to note that not all individuals who submit applications succeed in winning relief, and some are ultimately removed. Additionally, an individual may avoid removal (the metric used in Figure 1) even without filing an application – for example, if the immigration judge determines that they are not inadmissible or deportable and thus terminates the case, or if the case is terminated based upon prosecutorial discretion. See also App’s B. Therefore, the percentage of cases in which an individual avoided removal could potentially be greater than the percentage that applied for relief.
Figure 4 addresses the percentage of people who applied specifically for asylum, withholding of removal, or protection under the Convention Against Torture, contrasting this figure across groups defined by detention status and representation.
This section contains the results of a survey of nonprofit organizations that provide low- or no-cost legal services to individuals facing removal proceedings in New Jersey. The numbers reflect data as self-reported by the organizations for cases handled in 2013 and 2014. The survey was sent to thirteen organizations. All responded, although some responded to only certain questions. Notably, four of these organizations are based in New York. Additionally, no organization provided responses to all of the questions. As a result, the data set discussed below is intended to broadly illustrate the current state of non-profit removal defense providers in New Jersey, rather than to provide a precise accounting of such services. For the purposes of the figures below, the organizations that replied to the survey are not referred to by name. Each organization is referred to by the same randomly assigned number (Org 1 through Org 13) throughout this discussion. An organization is represented in the figures below only if it provided a response to the specific information elicited for that inquiry.

While the organizations surveyed all offer low- or no-cost services, they otherwise vary widely in their size, structure, and scope of operations. Some of the organizations have initiatives on a broad range of legal and non-legal issues. Others dedicate their work to immigration, with several of the organizations focusing on particular groups such as refugee, Lesbian, Gay, Bisexual and Transgender (LGBT), or juvenile clients. The three largest organizations have offices throughout the U.S. and even other countries, while others work in only one geographic area. Four of the organizations are law school clinics.

This diversity among providers is reflected in the types of cases the organizations served, as well as their volume of cases. Certain organizations, such as law school clinics, which typically provide time-intensive pro bono representation in a setting that provides practical training to law students, handled a smaller number of removal defense cases, while most of the immigration legal services organizations represented between 13 and 114 removal defense clients during each of the years surveyed. Organization 13, an organization that provides low-cost legal services and currently has two attorneys, reported representing between 700 and 900 immigrants in removal proceedings in each of the years covered, a far higher number than any other organization.

Case numbers are self-reported and do not reflect uniform record-keeping systems or any qualitative assessment of the services provided. However, they provide a descriptive snapshot of the case volumes at different types of organizations.
Figure 5:

**Figure 5** shows the total number of reported removal defense cases for each organization in the years 2013 and 2014.

 REGARDLESS OF OVERALL CASELOAD, EVERY ORGANIZATION HANDLED A SIGNIFICANTLY SMALLER NUMBER OF DETAINED CASES THAN NON-DETAINED CASES

The total number of removal defense cases handled collectively by the organizations in 2013 in which the client was detained was 111. The number of detained removal defense cases handled in 2014 was 141. As with the total number of removal defense cases, there was a general increase in the number of detained cases between the two years. One organization handled the majority of all detained cases, although its share of these cases became smaller in 2014 as other organizations took on more cases.
Figure 6 shows the number of reported removal defense cases for each organization in which the client was detained in the years 2013 and 2014.

FREE AND LOW-COST IMMIGRATION REPRESENTATION WAS CONCENTRATED IN A SMALL NUMBER OF COUNTIES IN NORTHERN NEW JERSEY

Almost all of the 13 legal service providers were located in either Northern New Jersey or New York City, revealing a dearth of legal services in Southern New Jersey.

More non-citizens live in the northeastern part of the state than in the other regions. Still, as figure 7b below illustrates, immigrant communities are also distributed throughout the southern and central parts of the state. This map tracks populations of immigrants, including those not in removal proceedings, so it provides only a very rough proxy for the need for removal defense representation. At the same time, it suggests a potential concern regarding severely limited legal services in South Jersey, particularly for immigrant residents in Burlington County and other localities with significant immigrant populations.
Analysis

Figure 7b:

Figure 7b is provided courtesy of the Eagleton program on Immigration and Democracy at the Eagleton Institute of Politics, Rutgers University.66

Figure 7a:

### Our Survey Organization Locations by County

<table>
<thead>
<tr>
<th>Organization Name</th>
<th>County, State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rutgers-Camden Immigrant Justice Clinic</td>
<td>Camden County, New Jersey</td>
</tr>
<tr>
<td>American Friends Service Committee (AFSC)</td>
<td>Essex County, New Jersey</td>
</tr>
<tr>
<td>Catholic Charities Immigration Assistance Program</td>
<td>Essex County, New Jersey</td>
</tr>
<tr>
<td>Kids in Need of Defense (KIND)</td>
<td>Essex County, New Jersey</td>
</tr>
<tr>
<td>Rutgers-Newark Immigrant Rights Clinic</td>
<td>Essex County, New Jersey</td>
</tr>
<tr>
<td>Seton Hall University School of Law-Center for Social Justice</td>
<td>Essex County, New Jersey</td>
</tr>
<tr>
<td>Centro Comunitario CEUS</td>
<td>Hudson County, New Jersey</td>
</tr>
<tr>
<td>Legal Services of New Jersey</td>
<td>Middlesex County, New Jersey</td>
</tr>
<tr>
<td>Casa Esperanza</td>
<td>Somerset County, New Jersey</td>
</tr>
<tr>
<td>HIAS</td>
<td>New York, New York</td>
</tr>
<tr>
<td>Human Rights First</td>
<td>New York, New York</td>
</tr>
<tr>
<td>Immigration Equality</td>
<td>New York, New York</td>
</tr>
<tr>
<td>Morningside Heights Legal Services</td>
<td>New York, New York</td>
</tr>
</tbody>
</table>
THE ORGANIZATIONS REPORTED THAT A SMALL NUMBER OF STAFF HANDLED THEIR TOTAL VOLUME OF REMOVAL DEFENSE CASES

Seven organizations reported that they only had one or two staff members who worked on removal defense cases. The highest number of staff members working on removal defense cases reported by any organization was four. These staff members included full-time staff attorneys, volunteers, deferred associates, and legal assistants. Five out of seven organizations reported that they had only one full-time staff attorney with more than five years’ experience working on removal defense cases.

Very few organizations provided information about the average number of hours devoted to each case. Therefore, it is difficult to draw conclusions. Moreover, the number of hours spent on a case is not necessarily a reliable indicator of the quality of representation when the advocates lack experience in the field. Both organizations with large caseloads, and organizations with small caseloads, had a small number of experienced attorneys working on cases. ⁶⁷

FUNDING AND SUPPORT FOR SERVICES VARIED BY ORGANIZATION BUT WAS GENERALLY INSUFFICIENT

All seven organizations that responded to a survey question “Why were RDE cases declined for representation in 2014?” pointed to a lack of resources. This was the only reason for declining representation that applied to every responding organization.

Eight organizations provided responses on their sources of funding, and each had a unique configuration of funding from federal grants, state grants, donations from private individuals and foundations, fees, and other sources. While one organization anticipated a twenty percent increase in funding for the 2015 fiscal year, most organizations anticipated that their funding would stay the same, and one expected a substantial decrease due to a discontinuation of grant funding.

When asked about the uses to which they would put additional funding, the organizations universally preferred adding more full-time staff attorneys, followed by adding more part-time attorneys or other experienced staff. The next most common goal was adding language translation and interpreter support.

⁶⁷ Removal defense cases are typically very labor-intensive because they require detailed factual investigation and documentation in addition to legal research. See New York Report II, supra note 48, at 19.
Figure 8, shows the categories of resources needed to increase representation. All twelve respondents indicated that they needed more full-time staff attorneys and more support staff.

This data suggests that while there are nonprofit organizations willing to fill the critical gap in representation for immigrant clients, they are unable to fulfill the total demand in New Jersey due to a lack of resources.
Conclusion

This study finds that immigrants who have legal representation in New Jersey are much more likely to file applications for relief, and ultimately to avoid removal. Additionally, it finds that people who are detained during removal proceedings had a particularly low probability of finding representation or avoiding removal. Finally, it finds that, despite its proximity to New York and its high percentage of foreign-born residents, New Jersey has a relatively low capacity to provide free and low-cost immigration legal services.

This data suggests that the need to expand access to free and low-cost legal services for low-income New Jersey residents is severe and acute, particularly considering the life-altering consequences of removal from the United States. The data described above bear strong similarities to data available for Northern California.

The findings of the present study are consistent with preliminary data from the New York Immigrant Family Unity Project (NYIFUP), which indicates that providing full access to high-quality, free legal representation can significantly improve case outcomes. As of August 2015, NYIFUP attorneys had won 71 percent of their trials, a remarkable contrast to the success rate for unrepresented and detained immigrants.68

In 2015, following the period covered in this study, a prominent Newark-based legal services organization, American Friends Service Committee (AFSC), implemented the Friends Representation Initiative of New Jersey (FRINJ), a pilot universal representation program to represent people detained during New Jersey immigration removal proceedings. The program initially represented all detained individuals appearing in court for initial hearings on certain days of the week, and in its first three quarters it represented 232 people in detention.69 The program currently represents clients detained in Elizabeth Detention Center, one of several facilities that U.S. Immigration and Customs Enforcement uses to detain people appearing before immigration courts in New Jersey.70 When further data from that program is available, it may permit a deeper understanding of the impact of attorneys on case outcomes and application rates.71

68 BLAZING A TRAIL, supra note 41, at 15.
69 Id. at 19.
70 The three primary detention centers housing people in removal proceedings in New Jersey are Delaney Hall Detention Center, Elizabeth Detention Center, and Essex County Jail.
71 In addition, several organizations working in New Jersey have received funding from the Immigrant Justice Corps and other donors to hire several new, typically entry-level attorneys, who may devote some or all of their time to removal defense.
Conclusion

These programs represent critical steps in increasing the representation of immigrants in removal proceedings in New Jersey. At the same time, New Jersey remains very far from the goal of universal representation. Notably, both NYIFUP and the FRINJ program appear to have been designed with careful attention to maximizing the quality of representation within the constraints of a public defender model. NYIFUP began with a pilot phase, and contracts for legal services were awarded to organizations that had prior experience in running public defender programs as well as in removal defense. FRINJ builds upon the model created by NYIFUP, although with more limited numbers of staff, and was also implemented by a respected organization with experienced immigration attorneys. Although an analysis of appropriate caseloads for future projects is beyond the scope of this study, the success of future projects will depend not only on maximizing the number of people served, but also on the quality of representation.
Assumptions in EOIR Data Analysis\(^2\)

1. The study used EOIR data from February 1, 2014 to January 31, 2015, the last available year covered by the Freedom of Information Act production analyzed in this report. Some proceedings are excluded because they lacked a final outcome during this time period. Therefore, the study slightly underestimates the total number of proceedings. The study may also slightly overestimate the number of cases listed as “detained throughout” as some of the detained immigrants might have been released after the data cut-off date.

2. For purposes of this study, cases were coded as “represented” if the immigration court data recorded a representative as being associated with the case at any time during the course of removal proceedings (including for any court hearing, change of venue, or other case event coded as a “proceeding” by the immigration court). For example, if a case had three hearings, and an attorney appeared at only one of the hearings, the case is treated as represented. Therefore, the study may overestimate the volume of representation in removal proceedings.

3. The EOIR data study did not distinguish between cases involving children and cases involving adults, or between dependent and non-dependent cases.

4. The category in the study entitled “not leading to deportation” contains all cases coded by EOIR as: ‘Alien Maintains Legal Status,’ ‘Case Terminated by IJ,’ ‘Conditional Grant,’ ‘Granted,’ ‘Relief or Rescinded,’ ‘Legally Admitted,’ ‘Prosecutorial Discretion – Terminated,’ ‘Failure to Prosecute (DHS Cases Only),’ ‘Haitian,’ ‘Temporary Protected Status,’ and ‘Prosecutorial Discretion - Admin Close.’

5. The study categorized cases as ‘Removal/VD’ if the EOIR data reported the outcome as any of the following: ‘Remove,’ ‘Voluntary Departure,’ ‘Excluded,’ or ‘Deported.’

6. The EOIR data set contained a small number of cases with unintelligible outcome codes. Given the overall number of cases, this does not affect the conclusions drawn.

\(^2\) Appendices A and B are modeled on, and reflect language from, similar appendices that David Hausman, the researcher who obtained the EOIR data discussed in this report, originally prepared for the Northern California Report. *Supra* note 4.
Appendix B

EOIR Data Analysis: Breakdown of Relief Applications by Type

The tables below illustrate how representation and detention status correlate with likelihood of applying for specified types of relief.

Table 1. Percentage of “never detained” cases in which individuals filed applications for relief or voluntary departure

<table>
<thead>
<tr>
<th>Table 1</th>
<th>LPR-Related</th>
<th>Non-LPR-Related</th>
<th>Other</th>
<th>Persecution-Related</th>
<th>Voluntary Departure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Represented</td>
<td>3%</td>
<td>32%</td>
<td>5%</td>
<td>38%</td>
<td>21%</td>
</tr>
<tr>
<td>Unrepresented</td>
<td>0%</td>
<td>3%</td>
<td>0%</td>
<td>7%</td>
<td>3%</td>
</tr>
</tbody>
</table>

Table 2. Percentage of “initially detained” cases in which individuals filed applications for relief or voluntary departure

<table>
<thead>
<tr>
<th>Table 2</th>
<th>LPR-Related</th>
<th>Non-LPR-Related</th>
<th>Other</th>
<th>Persecution-Related</th>
<th>Voluntary Departure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Represented</td>
<td>1%</td>
<td>16%</td>
<td>2%</td>
<td>31%</td>
<td>17%</td>
</tr>
<tr>
<td>Unrepresented</td>
<td>1%</td>
<td>4%</td>
<td>0%</td>
<td>6%</td>
<td>9%</td>
</tr>
</tbody>
</table>

Table 3. Percentage of “detained throughout” cases in which individuals filed applications for relief or voluntary departure

<table>
<thead>
<tr>
<th>Table 3</th>
<th>LPR-Related</th>
<th>Non-LPR-Related</th>
<th>Other</th>
<th>Persecution-Related</th>
<th>Voluntary Departure</th>
</tr>
</thead>
<tbody>
<tr>
<td>Represented</td>
<td>15%</td>
<td>7%</td>
<td>4%</td>
<td>48%</td>
<td>3%</td>
</tr>
<tr>
<td>Unrepresented</td>
<td>1%</td>
<td>2%</td>
<td>0%</td>
<td>12%</td>
<td>3%</td>
</tr>
</tbody>
</table>

The categories above are defined as follows:

1. “LPR-Related” refers to forms of relief requiring lawful permanent resident (LPR) status, namely, “cancellation of removal” for LPRs, 8 U.S.C. § 1229b(a), and a now-repealed waiver of inadmissibility, id. § 1182(c);

2. “Non-LPR-Related” refers to those forms of relief that are not related to LPR status, namely, non-LPR cancellation of removal, 8 U.S.C. § 1229b(b), and a form of adjustment of status, id. § 1255;
(3) “Persecution-Related” includes asylum, withholding of removal, and Convention Against Torture relief;

(4) “Other” includes other miscellaneous waivers of inadmissibility and forms of relief that can prevent removal;

(5) “Voluntary Departure” avoids removal only in the sense that it permits an individual to leave the country without being formally removed and incurring a statutory bar to reentry.

Because a single case can involve applications for multiple forms of relief, any given case may be represented in more than one of the columns below. Therefore, the overall percentage of individuals who applied for relief of any type may be lower than the sum of the percentages for each of the relief categories below (i.e., the sum of a given row in the tables below). Figure 4 in the text above provides a more aggregated overview of this data, insofar as it depicts the percentage of people within each population subset (i.e., detention/representation group) who applied for any form of relief.
Non-Profit Survey Data Analysis: Assumptions and Clarifications

1. Because the time periods assessed by the EOIR data and the nonprofit survey data are not concurrent, and because the data was collected in very different ways, this study cannot draw inferences about the relationship between the findings from the two sets of data. Additionally, the survey data is wholly self-reported and may be affected by differences in the internal record-keeping procedures of each legal service provider.

2. As mentioned earlier, many of the organizations responding to the survey did not respond to every question, and several only responded to a few questions. The data reported above focuses on questions that were answered by a significant number of respondents. Nevertheless, this data is presented as a general snapshot and not a precise and complete accounting of all legal services provided in New Jersey.
Description of nonprofit legal service providers serving immigrants in New Jersey.

The organizations that participated in the survey include: American Friends Service Committee (Newark, NJ), Centro Comunitario CEUS (Union City, NJ), HIAS (New York, NY), Human Rights First (New York, NY), Immigration Equality (New York, NY), Kids in Need of Defense (Roseland, NJ), Legal Services of New Jersey (Edison, NJ), Morningside Heights Legal Services (New York, NY), Rutgers University-Camden Immigrant Justice Clinic (Camden, NJ), Rutgers University-Newark Immigrant Rights Clinic (Newark, NJ), Seton Hall Law School Center for Social Justice Immigrants’ Rights Clinic (Newark, NJ).

**American Friends Service Committee (AFSC)** [www.afsc.org/office/newark-nj](http://www.afsc.org/office/newark-nj)
The American Friends Service Committee Immigrant Rights Program integrates legal services, advocacy, and organizing, providing legal representation in challenging immigration cases and also ensuring that immigrant voices in New Jersey and beyond are heard in policy debates. Legal representation is provided to particularly vulnerable immigrants, with an emphasis on people in detention, children, survivors of domestic violence and other crimes, and those who are indigent.

**Casa Esperanza** [www.casaesperanzanj.com](http://www.casaesperanzanj.com)
Casa Esperanza is a non-profit organization created to serve immigrants and refugees who need affordable legal, educational and social services, as well as a place to go when they need help. Casa Esperanza’s goal is to help immigrants and refugees to understand how the legal system works in the United States and to avoid mistakes that can jeopardize their opportunity to have a better life.

**Catholic Charities Charities** [www.catholiccharitiesusa.org](http://www.catholiccharitiesusa.org)
Catholic Charities is a non-profit organization with agencies across the country that offers support to member agencies, provides disaster relief, and promotes poverty reduction through research and legislative reform. The Newark agency of Catholic Charities offers low-cost, fee-for-service legal assistance to non-citizens in need. The agency provides assistance in all phases of immigration proceedings, including deportation and exclusion proceedings before the Immigration Court.

**Centro Comunitario CEUS** [www.ceusnj.org](http://www.ceusnj.org)
CEUS is a nonprofit, community-based agency that serves and organizes Hispanic non-citizens in northern New Jersey. The Center’s programs include educational, community development, and cultural activities. CEUS also provides immigration legal services through a staff attorney and has for fifteen years organized the community to seek justice, legal status, and fairness for non-citizens.

**Hebrew Immigration Aid Society (HIAS)** [www.hias.org](http://www.hias.org)
Appendix D

HIAS is the oldest international migration and refugee resettlement agency in the United States. Based in New York City, HIAS works around the world to protect refugees who have been forced to flee their homelands because of who they are, including ethnic, religious, and sexual minorities. For more than 130 years, HIAS has been helping refugees rebuild their lives in safety and dignity.

**IMMIGRATION EQUALITY** [www.immigrationequality.org](http://www.immigrationequality.org)
Since 1994, Immigration Equality has been proud to support and represent LGBT and HIV-positive non-citizens seeking safety, fair treatment, and freedom. As the only LGBT organization with a staff of immigration attorneys, Immigration Equality impacts both the individuals they serve and the immigration system as a whole.

**KIDS IN NEED OF DEFENSE (KIND)** [www.supportkind.org](http://www.supportkind.org)
KIND is a leading advocacy organization in the protection of unaccompanied children nationally and internationally. The New Jersey field office of KIND offers training and mentorship to *pro bono* attorneys handling non-citizen children’s cases before the immigration court, immigration agencies, and state courts. KIND also provides direct representation to non-citizen children residing in or detained in Bergen, Essex, Hudson, Morris, Passaic, and Union counties.

**LEGAL SERVICES OF NEW JERSEY (LSNJ)** [www.lsnj.org](http://www.lsnj.org)
The Immigration Representation Project (“IRP”) of LSNJ provides free advice, counsel, and representation to low-income New Jersey residents in Immigration matters before USCIS and EOIR. The IRP also provides Legal Orientation Program Services to immigrant detainees at the Hudson, Essex, and Elizabeth detention facilities.

**MORNINGSIDE HEIGHTS LEGAL SERVICES, COLUMBIA LAW SCHOOL**
With an emphasis on client-centered lawyering, clinic students work with clients from around the world. In the previous academic year, the clinic represented individuals detained at the Elizabeth Detention Center and Newark’s Delaney Hall. In the 2014-2015 academic year, the clinic represented non-detained unaccompanied minors and worked with families detained near the southern border.

**RUTGERS UNIVERSITY-CAMDEN IMMIGRANT JUSTICE CLINIC (IJC); CAMDEN, NJ**
[https://camlaw.rutgers.edu/immigrant-justice-clinic](https://camlaw.rutgers.edu/immigrant-justice-clinic)
The IJC is a student-staffed law office that represents non-citizens in matters at the intersection of federal immigration law and state law. In addition to providing legal representation, the IJC also hopes to increase understanding and awareness of non-citizen issues in the criminal justice, child welfare, and domestic violence systems through the development of workshops and practice guides.
Appendix D

**Rutgers University-Newark Immigrant Rights Clinic; Newark, NJ**
https://law.newark.rutgers.edu/clinics/immigrant-rights-clinic
The Immigrant Rights Clinic serves the local and national non-citizen population through a combination of individual client representation and broader advocacy.

**Seton Hall University School of Law Center for Social Justice (CSJ), Immigrants’ Rights/International Human Rights Clinic**
http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/Immigration-and-Human-Rights-Clinic.cfm

CSJ’s Immigrants’ Rights/International Human Rights Clinic represents non-citizens seeking protection from persecution, trafficking, and torture, as well as non-citizens who have survived domestic violence or other violent crimes in the United States. The Clinic also engages in human rights reporting, fact-finding, and advocacy. This hands-on program prepares law students to become strong advocates for their clients and to promote social justice throughout their careers.
Editor-in-Chief’s Column

Are More Pro Bono Assignments on the Horizon for Family Law Attorneys Due to Kavadas v. Martinez?

by Charles F. Vuotto Jr.

Due to the Herculean efforts of one of the family law community, David Perry Davis, and the wise decision of a member of the bench, the Honorable Mary Jacobson, A.J.S.C., arguably a problematic aspect of the law is in the process of being corrected. However, with good always comes a little bad. Along with all the other obligations imposed upon the family law attorneys of this state, this new decision may possibly impose a further burden.

In Kavadas v. Martinez, the plaintiffs challenged the constitutionality of the automatic suspension of driver’s licenses when a bench warrant is issued for non-payment of child support in accordance with N.J.S.A. 2A:17-56.41(a) (the New Jersey Child Support Program Improvement Act).¹ The lawsuit essentially sought to expand upon the procedural safeguards mandated by the New Jersey Supreme Court in the seminal case of Pasqua v. Council, pursuant to which indigent parents at risk of incarceration at child support enforcement hearings are entitled to the assignment of counsel.²

Attacking its constitutionality, the plaintiffs in Kavadas challenged the child support enforcement procedures implemented in accordance with the act on both procedural and substantive due process grounds. The plaintiffs argued that the procedures in place fail to provide adequate notice and opportunities to be heard prior to the automatic suspension of a driver’s license;³ are arbitrary in nature; and fail to provide indigent obligors with legal representation in such proceedings. The plaintiffs further contended that poor obligors are disparately impacted, compounding their financial struggles by limiting their ability to work, and cited several circumstances under which the procedures harm the non-custodial children the statute was designed to protect. As an alternative to their constitutional challenges, the plaintiffs advanced arguments of statutory interpretation to contest the suspension procedures. In turn, the defendants countered with public policy considerations, arguing the prospect of a license suspension serves to deter obligors from defaulting on their child support obligation; encourages compliance with the associated bench warrant that triggered the license suspension; and coerces obligors to make payment towards their arrears as a precondition to restoring their licenses. In addition, the defendants disputed the suggestion of inadequate notice and the notion of a right to counsel in connection with a temporary loss of driving privileges in a civil child support matter.

Following three-and-a-half years of litigation, the case culminated in competing motions for summary judgment. The orders entered by Judge Jacobson were supported by a comprehensive 187-page opinion. The court prefaced its legal analysis with a thorough review of the act and its legislative history, the procedures enacted by various state agencies in accordance with the act, and a review of certain statistics on the suspension of driver’s licenses and the resulting impact on obligors of different economic and racial groups. Transitioning to its disposition of the issues raised, the court rejected the plaintiffs’ statutory interpretation and substantive due process arguments.⁴ As to the latter, using a rational basis standard of review, the court concluded the plaintiffs failed to demonstrate the statutory provisions are arbitrary considering the public policies cited by the defendants.

The plaintiffs did, however, find success in their procedural due process arguments, as the court found that “the procedural due process guarantees of the New Jersey Constitution and this State’s doctrine of fundamental fairness require that delinquent child support obligors be provided with advance notice and an opportunity to be heard when [the] Probation [Division] seeks to impose driver’s license suspensions as a child support enforcement mechanism.”⁵ The court further required that obligors be notified of a date certain on which the suspension of their license will take effect, and provided the affected state agencies a period of 120 days to draft
new procedures consistent with its decision.\

Finally, and of particular concern to the family law bar, the court held that attorneys must be appointed to represent indigent obligors in enforcement hearings in which an obligor's license may be suspended, citing the New Jersey Supreme Court's decisions in Pasqua, Rodriguez v. Rosenblatt, and State v. Moran. The court provided a general overview of the authority and procedures in place for appointing counsel to indigent persons facing "consequences of magnitude" in municipal and state criminal courts, as well as in termination of parental rights cases. The court then noted that "[t]here is no equivalent infrastructure for most proceedings in the state civil or family court systems," and that where the Legislature has made no provision for the Office of the Public Defender to represent indigent defendants entitled to counsel, "the Assignment Judge of each vicinage must assign pro bono counsel using a list of licensed attorneys known as the 'Madden List.'"

Following its analysis of the relevant case law, the court held as follows:

This court finds that both due process and fundamental fairness require courts to provide counsel to indigent obligors at any hearing at which a hearing officer may recommend a driver's license suspension to a court, or at any hearing when the family court itself is considering a driver's license suspension. Essentially, the court is directing that the Pasqua model be followed when Probation is seeking to impose a driver's license suspension for failure to pay child support.\

The court's decision in Kavadas does not seem to be clear on the precise protocol to be followed in the event a litigant is deemed indigent when faced with the potential of a driver's license suspension. The decision definitively provides that such indigent litigants are entitled to legal representation; however, it is unclear whether courts are instructed to appoint counsel from the Madden list, or whether courts are prevented from suspending an indigent obligor's driver's license unless and until the Legislature addresses the issue (i.e., by statutorily mandating the appointment of the Office of the Public Defender).

As indicated in the quote above, the court directed "that the Pasqua model be followed" in hearings entailing the possible suspension of a driver's license. In Pasqua, the New Jersey Supreme Court held that counsel must be appointed for indigent obligors in hearings in which incarceration is under consideration. In regard to the procedure for appointing counsel, the Court deferred to the Legislature:

We realize that unless there is a funding source for the provision of counsel to indigent parents in Rule 1:10-3 proceedings, coercive incarceration will not be an available sanction. We will not use our authority to impress lawyers into service without promise of payment to remedy the constitutional defect in our system. The benefits and burdens of our constitutional system must be borne by society as a whole. In the past, the Legislature has acted responsibly to provide funding to assure the availability of constitutionally mandated counsel to the poor... We trust that the Legislature will address the current issue as well.\

In essence, absent the enactment of the necessary legislation, incarceration may not be used to coerce compliance in cases where an indigent obligor requests counsel. This is reflected in the official note regarding the 2007 amendment to Rule 5:3-4 (addressing the right to counsel in family law matters), which provides as follows:

Pertaining to actions brought under Rule 1:10-2 for noncompliance with child support orders, the Supreme Court in Pasqua v. Council, 186 N.J. 127, 146, 149 (2006), established a due process right for the obligor to be advised of the right to counsel. Where counsel is requested, and the obligor is found to be indigent, counsel must be assigned before incarceration may be used to coerce compliance. The Court determined that pro bono attorneys would not be appointed in these cases, referring the issue to the Legislature. Currently, Administrative Office of the Courts Directive #18-06 promulgates statewide standards and procedures relating to the use of warrants and incarceration in child support enforcement.\^\

In light of the holding in Pasqua, and given that the court in Kavadas instructs to follow the model established in Pasqua, one interpretation of Judge Jacobson's decision is that suspension of a driver's license may not be used as
coercive measures until counsel is legislatively provided. Yet, in its decision in Kavadas, the court made several references to appointing pro bono counsel, giving the impression that its holding did not affect the use of the Madden list. By way of example, the court noted that in cases “in which courts consider ordering license suspensions as punitive or coercive measures, the same procedure for appointing pro bono counsel to indigent obligors as is required by Pasqua should be followed,” and in the preceding paragraph in its decision, further suggested that it “does not anticipate the need for more pro bono counsel being appointed at the pre-suspension hearings required by this decision.” Further clouding the court’s intent in its decision is its reference to the New Jersey Supreme Court’s decision in In re Adoption of J.E.V., where the Court held that indigent litigants in contested adoption cases are entitled to legal representation and opined that “[u]ntil the Legislature acts, we may need to assign counsel through the Madden list, which is not an ideal solution.”

Perhaps due to this uncertainty, during the case management conference that followed the court’s decision in Kavadas, the Administrative Office of the Courts (AOC) requested clarification of its obligation to provide counsel. This was addressed in paragraph 6 of the court’s case management order, wherein the court issued the following directives:

Counsel for Defendant, AOC, shall submit to Plaintiff’s counsel a proposed mechanism for appointing counsel for indigent child support obligors facing driver’s license suspensions by February 8, 2019. In the interim, the parties shall confer to determine if a temporary mechanism regarding appointments of counsel for indigent obligors facing driver’s license suspension can be incorporated into the consent order referenced in paragraph 5 of this Order.

Thus, even with the court’s otherwise thorough decision, it appears the long and winding road to appointing counsel to indigent child support obligors facing driver’s license suspensions stretches on.

The ongoing dispute over implementation of the court’s decision regarding the right to representation begs the question: Should the court (a) defer to the Legislature and effectively prohibit suspension of an unrepresented indigent obligor’s driver’s license until such time as the issue is addressed statutorily by providing funding to assure the availability of constitutionally mandated counsel to the poor (Pasqua); (b) employ use of the Madden list in the interim (J.E.V.); or (c) take another approach? It is this author’s opinion that the use of the Madden list for these hearings may result in an unreasonable burden on the family law bar and continue a disconcerting trend. It is also unfair to the litigants, as they will be assigned to attorneys who are not proficient or familiar, or practice regularly, in this area of the law.

The Kavadas decision comes on the heels of the New Jersey Supreme Court’s denial of the Family Law Section’s request for attorneys who volunteer substantial time, skill and knowledge each year as panelists in the Matrimonial Early Settlement Program (ESP) to receive pro bono (Madden) credits. Had this request been approved, attorneys volunteering a certain fixed number of hours (e.g., 25 hours per year) to this program would be excluded from the Madden list and exempt from pro bono case assignment the following calendar year.

Compounding the Court’s decision not to grant a pro bono exemption to ESP panelists is the fact that Rule 5:5-6 requires mandatory economic mediation, and that participant mediators provide two free hours of service. Many of these family law mediators also volunteer their time as ESP panelists.

Further still, family law attorneys are called upon for pro bono representation in other, more complex matters. Case in point, the Court’s decision in J.E.V., where Chief Justice Stuart Rabner and a unanimous Court ruled that litigants have a right to appointed counsel in contested adoption cases. In J.E.V., the Court specifically noted that until some state funding occurs, the bar association and family law attorneys would bear the brunt of these assignments. The Court stated:

The very reasons that call for a lawyer to be appointed also favor the appointment of attorneys with the experience to handle these matters. Contested adoption proceedings raise important substantive issues and can lead to complicated and involved hearings. The Office of Parental Representation in the Public Defender’s Office has developed expertise in this area from its fine work in state-initiated termination of parental rights cases. Without a funding source, we cannot direct the office to take on an additional assignment and handle contested cases under the Adoption Act.
In the past, as we noted in Pasqua, “the Legislature has acted responsibly” and provided counsel for the poor when the Constitution so requires. For example, after Crist, the Legislature enacted N.J.S.A. 30:4C-15.4(a), which directs judges to appoint the Office of the Public Defender to represent indigent parents who ask for counsel in termination of parental rights cases under Title 30. Once again, we trust that the Legislature will act and address this issue.

In the interim, we have no choice but to turn to private counsel for assistance. We invite volunteer organizations to offer their services, as pro bono attorneys have done in other areas. Until the Legislature acts, we may need to assign counsel through the Madden list, which is not an ideal solution.19

The family law practice is a noble one, and practitioners should be proud of the service they provide to society. Still, as officers of the court, family lawyers realize that they have a reasonable obligation to go a step further and perform pro bono service that goes along with the privilege of having a law license;20 however, the burden of pro bono service appears to fall disproportionately on family law attorneys. Sadly, for the most part, the good work of ESP panelists and other volunteer family law attorneys goes unrecognized in a meaningful way.21

Even more, there does not appear to be an end in sight to the growing list of circumstances under which private attorneys will be mandated to represent indigent litigants.22 While pro bono service is certainly a justifiable and honorable cause, the suggestion that reliance on the Madden list as a stopgap measure until the Legislature acts may ignore the realities of politics. By ‘temporarily’ resolving such issues by defaulting to private attorneys until addressed by the Legislature, courts may be unintentionally removing an incentive or sense of urgency that would have otherwise prompted timely enactment of such legislation and the status quo of mandatory service by the family bar will unfortunately become the norm.

Therefore, it is the author’s opinion that the Legislature should statutorily fund and require legal services organizations or the Office of the Public Defender to fulfill the mandate arising from Judge Jacobson’s sound decision in Kavadas v. Martinez and J.E.V. Until such time, suspension of an unrepresented indigent obligor’s driver’s license should not be utilized as a method of enforcement until representation is provided by statute. The burden to represent indigent obligors under the circumstances delineated in the Kavadas opinion, the author believes, should not fall upon private attorneys, particularly the family law bar, which is already overburdened with such services.

Subsequent to the writing of this column, the author has been advised of a letter from Gregory J. Sullivan, deputy attorney general, dated March 29, 2019, to Judge Jacobson indicating to the court that the state will cease the practice of automatic suspensions of driver’s licenses when a warrant issues for non-payment of child support as of April 1, 2019.23

The author wishes to thank Rotem Peretz of LaRocca Hornik Rosen Greenberg & Grup, LLC in Freehold, and Jerelyn Lawrence of Lawrence Law, LLC in Watchung, for their contributions to this column.

Endnotes
3. Senator Shirley K. Turner has introduced a bill, S-3424, which removes from the statute the sentence that required the automatic suspension of a driver’s license upon the issuance of a child support-related bench warrant. The bill has been referred to the Senate Judiciary Committee.
4. The court also dismissed one of the named plaintiffs, Alisha Grabowski, as a party to the case due to lack of standing. The court reasoned that Grabowski was not a New Jersey resident when the complaint was filed and, more notably, did not maintain a New Jersey driver’s license. Due to the latter point, Grabowski was not affected by and did not experience harm as a result of the New Jersey laws and processes in question. Kavadas, slip op. at 93-98.
5. Id. at 185.


8. Kavadas, slip op. at 178 (citing Madden v. Delran, 126 N.J. 591 (1992); In re Adoption of J.E.V., 226 N.J. 90, 113 (2016)).

9. Id. at 181.

10. Pasqua, 186 N.J. at 149.

11. Id. at 153-54 (emphasis added).

12. Pressler and Verniero, Current N.J. Court Rules, Official Note Regarding 2007 Amendment to R. 5:3-4 (2018) (emphasis added); see also the comment to the rule, which provides, in relevant part, as follows:

   If an indigent party is entitled to counsel and there is no publicly funded source for representation, the court may make pro bono assignments as provided by paragraph (a). This paragraph of the rule, however, excepts child support enforcement proceedings from pro bono counsel assignment. As the Official Note explains, this exception follows Pasqua v. Council, 186 N.J. 127 (2006), and the implementing Administrative Directive, #18-06, pursuant to which indigent child-support obligors may not be incarcerated unless they are represented and excepting such representation from the pro bono program.

   Pressler, cmt. 2.1 on R. 5:3-4 (emphasis added).

13. Kavadas, slip op. at 181 (emphasis added).

14. Id. at 178 (quoting J.E.V., 226 N.J. at 113).

15. It should be noted that the plaintiff’s counsel, Davis, has indicated to the author that he consistently opposed the use of the Madden list for these matters.


17. On Feb. 22, 2019, the AOC filed a motion for reconsideration of the court’s directive that the AOC devise a mechanism for the appointment of counsel. The crux of the AOC’s legal argument is that, absent a statutory provision or a delegation of the authority by the Supreme Court of New Jersey, only the Supreme Court may decide how to appoint constitutionally required counsel. As such, it appears to be the AOC’s position that it lacks the authority to comply with the court’s directive.

18. J.E.V., 226 N.J. at 111 (“Given the fundamental nature of the right to parent that may be lost forever in a disputed adoption hearing...[we] hold that indigent parents who face termination of parental rights in contested proceedings under the Adoption Act are entitled to have counsel represent them under Article I, Paragraph 1 of the State Constitution.”).

19. Id. at 113 (citations omitted) (emphasis added).

20. The total amount of time Davis spent on Kavadas over the years (complaint filed in May 2015) is 852.9 hours. This has not been his only substantial pro bono work. In Pasqua, he spent 613 hours over a six-year period through five different courts. In Leonard v. Blackburn, he spent 245 hours in the trial and appellate courts. In Rich v. Fowler, he spent 78 hours. In W.M. v. Carcman, he spent 15 hours. In Occupy Trenton v. Zawacki, he spent 10 hours. Thus, the total time over the last 19 years that Mr. Davis spent on these cases totals a whopping 1,813.9 hours (Kavadas—852.9, Pasqua—613, Leonard—245, Fowler—78, W.M.—15, Occupy—10). Of all of these cases, the trial court in Kavadas was the first (and only) to grant Davis’s application to be compensated for the 852.9 hours of services rendered in the case, and the issue is currently being addressed in mediation.

22. See also Parness-Lipson v. Parness, No. A-2221-13 (App. Div. June 6, 2014) (slip op. at 7). In this unpublished decision, the Appellate Division held as follows:

Based on the record before us, we conclude that, solely for purposes of appointment of counsel at the Mathweil hearing, defendant should be deemed indigent....Lastly, because the issue is whether defendant should continue to be incarcerated, and he has been in jail for five years, we choose to err on the side of caution. Hence, we remand this matter to the trial court with direction to appoint counsel to represent defendant. It may be appropriate to use the same process that would be employed to appoint counsel for an indigent defendant in a child support enforcement proceeding. See Pasqua v. Council, 186 N.J. 127 (2006).

In addition, the Madden list is routinely used to appoint counsel to indigent litigants charged with violation of domestic violence restraining orders, municipal appeals, and parole revocation hearings.

THREE 3LS, KAIROS, AND THE CIVIL RIGHT TO COUNSEL IN DOMESTIC VIOLENCE CASES

Ruth Anne Robbins

2015 Mich. St. L. Rev. 1359

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This is the story of three clinic students and the mark they
made on New Jersey law. Really, it is a story about students trying to
seize kairos, the opportune moment in time to effectuate change.

In Greek myth, two spirits represented different aspects of
time: Chronos and Kairos. Both had wings and long hair growing
only out of their faces—not on the tops or backs of their heads—
symbolizing the ability of a person to seize time as it approached
but not as it passed by. Chronos was the spirit representing the sequential
and linear passage of time, and is often depicted as older,¹ whereas

¹ * Clinical Professor of Law, Rutgers Law School (known as Rutgers
School of Law–Camden until the editing stages of this Article). Thanks to
Mark Gulbranson, Esq.; Mark Natale, Esq.; and Logan Elliott Pettigrew, Esq.; the 2013
graduates who wrote the brief for amici curiae in 2013, granted permission to talk
Kairos is shown as young, floating on air in a circuitous path. He was the spirit of opportune moments—of possibilities. Thus, the concept of kairos in rhetoric centers on the opportune moment or the “right
time and place.”

The “opportune moment” concept of kairos has been part of rhetoric since the time of Aristotle, who took the view that the moment in time in which an argument was delivered dictated the type of rhetorical devices that would be most effective. The sophists took a different view: Kairos is something to be manipulated by the speaker as part of adapting the audience’s interpretation of the current situation. Kairos assists the speaker in molding the persuasive message the speaker is communicating. Modern rhetoricians hold a middle view—that a speaker must be inventive and fluid because there can never be more than a contingent management of a present opportunity.

The Greek word kairos and its translation “opportune moment” embody two distinct concepts communicated through metaphors. The first concept, the derivation of the “right moment” half of the definition, is temporal. Greek mythology concentrated the spirit on

about their story at the Michigan State Law Review 2015 Spring Symposium, Persuasion in Civil Rights Advocacy, and in this Article, revisited their notes and reflected on the experience in interviews, and rolled up their sleeves to offer revising and editing suggestions. Thanks also to Professor Victoria L. Chase, the clinical professor who taught the students in their first clinic semester and who shared the delight of working with these students during the amicus brief project while we co-taught the advanced clinic course in the spring 2013 semester. My appreciation to these people who kindly spent time reading and providing feedback and talking to me about ideas: Steve Johansen, Ken Chestek, Joan Ames Magat, Kristen K. Tiscione, and Steve Robbins. Last, my very special thanks to John Pollock, Esq., at the Public Justice Center and the National Coalition for a Civil Right to Counsel for his help throughout the preparation of the presentation and writing of this Article.

1. Our image of Father Time, although several paintings and sculptures depict Chronos with wings.
6. Id. at 13.
the temporal. But, the second half of the definition—the opportunity—is spatial. To seize the opportunity at the right time requires one to be in the right place and under the right circumstances—including those of the situation and those of the actor. Rhetoricians commonly use visualizations of the penetrable openings needed for both the successful passage of the arrows of archery through loopholes in solid walls, and the productive shuttles of weaving through the warp yarns in fabric, as a way to describe the spatial aspect of kairos. Modern rhetoric takes these metaphors and elaborates, defining kairos as “a passing instant when an opening appears which must be driven through with force if success is to be achieved.” The idea is one of force and power.

Seeing an opportune moment in time to call attention to a legal issue they identified as important, the three third-year law students in this story wrote, as amici curiae, a brief in support of petition for certification to the New Jersey Supreme Court on the issue of whether indigent litigants in civil domestic violence cases have the right to court-appointed attorneys. They prepared this brief under the guidance of their clinical professors during the last weeks of their third year of law school, when many of their classmates were wrapping up their work and taking a relaxing breath.

In civil rights advocacy, lawyers must choose not only the right arguments, but also the right moment for the argument. These students and their professors believed the timing was right to argue that indigent litigants involved in the New Jersey domestic violence restraining order process have a legal right to court-appointed counsel as a requirement of equal access to a fair trial. The issue had been briefly raised several years earlier by a defendant who had questioned the constitutionality of New Jersey’s Prevention of Domestic Violence Act. However, the right to counsel issue had been completely disregarded by the courts, and no state-based advocacy groups pursued the issue.

These students, in contrast, saw something to the issue that other advocates had missed. Moreover, they saw it at the right time in their own legal education to act on it, compellingly.

It is fair for readers to know up front that the New Jersey Supreme Court ultimately denied certification in the matter. So,

7. Miller, supra note 3, at 313.
8. Id.
9. Id.
why bother reading any further? For that matter, why does this Article exist at all? Because, instead of summarily denying certification without comment, as it normally does, the New Jersey Supreme Court took the unusual step of publishing an opinion explaining the reasons for denying certification. Perhaps more importantly, one justice went further, taking the even rarer step of publishing a dissent to the denial of certification. His dissent ran several pages.\textsuperscript{11} The surrounding circumstances permit a reasonable inference that the students’ arguments contributed to the court’s decision-making processes. Both the opinion and the dissent reference arguments contained in the amicus brief. That, the paucity of law in other states at the time, and the brevity petitioning party’s papers, point to the amicus brief as the most substantial document arguing the merits.

The students’ story, thus, is not a story with an unhappy ending: It is a story of beginnings. The students’ persuasion helped experienced lawyers see the importance of maintaining this new civil-rights advocacy effort in state court—something that was relatively extraordinary for law students to do given the normative law school emphasis on federal law cases and established rules of law. Further, the substance of the published opinion and dissent highlights the rhetorical situation of the brief: a particular historical moment in the political and financial landscape of New Jersey. It provides an interesting lesson that the right arguments, made by the right people, but written and submitted at what turned out to be the wrong time, can nevertheless create an opening for a later \textit{kairic} moment.\textsuperscript{12}

In the rhetoric of \textit{kairos}, when an opportune moment is missed—whether because of the wrong timing, a lack of force, or a

\textsuperscript{11} \textit{Id.} (Albin, J., dissenting). The dissent was three and one-half pages long in the Atlantic 3d Reporter, i.e., it ended on page 829. Legal databases are not set up to easily search for other instances of dissents related to denials of certifications. After some trial and error with digests, tables, and electronic databases, I found only one other case in which the New Jersey Supreme Court published an opinion and accompanying dissent as part of a denial of certification. State v. Farinich, 446 A.2d 120, 120 (N.J. 1982) (Clifford, J., dissenting). There are also two decisions I found in which the New Jersey Supreme Court determined that the certification was improvidently granted, and in which a Justice issued a separate opinion. Reuter v. Borough Council, 796 A.2d 843, 843 (N.J. 2002) (Long, J., dissenting); Mahony v. Davis, 469 A.2d 31, 31 (N.J. 1983) (Handler, J., concurring). Thank you to Melissa Gorsline at LexisNexis and to Professor Genevieve Tung, Research Librarian, Rutgers Law School, for shadowing me on these searches.

\textsuperscript{12} Miller, \textit{supra} note 3, at 313.
missed target—all is not lost because the spirit Kairos is not confined to Chronos’ linear path, but may reappear at the same location again. For that reason, Professor Linda Berger has suggested that the temporal and spatial metaphors may still be useful. What may look like missed opportunity may still have yielded enough success to snag a thread in the weave that can later be pulled to unravel the existing fabric of the social sky when the moment is right and the opportunity next presents itself. And, that is precisely what has happened in the case of these three third-year law students and their brief filed as amici curiae. They created initial stray threads in the fabric of existing New Jersey domestic violence law that can be tugged in the future.

I. THE RIGHT WRITERS: MEET THE THREE 3LS

The combined energy and skill set of these three students were critical components to the strategy and persuasion of this amicus brief. Had this been a different group of students, the project very likely would have ended over a cup of coffee. But all three of the students were among the most academically successful students in their class, balancing doctrinal knowledge and client-centered writing competency. They had law journal, law firm, and judicial internship experiences to draw upon. They studied persuasion theory and some rhetoric in their second year of law school as part of an experimental overhaul of our intramural moot court program. Coincidentally—if one believes in coincidences—the moot court simulation that the students wrote about and argued was set in the New Jersey Supreme Court and explored aspects of state and federal guarantees of the right to a fair trial. In their third year, these students served as teaching assistants to the selected students in the second


14. The fall semester course was based on the course created by Michael R. Smith in his textbook, Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing (2d. ed. 2008), combined with other readings on persuasion and rhetoric written by legal writing and clinical scholars.
year of the program. In short, these three students were among the most prepared the law school could offer in terms of written advocacy capabilities. Beyond that, each of the students brought other knowledge bases to the project.

- **Logan Elliott Pettigrew** worked on a pro bono amicus brief at a law firm between his second and third years of law school. His legal research skills were particularly well honed for someone at his level, described by one of the firm’s partners as “uncanny.”

Among his peers and the clinical faculty, Mr. Pettigrew was also well-known for his work ethic, his writing, and his attention to procedural details. He volunteered in several administrative capacities in the law school, including in the admissions department, and he served as a student representative at recruitment fairs where very few law students were present. For reasons explained below, the recruitment of students was of particular and critical significance in the 2012–2013 academic year at Rutgers–Camden.

- **Mark Gulbranson** interned between his second and third years of law school for a Superior Court judge assigned to the Family Part, and as a result witnessed over one hundred domestic violence trials. In one of his law school courses, Mr. Gulbranson wrote a brief set in New Jersey domestic violence law. These experiences gave him a foundation in many of the documents used by the courts in domestic violence, including a procedure manual and directives. Mark also had a special interest in the art and form of writing and had moved beyond the often-rigid paradigms of first-year students by the fall of his second year when his fluid style took shape.

- **Mark Natale** was passionate about civil rights and during interviews for this Article remained so. He was the person most invested, initially, in the merits of the issues and inspired everyone else to become so. Mr. Natale excelled in his trial-advocacy course and thought like a trial attorney, something that became important knowledge to draw upon as he wrote his section of the legal argument. In his second year of law school,

15. Mr. Pettigrew was the student chairperson of the moot court program in his 3L year. Between the clinic work and the advanced writing course, there was quite a lot of talk about persuasion in written advocacy.


17. His first-year legal writing course (i.e., using a simulation trial transcript and exhibits that I wrote or created).
Mr. Natale and his moot court partner (Mr. Pettigrew) had won the oral argument competition in the law school’s intramural moot court program.

The students also knew the professors very well. I taught Mr. Gulbranson in each of his six semesters of law school, and Mr. Natale and Mr. Pettigrew in five semesters. Professor Victoria Chase taught all three students in the Domestic Violence Clinic their second year and had occasion to work with them individually for a few hours prior to that as part of our integrated lawyering program. The depth of the teaching relationships meant that Professor Chase and I had a great deal of trust in their capabilities: We treated them as colleagues during the briefing process.

In addition to their educational experiences in their casebook, clinic, and legal writing courses, historical factors affecting the law school also may have played a role in shaping this trio of students’ desire to contribute, even as the clock ticked down to graduation. The students of the 2013 Class were a motivated and talented group already, but this class worked to distinguish itself. At the time of graduation, the list of accomplishments of class members was long and memorable.18 If it appeared that students might have been trying to prove themselves over and above, there was a reason for that. The Class of 2013 at Rutgers School of Law–Camden found itself tossed in a political maelstrom at the very midpoint of their law school tenure, and the rest of their time in law school was one marked by the distraction of those politics, coupled with brand-confusion and swirling questions from outsiders about whether Rutgers–Camden even existed anymore.

On January 25, 2012, Governor Chris Christie stunned the law-school community when he announced during a press conference that, as part of a plan to restructure medical education in New Jersey, Rutgers–Camden would become part of Rowan University, a regional school in southern New Jersey. Under the plan, the regional school would be elevated to a research university, in part with the gift of the Camden campus of Rutgers University—the southern third of the Rutgers’ system. The main campus of Rutgers University, in return, would receive components of the remnants of the University of Medicine and Dentistry of New Jersey closest to New

18. Students in the class published seven expanded issues of the main law journal in one year to cure a backlog of almost three volumes; started a 501(c)(3) pro bono program; and worked on more high-stakes matters and wrote more briefs in the clinical programs than the clinicians could keep up with when it came time to select honors at graduation.
Brunswick. Not known for hesitation, Governor Christie announced this would all happen by the end of the legislative term and that Rutgers–Camden would be merged with Rowan at that time. There was no warning on the Rutgers–Camden campus leading to this announcement: It was a thunderbolt to staff and the student body alike. As the story unfolded, it appeared that the Rutgers University president had resigned himself to this plan and that legislators in our own county were falling into line with the Democratic leaders even though the net effect could economically hurt the county. What followed was a decision by the Rutgers–Camden chancellor to fight this announcement, and six months of grassroots campaigning, legal research, editorials, campaigning, and the retention of a nationally known attorney to represent the University Trustees who also opposed the action. During this time, there was a great deal of uncertainty about the future of the campus. The law school’s national reputation was in particular jeopardy, and admissions plummeted dramatically. Faculty and students fielded constant questions about the merger, and many people thought it had already taken place. All of this contributed to members of the Class of 2013’s commitment to proving they were still students of national caliber.


22. See id. at 356-72.

23. See id. at 355. The law school received only 25% of the applications it normally would have received during that year. Even with the downturn in law school applications nationwide, this was unprecedented and was attributed to the uncertainty caused by the announcement. The numbers stabilized the following year.
II. THE RIGHT CIRCUMSTANCES: THE DOMESTIC VIOLENCE RESTRAINING ORDER HEARING SYSTEM IN NEW JERSEY

The students’ efforts related to parties’ access to counsel at hearings for domestic violence final restraining orders in New Jersey. Those hearings are governed by the Prevention of Domestic Violence Act of 1991.\textsuperscript{24} Final Restraining Order (FRO) hearings are civil actions conducted in the Family Part of the Superior Court as bench trials and occur seven to ten days after the plaintiff files a complaint.\textsuperscript{25} The complaint performs double duty—at once providing notice to the defendant and acting as a request to the court for the protection of a temporary restraining order (TRO).\textsuperscript{26} The courts are always open for these matters. Depending on the day and time, a TRO may be issued at the time the application is filed, as determined by a superior court hearing officer, superior court judge, or municipal judge. The abbreviated time between the entry of a TRO and the scheduled hearing for an FRO is designed deliberately for speed, which in turn provides maximum safety to the plaintiff. It is also intended to be equitable to the defendant, as quick, \textit{pro se} summary dispositions theoretically offset the potential disruption caused by the \textit{ex parte} TRO. Entry of a TRO limits the defendant’s ability to access the family home, contact family members, access personal property (the defendant will typically have a few minutes, escorted, to collect some personal belongings), and possess firearms—including any service weapons needed for employment purposes, e.g., police officer.\textsuperscript{27}

But, despite the initial notion that the Act had created a simple method that allowed matters to be handled by the parties themselves appearing \textit{pro se}, asking indigent parties to navigate the system without the benefit of a right to court-appointed counsel has become increasingly problematic. The trial procedure of the final restraining order hearing has evolved in its legal and procedural complexity. At the trial to determine whether the TRO restraining order should be converted to an FRO, parties are expected to collect and bring any physical or documentary evidence they may have without the benefit of formal discovery,\textsuperscript{28} to authenticate any of the evidence as necessary, to issue subpoenas for witnesses to appear in advance of

\textsuperscript{25} § 2C:25-29.
\textsuperscript{26} § 2C:25-28.
\textsuperscript{27} § 2C:25-28(f)-(j).
\textsuperscript{28} N.J. Ct. R. 5:5-1 (West 2015).
the hearing, and to provide proper notice of any amendments to the complaint or motions. During the hearing itself, the pro se parties solicit testimony, cross-examine, object, and argue their cases in any closing statements—all of which is subject to the full body of the New Jersey Rules of Evidence.

The legal tests and standards trial courts must apply are no longer as simple as imagined when the Act was first enacted, but have increased over time since the passage of the Act. By way of illustration, approximately 200 published cases discuss issues related to just the entry of restraining orders. As the New Jersey Supreme Court recognized in 2011, constitutional due process and notice considerations apply in these cases just as in any other. The cases also require parties to present or refute evidence about a history of domestic violence and to argue that the history is related or not to the predicate acts of violence. Last, the parties must engage in an inferential analysis of whether the plaintiff “needs” a restraining order. What serves as an excellent and manageable learning challenge for third-year law students in a clinic setting often may be overwhelming to unrepresented parties who have little or no familiarity with legal proceedings.

The risk factors in these matters are very real for both parties. The plaintiff has made a calculated gamble of exposure and possible financial and community pressures by filing the action. The plaintiff bears the burden of proving the prima facie case in the action. If the plaintiff loses, he or she faces the possibility of returning home to that defendant after the plaintiff has publicly announced the abuse, and after subjecting the defendant to eviction, expense, and potential stigma. For the plaintiff, the hearing itself poses some high-stakes hazards. By succeeding, she or he will secure some protections to live independently and safely, with the promise of assistance of heightened police intervention. By losing, she or he will be at the

30. Per a search done for cases that cited the section of the statute governing the entry of a Final Restraining Order. N.J. STAT. ANN. §§ 2C:25-19, -28, -29.
34. See N.J. STAT. ANN. § 2C:25-29(a). The evidentiary standard makes the burden of proof on the plaintiff abundantly clear, “the standard for proving the allegations in the complaint shall be by a preponderance of the evidence.” Id.
most vulnerable point—at the mercy of a defendant who has just succeeded.

The entrance of an FRO leaves a defendant subject to twenty different types of permanent relief—twenty different consequences—that the court may order.35 Many of those twenty types of consequences will have already happened upon the entry of a TRO—such as the seizure of any weapons and the defendant’s ejection from the home shared with the plaintiff, with only a short time under police escort to collect some personal belongings.36 Further, with the entry of an FRO, the Act, in two places, attaches a stigmatizing phrase for the defendant, branding that person as an “attacker.”37 The courts have also referred to these defendants as “batterers.”38 By law, the stigmatizing label of “attacker” is made permanent by entry into the Domestic Violence Registry along with the defendant’s fingerprints.39 Other examples of consequences that attach at the time of the FRO include monetary fines, more permanent custody or support provisions, the possibility of mandatory psychological evaluations, and the possibility of mandatory counseling.40

Abbreviated time frames such as these summary proceedings make FRO hearings an excellent learning vehicle for third-year law students who wish to participate in a trial-practice clinic. There are few other areas of law where law students in a clinical setting may shepherd multiple cases from start to conclusion in the space of three months. The clinic is purposely narrow in its scope, with the goal of affording each team the opportunity to take several cases from start to completion in a semester. Law students work in teams representing plaintiffs in civil restraining order hearings—the New Jersey FRO system—and in matters closely related to those FRO hearings. The student representation typically begins when a case is referred to the clinic after the entry of the TRO, and the preparation

35. See § 2C:25-29b.(1)-(12), (14)-(18); § 2C:25-29.4; § 2C:25-29.1; § 2C:25-30.
36. § 2C:25-28(j), (k). These consequences, broadly speaking, range on limitations on liberty, monetary consequences, loss of right to occupy a residence, possess a weapon, or see one’s children. Direct parallels were drawn in the amicus brief.
37. §§ 2C:25-21, 23.
39. § 2C:25-34.
40. § 2C:25-29(b).
time is limited to approximately two or possibly three weeks assuming the trial court grants a request of a short continuance.41

Enrolling in the Domestic Violence Clinic is a weighty time commitment for the students. There is no prerequisite that students know either domestic violence law or courtroom skills prior to enrolling. Rather, beyond those of the student-practice court rule,42 the only prerequisites are the Evidence and Professional Responsibility courses. The bottom line is that in one semester, students are expected to learn the area of law and the basics of the dynamics of abuse, to learn courtroom techniques if they do not already know them, to prepare a case for a bench trial in a time-pressured situation, to handle ancillary matters such as custody and support, and ultimately to represent a client during a difficult time in the client’s life. Students find the experience to be intense and challenging but achievable. Prior to any court appearance, they have multiple meetings with the supervising clinical professor as well as a moot with class members—all with the opportunity for feedback. They also know that there is a licensed and seasoned attorney in court with them at all times. It is a popular clinic for students interested in trial work.

A. The Right Situation: The Cross-Complaints in the D.N. v. K.M. Case

Against this backdrop, in early 2013 these three clinic students learned of a woman, D.N., who in December of 2011 filed for a restraining order against her former husband, K.M.,43 K.M. filed a cross-complaint, seeking a restraining order against her. While Mr. K.M. retained counsel, Ms. D.N. did not. At the FRO hearing, the trial court urged Ms. D.N. to consider retaining counsel. Ms. D.N. explained that, while she would like to retain counsel, she could not

41. The related Rutgers–Camden Pro Bono Domestic Violence Project trains interested law students to provide legal information—neither legal advice nor representation—to litigants who are in the restraining order process. Volunteer law students provide this information either over the phone or at the county courthouse. Volunteers also update literature produced by the Project, which are sent to police stations in the county and to wherever else they are requested.
42. N.J. Ct. R. 1:21-3(b) (West 2015).
43. In the interest of confidentiality, New Jersey courts have ceased using party names and instead use initials or pseudonyms for parties in cases involving domestic violence. See N.J. Stat. Ann. § 2C:25-33(a); N.J. Ct. R. 1:38–3(a), (d). No record cites appear in this section because the record is sealed under the same statute and court rule.
afford to retain counsel because she was unemployed. Both parties alleged assault as the basis for the restraints. Ms. D.N. alleged that Mr. K.M., driving his truck, pursued her to a Walmart parking lot, veered towards her, and struck her with the truck’s side mirrors while she was standing on the truck’s running boards. Mr. K.M. conceded that he pursued Ms. D.N. to the Walmart parking lot, but denied striking Ms. D.N. with his truck and alleged that Ms. D.N. had slapped him earlier that day at the home the parties formerly shared. The record mentions at least two other TROs filed by Ms. D.N., which were dismissed by other judges, as well as two TROs filed by Mr. K.M. that were similarly dismissed. The judge hearing the matter on this particular occasion made note at the beginning of the hearing of the parties’ return to court.

From the early stages of the hearing, Ms. D.N. struggled with her responsibilities to represent herself pro se. When Mr. K.M.’s attorney attempted to admit police reports into evidence, Ms. D.N. attempted an untutored objection. When questioned on it by opposing counsel, she attempted to explain the objection but without a background was unable to articulate her reasoning until the judge eventually provided a prompt that objections are permitted when the document’s writer is not present in court. Ms. D.N. repeated these words back to the court, still not understanding the evidentiary requirements. The reports were then marked for identification, confusing Ms. D.N. Her attempts to object ultimately were fruitless. In a series of questions by his attorney, Mr. K.M. testified to the contents of the police reports, including the statements made by the police as well as the police officer’s thoughts—all of which were inadmissible hearsay.

During the course of the hearing, the trial judge heard other inadmissible hearsay in the form of statements allegedly made by the parties’ minor daughter, court personnel, and Division of Youth and Family Services personnel. Mr. K.M.’s counseled testimony also contained improper speculation, leading questions, and most notably improper medical testimony about Ms. D.N.’s mental health.

45. Id., supra note 44, at 9.
46. Id. at 9-10.
Specifically, Mr. K.M. testified to highly prejudicial statements in response to a leading question by his attorney that Ms. D.N. spent three weeks in a mental health hospital over a dozen years earlier, when the parties were first together. He also claimed, with no evidentiary support, that she had been diagnosed with bipolar disorder and exhibited “psychotic behavior,” for which she had taken a variety of medicines. No foundation of relevance was provided for this testimony. More importantly, Ms. D.N. lodged no objections to any of this improper testimony, allowing testimony to remain unchallenged on the record.

As a defendant to Mr. K.M.’s cross-complaint, Ms. D.N. conducted a similarly uninformed and ineffective cross-examination. The trial judge corrected Ms. D.N. several times, as she repeatedly made arguments or issued statements rather than asked questions. The court neglected to allow Ms. D.N. an opportunity to cross-examine Mr. K.M. while she prosecuted her case against him on her own TRO. Instead, the trial judge moved directly into the ruling, without providing Ms. D.N. an opportunity to make a closing statement. Of course, attorneys are aware that their clients are permitted to cross-examine witnesses and give closing statements, and an attorney representing Ms. D.N. likely would have insisted on doing so.

During her ruling, the trial judge failed to address undisputed testimony demonstrating that Mr. K.M. had pursued Ms. D.N. in his truck to the Walmart parking lot, where he confronted her. Instead, the trial judge ruled that Ms. D.N. had presented insufficient evidence of assault or injury to meet the burden of proof on her TRO. Accordingly, the trial judge dismissed Ms. D.N.’s TRO against Mr. K.M. At the same time, based on the evidence the trial judge heard, including the hearsay evidence, the trial judge granted Mr. K.M.’s FRO. The trial judge found that Ms. D.N. committed an act of harassment and that Mr. K.M. needed an FRO because of that act

49. Id. at 9-10.
50. Id. at 54. Very recently, a trial judge’s decision to grant a Final Restraining Order has been reversed for a failure to allow cross examination. C.H. v. J.S., No. A-5846-13T1, at *10 (N.J. Super. Ct. App. Div. Aug. 28, 2015), http://www.judiciary.state.nj.us/opinions/a5876-13.pdf (concluding that the “defendant’s fundamental rights to be heard were trampled by the hearing procedures employed” when the defendant was not permitted to engage in cross-examination and when the plaintiff’s case was based on text messages she neither described nor showed).
of harassment. The trial judge included in the FRO several of the twenty possible consequences to Ms. D.N., including a prohibition from any and all future contact with Mr. K.M., from owning or possessing any weapons, and from returning to the marital home or to Mr. K.M.’s place of work. The court gave Ms. D.N. a limit of twenty minutes to remove her boxed belongings from the marital home. She was ordered to pay a fine—although it was suspended because the trial judge’s uncertainty about Ms. D.N.’s ability to pay. Ms. D.N. was also told that she would be fingerprinted and photographed and that her name would be entered into a national registry.51

Finally, based on Mr. K.M.’s improper testimony about Ms. D.N.’s mental health, the judge ordered Ms. D.N. to undergo a psychiatric evaluation. In all, the trial judge’s order resulted in Ms. D.N. facing at least nine different consequences resulting from the entry of the FRO against her. Mr. K.M. faced no consequences.

B. The Appellate Division’s Affirmance

An attorney represented Ms. D.N. on an appeal—whether on a pro bono basis we never knew—arguing first that Ms. D.N. proffered sufficient evidence to sustain her claim of assault, as well as her requisite need for the entry of an FRO.52 Counsel argued that the consequences of the entry of an FRO warrant the appointment of counsel when a party cannot afford to retain one. The Appellate Division specifically quoted that part of the trial court record in which the trial judge asked Ms. D.N. if she understood what the “consequences” would be if she were found guilty of an act of domestic violence.53

The Appellate Division found no errors in the trial court’s considerations of the evidence. The Appellate Division rejected Ms. D.N.’s argument that the entry of the FRO results in consequences significant enough to warrant state-provided counsel for indigent parties in this type of civil action. The Appellate Division distinguished domestic violence restraining order hearings from other civil hearings—even other family court matters—in which New Jersey provides a civil counsel to indigent clients as cases in which the power of the state actor is pitted against an individual. In

51. Brief, supra note 44, at 11.
53. Id. at 154.
contrast, the Appellate Division reasoned that because the type of relief granted with an FRO is designed to prevent future harm to the plaintiff rather than punish a perpetrator or pit a powerful state actor against an individual, the special situations that would warrant a civil right to counsel are not warranted in domestic violence matters. Moreover, the Appellate Division, noting that the trial judge outlined to Ms. D.N. the possible consequences flowing from the entry of an FRO against her and offered her an adjournment to obtain counsel, concluded that Ms. D.N. understood what she was relinquishing when she moved forward with the hearing. Thus, Ms. D.N.’s decision was deemed legally relevant despite her statements that she was unable to afford counsel. Never discussed were the relatively few pro bono options available to Ms. D.N.

III. PERSUADING THE EXPERIENCED ADVOCATES WITH THE STUDENTS’ UNIQUE PERSPECTIVE

News of the Appellate Division decision was reported in the local legal newspaper, and while of interest to the two clinical professors, it was not something they saw as within their roles as clinical professors at that particular moment. They were soon persuaded otherwise by the three third-year law students. Those students did see it as a priority and saw the Rutgers Domestic Violence Clinic as the right organization to become involved.

The issue of a right to court-appointed counsel made sense to these advanced clinic students. While they were completing longer-term work from the prior semester and had a firmer footing because they were working on familiar projects, they nevertheless had fresh memories of their own steep learning curves in their previous clinic semester. They knew precisely how much work was involved with preparing a case for an FRO hearing because they had just finished being novices who had to go through the process. Moreover, the students comprehended the added complexities that attended a hearing involving cross-complaints in a way that they believed a pro se litigant would not.

The D.N. case originated in the county next to ours, in the southern part of the state where there are relatively few organizations

54. Id. at 158.
55. Id. at 159.
56. Mary Pat Gallagher, Domestic Violence Litigants Have No Right to Counsel at State Expense, N.J. L.J., Jan. 24 2013, at 1, LEXIS.
57. D.N., 61 A.3d at 151.
that are equipped to handle appellate briefs in the area of domestic violence. The students thus felt some community responsibility and believed that if we did not become involved, then no other organization would. Soon, these three third-year law students had persuaded the professors and the deans that they should be permitted to approach the attorney representing Ms. D.N. in the petition for certification to the New Jersey Supreme Court and offer to work with him on the petition.

Mr. Pettigrew, who ultimately became the student manager of the brief, took the initiative of contacting the attorney representing Ms. D.N.; simultaneously, we began speaking to the supervising attorney at the National Coalition for a Civil Right to Counsel, an organization also tracking the case.\(^{58}\) Initially the attorney who represented Ms. D.N. at the Appellate Division was interested in a partnership and provided copies of the transcript and lower court documents. Ultimately, after a few strategy discussions, he decided that he would file a very short petition in support of certification and possibly request leave for supplemental briefing after certification had been granted.\(^{59}\)

While the attorney’s approach is a common one, this did not work for the students or professors, either substantively or procedurally. The students’ thoughts about the arguments were operating on a different level, and their timing needs were fundamentally different by virtue of their own impending graduation and career trajectories. After graduation, Mr. Pettigrew, Mr. Gulbranson, and Mr. Natale were each moving to a federal or state appellate clerkship and knew that they would have to cease working on the case when they left the law school at graduation. That affected the timing of the filing, which in turn affected the procedural posture of what they could file. They were interested in devoting more intense time to the arguments up front, while they were still able to do so. In terms of the \textit{kairos}, this two-or-three-month window of time was the right moment in their legal education to work on this type of project.

Thus, what began as an idea to assist in writing the party brief became a project to write the brief as amici curiae in support of the grant of certification, filed by the clinic and the pro bono domestic violence program at Rutgers–Camden. We did not operate in

\(^{58}\) John Pollock, Esq., Coordinator of the Public Justice Center’s National Coalition for a Civil Right to Counsel Project.

\(^{59}\) This is permitted under N.J. Ct. R. 2:12-11 (West 2015).
consultation with the attorney representing Ms. D.N., nor communicate except to forward copies of the amicus brief. The students had the clinicians to help guide them and serve as resources, but otherwise they were now in the role of activist attorneys developing arguments.

At the time, the students were disappointed, thinking that this was almost a wasted effort—they believed that the certification was such a foregone conclusion that the amicus brief was superfluous. In retrospect, filing the brief that way was serendipitous. The court rules limit petition briefs to a maximum of twenty of New Jersey’s formatted pages in which to write an argument under any circumstances, which is equivalent to something around 6,000 words. The petitioning brief was eleven pages and under 2,500 words. In contrast, and based on Mr. Pettigrew’s research into non-standard methods of filing amici curiae briefs, the New Jersey Supreme Court granted the students’ motion to file the brief at the full length normally allowed to parties in appellate matters. Given the outcome, the denial of certification, the amicus brief ended up offering the students the richest opportunity to make the strongest arguments.

60. We did not see the party briefs until long after the New Jersey Supreme Court rendered its decision. However, neither did the National Coalition for a Civil Right to Counsel. E-mail from John Pollock, Coordinator, Nat’l Coal. for a Civil Right to Counsel, Staff Attorney, Pub. Justice Ctr. to Logan Elliott Pettigrew, 2013 Graduate, Rutgers Sch. of Law—Camden (May 30, 2013, 2:38 PM) (copy on file with author). Because the attorney had told us the intended contents, we assumed this was simply an oversight that was caused by his busy practice and thought nothing of it at the time. Upon learning that the National Coalition for a Civil Counsel did not have the briefs, the attorney immediately forwarded them. E-mail from John Pollock, Coordinator, Nat’l Coal. for a Civil Right to Counsel, Staff Attorney, Pub. Justice Ctr. to Ruth Anne Robbins, Clinical Professor of Law, Rutgers Sch. of Law—Camden (Feb. 24, 2015, 5:10 PM) (copy on file with author).

61. New Jersey’s rules require attorneys to use Courier New, double-spaced, with only twenty-six lines per page. N.J. C.R. 2:6-10. This requirement extends to electronic filings as well, except that the rules are relaxed with respect to the size of top margins. Id.


63. The filed brief was sixty-two pages in this formatting. Brief, supra note 44. Excluding the tables of contents and authorities but including everything from the statement of interest to the signature lines and credits, the word count shows at 13,053. Counsel has provided permission to the National Coalition for a Civil Right to Counsel to archive the briefs in the NCCRC’s state-by-state resources. State Map, NCCRC, http://www.civilrighttocounsel.org/map (last visited Dec. 10, 2015).
IV. THE RIGHT TOOLS: THE CIVIL RIGHT TO COUNSEL IN NEW JERSEY IS BASED ON “CONSEQUENCES OF MAGNITUDE”

At the heart of the arguments is the historical approach that the New Jersey legal system has taken when examining an indigent party’s civil right to counsel. Per the 1971 watershed case, decided only eight years after *Gideon v. Wainwright*, New Jersey already recognizes the right in a number of other legal scenarios. Guided by the New Jersey Supreme Court’s language, “[A]s a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.”

That 1971 phrase has evolved into a legal standard unique to New Jersey and at the heart of the petition for certification. A court’s conclusion that a civil proceeding involves a potential “consequence of magnitude” will trigger a civil right to counsel for indigent clients because the court will have adjudged those instances to have adverse outcomes that “can be as devastating as those resulting from the conviction of a crime.” The “consequences of magnitude” language appears in municipal court rules and judicial opinions, creating a right for indigent parties to state-appointed counsel in a variety of civil matters where the courts have found that right as part of a fair trial and equal justice. To date those situations include:

1. Any municipal matter that could result in incarceration;
2. Loss of motor vehicle privileges or a substantial fine in municipal court in the aggregate of $800;
3. Child support enforcement proceedings;
4. Involuntary civil commitment proceedings;
5. Megan’s law tier classification hearings;

64. 372 U.S. 335, 335 (1963).
68. Id. At the time of the amicus brief filing the amount was $750.
69. Pasqua, 892 A.2d at 671.
6. Loss of liberty such as the ability to own weapons or to move freely; 72
7. Criminal contempt for violations of FROs; 73 and
8. Proceedings regarding abuse, neglect, or termination of all parental rights. 74

The manner in which the students approached the synthesis of those circumstances formed the critical aspects of persuasion in the amicus brief.

Prior to the D.N. case, the issue of court-appointed counsel for defendants had been raised in 2007 at the trial and appellate levels when a defendant filed a motion to dismiss an FRO, arguing the entire Prevention of Domestic Violence Act was unconstitutional on a variety of grounds. 75 A family court judge agreed with certain points the defendant made; however, the judge nevertheless declined to find the Act unconstitutional based on a failure of provisions for the defendant’s right to state-appointed counsel. 76 The New Jersey Appellate Division reversed the trial court’s decision to find the Act unconstitutional based on the burden of proof. In doing so, it noted that the issue of the right to counsel had yet to be resolved by the courts, but the record did not reflect that the defendant ever sought the appointment of counsel prior to or during the adjudication, making the point “purely academic.” 77 The issue was not one of the six points addressed when the New Jersey Supreme Court affirmed the Appellate Division’s decision and presumably was not included

information about sexual crime offender registries available to the public. The amount of information available depends on the tier of offense.

76. See Crespo, 972 A.2d at 1177. The trial judge found the Act unconstitutional for using a preponderance standard burden of evidence rather than a higher clear and convincing standard. The Appellate Division in Crespo noted that the issue had already been determined by another Appellate Division case, Roe v. Roe, 601 A.2d 1201 (N.J. Super. Ct. App. Div. 1992), and took pains to quote Judge King’s opinion. As it happened, I was clerking for Judge King when the Roe decision was written and likely proofread the opinion as Judge King had his law clerks do.
77. Crespo, 972 A.2d at 1180.
in the petition for certification. It was therefore a novel issue when brought to the New Jersey Supreme Court in the petition for certification filed in 2013.

V. THE GRAND STRATEGY: BOTH PARTIES SHOULD HAVE ACCESS TO COUNSEL

From the beginning, the one concern that I and the other clinical professor raised was that of doing no harm to the majority of the clients of the clinic with the brief. The entire purpose of the New Jersey Prevention of Domestic Violence Act is to provide victims of domestic violence with a method of accessing legal protections that does not require a criminal conviction or even, necessarily, criminal charges. The idea of civil protections is one of using the court system to intervene when a power imbalance in the parties’ relationship has resulted in one or more acts of violence. Any brief we filed from the Domestic Violence Clinic had to argue for a right to counsel for both plaintiffs and defendants. The Rutgers Domestic Violence Clinic represents victims of domestic violence—plaintiffs in these matters for the most part. Although it may be easier to understand why an indigent defendant should be entitled to a right to counsel, we could not take that position by itself. At the same time, we did not believe that we could make a persuasive argument about indigent plaintiffs having access to counsel without also acknowledging the defendants’ rights. One of the students’ challenges became conceptualizing arguments that allowed them to present arguments for indigent defendants’ civil right to counsel that would not appear to subtract from indigent plaintiffs’ equal right. The theme of making the two arguments work in tandem was “symmetry.”

At the time, only New York had a statute that provided a right to counsel for both parties in domestic violence proceedings. Otherwise, by common law, one of only two published cases allowing the right in domestic violence restraining order hearings

78. Id. at 828.
80. See § 2C:25-19. The definitions do not discuss power imbalance explicitly, but the definitions of victim and acts of violence allow the inference.
81. Interview with Mark Gulbranson, Esq., 2013 Graduate, Rutgers Sch. of Law–Camden (Oct. 27, 2014).
82. N.Y. FAM. CT. ACT § 262(a)(ii) (West 2012) (referring to Article 8, Family Offense Proceedings); § 1120(a) (West 2010) (referring to right on appeals).
was a largely unnoticed trial level case, serendipitously, in New Jersey.\textsuperscript{83} The decision in that case turned on the plaintiff's young age. Plaintiff, who was seventeen at the time of the hearing, alleged that the defendant punched and broke her car windshield while she was sitting in the driver's seat. Plaintiff further alleged that this was not an isolated incident.\textsuperscript{84} The judge was troubled by the imbalanced courtroom scene in front of him and halted the proceedings, noting that there was no basis for this court to conclude that this minor plaintiff is in any way equipped to conduct this legal proceeding by herself, all alone against a represented adult. She has no legal experience with concepts such as direct and cross examination, introduction of evidence, or legal objections in a domestic violence case. She is a high school student and legally still a child, barely old enough to gain entry by herself into an R-rated movie fictionally depicting domestic violence.\textsuperscript{85} Using law students as the actors, Mr. Natale organized a re-enactment photograph of that imbalanced courtroom scene in the \textit{J.L.} case, taken in the law school courtroom, and photographed as if the judge were the photographer, looking down from the bench. We kept the photograph propped up in my office during the drafting process to remind the trio about the policy reasons behind the arguments for indigent plaintiffs, as well as defendants, requiring access to counsel during domestic violence restraining order hearings.

After that, the decision became the ordering of the arguments and the use of the persuasive techniques that the students had learned and utilized many times in their other clinic cases and in their legal writing work.

A. The Presentation of Arguments (and an Explanation of Why)

The legal argument was broken into four major parts, with a fifth serving as a conclusion. It is easiest to show the argument structure and rhetorical strategy side-by-side, in chart form.

\textsuperscript{83} See \textit{J.L. v. G.D.}, 29 A.3d 752 (N.J. Sup. Ct. Ch. Div. 2010) (holding that a minor plaintiff in a domestic violence restraining order hearing is entitled to the appointment of a guardian ad litem to provide her with an adult voice, and in this case the plaintiff was entitled to the appointment of counsel to represent her interests during the hearing). In the other published case, the Ohio Court of Appeals found a due process right for juvenile respondents to have appointed counsel in civil protection order proceedings. \textit{In re D.L.}, 937 N.E.2d 1042, 1046 (Ohio Ct. App. 2010).

\textsuperscript{84} See \textit{J.L.}, 29 A.3d at 754.

\textsuperscript{85} Id. at 756.
<table>
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<tr>
<th>Argument</th>
<th>Rhetorical strategy</th>
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<tr>
<td>POINT I. The twenty different consequences an FRO may entail render domestic violence proceedings categorically different from proceedings previously addressed under New Jersey’s civil right to counsel principles</td>
<td>The argument began with what Kathy Stanchi has called a “Foot-in-door” technique. That is a way to organize the arguments by leading with premise or statement with which the audience is likely to agree, and then chaining other requests from that point. It is easier to see how defendants are aggrieved by a lack of access to counsel, and therefore the brief began with this position. Making this decision to lead with an argument for the defendant was careful and deliberate—the Domestic Violence Clinic represents victims. The students and professors determined that the most credible way to argue for victims was to begin with the defendants’ rights.</td>
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| A. The body of law in New Jersey broadly conceives the civil right to counsel | This section suggests logical consistency across New Jersey law. To show the current inconsistency, the section contains a comparison of the same act by the defendant in two parallel court hearings as a way to demonstrate the current inconsistencies and unfairness to indigent litigants facing charges stemming from the same incident. If a person is charged with the crime of harassment, a petty disorderly offense, the matter would be heard in municipal court, and an indigent defendant would be entitled to a court-appointed counsel because of the fines and remote possibility of incarceration (if a repeat offender, for example). The very same acts of harassment, however, if used by the victim for the purposes of seeking a restraining order, could result in twenty different acts.

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consequences for the defendant. Those range from loss of ability to access the home, to loss of the right to own or carry a weapon, to mandatory drug testing and psychological counseling. But the law would permit no right to court-appointed counsel to the indigent defendant.

Mr. Pettigrew presented the comparison in chart form as a visual persuasion tool for the reader.87

<table>
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<tr>
<th>B. Domestic violence proceedings give rise to myriad consequences in excess of the “consequences of magnitude” already recognized by this Court’s right to counsel jurisprudence</th>
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<td>In addition to setting out the general principles of the “consequences of magnitude” law, this section spent time noting that the municipal court rule codifying the standard was a key and memorable analogy to domestic violence restraining order hearings. The analogy was designed to activate visualizations of municipal court hearings, which are also summary proceedings, with a long docket sheet of matters listed for hearing on the same day or evening. This is similar to the scene in a family courtroom on a day of domestic violence restraining order hearings. Persuasion is more effective when visualization is possible.</td>
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<th>1. Domestic violence orders result in a substantial loss of essential privileges</th>
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<td>These subsections used analogical reasoning to compare the loss of a driver’s license and the potential impact on employment to the loss of a professional license that the entry of a domestic violence restraining order has</td>
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87. For more on visual organizers used for legal analysis, see Steve Johansen & Ruth Anne Robbins, Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning, 20 LEGAL WRITING 57, 83-86 (2015) (including a discussion of the chart).
<table>
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<th>2. Domestic violence orders carry significant monetary sanctions</th>
<th>on an aggressor who is in certain types of licensed professions. Similarly, the entry of an FRO carries with it financial penalties in the form of two separate fines. Also assessed will be living expenses including child support, temporary spousal support as appropriate, and payment for two housing costs because the defendant cannot live in the same home as the victim.</th>
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<tr>
<td>C. Even if domestic violence proceedings do not give rise to consequences of magnitude, such actions impact fundamental interests</td>
<td>This section reviewed the other situations in which New Jersey has recognized a civil right to counsel for indigent parties. The students grouped those situations according to the types of fundamental rights they touched upon: reputation, liberty, and parental/property rights</td>
</tr>
<tr>
<td>1. Domestic violence actions engender social consequences and stigma</td>
<td>The social stigma of being labeled a domestic violence batterer relates to the stigma of being adjudged a Megan’s Law violator or to being involuntarily committed.</td>
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<td>2. FROs result in a loss of liberty for the defendant</td>
<td>In this section, the Constitutional right to bear arms is discussed as are the consequences of domestic violence restraining orders that impact the defendant’s speech (limitations on contacting certain persons) and on the defendant’s movements (restrictions on the defendant’s right to travel to certain locations such as where the plaintiff resides or works).</td>
</tr>
<tr>
<td>3. FROs impact fundamental parental and property rights that already carry a civil right to counsel</td>
<td>The argument in this section tied the custody changes caused by the entry of an FRO to the New Jersey Supreme Court’s language that the right to raise one’s child is more precious than property rights—language that created a right to counsel in parental termination cases. The entry of a restraining order normally involves</td>
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material changes to custody following an initial period of disruption between the entry of the temporary and the conclusion of the final hearing and any required evaluations.

**POINT II. The right to court-appointed counsel in domestic violence proceedings must flow to both parties**

Point I was relatively straightforward and flowed from the appellate decision. It is relatively easy for readers to understand why a defendant might need a civil right to counsel in a domestic violence hearing. Point II’s purpose was to connect the arguments to a civil right to counsel for plaintiffs as well as defendants. The theme in Part II was “symmetry,” and everything that Mr. Gulbranson wrote was designed to create a symmetrical argument with Mr. Pettigrew’s arguments in Point I.

The argument began with the purpose of the Act itself: to provide a broad form of protective relief to victims. A crucial argument for the plaintiff appears up front: In other right-to-counsel situations, the plaintiff is already represented by the State and does not need to request counsel. Domestic violence restraining order hearings are different and require both parties to be granted the right.

**A. Granting counsel to both parties in domestic violence proceedings fits within the protective framework established by the New Jersey Legislature and its Courts**

The New Jersey Supreme Court and the Attorney General has promulgated an extensive (294-page) Domestic Violence Procedure Manual as a guide for judicial and law enforcement personnel.88 Significantly, the manual outlines instructions for procedures involved with a two-tiered system based on a party’s ability to retain an attorney. That procedure of “civil restraints” permits a

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represented party to negotiate a settlement despite a statutory prohibition on negotiations.  

| B. One New Jersey court has already found that parties in a domestic violence proceeding must be on equal footing | The J.L. case was discussed with details selected to create the third visual impact moment in the legal argument. The message is, “It would run contrary to common sense principles as well as equity to allow the courthouse mechanism of protection to re-victimize the victim.” The case was not used as one of analogical reasoning but as policy-based reasoning. The same policies that led the trial judge to rule as he did in the J.L. case are pertinent to all domestic violence |

89. **N.J. Stat. Ann.** § 2C:25-29(a) (West 2015) provides, “[t]he issue of whether or not a violation of this act occurred, including an act of contempt under this act, shall not be subject to mediation or negotiation in any form.” This opportunity to enter into a consent stay-away order called “civil restraints” and is available to those parties who have children in common or who are going through divorce and who are represented by counsel. The trial courts will facilitate that process on a non-domestic violence docket number. These civil restraints do not involve the same criminal contempt protections as domestic violence restraining orders, but they do allow the plaintiff to return to court for enforcement under the normal family court negotiated agreement enforcement procedures. Entry of civil restraints avoids the consequences to the defendants related to the twenty types of permanent relief—there is no mandatory forfeiture of weapons or inclusion on the Domestic Violence Registry. Entry of civil restraints also avoids the potential trauma associated with a plaintiff testifying or with failing to meet a burden of proof and leaving the courthouse with no protections at all. The trial court may not facilitate the entry of civil restraints on its own initiative or suggestion, which means that either the parties must be aware of the possibility, or—as is most usually the case—at least one party is represented and suggests it as an alternative. In other words, cases with legally trained parties have more opportunities for resolution.

hearings. The re-enactment photograph was the inspiration for this section.

C. Victims of domestic violence, in seeking the court’s protection, face significant consequences of magnitude

In this section, Mr. Gulbranson wove in non-adjudicative and non-legal research discussing the social science research of reclaiming one’s autonomy. The hearing itself is consequential because it is likely the first time the victim has seen the aggressor since the precipitating actions that led to the TRO filing and because the victim has to testify to facts that are, by their nature, demoralizing and humiliating. The consequences to the victim of the entry or denial of an FRO are significant because they affect custody, finances, living situations, safety, and relationships.

Many law students would have had a hard time trying to discern an “IRAC” structure in this section. There wasn’t one.

POINT III. Both parties in domestic violence proceedings face the risk of egregious trial errors

A. The court admitted numerous hearsay statements into evidence and overlooked egregiously leading questioning

Finally, the facts of the case were used in this section as a demonstrative illustration of the vulnerabilities of unrepresented parties who do not understand the consequences of moving forward without counsel and who cannot afford to retain counsel even when the consequences are explained to them.

This was the first time that the facts of this particular case came back into the arguments. The facts were used to argue for granting certification of this case, rather than a future case. This case already presented the type of situation that highlights what can—and did—go wrong, procedurally, when a party requested counsel, but none was provided. This case was complex because the parties filed cross-complaints against each other. That the plaintiff filed two
<table>
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<th>the need for counsel in domestic violence cases</th>
<th>briefs as part of the primary certification package underscores the complexity. Because law students are more frequently asked to engage with facts for the purposes of analogical reasoning, i.e., fact-to-fact comparisons with prior case law, the use of the litigation-story facts in this alternative manner was not intuitive. Mr. Natale learned something about civil rights advocacy from writing this section and remembers this as a very interesting lesson. It was a very interesting teaching point, but also a more difficult one than the professors appreciated at the time.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Point IV. Providing counsel to domestic violence litigants is economically and practically feasible</td>
<td>The New Jersey Supreme Court has noted that practical considerations are relevant,(^9) and we knew the Court would be concerned about the feasibility of creating a right when there are between 14,000 and 15,000 cases heard each year. The argument here was attempting to show that solutions are attainable through the statutory scheme of a domestic violence surcharge that could be used for funding.(^2) The persuasive technique here was one of framing: We urged the court to frame the numbers county-by-county rather than statewide. Statistical data are kept on a countywide basis. The two counties with the largest caseloads also have multiple agencies, including the three law schools in the state.</td>
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B. The Students’ Reflections on the Process

None of these students remembers this brief as a simple one. Brief writing in the abstract was not an issue for these students: Mr.  

92. N.J. STAT. ANN. § 2C:25-29.4 (authorizing a surcharge, proceeds to be used for program funding).
Pettigrew had dashed off a short motion brief during the fall semester Domestic Violence Clinic and received enough praise from a trial judge for other clinic students to try to mimic it. But, in discussions afterwards, the students noted that it is “remarkably different” in several respects to write a brief as amici curiae because their lawyering education to that point had focused on legal analysis in the context of client representation.

Mr. Natale, the student who was the most committed to civil rights issues, found that he particularly struggled with the format of the brief because, as he said afterwards, he kept “losing his place in the case” and trying to determine what his role was with his section of the argument. It took him time to come to terms with the fact that his task was to focus on the small generic issues that happened at trial and to present them in the aggregate as representative of the problem with this group of litigants having no access to a right to counsel. Initially he put a great deal of pressure on himself to win the case for Ms. D.N. based on her story. He kept forgetting, he reflected afterwards, that it was not his job to tell Ms. D.N.’s story for the merits—that was the role of her actual attorney. After the fact, Mr. Natale has spent the most time continuing to think about the issues and about what else could be done to build towards response-changing in this area of law. In contrast, Mr. Gulbranson reported that when he agreed to write the section of the brief arguing the victim’s right to counsel, he did not fully appreciate the complexity of the arguments until he was mired in the material. He also found it difficult to maintain perspective while “inside the arguments” but used the symmetry theme as his way of staying grounded. As an aside, Mr. Gulbranson told me that until this brief he had not fully

93. Interview with Mark Natale, Esq., 2013 Graduate, Rutgers Sch. of Law–Camden (Oct. 27, 2014).

94. Id. Mr. Natale talked about books he read that taught him the same lessons including, naturally, ANTHONY LEWIS, GIDEON’S TRUMPET (Vintage Books 1989) (1964) (telling the story behind the landmark case of Gideon v. Wainwright). The two other books were GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA (2013) and RAWN JAMES JR., ROOT AND BRANCH: CHARLES HAMILTON HUSTON, THURGOOD MARSHALL, AND THE STRUGGLE TO END SEGREGATION (2010).

95. Persuasion is an attempt by a speaker to elicit a response in the audience. To simplify, there are three types of possible responses: creation (when the audience has no prior knowledge), reinforcement of an existing behavior or belief, or change to a behavior or attitude. The last is the most difficult response to achieve. Gerald R. Miller, On Being Persuaded, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 3-16 (James Price Dillard & Michael Pfau eds., 2002).
appreciated the importance of Brandeis Briefing. Although he had used the technique in other brief writing situations, he had done so because he felt it was expected rather than because it felt right.96

The style of the writing also took the students outside of their comfort zones. Mr. Pettigrew brought up this point early in the process—for this brief he felt his tone shift away from a large law firm perspective and into that of a public interest attorney.97 He also continued to question the use of a chart in the very early pages of the argument section he worked on—a chart that we debated for some time during the drafting stages. As of a year after filing the brief, he was still unsure whether he would have included it, if left to his own devices.98 Mr. Gulbranson’s writing was already very good, but he turned a corner during this brief. His writing became more like that of a seasoned appellate attorney. There was a narrative flow not often seen in law student writing. Most of the brief is like that, in fact—there is very little of the student left in the writing style.99

VI. KAIROS PASSED BY . . . THE DECISION

The New Jersey Supreme Court informed us eight months later that it had denied certification. By that time, in January 2014, the students were already sworn in as members of the bar and were deep into their clerkships. Nevertheless, all three paused their day to react immediately, with surprise and dejection. Any wonders why were answered immediately in the wonderment of the published decision along with the published dissent. It took a day for the import of having a published opinion and dissent to sink in.100

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96. Interview with Mark Gulbranson, supra note 81.
97. That is, he had to shift his normal writing tone as part of responding to the rhetorical situation. The students were exposed to Lloyd Bitzer’s idea of the rhetorical situation as applied in lawyering during the revamped moot court course. See Jason K. Cohen, Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom, 8 LEGAL COMM. & RHETORIC: JALWD 73, 75-84 (2011), relying on the work of Lloyd F. Bitzer, The Rhetorical Situation, 1 PHIL. & RHETORIC 1, 6 (1968).
98. E-mail from Logan Elliott Pettigrew, Esq., 2013 Graduate, Rutgers Sch. of Law–Camden to Ruth Anne Robbins, Clinical Professor of Law–Camden (deleted from files) (June 2014) (sent in response to question for presentation preparation for Legal Writing Institute Biennial Conference, Phila., PA, July 2014).
99. Five semesters of legal writing for two of the students and six semesters for the other. Mr. Natale still likes to harangue me for not teaching him all six.
The *per curiam* opinion focused on pragmatic concerns it associated with permitting the parties a right to seek counsel provided by the State. For the 2012–2013 court year, the court noted that there were 15,800 FRO hearings, and the opinion noted that the Administrative Office of the Courts maintains records that the vast majority of both plaintiffs and defendants are unrepresented.\(^{101}\) New Jersey operates a system of pro bono assignment of private counsel for indigent defendants, but assigns only 1,200 cases per year.\(^{102}\) The opinion concluded with the statement that this case did not appear to be the right vehicle because Ms. D.N. did not assert that she was indigent nor ask the trial court to appoint counsel.

It is in Justice Barry T. Albin’s published dissent, however, that the students found some gratification. As mentioned, Justice Albin’s dissent is longer than the *per curiam* decision. In it he listed the consequences that a defendant faces, any of which would create a right to the appointment of counsel by themselves: the loss of custody and possession of a home; large fines; the placement of her name on a registry, which in turn could jeopardize her ability to maintain or secure employment or credit; and the right to possess a firearm. Moreover, Justice Albin found it unreasonable to expect an uncounseled and untutored person to know how to assert her right to request counsel.\(^{103}\) He thought that the *D.N.* case was appropriate for certification of this issue.

His dissent then reviewed the history of the civil right to counsel in New Jersey as it relates to the right to a fair trial, chiding “those who expect this Court to remain at the forefront of ensuring a fair adversarial process for the poor who face serious consequences of magnitude in civil cases.”\(^{104}\)

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101. *Id.* at 825-26. It is cheering to notice that the opinion mentioned both plaintiffs and defendants—that is, the majority of justices appeared to be entertaining the issue as one of a right attaching to both parties at the hearing.

102. *Id.* at 826 (upholding the constitutionality of the system) (citing *Madden v. Township of Delran*, 601 A.2d 211 (N.J. 1992)).

103. In fact, Ms. D.N. told the judge that she could not afford counsel, although she did not technically claim to be indigent.

104. *D.N.*, 83 A.3d at 827 (Albin, J., dissenting). Comparable to the famous *Gideon v. Wainwright* decision in the United States Supreme Court, New Jersey’s germinal case articulating the right to counsel in state criminal cases is *Rodriguez v. Rosenblatt*, 277 A.2d 216 (1971). Justice Albin referenced both cases while writing to his colleagues, “Had the United States Supreme Court taken the cost-analysis approach, *Gideon* would not be on the books today, nor would *Rodriguez.*” *D.N.*, 83 A.3d at 828.
In his last major point, Justice Albin listed the many consequences that flow from the entry of an FRO and asked a rhetorical question, the language of which is telling. “How can our jurisprudence reconcile the right of appointed counsel to a defendant facing a $750 fine or a one-day license suspension in municipal court with the denial of that right to a defendant who is facing much more serious consequences in Superior Court in a domestic violence cases?” In that question, the students could see the effect of their persuasion. Justice Albin found persuasive the comparisons of summary proceedings in municipal courts and domestic violence courts. He was also persuaded by the comparison between a relatively minor matter handled in municipal court to the bullet-point list of twenty consequences flowing from FROs, although he might have preferred driving license suspensions to have appeared on the chart instead of harassment.

The language of the published denial of certification, taken with the dissent, holds open the door for another opportunity. In re-reading the briefs, the arguments still ring true. It was not the arguments, it was not the writers, and it probably wasn’t the parties. It must have been the wrong moment in time.

A. The Wrong Moment in Time for New Jersey

Given the political milieu of the 2012–2013 court term and the logistical difficulties that a ruling allowing a right to counsel for 31,000 litigants annually might entail, it seems obvious in retrospect that the timing was not right for the New Jersey Supreme Court to take up the issue. We knew, going in, that there would be difficulties and challenges to the court accepting the arguments, but we were naïve, perhaps, in assuming that the case would be decided on its merits. In retrospect, the decision the New Jersey Supreme Court made to decline certification was the second best for which we could have hoped. The published decision and dissent are priceless tools allowing advocates to consider carefully the best way to tailor future advocacy.

At the time of the briefing, the state of New Jersey was facing serious financial woes—as were many states. At the same time, the

105. Id.
106. The driving license suspension comparison came up three times in the brief—it was argued.
New Jersey Supreme Court was still the unwilling participant of what one legal scholar has analogized to a three-ring circus involving all three branches of government and lasting several years, beginning in 2010. The origin of the struggle with the New Jersey Supreme Court did not originate in one specific court action, although certain hot-button items exacerbated the tensions. Governor Christie has publicly criticized justices for what he sees as judicial activism particularly on issues involving state funding for public issues relating to some of the citizens with the least ability to speak for themselves. For example, he openly criticized Justice Albin in 2011 on the issue of school funding in poorer school districts, and he criticized Chief Justice Rabner in July 2013 about the Court’s decision on the issue of affordable housing. Lambda Legal pointed to the same public justice hot-button items in a 2014 video.

gov/transparency/debt/pdf/2013_Dept Report.pdf (listing New Jersey as the state with the fourth highest debt per capita rating).


109. For example, at town hall meetings several weeks before the decision was released, Governor Christie publicly disparaged Justice Albin making remarks during the hearings that pertained to taxation decisions made during the Christie Administration—comments that led editors of one New Jersey newspaper to publish an editorial calling attention to the vitriol. See, e.g., Editorial, The Attack on Justice Barry Albin, STAR-LEDGER (Apr. 28, 2011, 5:30 AM), http://blog.nj.com/njv_editorial_page/2011/04/the_attack_on_justice_barry_al.html (criticizing Governor Christie for attacking Justice Albin, calling it a “new low,” “tasteless,” and a “cheap and dishonest attempt to demonize Albin by distorting his statements [about] school funding”). Justice Albin was not the author of a school funding decision in 2011 that ordered the state to spend $500 million more than had been budgeted on public education in the identified poorer school districts. Abbott ex rel. Abbott v. Burke, 20 A.3d 1018, 1023 (N.J. 2011). Justice Jaynee LaVecchia authored the opinion. Justice Albin filed a concurring opinion. Id. at 1100 (Albin, J., concurring).

110. Martin Brickett, NJ Court Checks Gov. Powers with Affordable Housing Ruling, LAW360 (July 10, 2013, 7:52 PM), http://www.law360.com/articles/456110/nj-court-checks-gov-powers-with-affordable-housing-ruling. Governor Christie attempted to abolish the state’s Commission on Affordable Housing (COAH). Instead, the Court ruled that the Governor could not do so without following a particular set of procedures, based on certain reorganization structures in the state that also govern Rutgers University and that prevented the Legislature from severing Rutgers–Camden from the university. Governor Christie’s comments about Chief Justice Rabner on the decision were termed “blistering” by the reporter. Id. To put this in temporal context, this statement by Governor Christie was made approximately two months after the briefs were submitted in support of certification in the D.N. case.
discussing judicial independence issues in New Jersey.\textsuperscript{111} To grant certification on this civil right to counsel case could very easily have opened a new chapter of bitter words directed at another group of underrepresented litigants in the state. While it does not lessen the students’, nor this professor’s continuing belief in the merits of the issue, it redirects some energies towards contemplating what an infrastructure might look like that could support a legal decision in favor of a civil right to counsel.

B. The Thread, Pulled

The resolution of the \textit{D.N.} petition for certification captured the attention of the editorial board of the New Jersey Law Journal as the direct result of the New Jersey Supreme Court’s published denial and dissent of certification.\textsuperscript{112} The case has also been the subject of an opinion/editorial piece designed, also, to raise awareness.\textsuperscript{113} John Pollock, the staff attorney at the Public Justice Center and the Coordinator attorney at the National Coalition for a Civil Right to Counsel has said that the New Jersey Supreme Court’s denial of certification was his biggest blow of 2014. I have encouraged him to see it not as a loss, but as a first step.

\textsuperscript{111} Lambda Legal, \textit{Bullying the Bench: Gov. Christie’s Attack on New Jersey’s Court} (May 5, 2014), https://www.youtube.com/watch?v=1Cf7JAf9nM. Lambda Legal was not lobbying for gay marriage when it made the video (gay marriage was already legal in New Jersey at the time), but was lobbying for the reappointment of Chief Justice Rabner, whose reappointment was in doubt not on the merits but for political concerns. Lambda Legal’s concerns for Chief Justice Rabner stemmed from comments made by Governor Christie during the gay marriage case, who was open with his plans to “reshape the court,” based on his belief that it “has repeatedly strayed from its purview and overstepped its role.” Editorial, \textit{Obvious Inequality}, N.Y. \textit{Times} (Aug. 14, 2013), http://www.nytimes.com/2013/08/15/opinion/obvious-inequality.html?ref=opinion&_r=2&. Previously, Governor Christie had declined to reappoint two other justices: the first governor to decline to do so since New Jersey’s 1947 Constitution. The video builds a theme that the success of civil rights in New Jersey turns on the independence of the judiciary. The history of judicial reappointments in New Jersey is part of the same history of the judicial crisis of 2010–2014 and has been the subject of several law review and mainstream press articles as well as a Rachel Maddow segment on MSNBC, but is outside the scope of this Article.

\textsuperscript{112} Editorial, \textit{Domestic Violence Counsel}, N.J. L.J., Jan. 17, 2014), at 1, LEXIS.

Linda Berger suggests that some dissents operate as her proverbial pulled threads in the social fabric of the sky that may be tugged at an opportune moment when it appears in a different chronological time.\textsuperscript{114} What is a dissent in one case may become the basis for a majority decision in the next.\textsuperscript{115} Justice Albin himself has assured other Rutgers Law students at their 2015 graduation ceremonies that a dissent may lay a claim on the future.\textsuperscript{116} In the \textit{D.N.} decision, the majority of the New Jersey Supreme Court clearly held open the door for the possibility of revisiting the issue with another case on another day.

Some of the language used by courts in later decisions since January 2014—when the New Jersey Supreme Court filed its opinion—suggests that there may be a slight shift in view. Since January 2014, the Appellate Division’s ruling in \textit{D.N.} has been cited three times when parties represented themselves \textit{pro se} at the FRO hearing after requesting and being denied an adjournment or second adjournment to seek legal counsel.\textsuperscript{117} In each case, the Appellate Division cited the same language from \textit{D.N.} calling attention to the importance of legal representation at FRO hearings, “[d]ue process . . . does allow litigants a meaningful opportunity to defend against a complaint in domestic violence matters, which would include the opportunity to seek legal representation, if requested.”\textsuperscript{118}

Certainly, in those cases, the courts presumed the party’s ability to afford that representation when speaking of due process rights. But, one panel of appellate judges remanded the entry of an FRO for a new trial, indicating its unease with the decision of the trial court to move forward with a hearing when it was clear that the defendant understood neither the mechanics of the trial process nor

\textsuperscript{114} Berger, \textit{supra} note 13, at 19, 28-29. She referred to it as the “fabric of the social sky” at the Applied Legal Storytelling Conference.

\textsuperscript{115} \textit{Id.} at 21 (discussing the way Justice Holmes characterized a dissent in a whole new light to use it as a springboard for a majority decision).

\textsuperscript{116} Barry T. Albin, J., Supreme Court of N.J., Address at Rutgers Univ. – Newark Law Sch. Commencement (May 22, 2015), https://www.newark.rutgers.edu/justice-barry-t-albins-address-students.


the consequences of not understanding the mechanics. The defendant in that case did not express a wish to retain counsel but rather indicated a willingness to listen to the plaintiff’s testimony and “take it from that point,” although the defendant also told the judge during a colloquy, “I really don’t know what’s going on.”119 The court was quick to point out that this alone might not have resulted in plain error, but that a subsequent turn of events during the trial implicated additional due process rights, requiring a reversal. Analogous to the mental health and hearsay evidence permitted at trial in the D.N. case, the plaintiff in the S.C. case testified to expanded allegations beyond the scope of the TRO, which the trial judge permitted and relied upon when granting the FRO, in violation of the defendant’s due process rights.120 These are precisely the types of trial errors that suggest the need for a right to counsel to ensure the party’s right to a fair trial.

New Jersey may not have had its opportune moment, but the moment is beginning to happen in twenty-eight other states plus the District of Columbia.121 The most advancement has happened in states nearby. Maryland is on track to become the second state in the country to have a right to counsel in civil domestic violence cases. A Legislative Task Force released a report in October 2014 recommending a right to counsel in civil domestic violence cases.122 New York already granted that right by statute, but has since gone further. In mid-June 2015, both houses of the New York Legislature adopted a concurrent resolution supporting a statewide policy of “legal assistance for persons in need of the essentials of life.”123 The resolution is not binding, but idealized and was moved to the top of

119. Id. at *6.
123. CON. RES. C776/B2995 (N.Y. 2015); see also Joel Stashenko, Legislature’s Resolution Supports Civil Gideon, N.Y. L.J. (June 29, 2015), http://www.newyorklawjournal.com/id=1202730718872/Legislatures-Resolution-Supports-Civil-Gideon.
New York’s Office of Court Administration priority list this year. New York claims it leads the nation with the resolution and defines “essentials of life” very broadly, but the standard’s wording sounds familiar, an echo of New Jersey’s “consequences of magnitude” language. The Chief Justice of the Connecticut Supreme Court has also announced that the state is exploring the issue of providing counsel in all civil matters, calling it “particularly important when such issues as housing, family matters, access to health care, education and subsistence income are being decided.”

The students have accomplished something already by putting on New Jersey advocates’ radar the problematic procedures in play when either party cannot afford to retain counsel for an FRO hearing. Any change to the law that could implicate legal services on a large scale will realistically take time and additional advocacy. And, in reality, the issue was not waving brightly in New Jersey for any advocate to see as a priority problem before the students asked the Rutgers Domestic Violence Clinic to participate in the D.N. case. Advocates are now forced to address it, and at least a handful see it as a priority topic. The students’ reach has extended beyond the walls of the building—something very few students can look back and say about their law school years. In the scheme of civil rights advocacy, that is a lot of bang for the buck. These students may not have ripped the fabric of the social sky, but they have at least snagged a thread in its weave.

124. Stashenko, supra note 123. Domestic violence litigants already have a right to counsel. See supra note 82 and accompanying text.

125. Video: Connecticut Bar Association Annual Luncheon Meeting (June 15, 2015), http://ct-n.com/ctnplayer.asp?odID=11660 (reciting statistic that 85% of family court litigants represent themselves and calling on the state to confront these Civil Gideon questions, at 14:12); see also Michelle Tuccitto Sullo, Incoming CBA President Looks to Expand Membership, Cultivate New Leaders, CONN. L. TRIB. (June 18, 2015), http://www.ctlawtribune.com/id=1202729857427/Incoming-CBA-President-Looks-to-Expand-Membership-Cultivate-New-Leaders?mcode=1202615402746&curindex=2 (supporting the Chief Justice’s idea of Civil Gideon in all cases and hoping that a dialogue with bench and bar will provide solutions to the funding questions).

126. Neall, supra note 122. The Maryland recommendation, for example, proposes a four-year phase-in of funding and offers suggestions for ways to deliver cost-effective legal services to litigants using existing providers. Id.
The Impact of Counsel:  
An Analysis of Empirical Evidence

Rebecca L. Sandefur

INTRODUCTION

In this article, I provide three lenses on empirical evidence about the American public’s experience with civil justice problems: the depth of public experience, the scope of public experience, and the impact of counsel on public experience. The analysis of empirical evidence reveals a fundamental problem with traditional U.S. thinking and policy concerning access to justice: both are too narrowly focused on law and formal legal institutions. To move forward, we need both new understanding and new policies. New understanding comes from viewing justice problems from the public’s perspective. New policies should include providing effective, accessible, nonlegal routes to solutions for common and significant civil justice problems; these routes will be a necessary complement to the traditional solution of more access to law.

The first two sections of this paper assess empirical evidence about how frequently Americans encounter civil justice problems and how these problems affect them and society at large. Millions of Americans are currently experiencing significant civil justice problems. Such troubles are common and widespread, and their impact both on the people who experience them and the public as a whole can be deep and long lasting. This article’s third section reviews evidence about how lawyers affect public experience with civil justice problems, focusing particularly on how lawyer representation changes the outcomes of adjudicated civil cases. Most Americans’ civil justice problems are never taken to lawyers for advice nor are they pursued in courts or tribunals. When justice problems do become cases that are adjudicated, many people appear without attorneys. When
people are represented by attorneys, they are, on average, more likely to win in adjudication than are people who are unrepresented. But how much more likely varies greatly; the observed difference in case outcomes between attorney-represented and unrepresented members of the public varies widely across different kinds of civil justice problems and different studies of lawyers’ impact. One factor that seems to shape variation in the magnitude of lawyers’ impact is procedural complexity—the complexity of the documents and procedures necessary to pursue a justice problem as a court case appears to account for some of lawyers’ effect on case outcomes.

Taken together, these findings support some traditional calls for reform, but they also suggest innovative avenues through which the United States might expand access to justice. Observers have advocated perennially for greater access to law—more access to counsel and simplified procedures that would allow ordinary people to pursue civil cases without legal representation. These traditional routes to expanding access to justice are clearly indicated. However, they will not go far enough. The solution is not more of the same; it is, rather, something new entirely. Our typical ways of conceptualizing people’s experiences with civil justice problems focus too narrowly on law. Stepping back to look at the whole canvas of public experience with civil justice problems reveals that we need not merely additional access to law, but also more creativity in thinking about access to justice.

I. The Depth of Civil Justice Problems’ Impact

For many members of the American public, civil justice problems emerge “at the intersection of civil law and everyday adversity.” These problems can involve family relationships, work, money, insurance, pensions, wages, benefits, housing, and property—to name just a few areas of contemporary life. Though these different types of problems affect different aspects of peoples’ lives and concern different kinds of relationships, they share a
certain important quality: they are problems that have civil legal aspects, raise civil legal issues, and have consequences shaped by civil law, even though the people who experience them may never think of them as “legal” and may never attempt to use law to try to resolve them.10 Such problems are both common, as I will describe in the next section,11 and impactful, as I illustrate in this one.

A clear image of the depth of impact of civil justice problems is provided by allowing members of the public to speak for themselves about their own experiences. I tell a single story here, but it represents many. It comes from a series of focus groups that I conducted in two midsize cities in the Midwestern region of the United States during the autumns of 2005 and 2007. Participants in these groups were randomly selected to be invited to spend a couple of hours on a weeknight in a library or community center meeting room to discuss “problems facing American families today.” The first exercise in the focus groups was to go around the room and ask each person to tell a story about a problem that he or she had experienced in any of a variety of different arenas including with housing, finances, bills, child support, divorce, and the like. The focus group facilitator and I made no mention of the fact that the study was about civil justice problems or law; we simply asked people to tell us about problems they were having.12

Countless aspects of life in contemporary market democracies are shaped by civil law, so it will come as no surprise that a substantial proportion of everyday problems that people in the focus groups described were civil justice problems.13 By this, I do not mean that people thought of these problems as “legal” problems—they typically did not—nor that these problems were necessarily best resolved through law. Rather, these problems raised civil legal issues, had civil legal aspects, and had consequences shaped by civil law, as the story I am about to recount illustrates.

This account was related by a woman in her mid-thirties. Though she earned too much to meet the means-tested requirements for Legal Services
Corporation (LSC)-funded civil legal aid (an income less than 125 percent of the federal poverty level), her family’s income was still low in relative terms—less than 80 percent of her county’s median income.\textsuperscript{14} As we sat in plastic chairs around a slightly sticky table in the small community center’s classroom, drinking soda and eating cheese crackers and oatmeal cookies, this is the story that she told:

About five years ago, I used to pay insurance. I used to pay about $300 of insurance for my kids and then my kids weren’t going to the doctor, so I decided I was going to take them off insurance and go on [Community Care, her state’s insurance program for low-income children]. Well, right as I almost qualified for [Community Care], my thirteen-year-old got killed. So then, he didn’t have no health insurance and neither did my fifteen-year old, who also got shot.

So then that leads back down here to collections and [the hospital] wants me to pay for it. And I keep telling them, “I’m not paying for that.” So they want me to get a loan so that I can pay for it. So what I did was go back to the district attorney’s office and see if the people who killed my son, pay for it. But since they’re in prison, it’s going to be on my credit forever. So that causes me a lot of pain because I can’t even look at buying a house. Because they want me to pay for it and wait until the money trickles, you know, from here to thirty years. . . .

This is a particularly tragic account of experience with civil justice problems. It is not unique, however. As with many situations people described in the focus groups, here, an initial problem triggered a series of problems that would affect the lives of those involved for many years to come. Significant civil justice problems and the consequences they create are neither exceptional nor unusual.\textsuperscript{15} Civil justice problems can have a wide-ranging and deep impact, not only on the people who experience them, but also on the societies in which these people live, both as illustrated above and as documented in research based on large, national population surveys.
Scholars working with the England and Wales Civil and Social Justice Surveys have found that people’s experiences with civil justice problems can lead to physical health problems, mental health problems, the breakdown of family relationships, loss of housing, lost employment, and lost income—among other adverse consequences. An initial civil justice problem can thus cascade into a shower of problems, some related to civil law and others not.

The impact of civil justice problems is borne not only by the people who experience them but also by society at large. Research in the United Kingdom reveals that the adverse health consequences of civil justice problems can lead to increased public expenditures on the provision of medical services. It also shows that lost employment as a consequence of civil justice problems can lead to increased expenditures on public benefits. It further documents that, while some people who lose their housing as a result of civil justice problems are able to find new shelter, others are not and so must stay in temporary accommodation, some of which is publicly subsidized and, thus, represents an additional public expense.

As other research shows, the costs are not solely fiscal in nature. A study drawing on a recent Canadian survey of public experience with civil justice problems finds that “[t]he mere fact of experiencing” a civil justice problem—whether or not the problem involves contact with the law or the justice system—is “related to the view that the law and the justice system are unfair.” This sense of unfairness appears to be exacerbated when justice problems go unresolved. These deep and wide-ranging consequences flow from civil justice problems that are quite common in contemporary America.
II. THE SCOPE OF PUBLIC EXPERIENCE WITH CIVIL JUSTICE PROBLEMS

The United States’ more than three hundred million people\(^{23}\) experience many problems that have civil legal aspects and raise civil legal issues.\(^{24}\) Here, and in other western market democracies, these problems are so common as to be “nearly normal features of everyday life.”\(^{25}\) The best estimates available for the scope of the American public’s experience with civil justice problems are based on information that was collected long before the recent recession. In fact, the most recent survey of the population is from 1992, and it provides information representing the experiences of only a portion of the American public.\(^{26}\) This 1992 survey is not comprehensive, as it excludes one-fifth of the population, the highest-earning 20 percent of households.\(^{27}\) The last truly comprehensive surveys of public experience with civil justice problems are more than three decades out of date, conducted in the 1970s.\(^{28}\)

Like most contemporary civil justice surveys, the 1992 survey presented respondents with lists of specific problems, each carefully selected to be problems that raised issues in civil law, and then asked whether respondents had experienced each during a specified period of time before the survey—in this case, one year.\(^{29}\) General categories queried included those involving family, work, benefits, housing, debt, credit, and neighborhood problems. Specific problems included events like “not having money to pay bills,”\(^{30}\) “serious dispute with tax people,”\(^{31}\) “had difficulty collecting pay,”\(^{32}\) and “separation, divorce, or annulment.”\(^{33}\)

The 1992 U.S. survey revealed that about half of surveyed households had been experiencing at least one serious civil justice problem in the twelve months prior to the survey.\(^{34}\) If one project forward that rate of problems experienced to today, the projection implies that more than forty-four million households (in which live more than one hundred million people) are experiencing at least one nontrivial civil justice problem.\(^ {35}\)
One hundred million people affected each year may seem staggeringly large—it is on the order of one-third of the U.S. population—but it is in fact a conservative estimate for the scope of the American public’s experience with civil justice problems. More than one hundred million people are estimated to live in households with incomes of less than $90,000 a year and are experiencing at least one civil justice problem—this excludes the justice problems experienced by the rest of the population, the additional 90.9 million people who live in households with incomes of $90,000 per year or more.36

But one hundred million affected each year is a conservative estimate, even for the justice problems of the low- and moderate-income public. The current recession will likely have increased the number of people experiencing hardships like foreclosure,37 job loss,38 trouble paying medical bills,39 difficulties with consumer debt,40 and eviction41—all of which can produce civil justice problems or be civil justice problems in and of themselves.42 In addition, the survey techniques used in the 1992 national study may lead to underestimates of how often people experience different kinds of justice problems. Traditional surveys typically use the past twelve months to five years as their frame of reference when asking people to report on their justice problems.33 Some scholars argue that the retrospective focus of such studies leads to underreporting because people fail to remember or report all the problems that they have experienced in the past.44 A recent study estimates that these kinds of surveys may understate the incidence of civil justice problems by a factor of as much as two-thirds.45 We can conclude, therefore, that the American public faces a substantial volume of civil justice problems—probably many more problems than suggested by the most recent U.S. civil justice survey.

Under any expansion of access to legal services, whether as a right or through other means, only some of these more than one hundred million people living with civil justice problems would likely be eligible for publicly subsidized legal advice or lawyer representation. The current
means test for LSC-funded legal services is an annual household income of no more than 125 percent of the federal poverty level. For a family of four in 2008, this threshold would have been an income less than about $27,530. As Figure 1 demonstrates, in 2008 there were more than 53.8 million people living in households eligible by this means test. Based on projections from the 1992 survey, an estimated 25.3 million people eligible for LSC-funded services were living in households experiencing at least one civil justice problem. Some contemporary proposals would extend a government subsidy for access to lawyers’ services farther along the household income distribution, up to 200 percent of poverty. For a family of four in 2008, that threshold would have been a household income of around $44,050. If implemented as a national means test, the 200 percent of poverty standard would imply a projected more than 96.3 million people living in households eligible for subsidized civil legal services, an estimated 47.4 million of whom would be living in households experiencing at least one civil justice problem.

Figure 1. Estimated Numbers of People Eligible for Civil Legal Aid and Living with Civil Justice Problems, by Means-Tested Household Income: USA, 2008.

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For the more than ninety-six million people living in households with incomes below 200 percent of poverty in 2008, these conservative, pre-recession estimates of experience with civil justice problems imply, for example:

- 12 million people living in households experiencing at least one civil justice problem related to livelihood (whether from employment, pensions, or public benefits), including discrimination, problems with wages or pensions, and problems with working conditions;
- 9.9 million people living in households experiencing at least one civil justice problem involving family or domestic situations, including problems involving divorce, elder abuse, domestic violence, or child support; and
- 16.4 million people living in households experiencing at least one civil justice problem involving personal finances, including problems with insurance, taxes, debt, and credit.49

III. LAWYERS’ IMPACT ON PUBLIC EXPERIENCE WITH CIVIL JUSTICE PROBLEMS

As these estimates suggest, civil justice problems are so common as to be “features of everyday life” in contemporary U.S. society.50 And, while such problems are very common, legal responses to them are not. Turning to law is not Americans’ usual reaction to their civil justice problems.51 In this respect, Americans are similar to residents of most other contemporary developed nations: “Although studies reveal that different societies provide diverse routes for resolving civil justice problems, they also reveal that the majority of problems never make it to law, lawyers, or the civil justice system.”52

Despite representations in the media that would imply otherwise,53 Americans typically do not find legal remedies to their civil justice
problems. Forty years of civil justice surveys reveal that the vast majority of civil justice problems are never taken either to lawyers or to a court or other hearing body.54 Most civil justice problems do not involve advice from an attorney.55 The 1992 national survey of the American public’s experience with civil justice problems found that 24 percent of problems involved consulting an attorney.56 Such a consultation did not necessarily involve the receipt of legal services; in some instances, it went no further than a discussion about whether or not the attorney would take the case.57 Earlier U.S. studies found similarly low rates of consultation with lawyers for help with civil justice problems,58 and more recent state-level civil justice surveys focused on low-income populations also found low rates of lawyer consultation for civil justice problems.59

Most civil justice problems are not adjudicated in front of hearing bodies. According to the 1992 survey, only 14 percent of civil justice problems were taken to a court or hearing body.60 Certain kinds of civil justice problems are more likely than others to lead to contact with courts or tribunals. For example, the 1992 survey found that 37 percent of family and domestic problems involved a court or hearing body, while 12 percent of employment-related problems and 11 percent of civil justice problems involving personal finances involved courts or other hearing bodies.61 Notwithstanding this variation in the kinds of problems more and less likely to be taken to lawyers or heard in courts, most of the public’s civil justice problems do not make it to the formal legal system.

When members of the public do seek resolution from a court or tribunal, they often appear as self-represented litigants. National statistics regarding self-representation do not exist, but studies in individual jurisdictions suggest that a majority of certain types of cases—including family and domestic cases and unlawful detainer disputes—involve at least one self-represented litigant.62 Some states report that as many as 90 percent of certain kinds of cases involve at least one self-represented litigant.63
A. Public Experience with Civil Justice Problems and a Right to Counsel

Arguments for a right to counsel in civil matters have often centered on precisely this issue: that many members of the lay public who appear in civil hearings and trials do so without the representation of a lawyer. Implied in this rationale is the belief that the presence of lawyers changes something important. For example, in the absence of lawyer representation, meritorious cases might nevertheless lose when presented by people who do not know how to communicate those merits effectively by using the terms and the means that courts and judges understand. In addition, attorneys may provide an advantage in litigation that is independent from the merits of a case. To the extent that courts treat the unsophisticated or inexperienced litigants who self-represent as equivalent to litigants who are represented by attorneys, attorney-represented litigants who square off against self-represented litigants may benefit from the sheer imbalance of representation. As Mark Galanter famously argued in his analysis of “why the ‘haves’ come out ahead,” the ability to hire attorneys is one of the advantages enjoyed by the “haves” that—regardless of the rightness of their cause—permit them to prevail more often than the “have nots.” In this understanding, a right to counsel would be a move toward a basic equality of arms.

Yet, only a modest amount of research effort has gone into investigating the question of how lawyers change what happens in courtrooms, perhaps because the claim that they do so seems self-evident to many observers. Over the past half century, a few dozen published studies have empirically investigated the relationship between lawyer representation and what happens in adjudicated civil cases. These studies typically inquire into whether, and sometimes how, the presence of attorneys changes the outcomes of civil trials and hearings. By reviewing these studies together, one can gain new information about lawyers’ impact on public experience with civil justice problems.
B. Empirical Evidence about Lawyer Representation and Public Experience with Civil Justice Problems

My review of the evidence examines a very specific component of lawyers’ impact: how much lawyer representation changes the outcomes of formal adjudication. This impact, of course, does not comprise all that lawyers do. Among other work, attorneys advise, counsel, and negotiate; they identify, cultivate, and pursue test and impact cases; they control access to law by screening cases for representation or not; they organize small claims that would go unattended into large classes that become the object of legal action and public scrutiny; and they engage in legislative advocacy and grassroots organizing. Nevertheless, a central part of the legal profession’s contribution to the public’s access to law and justice is the lawyers’ work of advocacy in hearings and trials.

1. Meta-Analysis

This review takes the form of a meta-analysis—a quantitative research synthesis that uses the findings of extant research to produce a summary of general knowledge about a given phenomenon.58 I focus on a single empirical question: how much does lawyer representation affect who wins and loses in adjudication? My review is agnostic about whether lawyers’ work makes the outcomes of adjudication “better” in the sense of making them more legally accurate or substantively just. Rather, the inquiry is into what we know about whether lawyers make outcomes different than they would be in the absence of attorney representation.

Combining research in a synthetic review requires that the studies be comparable in design, and that they report all the information necessary to construct quantitative measures of the relationship between lawyer representation and case outcomes. Because no impact of counsel research canon yet exists in the literature, the various extant studies exhibit little consensus about terminology, methodology, or theoretical approach. In
conducting the synthetic review, a number of studies had to be excluded for reasons of research design or incomplete reporting of results.

To serve for the meta-analysis, studies had to present quantitative summaries of the outcomes of civil contests that were formally adjudicated—that is, actually taken to trial and heard—in courts or tribunals somewhere in the United States. In order to permit comparisons between other-represented and self-represented parties, studies had to include (on at least one side of the dispute) parties who could potentially appear unrepresented by any agent, i.e., private individuals. In order to provide information that could be generalized to the whole population of cases heard in a particular kind of forum, the studies had to report on a sample of cases that was representative of the population of cases being studied. The published reports needed to provide sufficient information to construct measures of the number of cases won and lost by the type of representation used. In particular, studies had to distinguish between cases represented by qualified attorneys and cases represented by other kinds of advocates, such as law students or paralegals. I did not exclude studies that distinguished between represented and unrepresented parties on only one side of a dispute, as this would have eliminated many otherwise eligible studies.

Twelve studies, comprising more than seventy thousand adjudicated civil cases, met the criteria for inclusion. In terms of the kinds of legal problems and courts empirically investigated, the studies included in the review closely resemble those that were excluded. The only exception to this resemblance is the exclusion of all studies in family law. Because my analysis is of wins and losses, I excluded studies of family cases; as observers have noted, “[d]omestic disputes, unlike other civil disputes, are difficult to assess regarding winners per se.”

Table 1 lists the included studies, the number of cases that contribute to the meta-analysis, the kinds of cases they include, and the kind of forum in which the cases are heard. As the table reveals, existing studies prominently feature areas of classical poverty law, such as administrative hearings about
benefits and eviction defense for low-income tenants. But the studies also include a range of civil justice problems faced across the population, including tax appeals and hearings to contest the special education classification of one’s children, as well as problems of employment law, including social security disability insurance reconsideration hearings.71

Two studies investigate asylum requests, each looking separately at two types of cases: those where people claim asylum as a defense to deportation and those where they seek asylum affirmatively. Two studies investigate hearings in small claims courts. Typically, the studies take the perspective of a focal party, usually a person facing a business, a landlord, or a government agency (such as a tenant facing eviction for nonpayment of rent, an “Aid to Families with Dependent Children”72 recipient contesting a reduction or termination of benefits, or a person appealing a state tax bill).

As Table 1 reports, the studies vary in two ways that will turn out to be useful in the meta-analysis, as both provide some information about how easy or difficult it might be for a lay person to attempt to represent himself or herself. As the third column of the table notes, some studies are of adjudication in traditional trial courts, while others are in tribunals or small claims courts. These latter two kinds of forums often employ relaxed evidence rules and sometimes permit a more narrative style of presentation than do traditional trial courts. One of the principal purposes of the reformers who pushed for these kinds of modified forums was to simplify rules and procedures so that lay people could more effectively represent themselves.73 To the extent that reformers’ aims were realized, we might expect that the advantage of being represented by an attorney is less in small claims courts or tribunals than it is in traditional trial courts.

The final column of the table includes an assessment of how complex the documents and procedures are in the field of law that comprises the cases included in each study. The measure comes from the 1995 Chicago Lawyers Survey, a contemporary study of practicing attorneys, in which these attorneys were asked to rate the procedural complexity of their own

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work. In this survey, a random sample of people eligible to practice law with offices in Chicago were asked to rate their own practices in terms of the degree to which someone without legal training or experience could easily understand the documents and procedures used in their work. The “procedural complexity measure” is the lawyers’ average rating on a scale indicating the extent to which the procedures and documents involved in the work required so much specialized skill and knowledge that they could not be understood by an educated layperson. Raters are attorneys who reported devoting at least 25 percent of their total work time to that field of law. That is, for each field of law, the measure is the practitioners’ average response to the item below:

Different kinds of law require different kinds of professional activities. [Below are] a series of paired statements that describe different demands made on the lawyer. These are presented as polar opposites. Please circle the number that best represents your position in relation to the two opposites. If the situation in your practice is midway between poles, circle code 3; if your situation is at one or the other extreme, circle 1 or 5; if your position leans somewhat to either pole, circle 2 or 4.

<table>
<thead>
<tr>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>The type and content of my practice is such that even an educated layman couldn’t really understand or prepare the documents</td>
<td>A para-professional could be trained to handle many of the procedures and documents in my area of law</td>
</tr>
</tbody>
</table>

1 2 3 4 5

In computing the procedural complexity measure, I reverse coded the scale, so that higher ratings indicated greater complexity. I standardized the ratings for each field, so that fifty indicates the average score and each ten-
point change indicates one standard deviation. I classified each study into the broad field of law that most closely approximated the cases in the study.

Looking at the range of procedural complexity ratings, it is readily apparent that the studies are centered in fields of law that lawyers regard as average or below average relative to the scope of lawyers’ work. Ten studies examine lawyers’ impact in trials or hearings involving fields of law that lawyers rate as having roughly average complexity (a score of 46 to 51). Two studies examine lawyers’ impact on the outcomes of trials or hearings that involve fields of law that lawyers rate as below average in procedural complexity (43 on the procedural complexity scale). This restricted range of complexity is an important factor to keep in mind when considering the range of case types to which these findings may generalize. Some kinds of civil justice problems encountered by people who might be eligible for civil legal assistance—such as Medicaid eligibility cases, for example—are arguably more complex than many of the kinds of cases considered here. In general, whatever the findings about representation and case outcomes, we cannot generalize those findings to highly complex fields of law, as we have no information about those fields.

Table 1. Studies Contributing Data to the Meta-Analysis: Case Type, Study Citation, Number of Cases Contributed, Field of Law, Type of Forum, and Procedural Complexity Rating

<table>
<thead>
<tr>
<th>Type of Case (number of cases)</th>
<th>Field of Law</th>
<th>Forum Type</th>
<th>Procedural Complexity Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>State tax appeals</td>
<td>Personal income tax</td>
<td>Court</td>
<td>48</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Field of Law</th>
<th>Forum Type</th>
<th>Procedural Complexity Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goldberg hearings</td>
<td>General family practice: poverty-level clients</td>
<td>Tribal</td>
<td>43</td>
</tr>
<tr>
<td>Evictions</td>
<td>Real Estate: Landlord/Tenant</td>
<td>Court</td>
<td>46</td>
</tr>
<tr>
<td>Type of Case</td>
<td>Field of Law</td>
<td>Forum Type</td>
<td>Procedural Complexity Rating</td>
</tr>
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</tr>
<tr>
<td><strong>Affirmative asylum requests</strong></td>
<td>Immigration</td>
<td>Court</td>
<td>48</td>
</tr>
<tr>
<td><strong>Defensive asylum requests</strong> (i.e., focal party is facing deportation)</td>
<td>Immigration</td>
<td>Court</td>
<td>48</td>
</tr>
<tr>
<td><strong>Special education certification hearings</strong></td>
<td>Civil litigating: personal</td>
<td>Tribunal</td>
<td>46</td>
</tr>
<tr>
<td><strong>Small claims consumer cases</strong></td>
<td>Consumer law: consumer/debtor</td>
<td>Small claims court</td>
<td>47</td>
</tr>
<tr>
<td><strong>Small claims court</strong></td>
<td>Civil litigation: personal</td>
<td>Small claims court</td>
<td>48</td>
</tr>
</tbody>
</table>

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2. The Observed Difference between Lawyer-Represented and Unrepresented Parties

Lawyer-represented people are more likely to prevail than people who appear unrepresented, on average. Figure 2 reports for each study the difference in likelihood that lawyer-represented people win in comparison with the likelihood that unrepresented people win. Here, this difference, which I will refer to as the “observed difference” between lawyer-represented and unrepresented people’s case outcomes, is expressed as an odds ratio.75 When an odds ratio equals one, the odds are even: unrepresented people have just as good a chance of winning their cases, on average, as do lawyer-represented people. Odds ratios less than 1.0 would indicate that lawyer-represented people tend to have worse outcomes than unrepresented people; the odds of their winning would be lower than the odds of unrepresented people winning. Odds ratios greater than 1.0 indicate that lawyer-represented people tend to have better outcomes (in terms of winning their cases), on average, than do unrepresented people.

All of the odds ratios for all of the studies are greater than 1.0. As Figure 2 shows, lawyer-represented people do better—on average, lawyer-represented people are more likely to win than are unrepresented people in every study. But, though this difference consistently indicates that lawyer-represented parties enjoy better outcomes than do unrepresented parties, just how much better varies considerably across studies—from a study where lawyer-represented people are 19 percent more likely to win than unrepresented people, to studies where lawyer-represented people are three or four times more likely to win, to a study which finds that lawyer-represented people are almost fourteen times (odds ratio = 13.79) more likely to win than are unrepresented people.
Figure 2. Observed Difference in the Likelihood People Win in Adjudication: Lawyer-Represented People Compared to Unrepresented People

N = 12 studies of 14 case groups, comprising 72,337 cases.

It is not clear from most existing studies how much of the observed difference reflects how lawyers actually change case outcomes and how much is due to other factors, such as characteristics of the lay litigants or the cases themselves. The kinds of people who seek out and secure representation by attorneys may be different from those who do not, and these differences may be related to skills or personality traits that would make these litigants more successful on their own, even without attorneys. For example, they may have greater facility with English, or be more organized, more persistent, or better at communicating information to legal professionals than litigants who do not seek out attorneys or cannot secure representation when they do. We might expect that people with the qualities of language facility, organization, persistence, and good communication skills would have been more likely to win their cases even without lawyers to represent them. Similarly, the kinds of cases that end up being

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represented by lawyers are likely different from the kinds of cases that do not. For example, cases that lawyers take may have more legal merit, more easily available evidence, or better facts than cases that lawyers turn away. Both of these potential differences—differences in litigant capacity to represent themselves, and differences in the likelihood that cases will win given the facts and the law—combine with what lawyers actually do in litigation to create the differences in case outcomes that we observe between lawyer-represented and self-represented people.

One study avoids this problem of interpretation by employing a randomized trial. In this study, people waiting in line at a courthouse to respond to a summons for eviction for nonpayment of rent were randomly selected to receive lawyer advice and representation or to be told that no lawyer was available to assist them at that time. Both groups of people, those provided with attorneys as part of the research project and those told that they could be offered no assistance, were then followed through to the conclusion of their court cases. Because the research design matched litigants to the conditions of lawyer representation or no representation randomly (without reference to litigant characteristics or aspects of the case), the differences observed in the outcomes of lawyer-represented and unrepresented people are likely due to the presence of lawyers themselves, as the two groups of cases differ in no other systematic way. This randomized trial found a difference in the middle of the observed range. In this study, tenants facing eviction for nonpayment of rent who were represented by lawyers were more than 4.4 times more likely to retain possession of their apartments than similar tenants who were not represented.

3. What Are Lawyers Doing that Creates the Observed Difference? Evaluating the Role of Procedural Complexity

The magnitude of the observed difference varies widely across studies, but this variation is patterned in instructive ways. Figure 3 reports on the
average observed difference when studies are classified into four categories based on the two dimensions of variation introduced in Table 1—procedural complexity and type of hearing forum. The quantities in the figure are weighted averages, calculated for each study and then weighted within each category, so studies that contribute more cases weigh more heavily on the average than smaller studies that contribute fewer cases.78

The first dimension of variation, reflected in the color of the bars, is procedural complexity as rated by attorneys who practice in that field of law. The fields of law for which lawyers provided complexity ratings in the Chicago Lawyers Survey were not always at the same level of detail as the fields of law included in the studies of lawyers’ impact. The process of classifying the studies into fields thus involves measurement error: in some instances, the fields of law for which we have complexity measures are much broader than the fields of law represented in the studies (e.g., civil litigation for personal clients versus education law, respectively). To the extent that this measurement error is random with respect to the variables of interest, it serves to reduce observed differences between categories of cases—that is, it will make the differences appear smaller than they actually are.79 The second dimension of variation is the kind of forum in which the dispute is heard: it distinguishes traditional trial courts from small claims courts and tribunals. As noted above, these latter types of forum were specifically intended to be forums in which lay people could more easily pursue their own cases.80

In the figure, studies in which the field of law is below average in procedural complexity, as rated by attorneys, are represented by the darker bar; studies in which attorneys rated procedural complexity as average are indicated by the lighter bars. The left pair of bars reports the observed difference in case outcomes between lawyer-represented and unrepresented people in simplified forums (tribunals and small claims courts), while the right bar reports the observed difference in traditional trial courts. None of

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the studies includes cases in fields of law of average complexity that are heard in simplified forums.

The figure reveals a striking finding: the observed difference is much greater for cases in those fields of law that lawyers rate as involving greater procedural complexity. This is true even when such cases are heard in simplified forums such as tribunals and small claims courts. The smallest observed difference between lawyer-represented and unrepresented cases is found in the two studies of welfare fair hearings, which involve a field of law that attorneys rate as less procedurally complex and in which cases are heard in a tribunal. In these two studies, focal parties represented by attorneys are on average 40 percent more likely to prevail than are focal parties who represent themselves. In studies of cases in fields that lawyers rate as having average procedural complexity—tax, immigration, employment law, landlord/tenant, consumer claims, and general personal civil litigation—lawyers’ potential impact is much larger.

In this body of research, when procedural complexity is greater, the type of forum in which the case is heard appears to make little difference. In more complex fields of law, the observed difference in outcomes for lawyer-represented and unrepresented people is quite large, depending on whether the cases are heard in a court or in a simplified forum (like a tribunal or small claims court). In fields of average complexity in trial courts, lawyer-represented people are on average 6.5 times more likely to win their cases than are unrepresented people in trial courts. In fields of average complexity in tribunals, lawyer-represented people are on average 7.6 times more likely to win their cases than are unrepresented people.
The finding that the observed difference is larger when procedures are more complex suggests that part of what lawyers do to affect litigation outcomes may be assisting people in managing procedural complexity. Of course, we cannot know that procedural complexity is the only, or even the largest, factor creating the differences we observe. And, as I noted earlier, we cannot know how much of the observed difference is due to what lawyers are doing and how much is due to differences in the kinds of cases or litigants that end up having attorneys to represent them. And, of course, we would like to have many more studies on which to base such a conclusion. But the finding that procedural complexity bears a relationship to the size of the observed difference is very suggestive.
IV. ACCESS TO LAW AND ACCESS TO JUSTICE

A. The Impact of Expanded Access to Counsel

The finding that procedural complexity may account for at least a portion of lawyers’ impact on case outcomes provides some insight into how expanded access to counsel, whether through a “right” or other means, might affect the American public’s experience with its civil justice problems. Procedural complexity involves two distinct kinds of practical challenges for a lay litigant: figuring out what is specifically legal about one’s problems and figuring out how to pursue one’s problems using the formal legal system. Complexity likely raises the bar on both of these dimensions: greater complexity makes it more difficult for lay litigants to identify legally cognizable claims, and it further makes it difficult for lay people to pursue those claims through hearings, trials, and legal documents.

Consider, as an example, a type of case that features in three of the studies in the meta-analysis: evictions. No national empirical picture of evictions exists, so we do not know how many evictions occur each year, nor do we know what most evictions are like. We do not know the typical issues of law raised in evictions around the country, nor do we know about the prevalence of different kinds of facts. For example, we do not know the usual reasons that landlords move for eviction. Nor do we know how many evictions involve fact situations that are favorable or unfavorable to one side or another, such as how many evictions for breach of lease involve actual breaches. One likely very common allegation in evictions is nonpayment of rent. One author suggests that “[p]erhaps the most common reason a landlord seeks a tenant’s removal is because the tenant has not paid the rent.” A recent study in San Mateo County, California, found that almost two-thirds (65 percent) of eviction filings alleged nonpayment of rent. This proportion may have been lower than in typical years, as the mortgage crisis contributed to many post-foreclosure evictions (27 percent of those filed). Because evictions for nonpayment of rent are apparently a
common—and perhaps the _most_ common—type of eviction, I will take them as the exemplary case.

Lay litigants may have poor skills when it comes to figuring out what their peculiarly legal problems are. For example, among people who face eviction for not paying their rent, some will, in fact, have not paid it. The reasons they did not pay their rent may be socially legitimate reasons, in that both the defaulting tenant and many other people would recognize them as legitimate excuses for not paying rent. For example, someone may have a child who is very ill and requires expensive medication. If this family has no health insurance, because they cannot afford it, they will have to pay out-of-pocket for that medication. Given limited resources, they may have to choose between paying the rent and treating their child’s illness with costly drugs. Or, the car that someone relies on for traveling to a job that supports her family may need expensive repairs. She must repair the car to keep the job but, given limited resources, that may mean not paying the rent. Most of us would probably be in sympathy with a parent’s choice to pay for necessary medicines ahead of rent. Many of us would also sympathize with the parent who did what was necessary to keep her job even though that meant not fulfilling other obligations, such as paying rent as part of a rental contract. But neither of these defenses is typically legally cognizable.

A tenant who had not paid the rent might still have some means of staving off the eviction. In some jurisdictions, the tenant might be able to get some or all of the unpaid rent rebated under an implied warranty of habitability, if the premises were deficient under housing codes. However, not all low-income housing is bad enough to justify rent rebates. Eviction requires that proper notice be served on the tenant. The notice of eviction might have been defective or improperly served. However, notices are not always incorrect or improperly served. In the absence of a habitability claim or a defective notice, the tenant in rent arrears has little legal leverage to counter the eviction.
The Impact of Counsel

How could an attorney assist in this hypothetical case—perhaps a very common one—where a poor person faces eviction for not paying rent that she, in fact, has not paid? An attorney could have the expertise to understand, explain, and collect the evidence for habitability violations. The attorney could also make that case for the tenant in court. An attorney could do similar tasks if the notice of eviction were defective. Even if the case involved good notice and safe and secure premises, an attorney could advise the tenant about the situation and the tenant’s options and try to help limit the collateral damage of being sued for eviction. The attorney could help the tenant file an answer, which would effectively stay the judgment until a trial date and give the tenant a few weeks in which to try to find new premises. The tenant, with the attorney’s assistance, could also try to settle with the landlord without proceeding to trial. An attorney might also help the tenant get out of the apartment without an adverse judgment that would appear on his or her credit rating.

However, ironically, the attorney might be least useful in this situation when representing the tenant in court. Given the usual law and these hypothetical facts (unpaid rent, properly served notice, no habitability issues), if the tenant followed the eviction all the way through to trial, the outcome of adjudication could well be the same whether or not the tenant was represented by an attorney; the landlord would regain possession of the apartment, and the tenant would receive a judgment of eviction.

This example highlights two ways that an expanded access to counsel might affect public experience with civil justice problems. First, the example suggests that greater access to attorneys could be a form of public legal education. Attorneys could give members of the public assistance in figuring out what their legal claims might be or, indeed, whether they have any legal claims at all. Many unjust, unfair, appalling, and regrettable events happen in the world; the legal system, for better or for worse, has remedies for only a few of them. Part of the impact of an expanded access
to counsel could be to better inform the public about the practical scope of the legal system.

If this reasoning is correct, then an expanded access to counsel would increase the share of litigants who appeared in court with legally cognizable claims and defenses. Part of this change in the pool of adjudicated cases would occur because people with legally cognizable claims (who currently do not know how to identify those claims) would be able to make claims with the assistance of lawyers. At the same time, more cases with legal grounds would be appearing on dockets in part because greater access to attorneys would lead to fewer groundless cases in court. In some instances, lawyers might well advise potential litigants to forgo pursuing their claims through law and assist them in seeking out other solutions, like attempting to negotiate mutually acceptable resolutions with the other parties involved in their civil justice problems.

Second, the example suggests that greater access to attorneys might lead to more legally accurate decisions on the part of adjudicators. The second aspect of complexity that I identified involved getting the problem through the formal legal process: filling out and filing legal forms, writing pleadings, making motions, presenting legal arguments, figuring out what is admissible as evidence, using that evidence appropriately and effectively, etc. Part of the reason that unrepresented litigants fare so poorly may be the sheer confusion created by all of the documents and procedures that are outside their usual experience. Studies investigating the experiences of lay people who appear unrepresented in courts and tribunals show that many have great difficulty translating their goals and experiences into legal terms, and that court staff are often not helpful to them. The impact of expanded access to lawyers would likely be to increase the rates at which currently unrepresented people won their cases, because lawyers’ understanding of procedure would reveal meritorious claims that are currently buried under unrepresented litigants’ confusion about, and misunderstanding of, the formal legal process. In pools of cases where the people in these studies

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typically face opponents who have lawyer representation, expanded access to lawyers for these people might also help to reduce the advantage currently enjoyed by their lawyered-up adversaries.

Focusing narrowly on the small share of civil justice problems that ever become court cases, these findings suggest considerable scope for the impact of lawyers. It is not clear, though, that lawyers are necessary to achieve the impacts identified here—at least not for the types of ordinary litigation in fields of low to average complexity that have been investigated in the studies reviewed. Recall that the complexity that appears to trip up the lay public does not seem especially complex to lawyers. The studies in which we observe the largest differences between lawyer-represented and unrepresented people involve law that holds average complexity compared to the full scope of lawyers’ work.

This average level of complexity might be manageable through other means than expanded access to attorneys. In some U.S. forums, nonlawyer advocates are already allowed to appear. My own research, and that of other scholars, suggests that these nonlawyer advocates, when trained and experienced, can be at least as effective as attorneys in assisting people in pursuing their claims in tribunals. Similarly, if complex procedures create barriers in access to justice, jurisdictions might tackle this problem directly by simplifying the procedures themselves, in favor of supplying representatives to assist lay people in navigating them.

All three of these solutions are quite traditional and have been repeatedly proposed for years: more access to lawyers, more access to nonlawyer advocates, and simplified procedures that would allow lay people to more easily use law to pursue resolution of their justice problems. What is traditional about all of these solutions is their focus on formal legal institutions as the universal response to justice problems.
B. Beyond Access to Law: Access to Justice

1. Three Empirical Realities Ignored By the Traditional Focus on Law

This traditional focus on law is, unfortunately, myopic.\textsuperscript{94} It ignores three empirical realities that should inspire us to new thinking about access to justice. The first reality is that Americans typically do not understand their civil justice problems as legal problems. Decades of research show not only that Americans usually do not turn to lawyers and courts with their justice problems,\textsuperscript{95} but also that law often does not even enter their thinking about these problems.\textsuperscript{96} Perhaps Americans act and think this way because law is not available; but, perhaps they would also prefer the opportunity to have access to other nonlegal sources of advice and assistance for these very common problems.

In the United Kingdom (U.K.), another common law country, people appear quite happy to go to an established advice sector (staffed by nonlawyers) to gain information and advice for resolving their justice problems, often without taking formal legal action. People in the U.K. go to this advice sector even when lawyers’ services are heavily subsidized or free (as they are for more than two-fifths of the population).\textsuperscript{97} U.K. residents also enjoy another resource absent in the American context: a group of government ombudsmen’s offices, empowered to independently investigate and authoritatively resolve civil justice problems involving a variety of regulated industries, including common problems with insurers, pensions, banks, and the like.\textsuperscript{98}

Whether lawyers and courts are the proper solution to a justice problem depends on what one’s goals are, and the traditional U.S. approach to legal aid assumes the goal is more law. But, in fact, we know very little about the American public’s goals with respect to their own justice problems. U.S. civil justice surveys do not ask people what they would have liked to do about their justice problems, but rather about whether or not they consulted a lawyer for those problems. Instead of a day in court, what members of the
public may often want is simply to have their problems resolved or their options explained to them. The U.K. experience reviewed above suggests that lawyers and courts are not always necessary for resolution and explanation. Conceptually, empirically, and in policy, we should be considering a much wider range of sources of resolution, rather than forcing a single vision on a very diverse public experiencing a wide variety of justice problems.

The second reality is that when poor people in the United States do have access to law, they seldom receive complex legal services. One can see this pattern in the LSC’s reports of the services that its grantees provide. Most of the LSC’s civil legal services provided to poor people do not involve representation in court. In 2008, most cases taken by the LSC (60.3 percent) were closed with “counsel and advice,” which includes services such as “the advocate ascertain[ing] and review[ing] relevant facts, exercise[ing] judgment in interpreting the particular facts presented by the client and in applying the relevant law to the facts presented, and counsel[ing] the client concerning his or her legal problem.”109 Another 18.7 percent of cases were closed with “limited action,” which includes actions like “communication by letter, telephone or other means to a third party” and “preparation of a simple legal document such as a routine will or power of attorney.”

A minority of closed cases received representation in some kind of court case or hearing, though it is not possible to determine precisely how many, given the way the LSC collects case reporting data. Contested court decisions and appeals combined closed 3.7 percent of cases;101 4.6 percent of cases were closed by “settlement with litigation.”102 Agency decisions closed 3.2 percent of cases, and 2.4 percent of cases received “extensive services,” which can include “extensive ongoing assistance to clients who are proceeding pro se.”103 So, something less than 20 percent of the cases served by the LSC-involved lawyers appearing on behalf of clients in courts or hearings. The pattern of services, which heavily favors information, advice, and basic assistance over representation, in part reflects legal aid
agencies’ strategic decisions about how to effectively use scarce resources. But it is also, in part, a reflection of what many people may typically need with respect to common justice problems, as illustrated in the eviction example above. We might consider whether it is actually necessary that lawyers per se provide these basic legal services.

The third problem with the field’s narrow focus on the formal legal institutions of lawyers and courts is that it presumes a questionably feasible solution to an empirically enormous problem. In 2008, LSC-funded programs closed something fewer than nine hundred thousand cases, receiving total funding from all sources that amounted to about $990 per closed case. Recall that by a conservative estimate, more than twenty-five million LSC-eligible people are living in households already affected by at least one justice problem. No one knows precisely how much is spent to subsidize access to civil justice in the United States, but one observer puts this figure at around one billion dollars each year. To expand the basic levels of services currently provided to serve every LSC-eligible client with a civil justice problem, how much more funding would we need? Lawyers are expensive. A recent estimate suggests that providing one additional hour of lawyers’ services to the existing justice problem for each household would require “a twenty-fold increase in current U.S. levels of public and private (charitable) legal aid funding.” Twenty billion dollars is small change in the context of $3.6 trillion or so in total federal spending and a gross domestic product of $14.6 trillion. However, it is a massive increase in the context of current levels of funding for access to civil justice. More access to law is part of the answer, but only part.

Expanding access to nonlegal institutions of remedy for civil justice problems is an innovative solution that responds to all three of these empirical realities—the fact that Americans often do not think of their justice problems as legal; the fact that many could benefit from services that could be provided by nonlawyers and; the high cost of lawyers’ services as they are currently produced. Nonlegal institutions of remedy provide

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advice, information, and authoritative resolution of civil justice problems, but “without requiring public contact with courts, tribunals, lawsuits, litigation or lawyers.”\textsuperscript{110} A robust and effective set of nonlegal institutions would include both a component that is “empowered to produce authoritative resolution to the public’s civil justice problems”\textsuperscript{111} and a set of auxiliaries that “work apart from formal institutions of remedy by providing problem-resolution strategies that, although not authoritative, may nevertheless be very effective from the public’s perspective.”\textsuperscript{112}

2. Twin Pillars for New Nonlegal Institutions of Remedy

These new nonlegal institutions of remedy would rest on two pillars. The first would be a nationally present, nonlawyer advice sector that centers its work around substantive problems that people commonly confront. As in the U.K., these advisors should be empowered to give legal advice. Their advice would not be limited to legal routes to obtain solutions; rather, it would be focused on helping people understand their options and resolve their substantive problems. Such services could provide many Americans with the information and assistance they need to resolve many of the kinds of justice problems they face today, often without recourse to formal law. These advice services might be public or charitable, but we also might consider market-based models for the provision of nonlawyer advice. In any event, implementing this policy would, of course, require relaxing lawyers’ monopoly on the provision of legal advice, as has been advocated by others.\textsuperscript{113}

The second pillar of the new U.S. nonlegal institutions of remedy would be authoritative nonlegal routes to the resolution of justice problems. One of the most promising forms of such institutions is government ombudsmen’s offices. Ombudsmen’s offices are empowered to independently investigate and authoritatively resolve complaints by the public about vendors in the industries that they oversee.\textsuperscript{114} As the U.K.’s Financial Ombudsman Service puts it, “these offices are ‘the official independent expert[s] in settling . . .
complaints, with the power to put things right.”\textsuperscript{115} As noted above, my own research shows that, in contexts where such nonlegal solutions are available, people use them, doing so even when publicly subsidized attorney services are also available.\textsuperscript{116} In the contemporary United States, perhaps the most prominent regulated industries appearing in the public’s civil justice problems are financial services and health care, including health insurance.\textsuperscript{117} In addition to the new Consumer Financial Protection Bureau czar,\textsuperscript{118} we should seriously consider a Consumer Financial Protection Ombudsman. A similar office could be created to resolve consumers’ problems with health insurance providers. These problems are frequent now, but likely will become much more common as many more people will soon have health insurance; the recent health care reform bill will expand the population covered by both public and private insurers by thirty million people.\textsuperscript{119}

\textbf{CONCLUSION}

Many millions of people in this country face civil justice problems that can and often do have far-reaching effects on their lives. More than fifty million people are currently eligible for LSC-funded civil legal aid. The best available evidence suggests that at least half of them are living in households facing at least one civil justice problem. Even though most of these problems never make it to courts, tribunals, or attorneys’ offices, the existing legal aid resources of the country are overstretched by any measure. The tens of millions of people facing civil justice problems and eligible under current means tests for aid have access to perhaps one full-time civil legal assistance attorney for every five thousand people eligible for that attorney’s services—and that is if one includes as sources of civil legal assistance not just LSC-funded legal aid, but also legal aid lawyers salaried from other sources and lawyers working in organized civil pro bono programs.\textsuperscript{120} Given these facts, it is no surprise that, in recent studies of its own offices’ capacity to serve, the LSC found that these offices must turn

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away for lack of resources at least as many people as they are able to help.\footnote{This paper is a revision of a presentation prepared for a Symposium, \textit{Civil Legal Representation and Access to Justice: Breaking Point or Opportunity to Change} (Feb. 19, 2010), \url{http://www.law.seattleu.edu/Continuing_Legal_Education/Event_Archives/2010/Korematsu.xml} (last visited Oct. 8, 2010) (The symposium was jointly sponsored by the Korematsu Center for Law and Equality at Seattle University School of Law, University of Washington School of Law, and Gonzaga University School of Law). Research reported herein was supported in part by a Stanford University Office of Technology Licensing Junior Faculty Incentive Grant and the UPS Endowment Fund. I thank Stanford Sociology PhD students Justine Tinkler (now on the faculty of the Department of Sociology at Louisiana State University) and Colin Beck (now on the faculty of the Department of Sociology at Pomona College) for research assistance, as well as Laura Abel, Jeanne Charn, Russell Engler, Tomas Jimenez, Herbert Kritzer, Paul Marvy, and Colin Beck (now on the faculty of the Department of Sociology at Pomona College) for research assistance, as well as Laura Abel, Jeanne Charn, Russell Engler, Tomas Jimenez, Herbert Kritzer, Paul Marvy,}

The seemingly overwhelming nature of the present problem constitutes a necessity that can spur innovation, both in how we think about access to civil justice and in what we do about it. Choosing what solutions to employ in any given reform should be substantially an empirical question—that is, we should use empirical evidence to guide us in deciding when simplifying procedures would be an adequate solution, when a nonlawyer advocate or legal advice from a nonlawyer advisor would be sufficient, or when situations need fully qualified attorneys. We certainly do not yet have the evidence base we need to make these kinds of determinations. The significant deficits in our understanding should be an impetus to get working.

But choosing between solutions cannot be a completely empirical question. We first have to decide on what goals we want these solutions to achieve. The people bearing the greatest weight of the current failures of our institutions of remedy for civil justice problems are the public. They should be consulted about what they want when they face civil justice problems.
Monica McDermott, Paolo Parigi, Carroll Seron, and participants at the Seattle University School of Law symposium for comments and suggestions.

2 See discussion infra Section III.
3 See discussion infra Section II.
4 See infra pp. 9–10.
5 See infra p. 11.
6 See discussion infra Section IV.
7 Id.
8 See discussion infra Section IV, Part iii.
9 Rebecca L. Sandefur, The Importance of Doing Nothing: Everyday Problems and Responses of Inaction, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 1, 113 (Pascoe Pleasence et al. eds., 2007).
10 Id.; see also HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 1, 12–13 (1999) (providing the definition of “justiciable event”).
11 See discussion infra Section III.
12 See Importance of Doing Nothing, supra note 2, at 117–123, for a detailed description of the focus group procedures.
13 See also Ab Currie, The Legal Problems of Everyday Life, in ACCESS TO JUSTICE 1, 2 (Rebecca L. Sandefur ed., Emerald Group 2009) [hereinafter The Legal Problems]. “So many aspects of ordinary daily activities of life are lived in the shadow of the law, it should not be at all surprising that a study of the extent or incidence of civil justice problems should reveal that a large proportion of the population should experience problems that have a legal aspect.” Id.
14 See Importance of Doing Nothing, supra note 9, at 119.
15 See discussion infra Section III.
17 GENN, supra note 10, at 35 (the term “cascade” comes from Genn’s study).
18 Pleasence et al., supra note 16, at 83–84.
19 Id. at 84.
20 Id. at 85; see also Pascoe Pleasence et al., Causes of Action: First Findings of the LSRC Periodic Survey, 30(1) J. L. & SOC’Y 11, 19 (2003) (finding a great proportion of people living in temporary accommodation “were living in [them] as a consequence of justiciable problems they had experienced.”).
21 Ab Currie, ‘A Lightening Rod for Discontent’: Justiciable Problems and Attitudes Toward Law and the Justice System, in REACHING FURTHER: INNOVATION, ACCESS AND QUALITY IN LEGAL SERVICES 100, 111–12 (Alexy Buck et al. eds., 2009) [hereinafter Lightening Rod].
22 Id. at 107. Other research suggests that public perceptions of the justice system are also affected by how people evaluate their experiences with the system itself. For

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example, procedural justice research suggests that people evaluate the justice system based in part upon how fairly they feel they are treated in interactions with that system. See Tom R. Tyler, What is Procedural Justice: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 LAW & SOC’Y REV. 103 (1988); see generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).


24 See GENN, supra note 10.

25 The Legal Problems, supra note 13, at 5, tbl. 1 (Table 1 reviews problem incidence rates based on twelve recent civil justice surveys in seven nations).


29 The Legal Problems, supra note 13, at 2–3, tbl. 1.

30 CONSORTIUM ON LEGAL SERVS., supra note 27, at 56.

31 Id. at 54.

32 Id. at 33.

33 Id. at 20.

34 Id. at 3 (reporting that 47 percent of households with incomes below 125 percent of the federal poverty line were experiencing one or more civil justice problems in the year prior to the survey, while 52 percent of households with incomes above 125 percent of the federal poverty line (but no more than $60,000 per year) were experiencing at least one civil justice problem.).

35 The 1994 ABA report surveyed households with incomes within the eightieth percentile of the household income distribution, or $60,000 per year in then-current dollars. In inflation-adjusted 2008 dollars, this would have been $90,972 per year. The estimate of the number of households affected by civil justice problems reflects the prevalence rates from the 1992 survey projected forward on to the distribution of households by income as reported in: Table HINC-06. Income Distribution to $250,000 or More for Households: 2008, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstable/032009/hhinc/new06_000.htm (last visited Oct. 11, 2010). The estimate of people exposed to problems comes from calculating the number of people living in households with incomes below $90,000 per year in 2008 from: Table HINC-03. People in Households -- Households, by Total Money Income in 2008, Age, Race and Hispanic Origin of Householder, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstable/032009/hhinc/new03_001.htm, (last visited Oct. 11, 2010), and then dividing that number by half, an estimation strategy which
assumes that civil justice problems are evenly distributed with respect to household size. This strategy may produce a conservative estimate of the number of people living in households affected by civil justice problems, as large households may be more likely to have civil justice problems than are smaller households. See supra note 27, Table 3–5 (reporting that 55 percent of households of five or more people reported at least one civil justice problem, in comparison with 42 percent of four-person households, 51 percent of three person households, 41 percent of two-person households, and 47 percent of one-person households). 36 Table HINC-03, supra note 35.


38 2008 was the worst year for job losses since 1945, with 2.6 million total jobs lost over the course of the year. David Goldman, Worst Year for Jobs Since ’45, CNNMoney.com (Jan. 9, 2009), http://money.cnn.com/2009/01/09/news/economy/jobs_december/.

39 The Centers for Disease Control and Prevention reported that, in 2008, one in five Americans aged eighteen to sixty-four were without health insurance for at least part of the year. FastStats: Health Insurance Coverage, CENT. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/faststats/hinsure.htm (last updated Apr. 2, 2009).

40 The 2008 Financial Literacy Survey, a Harris Poll-mounted survey of about one thousand adult Americans, found that about a quarter (27 percent), or more than sixty-two million people, reported that they did not pay all of their bills on time. 2008 Financial Literacy Survey: Summary Report and Topline, NAT’L FNDN. FOR CREDIT COUNSELING, 4 (Apr. 29, 2008), www.nfcc.org/NewsRoom/FinancialLiteracy/files/2008SummaryReportTopline.pdf.

41 National eviction data are not available, but reports from individual jurisdictions suggest a rise. In Massachusetts, fiscal year 2007-08 saw an 8.8 percent increase in evictions over the previous year. Eviction spike leaving more Bay Staters out in the cold: Foreclosures driving homelessness, Boston Herald (Nov. 23, 2009), available at http://www.beaconhillbpg.com/uploads/Eviction_Spike.pdf. In Cleveland, Ohio, the housing court noted a near doubling in eviction filings, which it attributed to increased foreclosures. Testimony of David Rothstein of Policy Matters Ohio for the Ohio House of Representatives, Pol’y Matters Ohio, 2 (Mar. 5, 2009), available at http://www.policymattersohio.org/pdf/HB9TestimonyDavidRothstein2009_03.pdf.

42 For example, job loss due to the recession can lead people to seek to collect unemployment insurance. See Jason DeParle, Contesting Jobless Claims Becomes a Boom Industry, N.Y. TIMES, Apr. 4, 2010, at A1 (describing a company that “helps [employers] decide which applications [for unemployment benefits] to resist and how to mount effective appeals”).

43 The Legal Problems, supra note 13, at tbl. 1.

44 Jon Johnsen, Legal Needs Studied in a Market Context, in The Transformation of Legal Aid: Comparative and Historical Studies, 205, 217–18 (Francis Regan et al. eds., 1999). (Legal needs studies employing typically used survey methods appear to
be “vulnerable to under-reporting. When asked about past problems, people forget details. They are also likely to experience emotional barriers to reporting sensitive cases. So far surveys have usually measured problems experienced in the past, not the amount and structure of unsolved problems that currently exist. But we could expect people to be more concerned about their current problems than those in the past. Often they also have vague memories of, and are less willing to talk about, past problems.”

Summarizing their findings from the English and Wales Civil and Social Justice Survey (CSJS), Pascoe Pleasence, Nigel J. Balmer, and Tania Tam conclude: “As our results demonstrate, maybe two-thirds or more of civil justice problems that CSJS respondents would regard as falling within the scope of the survey go unreported. Incidence of civil justice problems is therefore likely to be much higher than CSJS estimates suggest.” Pascoe Pleasence et al., Failure to Recall: Indications from the English and Welsh Civil and Social Justice Survey of the Relative Severity and Incidence of Civil Justice Problems, in ACCESS TO JUSTICE 43, 60 (Rebecca L. Sandefur ed., Emerald Group 2009).


68 Based on data presented in Poverty Thresholds, supra note 46.

69 Author’s calculations based on findings presented in CONSORTIUM ON LEGAL SERVS., supra note 27, and population estimates and poverty thresholds from the US Bureau of the Census in U.S. BUREAU OF THE CENSUS, supra note 23.

70 The Legal Problems, supra note 13, at 5.


72 The Fulcrum Point, supra note 51, at 953; Access to Civil Justice, supra note 51, at 341–42 (The public’s nonlegal responses to their justice problems are “quite diverse, ranging from doing nothing about a problem; seeking punitive publicity from media consumer reporters; writing letters to the editor of local or national newspapers; visiting nonlawyer advice or mediation services; and seeking the intervention of legislators, government ombudsmen (in countries where these exist), administrative agencies, or consumer advocacy groups.”).
In defiance of fact, Americans have, for years, been portrayed as a deeply litigious people, ever ready to file law suits and pursue frivolous claims. See, for example, responses to the famous McDonald’s Coffee Case. Mark B. Greenlee, Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform, 26 CAP. U. L. REV. 701, 724–30 (1997). Or, consider a recent claim by the chairman of Lloyd’s of London in a speech to a Chicago business group: “The U.S. system of civil litigation has spawned an American pastime, something that ranks alongside catching a game of baseball or basketball: going to court to sue other people, or companies, or organizations, or the Government.” Litigious Culture is Suppressing American Enterprise, LLOYD’S (Apr. 8, 2003), http://www.lloyds.com/lloyds/Press-Centre/Press-Releases/2003/04/Litigious_culture_is_suppressing_American_enterprise.

See Sandefur, supra note 51, at 342 (reviewing findings from studies of public experience with civil justice problems.) Empirical studies of court filings also reveal litigation patterns that differ sharply from media representations of a litigious American public. Marc Galanter, in a study of trends in product liability filings in federal district courts between 1985 and 1991, found that tort claims unrelated to asbestos declined over the period. See his News from Nowhere: The Debased Debate on Civil Justice, 71 DENY. U. L. REV. 77, 91 (1993). A study of federal litigation involving the nation’s 2000 largest corporations between 1971 and 1991 found that “although the aggregate volume of business litigation grew during the 1970s and early 1980s,” litigation subsequently declined “in all major categories of cases.” The study further found that “business-related litigation [was] heavily concentrated, with an extremely limited number of business ‘mega-litigants’ accounting for most of the activity . . . with the result that” tort cases involving companies that were not “mega-litigants” actually held steady or declined over the period. The study also reported that “a good deal of the growth in litigation outside the tort area can be attributed to business itself,” with businesses increasingly suing each other. Terence Danworth & Joel Rogers, Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991, 21 LAW & SOC. INQUIRY 497, 497 (1996).

Access to Civil Justice, supra note 51, at 342.

Author’s calculation based on information reported in CONSORTIUM ON LEGAL SERV., supra note 27, tbl. 4–7.

In 16 percent of lawyer contacts by low-income respondents, the “most involved lawyer” did not agree to provide legal assistance with the respondent’s civil justice problem. Id. at tbl. 5–9. In 11 percent of lawyer contacts by moderate-income respondents, the “most involved lawyer” did not agree to provide legal assistance with the respondent’s civil justice problem. Id.

CURRAN, supra note 28, at fig. 4.26; Miller & Sarat, supra note 28, at tbl. 2.


Author’s calculation based on information reported in CONSORTIUM ON LEGAL SERV., supra note 27, tbl. 4–10.

CIVIL LEGAL REPRESENTATION
The Impact of Counsel


64 See e.g., BOSTON BAR ASS’N TASKFORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, GIDEON’S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS 1, 4 (2008).


66 Both of these arguments—the argument that the presence of lawyers leads to more legally accurate decisions by adjudicators and the argument that the presence of a lawyer on only one side of a case advantages the represented party—assume that the lawyers in question are competent. Of course, this is not always the case—lawyers can be, and sometimes are, incompetent, negligent, malfeasant, and unacceptably rude, to name just a few failures of their professional responsibilities. Richard L. Abel’s recent LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS (2008) provides examples of this behavior. The challenges to ensuring acceptable quality under a civil right to counsel would be considerable, but they are the topic for another paper. Laura K. Abel discusses lessons about quality and quality control that may be gleaned from the criminal justice context in her A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright, 15 TEMP., POL. & CIV. RTS. L. REV. 527, 538–41, 546–49 (2006).

67 Here, publication is broadly construed to mean that an organization judged the report to be fit for public consumption. Thus, the universe of published literature includes reports put out by foundations, agencies and congressional committees, as well as work that has gone through some form of independent editorial review. A minority of representation studies have been peer-reviewed, as most appear either in law reviews or in foundation or agency reports. Rebecca L. Sandefur, Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes (2010) (under review).


69 See Elements of Expertise, supra note 67.


71 While most Social Security disability beneficiaries probably “would have difficulty obtaining well-paying jobs even in the absence of their disabilities,” many people whose disabilities prevent them from obtaining well-paying jobs also receive such benefits. A recent study found that a substantial minority (22.8 percent) of recipients had received some college education or a college degree. Gina A. Livermore, Nanette Goodman, and Debra Wright, Social Security Beneficiaries: Characteristics, Work Activity, and Use of Services, 27 J. VOCATIONAL REHABILITATION 85, 87 (2007). Another recent study found
that 3.7 percent of college-educated men aged fifty-five to sixty-four and 5 percent of college-educated women of the same age were receiving Social Security disability benefits in 2004. These receipt rates were substantially lower than those among comparably aged, high-school drop outs, but nevertheless illustrate the fact that disability occurs across the socioeconomic structure. See David H. Autor & Mark G. Duggan, The Growth in the Social Security Disability Rolls: A Fiscal Crisis Unfolding, 20 J. ECON. PERSP., 71, 83 tbl. 3 (2006).

Aid to Families with Dependent Children was a federal assistance program in effect from 1935–1996.


An odds ratio is a ratio of two odds. An odds is a probability divided by its complement (i.e., \( p/(1-p) \)) where \( p \) is the probability that some event of interest occurs. For example, if in a given study of lawyers’ impact, the authors observe that unrepresented parties win 10 percent of their cases, the odds of winning unrepresented are \( .1 \) \( (=10/90) \). If lawyer-represented parties in the same study win 50 percent of their cases, the odds of winning when represented by an attorney are even, or 1.0 \( (=50/50) \). We can compare the odds of winning represented to the odds of winning unrepresented by using the odds ratio. In this case the odds ratio is about 9 \( (=1.0/11) \): in this hypothetical study, lawyer-represented parties are nine times more likely to prevail than are unrepresented parties.

Author’s compilation from the studies listed on pp. 16–18, tbl. 1. Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment, 35 LAW & SOC’Y REV. 419 (2001).


HUBERT M. BLALOCK, JR., SOCIAL STATISTICS 412 (2d ed. 1972) (“In general, measures of association will be attenuated by random measurement errors.”).

See generally Genn, supra note 72; Yngvesson, supra note 73.

Randy G. Gerchick, No Easy Way Out: Making the Summary Eviction Process A Fairer and More Efficient Alternative to Landlord Self-Help, 41 UCLA L. REV. 759, 766 (1994), also citing evidence from Cleveland, Ohio, that more than 90 percent of evictions are for nonpayment of rent. Id. at 766 n.25.


Gerchick, supra note 81, at 826.

CIVIL LEGAL REPRESENTATION
The literature includes many studies documenting that many groups of Americans do not think about their justice problems in legal terms, including: David Engel, The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18

85 Id. at 826.
86 Id. at 788–89.
88 Nonlawyer advocacy has been allowed in a number of federal hearing forums for some time. See generally Deborah L. Rhode, Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice, 1 J. INST. FOR STUDY OF LEGAL ETHICS 197 (1996).
89 See Sandefur, supra note 67 (reviewing findings from studies that compare case outcomes for people represented by lawyers and those represented by non-lawyer advocates); See generally HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998) (reviewing evidence about lawyer and nonlawyer advocacy in several distinct kinds of civil legal cases); Ralph C. Cavanaugh & Deborah L. Rhode, Project, The Unauthorized Practice of Law and Pro Se Divorce, 86 YALE L.J. 104 (1976) (comparing the experiences of pro se and lawyer-represented divorce petitioners).
93 See generally Jane C. Murphy, Access to Legal Remedies: The Crisis in Family Law, 8 BYU J. PUB. L. 123 (1993).
95 See supra Section IV.
96 The literature includes many studies documenting that many groups of Americans do not think about their justice problems in legal terms, including: David Engel, The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community, 18
The Fulcrum Point, supra note 51, at 957.

Id. at 958.

Id. at 960.

See generally Hadfield, supra note 92; Cavanaugh and Rhode, supra note 88; Rhode, supra note 92.

The Fulcrum Point, supra note 51, at 959–60.

Id. at 964.

See generally The Fulcrum Point, supra note 51.

CIVIL LEGAL REPRESENTATION
In the 1992 U.S. civil justice survey, 17 percent of low income households were experiencing personal finances or consumer civil justice problems; 12 percent of moderate-income households were experiencing such problems. Six percent of low-income households reported health-care-related problems, while 5 percent of moderate-income households reported experiencing such problems. CONSORTIUM ON LEGAL SERV., supra note 27, at 10.


Documenting the Justice Gap, supra note 59, at 5; Documenting the Justice Gap: Updated Report, supra note 59, at tbl. 1.
A Right to Counsel for Low-Income Tenants Facing Eviction,
Paula A. Franzese, Peter W. Rodino Professor of Law, Seton Hall Law School

Every day, in New Jersey and across the country, countless residential tenants face the prospect of eviction. Last year, our state saw 161,000 evictions. The preponderance of those tenants, many among the ranks of the working poor and the disabled, remain voiceless, without legal counsel or the opportunity to be meaningfully heard. Yet there are catastrophic personal and societal consequences of housing displacement and homelessness.

Indeed, only 80 of the 40,000 residential eviction actions brought in Essex County in one year alone had tenants asserting their most basic right to a safe and inhabitable dwelling. That figure is startling, particularly given the far greater statistical likelihood and documented accounts of serious housing code violations in derelict rental units in Newark and its vicinity.

The principal defense available to aggrieved tenants, known as "breach of the implied warranty of habitability," is supposed to guarantee residential tenants that the apartments they rent are livable and in good condition. It was created to give aggrieved tenants who are for example without heat or running water or whose premises are fraught with rodent, bug or mold infestation the right to lawfully withhold rent until the landlord makes the necessary repairs. It is meant to be a defense to an eviction action and to compel landlords’ compliance with basic standards of safety and decency in the apartments that they lease.

Yet, in most cases that assurance goes unheeded because the injured tenant is without a lawyer to assert it.

For a tenant to appear in court without legal representation requires that she navigate on her own a procedural labyrinth rife with sand traps for the unwary. To successfully contest an eviction action requires substantive knowledge of the law and the defenses available for nonpayment of rent when the premises are unsafe and betray basic standards of habitability. In other words, it requires the effective assistance of counsel.

For a tenant living paycheck to paycheck to even enter a court appearance to defend an eviction action can mean taking a day off from work, losing wages and securing child care.

In our state, where one in three residents live at or below the poverty line and many are often one paycheck away from homelessness, there is no provision of counsel for low-income tenants faced with the peril of eviction. Given the stakes, there should be.

A recent NPR investigation revealed how, in Newark’s housing court, counsel for the landlord can, contrary to the law and rules of professional responsibility, seek out the unrepresented tenant in that landlord’s eviction action, elicit information from her, and then, once in court, use that very information to secure a swift eviction judgment before the tenant even realizes what just transpired. That is wrong, and must stop.

This year, the New York City Council passed a ground-breaking bill that provides on a pilot five-year basis free counsel to low-income tenants facing eviction. The bill, entitled Right to Counsel
in Housing Court, cited in its legislative history the fact that there is a 77 percent reduction in eviction judgments entered against tenants who are represented by counsel in Housing Court, compared to those without an attorney. The bill’s sponsors note the cost effectiveness of affording tenants' legal representation, citing its capacity to help tenants and taxpayers avoid the high costs of housing displacement, disruption and homelessness.

In the words of one of the bill's sponsors, “Never will tenants be evicted to homeless shelters because they could not afford a lawyer.”

In response to concerns over the costs of funding a right to counsel, a report issued by an independent global financial advisory firm determined that in addition to keeping 5,200 families out of NYC's shelter system, assuring counsel to low-income tenants facing eviction would "not only offset the cost of counsel, it would save NYC an additional $320 million each year."

New Jersey, perhaps under the aegis of the state's bar association, could commission its own cost-benefit study, and then decide whether it is well-advised to launch a right-to-counsel program on a pilot basis.

The challenges to providing decent and affordable housing for all are surmountable. The problems with the system at present are solvable. Recently, New Jersey Senators Codey, Rice and Beck introduced several bills aimed at remediating a number of deficiencies in the ways that justice for renters is dispensed.

Still, rights without a means to assert them become meaningless. Providing counsel for low-income tenants at risk of displacement will help to assure that basic guarantees of due process and essential fairness are met.

We are a state comprised of compassionate, engaged, and immensely talented residents. We can muster the collective will to do better for the poor, the suffering and the marginalized.

Dr. King noted aptly that, “Every condition exists simply because someone profits by its existence. This economic exploitation is crystallized in the slum.” It is time to put an end to the profiteering of the slumlord, and to realize the dream of a safe place to call home for all.
Why We Do the Work

By Paula A. Franzese

It is easy to forget why we do the work that we do, and why it matters. With that in mind, I wrote this letter to my law students. It resonated with many of them. If a principal cause of suffering is forgetfulness, this reminder seems timely for all of us:

Be grateful to have work to do. It is a safe harbor against the heartbreaks and sorrows of this life. Do it not so much for your own sake but on behalf of the people and constituencies, many still unknown to you, who nonetheless are waiting for you to use your expertise to make their lives better.

Do the work to vindicate the legacy and sacrifice of those on whose shoulders you stand. Do it because in these fraught times and in a world preoccupied with status, the law degree gives a status that affords access to power.

Do the work with both technique and compassion. One cannot be reliably sustained without the other.

Do the work to cultivate proximity to those whose experiences, identities, and circumstances are different from your own. Proximity is empathy’s gateway. It is an antidote to the indifference that the facelessness of virtual worlds breeds.

Proximity to the “other,” however and whatever you conceive that to be, becomes a reminder that the burdens of your own struggles and circumstances do not relieve you of the imperative to acknowledge and to see others in theirs. I do not wish for you the plight of the desperately poor for you to garner a better understanding of what it means to live hand to mouth, but spend a day in a homeless intake center and tell me if you are not forever changed.
Do the work to cultivate humility, best described by C.S. Lewis as “not thinking less of yourself, but thinking of yourself less.” Do it to take charge of your focus, so that it becomes less self-seeking and more “other”-reaching.

Your focus is yours alone, and the one thing that you remain in charge of in the changing winds of time and context. Do not give it away to the idle distractions of the frivolous or, worse, the vexatious. Let the work help you to stay away from the bottom-feeders and those who prey on human frailties. Let it prepare you for the sweet spot that awaits, when your carefully honed skills meet the world’s greatest needs.

Do the work to help you to remember what you stand for, even more than what you stand against. There is more power in standing for decency, fairness, and the cause of justice than there is in decrying injustice. Rather than call out the wrong-headed, do the work to be able to call in people of good conscience.

Do the work because these are uncertain times for the promise of equal access to justice. Particularly now, be glad for the acuities that allow you to show up with the force of reason and rightness to be an instigator, catalyst, and defender of the rule of law and the promise of mercy.

Do the work to give you standing—the right that preparation and experience affords—to advance the cause of progress, champion the underdog, and give voice to those yet to find their own. Do it to see what needs to be seen and then, having seen, to tell the stories of those left out and left behind. A Nigerian proverb makes the point: “Until the lion has a historian, the hunter will always be the hero.”

When there is so much to do, and it sometimes feels that you push that boulder up the mountain only to have it tumble down again, remain mindful of Camus’ choice to interpret the myth of Sisyphus through a lens of hope. Camus writes that while some might see only futility in the task at hand, he chooses instead to see the nobility of the very effort. He notes, “The struggle itself toward the heights is enough to fill a man’s heart. One must imagine Sisyphus happy.”

Optimism is a daily choice. So is love. Do the work so that it might become “love made visible.”

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A Safe Place to Call Home: Giving Voice to Tenants Left Behind
Paula A. Franzese, Peter W. Rodino Professor of Law, Seton Hall Law School

Our State’s courts have become inundated with eviction actions, as tenants struggle to make ends meet. In Newark alone, tenant evictions affect 30,000 residents annually, destabilizing families and neighborhoods, targeting the most vulnerable and compounding the crisis in homelessness.

A safe place to call home is a human right. When a tenant is displaced, a parade of horribles follows in the form of economic loss, trauma, illness, physical and emotional stress and, most tragically, homelessness.

Homelessness comes at a high cost to already strapped government budgets. It costs more to provide temporary shelter than it does to subsidize sustainable affordable housing and prevent wrongful evictions in the first place.

With so much at stake, it defies conscience and common sense that the vast preponderance of vulnerable tenant households named in eviction actions are without access to counsel. While their landlords are typically well represented, low and moderate income tenants without a lawyer are without the mechanisms to assert their statutory rights to safe and habitable premises along with their right to be free from eviction unless the landlord can show cause. Indeed, in our study of the 40,000 eviction actions brought in Essex County in one year alone, my colleagues and I found that only 80 of those cases (0.002%) had tenants asserting habitability defenses, this notwithstanding the effects of gentrification’s contributions to wrongful evictions and the documented instances of rentals in Newark and beyond that are grossly substandard.

Against that bleak landscape, I applaud Newark Mayor Ras Baraka’s commitment to bring to fruition a right to counsel for Newark tenants most at risk of eviction - the disabled, the elderly, and those with incomes no more than two times the federal poverty level. The City’s initiative will give voice to tenants otherwise silenced by a system that too often is stacked against them. It is a major step on behalf of fundamental fairness and equal access to justice and should serve as a model for State-wide implementation.

The right to counsel must be supported by just landlord-tenant laws. New Jersey's rent posting requirement impedes an aggrieved tenant’s right to a hearing on claims that the premises are uninhabitable. It provides that a tenant named in an eviction action for nonpayment of rent cannot be heard on her defense that the premises are unsafe and unsound unless she first remits to the court any rent amounts claimed due by the landlord, without consideration of whether those amounts are actually owed in view of the rental unit’s defects. Further, the requirement fails to take into account the fact that in the face of landlord inaction tenants can and do apply withheld rent to self-help remediation (such as hiring an exterminator when the premises are roach or rodent infested or purchasing a space heater when the apartment is without heat).
Worse yet, there are a proliferating number of private reporting agencies that comb court records for eviction filings which they then sell to landlords for profit. Tenants whose names appear on these “blacklists” often find themselves denied future renting opportunities, stigmatized and excluded from the promise of fair housing. What is more, the specter of being blacklisted chills an aggrieved tenant’s willingness to rock the boat, lest she endure the banishment that can attach because she fought for her rights or, more simply, fell upon hard times.

The NJ Senate has before it two important bills introduced by Senators Codey and Rice. The first, S805, relieves aggrieved tenants of the rent deposit requirement pending a hearing on the premises’ habitability. That bill brings NJ in line with the majority of states that do not require a tenant to post rent claimed due by the landlord in order to get a hearing on the tenant’s habitability claim.

The second, S806, keeps court filing records in eviction proceedings confidential and unavailable to the public for at least sixty days after an action is filed to allow time for the case to proceed. Thereafter, those records would be discoverable only if the given matter did not result in a resolution favorable to the tenant. At the federal level, Sen. Cory Booker (D-NJ) has introduced a national bill to reform unfair tenant screening practices and reporting procedures. These initiatives deserve passage.

We have reached a tipping point in this nation as unprecedented income inequality puts the plight of the most vulnerable into sharper focus. We can allay and also prevent the suffering wrought by housing displacement. In the process, let us seek for others the same basic assurances that we wish for ourselves.
Biographies

Paula Franzese, the Peter W. Rodino Professor of Law at Seton Hall Law School, is one of the country's leading experts in property law, housing reform, and government ethics. Her empirical work on the plight of low-income tenants facing eviction has been widely cited, spurring state legislative reform efforts. Her scholarship shines a light on the crisis in safe and affordable housing, the problem of tenant blacklisting and the barriers to enforcement of the implied warranty of habitability. Prof. Franzese has championed the right to counsel for tenants facing eviction and partnered with Sen. Cory Booker on his proposed federal reform to end tenant blacklisting. She has written extensively on privatization and the erosion of community, the imperative to reclaim civility, and state ethics reform. She served as Special Ethics Counsel to Gov. Richard J. Codey, Chair of the NJ State Ethics Commission and Vice-Chair of the Election Law Enforcement Commission. She is featured in the Harvard University Press publication, What the Best Law Teachers Do, and is the unprecedented ten time recipient of the SBA Professor of the Year Award. In 2019, that award was renamed the Paula A. Franzese Excellence in Teaching Award in her honor.

Nicholas M. Insua is a shareholder in the New Jersey office of Anderson Kill who focuses his practice on insurance recovery litigation and counseling. Nick is a frequent author and lecturer, who has been cited in numerous court decisions. He has served as an Adjunct Professor at Seton Hall University School of Law as well as a guest lecturer at Rutgers School of Law - Camden. Prior to rejoining Anderson Kill in 2019, Nick took a leadership role in pro bono practice at a major law firm. In his own pro bono practice, Nick has represented clients seeking asylum and other forms of relief from deportation. After Superstorm Sandy, he worked with Volunteer Lawyers for Justice and other organizations to bring insurance coverage support to those in need. He drafted manuals focused on insurance coverage issues for both victims of the storm and attorneys assisting those victims. In addition, Nick has handled impact pro bono litigation including teaming with the ACLU-NJ to overturn city ordinances that criminalized seeking food or monetary assistance. Nick served as Chair of the Insurance Law Section of the New Jersey State Bar Association, and currently serves as Chair of the organization's Pro Bono Committee.

Lori A. Nessel is a Professor at Seton Hall University School of Law. Her teaching and scholarship focus in the areas of immigration and refugee law and policy, international human rights, rule of law, and access to justice. In her Immigrants' Rights/International Human Rights Clinic, Professor Nessel supervises live cases including claims under the Refugee and Torture Conventions, as well as cases involving human trafficking, family reunification and other forms of relief from deportation. In 1995, prior to becoming a professor at Seton Hall, Professor Nessel completed a Skadden Arps Public Interest Law Fellowship representing migrant farmworkers in Upstate New York and worked at a small civil rights firm in New York City. In 2006, Professor Nessel was appointed Director of the Center for Social Justice, home of Seton Hall's Clinical and Pro Bono Programs. She has also been actively involved in designing the International Human Rights/Rule of Law Initiative, is the faculty director of the Haiti Rule of Law Project and is in the process of designing a new Guatemala Rule of Law Project. Professor Nessel has written numerous scholarly articles which have been published in top academic journals and republished in annual immigration anthologies.
Trish Perlmutter joined Partners for Women and Justice in 2017, as Policy Counsel. Throughout her career, she has sought to combat systemic injustice, impacting marginalized groups. At Partners she advocates to ensure that the criminal justice system considers domestic violence risk in determining whether defendants are released pre-trial to improve safe access to child support. Prior, Perlmutter was a clinical professor at the Center for Social Justice at Seton Hall University School of Law. She litigated class action conditions cases on behalf of inmates in New Jersey for over a decade, including a successful statewide suit against the New Jersey Department of Corrections for punishing prisoners with mental illness. Prior to that, Perlmutter was also a litigation associate at Cravath, Swaine & Moore. In a pro bono case, she represented the first person to be sentenced to death under the federal drug “kingpin” statute on direct appeal and undertook a fact investigation which resulted in a presidential commutation of the death sentence. She serves on the Board of the Princeton University Prize in Race Relations. She holds a B.A. from Princeton University’s Woodrow Wilson School of Public and International Affairs and a J.D. from Harvard Law School.

Ruth Anne Robbins is a national academic leader in the field of legal writing and is the founder of the Rutgers Law Domestic Violence Clinic (now taught and directed by another professor). Her scholarship focuses on legal narrative, document design, and New Jersey domestic violence law. She has won multiple teaching and service awards, authors and co-authors books and articles, and edits Legal Communication & Rhetoric, a peer-reviewed journal designed for the practitioner audience. Since 2013 she and law students have worked on the issue of a civil right to counsel in domestic violence restraining order hearings; she has presented nationally, written a law review article, and written blogs on this topic.

Diane K. Smith is the Executive Director of Legal Services of Northwest Jersey, a five-office legal services program that provides free legal assistance to low-income families and individuals in Hunterdon, Morris, Somerset, Sussex and Warren Counties. Her achievements include providing leadership in developing a new vision of equal access of justice, directing merger of four not-for-profit corporations to form LSNWJ, and strengthening of LSNWJ’s volunteer projects. She is a Trustee of the New Jersey State Bar Association and Somerset County Bar Association, and past chair of the NSJBA JPAC and NJSBA Pro Bono Committee. She was Chair of the District XIII Ethics Committee and has served on the Supreme Court Committees on Women and Minority Concerns. Smith is the first recipient of the Charles J. Hollenbeck Award of the NJ State Professionalism Commission (2015) and a recipient of the NJ Women Lawyers Platinum Award (2017).