

NATURAL DISASTERS, ACCESS TO JUSTICE, AND LEGAL SERVICES

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INTRODUCTION

When the high winds and floodwaters from Hurricane Sandy began to subside on October 30, 2012, the New York City metropolitan area was left facing an unprecedented level of destruction.¹ The immediate aftermath of a natural disaster like Sandy² com-

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¹ See, e.g., ERIC S. BLAKE ET AL., NAT’L HURRICANE CTR., TROPICAL CYCLONE REPORT: HURRICANE SANDY (2013), available at http://www.nhc.noaa.gov/data/tcr/AL182012_Sandy.pdf.

² As many know, even deciding what to call Sandy has legal consequences. The Federal Emergency Management Agency (FEMA) Individual Household Program (IHP) administrators generally refer to Sandy as “Hurricane Sandy.” E.g., FEMA, HURRICANE SANDY RECOVERY EFFORTS ONE YEAR LATER (n.d.), available at http://www.fema.gov/media-library-data/1382967173777-7411aa1b6d729a8a97e84dbba62083d8/FEMA+Sandy+One+Year+Fact+Sheet_508.pdf. However, for homeowner’s insurance policyholders with special, higher-dollar hurricane deductibles in their policies, Sandy is Superstorm Sandy, an executive determination made by New York State Governor

pounds the structural problems of the inadequate provision of legal services to marginalized communities.³ How should legal services providers reorganize their limited resources to respond to sudden catastrophe?

This Article describes the response of the New York Legal Assistance Group (NYLAG) to the post-disaster access to justice emergency following Hurricane Sandy.⁴ Part I describes the structure and focus of NYLAG's Storm Response Unit (SRU), a unit born out of NYLAG's efforts to assist storm victims. Part II presents client stories to illustrate the interplay of post-disaster legal issues. Part III concludes by noting the significant benefits found in a dedicated, comprehensive legal services project as a response to natural disas-

Andrew M. Cuomo, among other state executives (and under somewhat dubious legal authority). See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Homeowners Will Not Have to Pay Hurricane Deductibles (October 31, 2012), available at <http://www.governor.ny.gov/press/10312012Hurricane-Deductibles>. Administrators in FEMA's National Flood Insurance Program (NFIP) avoid the issue by referring to Sandy as a "meteorological event." E.g., JAMES A. SADLER, FEMA, W-12115, METEOROLOGICAL EVENT SANDY – FLOOD DAMAGED CONTENTS CLAIM GUIDANCE (Dec. 19, 2012), available at <http://bsa.nfipstat.fema.gov/wyobull/2012/w-12115.pdf>. The authors will generally refer to the storm simply as "Sandy." It should also be noted that while the focus of this Article is on Sandy and the legal needs that arise with natural disasters, many programs and issues discussed in this Article are relevant for other types of disasters. For that reason, *natural disaster* and *disaster* are often used in this Article interchangeably.

³ Each year, more than 2.3 million low-income New Yorkers navigate the State's legal system without assistance of counsel. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2012), available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf. Even before Hurricane Sandy, at best only 20% of the legal needs of low-income New Yorkers were being met. *Id.* In 2010, Chief Judge Lippman's Task Force found that 99% of tenants are unrepresented in eviction cases in New York City; 98% are unrepresented outside of the City; 99% of borrowers are unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City; 97% of parents are unrepresented in child support matters in New York City, 95% are unrepresented in the rest of the state; and 44% of homeowners are unrepresented in foreclosure cases throughout our state. Overall, 70% of civil matters in New York State courts involve family law, consumer credit, landlord-tenant, and foreclosure cases. TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2010), available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>.

⁴ NYLAG's Storm Response Unit was one among many legal services providers in the New York City Metropolitan Area assisting Sandy victims in critical relief efforts. This community of legal services providers included Brooklyn Jubilee, Law Help New York, The Legal Aid Society, Legal Services of New York, Touro Law Center's Disaster Relief Clinic, MFY Legal Services, New York City Bar Justice Center, South Brooklyn Legal Services, Staten Island Legal Services, Pro Bono Net, the City Bar Justice Center (an affiliate of the New York City Bar Association), Make the Road New York, and Volunteer Lawyers for Justice of New Jersey.

ters. We also hope this Article will serve as a partial compendium of legal and non-legal resources, federal law and policy, and practice tips for advocates who are confronted with the sudden mass of urgent, complex, and intertwined claims for assistance that natural disaster victims bring.

I. SRU ORIGIN AND STRUCTURE

NYLAG is a private, independent public-interest law firm that provides comprehensive civil legal services to low-income New Yorkers. In the immediate aftermath of Sandy, NYLAG, as with many other legal services providers, was displaced from its offices and forced to set up temporary offices in various law firms and community partners' offices across Manhattan, creating another level of logistical challenges in organizing and deploying disaster legal assistance.⁵ Despite this, it set about creating SRU from the premise that disaster victims comprise a diverse client population—diverse across socioeconomic and demographic lines, and diverse in the wide variety of legal issues they present. There is no “one size fits all” approach for providing legal assistance in such circumstances. Recognizing this, NYLAG established a comprehensive legal services unit. NYLAG also established multiple points of entry for storm victims. The goal of this arrangement was and is creating flexibility in meeting clients and responding to their needs, and to efficiently provide varying levels of assistance across several distinct legal issue areas.

Thus NYLAG, despite itself being displaced from its offices in lower Manhattan by Sandy's storm surge, was able to establish a presence among affected areas. This was vital not only to reaching as many disaster victims as possible, but also to allowing SRU to develop an early familiarity with the types of factual scenarios and legal problems facing disaster victims. For example, New York City storm victims were eligible for a very short-term temporary food assistance program. The program was designed for victims who were not already eligible for Supplemental Nutrition Assistance Program (SNAP) benefits (commonly known as food stamps).⁶ NYLAG learned through its partnerships with community organizations that the City's Human Resources Administration (HRA) only

⁵ NYLAG was displaced for over two months, returning to its offices in mid-January 2013.

⁶ The temporary disaster program is also known as D-SNAP. See U.S. DEP'T OF AGRIC. FOOD & NUTRITION SERV., *DISASTER SNAP GUIDANCE* (2013), available at http://www.fns.usda.gov/disasters/response/D-SNAP_Handbook/D-SNAP_Handbook.pdf.

arranged for two application centers, neither of which was convenient to the hardest-hit areas. In response, NYLAG staff and volunteers developed informational flyers for Sandy victims and canvassed Far Rockaway, Coney Island, and parts of Staten Island to spread the word about the temporary food assistance program.⁷

A. *SRU Components*

NYLAG did not have a Storm Response Unit before Sandy. NYLAG's initial response efforts consisted of staff members volunteering to help disaster victims while still being responsible for their own full caseloads. Staff members from other units volunteered after work hours and during weekends to begin providing disaster legal services in the immediate aftermath. NYLAG's early presence on the ground also allowed it to organize the efforts of dozens of volunteers, including pro bono attorneys and law students. Within a very short time, however, NYLAG leadership determined that the long-term recovery needs of Sandy victims would require a dedicated, multi-issue legal services project. The new Storm Response Unit brought together experienced NYLAG attorneys and expanded under their leadership with vital support from the Robin Hood Foundation, the UJA Federation, and several other private donors.⁸

In the early days after Sandy, NYLAG established its Storm Help Hotline to field legal questions from storm victims across the five boroughs of New York City, as well as Nassau and Suffolk Counties on Long Island. NYLAG sent attorneys to impacted communities around New York City and Long Island to meet clients in person at FEMA disaster relief centers. NYLAG drew on its close relationships with social service providers and community organizations to set up more than twenty legal clinics in many of the hardest-hit neighborhoods, including Far Rockaway, Coney Island, Long Beach, Brighton Beach, and Freeport. It also deployed the Mobile Legal Help Center, a law office and courtroom on wheels, to allow staff and volunteer attorneys to meet directly with clients in devastated areas that often lacked sufficient infrastructure to host storm relief clinics.⁹

⁷ See *Spreading the Word, One Flyer at a Time*, NYLAG (Dec. 20, 2012), <http://nylag.org/news/2012/12/spreading-the-word-one-flyer-at-a-time/>.

⁸ See Press Release, New York Legal Assistance Group, *An Unprecedented Storm Response* (Jan. 10, 2013), <http://nylag.org/news/2013/01/an-unprecedented-storm-response>.

⁹ This courtroom on wheels enabled attorneys to provide counseling, advice, and direct representation to clients without leaving the vehicle. A video link with the

The legal consultations NYLAG conducted in the first weeks after Sandy often addressed basic questions about recovery programs' procedures and eligibility requirements. For some Sandy victims, this was enough help for them to navigate the recovery on their own. It was immediately clear, however, that many clients required ongoing assistance and eventually representation to resolve their post-disaster legal issues. Thus, many of the temporary legal clinics evolved into long-standing legal consultation sites. This proved particularly useful to connect with potential clients who had evacuated before the storm and only returned to their homes weeks or months afterward. SRU's ability to meet clients closer to their homes also made for more effective attorney-client relationships by minimizing the logistical hurdles of gathering documents and scheduling phone appointments that can impede advice and counsel.

B. Legal Issues

Natural-disaster victims face a complex and shifting array of legal issues. In the early stages following a disaster, they must maneuver a confusing and, as in the case of many Sandy victims, novel set of questions about their rights, duties, and options for disaster recovery. Some legal issues are familiar to legal services advocates, such as landlord-tenant disputes, foreclosure defense, and public-benefits maintenance. Related to these issues are programs implemented specifically for disaster victims, such as the temporary food assistance and Disaster Unemployment Assistance programs.¹⁰

From its inception, SRU incorporated the broad toolkit of direct legal services advocacy. The post-disaster legal landscape, however, presented areas of law and government benefits programs not typically handled by non-profit legal services providers. In addition to handling the familiar stew of civil legal issues in the unfamiliar context of a post-disaster emergency, SRU faced a steep learning curve in new legal issues to adequately advise Sandy victims. NYLAG reached out to legal services attorneys with disaster recovery experience for substantive training on post-disaster benefits programs and experiences following Hurricane Katrina and other nat-

courts provided access to judges for emergency hearings, including domestic violence and eviction cases. *Mobile Legal Help Center*, NYLAG, <http://nylag.org/units/mobile-legal-help-center> (last visited Oct. 29, 2013).

¹⁰ See *Disaster Unemployment Assistance*, N.Y. STATE DEP'T OF LABOR, <http://www.labor.ny.gov/ui/claimantinfo/disaster-unemployment-assistance.shtm> (last updated Mar. 7, 2013).

ural disasters.¹¹ In turn, NYLAG led training programs for legal services and pro bono attorneys in the metropolitan area.¹² Advocacy for FEMA benefits, for example, required that SRU attorneys quickly familiarize themselves with not only a new set of federal rules and regulations, but also the government bureaucracy that administers the program. Just as a legal services housing attorney develops a rapport and best practices with her local public housing administration and housing court, or a public benefits advocate with local Human Resources Administration staff and administrative law judges, SRU attorneys had to learn—and learn quickly—through practice the peculiarities of advocating for their clients' appropriate disaster recovery benefits.

1. Federal Assistance: FEMA and SBA

Disaster victims may be eligible for a variety of benefits from the federal government. Generally, the most significant source of benefits for individuals following a natural disaster is FEMA's Individuals and Households Program (IHP).¹³ IHP assistance may either be direct—such as the provision of a housing unit for temporary shelter—or financial, in the form of purpose-specific grants. Financial assistance is the more common form of assistance

¹¹ Among the organizations that offered assistance and training were Southeast Louisiana Legal Services and Equal Justice Works. SRU benefited in particular from a week of firsthand training and assistance by Zachary Tusinger, an Equal Justice Works AmeriCorps Legal Fellow from Legal Aid of Western Missouri.

¹² NYLAG held its first training on post-disaster legal issues on November 9, 2012.

¹³ There is a regulatory sequence of delivery for FEMA IHP disaster benefits, according to which emergency assistance from "volunteer" (i.e., charitable) organizations and insurance contract proceeds should be provided before FEMA IHP provides rental, home repair, personal property replacement, or any other assistance. 44 C.F.R. § 206.191(d)(2) (2013). In practice, however, an insurance claim settlement may take months, if not years, and FEMA benefits can therefore be temporally interspersed with other benefits. As this Article went to print, NYLAG was still working on some FEMA IHP assistance appeals, although advocates should know that FEMA IHP representatives have stated that the eighteen-month deadline for assistance in the *Code of Federal Regulations*, 44 C.F.R. § 206.110(e), will apparently by policy be interpreted to mean that no new requests for assistance or appeals of denied requests will be considered after that deadline without a strong showing of good cause for the delay. As an initial practice tip, this means that advocates should not wait for the complete and final settlement of an insurance claim (whether for home repair, additional living expenses benefits through a homeowner's or renter's insurance policy, or any other benefits) before pursuing FEMA IHP assistance. The individual may always pay back to FEMA the benefits that have been duplicated by insurance proceeds or charity. *See id.* §§ 206.116, 206.191(a)–(d). This also means that advocates should be aware of the effect of the sequence of delivery on individuals' eligibility for benefits. Nonetheless, when strict application of the sequence of delivery regulations "would adversely affect the timely receipt of essential assistance," out-of-order provision of services is permissible. *Id.* § 206.191(d)(4).

and covers a wide variety of post-disaster expenses, such as rental assistance, home repair, personal property reimbursement, and moving and storage expenses.¹⁴ Each type of benefit has specific eligibility requirements¹⁵ or monetary limits¹⁶ that FEMA applicants might not be aware of when they register.¹⁷

Some aspects of FEMA policy regarding eligibility and monetary limits for IHP benefits are available through the FEMA Office of Chief Counsel's *Disaster Operations Legal Reference (DOLR)*, which is generally not available to the public, but should be obtainable by contacting FEMA itself.¹⁸ The *DOLR* leaves open more questions than it addresses, but it is particularly helpful in understanding Other Needs Assistance (ONA) benefits administration, the disaster declaration, and federal response processes.¹⁹ Mainly, though, FEMA IHP policy is set out in the *IHP Policies and Procedures Manual*, commonly referred to as the PPM. This internal document indicates how IHP staff members should process requests for various types of assistance in different circumstances. It also provides guidance on various related issues, such as FEMA's policies for accept-

¹⁴ *Id.* §§ 206.110, 206.117, 206.119.

¹⁵ For example, financial assistance for home repair is limited to "help return owner-occupied primary residences to a safe and sanitary living or functioning condition." *Id.* § 206.117(b)(2)(i). Thus, only when an IHP applicant can show that he or she owns a damaged property and uses that property as his or her primary residence (a term defined in the regulations) is that applicant eligible for any IHP Housing Assistance (HA) home repair funds.

¹⁶ See FEMA, DISASTER OPERATIONS LEGAL REFERENCE 6-62 (2011). This resource notes that

FEMA awards assistance for different types of disaster-related personal property expenses as determined by a standardized, line item list. A contractor, currently R.S. Means, provides a list that contains standardized line item costs. Thus all eligible personal property has an associated line item and price that NEMIS [National Emergency Management Information System] establishes in its administrative setup.

Id. at 6-62. These costs vary according to regional pricing variations, presumably also established by R.S. Means. For Sandy, this meant pricing differences between Long Island and New York City victims.

¹⁷ Somewhat similarly, many SRU clients reported that they were misinformed by FEMA employees that they could receive at-cost reimbursement for a given replacement or repair. While these incidences seemed to decrease over time, the authors are personally aware that such misinformation was provided by IHP staff members through May 2013.

¹⁸ SRU advocates found that the only reliable way to communicate directly with a FEMA representative was to call the FEMA Helpline. Written appeals would yield phone calls from appeals officers or email responses from general counsel staff on rare occasions.

¹⁹ The *DOLR* also has a lengthy section on Public Assistance benefits, which are available to state agencies, local governments, and certain private non-profit organizations. See 44 C.F.R. §§ 206.201, 206.202.

able evidence in certain situations. As will be discussed in subsequent sections, because FEMA generally does not provide any reasonable level of particularity in its written decision letters, advocates generally cannot cobble together any part of the PPM based on decision letters. It is only in talking with IHP staff members that one can start to understand how FEMA will interpret, or is at least supposed to interpret, a certain set of facts. And as policies evolve over time, understandings gained through benefits applications and appeals following one disaster may no longer be in place for the next disaster.

A particular challenge that SRU has faced in assisting individuals with obtaining FEMA IHP benefits is acquiring the client's IHP assistance file. A client's FEMA file is often the best source to use to evaluate a disaster victim's legal options. Federal regulations²⁰ and law²¹ allow individuals and their advocates to obtain these files, which are the only means to obtain IHP inspectors' reports of damaged residences and personal property, records of IHP staff members' contact with applicants,²² and more detailed notes of IHP actions.²³ These notes are crucial in determining the basis for a denial, since the decision letters applicants receive are merely automated form letters that are not designed to identify each missing element in an application or appeal. The IHP files are also helpful in obtaining a record of all documentation that FEMA has received from an individual, as individuals are often unable to provide a certain document months after they submitted it to FEMA or another party.²⁴ Because of these factors, obtaining an individual's

²⁰ 44 C.F.R. § 206.115(d) ("An applicant may ask for a copy of information in his or her file by writing to FEMA or the State as appropriate. If someone other than the applicant is submitting the request, then the applicant must also submit a signed statement giving that person authority to represent him or her.").

²¹ 5 U.S.C. § 552a(d) (2012).

²² This is referred to by IHP as a "Mail Room Report – MR 01 Contact Report."

²³ This is referred to by IHP as a "Mail Room Report – MR 02 Comments Report."

²⁴ The standard cover letter that IHP sends with an assistance file contains the following verbatim list of types of documentation for inclusion in a requested file:

- A computer print-out of the FEMA Housing Inspection Report;
- Documentation concerning the application (for example: receipts submitted, computer data base [sic] print-out verifying property ownership;
- Letters previously sent to FEMA; or
- Contact Sheets. These are FEMA staff records of conversations with the application, the landlord, the employer, or representatives of insurance companies or banks.

During recent teleconferences, FEMA leadership has also stated that advocates can request a benefits issuance sheet, which will show what types of IHP awards have been issued to a client; NYLAG, however, has not been successful in obtaining this additional documentation, otherwise gathering this information by telephone.

IHP assistance file is often one of the first steps an advocate needs to take in assessing the merits of a claim and his or her ability to represent that individual on that claim.

There are several hurdles advocates may face in this effort to obtain an IHP assistance file. First, FEMA does not have a file request form, so advocates must create their own. This presents a design challenge, in that advocates are frequently told by IHP representatives that FEMA did not understand the file request to be a file request, but rather some other document. A second and related challenge is that IHP will not confirm a documentation submission, and therefore advocates will only know that there is an issue (or that there is no issue) if they or the represented party contacts IHP to inquire.²⁵ A third challenge is that IHP representatives unfortunately do not seem to be consistently trained in what constitutes a valid file record request.²⁶ Most commonly, IHP representatives have told SRU that the request is in a “wrong” form or that certain unnecessary information, such as a copy of a driver license (which IHP will use as an alternate form of identity verifica-

²⁵ Experience indicates that at minimum, it is best to call IHP to confirm that it received a file request two to three business days after submitting the request, and then to check on its status and navigate any asserted issues approximately three weeks after submitting the request.

²⁶ The Department of Homeland Security, the agency within which FEMA is organized, provides regulations for processing a request for records on a U.S. citizen or lawful permanent resident. Regarding basic information, advocates and individuals should be prepared to list the applicant’s name, current address, date of birth, and place of birth. 6 C.F.R. § 5.21(d) (2013). DHS regulations give requesting parties the option to include a Social Security number to “help the identification and location of requested records,” *id.*, but it is good practice to include that information because IHP representatives verify identity in part through the last four digits of an applicant’s Social Security number. *See* FEMA, HELP AFTER A DISASTER: APPLICANT’S GUIDE TO THE INDIVIDUALS & HOUSEHOLDS PROGRAM 2 (2008), available at http://www.fema.gov/pdf/assistance/process/help_after_disaster_english.pdf (noting that applicants should be prepared to provide their social security numbers when applying for disaster assistance benefits). Additionally, individuals may submit a signed and dated statement that includes the sentence “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct . . .” as a substitute for the notarized statement required under the regulation. 6 C.F.R. § 5.21(d) (imposing sworn statement requirement and noting the process under 28 U.S.C. § 1746 as an adequate substitute therefor). Furthermore, the regulation requires an individual to describe the record with enough detail to enable FEMA to locate the records with “a reasonable amount of effort.” 6 C.F.R. § 5.21(b). This means that, at minimum, FEMA should receive information on the disaster address, the FEMA IHP disaster number corresponding to the event, and a description of the documents requested (e.g., inspection reports and eligibility letters). If the individual or advocate is requesting something unusual, such as the IHP inspector’s photos, this should be specifically noted. Finally, if the advocate wants the file released to him or her directly, the request must include a statement from the applicant authorizing such. *Id.* § 5.21(f).

tion) or a notarization of the request form, is missing. While generally these problems are best resolved by referring back to FEMA's unpublished policies in the PPM or asking to speak with a supervisor—IHP representatives, in other words, are generally unmoved by references to legal authorities, such as the United States Code—it is important that advocates know the requirements and project confidence in communicating those requirements to IHP representatives.

Additionally, it is important to know what FEMA will generally *not* release with assistance files. IHP inspection photos, which may in some cases be the only photos of home and personal property damage that exist and are likely some of the best-quality visual documentation of losses, will usually not be released by FEMA. A written list of payments made to an applicant will not be provided, although this can be obtained orally from an IHP representative or by comparing IHP decision letters with an applicant's records of payment. The breakdown of payments for specific home repairs or personal property damage will also not be provided in writing, but as with the overall list of payments, this can be obtained orally from an IHP representative.²⁷

The other main source of federal disaster benefits is, somewhat oddly, available through the federal Small Business Administration (SBA) and its Disaster Loans programs. Disaster loans have been made available to help Sandy victims finance their recovery expenses. Despite the explicit orientation of the SBA, a category of disaster loans is available to individuals to help them finance up to \$200,000 in home repairs and \$45,000 in personal property replacement.²⁸ SBA disaster loans can also be used in certain circumstances to refinance mortgages, although in practice this is not widely available to disaster victims.²⁹ SBA assistance is partially dependent on individuals' access to alternative sources of assistance: SBA offers its loans at reduced interest rates when individuals do

²⁷ Often one of the first things an advocate must do when advising a client is explain which repairs or personal property losses FEMA is paying for with an IHP award, and to explain that FEMA's dollar amounts for a given repair or loss are fixed and often far below the actual replacement cost of that item.

²⁸ U.S. SMALL BUS. ADMIN., HOME AND PERSONAL PROPERTY LOANS, *available at* <http://www.sba.gov/content/home-and-personal-property-loans> (last visited Dec. 3, 2013).

²⁹ *Disaster Loan Program—Fact Sheet about U. S. Small Business Administration (SBA) Disaster Loans*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/disaster-loan-program> (last visited Dec. 22, 2013); U.S. SMALL BUS. ADMIN., STANDARD OPERATING PROCEDURE 50-30-7, at 72 (2011) [hereinafter S.O.P. 50-30-7], *available at* <http://www.sba.gov/sites/default/files/SOP%2050%2030%207.pdf>.

not have access to alternative private credit options,³⁰ and SBA is subject to the same sequence-of-delivery requirements as FEMA.³¹ Unlike FEMA, SBA is a relatively transparent organization, and has published its Standard Operating Procedure for the disaster loans programs—an exceedingly helpful development.³²

Beyond the importance of SBA disaster loan programs as a recovery tool, working familiarity with them is a necessity for disaster assistance advocates because as a provider of last resort, FEMA requires that individuals apply to SBA for a loan before it will authorize grant assistance for “Other Needs Assistance” (ONA).³³ In other words, FEMA will provide IHP Housing Assistance funding in the form of rental assistance and home repair grants without an SBA disaster loan decision, but ONA assistance such as transportation, medical, personal property, and various other costs will not be considered until an individual can provide an SBA letter effectively showing a remaining financial need for an ONA expense.³⁴

2. Private Insurance (Homeowner’s and Flood Insurance)

The legal needs of Sandy victims also forced NYLAG attorneys to grapple with private homeowner’s and flood insurance issues for the first time. In New York City, over 370,000 homes, apartments, and other residences were affected.³⁵ In Long Island, over 58,000 residences were affected.³⁶ As mentioned above, entire categories of federal disaster assistance are not available to disaster victims

³⁰ See 13 C.F.R. § 123.104 (2013).

³¹ The Stafford Act prohibits federal aid from duplicating assistance that a disaster victim receives from local government, charitable organizations, insurance proceeds, or any other sources. 42 U.S.C. § 5155 (2012). To address this “duplication of benefits” rule, FEMA and the SBA established a sequence of delivery protocol that takes into account disaster aid from other sources before determining the amount of a FEMA grant or SBA disaster loan. See 44 C.F.R. § 206.191 (2013); see also S.O.P. 50-30-7, *supra* note 29, at 98.

³² See generally S.O.P. 50-30-7, *supra* note 29.

³³ See 44 C.F.R. § 206.191(d)(1)(i), (d)(2)(iii), (d)(2)(iv) (2013).

³⁴ For applicants with very modest means and clear documentation indicating such, FEMA will evaluate the application for ONA without requiring an SBA loan application. Advocates can determine whether a client can skip the SBA loan application if the FEMA file contains a note indicating “SBA = FIT,” which means that the applicant has failed the SBA income test.

³⁵ CITY OF N.Y., COMMUNITY DEVELOPMENT BLOCK GRANT-DISASTER RECOVERY: PARTIAL ACTION PLAN A, at 25 (2013), available at http://www.nyc.gov/html/recovery/downloads/pdf/nyc_cdbg-dr_action_plan_hud_submission.pdf.

³⁶ N.Y. STATE OFFICE OF CMTY. RENEWAL, STATE OF NEW YORK ACTION PLAN FOR COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM DISASTER RECOVERY 5–6 (2013), available at <http://www.ny.gov/assets/documents/CDBGActionPlan.pdf>.

who have insurance coverage.³⁷ Although private individual insurance is not traditionally included in the ambit of legal services providers, SRU recognized early that a comprehensive response to Sandy would be severely incomplete without addressing this fundamental component of storm victims' recovery. Indeed, insurance issues are among the most long-running and intractable issues that NYLAG attorneys are handling.

NYLAG reached out to the private bar to fill the knowledge gap in federal³⁸ and state residential insurance law. Private insurance law firms provided substantive pro bono training on insurance advocacy, and SRU attorneys quickly incorporated insurance issues into their legal analyses. With increased experience and further trainings, they were able to advise and represent clients in flood insurance claims settlement and appeals, homeowner's insurance negotiations, and consumer disputes with contractors and public adjusters. SRU attorneys also began to represent low-income homeowners in insurance mediations against their homeowner's insurance providers as soon as that special disaster-relief program was implemented by the American Arbitration Association.³⁹

³⁷ See discussion *supra* Part I.B.1.

³⁸ Unless there is a special policy (generally a policy that is imposed by the mortgage bank because the mortgaging party, likely a homeowner, has not purchased a compliant flood insurance policy, referred to as "force-placed insurance") or additional-coverage (an "excess") policy, flood insurance in the U.S. is organized under FEMA's National Flood Insurance Program (NFIP). NFIP has standard insurance contracts that it uses for residences and other types of insurable property. See generally NFIP, STANDARD FLOOD INSURANCE POLICY – DWELLING FORM (2000), available at <http://www.fema.gov/media-library-data/20130726-1730-25045-6388/f122dwellingform0809.pdf>. Additionally, flood insurance policy interpretation is governed by federal—not state—laws, regulation, and policy. See *DeCosta v. Allstate Ins. Co.*, 730 F.3d 76, 83 (1st Cir. 2013); DWELLING FORM at 18 ("This **policy** and all disputes arising from the handling of any claim under the **policy** are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, et seq.), and Federal common law." (emphases in original)).

³⁹ See Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces DFS Mediation Program for Disputed or Denied Insurance Claims for Storm Sandy Homeowners (Feb. 25, 2012), available at <https://www.governor.ny.gov/press/02252013-%20dfs-mediation-program-for-disputed-or-denied-insurance-claims>.

A similar program operates in New Jersey for Sandy claims arising there, and these types of post-disaster insurance claim arbitration programs have become common in the years following the Hurricane Katrina disaster. See *Storm Sandy Insurance Mediation Program*, N.J. STATE DEP'T OF BANKING & INS., http://www.state.nj.us/dobi/division_consumers/insurance/sandymediation.html (last visited Dec. 22, 2013); see also *Disaster Recovery Programs*, AM. ARBITRATION ASS'N (AAA) (2013), <http://www.adr.org/aaa/faces/aoe/gc/government/statenaturaldisasterprograms> (noting AAA programs for Hurricane Katrina, Superstorm Sandy, and a standing program for North Carolina homeowners with claims from declared natural disasters).

The settlement of flood insurance claims has presented a unique challenge. Despite the flood damage wrought by hurricanes and tropical storms in New York in recent years⁴⁰ and the unfortunately high frequency of devastating hurricanes and other flood events across the United States, there is generally little written information available on preparing, adjusting, and litigating flood insurance claims. This includes, notably, case law.⁴¹ As a result, beyond consulting with experienced attorneys directly, much of the knowledge gained in flood insurance law and claims settlement has come through “on the job” training.

For example, one of the most pressing issues that NYLAG, other Sandy legal services providers, and private attorneys were dealing with as this Article was being written was filing compliant proofs of loss for flood insurance claims. A proof of loss is a standard document in real property insurance claims that serves as an official statement of damages for insured property for a given event, such as Sandy. In the context of public interest legal services providers and Sandy floodwaters damages, a proof of loss refers to the sworn-under-penalty-of-perjury statement that a policyholder must make within a specific timeframe to the insurance company⁴² to remain compliant with the terms of a Standard Flood Insurance

⁴⁰ N.Y. STATE OFFICE OF CMTY. RENEWAL, *supra* note 36, at 7 (noting that about 9,300 owner-occupied homes in New York City and Long Island—including Bronx, Kings, Nassau, Queens, Richmond and Suffolk counties—suffered damage from Hurricane Irene).

⁴¹ A Westlaw search reveals an average of about thirty decisions per year over the last ten years involved the regular Standard Flood Insurance Program (SFIP) within the NFIP, although some number of these cases may not involve the Dwelling Form contract that applies to individual homeowners. A substantial number, as will be shortly discussed, involve little more than simple decisions on summary judgment motions against policyholders who failed to submit a compliant proof of loss for their flood insurance claim by the relevant deadline. More importantly, NYLAG experience indicates that even with this number of decisions, there are many important questions that are either only partially resolved or are totally unresolved by the federal courts.

⁴² Most SFIP policies are issued under the Write Your Own (WYO) program, in which NFIP grants private insurers the right to issue and administer SFIP policies in their own names in return for potentially profitable operating allowances from NFIP. The WYO program leads to confusion among homeowners, as it is very easy to confuse the IHP and the NFIP as just “FEMA,” or to believe that any policy administered by a private insurer is not an NFIP policy. See NAT’L FLOOD INS. PROGRAM, FLOOD INSURANCE MANUAL, at REF-1 (2013), *available at* http://www.fema.gov/media-library-data/475d6c4f6dc907803f7392155ca50d60/02_reference_508_oct2013.pdf. Over eighty percent of SFIP policies are issued and administered by WYO carriers operating as fiscal agents and under the authority of the NFIP. Memorandum W-13058 from James A. Sadler, FEMA, for Write Your Own (WYO) Principal Coordinators, WYO Vendors, and NFIP Direct Servicing Agent (Sept. 23, 2013), *available at* <http://bsa.nfipstat.fema.gov/wyobull/2013/w-13058.pdf> (mandating, by way of a policy statement, WYO carriers and NFIP staff to participate in certain non-binding mediations

Program (SFIP) contract.⁴³ The consequence of the failure to meet this obligation to submit a compliant proof of loss by the stated deadline—under normal terms, within sixty days of the date of loss⁴⁴—is potential denial by the insurer of further adjustment of the claim,⁴⁵ and summary judgment against the individual should she bring suit against the insurer for breach of contract.⁴⁶

that are organized by a state following a major disaster). The remaining policies are serviced by NFIP under its NFIP Direct arm.

⁴³ See *Proof of Loss*, FEMA, <https://www.fema.gov/media-library/assets/documents/9343?id=2545> (last visited Dec. 22, 2013) (providing a link to the NFIP model cover page for the proof of loss and defining it as “a form used by the policyholder to support the amount they are claiming under their policy, which must then be signed and sworn to, and submitted with supporting documentation”). The Dwelling Form contract that is used for residential homeowners in either non-condominium, one-to-four-family buildings, or a single-family residence in a condominium building, is available at 44 C.F.R. pt. 61, app. A(1) (2013) and through the FEMA website at <http://www.fema.gov/media-library-data/20130726-1730-25045-6388/f122dwellingform0809.pdf>. The proof of loss requirements are set forth in 44 C.F.R. pt. 61, app. A(1), art. VII(J)(3) and (4).

⁴⁴ 44 C.F.R. pt. 61, app. A(1), art. VII(3), (4). As with other large-scale declared natural disasters, the NFIP extended the proof of loss filing deadline for Sandy flood insurance claimants from sixty days to one year. Memorandum W-12092a from David L. Miller, FEMA, for Write Your Own (WYO) Company Principal Coordinators, WYO Vendors, NFIP Direct Servicing Agent, and Independent Adjusting Firms (Nov. 9, 2012), available at <http://bsa.nfipstat.fema.gov/wyobull/2012/w-12092a.pdf>. As this deadline approached, the NFIP issued another deadline extension. See Memorandum W-13060a from David L. Miller, FEMA, for Write Your Own (WYO) Company Principal Coordinators, WYO Vendors, NFIP Direct Servicing Agent, and Independent Adjusting Firms (Oct. 1, 2013), available at <http://www.nfipiservice.com/Stakeholder/pdf/bulletin/w-13060a.pdf> (extending standard flood insurance proof of loss time requirement set out in prior notice). As this Article went to print, the NFIP extended the Proof of Loss deadline a third and likely final time—from eighteen to twenty-four months from the date of loss—although this does not mean that the one-year statute of limitations for filing in federal court has been extended.

⁴⁵ While there is no public guidance from NFIP to WYO carriers (and hopefully no private explicit guidance on this point), select federal court decisions note insurers’ refusals to deal with policyholders who are non-compliant with the proof of loss requirement, even when it seems litigation is not in the parties’ minds. See, e.g., *Hughes v. Am. Nat’l Prop. & Cas. Ins. Co.*, No. 12-1527, 2013 WL 3776486, at *2 (E.D. La. July 16, 2013) (“In March of 2012, ANPAC notified Hughes’ counsel that Hughes’ claim had been closed without payment because Hughes had not provided a sworn proof of loss.”); *Evanoff v. Standard Fire Ins. Co.*, 534 F.3d 516, 518 (6th Cir. 2008) (“Standard Fire wrote Evanoff and informed him that because he had failed to submit a proof of loss from within 60 days from the date of loss, Standard Fire was denying plaintiff’s flood claim.”). NYLAG’s own experience dealing with adjusters and insurer representatives in the days and weeks before the Proof of Loss deadline was extended a third time does indicate that claim negotiation will completely end once the deadline passes, unless the homeowner first obtains a waiver of the deadline directly from NFIP itself.

⁴⁶ Advocates may take their pick of the dozens of opinions that are little more than repetitious statements by courts of this point. See, e.g., *Jacobson v. Metro. Prop. & Cas. Ins. Co.*, 672 F.3d 171, 178 (2d. Cir. 2012) (upholding the district court’s grant of

There are multiple issues that advocates encounter in helping homeowners file proofs of loss. First, as a practical matter, filing a proof of loss for an individual homeowner can be a very substantial undertaking, as a proof of loss must describe, item by item and room by room, the damage that an individual has suffered.⁴⁷ More concretely, this means listing exactly the identity of the damaged item, the quantity of damaged item, the replacement cost for that damaged item, the estimated depreciation of the item's value between the time of purchase or installation and the date of the loss, and the resulting current value of the item (called the "actual cash value" of the item).⁴⁸ Composing the document itself therefore can take many hours.

In the case of home repairs, there is the additional problem of securing sufficient documentation to justify the individual's posi-

summary judgment to the defendant WYO insurer); *Marseilles Homeowners Condominium Ass'n Inc. v. Fidelity Nat'l Ins. Co.*, 542 F.3d 1053, 1054 (5th Cir. 2008); *Flick v. Liberty Mut. Fire Ins. Co.*, 205 F.3d 386, 387 (9th Cir. 2000). It is also important that advocates are aware that, contrary to the prevailing law in many states that ambiguities in state-regulated insurance contracts are resolved in favor of the policyholder, SFIP contract provisions, because they affect the federal treasury, are strictly enforced against the relevant party. *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 697–98 (2d. Cir. 1998) (citing *Matthews v. Am. Cent. Ins. Co.*, 154 N.Y. 449, 456–57 (1897)) (noting New York court rulings on the contra-insurer rule of policy construction); *Jacobson*, 672 F.3d at 175 (explaining that SFIP "requirements must be strictly construed and enforced" and citing sister-circuit cases in support of this position). In many instances, the relevant party is the individual policyholder.

⁴⁷ 44 C.F.R. pt. 61, app. A(1), art. VII(J)(4)(f), VII(J)(4)(i) (respectively requiring "detailed repair estimates" and "an inventory of damaged personal property"). Both of these phrases seem innocuous until one realizes that this entails hundreds, perhaps many hundreds of items, either with their own description and quantity, and replacement value, depreciation estimate, and resulting actual cash value. In the case of personal property, this means describing the item with enough particularity to verify its identity, which could mean digging through one's moldy, decomposing personal belongings to identify and document brands and model numbers, and justifying the replacement cost value, which could mean driving to a local department store or using a local library's computer to figure out the replacement item's cost. The item-by-item, room-by-room requirement for flood insurance claims and proofs of loss is not stated in those terms in the SFIP for home repairs, but is a well-known and bona fide requirement. See Memorandum W-13060a from James A. Sadler, FEMA, for Write Your Own (WYO) Company Principal Coordinators and National Flood Insurance (NFIP) Servicing Agent (May 16, 2013), available at <http://bsa.nfipstat.fema.gov/wyobull/2013/w-13027a.pdf> ("When a policyholder disputes the adjuster's payment recommendation and estimate, a written request for a supplemental claim should be submitted along with a completed, signed, and sworn-to proof of loss attaching all documentation to fully support the supplemental claim such as: [an] . . . itemized (room by room) contractor's estimate . . .").

⁴⁸ See 44 C.F.R. pt. 61, app. A(1), arts. II(B)(2), VII(J)(3) (defining, respectively, "actual cash value" as the difference between replacement cost value and the value of its physical depreciation, and requiring a "quantity, description, and actual cash value" for each item of damaged personal property).

tion. In addition to the fact that “detailed repair estimates” are required to “justify th[e] amount” claimed under an individual’s particular SFIP contract,⁴⁹ fully itemized estimates or invoices justifying repair costs are required for a compliant proof of loss.⁵⁰ Most individuals are not familiar with the construction industry, and contractors in the New York area are generally unfamiliar with the vastly more detailed requirements of repair estimates that are needed to support insurance claims. Experience shows that contractors will write repair estimates that do not provide detailed line items, including listings of discrete repairs, corresponding quantities, and corresponding prices for each repair.⁵¹

The reason seems to be two-fold: in a highly skewed post-disaster seller’s market, contractors do not want to spend any time doing anything that is not actual repair work; and generally, contractors in a regular or average market setting do not write anything remotely close to line-by-line, room-by-room estimates. Therefore, working with contractors to develop these estimates can be a challenging and time-consuming process. Furthermore, because storm victims desperately want to rebuild, they are not interested in firing contractors just because these contractors will not produce the kind of detailed estimates a lawyer or other advocate says they will need for a future dispute. The consequence is that many homeowners are still struggling to file a compliant proof of loss nearly a year after the storm. Thanks to the deadline extension,⁵² storm victims have crucial extra time to meet this requirement, enabling them to continue negotiating with the insurer for more money under the policy,⁵³ and preserving the right to their

⁴⁹ *Id.* pt. 61, app. A(1), art. VII(J)(4)(f), VII(J)(5).

⁵⁰ *See, e.g.,* Eichaker v. Fidelity Nat’l Prop. & Cas. Ins. Co., No. 07-4485, 2008 WL 2308959, at *3 (E.D. La. June 3, 2008) (holding that a compliant proof of loss must be supported by justification from contractor estimates or the insured’s persons own research or knowledge to survive summary judgment). *See also* Memorandum W-13058 from Sadler, *supra* note 42.

⁵¹ For example, NYLAG has seen estimates that have line items such as “repair exterior” or “install new electrical.” The point is not that contractors are doing something wrong, especially if this is the usual course of business; the point is that in the context of disaster relief and high-dollar, emergent insurance claims, this type of estimate is unfortunately nearly useless.

⁵² Memorandum W-13060a from Miller, *supra* note 44.

⁵³ This limited discussion glosses over or omits many, many important issues in flood insurance claims settlement for Sandy victims. There have been many issues in Staten Island, for example, where homes seem to have been built with a first floor below the surrounding elevation to be used as a garage, but homeowners have finished some of that space and used it as bedrooms, living rooms, and other living areas. Especially when these homes are built after the home’s corresponding Flood Insurance Rate Map (FIRM)—in NFIP parlance, meaning the home is a post-FIRM

day in court should an informal agreement prove impossible.

C. Levels of Assistance

Thus in a remarkably short time SRU was able to add two main legal issues to its practice areas: federal disaster assistance and private insurance. With this expanded roster of core competencies, SRU was able to provide legal assistance in a wide variety of issue areas vital to the recovery concerns of Sandy victims: mainly housing, foreclosure prevention, disaster assistance, homeowner's insurance, and flood insurance assistance. SRU advocates advised clients on their eligibility for disaster recovery programs and benefits, identified deadlines and next steps to secure their eligibility and rights to appeal, and helped prioritize their options in the confusing aftermath of the storm. They provided varying levels of assistance based on clients' needs and the availability of scarce resources—at times, providing advice and counsel for clients to proceed *pro se*, but also stepping in for direct representation where appropriate. SRU also relied on NYLAG's pre-existing pro bono

home—this has often resulted in a severe coverage restriction for flood damages otherwise covered by an SFIP. FEMA, COMMUNITY STATUS BOOK REPORT: NEW YORK: COMMUNITIES PARTICIPATING IN THE NATIONAL FLOOD PROGRAM 19 (updated Dec. 9, 2013), available at <http://www.fema.gov/cis/NY.pdf> (noting an effective FIRM date for New York City of November 16, 1983); 44 C.F.R. pt. 61, app. A(1), arts. II(B)(5), III(A)(8), III(B)(3) (respectively, defining “basement” and setting coverage restrictions for structural and personal property coverage for property in a basement of certain types of post-FIRM homes). Another ongoing and significant issue is that following Sandy, FEMA has begun the long-overdue process of updating the FIRMs for New York City and the metropolitan area (among other areas). For homeowners to avoid the same type of coverage restriction described above—and to avoid very high insurance premiums—the top of the floor of the lowest level of the building must, as a general rule, be elevated to at least the Base Flood Elevation (BFE) level displayed on the FIRM. See 44 C.F.R. pt. 61, app. A(1), art. III(A)(8), III(B)(3) (coverage restrictions in the Dwelling Form); FEMA, FLOOD INSURANCE MANUAL (Oct. 1, 2013), available at http://www.fema.gov/media-library-data/7f08b184ce6283d1a468d897a56cdb02/05_rating_508_oct2013.pdf (listing the rating rules for A- and V-zone structures, including the general difference for rating between structures found in A- and V-zones). The issue is that such maps for New York City presently remain “preliminary” as of publication, and therefore homeowners remain unsure of exactly to what height they should elevate their homes to avoid unnecessary costs but remain compliant with their SFIP. See *Preliminary Flood Insurance Rate Maps Now Available for New York City*, FEMA REGION II: COASTAL ANALYSIS AND MAPPING (Dec. 4, 2013), <http://www.region2coastal.com/site-news/preliminaryfloodinsuranceratemapsnowavailablefornewyorkcity>; *View Your Community's Preliminary Flood Hazard Data*, FEMA, <http://www.fema.gov/view-your-community-preliminary-flood-hazard-data-0> (updated Sept. 5, 2013; last accessed Dec. 10, 2013) (“Preliminary data are not for use, distribution, or replication until the data are finalized and labeled as ‘effective’ on the MSC. Preliminary data are for review and guidance purposes only. By viewing preliminary data, the user acknowledges that the information provided is preliminary and subject to change.”).

contacts to refer cases directly to private attorneys who were eager to help Sandy victims.

Direct representation, advice, and counsel were not the only contexts in which SRU advocates addressed the recovery needs of Sandy victims. SRU staff also held several trainings for pro bono attorneys on disaster law advocacy and for case managers and social services staff to aid them in spotting potential legal issues among their clients. SRU also developed a dynamic database of disaster recovery resources and program eligibility for disaster victims. The Storm Help Hotline became a clearinghouse of sorts for Sandy victims seeking government and nonprofit aid. As initial temporary programs were phased out and newer recovery programs began, SRU updated its resource database accordingly. This added a crucial layer of assistance in SRU's comprehensive legal services: in addition to spotting and analyzing a wide variety of legal issues, SRU advocates could also identify grant programs that would provide vital recovery assistance, and tailor legal advice with an eye toward obtaining or maintaining eligibility for aid programs.

D. Expanded Client Populations

Despite its numerous points of entry for potential clients, SRU did not simply wait for Sandy victims to reach out to NYLAG. SRU conducted outreach to affected areas, notifying as many people as possible about their right to register for federal benefits. SRU paid particular attention to immigrant communities, members of which may be reticent to seek out federal assistance in any form. SRU advised clients of immigration status requirements for FEMA, SBA, and other disaster recovery programs, and referred eligible disaster victims to appropriate recovery resources. NYLAG and its community partners have also made a concerted effort to provide interpreters⁵⁴ in person at as many legal clinics as possible. Between NYLAG's own considerable linguistic skills on staff and the cooperation of its partner organizations, SRU has been able to overcome this significant barrier in providing legal services.

Commensurate to the effort to reach out to as many areas of New York City and the metropolitan area as possible, SRU expanded from its historic client population to serve new client populations that suffered from the broadly destructive force of Sandy. The most significant new segment of clients was homeown-

⁵⁴ SRU's clients speak a wide variety of languages, including, but not limited to, Albanian, Bengali, Cantonese, Creole, French, Hebrew, Hindu, Korean, Mandarin, Russian, and Spanish.

ers—a more socioeconomically diverse group than the traditional legal services client group, including some households with higher incomes that would not normally qualify for legal services but had a tremendous need for speedy and comprehensive legal assistance, given Sandy’s unprecedented destruction and the attendant mix of public programs and private legal issues affected. This expanded client population presented new legal issues in the form of residential property insurance claims.⁵⁵ Homeowners were also the main source of requests for assistance regarding contractor issues and requests for guidance regarding the New York State, New York City, and local rebuilding grant programs being funded through FEMA and the Department of Housing and Urban Development (HUD).⁵⁶

II. CASE STUDIES

A. Client A—FEMA Home Repair and Basement Living Areas

Client Ms. Francine Faraglioni⁵⁷ lived with her two children in a neighborhood of Staten Island that was one of the hardest-hit areas of the New York City metropolitan area. She owns her home, a structure split into two units: a top-floor unit that the client rents for income, and a lower-level unit composed of the home’s ground and basement floors, which she used at the time of Sandy as her primary residence.

The home was severely flooded during Sandy, and Ms. Faraglioni’s family was, as with so many Staten Island families, forced to flee to temporary housing. The home’s basement was almost completely washed out, and the first floor sustained flood damage as well. Ms. Faraglioni filed an application with FEMA shortly after the storm passed, and representatives from FEMA’s Individuals and Households Program (IHP) granted her several thousand dollars

⁵⁵ Interestingly, SRU did not receive many requests for assistance from renters experiencing issues with renter’s insurance claims following Sandy.

⁵⁶ These are, respectively, New York State’s NY Rising program, funded by a HUD Community Development Block Grant (CDBG); New York City’s Build It Back Program, also funded by a HUD CDBG; and local programs, funded by FEMA’s Hazard Mitigation Assistance (HMA) grant programs. *See generally supra* notes 35–36; *Hazard Mitigation Assistance*, FEMA, <http://fema.gov/hazard-mitigation-assistance> (last visited Oct. 25, 2013). Note that the City recently released an updated action plan with various amendments. *See CITY OF N.Y., COMMUNITY DEVELOPMENT BLOCK GRANT: DISASTER RECOVERY ACTION PLAN INCORPORATING AMENDMENTS 1–4 (2013)*, available at http://www.nyc.gov/html/cdbg/downloads/pdf/CDBG-DR-Action-Plan-incorporating-Amendments-1-4_11-25-13.pdf.

⁵⁷ The names of all clients in this Article have been changed to protect their identities.

in home repair costs, among other assistance in the months after the storm. Given the damage to Ms. Faraglioni's home and FEMA's repair-cost methodology, however, that assistance was insufficient, and she began appealing FEMA's determination on her appropriate home repair assistance under the IHP.

At this point, it is useful to understand the layout of the client's residence. At the time of the storm, Ms. Faraglioni occupied the residence with her two young children. Those children occupied bedrooms located on the first floor of the residence, while the client's bedroom was in the basement of the residence, along with a living room and other rooms. The FEMA inspection report was internally inconsistent: although its summary description of the property indicated three occupied bedrooms, the inspection report's room-by-room damage inventory noted that the home had only two bedrooms. Similarly, the residence according to FEMA also had two living rooms: one on the first floor, and one in the basement. The FEMA inspector seems to have decided that the residence's first-floor dining room should be an optional second living room, thus limiting her assistance.

FEMA's initial home repair assistance award, which stood through Ms. Faraglioni's three initial appeals and our first appeal, did not cover any structural repairs to her basement. In other words, Ms. Faraglioni received no funds to repair her bedroom or her living room, as FEMA normally would do when the bedroom is occupied and there is no substitute bedroom and living room for the household to use.⁵⁸ FEMA's award instead, after covering essential appliances and exterior elements of the home, only provided funds for her to remove debris, pump out storm waters, and disinfect her basement.

⁵⁸ There actually is no publicly available policy or even guidance on this point. FEMA still informally uses the phrase "essential living areas" when referring to their decision-making rationale for IHP home repair and personal property assistance. *See, e.g.*, Press Release, FEMA, FEMA Housing Assistance Is Based on Damage to Essential Living Areas (Dec. 18, 2012), <http://www.fema.gov/news-release/2012/12/18/fema-housing-assistance-based-damage-essential-living-areas>. It seems then that FEMA made the now-obsolete regulations governing home repair assistance for disasters declared before October 15, 2002, its internal policy for disasters declared thereafter. *See* 44 C.F.R. § 206.101(g)(4) (2013) ("Repairs may be authorized to quickly repair or restore to a livable condition that portion of or areas affecting the essential living area of, or private access to, an owner-occupied primary residence which was damaged as a result of the disaster."); *id.* § 206.101(c)(3) ("Essential living area means that area of the residence essential to normal living, i.e., kitchen, one bathroom, dining area, living room, entrances and exits, and essential sleeping areas. It does not include family rooms, guest rooms, garages, or other nonessential areas, unless hazards exist in these areas which impact the safety of the essential living area.").

Based on the documents obtained through the Freedom of Information Act (FOIA) request submitted on Ms. Faraglioni's behalf, the client herself wrote three appeal letters to FEMA asking for reconsideration of her home repair assistance specifically. Based on FEMA's decision letter and internal program notes for Ms. Faraglioni's case, FEMA issued only one decision for these three appeals, and it came well over two months after the client had submitted her initial appeal. These types of delays and silences from FEMA underscore, even for advocates, that it is important to follow up with FEMA to establish that an appeal has been received, that it has been deemed an appeal, and that FEMA should make a decision on that appeal.

Moreover, here it is worth underscoring that a conversation with FEMA IHP staff members is often the only way that one can ascertain exactly why an appeal was unsuccessful. The denial letter that Ms. Faraglioni received after her three appeals simply stated that FEMA "ha[d] reviewed your appeal for additional Home Repair [sic] and any documents that [the client] may have provided, along with the FEMA inspection(s) of your home," and that FEMA "ha[d] determined that the previous amount of assistance we [sic] provided was correct." This level of reasoning does not provide much guidance to the advocate in determining where additional evidence and documentation is necessary to craft a subsequent successful appeal. While it is fairly clear from FEMA's decision that the agency did not consider the client's basement bedroom and living room to be essential living areas even though practice dictates that an occupied bedroom and a household's sole living room are essential living areas, it was only after speaking with FEMA—directly in the form of telephone conversations with IHP customer service representatives and indirectly in the form of FOIA-obtained case notes—that it became clear that FEMA applies a presumption of non-essentiality to any basement living area. It therefore becomes, at least practically, the burden of the homeowner to demonstrate that a basement area is essential.

Thus, with regard to assistance for bedroom repairs, the first appeal submitted for Ms. Faraglioni stressed laws, regulations, and policies that place importance on how FEMA determines essential living areas, and in particular, bedrooms. In fact, FEMA does not have direct policy, or at least publicly available direct policy,⁵⁹ on coverage of bedrooms for the purposes of determining appropriate home repair assistance. Rather, there is direct guidance in the *Code*

⁵⁹ See discussion *supra* Part I.B.1.

of *Federal Regulations* (CFR) and the *Disaster Operations Legal Reference* on related assistance, such as rental assistance for displaced households⁶⁰ and personal property awards;⁶¹ there are also general principles, also in the CFR, that home repair awards are to restore a home to a “safe and sanitary living or functioning condition,” and that eligible home repair costs must take in account “the needs of the occupant.”⁶² Thus, the primary argument in Ms. Faraglioni’s appeal for bedroom home repair assistance was an analogy: based on how FEMA determines what an essential bedroom is for the purposes of rental assistance and personal property awards, FEMA should provide Ms. Faraglioni with appropriate assistance for repairs to her basement bedroom.

Additionally, it seemed useful to look to HUD, the federal agency that regulates housing quality. While HUD regulations are not binding in any way, direct support for Ms. Faraglioni’s position would hopefully be persuasive to the IHP appeals officer reviewing the appeal. HUD itself, however, also has no occupancy policy that could be used to argue that FEMA should recognize Ms. Faraglioni’s household’s right to occupy three bedrooms, and therefore receive home repair funds for the third basement bedroom.⁶³

⁶⁰ See, e.g., 44 C.F.R. § 206.117(b)(1)(i)(B) (basing FEMA IHP temporary rental assistance on the “household’s bedroom requirement”); FEMA, HELP AFTER A DISASTER: APPLICANT’S GUIDE TO THE INDIVIDUALS & HOUSEHOLDS PROGRAM 25 (2008), available at http://www.fema.gov/pdf/assistance/process/help_after_disaster_english.pdf (indicating that FEMA policy defines a “household’s bedroom requirement” as “the number of occupied bedrooms in the applicant’s home at the time of the disaster”).

⁶¹ 44 C.F.R. § 206.119(c)(1)(ii); FEMA, DISASTER OPERATIONS LEGAL REFERENCE 6–68 (2011) (interpreting “necessary expenses or serious needs” for the purposes of determining eligible bedrooms as “the number of pre-disaster occupied bedrooms up to six. . .”). This publication is not available online, but copies can be obtained by contacting FEMA (information is available at <http://www.ready.gov/publications>) itself—perhaps most easily through a FEMA IHP Voluntary Agency Liaison (VAL).

⁶² 44 C.F.R. § 206.117(c)(1) (“Repairs to the primary residence or replacement of items must be disaster-related and must be of average quality, size, and capacity, taking into consideration the needs of the occupant.”); *Id.* § 206.117(b)(2)(i) (“FEMA may provide financial assistance for the repairs of uninsured disaster-related damages to an owner’s primary residence. The funds are to help return owner-occupied primary residences to a safe and sanitary living or functioning condition.”).

⁶³ HUD policy primarily speaks to a necessary number of bedrooms and a safe living condition in terms of habitability, or an adequate number of bedrooms for the number of occupants. See HUD, HUD HANDBOOK 4350.3: OCCUPANCY REQUIREMENTS OF SUBSIDIZED MULTIFAMILY HOUSING PROGRAMS 3-66 (2009), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf. Being concerned with over- and under-utilization of housing, however, HUD policy generally grants residence owners discretion in determining the number of necessary bedrooms, so there was no analogous rule to rely on here. *Id.* at 3-65–3-67 (citing Fair Housing Enforcement–Occupancy Standards Notice of Statement of Policy, 63 Fed. Reg. 70256, 70257 (Dec. 18, 1998)).

HUD instead concentrates on overcrowding and safety, leaving owners and occupiers of housing discretion in determining what a “correct” or “appropriate” number of bedrooms for a given household is. Nonetheless, given the lack of explicit FEMA policy on this issue and HUD’s purview, HUD’s policy of granting owners discretion in determining bedroom occupancy seemed at least useful in arguing to IHP that because Ms. Faraglioni could occupy three bedrooms with her three-person household and did in fact occupy three bedrooms at the time Sandy washed through her home, assistance for repairing that third bedroom was proper.

For obtaining repair assistance for the living room, in contrast, there was little legal authority to reference in an appeal to FEMA. As noted previously, there is no publicly available policy on coverage of a living room.⁶⁴ Thus, the only argument that was advanced (in the form of a sworn statement from Ms. Faraglioni) was factual: that the IHP inspector who visited Ms. Faraglioni’s home after Sandy incorrectly mapped her residence, and the living room is actually located in the basement, not on the first floor. That the appeal reviewer should authorize appropriate assistance once the basement living room was recognized as such was left implied.

Although many Sandy victims have suffered from this issue of non-recognition of essential living areas located in a basement, we hoped that the additional evidence of a sworn statement and a full discussion of FEMA’s regulations and policy on coverage would be sufficient. The IHP reviewer, however, disagreed, and denied the fourth appeal for Ms. Faraglioni.

At present, Ms. Faraglioni still lives in temporary housing, as she is awaiting funds from either the HUD-funded Build It Back program or from a successful FEMA appeal to return her home to habitability. While she is fortunate in that she still has two relatively habitable bedrooms on the first floor of her residence, she still has suffered tens of thousands of dollars in losses and has an ultimately uninhabitable home. There are many examples of households that desperately need a living area to be repaired, perhaps for medical equipment or a caretaker, or simply to avoid overcrowding. These households are being refused funds almost a year after the storm, just because part of their residence is in a basement.

⁶⁴ See *supra* note 58.

B. Client B—Displaced Renter Affected by New Zoning and Flood Elevation Regulations

Ms. Anderson is a 64-year-old, low-income Brooklyn resident. She had been living in her rent-stabilized basement apartment in Manhattan Beach for more than thirty-three years when Sandy struck. The Atlantic Ocean filled her home with about ten feet of seawater, and Ms. Anderson, who chose to not evacuate, nearly drowned. Fleeing her inundated home in the middle of the night with her adult son, Ms. Anderson rented a small room from an acquaintance, which she could afford due to FEMA rental assistance, while she waited for her landlord to make repairs. Her son was forced to find his own accommodation.

By the time Ms. Anderson contacted NYLAG in February, nearly four months after the storm, her landlord had still made no attempt to repair her unit and return her to her home. In fact, when she returned to the building to check her mail, she discovered that she had been illegally locked out of her floor. When she asked her landlord when the repairs would be completed, a representative from the management company told her that the repairs would likely take three to five years, and thus, she would have to find somewhere else to live. Her landlord then offered to move her to another unit that was significantly smaller and more expensive. Believing she had no other option, Ms. Anderson almost signed the lease. Fortunately, however, she called the SRU hotline before agreeing to move. The NYLAG attorney she spoke with advised her that, because she leased a rent-stabilized apartment, she was entitled to the repairs and did not have to give up her apartment.⁶⁵

Following NYLAG's advice, Ms. Anderson initiated a Housing Part (HP) proceeding in Kings County (i.e. Brooklyn) Housing Court, seeking a judgment and order from the court requiring her landlord to make the repairs and restore her to possession.⁶⁶ Ms. Anderson filed the petition *pro se*; NYLAG subsequently appeared in court on her behalf and agreed to represent her in the case going forward. On the second appearance, the parties entered into a consent order, whereby Ms. Anderson's landlord agreed to correct all outstanding housing code violations within sixty days.

Shortly thereafter, however, Ms. Anderson discovered that

⁶⁵ See N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2520.6, 2524.1 (2013).

⁶⁶ The duty of the HP court is to enforce the housing code and preserve affordable housing in New York City. It is a unique venue designed as a platform for tenants to bring suits against landlords that fail to make repairs and fail to comply with the New York City Housing Code.

construction in the apartment had ceased. The superintendent informed her that the landlord stopped making repairs because the New York City Department of Buildings issued a stop-work order and a violation alleging that residential occupancy of her unit was illegal. The landlord subsequently filed a motion in the HP proceeding alleging that Ms. Anderson could not legally be restored to her apartment, and sought to vacate the consent order on the ground that they were unaware of the legal status of the apartment at the time they agreed to make the repairs. The landlord also referred to newly amended city zoning regulations that required buildings in certain flood zones to be elevated.⁶⁷

NYLAG then filed an opposition to the landlord's motion and filed a cross-motion asking the court to compel her landlord to make the repairs. NYLAG argued that, because Ms. Anderson is a rent-stabilized tenant, her landlord is required to legalize her apartment and may not terminate her tenancy rights unless he can prove that legalization is impossible. There is an extensive body of case law finding that not only does the illegal status of an apartment "not exempt an apartment from rent stabilization entirely, but it also does not form a legal basis for the termination of a rent stabilized tenancy unless the apartment cannot be legalized."⁶⁸

The landlord argued that legalization is not possible because Ms. Anderson's unit is a basement apartment located in a flood zone and, therefore, cannot be converted to residential space pursuant to new building code regulations. On January 31, 2013, New York City amended its Building Code to incorporate new "Flood Resistant Construction" rules.⁶⁹ The relevant changes are found in the Building Code's Appendix G, which requires that all plans to build new structures or substantially alter existing structures within certain flood zones only be approved if the building is elevated in accordance with the base flood elevations (BFEs) set in FEMA's new flood elevation maps.⁷⁰ If Ms. Anderson's apartment were legal for occupancy, then Appendix G would not apply because the

⁶⁷ See *infra* notes 70–71 and accompanying text.

⁶⁸ C&E Assocs. LLC v. Hernandez, 2008 N.Y. Misc. LEXIS 3087, at *3–6 (N.Y. Civ. Ct. 2008) ("It is simply not the case that any illegally occupied apartment is exempt from the coverage of rent stabilization."). See also 625 West End Inc. v. Howard, N.Y. Misc. LEXIS 729 (1st Dep't 2001); Zaccaro v. Freidenbergs, 10 Misc.3d 143(A) (1st Dep't 2006).

⁶⁹ Exec. Order No. 230, City of New York Office of the Mayor (Jan. 31, 2013), available at http://www.nyc.gov/html/om/pdf/eo/eo_230.pdf.

⁷⁰ Appendix G imposes minimum requirements for development buildings in "areas of special flood hazard" within New York City. N.Y.C. BUILDING CODE appx. G, § G201 (2013). Usually known as Special Flood Hazard Areas (SFHA), these areas are

restoration of an existing apartment would not be considered a substantial alteration.⁷¹ Appendix G, however, does apply where the alteration involves the conversion of a space below the property's corresponding BFE from a non-habitable space into a habitable space.⁷²

NYLAG argued that the restoration of Ms. Anderson's apartment would not be considered a conversion because the actual use of the apartment prior to the storm was residential occupancy. The repair work would simply involve restoring a previously habitable space to its original use. It is unclear, however, whether the law refers to the actual previous use or the legal previous use. If by "habitable space" the law refers to an apartment that is legal for residential occupancy, Appendix G restrictions would apply because the restoration of Ms. Anderson's apartment would involve the conversion of a non-habitable space below the base flood elevation into a habitable space. Under such an interpretation, the landlord would be required to elevate the entire ninety-eight-unit building, which may be considered "impossible," and thus Ms. Anderson would not be entitled to repairs.

The housing court ultimately agreed with NYLAG that Ms. Anderson's landlord failed to sufficiently prove that legalization of her apartment was impossible. The landlord was ordered to resume repairs. This victory was short-lived, unfortunately, once further investigation revealed that the Department of Buildings would not approve a plan for conversion to residential space. This would bolster the landlord's claim that legalizing the apartment would be impossible and likely lead to housing court's decision being overturned.

As it became clear that Ms. Anderson would likely not be restored to possession, NYLAG requested that the landlord offer her a comparable apartment at a similar regulated rent instead. In re-

generally designated with an "A" or "V" prefix on Flood Insurance Rate Maps (FIRM).
Id.

⁷¹ The rule defines "substantial improvement" as [a]ny repair, reconstruction, rehabilitation, addition or improvement of a building or structure, the cost of which equals or exceeds 50 percent of the market value of the structure before the improvement or repair is started. If the structure has sustained substantial damage, any repairs are considered substantial improvement regardless of the actual repair work performed.

Id. However, there is an exception for repairs "necessary to assure safe living conditions" in pre-FIRM buildings, that is, buildings that were constructed before the current effective flood maps designated their locations as high-risk flood zones. *Id.*

⁷² *Id.* § G102.1.9.3.

sponse, the landlord claimed it had no comparable apartments in all of Brooklyn. NYLAG then served the landlord with a Supreme Court petition alleging wrongful eviction and seeking damages to compensate Ms. Anderson for the loss of her rent-stabilized tenancy based on a theory of breach of contract. Rather than pursue further litigation, the parties agreed to settle both cases. Ms. Anderson agreed to dismiss all claims against her landlord in consideration for \$25,000.

Over a year elapsed between Ms. Anderson's emergency evacuation during Sandy and the resolution of her legal dispute with the landlord. Throughout this ordeal she lived in a temporary apartment, uncertain when or if she would be able to return to her home. Ultimately, while Ms. Anderson once again has a more stable living situation, never again will she return to her home of over three decades, the home Sandy took from her in October 2012, and the home ultimately taken away from her by local and federal floodplain management decisions.

C. Client C—SRU's Holistic Approach to Assistance

As previously discussed, NYLAG's Storm Response Unit has many different practitioners that focus on various areas of disaster assistance. Sometimes, clients who contact SRU only need help with one specific issue and are referred to the appropriate expert. Many times, however, clients need assistance in different areas and, subsequently, receive assistance from several practitioners within the unit. Deborah James was a client who was able to benefit from SRU's wide array of expertise.

Ms. James owns a home on Long Island in Massapequa, New York. She is elderly, lives alone, and her main source of income is Social Security retirement benefits. When Sandy hit, the exterior and interior of Ms. James' home were affected and sustained severe damage. Like many homes in the area, the majority of the damage to her home was flood-induced. The exterior siding of the home was torn off by passing waters, and the outside doors all had to be replaced. The interior of the home was inundated with water, mud, and debris, and everything on the first level had to be cleaned, repaired, or replaced. The effects of the storm were devastating for Ms. James, and she had to start picking up the pieces of her life by herself. Ms. James received a minimal amount of disaster assistance from FEMA IHP and claim compensation from her homeowner's insurance policy, but she was fortunate enough to have

had a comprehensive flood insurance policy on her home that was issued through the National Flood Insurance Program (NFIP).

Ms. James originally contacted NYLAG for assistance with her flood insurance claim. At that point, Ms. James had received approximately \$56,000 as her flood insurance settlement. This was not enough to cover all of Ms. James' flood-related damages, and it appeared that Ms. James could benefit from NYLAG's assistance in arguing for additional payment under her policy. After reviewing Ms. James' insurance documents, including the insurance company's adjuster's report and Ms. James' contractors' estimates and invoices, however, a NYLAG attorney realized that Ms. James needed additional assistance beyond her flood insurance issue.

Ms. James initially hired a contractor who estimated that it would cost approximately \$117,000 to completely repair Ms. James' home. Ms. James had also hired a cleaning company to clean up the dirt, water, and debris that was brought into the home by the flood for \$13,000. While Ms. James had signed these contracts, she had only received approximately \$27,000 in advance payments from her flood insurance company at that time. The remainder of her insurance settlement money was being held by the bank that owned and serviced her mortgage.

Insurance companies must issue settlement checks to both the homeowner and the mortgage servicer, as the mortgage servicer has an interest in the home. Whether by contractual provision in the note or by commonly accepted policy, mortgage servicers will not simply sign over insurance proceeds checks to the homeowner for commencement of repairs. Instead, servicers hold the proceeds in escrow, potentially along with funds for property tax, insurance premium and other costs of real property ownership. Servicers are then supposed to, but frequently do not, provide a policy for release of escrow proceeds. Servicers also frequently do not follow the policy they have promulgated.⁷³

⁷³ At least to some, the role of mortgage servicers in delaying and vitiating Sandy victims' recovery was unforeseen. The back-and-forth between servicers and victims was often acrimonious, and the subject of much media coverage and political action. See, e.g., David Ariosto, *Banks Holding over \$200 Million in Sandy Payments*, (Feb 12, 2013), <http://www.cnn.com/2013/02/12/us/new-york-banks-sandy-payments/>; Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces DFS Investigation Identifies Banks with Worst Sandy Aid Statistics, (March 19, 2013), *available at* https://www.governor.ny.gov/press/03192013cuomo_dfs_worst_sandy_aid; Press Release, New York State Dep't of Fin. Services, Governor Cuomo Announces Fannie Mae and Freddie Mac Have Agreed to State's Request for New Rules to Accelerate the Release of Insurance Money to Homeowners Affected by Sandy (Feb. 26, 2013), *available at* <http://www.dfs.ny.gov/about/press2013/pr1302262.htm>.

More importantly, servicers set disbursement schedules for these insurance proceeds somewhat arbitrarily. Therefore, oftentimes homeowners' needs for proceeds, driven by their contractors' payment schedules, differ from these disbursement schedules. Sandy victims also frequently elected—and unfortunately continue to elect—to hire contractors without obtaining necessary documentation, including a payment schedule, a contract or receipts for services performed, and in some cases, even basic identifying information. Similarly, without these pieces of information, homeowners would find that their mortgage servicers effectively locked up their insurance funds.

In Ms. James' case, her bank withheld her insurance settlement funds because it required a final sign-off letter from the contractor that repairs had been completed, and she was embroiled in a dispute with her contractor over pricing and the type and quality of work that had been completed. Ms. James had paid the contractor \$9,000 for work completed to that point and was under the impression that this payment constituted the end of the business relationship. The contractor, however, later issued Ms. James an invoice for over \$30,000. When Ms. James refused to pay this amount, the contractor threatened to file for a mechanic's lien against her property, and he refused to provide documents to the bank that indicated his work was completed. Without the contractor's documents, and without legal intervention, the mortgage servicer could have held the insurance settlement funds indefinitely.

After NYLAG learned of this second issue, Ms. James was referred to a NYLAG attorney who specializes in contractors' disputes. This attorney successfully negotiated with the contractor, and the parties reached an agreement where Ms. James would pay a small fraction of the bill and the contractor would in turn provide a signed statement that confirmed that he would not file a lien on the property. Once the contractor's dispute was resolved, Ms. James, with the help of a NYLAG insurance attorney, was able to file a supplemental claim with her WYO⁷⁴ insurance company to have the cost of hiring the cleaning company incorporated into her settlement. The insurance company agreed to pay an additional \$11,000 for these costs. The attorney that helped Ms. James with her contractor dispute was then able to reach an agreement with the cleaning company for that amount. These additional proceeds, however, along with the rest of the insurance settlement, were still being held with Ms. James' mortgage servicer. Ms. James'

⁷⁴ See *supra* note 42.

attorney then contacted Ms. James' mortgage servicer and submitted the contractor's receipts and statement, the cleaning company's unpaid invoice, and the settlement statements from the WYO insurance company. After much discussion, the bank agreed to release the remainder of Ms. James' insurance settlement funds. Ms. James was then able to fully pay the cleaning company's invoice and hire a second contractor who agreed to finish her repairs for the remainder of her insurance settlement.

During Ms. James' time working with NYLAG, it became clear that she had trouble managing her bills and would benefit from financial counseling. Her monthly mortgage bill was approximately \$1,520 and she had relied on credit cards to pay the majority of her expenses. When Ms. James contacted NYLAG, she had roughly \$80,000 in credit card debt. With only Social Security to rely on, she had lapsed in her credit card payments and was receiving harassing telephone calls and letters from her creditors. Ms. James had seriously contemplated filing for bankruptcy. She was subsequently referred to a NYLAG financial counselor. The financial counselor was able to sit down with Ms. James, review her income and household expenses and come up with suggestions that would allow Ms. James to better manage her finances. While her recovery from the disaster still posed a significant financial hurdle, Ms. James was thus able to face it free of several interconnected legal obstacles and with a clearer plan for maintaining self-sufficiency.

CONCLUSION: AN ONGOING RECOVERY

This Article has described the experiences of one legal services organization in the aftermath of a major natural disaster. In relating NYLAG's efforts in Sandy's aftermath, it has been the authors' intention to identify notable issues and successful practices from SRU and its counterparts in the legal services community. We began by reaching out to legal services providers in other regions that had been through a major disaster recovery. In addition to their training on specific disaster-related legal issues, their advice to establish and maintain a presence on the ground in affected areas was prescient and critical. It was imperative to get to clients as early as possible in the storm's immediate aftermath—both at official FEMA sites and at other locations as informed by our ties with local communities. SRU also found tremendous value in the coordination among the larger legal services community across the New York City metropolitan area, including a very active email listserv,

roundtables on specific legal issues, and a proactive pro bono recruitment effort that began immediately after the storm.

NYLAG developed its SRU with an emphasis on holistic advocacy. Each SRU case handler, while typically focused on one or two areas of expertise in their past practice, is now capable of advising on a wide variety of disaster recovery legal issues. Additionally, we cultivated a detailed working knowledge of non-legal disaster relief programs, such as county and state home repair and recovery funds, as well as federal grant and loan programs. We continued to work with other legal services providers as the needs of our clients evolved, and we collaborated with local government, community organizations, and social services providers to integrate legal services into the broader disaster recovery effort.

SRU remains deeply engaged in the recovery process for New York City's and Long Island's Sandy victims, a process that continues to be slow and arduous for thousands of households. Issues related to immediate relief efforts, such as eligibility for FEMA benefits and SBA disaster loans, have given way to questions about long-term recovery and resiliency. Homeowners face looming deadlines to protect their interests in flood insurance claims and the costly question of whether and how high to elevate their houses, while the future of subsidized policy premiums seems uncertain. Tenants across affected areas are still waiting for repairs to their homes, some of which may be impossible to bring into compliance with updated building codes. At the one-year anniversary of the storm, residents awaited the rollout of state- and city-wide implementation of federal Community Development Block Grant funds. With a versatile, holistic project in SRU, NYLAG remains dedicated to disaster victims' recovery issues for as long as the need exists.

FIGHTING FOR EDUCATIONAL STABILITY IN THE FACE OF FAMILY TURMOIL

Michael R. Mastrangelo†

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I. MY CLIENTS’ STORIES

A. *Carlos’ Story: Educational Disabilities, Family Court, and School Discipline*

The letter from the New York City Department of Education (DOE) addressed to Carlos¹ mom spelled out what she had already learned when she picked Carlos up from school the previous day: Carlos had been suspended until further notice. The seven-page letter—an impersonal, wordy, boilerplate-language-laden document—explained that Carlos was suspended because his continued presence in school posed a continuing danger to students and/or teachers.² The letter also explained Carlos and his mother were entitled to a hearing to dispute the charge alleging he had engaged in a fight with another boy in his class. The letter also noted the school could seek between a thirty- to ninety-day suspension or even a one-year suspension to punish Carlos for his behavior.³

Carlos was not a typical seven-year-old second grader. Diagnosed with Autism Spectrum Disorder (ASD),⁴ Post-Traumatic Stress Disorder (PTSD),⁵ and Oppositional Defiance Disorder

¹ All names of clients have been changed to protect confidentiality.

² See N.Y.C. DEP’T OF EDUC., NO. A-443, STUDENT DISCIPLINE PROCEDURES 33–34 (2004), available at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-22/A-443.pdf> (stating that the school is required to provide a student’s parent with immediate notice of the suspension upon the suspension’s authorization).

³ See *id.* at 27–30 (describing student behaviors that warrant a superintendent suspension, which exceeds five days).

⁴ See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS V, at 50–59 (5th ed. 2013) (diagnostic criteria for Autism Spectrum Disorder).

⁵ See *id.* at 271–80 (diagnostic criteria for PTSD).

(ODD),⁶ Carlos was very difficult to manage, particularly in a classroom with fifteen other seven-year-olds and a set of class rules governing when students can leave their desks, go to the bathroom, or speak. This was Carlos' second suspension during his second grade year and he had been suspended two times in the first grade for impulsive and aggressive behavior. These suspensions led to Carlos losing many valuable classroom hours—crucial time that should have been used to help him work on social interaction and impulse control, and time for working on the more traditional classroom tasks of improving his spelling, practicing long division, and reading *Charlotte's Web*.

Though the direct cause of Carlos' ASD, a developmental disability that hinders a child's ability to interact appropriately with others, was unknown, Carlos' PTSD and ODD diagnoses were rooted in the years of domestic violence he witnessed in his home.

This domestic violence resulted in Carlos' parents' involvement in one of New York City's Integrated Domestic Violence Courts (IDV),⁷ a court that consolidates the criminal prosecution of a domestic violence case with a connected family court proceeding under the authority of one judge. Carlos' father was prosecuted for the violence he had allegedly committed against Carlos' mother. Simultaneously, Carlos' mother petitioned the court for sole legal custody of Carlos, opposing Carlos' participation in visitation with his father.

The IDV judge was charged with the task of determining what custody and visitation arrangement was in the best interests of Carlos given the family's history of domestic violence and Carlos' needs. The judge had the difficult job of deciding whether, if she granted the mother sole custody of Carlos, Carlos' father would be able to maintain a meaningful relationship with his son, and whether Carlos would benefit from visitation with his father despite Carlos' reluctance to see his father.⁸ This proceeding was at the

⁶ See *id.* at 462–66 (diagnostic criteria for ODD).

⁷ See *Integrated Domestic Violence Courts*, N.Y. STATE UNIFIED COURT SYS., <http://www.courts.state.ny.us/ip/domesticviolence/index.shtml> (last updated Aug. 3, 2006); see also N.Y. FAM. CT. ACT § 812 (McKinney 2013) (setting out the procedures for family offense proceedings).

⁸ See *cf. In re Luis*, 847 N.Y.S.2d 835, 845–46 (Fam. Ct. 2007) (citations omitted) (stating that New York courts' "paramount concern" in making custody determinations is the best interests of the child, which requires an evaluation of the totality of the circumstances, including "the quality of the parents' respective home environments, the length of time of the existing custody arrangement, the parents' past performance and relative fitness, their ability to guide and provide for the child's intellectual and emotional development, the needs of the child, the child's wishes, as

center of this family's life for over two years, and greatly contributed to Carlos living in an unstable, unpredictable family situation—a situation that would be difficult for any seven-year-old to experience. However, for Carlos, a child whose special needs both hindered his ability to adapt to challenges and frequently led to emotional outbursts, his family's turmoil proved to be an immense obstacle that pervaded his daily functioning, most prominently in school.

Carlos' mother had been consumed by this court case and her efforts to stabilize her life after years of domestic violence victimization. These deeply personal and emotional issues, on top of her son's educational and mental health needs, caused her to become overwhelmed by the challenge of truly understanding Carlos' needs—needs that were taking a large toll on Carlos' progress in school. The school called Carlos' mother on an almost daily basis to express their frustration with his unruly behavior. Sometimes the school requested that she pick Carlos up from school because the teachers could not control him. The challenges Carlos faced in school because of his special needs, combined with his distress over his family's ongoing court case, if left unaddressed, were setting Carlos up for inevitable educational failure.

B. Tommy's Story: When Parents Are at Odds over Special Education

Tommy's parents were battling for custody of him in Bronx County Family Court for three years. During this time, each parent accused the other of child abuse and neglect. Due to the parties' attorneys' litigation tactics and the enormously high volume of cases in the family court,⁹ the judge delayed trial several times. In the meantime, as the case slowly chugged on, Tommy's hope for his parents' fighting to end seemed to disappear.

Tommy, a fifth-grader, constantly had difficulty staying focused and on-task in school. Tommy had been receiving barely passing grades each school year, read at a second-grade level, and was often reprimanded by his teachers for talking out of turn and for wandering around the classroom during class time. When

well as any possible manipulation of those wishes, and the need for stability in the child's life").

⁹ See N.Y.C. FAMILY COURT, NEW YORK CITY FAMILY COURT 2010 ANNUAL REPORT 28 (2011), available at <http://www.nycourts.gov/courts/nyc/family/2010%20Annual%20Report%20NYC%20Family%20Court.pdf> (noting that Bronx County Family Court had a total of 42,677 filings and 42,582 dispositions in 2005, 51,050 filings and 50,018 dispositions in 2007, and 57,944 filings and 57,791 dispositions in 2010).

Tommy was much younger, a psychiatrist evaluated him and diagnosed him with Attention Deficit Hyperactivity Disorder (ADHD).

The cause of Tommy's education failure became a primary issue in the custody case. Each parent pushed forth their opinion about the reason behind Tommy's challenges to bolster their own position that they were the better-fit parent to meet Tommy's educational needs. Tommy's mother claimed Tommy's ADHD constituted a disability that required special education services, while his father continually downplayed the significance of the ADHD diagnosis on Tommy's lack of academic progress. Tommy's father adamantly denied the need to "label" Tommy as a special education student, and argued Tommy's educational troubles were minimized when Tommy spent more time with him, a father who provided structure in Tommy's life.

Additionally, because neither parent had an order of sole custody of Tommy, they shared joint custody and equal decision-making rights pertaining to Tommy's education. A court's order of sole custody to either parent—which is what both parents sought—would give that parent final decision-making rights. However, the lack of such an order to either parent had made it difficult for Tommy's school to take action. Without a clear determination of which parent had final educational-decision-making rights, and because of the stark difference between the parents' opinions, the school would not evaluate Tommy without the consent of the parent that had the superior right to make education decisions. Consequently, Tommy's parents' custody dispute left him in educational limbo, which only proved to further worsen his academic challenges and delay his school's ability to address his needs effectively.

II. HOW DOES FAMILY INSTABILITY IMPACT EDUCATIONAL OUTCOMES?

Research shows that children who experience family disruption may have lower educational attainment relative to children in stable, intact families, either because of deficits resulting from the absence of a parent in the same household or because of other destabilizing changes that accompany the process of family disruption.¹⁰ Children who experience family disruption are more likely to have problems in school and are less likely to succeed education-

¹⁰ Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-being of Children: A Meta-Analysis*, 110 *PSYCHOL. BULL.* 26, 26–27, 36–40 (1991).

ally.¹¹ It is upon this premise that I shaped my work as an education attorney for children stuck in the middle of New York City Family Court proceedings.

I have worked with the children described above to minimize the impact of family disruption inherent to a contentious family court case, on the child's educational stability. These children are not only involuntarily subjected to experiencing the pain of family disruption, but each is also a child with special needs. My clients have mental health challenges, ASD, and severe learning disabilities. These are children whose educational progress is significantly determined by the ability of a parent or teacher to detect special needs, the quality of a school's delivery of special education services, the pedagogy designed specifically to meet the child's individualized needs, and the parents' ability to advocate on behalf of those needs effectively. A lot of collaboration and hard work is necessary to help these children succeed. However, for my clients, the interplay of family disruption, special education needs, and a community's poverty and its resulting under-resourced schools, create a perfect storm that positions my clients at the bottom of a steep educational mountain with very few of the tools necessary to begin—let alone complete—the ascent to success.

In this Article, I will discuss my work as an education attorney at the Children's Law Center (CLCNY),¹² a non-profit law firm that represents children in New York City's Family Courts. I work to ensure that my clients have access to and take advantage of quality educational services despite their daily challenges of family turmoil, special education needs, and poverty. This Article examines these specific obstacles to education my clients face and strategies that I employ to help them and their families overcome such hurdles. Additionally, I hope that my discussion will shine a light on the importance of collaboration between advocates and families, as well as the key roles advocates play in ensuring student and parent empowerment.

III. THE CHILDREN'S LAW CENTER: GIVING CHILDREN A VOICE

CLCNY fulfills the essential role of providing attorneys to represent the subject children in New York Family Court proceedings. In many New York City Family Court custody, visitation,

¹¹ See Andrew Shepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 703 (1985).

¹² See generally *About Us*, CHILDREN'S LAW CTR. N.Y., <http://www.clcny.org/> (last visited Sept. 12, 2013).

guardianship, paternity, and child protective proceedings, the judge appoints an attorney to represent the child, “who often require[s] the assistance of counsel to help protect their interests and to help them express their wishes to the court.”¹³

Rule 7.2 of the Rules of The Chief Judge of the State of New York explains the role of the attorney for the child.¹⁴ In these family court proceedings, where the child is the subject, the attorney for the child must zealously advocate for the child’s position.¹⁵ The Rule explains:

If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child’s best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney’s view would best promote the child’s interests.¹⁶

However:

When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child’s wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child’s wishes. In these circumstances, the attorney for the child must inform the court of the child’s articulated wishes if the child wants the attorney to do so, notwithstanding the attorney’s position.¹⁷

Rule 7.2 creates a uniquely dual purpose of the attorney, one that both obliges the attorney to advocate zealously for the child’s desires in court, and requires the attorney to assess the child’s ability to make an informed decision with respect to their emotionally charged family court cases.¹⁸ In effect, child advocacy is a unique practice that demands an attorney’s ability to understand the family dynamics of each case deeply and effectively, and candidly communicate with children of all ages.

In four out of five New York City boroughs (Manhattan excluded), CLCNY represents approximately 9,000 children annually in custody, guardianship, visitation, paternity, child support, do-

¹³ Sobie, Practice Commentary, McKinney’s Consolidated Laws of N.Y., Book 29A, Fam. Ct. Act § 241 (2013).

¹⁴ N.Y. COMP. CODES R. & REGS. tit. 22, § 7.2 (2013).

¹⁵ *Id.* § 7.2(d).

¹⁶ *Id.* § 7.2(d)(2).

¹⁷ *Id.* § 7.2(d)(3).

¹⁸ *Id.* § 7.2.

mestic violence, and connected child protective cases in New York City's Family Courts.¹⁹ Through this representation, CLCNY gives each child "a strong and effective voice in a legal proceeding that has a critical impact on his or her life."²⁰

IV. HOW DO WE HELP CHILDREN WHO ARE FAILING ACADEMICALLY?

CLCNY has represented children in these proceedings for over fifteen years, and during those fifteen years, CLCNY has developed and employed a holistic model of representation, which incorporates the expertise of skilled social workers to gain a better understanding of family dynamics and connect our clients and their families to needed services that have the potential to enhance their quality of life.²¹ CLCNY strives to represent the child holistically, in a way that extends beyond the courtroom walls. While we zealously advocate for our clients' positions in court, we also provide the resources of a social work team that works to stabilize our clients' family lives. As a legal service provider to so many New York City children each year, a few years ago CLCNY recognized a piece was missing from a more effective and complete model of representation. Although CLCNY was able to address the legal issues in family court and provide social work services, we were not addressing another crucial aspect of our clients' lives: their educational well-being.

For several years, CLCNY attorneys and social workers identified trends: too many clients were underachieving in school. Clients with Individualized Education Plans (IEP),²² in particular, were struggling the most, and were suspended from school regularly. CLCNY's clients' experiences with family disruption and turmoil were undoubtedly a strong factor in their school failure. Moreover, CLCNY's attorneys and social workers were not able to address these education issues effectively because of their high caseloads and lack of expertise in education rights. In response to this recognized educational failure among many of CLCNY's cli-

¹⁹ Dawn Post, *Don't Forget the Casualties of a Custody War*, CITY LIMITS (May 6, 2013), <http://www.citylimits.org/conversations/200/>.

²⁰ *Id.*

²¹ See *Who We Are*, CHILDREN'S LAW CTR. N.Y., http://www.clcny.org/?page_id=2 (last visited Sept. 19, 2013); see also *Client Services*, CHILDREN'S LAW CTR. N.Y., http://www.clcny.org/?page_id=5 (last visited Sept. 19, 2013).

²² See Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1414(d)(1)(A) (2012) (defining an IEP).

ents, the organization sought to incorporate an education advocacy component into its service to its young clients.

My law school internship with CLCNY turned into a postgraduate Equal Justice Works Fellowship, which allowed me to team up with CLCNY to design and implement this education advocacy project to supplement CLCNY's model of representation.²³ The project, which started in September 2011, aims to enhance educational opportunities for children at the center of family court proceedings, with a particular focus on securing special education entitlements for children with disabilities and empowering these students and their parents to be their own best advocates.

My commitment to help enhance the quality of education for children living in the low-income urban communities of New York City is rooted in my life before lawyering. For three years, I taught at a middle school in Morrisania, an under-resourced South Bronx neighborhood. Sharing the fourth floor of an imposing, block-long, pale brown, concrete complex with three other small schools, my school faced the daunting challenges of under-resourced urban education. Morrisania was, and continues to be, one of the country's poorest neighborhoods, with a median household income of around \$20,000.²⁴ Approximately twenty-three percent of the adult population residing in Morrisania holds a high school diploma.²⁵ I witnessed how the interplay of the community's high poverty and frequency of educational failure translated into low expectations,

²³ See generally *Who We Are*, CHILDREN'S LAW CTR. N. Y., http://www.clcny.org/?page_id=2 (last visited Sept. 19, 2013); CHILDREN'S LAW CENTER'S SSES PROJECT, <http://ssexproject.tumblr.com/> (last visited Sept. 26, 2013).

²⁴ See Arun Venugopal, *Census Pinpoints City's Wealthiest, Poorest Neighborhoods*, WNYC (Dec. 8, 2011), <http://www.wnyc.org/story/174508-blog-census-locates-citys-wealthiest-and-poorest-neighborhoods/> (providing a scroll-over map, which shows that Morrisania's average household income ranges from approximately \$16,544 to \$28,022 per year); see also *2007–2011 American Community Survey 5-Year Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_5YR_DP03 (last visited Sept. 26, 2013) (stating that the median household income for the 10456 zip code, which includes the neighborhood of Morrisania, was \$22,549 per year from 2007 to 2011); N.Y.C. DEP'T OF CONSUMER AFFAIRS, OFFICE OF FIN. EMPOWERMENT, FINANCIAL EMPOWERMENT BRIEF (2011), *available at* http://www.nyc.gov/html/ofe/downloads/pdf/fe_brief_february2011.pdf (summarizing the findings of New York City's low-income neighborhoods' access to credit, debt levels and credit card use, and financial distress, which includes Morrisania's, in comparison to the rest of New York City and the nation).

²⁵ N.Y.C. DEP'T OF HEALTH AND MENTAL HYGIENE, NYC COMMUNITY HEALTH PROFILES: TAKE CARE HIGHBRIDGE AND MORRISANIA 2 (2d ed. 2006), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/data/2006chp-106.pdf> (stating that twenty-three percent of residents over the age of twenty-five in the Bronx neighborhoods Morrisania and Highbridge hold a high school diploma).

few resources, and even fewer opportunities for my students. I entered the teaching field hoping to help rewrite this narrative for the students who would sit before me in my classroom. I believed that by ensuring a quality education and setting high expectations, I could ensure that my students would graduate from high school, go to college, and defeat the cycle of poverty that held too many in their community back.

I quickly learned that it was not so easy to provide a quality education. For three years, I educated students who taught me the realities of educational inequity—how factors beyond students' control were thwarting their ability to receive an effective, sound education that would lead to long-term, positive educational outcomes. We did not have enough textbooks; we did not have a special education teacher; our hallways were filled with puddles when it rained hard enough; and mice roamed the classroom closets. I often wondered whether it was realistic to expect children to succeed in such an environment, and whether the test-driven policy-makers honestly expected teachers to meet the “challenging” standards²⁶ imposed on them while working under these conditions. These questions were neither new for my students nor for the dedicated teachers who had struggled in under-resourced schools for years. But for me, a twenty-one-year-old, newly minted college graduate who grew up in suburbia, this was an eye-opening, firsthand look into urban American poverty. I soon learned that this hope of mine—educating children *out of* poverty—was not so simple. A quality education is an essential piece to achieving this notion, but the inherent challenges caused by poverty to accessing quality education make the solution more complex.

During my time as a teacher, I identified some of the specific issues that rendered educational achievement so elusive in my school's community.²⁷ I observed how my students' community suf-

²⁶ See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.). The central piece of No Child Left Behind requires states to design and implement standardized testing to measure whether students in grades three through eight are meeting “challenging” state curriculum standards, particularly in the reading and math content areas. See 20 U.S.C. § 6311 (West, Westlaw through Pub. L. 113-74 (excluding Pub. L. 113-66, 113-67, and 113-73)).

²⁷ See MICHAEL HOLZMAN, SCHOTT FOUND. FOR PUB. EDUC., A ROTTING APPLE: EDUCATION REDLINING IN NEW YORK CITY 7–8 (Ann Beaudry ed., 2012), available at <http://schottfoundation.org/drupal/docs/redlining-full-report.pdf> (showing that students who live in low-income neighborhoods in New York City, including Morrisania, have a zero percent opportunity to attend a high-performing school); see also N.Y. STATE EDUC. DEP'T, THE NEW YORK STATE REPORT CARD 13 (2009), available at <https://reportcards.nysed.gov/statewide/2009statewideAOR.pdf> (noting that approximately

ferred from a lack of resources, a dearth of early childhood education opportunities, inadequate services to address developmental disabilities, high incarceration rates, housing instability, and family instability. These issues result in poor graduation rates, significant difficulties for children with disabilities, low levels of reading and math proficiency, and dismal college-readiness statistics.²⁸

After three years of teaching, I made the difficult decision to leave my classroom to pursue a legal career. As an attorney, I wanted to work with children and their families struggling in under-resourced communities to ensure they had access to quality educational opportunities. I began law school motivated by the urgency to expand educational access for students living in poverty, and graduated from law school with a role that bridged my experiences as a teacher with my new position as an attorney for children.

After law school, I teamed up with CLCNY to identify the pressing education issues faced by its nearly 9,000 yearly clients and devised strategies to address these issues. We quickly recognized and homed in on a pattern of academic failure amongst CLCNY's special-needs clients—clients with learning disabilities, developmental delays, speech impairments, ASD, and mental health challenges. These clients, similar to the rest of the special-needs population in New York City's public school system, underperformed and often did not graduate from high school.²⁹ We began to identify reasons for this common educational failure and found that despite the legal protections afforded to children with disabilities, these children were not always receiving appropriate special education services. Additionally, we found that children

only sixty-three percent of economically disadvantaged students graduated from high school); *see also* Michael Heise, *The Courts, Educational Policy, and Unintended Consequences*, 11 CORNELL J.L. & PUB. POL'Y 633, 644 (2002) (finding that students in high-poverty schools, particularly high-poverty urban schools, "almost always have lower levels of academic achievement than do low-poverty schools"); *see also* ANNENBERG INSTITUTE FOR SCHOOL REFORM, IS DEMOGRAPHY STILL DESTINY? 1, 5–6 (Margaret Balch-Gonzalez ed., 2012), *available at* <http://annenberginstitute.org/sites/default/files/Demography%20is%20Destiny.pdf> (noting that eighteen of the twenty-one neighborhoods with the lowest college-readiness rates are in the Bronx); *see also* *Attendance Stats by Borough (PAR)*, N.Y.C. DEP'T OF EDUC., <http://school.nyc.gov/AboutUs/data/stats/arreports.htm> (follow "Stats by Borough (PAR)" hyperlink) (last visited Oct. 18, 2013).

²⁸ *See* sources cited in previous footnote.

²⁹ *See* N.Y.C. DEP'T OF EDUC., NEW YORK CITY GRADUATION RATES CLASS OF 2012 (2008 COHORT), at 11, *available at* <http://school.nyc.gov/NR/rdonlyres/31DFBEE6-2620-4792-BE7A-01B00F2E5B56/0/2012GraduationRatesPUBLICFINALWebsite.pdf> (diagramming the four-, five-, and six-year graduation rates for students with disabilities).

who had not been evaluated for special education services in a timely manner had to play a constant game of catch-up due to the years lost in learning. The complexities of the special education process and its laws overwhelm many parents, especially those of my clients, who are stuck in the turmoil of family court proceedings and do not have the time or the knowledge on how to advocate on their child's behalf. My project—bringing education advocacy to CLCNY—aims to protect these children's legal rights so that they may access an appropriate education tailored to their special needs, with the ultimate goal of a high school diploma.

V. HOW DOES THE LAW PROTECT CHILDREN WITH SPECIAL NEEDS?

In 1975, Congress enacted the Education for All Handicapped Children Act (EAHCA),³⁰ another piece of the civil rights movement that commenced with the Supreme Court's school integration decision in *Brown v. Board of Education*.³¹ The *Brown* decision held that separate classrooms for children based on the color of their skin was inherently unequal, and in effect labeled the classroom as an equal rights venue.³² Attempting to take advantage of this notion and the momentum built during the civil rights movement, disability rights advocates urged lawmakers to address the inequities in educational access for children with disabilities.³³ In 1970, only one in five children with disabilities learned alongside non-disabled peers in public school classrooms.³⁴ Congress enacted the EAHCA with the intent of including more children with disabilities in public schools.³⁵ The EAHCA mandated school districts to provide special education services and implement special

³⁰ See Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

³¹ 347 U.S. 483 (1954).

³² *Id.* at 495.

³³ David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 166 (1991) ("The passage of the Education for All Handicapped Children Act (EHA) in 1975 . . . resulted from changes in popular conceptions of 'handicaps,' political activism by and on behalf of persons with disabilities, recognition of the importance of public education to integrate disempowered groups into society, and an increased willingness to perceive persons with disabilities as a minority group to whom the civil rights paradigm should be applied."); see also Elizabeth Palley, *The Role of the Courts in the Development and Implementation of the IDEA*, 77 SOC. SERV. REV. 605, 607-08 (2003) (explaining how *Brown v. Board of Education* influenced court decisions on educational access for disabled children).

³⁴ U.S. DEP'T OF EDUC., U.S. OFFICE OF SPECIAL EDUC. PROGRAMS, HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA (n.d.), available at <http://www2.ed.gov/policy/spced/leg/idea/history.pdf>.

³⁵ 89 Stat. at 774-75.

protections designed to empower children with disabilities and their parents.³⁶

In 1990, Congress replaced and improved the EAHCA by enacting the Individuals with Disabilities Education Act (IDEA).³⁷ Congress' enactment of the IDEA expanded the rights of students with special needs granted by the EAHCA, as it provided all disabled children with the right to a "free appropriate public education . . . designed to meet their unique needs."³⁸ Additionally, the IDEA provides the framework for school districts to follow to ensure fair processes for both students with disabilities and their parents to secure meaningful involvement in the development and implementation of the child's education program.

A. *Who Does the IDEA Protect and What Are These Protections?*

The IDEA is a complex federal statute that has resulted in significant litigation, which in turn has further complicated legal interpretation for school districts and special education lawyers. I will boil down the IDEA's special education protections that are essential to ensuring appropriate educational services for my clients by describing which children are protected and how they are protected.

The IDEA's protections extend to children with disabilities—children classified with

intellectual disabilities,³⁹ hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to . . . as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof, need[] special education and related services.⁴⁰

Once the school district evaluates and classifies a child with at least one of the above-listed disabilities, the school district must design a plan to meet the special education needs of the child—an

³⁶ *Id.* at 784–86.

³⁷ Pub. L. No. 101-476, 104 Stat. 1103 (1990). In 2004, the IDEA was reauthorized as the Individuals with Disabilities Education Improvement Act (IDEIA), Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended at 20 U.S.C. §§ 1400–85).

³⁸ 20 U.S.C. § 1400(d)(1)(A) (2012).

³⁹ See *Categories of Disability under IDEA*, NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, <http://nichcy.org/disability/categories#id> (last visited Nov. 2, 2013) (explaining that the IDEA term "intellectual disability" is relatively new—the IDEA had previously used the term "mental retardation"—given effect by Rosa's Law, implemented by President Obama in 2010).

⁴⁰ 20 U.S.C. § 1401(3)(A)(i)–(ii).

IEP.⁴¹ The school district must then provide the special education program and/or related services outlined in the IEP.⁴² The school district's provision of an educational program designed to meet the students' needs constitutes the *appropriate* education that the IDEA mandates in its key requirement that schools provide a free appropriate public education (FAPE)⁴³ to all children with an educational disability.

Furthermore, under the IDEA, the provision of FAPE must take place in the least restrictive environment to enable disabled students to work alongside non-disabled students to the maximum extent appropriate.⁴⁴ The dual nature of this requirement is to ensure that a child with a disability receives specialized services and instruction to address his or her needs in a manner that does not relegate the child to an educational experience marred by the unfortunate stigma associated with special education, a stigma based on the historic segregation of children with disabilities from non-disabled peers.⁴⁵ Because of the IDEA's mandate that a school district provide FAPE in the least restrictive environment possible, a significant number of children with disabilities now go to public schools in their neighborhood and learn alongside non-disabled classmates. However, children whose disabilities are too severe for the neighborhood public schools may attend specialized schools at no cost to the parents. This crucial right ensures that all children with special needs, regardless of the severity of their disability, will learn in an appropriate educational setting.

B. Does the IDEA Ensure Educational Success?

The IDEA offers significant protections for the education rights of children with disabilities. However, the existence of these protections has not translated into academic achievement for the majority of the special education population in New York City's public school system.⁴⁶ Despite the protections of the IDEA, New York state law, and New York City regulations, students with disabilities have continually failed to achieve academically.

New York City's public schools educate nearly 1.1 million chil-

⁴¹ *Id.* § 1414(b)(4)–(d).

⁴² *Id.* § 1414(d).

⁴³ *See id.* § 1401(9) (defining “free appropriate public education”).

⁴⁴ 20 U.S.C. § 1412(a)(5)(A) (2012).

⁴⁵ *See id.* § 1400(d) (setting forth the purposes of the IDEA).

⁴⁶ *See supra* note 29, at 11.

dren.⁴⁷ Approximately 225,000 students, or about twenty-one percent of the district's total student population, received the DOE's special education services during the 2012–2013 school year.⁴⁸ During the same year, the DOE evaluated and recommended special education services for 15,259 more students.⁴⁹ This large portion of the New York City public school population has historically failed to achieve academic gains anywhere near their general education counterparts. For example, in 2012, the four-year graduation rate for students with IEPs was a dismal 30.5% compared to the 64.7% graduation rate of general education students.⁵⁰ These numbers show that children with disabilities in New York City continue to fall short of graduating high school. So, what is the problem? Why are these students not graduating on time? The answer involves many of the same factors that caused the educational challenges my students faced in the South Bronx.

VI. WHY ARE CHILDREN WITH DISABILITIES FAILING?

After two years working as an attorney for children, I believe there are three primary school-based factors that increase the likelihood of dropping out or aging out of high school without a diploma for my special-needs clients. First, New York City's under-resourced schools have difficulty implementing IEPs that truly address the individualized needs of students with disabilities. Second, parents, who are their children's best advocates, are confused by the DOE's complicated and ill-communicated special education rules and procedures. As a result, these parents too often have difficulty understanding their children's rights under the IDEA and become frustrated and overwhelmed navigating the process. Third, school discipline practices, like suspensions, disproportionately exclude students with disabilities from the classroom. Each of these factors, if not all three simultaneously, hinders many of my clients' paths to educational success. Further, the poverty and family turmoil my clients experience in their daily lives only exacerbate the negative impact of these obstacles. As an education advocate for my clients, it is my job to minimize these factors' negative impacts, while simultaneously striving to increase the likelihood of successful high school graduation by ensuring the implementation of suf-

⁴⁷ CITY OF N.Y., MAYOR'S MANAGEMENT REPORT FISCAL 2013, at 121 (2013), available at http://www.nyc.gov/html/ops/downloads/pdf/mmr2013/2013_mmr.pdf.

⁴⁸ *Id.* at 124.

⁴⁹ *Id.*

⁵⁰ See *supra* note 29, at 4, 11.

ficient IEPs, informing parents, and advocating against school suspensions.

FAPE requires schools to provide special needs children with the special education services that are designed to address their specific needs so that they will get an educational benefit from their instructional program.⁵¹ However, I have seen that schools, particularly in poor communities, are not always able to provide the special education program or service that a child's IEP mandates. For example, if a child classified with an Emotional Disturbance (ED)⁵² has an IEP that requires a crisis-management paraprofessional to work with the student one-on-one during classroom instruction to help keep him on-task and manage his or her behavior, the school *must* provide the student with that paraprofessional. I have seen financially strapped schools that do not have the money in their budgets to hire even a single paraprofessional convince instead the child's parent to consent to a change in the IEP so that it no longer mandates the child to receive one-on-one services from the crisis-management paraprofessional. In the end, rather than providing what he or she truly needs to make academic progress, the school tries its best to accommodate the child without the appropriate services—and violates the IDEA—while the child's educational well-being suffers.

The second factor that causes children with disabilities to fail is the lack of empowerment among the parents of special-needs children. New York City's special education process can be overwhelming and complicated. Many parents do not know how to request a special education evaluation when they first detect an issue with their child's learning ability. Parents have to make the time to attend several meetings, sign consent forms that can be difficult to grasp, and understand a lot of complicated special education jargon. Many parents are also not aware that they have rights once the school classifies their child with a disability. Some parents believe that school professionals should be the primary decision-makers on their child's IEP development, and that their role as parents

⁵¹ See 20 U.S.C. § 1412(a)(3)–(4) (2012).

⁵² See 34 C.F.R. § 300.8(c)(4)(i) (2013) (“Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree adversely affects a child's educational performance: (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors. (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers. (C) Inappropriate types of behavior or feelings under normal circumstances. (D) A general pervasive mood of unhappiness or depression. (E) A tendency to develop physical symptoms or fears associated with personal or school problems.”).

is to simply sign the IEP without contributing any input.⁵³ When I speak with parents about their children's special needs, they are often uncertain as to what services their child is receiving. They are unsure when their child's IEP annual review will take place.⁵⁴ They often have not read their child's IEP.

I do not believe parents' lack of awareness is due to a resistance to understand their child's disability or the services required to help their child progress. Rather, the special education process is inherently complicated and schools frequently fail to communicate parents' and students' rights to the parents during the evaluation or IEP meeting stages. I also do not believe schools communicate how integral parents are in the special education and IEP development processes.

The third factor is the disproportionate number of special-needs students who are suspended from school. When a student is suspended, he or she is removed from the classroom and often spends the duration of the suspension in an alternate learning site, typically with other suspended students.⁵⁵ The DOE can suspend students of any age for one day to a year⁵⁶ for behaviors ranging from talking back to a teacher to fighting with another student.⁵⁷ During the 2011–2012 school year, the DOE suspended nearly 70,000 students. Students with special needs, comprising just seventeen percent of the total student population, accounted for twenty-nine percent of the suspensions.⁵⁸

The disproportionate number of suspensions of students with special needs is a systemic problem in New York City's public schools, which increases these children's likelihood of becoming

⁵³ *But see* 20 U.S.C. § 1414(d)(1)(B)(i) (2012) (identifying parents of a child with a disability as part of the child's IEP team).

⁵⁴ *See id.* § 1414(d)(4)(A)(i) (mandating IEP teams to review children's IEPs "periodically, but not less frequently than annually").

⁵⁵ *See* N.Y.C. DEP'T OF EDUC., NO. A-443, STUDENT DISCIPLINE PROCEDURES 19–20 (2004), *available at* <http://docs.nycenet.edu/docushare/dsweb/Get/Document-22/A-443.pdf> (explaining suspension procedures).

⁵⁶ A principal's suspension may result in a suspension period of one to five days. *Id.* at 22. A superintendent's suspension can result in a suspension period of six days to one year. *Id.* at 27, 52.

⁵⁷ *See* N.Y.C. DEP'T OF EDUC., CITYWIDE STANDARDS OF INTERVENTION AND DISCIPLINE MEASURES 17–29 (2013), *available at* <http://school.nyc.gov/NR/rdonlyres/188AF3E2-F12B-4754-8471-F2EFB344AE2B/0/DiscCodebooklet2013final.pdf> (listing infractions and corresponding lists of interventions and disciplinary responses schools can use to address a student's noncompliant behavior).

⁵⁸ N.Y. CIVIL LIBERTIES UNION, A, B, C, D, STPP: HOW SCHOOL DISCIPLINE FEEDS THE SCHOOL-TO-PRISON PIPELINE 12–13 (2013), *available at* http://www.nyclu.org/files/publications/nyclu_STPP_1021_FINAL.pdf [hereinafter "SCHOOL-TO-PRISON PIPELINE"].

involved in the juvenile and/or criminal justice system and decreases their likelihood of graduating from high school.⁵⁹ Schools too often rely on exclusionary discipline tactics that cause more harm to students by removing them from their familiar educational settings and depriving them from their special education programs and services that they need in order to progress, rather than addressing their troubling behaviors through counseling or social work services.

Ineffective IEP implementation, lack of rights awareness amongst parents and students, and the overuse of suspensions to discipline special-needs students are crucial factors that lead to their academic failure. These factors make it that much more difficult for the special-needs population to make educational progress and ultimately graduate from high school. In addition to these already prevalent educational challenges, my clients—children who are at the center of family court proceedings—must also confront the very difficult challenge that results from the destabilizing impact of significant family turmoil on their daily lives. Consequently, my clients' educational stability often suffers from the family instability that prominently plays into their everyday lives.

VII. THE IMPACT OF FAMILY COURT INVOLVEMENT ON SPECIAL NEEDS CHILDREN'S EDUCATIONAL PROGRESS

Each child with whom I work is the subject of a family court proceeding, which can be very litigious and emotionally charged. As a result, my clients are in the middle of difficult family turmoil, with their parents aggressively vying for custody and too often pull-

⁵⁹ See N.Y. CIVIL LIBERTIES UNION, EDUCATION INTERRUPTED: THE GROWING USE OF SUSPENSIONS IN NEW YORK CITY'S PUBLIC SCHOOLS 20–22 (2011), available at http://www.nyclu.org/files/publications/Suspension_Report_FINAL_noSpreads.pdf (finding that students with special needs are more likely to be suspended than general-education students, and noting a correlation between suspensions, dropping out or failing to graduate on time, and involvement in the criminal justice system); ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT AT HARVARD UNIV., OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE 13 (2000) (footnote omitted), available at <http://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/opportunities-suspended-the-devastating-consequences-of-zero-tolerance-and-school-discipline-policies/crp-opportunities-suspended-zero-tolerance-2000.pdf> (“[S]uspension is a moderate to strong predictor of a student dropping out of school; more than 30% of sophomores who drop out of school have been suspended. Beyond dropping out, children shut out from the education system are more likely to engage in conduct detrimental to the safety of their families and communities. The ultimate result is that Zero Tolerance Policies create a downward-spiral in the lives of these children, which ultimately may lead to long-term incarceration.”); *id.* at n.45 (“[S]ixty-eight percent of the U.S. prison population dropped out of high school.”).

ing them in opposite directions. My clients' family court cases sometimes involve domestic violence histories, absent parents, child abuse, child neglect, drug abuse, criminal allegations, and orders of protection. Needless to say, these cases are intensely emotional for everyone involved and particularly for my clients, who are at the center of the controversy. My clients' cases can trudge through the court system for years,⁶⁰ resulting in too many of them spending half of their childhoods as the subject of court proceedings.

During these years in family court, my clients are often growing accustomed to new visiting schedules with their parents, spending time with parents they may not have known before, discussing their families and their personal lives with lawyers, ACS caseworkers, social workers, and forensic psychologists. For many of my clients, this family turmoil often translates into distractions at school, and sadness, anger, and frustration that result in poor academic progress and unruly classroom behavior. In turn, my clients often receive poor grades or school suspensions. For parents, these family court cases often overwhelm their lives, leaving less time to focus on ensuring their children's success in school.

These educational challenges, often caused by a family's lengthy court involvement, are common amongst many of our clients, but, through my work, I have seen how these challenges in particular impact clients with special needs. As an attorney at CLCNY, I have the opportunity and responsibility to help minimize the impact of family instability on my clients' educational progress and to help increase the likelihood of high school graduation for all of my clients.

The extent to which family turmoil impacts educational well-

⁶⁰ See JUDITH S. KAYE, *THE STATE OF THE JUDICIARY 2008: A COURT SYSTEM FOR THE 21ST CENTURY* 4–5 (2008), available at <http://www.courts.state.ny.us/admin/stateofjudiciary/soj2008.pdf> (“I personally have never before seen such burdens placed on Family Court, emotional burdens and calendar burdens, typically necessitating long court days and long court delays—delays that in child time are an eternity. No fair to the litigants, no fair to the courts.”); see also Joy S. Rosenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y. CITY L. REV. 127, 136 (2007) (footnote omitted) (“Once inside the courtroom, cases are often rushed or adjourned, if they are heard at all. Cases may be adjourned for weeks or even months at a time, and litigants may be told to come back again and again. This is frustrating for those who have to work or have child-care responsibilities because they have to take a whole day off each time they must appear in court, and/or arrange for others to take care of their children. Parents have told me that they have used all of their vacation time for the year waiting in Family Court. One parent told me that she lost her job because of required Family Court appearances. What might have started out seeming like a simple matter may take months or even years to complete.”).

being of a child with a disability is often dependent on the child's disability. The negative consequences of family instability manifest in different ways in my clients' classrooms. Children with social and emotional challenges due to mental health diagnoses may have temper tantrums and aggressively act out; children with ASD may be withdrawn and disinterested with class; and children with learning disabilities may become overly frustrated and disillusioned with school because of the mounting difficulty of their schoolwork. These difficulties only grow worse if these children are not receiving appropriate special education services.

As an attorney for children who is at the center of highly emotional family court cases, one of the most common educational disabilities I encounter is ED. When a child has significant behavioral challenges that impede his or her ability to learn, the DOE typically classifies the child with an ED.⁶¹ A child with this disability typically has significant difficulty following classroom rules and may act out violently in response to being reprimanded by a teacher or teased by another student.⁶² Based on my experiences as an attorney, family turmoil that is continually a part of my clients' lives may often be the root of their social and emotional challenges. Additionally, the continued presence of a contentious family court case during important childhood development stages exacerbates his or her social and emotional challenges.

Danny, a six-year-old client classified as ED, frequently had tantrums in his classroom that included throwing himself on the floor, pushing desks and furniture across the classroom, and swinging his fists at his teachers. These behaviors led to several suspensions⁶³ and multiple 9-1-1 calls⁶⁴ resulting in visits to the emergency room for psychiatric testing. Incidentally, these behaviors primarily occurred on the Monday mornings following court-ordered alternating weekend visits with his mother. This child's behavioral chal-

⁶¹ See 34 C.F.R. § 300.8(c)(4)(i) (2013).

⁶² See *id.*

⁶³ SCHOOL-TO-PRISON PIPELINE, *supra* note 58, at 26–27.

⁶⁴ See generally Michael Winerip, *Keeping Students' Mental Health Care Out of the E.R.*, N.Y. TIMES (Apr. 8, 2012), <http://www.nytimes.com/2012/04/09/nyregion/trying-to-keep-students-mental-health-care-out-of-the-er.html> (discussing how school officials increasingly rely on emergency medical services to address behavioral issues with students due to the lack of sufficient mental health services in the school); see also Geoff Decker, *School EMS Referrals, on the Rise, Catch City Council's Attention*, GOTHAM SCHOOLS (May 1, 2012), <http://gothamschool.org/2012/05/01/school-ems-referrals-on-the-rise-catch-city-councils-attention/> (“[S]chools are too frequently referring students to EMS where school discipline is the issue, not medical or mental health treatment . . .”).

lenges grew worse as he had more visits with his mother, who had been an inconsistent presence in his life prior to the court-ordered visitation.

Danny's school reached out to both parents to discuss his behavior. In response, Danny's father blamed the mother for Danny's misbehavior, and alleged the mother treated Danny poorly, and even physically abused him, during his weekend visits with her. The mother denied all of the allegations, and claimed that Danny's behavior was rooted in his distress over having to leave his mother and return to his father's care for the week. Because each parent was focused on blaming the other, neither parent considered working with the school to develop strategies to address Danny's behaviors. Maybe Danny needed a re-evaluation to re-assess whether his current services were appropriate, or to determine whether he needed more counseling services, or a behavior intervention plan.

Instead, each exasperated parent threw their hands up, pointed fingers, and worried about building evidence against the other parent for the purpose of their family court case. As a result, Danny's needs became secondary to the parents' legal positions and consequently, his educational progress suffered—Danny missed many hours of class due to the school's strategies of excluding him from class. Further, Danny's parents were not aware of his rights as a special education student and did not feel empowered to fight for more services for Danny.

Danny's story exemplifies an unfortunate and common by-product of family court proceedings: sometimes parents vying for custody of their child become so entrenched in strengthening their legal position that their interest in "winning" the case eclipses their child's best interests. However, as parents litigate for months and sometimes even years, the child—who is at the center of this fight—often loses. In Danny's case, his parents' shortsighted strategies caused Danny's educational well-being to suffer. Further, the tension created by the family court case and the lack of consistent nurturing and care giving by his parents continued to result in negative developmental outcomes for this six-year-old child. Unlike Danny, children who have consistent and nurturing caregivers are more likely to have trusting relationships with their caregivers and others. This type of rearing leads to positive developmental outcomes, such as the social and emotional skills necessary for academic functioning.⁶⁵

⁶⁵ See Jennifer Kahn, *Can Emotional Intelligence Be Taught?*, N.Y. TIMES (Sept. 11, 2013), <http://www.nytimes.com/2013/09/15/magazine/can-emotional-intelligence->

For Danny and too many of my other clients, the lack of consistent positive parental relationships and the unstable feeling of being pushed and pulled by each parent result in low emotional intelligence, feelings of frustration, and demonstrations of negative behavior that tends to stymie their academic growth. What can we do as advocates to combat the negative impact of family instability and the lack of special education advocacy on my clients' educational outcomes that also decrease their chances of graduating high school?

VIII. STRATEGIES TO SECURE EDUCATIONAL STABILITY: ADVOCACY AND EMPOWERMENT

My role at CLCNY is to help promote educational stability for my clients, who are at a particularly great risk of educational failure because of the harmful impact of the intersection of their family instability and special education needs. I work to eliminate the risk factors that increase the likelihood of dropping out, failing out, or aging out of school, by assisting my clients and their families in attaining a level of educational stability that will promote academic progress.

Three commonly recognized risk factors that lead students to exit high school without a diploma are poverty, family instability, and the presence of a disability. Children living in poverty are five times more likely to drop out of school than children who come from higher-income families.⁶⁶ In New York City, only 11.84%⁶⁷ of students who receive special education services graduated from high school with a Regents⁶⁸ or local diploma.⁶⁹ In the same year, thirty-four percent of students receiving special education services were labeled as "drop-outs,"⁷⁰ and

[a]nother 35% of students receiving special education services who leave school are categorized as students who have "moved"

be-taught.html (explaining the positive effects of social-emotional learning on children's learning and academic achievement).

⁶⁶ Emmeline Zhao, *High School Dropout Rates for Minority and Poor Students Disproportionately High*, HUFFINGTON POST (Oct. 20, 2011, 2:22 PM; updated Feb. 14, 2012, 12:22 AM), http://www.huffingtonpost.com/2011/10/20/high-school-dropout-rates_n_1022221.html.

⁶⁷ ADVOCATES FOR CHILDREN OF N.Y., LEAVING SCHOOL EMPTY HANDED: A REPORT ON GRADUATION AND DROPOUT RATES FOR STUDENTS WHO RECEIVE SPECIAL EDUCATION SERVICES IN NEW YORK CITY 1 (2005), available at http://www.advocatesforchildren.org/sites/default/files/library/leaving_school_empty_2005.pdf?pt=1.

⁶⁸ See N.Y. COMP. CODES R. & REGS. tit. 8, § 100.5(a)-(c) (2013).

⁶⁹ See *id.*

⁷⁰ ADVOCATES FOR CHILDREN OF N.Y., *supra* note 67, at 3.

and are allegedly “known to be continuing” in some other non-DOE school (including a GED program run by the NYC DOE). This essentially means that these students have also left school without a diploma.⁷¹

Furthermore, children with different disability classifications graduate with a diploma at different rates. In 2004, ninety-six percent of students classified as having an ED, eighty-three percent of students classified as having a learning disability, and eighty-nine percent of students classified as having a speech impairment left high school without a diploma.⁷² These staggering numbers indicate that too many of New York City’s public schools are unable to provide effective special education services, if at all. Some teachers are not aware that certain students have IEPs. Some schools do not have qualified special education teachers. In addition, children with disabilities are excluded from school through disciplinary suspensions, instead of being counseled. Because of inadequate special education services, special education students frequently feel overwhelmed by school and do not work to complete high school.⁷³

After looking deeper into the specific challenges that my clients face, I have worked to develop effective strategies to minimize these risk factors that lead to my clients’ academic failures. As an attorney focusing on the education issues of children in family court cases, I strive to make sure my clients have as many tools as possible to succeed in school. To achieve this, I engage in a two-prong approach of direct client service: advocacy and empowerment. This approach works to secure immediate results—a change in my client’s special education services and school placement—and simultaneously equips the client and his or her parents with the knowledge and understanding of special education rights to empower my clients and their parents to become lifelong advocates for themselves.

A. *Education Advocacy Strategies: Secure Appropriate Services, Limit Suspensions*

My education advocacy on behalf of my clients takes on a few forms. I advocate on behalf of my young clients at IEP meetings

⁷¹ ADVOCATES FOR CHILDREN OF N.Y., *supra* note 67, at 4.

⁷² *Id.* at 2.

⁷³ See ADVOCATES FOR CHILDREN OF N.Y., SCHOOL PUSHOUT: WHERE ARE WE NOW? I (2008), available at http://www.advocatesforchildren.org/sites/default/files/library/school_pushout_update_2008.pdf?pt=1.

and New York City DOE hearings. Once a CLCNY attorney or social worker identifies a client's special education issue (i.e., the child's need for a special education evaluation, advocacy at an IEP meeting, working to ensure that a much-needed special education service that is not being provided is provided, suspension), that client is referred to me and I work to ensure the client's educational needs are met, while the child's family court attorney represents the child in the family court proceeding. Sometimes, if the child's educational well-being is a major issue in the family court proceeding, I appear in the family court case to help the judge understand the issue, what I am doing to remedy the problem, and argue which of either parent is better-suited to address the child's education.

The best way to describe what this advocacy entails is to revisit the stories of my clients that I shared with you.

Strategy 1: Understand the Child's Special Needs

Carlos, to remind you, was a seven-year-old second grader, diagnosed with ASD, PTSD, and ODD. Carlos had an IDEA disability classification of ED, and his IEP mandated that the DOE place him in a New York City public special education school in District 75⁷⁴ and that he receive counseling services. Carlos had been suspended from school for fighting with another student. The school was tired of dealing with Carlos' aggressive and disruptive behaviors, and sought to suspend him for ten school days, pending a hearing. When I first met with Carlos, I had difficulty believing that the child who sat in front of me, who excitedly recited facts he had just learned about dinosaurs, was in my office because he had attacked another child in his classroom.

After speaking with Carlos for about an hour, I began to understand the extent to which his parents' volatile relationship affected him. Carlos described how his father would hit his mother, how he witnessed this abuse, and how angry and sad it made him. Carlos explained how he did not want to participate in visits with his father because he was angry with him for how he treated his

⁷⁴ *Special Education District 75*, N.Y.C. DEP'T OF EDUC., <http://school.nyc.gov/Offices/District75/default.htm> (last visited Nov. 21, 2013) ("District 75 provides citywide educational, vocational, and behavior support programs for students who are on the autism spectrum, have significant cognitive delays, are severely emotionally challenged, sensory impaired and/or multiply disabled. District 75 consists of 56 school organizations, home and hospital instruction and vision and hearing services. Our schools and programs are located at more than 310 sites in the Bronx, Brooklyn, Manhattan, Queens, Staten Island and Syosset, New York.")

mother. He noted that sometimes in school, this anger took control of him and he felt like he needed to protect himself. This is what happened one day when another boy in Carlos' class teased him. Carlos lost control. He started punching the boy. I realized that Carlos' emotional challenges, and his behavior, while dangerous and wrong, could not be effectively addressed by removing him from school. It was clear to me that a suspension would not have the "lesson learned" effect on Carlos that his school intended. To the contrary, Carlos would become further disillusioned with school, and continue to feel even more vulnerable. If Carlos' needs were not addressed therapeutically, his unruly behavior would continue, increasing his chances of being suspended again, and decreasing his likelihood of academic progress and graduating from high school.⁷⁵

During that first meeting with Carlos and his mother, I learned more about Carlos' special education needs, and we agreed that Carlos' current school situation was not working—his behavior and the school's approach to address his behavior (suspensions), created significant obstacles to his academic progress. Carlos spent more time serving suspensions than he did working with a counselor or a school psychologist. Carlos told me he would often get frustrated and bored at school because the work was too easy, and when he became bored he was easily distracted by other students. Carlos also explained that he would become angry when other children teased him or the teacher made him do something he did not want to do. He said that he would get especially angry when, during class, he thought about the way his father treated his mother when they all lived together.

Carlos' mother explained Carlos' intellectual functioning was above average, but that he had a lot of trouble controlling his behavior because of his PTSD and ODD diagnoses. A therapist who evaluated Carlos believed that Carlos' experience of witnessing domestic violence between his father and mother was the root cause of his diagnoses. The three of us discussed how it would be beneficial for Carlos to be placed in a different school that focused on emotional challenges and provided more effective psychological services.

Strategy 2: Advocate at the Suspension Hearing

The next step in my advocacy was to represent Carlos at a

⁷⁵ See *cf.* N.Y. CIVIL LIBERTIES UNION, *supra* note 59, at 20–21.

DOE superintendent's suspension hearing, presided over by a DOE hearing officer, with the goal of getting Carlos back into school as quickly as possible. In all New York City DOE suspension hearings, the school must prove its case by direct evidence that the child engaged in the behavior that resulted in the suspension.⁷⁶ Therefore, as long as the school provides at least one witness who can credibly testify that he or she observed the child's offense, the likelihood that the superintendent will uphold the suspension is high.⁷⁷ In Carlos' case, Carlos' teacher, the school's lone witness, testified that Carlos, after being teased by another student in class, "lost it," and started punching and kicking this student. As a result of this straightforward testimony, Carlos' fifteen-day suspension was upheld.

Because the suspension was upheld, Carlos was entitled to a Manifestation Determination Review (MDR) pursuant to the IDEA, to determine whether his aggressive behavior that led to him hitting his classmate was a manifestation of his disability.⁷⁸ This meeting was held two days after the suspension hearing at Carlos' school and was facilitated by the school psychologist. I attended the meeting along with Carlos' mother and his teacher.

At the MDR, I sought to demonstrate that Carlos' school was not effectively addressing his social and emotional needs, and as a result, his academics were suffering. I argued Carlos' ED classification clearly was the root of his aggressive behavior and that his current special education program failed to meet his needs. I noted that his current special education program at a New York City DOE public special education school was not appropriate given his significant emotional challenges. The school psychologist agreed that the fight was the result of Carlos's ED. I also requested that the school schedule an IEP meeting to discuss a reassessment of Car-

⁷⁶ *In re Bd. of Educ. of Monticello Ctr. Sch. Dist. v. Comm'r of Educ.*, 91 N.Y.2d 133, 140–41 (footnote omitted) (1997) ("The decision to suspend a student must be based on competent and substantial evidence that the student actually participated in the conduct charged, but the burden of proof and evidentiary rules imposed in a school disciplinary proceeding are not as stringent as in a formal trial. In a school disciplinary proceeding the evidence may consist of hearsay, and reasonable inferences drawn by a Hearing Officer will be sustained if the record supports the inference.").

⁷⁷ *See id.*

⁷⁸ *See* N.Y.C. DEP'T OF EDUC., NO. A-443, STUDENT DISCIPLINE PROCEDURES 10–12 (2004), available at <http://docs.nycenet.edu/docushare/dsweb/Get/Document-22/A-443.pdf> (explaining when and how a school holds a Manifestation Determination Review).

los' current special education program and to consider whether he should be placed in a more appropriate setting.

Strategy 3: Advocate at the IEP Meeting

I attended Carlos' IEP meeting and advocated that based on Carlos' significant behavioral problems in his current special education program, he needed more therapeutic assistance coupled with more behavior supports at a school that focused on the needs of children with ASD and mental health diagnoses. If Carlos remained in the current program, the DOE would not be providing Carlos FAPE. The IEP team agreed, noting that Carlos' lack of progress in the current program indicated that his needs were not met. The team amended Carlos' IEP to mandate placement in a private special education school designed to address the needs of children with social emotional needs similar to Carlos'.

Today, Carlos is progressing academically, receives essential counseling services and participates in behavior management seminars, and has not been suspended since entering his new school. Carlos really needed these services, and in his new school he is now receiving them. Carlos is learning how to control his anger that stems from the turmoil between his parents. Because Carlos' school life is much more stable now than it was prior to his involvement with CLCNY, his chances of graduating from high school have increased. I continue to monitor Carlos' progress, and I will participate in his annual IEP reviews to ensure that he stays on-track toward high school graduation.

B. Parents as Advocates: Strategies Aimed to Empower the Parents of Special Needs Children

The other component of my strategy to ensure educational success for my clients is empowering my clients and their parents. I work with my clients and their parents to help them understand their rights, created from and protected by the IDEA, so they have the knowledge necessary to be empowered advocates.

One of the most important aspects of my job is to help parents understand their child's disability, their child's education rights, and their own rights so that they can be lifelong advocates for their child. I will only be able to advocate on behalf of my clients for a finite period of time. However, my clients' parents can advocate for my clients throughout their academic careers. Parents will always be their children's best advocates. This section will point out strategies to help attorneys, social workers, and professionals who work

with children with educational disabilities empower parents to be advocates.

Strategy 1: Help Parents Understand that Special Education
Is a Benefit, Not a Label

Many parents perceive special education as a label that they are reluctant to tag their child with, rather than a service designed to help their child succeed in school. When I encounter a parent who has this misperception, I try to help them shed the notion that special education will do more harm for their child than good by helping them understand that their children may learn differently and that certain supports are essential to help them learn.

I often work with clients who have yet to be evaluated, but whose teacher suspects that they have an educational disability. Sometimes parents of my clients resist consenting to an evaluation because of the fear that an evaluation of their child will forever label their child and set them on a track destined for educational failure. What these parents do not understand is that if their child does not receive these supports now, educational failure will almost be a certainty. In these cases, I strongly urge parents to consent to the evaluation, explaining that the evaluation's purpose is to help parents and their teachers learn more about the child's academic levels and needs and to assess whether there are special education services that will support the child's academic progress.

The evaluation itself does not automatically result in the child's receipt of special education services, but will provide the IEP team—a team composed of the child's parents, teachers, and a DOE representative—with essential information about the child's academic strengths, weaknesses, and whether there are indicators suggesting the presence of an educational disability. Rather, as I explain to my clients' parents, the decision to classify a child with an educational disability and to develop an IEP occurs after the evaluation, at an IEP meeting during which the child's teacher's input, the parent's input, and the results of the evaluation are all considered. Finally, I help parents understand that they make the ultimate decision on whether the child will receive special education services, regardless of what the evaluation and IEP determine.

Without an evaluation, a parent might not learn that their child has dyslexia, an ED, or another type of disability. I also try to curb a parent's reluctance to having his or her child evaluated by describing how it is essential for his or her child's academic future to truly understand his or her child's needs.

Once the IEP team, including the parents, agrees that the child has an educational disability, the IEP team develops an IEP for that child. Contrary to many parents' belief that once a child has an IEP, they will forever have one, I explain to parents that the IEP team will review the child's progress and that team will update the IEP according to that progress, decide whether to maintain the current special education program, or whether to declassify the child because he or she no longer needs special education services if that child has made significant progress.

I emphasize to parents that the school will review the child's IEP each year, adjust the IEP according to the child's needs that were determined during that review, and end the child's special education services if the team determines the child no longer needs them.⁷⁹ Parents should understand that the implementation of an IEP requires the school to track the child's progress in a very focused way and that the school must keep parents involved in this process. The IDEA grants many rights to parents of special-needs children, and as long as parents understand this, they will be empowered to advocate for their children.

Strategy 2: Encourage Parents to Learn About Their Child's Disability

When it comes to the special education process, I cannot over-emphasize the importance of parental knowledge. When my clients are classified with an educational disability, I help their parents understand what the disability means by providing them with information⁸⁰—DOE resources about the special education process, information about the specific disability, and instructional strategies designed to address the specific learning needs associated with the disability. As a former teacher, I can offer instructional techniques to parents when helping their children with homework. As a lawyer, I advocate for the necessary special education services to be included in the child's IEP. The more my clients' parents know and understand their children's needs, the better equipped they will be to advocate for the services necessary to help their children succeed.

This notion of parent as advocate was highlighted for me during my first year as a sixth grade teacher. One afternoon early in

⁷⁹ See 20 U.S.C. § 1414(c)(1)(B)(i) (2012).

⁸⁰ See generally *National Dissemination Center for Children with Disabilities*, NICHCY, <http://nichcy.org/> (last visited Dec. 4, 2013) (providing an example of a type of resource the author provides to his clients' parents).

the school year, the mother of one of my students approached me. She handed me a book about ADHD and said, "I'm not sure if you knew this, but Tara has ADHD. It affects everything she does. She takes medication, and it's important that you know the best ways to teach her." Tara's mother then described the specific behaviors I should expect to see in the classroom, and told me examples of strategies she uses to manage those behaviors at home. I was impressed with Tara's mother's knowledge of her eleven-year-old daughter's ADHD, that she was able to describe in detail the behaviors that I was already noticing, and the strategies she offered to address those behaviors in my classroom. She wanted to ensure that I had sufficient information to instruct Tara so that Tara would succeed. Tara's mother was the advocate that all of my clients' parents can be. Part of my job, as an advocate for my clients, is to empower their parents to be advocates as well.

Strategy 3: Explain the IDEA Rights to Parents and Clients

The DOE's special education process is composed of several steps from the evaluation to the implementation of services and parents must understand each step clearly in order to have a firm grasp of their and their child's rights in the process. The DOE provides a packet of information, entitled the Procedural Safeguards Notice,⁸¹ which outlines parents' rights once they consent to a special education evaluation. This forty-two-page document provides the parent with crucial information including how to request an evaluation, how many days the DOE has to conduct the evaluation, develop an IEP, implement services, and what options a parent has if he or she does not agree with the DOE's recommendations. However, I have found that many of my clients' parents have not read the document in its entirety, and even if the parents do, they do not always have a grasp on their rights and their child's rights as a special education student because the document is difficult to understand. As a result, I often describe the rights outlined in the procedural safeguards notice in detail during meetings with parents and my clients to make sure they understand their rights.

The key to parental empowerment is knowledge. Parents who are armed with a deep understanding of their child's needs and their rights, can be powerful advocates who can ensure that their

⁸¹ See generally N.Y. STATE DEP'T OF EDUC., PROCEDURAL SAFEGUARDS NOTICE (2007), available at <http://school.nyc.gov/NR/rdonlyres/FA85382D-1EAB-4C93-9F1F-E710D28024C1/0/Proceduralsafeguardsenglish.pdf>.

child's school provides the services necessary for academic progress.

IX. MY ADVOCACY AND EMPOWERMENT STRATEGIES AT WORK

These strategies aimed to empower parents were essential in helping to ensure that Tommy—my fifth grade client with ADHD I discussed earlier—received the special education services necessary for him to learn and that his parents truly understand his needs and become his very best advocates. To remind you, Tommy's parents had been the litigants in a lengthy custody battle, and one of the major issues in their case was their disagreement over whether Tommy should be formally evaluated for an educational disability.

Tommy's father was adamantly opposed to labeling his son as a special education student, even though Tommy was reading at a second grade level in the fifth grade and had a lot of difficulty focusing and staying on-task during class. On the other hand, Tommy's mother was very overwhelmed with Tommy's lack of educational progress and believed Tommy needed more support in school. However, Tommy's mother was not sure how to get this support and was not sure whether Tommy should be evaluated for special education.

My advocacy on behalf of Tommy began by looking into whether Tommy's ADHD was truly the cause of his significant academic difficulties, and whether he would benefit from receiving special education services. I read through his psychiatrist's evaluations that led to his ADHD diagnosis, and spoke with his teachers, and both of his parents about Tommy's behavior at home. Based on these documents and the information I learned through my conversations, it appeared that Tommy should be evaluated by the DOE to determine whether he needed special education services.

The next step was to clear up the issue of educational decision-making rights between the parents in family court. Advocating to ensure that Tommy received appropriate services at school, I collaborated with Tommy's family court attorney and advocated for Tommy by explaining to the family court judge that Tommy's mother should have temporary educational decision-making rights at least during the pendency of the custody trial so the school could evaluate Tommy and develop an IEP. After arguing in court that Tommy's academic failures were likely attributable to the absence of Tommy's receipt of special education services—by pointing to his significant academic struggles and their correlation to his ADHD diagnosis—the judge agreed to grant temporary educa-

tional decision-making rights to Tommy's mother so that Tommy could be evaluated.

I then worked closely with Tommy's mother to help her understand both how special education services would help Tommy progress and her rights in the special education process. Additionally, I worked to help Tommy's father shed his idea that Tommy's receipt of special education services would forever cast a cloud on his ability to learn. I explained that Tommy's ADHD made it very challenging for Tommy to learn in his current classroom environment and that he simply needed more individualized attention and less distractions to progress academically. In the end, I explained the services would help Tommy, and a continued denial of these needed supports would only continue to result in more academic challenges for Tommy. Tommy's father reluctantly agreed that an evaluation might help Tommy.

After Tommy was evaluated, I helped his mother understand what would occur at the IEP meeting, described the possible special education programs and services that Tommy might benefit from, and encouraged her to advocate for what she believed Tommy needed to succeed in school. At the IEP meeting, both Tommy's mother and I advocated for Tommy to be placed in a smaller class setting with a special education teacher and a one-on-one paraprofessional who would keep him on-task during class, by citing his ADHD as a primary contributing factor to his history of academic failure. Tommy was in serious need of more support, and the school's representatives, Tommy's teacher, and the assistant principal, agreed that a smaller special education class was appropriate for him. Tommy's mother consented to Tommy's placement in a special education class with the support of a one-on-one paraprofessional, and the school placed Tommy in that setting.

After receiving these supports, Tommy found it easier to focus in class. He had moved from a classroom filled with twenty-seven students to a class less than half of that size and received much more individualized attention from both his paraprofessional and his teacher. Not only did Tommy begin to progress academically, but he also became more comfortable at school. Tommy even told his mother that he loved his new class. Both Tommy's mother and father now have a better understanding of Tommy's needs and are better equipped to advocate on behalf of Tommy throughout his school career.

Tommy's story demonstrates that parents entrenched in their positions during emotional family court proceedings can lose sight

of their children's educational needs. It also shows that a parent's fear of a special education label might be rooted in not truly understanding his or her child's needs and/or what special education really means. Most importantly, it demonstrates that effective education advocacy can help parents overcome their positions and misperceptions and become empowered to ensure that their child receives needed educational support.

CONCLUSION: MY CLIENTS, DESPITE MANY CHALLENGES, CAN
SUCCEED IN SCHOOL

My clients face significant obstacles to educational achievement—family instability, educational disabilities, exclusionary school disciplinary practices, and poverty. Each of my clients has the potential to succeed if they are given the appropriate supports from their parents, teachers, and the school system, which is also tasked with the challenge of ensuring a quality education for all of its students. However, it is essential to understand that significant work is required to overcome the predominant obstacle of poverty to ensure this success. Educational achievement, high school graduation, and entry to higher education remain elusive because too many children from low-income communities often do not have access to a quality education.

Nearly six decades have passed since the Supreme Court held that separate educational facilities for children based on the color of their skin are inherently unequal in *Brown*,⁸² and inequality, specifically related to socioeconomic status, in public schools persists. Also, despite efforts by the New York State Governor's Office, policymakers, and litigation to ensure an adequate level of funding equity throughout New York City's public schools,⁸³ the gap in educational achievement between children from low-income communities and their middle and upper class peers is vast.⁸⁴ For children

⁸² *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

⁸³ See *Campaign for Fiscal Equity, Inc. v. State*, 8 N.Y.3d 14, 14–24 (2006).

⁸⁴ Gail Robinson, *Class in the Classroom: The Income Gap and NYC's Schools*, CITY LIMITS (Sept. 25, 2013), <http://www.citylimits.org/news/articles/4936/class-in-the-classroom-the-income-gap-and-nyc-s-schools> (comparing standardized test results in English and math between poor and affluent New York City districts, such as Manhattan and South Bronx, and finding that poor districts had significantly lower test scores). Robinson writes:

On the 2013 state standardized math tests, admittedly a flawed measure due to the generally poor results, District 2 students [which includes many of the wealthiest areas in Manhattan] fared the best, with 60.2 percent getting the 3 or 4 (on a scale of 1 to 4) to qualify as "proficient." Only 17 percent of District 8 students [located in the southeast corner

living in low-income communities, there is a connection between educational failure and juvenile/criminal justice system involvement⁸⁵ that contributes to the ongoing cycle of poverty in which educational success is a necessity to combat.⁸⁶ Education advocacy is an important component in securing quality educational opportunities that can lead to academic achievement.

For my clients at CLCNY, many of whom live in under-resourced communities, the family turmoil that brings them to our offices only seems to complicate the issue of attaining a solid education in poverty-stricken communities. The family instability and the lengthy family court cases that my clients are involved in provide significant stressors in their lives that destabilize their educational progress. My advocacy over the past two years has secured appropriate special education services for my clients, limited the amount of class time they miss because of suspensions, and empowered overwhelmed parents to advocate.

In only two years, CLCNY's newly developed dedication to education advocacy has significantly increased the scope and quality of its representation of children. Our clients, whose families choose to utilize the legal system to resolve their issues and engage in the lengthy, emotionally challenging court process, frequently struggle in school. Our provision of services to these children living with family instability ensures their voices are heard in their family's legal proceedings, their emotional issues are addressed by our social workers, and their chances of achieving academic success and graduating from high school are increased.

of the Bronx] did that well, and its neighbor—District 7 in the South Bronx—had the lowest scores with only 9.5 percent ‘passing’ the exam. Middle-income District 30 was in the middle—with 35.4 percent of children getting 3s and 4s. The English test scores followed a similar pattern. . . .

. . . .

The achievement gap between the rich and poor in city schools is no doubt narrower than the actual disparities among income classes because the most affluent families in New York opt out of public schools—and the standardized testing found there.

Id.

⁸⁵ ADVANCEMENT PROJECT & CIVIL RIGHTS PROJECT AT HARVARD UNIV., *supra* note 59, at 11.

⁸⁶ See Ronald Lee, *A Helping Hand: Full-Service Community Schools as a Model for Educating Low-Income Children*, 12 GEO. J. ON POVERTY L. & POL'Y 135, 138 (2005) (footnotes omitted) (“[H]igh school dropouts are 72% more likely to be unemployed and earn 27% less than high school graduates. They are less able to contribute effectively to society and more likely to add significant burdens to the corrections and welfare systems. To end the poverty cycle, it is critical to lower the dropout rate and improve employment prospects for these students.”).

Equal access to education for all children continues to be one of our nation's most pressing civil rights issues. It is our job as advocates to work with families, children, and schools to help solve this issue given the current systemic challenges, high levels of poverty, and situations in which we find our clients. While we cannot readily change school funding issues or quickly fix all problems associated with poverty, we can strive to ensure that our clients receive the special education services they are entitled to; spend more time in the classroom and less time suspended from school; and participate in mental health services, afterschool programs, and tutoring that will lead to successful educational outcomes. Despite the significant challenges my clients face, I continue to believe that all children can achieve in school. I have seen the results of the advocacy and collaborative efforts among attorneys, social workers, teachers, and parents who work to make educational success, no matter the child's socioeconomic status, family situation, or disability, a reality.

**“HE GOT IN MY FACE SO I SHOT HIM”:
HOW DEFENDANTS’ LANGUAGE IMPAIRMENTS
IMPAIR ATTORNEY-CLIENT RELATIONSHIPS**

Michele LaVigne[†]
Gregory Van Rybroek^{††}

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“What are you supposed to do when all your client can give you is,
‘He got in my face so I shot him?’”¹

INTRODUCTION

Language has been called “the stuff of thought,”² “an expression of innate human nature,”³ and “a fistula: an open wound through which our innards are exposed to an infectious world.”⁴ At a more prosaic level, language and the ability to use it can be called the quintessential tools of human development and communication:

A child who acquires language and the ability to use it effectively can carry on a conversation with a total stranger, make friends, tell a story, laugh at a joke, follow rules, figure out what makes other people tick, control his behavior, avoid offending conversational partners, and look forward to a lifetime of learning.⁵

For all of the power of language, however, the process of acquiring it in early childhood remains singularly vulnerable, and any resulting language impairments can have serious lifelong social, behavioral, emotional, and communicative effects. Those effects can be regularly observed in the criminal and juvenile justice systems.

Decades of research have shown that language impairments—i.e., deficits in language and language usage⁶—occur at starkly elevated rates among adolescents and adults charged with and convicted of crimes.⁷ British researchers estimate that “50–60% of

¹ Attorney I, *see infra* notes 57–58.

² STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 380 (2007).

³ GUY DEUTSCHER, *THROUGH THE LANGUAGE GLASS: WHY THE WORLD LOOKS DIFFERENT IN OTHER LANGUAGES* 6 (2010) (referring to Noam Chomsky’s theory of innate universal grammar).

⁴ PINKER, *supra* note 2, at 425.

⁵ Michele LaVigne & Gregory Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juveniles and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 37, 46–47 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663805.

⁶ Carla J. Johnson, Joseph H. Beitchman & E.B. Brownlie, *Twenty-Year Follow-Up of Children With and Without Speech-Language Impairments: Family, Educational, Occupational, and Quality of Life Outcomes*, 19 AM. J. SPEECH-LANGUAGE PATHOLOGY 51, 54 (2010).

⁷ *See* Theresa A. Belenchia & Thomas A. Crowe, *Prevalence of Speech and Hearing Disorders in a State Penitentiary Population*, 16 J. COMM. DISORDERS 279, 281–83 (1983) (finding higher rates of voice and hearing disorders in the incarcerated population than in the general population); Nicholas Bountress & Jacqueline Richards, *Speech, Language and Hearing Disorders in an Adult Penal Population*, 44 J. SPEECH & HEARING DISORDERS 293, 295–99 (1979) (finding a high incidence of deficient language skills

young people [= 21 years] who are involved in offending hav[e] speech, language and communication needs.”⁸ Common deficiencies include “abstract language tasks . . . information processing and narrative discourse.”⁹ Other research has shown that adolescents and young adults with language impairments are substantially more likely to be arrested than their non-impaired counterparts.¹⁰ And within juvenile and adult correctional institutions, language disorders have been found at rates ranging from three to ten times that of the general population.¹¹

While these findings are certainly disconcerting, they are not surprising, at least to language professionals. Speech-language scholars have long known that language impairments frequently occur in tandem with disabilities, deficits, and early-childhood conditions endemic to defendant populations.¹²

in an adult male prison population); Abbe D. Davis et al., *Language Skills of Delinquent and Nondelinquent Adolescent Males*, 24 J. COMM. DISORDERS 251, 252 (1991) (indicating that between 58 to 84% of institutionalized delinquents had language and communication difficulties); Dixie Sanger et al., *Prevalence of Language Problems Among Adolescent Delinquents: A Closer Look*, 23 COMM. DISORDERS Q. 17, 23 (2001) (explaining that 19.4% of female juvenile delinquents studied qualified for language services); Pamela C. Snow & Martine B. Powell, *Oral Language Competence, Social Skills and High-Risk Boys: What Are Juvenile Offenders Trying to Tell Us?*, 22 CHILD. & SOC'Y 16, 22 (2008) [hereinafter *High-Risk Boys*] (indicating that 52% of young male offenders studied had a language impairment); Cynthia Olson Wagner et al., *Communicative Disorders in a Group of Adult Female Offenders*, 16 J. COMM. DISORDERS 269 (1983) (revealing that 44% of incarcerated women studied had some form of speech-language deficiency).

⁸ Juliette Gregory & Karen Bryan, *Speech and Language Therapy Intervention with a Group of Persistent and Prolific Young Offenders in a Non-Custodial Setting with Previously Undiagnosed Speech, Language and Communication Difficulties*, 46 INT'L J. LANGUAGE COMM. DISORDERS 202, 203 (2011).

⁹ *High-Risk Boys*, *supra* note 7, at 17; *see also* Pamela C. Snow & Martine B. Powell, *Oral Language Competence in Incarcerated Young Offenders: Links with Offending Severity*, 13 INT'L J. SPEECH-LANGUAGE PATHOLOGY 1, 1–2 (2011) [hereinafter *Incarcerated Young Offenders*].

¹⁰ E.B. Brownlie et al., *Early Language Impairment and Young Adult Delinquent and Aggressive Behavior*, 32 J. ABNORMAL CHILD PSYCHOL. 453, 459–60, 463 (2004). These findings are consistent with other studies that employ different methodologies. *See, e.g.*, Nancy J. Cohen et al., *Language, Achievement, and Cognitive Processing in Psychiatrically Disturbed Children with Previously Identified and Unsuspected Language Impairments*, 39 J. CHILD PSYCHOL. PSYCHIATRY 865, 866 (1998). *See also* Sanger et al., *supra* note 7, at 23.

¹¹ *See* sources cited *supra* note 7. *See also* Kathryn Stone & Karen Bryan, *Unlocking the Evidence*, COUNS. MAG., Oct. 2010, at 35–37 (U.K.) (citing Karen Bryan, Jackie Freer & Cheryl Furlong, *Language and Communication Difficulties in Juvenile Offenders*, 42 INT'L J. LANGUAGE & COMM. DISORDERS 505, 505–20 (2007)) (finding that at least 60% of young offenders have communication difficulties) (on file with coauthor Michele LaVigne).

¹² *See* LaVigne & Van Rybroek, *supra* note 5, at 45–65. This will be discussed further in Section II.

The body of research confirming the high risk of language impairments among juvenile and adult defendants raises a host of questions about the quality of substantive and procedural justice provided to these individuals. Due process and other constitutional rights in juvenile and criminal court are, by their nature, language-based and require a satisfactory level of linguistic and communicative ability if they are to be accessed and exercised in a meaningful fashion. A shortfall in an individual's language and communication skills can reverberate throughout all stages of the legal process, from interactions with law enforcement to sentencing and even beyond.¹³

In an article published in 2011, we broadly surveyed the causes and effects of language impairments, their prevalence among client populations, and the extensive range of legal ramifications for juvenile or adult defendants.¹⁴ We called that article “an attempt to begin the conversation” about language disorders.¹⁵ We framed it that way because, despite literature within the speech-language field dating back as far as the 1920s, and the patently obvious relevance of language disorders for legal and correctional professionals, the subject was virtually unknown in the American legal field.¹⁶

In this Article, we circle back to take a closer look at the impact of language impairments within the context of the attorney-client relationship. We chose to concentrate on this aspect of the justice process because the attorney-client relationship is the constitutional aspect that arguably has the most profound influence on the overall quality of justice, yet is the most susceptible to interference by language deficits.¹⁷ Language deficits are uniquely destruc-

¹³ See *id.* at 65–100.

¹⁴ See generally LaVigne & Van Rybroek, *supra* note 5.

¹⁵ *Id.* at 45.

¹⁶ See *id.* at 44–45, 91–93. Studies on the high rate of language impairments in American correctional institutions appeared in the 1970s and 1980s. Unfortunately, these studies did not gain traction and were not continued. *Id.* Studies of language impairments in correctional institutions in Australia and Great Britain are ongoing. See, e.g., Bryan, Freer & Furlong, *supra* note 11; Pamela C. Snow & Martine B. Powell, *Youth (In)justice: Oral Language Competence in Early Life and Risk for Engagement in Antisocial Behaviour in Adolescence*, 435 TRENDS & ISSUES IN CRIM. JUST. 1 (2012) (Austl.) [hereinafter *Youth (In)justice*]. For a more detailed list of the studies conducted in the U.S., Australia, and Great Britain, see sources cited *supra* note 7.

¹⁷ The late Frank Remington of the University of Wisconsin Law School anticipated *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), by twenty-five years when he wrote that defense counsel should have “primary responsibility” for informed decision making by a defendant. Frank J. Remington, *The Changing Role of the Trial Judge in Criminal Cases – Ensuring that the Sixth Amendment Right to Assistance of Counsel Is Effective*, 20 U.C. DAVIS L. REV. 339, 339 (1987).

tive in this arena. While every client has a right to effective assistance of counsel, counsel’s ability to provide effective assistance is inextricably interconnected with the client’s reciprocal ability to effectively assist counsel.¹⁸ And the client’s ability to effectively assist counsel is inextricably interconnected with language. Or to put it more simply, in the attorney-client relationship, communication matters. In fact, communication is all there is.

In order to understand how language impairments can profoundly affect the attorney-client relationship, legal practitioners must appreciate the wide-ranging communicative and behavior implications of language impairments, as well as the idiosyncratic nature of a professional relationship that is as dependent upon the communication skills of the consumer as those of the professional. To that end, we have interwoven case law and forensic and legal scholarship with speech-language scholarship. We have also drawn heavily from the expert opinions, observations, and stories of practicing attorneys—sources too often ignored in discussions of the attorney-client relationship.

We structured this Article in a way we hope is accessible for those who may have little familiarity with the concept of language impairments, but who are interested in an issue that has ramifications for practice, policy, and research.¹⁹ As a preliminary matter, we first provide a simplified introduction to language impairments.²⁰ Even though the subject of language impairments re-

¹⁸ We have relied on Schmidt, Reppucci, and Woolard’s definition of effective assistance or participation. A client’s ability to effectively assist counsel refers to those “abilities beyond those that are constitutionally required [for competency to stand trial],” and that contribute to the development and operation of the attorney-client relationship. Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woolard, *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 176–77 (2003).

¹⁹ This Article is aimed primarily at juvenile and criminal defense attorneys. However, language impairments and their effects are highly relevant for attorneys who practice in civil areas such as family, consumer, landlord-tenant, employment, and disability, as well as quasi-criminal areas such as immigration and child protection.

²⁰ We encourage readers desiring more in-depth information to review some of the excellent literature on the long-term effects of language disorders and the prevalence of language impairments among juvenile and adult offenders. See, e.g., Joseph H. Beitchman et al., *Fourteen-Year Follow-Up of Speech/Language Impaired and Control Children: Psychiatric Outcome*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 75 (2001) [hereinafter *Fourteen-Year Follow-Up*]; Johnson, Beitchman & Brownlie, *supra* note 6, at 51. For over twenty years, Beitchman, Johnson, and Brownlie have been engaged in the Ottawa Language Study, a prospective longitudinal study of individuals with and without a history of early speech/language impairments. See *Fourteen-Year Follow-Up*, at 51; Johnson, Beitchman & Brownlie, *supra* note 6. Beitchman, Johnson, and Brownlie have published findings regarding the status of the individuals at ages 12, 19, and 25. See also Karen Bryan, *Preliminary Study of the Prevalence of Speech and Language Difficulties*

mains relatively unknown in the legal world, many of the behavioral and communicative effects will actually be quite familiar to practitioners.

We next look at language impairments in the context of the attorney-client relationship. Competency to stand trial is the obvious first stop, given the connection between communication and the constitutional requirement that a defendant be able to assist counsel.²¹ However, for most attorneys, it will be the client who is impaired but not legally incompetent who presents the greater (and much more frequent) challenge. Therefore, the bulk of our discussion focuses on those clients. Specifically, we look at what happens when a client's language impairments interfere with functions that are essential to the successful operation of an attorney-client relationship.

Finally, we consider potential remedies and accommodations for a problem that may, at first blush, seem intractable. These solutions are not just for lawyers, however. Given the significance of this issue for the quality of justice, language impairments cannot simply be "the lawyer's problem," but are the responsibility of all actors in the criminal justice system.

I. LANGUAGE IMPAIRMENTS IN A NUTSHELL

The term "language impairments" (or "language disorders") encompasses a broad constellation of deficits. Language impairments fall into three categories: receptive, expressive, and pragmatics. Receptive and expressive deficits are exactly what the words suggest—problems understanding or expressing language. These deficits affect skills such as syntax, vocabulary, and semantics that we typically associate with language, and can be readily tested with standardized instruments.²² On a functional level, receptive and

in Young Offenders, 39 INT'L J. LANGUAGE COMM. DISORDERS 391 (2004) [hereinafter *Preliminary Study*]; *High-Risk Boys*, *supra* note 7.

²¹ *Dusky v. United States*, 362 U.S. 402, 402 (1960).

²² E.B. Brownlie et al., *supra* note 10, at 454. Whether an individual is classified as having a "language impairment" based on test scores depends to a certain extent on who is asking and for what purpose. Researchers often use an inclusive cutoff (one standard deviation below the mean), which is consistent with speech-language pathologists' (SLP) referrals and judgments. *Fourteen-Year Follow-Up*, *supra* note 20, at 77. More stringent criteria are usually applied to determine qualification for publicly funded services. The Wisconsin Department of Public Instruction, for example, requires that a student score 1.75 standard deviations below the mean for his or her chronological age to be classified as having a language impairment for special education purposes. WIS. ADMIN. CODE CH. PI § 11.36(5)(b)(1) (2009–10).

expressive deficits affect the ability to comprehend meaning and to recall and relate information.

The third category, pragmatics, is less tangible. Pragmatics are generally defined as “the behavioral effects[] of communication,” and they govern the use and understanding of language in context.²³ Pragmatics are different from other linguistic concepts such as vocabulary, syntax, and processing in that pragmatics are concerned with the effect of a speaker’s communication choices and styles on the receiver *and* with the corresponding effect of the receiver’s reaction on the speaker.²⁴ Pragmatic competence refers to the communicative and cognitive skills that enable a speaker to successfully function as a social being in variety of contexts. Pragmatic incompetence reveals itself in a lack of social cognition,²⁵ an inability to take the perspective of the other person,²⁶ and a failure to appropriately adapt in interactions.²⁷

Language impairments arise when the language acquisition process goes awry during childhood. The cause may be an underlying communication disorder such as hearing loss,²⁸ auditory processing disorders,²⁹ or external conditions such as extreme pov-

²³ PAUL WATZLAWICK ET AL., PRAGMATICS OF HUMAN COMMUNICATION: A STUDY OF INTERACTIONAL PATTERNS, PATHOLOGIES, AND PARADOXES 22 (1967); *see also* Robert L. Russell, *Social Communication Impairments: Pragmatics*, 54 PEDIATRIC CLINICS OF N. AM. 483, 484 (2007) (defining pragmatics as “the communicative use of language and gesture in context”).

²⁴ WATZLAWICK ET AL., *supra* note 23, at 22.

²⁵ “Social cognition refers to the knowledge, processing and application of culturally relevant (and often quite subtle) behaviour that assists in establishing and maintaining interpersonal relationships of varying degrees of intimacy and complexity.” *Youth (In)justice*, *supra* note 16, at 2 (citing Curtis D. Hardin & Terri D. Conley, *A Relational Approach to Cognition: Shared Experience and Relationship Affirmation in Social Cognition*, in COGNITIVE SOCIAL PSYCHOLOGY: THE PRINCETON SYMPOSIUM ON THE LEGACY AND FUTURE OF SOCIAL COGNITION 3 (Gordon B. Moskowitz ed., 2001)).

²⁶ *See* LaVigne & Van Rybroek, *supra* note 5, at 60 (citing Philip S. Dale, *Language and Emotion: A Developmental Perspective*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS 8 (Joseph H. Beitchman et al. eds., 1996)); Ethan Rimmel et al., *Theory of Mind Development in Deaf Children*, in OXFORD HANDBOOK OF DEAF STUDIES, LANGUAGE, AND EDUCATION 113, 125 (Mark Marschark & Patricia E. Spencer eds., 2003); Heidemarie Lohmann et al., *Linguistic Communication and Social Understanding*, in WHY LANGUAGE MATTERS FOR THEORY OF MIND, 245, 261–63 (Janet Wilde Astington & Jodie A. Baird eds., 2005). For a discussion of theory of mind, *see infra* Section D.

²⁷ Russell, *supra* note 23, at 483.

²⁸ For a discussion of the effects of congenital or early-childhood hearing loss, *see* Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 852–65 (2003).

²⁹ Auditory processing disorders are “hearing impairment(s) arising from pathology of the brain.” D-E Bamiou et al., *Aetiology and Clinical Presentations of Auditory Processing Disorders—A Review*, 85 ARCHIVES DISEASE CHILD. 361, 361 (2001).

erty,³⁰ maltreatment, or neglect.³¹ Language impairments may also co-occur with any number of associated disorders including ADHD, learning disabilities, and pervasive developmental disorders.³²

Unfortunately, despite decades of research on causes and effects, and the well-documented high rates of occurrence among certain groups of individuals, language deficits among children are often still unrecognized and untreated, and persist into adolescence and adulthood.³³ Research has shown that unidentified language impairments are especially prevalent among offenders.³⁴

Language impairments have an insidious quality. Language disorders have as much to do with long-term academic, cognitive, social, emotional, and behavioral dysfunction, as with low vocabu-

³⁰ See generally BETTY HART & TODD R. RISLEY, *MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCE OF YOUNG AMERICAN CHILDREN* (1995) (connection between socioeconomic status and language deficits). For a discussion of the connection between language impairments and poverty, see LaVigne & Van Rybroek, *supra* note 5, at 51–53. The connection between language deficits and poverty is becoming an issue of great concern for many educators. See, e.g., Ginia Bellafante, *Before a Test, a Poverty of Words*, N.Y. TIMES (Oct. 5, 2012), <http://www.nytimes.com/2012/10/07/nyregion/for-poor-schoolchildren-a-poverty-of-words.html>.

³¹ See LaVigne & Van Rybroek, *supra* note 5, at 53–54; Pamela C. Snow, Martine B. Powell & Dixie D. Sanger, *Oral Language Competence, Young Speakers, and the Law*, 43 LANGUAGE, SPEECH & HEARING SERVICES IN SCHS. 496, 497–98 (2012) [hereinafter *Young Speakers*].

³² See, e.g., Joseph H. Beitchman et al., *Prevalence of Psychiatric Disorders in Children with Speech and Language Disorders*, 25 J. AM. ACAD. CHILD PSYCHIATRY 528, 532–33 (1986); Dennis P. Cantwell & Lorian Baker, *Association Between Attention Deficit-Hyperactivity Disorder and Learning Disorders*, 24 J. LEARNING DISABILITIES 88, 88–94 (1991). See also LaVigne & Van Rybroek, *supra* note 5, at 49–51. There is also a disorder known as specific language impairment (SLI). This disorder produces language deficits and associated difficulties that “are not directly attributable to neurological or speech mechanism abnormalities, sensory impairments, mental retardation, or environmental factors.” Eva Arkkila et al., *Specific Language Impairment in Childhood Is Associated with Impaired Mental and Social Well-being in Adulthood*, 33 LOGOPEDIC PHONIATRICS VOACOLOGY 179, 179 (2008).

³³ See, e.g., Gregory & Bryan, *supra* note 8, at 211–12.

³⁴ See *Incarcerated Young Offenders*, *supra* note 9, at 481; see also Pamela C. Snow & Dixie D. Sanger, *Restorative Justice Conferencing and the Youth Offender: Exploring the Role of Oral Language Competence*, 46 INT’L J. LANGUAGE & COMM. DISORDERS 324, 329 (2011) [hereinafter *Restorative Justice Conferencing*]; Bryan, Freer & Furlong, *supra* note 11, at 507–08; Cohen et al., *supra* note 10, at 866, 872–73 (demonstrating that children and adolescents with previously unidentified language disorders were more likely to show aggressive and delinquent behavior); Glyn Jones & Jenny Talbot, *No One Knows: The Bewildering Passage of Offenders with Learning Disability and Learning Difficulty Through the Criminal Justice System*, 20 CRIM. BEHAVIOUR & MENTAL HEALTH 1, 1–2 (2010) (U.K.) (explaining that in Great Britain, the Prison Reform Trust created the “No One Knows” program to deal with the “hidden problem” of inmates with “significant problems with understanding and communication”).

lary scores and poor grammar.³⁵ Their effects can be life-altering and frequently remain long after the individual has acquired sufficient language to get by on a day-to-day basis.³⁶

The array of potential deficiencies brought about by language impairments is vast, even when we confine our discussion to “only” those deficits that directly relate to communication within the attorney-client relationship. This list, culled from studies and literature reviews, illustrates the depth and breadth of potential effects that are likely to impede the ability to assist counsel:

- poor vocabulary;
- difficulty processing complex sentences;
- difficulty following directions;
- deficient auditory memory;
- staying on topic;
- poor reading skills;
- deficient narrative skills (both expressive and receptive);
- inability to grasp inferences;
- lack of background knowledge;
- difficulty learning new material;
- limited ability to seek clarification;
- limited ability to recognize and articulate emotional states;
- difficulty reading social cues;
- insensitivity to cause and effect;
- inability to recognize and control inappropriate behavior;
- inability to interpret the motivations and thoughts of others; and

³⁵ The literature on the prevalence of language disorders among those with identified behavioral, psychiatric, and emotional disorders is voluminous. For helpful literature reviews, see generally Joseph H. Beitchman et al., *Linguistic Impairment and Psychiatric Disorder: Pathways to Outcome*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS 493, 493–514 (Joseph H. Beitchman et al., eds. 1996) (giving a general overview of linguistic impairments and cognitive disorders); Ginette Dionne, *Language Development and Aggressive Behavior*, in DEVELOPMENTAL ORIGINS OF AGGRESSION 330, 330–52 (Richard E. Tremblay et al., eds. 2005) (covering language deficits and their result in aggression); see also Maria Carlson Törnqvist et al., *Adult People With Language Impairment and Their Life Situation*, 30 COMM. DISORDERS Q. 237, 238–39 (2009) (discussing the effects of language impairments on social development); Arlene R. Young et al., *Young Adult Academic Outcomes in a Longitudinal Sample of Early Identified Language Impaired and Control Children*, 43 J. OF CHILD PSYCHOL. & PSYCHIATRY 635, 642–43 (2002) (finding that early development of language impairments results in long-term academic problems).

³⁶ Johnson, Beitchman & Brownlie, *supra* note 6, at 60–62; Joseph H. Beitchman & E.B. Brownlie, *Childhood Speech and Language Disorders*, in DO THEY GROW OUT OF IT? LONG-TERM OUTCOMES OF CHILDHOOD DISORDERS 225, 225–53 (Lily Hechtman ed., 1996); *Fourteen-Year Follow-Up*, *supra* note 20, at 75–78.

- deficits in higher-order skills such as self-monitoring, planning, and appreciation of consequences.³⁷

Obviously, not every linguistically impaired individual will manifest deficits in every sphere of communication. The effects on a particular person will depend on factors such as the type and severity of disorder, home environment, and presence or absence of early intervention.³⁸ Nor will every deficit be readily apparent. In fact, many impaired older adolescents and adults sound “normal” (though perhaps abrupt, reluctant, or rude) to the uninitiated.³⁹ Nevertheless, as a class, language disorders are practically tailor-made to disrupt the attorney-client relationship.

II. LANGUAGE IMPAIRMENTS AND COMPETENCY TO STAND TRIAL

When considering communication dysfunction in the context of the attorney-client relationship, the question of competency to stand trial inevitably comes to mind. Courts have long relied on some variation of the *Dusky* standard, which requires that a criminal defendant have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”⁴⁰ In 1996, in *Cooper v. Oklahoma*, the Supreme Court made the language and competency link more explicit by defining the ability to consult with counsel as the ability to “communicate effectively with counsel.”⁴¹ By that definition, language impairments are as relevant to a client’s competency to stand trial as mental illness or intellectual disability.

An individual’s language skills are evaluated by means of specialized instruments administered and interpreted by a speech-language pathologist (SLP). For example, a common assessment tool used with individuals ages five to twenty-one is the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4).⁴² CELF-

³⁷ See, e.g., Gerard H. Poll et al., *Identification of Clinical Markers of Specific Language Impairment in Adults*, 53 J. SPEECH, LANGUAGE & HEARING RES. 414, 414–17 (2010); *High-Risk Boys*, *supra* note 7, at 16–18; LaVigne & Van Rybroek, *supra* note 5, at 43–44.

³⁸ Young et al., *supra* note 35, at 635–36.

³⁹ We must not overlook the humiliation and insecurity that accompany language impairments and the resultant desire to hide personal deficits. See *Youth (In)justice*, *supra* note 16, at 1–2; see also Pamela C. Snow & Martine B. Powell, *What’s the Story? An Exploration of Narrative Language Abilities in Male Juvenile Offenders*, 11 PSYCHOL. CRIME & L. 239 (2005) [hereinafter *What’s the Story?*].

⁴⁰ *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁴¹ 517 U.S. 348, 368 (1996).

⁴² See *Assessment and Information: Clinical Evaluation of Language Fundamentals®—Fourth Edition (CELF®-4)*, PEARSON EDUCATION, INC., <http://www.pearsonassessments.com>.

4 includes a series of subtests and scales that measure a variety of essential communicative tasks such as auditory comprehension and recall, ability to follow directions, and comprehension of social rules.⁴³ Instruments like CELF-4⁴⁴ are more finely tuned to the layers of language than measures typically relied on by courts such as Verbal IQ or clinical assessments.⁴⁵ They also tell us much more about a defendant’s actual communicative capabilities and how they are likely to play out with an attorney, especially when they are used in conjunction with a dedicated competency assessment tool like the MacArthur Competence Assessment Tool – Criminal Adjudication (MAC-CAT-CA).

While language assessments are hardly standard in the competency process,⁴⁶ a few lawyers have reported that they have supplemented competency evaluations with language assessments in selected cases where they believe the client’s extremely poor lan-

com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=015-8037-200 (last visited Dec. 13, 2013).

⁴³ Teresa Paslawski, *The Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4): A Review*, 20 CANADIAN J. SCH. PSYCHOL. 129, 131 (2005).

⁴⁴ Another commonly used standardized instrument is the Test of Adolescent/Adult Language (TOAL-4). See *Test of Adolescent and Adult Language—Fourth Edition*, PRO ED, INC., <http://www.proedinc.com/customer/productView.aspx?ID=4004> (last visited Dec. 13, 2013).

⁴⁵ “Although verbal IQ and language ability are related, the two constructs are conceptually distinct. The differences between verbal IQ and language ability are reflected in their measurement and scoring. Language ability includes . . . receptive and expressive semantics, morphology, and syntax. Verbal IQ measures do not systematically assess these aspects of language. For instance, Wechsler verbal IQ scales focus on acquired knowledge rather than language ability.” Brownlie et al., *supra* note 10, at 454. According to Australian psychologist Pamela Snow, speech-language pathologists (SLPs) do not rely on Verbal IQ as a measure of language skill:

One problem is that verbal IQ represents . . . quite “static” skills, and . . . it is unrealistic to reduce a wide variety of complex sub-skills down to one score. SLPs think in a number of dimensions – receptive language (comprehension) [versus] expressive language, and also look at a number of aspects of language – phonology (use of the sounds system in one’s language), semantics (vocabulary), syntax (sentence complexity), and pragmatics (the culturally determined set of social “rules” about how language is used). We . . . “dissect” language competence, which is why we use a number of different measures. . . . One of the most important composite skills is narrative language – the ability to apply a “template” that enables the logical sequencing of novel information for a listener who is naive about events. This has obvious forensic implications, but a verbal IQ score would only have a modest correlation with narrative skill.

E-mail from Pamela Snow, Assoc. Prof., Monash University-Australia, to co-author Michele LaVigne (Aug. 11, 2011) (on file with co-author Michele LaVigne).

⁴⁶ Given that the legal profession is just beginning to recognize the existence and significance of language impairments, the absence of language assessments is to be expected. See LaVigne & Van Rybroek, *supra* note 5, at 43–45.

guage skills exacerbate his or her immaturity or learning disabilities. These assessments shed important light on functional deficits that were overlooked in the ordinary competency process. In a Dane County, Wisconsin case, for example, a language assessment placed the juvenile client's expressive and receptive skills in the bottom percentile of individuals his age, deficits that had been missed not only by the client's school, but also in the initial competency evaluation.⁴⁷ Based on these low scores, both the evaluating psychologist (who had originally opined that the juvenile was likely to become competent within a year) and the court determined that the juvenile was incompetent, and unlikely to become competent within the statutory time period.

Although such low language scores may seem extreme, research and experience have shown that they are not uncommon among individuals in the juvenile and criminal justice systems.⁴⁸ These findings are a clear indication that the number of juvenile and criminal defendants who lack the constitutionally required ability to "communicate effectively with counsel" is probably much

⁴⁷ In this case the evaluating psychologist originally found that the juvenile was "likely to become competent with further education about the legal system and his legal rights." After receiving a copy of the language assessment that placed the juvenile in the bottom fourth to fifth percentile in ability to follow directions and recall information, the evaluator revised her opinion to state: "He is not likely to become competent within a 12 month period." Significantly, despite the youth's severe language impairments, his school had determined that he "did not have special education or learning disability needs." Reports from *In re* D.S., Dane Cnty., Wis. (on file with co-author Michele LaVigne) (permission to use documents granted by trial court judge, defense attorney, and prosecutor). In Massachusetts, a juvenile was found incompetent when her attorney provided the court a language assessment that placed the client's receptive and expressive skills below the first percentile. E-mail from Attorney A.P. to co-author Michele LaVigne (Jan. 10, 2013) (on file with co-author Michele LaVigne).

⁴⁸ At Mendota Juvenile Treatment Center (MJTC), a mental health facility for male offenders in juvenile corrections in Madison, Wis., testing has revealed that up to 25% of the boys have receptive and expressive language skills in the *bottom first percentile*. When asked about these children's ability to comprehend the legal process, a staff member questioned, "How could these kids possibly be competent?" LaVigne & Van Rybroek, *supra* note 5, at 41–42, 67. See also Bryan, Freer & Furlong, *supra* note 11, at 515 (indicating that 46 to 67% of offenders in juvenile correctional facility scored within poor or very poor category on language assessments, compared with 9% of general adolescent population); *Young Speakers*, *supra* note 31, at 502 (citing Debra J. Blanton & Paul A. Dagenais, *Comparison of Language Skills of Adjudicated and Nonadjudicated Adolescent Males and Females*, 38 LANGUAGE, SPEECH & HEARING SERVICES IN SCHS. 309, 309–14 (2007)) (positing that international studies show that between 19% and 60% of young offenders experience clinical levels of impairment); Sanger et al., *supra* note 7, at 23 (19.4% of female juvenile offenders studied qualified for language services); *Preliminary Study*, *supra* note 20, at 391–400; *High-Risk Boys*, *supra* note 7, at 16–28; *Incarcerated Young Offenders*, *supra* note 9, at 480–89.

higher than we have allowed ourselves to believe, and that questions of functional language ability properly belong in competency considerations.

III. THE ATTORNEY-CLIENT RELATIONSHIP: WHAT LAWYERS SAY

*“Doctors and judges don’t understand the subtle level of assisting counsel.”*⁴⁹

Most defendants with language impairments will be found or presumed competent, not because they are able to competently assist counsel, but because of the nature of the entire competency enterprise. While forensic scholars consider competency to stand trial to be “the most significant mental health inquiry pursued in the system of criminal law,”⁵⁰ as a statistical and practical matter it is only of marginal relevance in the actual operation of the juvenile and criminal justice systems.⁵¹ The constitutional threshold for a finding of competency is low⁵² and inconsistently applied.⁵³ Legal prac-

⁴⁹ Attorney D, *see infra* notes 58–59.

⁵⁰ Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 *PSYCHOL. PUB. POL’Y & L.* 1, 2 (2011) (citing ALAN A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 200 (1975)).

⁵¹ *See, e.g.*, Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases*, 18 *LAW & HUM. BEHAV.* 437, 450 (1994) (demonstrating that lawyers actually raised competency to stand trial with only a fraction of the clients whose competency they doubted).

⁵² *See, e.g.*, *Newman v. Harrington*, 726 F.3d 921 (7th Cir. 2013), *aff’g* *United States ex rel. Newman v. Rednour*, 917 F. Supp. 2d 765 (N.D. Ill. 2012) (granting habeas relief for defendant with IQ of 62). In *Newman*, the trial court had denied a post-conviction request for an evidentiary hearing on competency, stating: “If he was drooling or if his eyes were going someplace, counsel, I assure you, I would have sua sponte asked for a fitness hearing.” 917 F. Supp. 2d at 771. In *Pierce County, Wis.*, a trial court judge denied a request for a competency evaluation, stating: “I think we have to keep competency to the very few cases where, clearly, this person doesn’t have a clue what’s going on.” *In re Zachary A.*, No. 2009AP2091, 2010 WL 916879, at *1 (Wis. Ct. App., Mar. 16, 2010) (reversing the trial court). *See also* *Hibbert v. Poole*, 415 F. Supp. 2d 225, 240–41 (W.D.N.Y. 2006) (finding defendant with an IQ of 59 competent because he had lived independently and been employed, and because the defendant “himself never informed anyone at any time that he was having difficulty understanding what was occurring in his criminal proceeding”); *United States v. Wenzel*, 497 F. Supp. 489, 490–91 (D. Nev. 1980) (finding defendant with an IQ of 55–60 competent); *People v. Henderson*, 404 N.E.2d 392, 395–96 (Ill. App. Ct. 1980) (finding defendant with IQ of 62 competent, despite psychiatrist’s testimony that a person with the defendant’s IQ would have great difficulty understanding concepts and reading and understanding language).

⁵³ “Because judicial determinations almost always rest entirely on the recommendation of experts, and because those experts generally do not explain either their methodology or the basis for their conclusions, it is very difficult to know *what* underlies most adjudicative competence decisions.” Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 *AM. CRIM. L. REV.* 1375, 1400 (citing THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND IN-*

tioners regard the whole process with skepticism, and rarely raise it, even when they have doubts about a client's ability to adequately communicate.⁵⁴

The fact that a client clears the competency bar in no way means that the attorney-client relationship can operate as it should.⁵⁵ There is vast territory between the minimal standard for competency and the ability to effectively participate in the attorney-client relationship.⁵⁶ It is in this expanse that the effects of language impairment on both the lawyer's and the client's ability to do their jobs are most likely to be felt.

Anybody who wishes to understand the implications of a client's communication deficits on the attorney-client relationship and the quality of representation must be willing to delve into the nuanced and often messy world of juvenile and criminal defense. For us, the authors, that meant talking to lawyers. Scholarship and commentary, practice standards, and traditional case law obviously factor into the discussion, but we have chosen to give lawyers a leading voice because they are on the frontlines, bearing the ethical, constitutional, and practical responsibility for the attorney-client relationship. It is therefore vital that they be allowed to explain the often-painful realities of representing the client who lacks the tools to effectively communicate and assist in return.

For this Article, we talked with eleven lawyers with seven to forty-two years of experience in criminal or juvenile defense. These attorneys were handpicked based on several criteria including geographic and practice diversity (i.e., state vs. federal; juvenile vs. adult; private practice vs. public defender).⁵⁷ We have labeled the

STRUMENTS 69, 79 (2d ed. 2003)) (emphasis in original). See also Mark C. Bardwell & Bruce A. Arrigo, *Competency to Stand Trial: A Law, Psychology, and Policy Assessment*, 30 J. PSYCHIATRY & L. 147, 149 (2002).

⁵⁴ Poythress et al., *supra* note 51, at 450. See also Ron Kuby & William M. Kunstler, *So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J.L. & PUB. POL'Y 19 (1995).

⁵⁵ See *State v. Shields*, 593 A.2d 986, 987, 993, 1011 (Del. Super. Ct. 1990) (finding defendant with a serious language disorder competent, placing burden on defense attorney to compensate for any deficits, and stating, "[t]he fact that a defendant might not understand the proceedings unless they are explained to him in simple language would put an additional burden on defense counsel, but certainly does not establish that the defendant is incompetent to stand trial").

⁵⁶ Schmidt, Reppuci & Woolard, *supra* note 18, at 176-77.

⁵⁷ The attorneys practice in three Midwestern states and one Western state. They practice in jurisdictions that range from major metropolitan areas with dozens of judges on the criminal or juvenile bench to rural counties with a single judge. Five of the attorneys are women and six are men. Two of the attorneys are African-American; the rest are white. The attorneys were selected based on reputation within the profession as practitioners, policymakers, leaders, and trainers. Their standing was signifi-

lawyers as *Attorneys A to K* in order to protect their anonymity, since most of them were quite open—and not always favorable—in their assessments of the legal process.⁵⁸

The overarching themes in the conversations included what it means to provide effective representation in the best practices sense; how a client’s language and language-based skills factor in the effective operation of the attorney-client relationship; and the problems that arise when those skills are missing. The subject of competency to stand trial did come up occasionally, but competency was seen as a parallel universe that is seldom if ever visited;⁵⁹ a universe that is more concerned with moving cases along⁶⁰ than with the attorney-client relationship.⁶¹ The constitutional standard for effective assistance of counsel was similarly mentioned, but it was dismissed as unhelpful, or worse.⁶²

cant for us because it meant that the attorneys had spoken with and observed countless other lawyers, and had considerable experience identifying, conversing about, and helping to remedy issues confronting lawyers in the trenches. Co-author Michele LaVigne conducted the actual interviews. Nine were in person and two were by phone. All observations and conclusions about the lawyers’ attitudes, moods, and behavior are the responsibility of co-author LaVigne. The attorneys were all provided with a copy of this Article for comment before it was submitted for publication.

⁵⁸ For each attorney we have provided the date of the attorney’s initial bar admission in parentheses and a general statement of the type of law practice:

Attorney A: (1983) public defender (county), now clinical professor of law.

Attorney B: (1977) appellate defender (state).

Attorney C: (1992) private practice, former public defender (state).

Attorney D: (1985) public defender (state).

Attorney E: (1985) private practice (federal and state), former federal defender.

Attorney F: (1971) private practice (federal and state), death penalty defense.

Attorney G: (2006) private practice, half-time contract defender (county).

Attorney H: (1989) public defender (state).

Attorney I: (1982) private practice, former public defender (state).

Attorney J: (1980) public defender (state).

Attorney K: (1983) public defender (state), former federal defender.

⁵⁹ Attorney F said that his state does not use competency assessment instruments such as the MacArthur (MA-CAT-CA) but still relies on “a drive-by” method of assessing competency. See LaVigne & Vernon, *supra* note 28, at 927. He said that the client has “got to be really dysfunctional before you get to the evaluation.”

⁶⁰ Attorney E noted that a finding of incompetency means the system must “commit money and time”—both of which are in short supply, especially in state courts. Co-author Gregory Van Rybroek teaches psychology graduate students how to conduct competency assessments. He tells the students that the evaluator is always under pressure to participate in the process of “mushing” defendants through the system. In fact, on the ground, the system is specifically designed to “mush” toward a disposition. The competency question simply slows the process.

⁶¹ Attorney H said that forensic specialists and judges have “no idea what it means to participate or communicate with counsel.” Attorney I was in agreement: “Judges don’t all know how difficult it can be to communicate with clients and what it takes to represent someone.”

⁶² The ineffective assistance of counsel framework has been criticized as a “doctri-

Prior to becoming involved in this project, none of the attorneys were aware of language disorder or impairment as a diagnostic category *per se* and none recalled seeing language impairments mentioned in clients' records.⁶³ This lack of awareness was not surprising, given the high rate of unidentified language impairments and the general lack of familiarity about language deficits in the legal system.⁶⁴ Nevertheless, all of the attorneys instinctively "knew" they had represented many clients with language impairments (the term "inarticulate" was commonly used) and had observed many of the manifestations and symptoms described in Section II. A number of the attorneys also expressed relief at having an evidence-based explanation for difficulties that previously seemed unexplainable or attributable to a character flaw. Of course, none of these experienced attorneys were so naïve as to believe that all of their clients' problems are language-based. They were well aware that they have clients whose difficulties are caused by personality disorders or just a general desire to disrupt or not cooperate. However, the fact that default characterizations such as "bad attitude," "lying," "no remorse," or "non-compliant" are not always accurate was welcome news and affirmed what the lawyers had already intuited.

What emerged from these conversations is a portrait of the attorney-client relationship as a complicated, organic event, one that transcends the mechanistic descriptions that too often inform competency assessments, ineffective assistance of counsel analyses, or judges' observations. As we discuss below, the attorney-client relationship is not a series of tasks centered on the exchange of information and "facts." Rather, it is a sophisticated, symbiotic relationship in which the lawyer's ability to effectively respond to a client's needs depends directly on the client's ability to provide informative narratives, articulate emotional states, anticipate the

nal placeholder—something that had to be recognized in principle . . . but that ought in practice to be discouraged." Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110, 111 (2012). Attorney E called the Sixth Amendment "the floor" and said that the standard for ineffective assistance of counsel was "ridiculous."

⁶³ Prior to each interview, the attorneys were either asked to read LaVigne and Van Rybroek, *supra* note 5, which reviews social science literature describing language impairments and their effects, or received an oral summary. We took this step because, despite decades of research and volumes of literature about language impairments, they are not yet widely recognized or discussed within the legal world.

⁶⁴ See *Incarcerated Young Offenders*, *supra* note 9, at 481; *Restorative Justice Conferencing*, *supra* note 34, at 329; Bryan, Freer & Furlong, *supra* note 11, at 507–08; Cohen et al., *supra* note 10, at 866, 872.

thoughts and reactions of others (including the lawyer), and contextualize the abstractions of the legal system. When this relationship breaks down because of the client’s inability to meet those demands, the effects can scuttle the representation.

IV. THE ESSENTIALS OF THE ATTORNEY-CLIENT RELATIONSHIP AND THE IMPACT OF LANGUAGE IMPAIRMENTS

*“Lawyers and people who can’t communicate are a bad combination.”*⁶⁵

A. *Navigating the Attorney-Client Relationship Itself*

A fundamental requirement for any client is the ability to understand what the attorney-client relationship is about and to function appropriately within it.⁶⁶ In fact, many of the attorneys we talked with considered this a make-or-break skill that will influence the entire course of any representation. The ability to work with an attorney means more than an understanding that the lawyer is the client’s advocate. Absent some kind of delusional thinking, even the most unsophisticated defendants usually have some sense that the lawyer is there to help, though they may be confused or mistaken about what that help might entail.⁶⁷ Rather, the lawyers were talking about a client’s ability to appreciate and maneuver within a seemingly counterfactual agency relationship in which the client is the “boss.”⁶⁸

The attorney-client relationship has long been recognized as a principal/agent relationship with the lawyer acting on behalf of the client. This rationale is behind the legal concept of “waiver,” in

⁶⁵ Attorney A.

⁶⁶ “[T]he quality of the attorney-client relationship is important in the effective representation of all clients regardless of their categorization as competent or incompetent.” Marcus T. Boccaccini & Stanley L. Brodsky, *Attorney-Client Trust Among Convicted Criminal Defendants: Preliminary Examination of the Attorney-Client Trust Scale*, 20 BEHAV. SCI. & L. 69, 70 (2002). See Schmidt, Reppuci & Woolard, *supra* note 18, at 177.

⁶⁷ Lack of understanding of what an attorney can and cannot do is hardly limited to poor, linguistically deficient individuals charged in criminal court. Middle-class divorce clients make similar mistakes. See, e.g., Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children and Their Attorneys*, 33 FAM. L.Q. 283, 296–97 (1999). However, the type of dysfunction we are talking about here is much more basic.

⁶⁸ We have borrowed the term “boss” from Attorney Ben Gonring of Madison, who tells his juvenile clients that they are his “boss.” Interview with Ben Gonring, Assistant State Public Defender, Juvenile Division, in Madison, Wis. (Sept. 4, 2009). We presented that term to the attorneys during the interviews as a shorthand means of describing the agency relationship between attorney and client. A number of them ran with it.

which an attorney's actions or inactions are attributed to the client. As principal in this relationship, the client is responsible for all decisions relating to the objectives of the representation and the lawyer is responsible for carrying out his or her wishes.⁶⁹

Researchers have known for at least two decades that this model is difficult for younger adolescents.⁷⁰ Attorney A described her juvenile clients as having no idea “what they’re supposed to do with a lawyer.” However, individuals with language disorders may not grow out of those misconceptions and interactional difficulties even at age twenty, or twenty-five.⁷¹ Studies have repeatedly shown that older juveniles and adults with language impairments are less likely to have developed a skill set which would enable them to assume the “directive role” with an attorney. Individuals with language impairments will have achieved lower levels of education,⁷² will be more likely to be dependent on parents, siblings, and—in more severe cases—social services,⁷³ and will have increased levels of anxiety and social phobia.⁷⁴ This will leave them greatly diminished in any situation where language is power. Not only will they be less likely to be comfortable with their directive role, they may not know what it means or how to do it because they will have never done it.

The standard response is usually to exhort the attorney to spend more time and “explain carefully,” but such simplistic advice overlooks the fact that such a relationship represents a tectonic shift in how these clients interact with the world. Moreover, the client must be able to receive and process that information about the role of counsel, make sense of it, and apply it.⁷⁵ Attorney E, a

⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

⁷⁰ See, e.g., Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 641–44 (1995).

⁷¹ See generally Johnson, Beitchman & Brownlie, *supra* note 6, at 60–63.

⁷² *Id.* at 61.

⁷³ See, e.g., Törnqvist et al., *supra* note 35, at 238; Michael Rutter & Lynn Mawhood, *The Long-Term Psychosocial Sequelae of Specific Developmental Disorders of Speech and Language*, in BIOLOGICAL RISK FACTORS FOR PSYCHOSOCIAL DISORDERS 233, 249 (Michael Rutter & Paul Caesar eds., 1991).

⁷⁴ See, e.g., Sabrina C. Voci et al., *Social Anxiety in Late Adolescence: The Importance of Early Childhood Language Impairment*, 20 ANXIETY DISORDERS 915, 924–27 (2006).

⁷⁵ Schmidt, Reppucci & Woolard, *supra* note 18, at 177–78.

veteran defense attorney with state and federal experience, reflected on how the principal/agent relationship would make little sense to the uninitiated: "You're the boss and I'm your agent.' What does that mean? 'Help me help you.' What are you asking me to do?" Attorney A, who has long specialized in the defense of young juveniles and adolescents raised in extreme urban poverty, cut to the chase when she said, "You're the boss' means nothing if you have never been the boss of anything, and simply telling someone it's so doesn't make it so."

Even if a linguistically impaired individual can grasp a relationship in which he is in charge of the professional with the education and status, he must still have the skills to make that relationship work. A crucial skill is the ability to ask questions.⁷⁶ Attorney F, a private practitioner who specializes in complex criminal litigation, specifically defined the clients' role as asking "a lot of questions." Yet as he and others noted, many clients do not ask questions. Attorney F attributed some of this to a lack of power: "People are so used to not being allowed to ask questions, the whole notion of asking a question doesn't compute."

But the lack of questions must also be attributed to clients' linguistic and emotional inability to ask them. Indeed, language disorders are often marked by a long-standing lack of ability to seek clarification,⁷⁷ and to use questions as a means of negotiating difficult or unfamiliar circumstances.⁷⁸ Individuals with language disorders have also developed the ability to "hide incompetencies,"⁷⁹ and to adopt a survival mechanism that Attorney A claimed was very much like that seen in first-year law students: "I don't have a clue what you're talking about but don't make me look stupid." Meanwhile, the lawyer has no way of gauging how much the client does or does not understand of the attorney-client relationship and

⁷⁶ The consumer's ability to ask questions also factors into the successful doctor-patient relationship. S. Willems et al., *Socio-economic Status of the Patient and Doctor-Patient Communication: Does It Make a Difference?*, 56 *PATIENT EDUC. & COUNSELING* 139, 140 (2005).

⁷⁷ See DENNIS C. TANNER, *EXPLORING COMMUNICATION DISORDERS: A 21ST CENTURY INTRODUCTION THROUGH LITERATURE AND MEDIA* 121 (2003).

⁷⁸ Mendota Juvenile Treatment Center (MJTC) in Madison, Wis., includes sessions in social skills training for delinquent adolescent males. One of the skills taught is how to ask questions. Interview with Rachel Fregien, SLP at MJTC, in Madison, Wis. (Dec. 13, 2011). For an explanation of MJTC see LaVigne & Van Rybroek, *supra* note 5, at 41-42.

⁷⁹ Attorney B. See also *What's the Story?*, *supra* note 39, at 248 (explaining that juveniles rely on well-known "scripts" to cover incompetencies); Stone & Bryan, *supra* note 11, at 36 (indicating that defendants attempt to cover incompetencies by nodding frequently, agreeing with counsel, and "talk[ing] a lot but saying very little").

the work to be done within it. The good attorney will probe to find out⁸⁰ but can usually count on some version of what Attorney F portrayed as “‘nope I get it,’ [although] the student of human nature knows they don’t.”

B. Narrative Skills

*“Effective assistance of counsel is impossible unless the client can provide his or her lawyer with intelligent and informed input.”*⁸¹

Even the most crabbed views of assisting counsel and the attorney-client relationship generally concede that a defendant should be able to communicate about the allegation and his background with his attorney.⁸² Often this is couched as the ability to provide “facts” or recall “events.”⁸³ A slightly more expansive model of attorney-client interaction suggests that a defendant should possess “the ability to provide relevant information about crime events, personal feelings, and social background when working with counsel to develop a defense.”⁸⁴ However, as the attorneys we spoke with made clear, barebones information, facts, and even feelings, while obviously critical, are far from sufficient. What lawyers need from their clients are narratives.

Grossly defined, narratives “are stories that adhere to a broad temporal template so that an account can be provided that follows a logical, coherent order, taking into consideration the listener’s presumed prior knowledge.”⁸⁵ Narratives allow the unfamiliar listener to make sense of a story that involves persons and situations the listener knows nothing about.⁸⁶ However, narratives are not simply a factual chronological recitation. They are complicated linguistic, cognitive, and psychological structures that require setting or context, characters, temporal sequence, action, internal and external response, and cause and effect, all of which are moderated

⁸⁰ See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.2 (3d ed. 1993).

⁸¹ *United States v. Mosquera*, 816 F. Supp. 168, 173 (E.D.N.Y. 1993).

⁸² See, e.g., *Bardwell & Arrigo*, *supra* note 53, at 155. See also *Youth (In)justice*, *supra* note 16, at 4 (“The opportunity to ‘tell one’s story’ to . . . one’s legal counsel . . . is a basic right in a civilized society.”). *But cf.* *New Jersey v. Miller*, 216 N.J. 40, 72 (2013) (finding that trial court did not abuse its discretion when it denied an adjournment for a defendant who met his newly appointed attorney for the first time for twenty-five minutes in a stairwell on the morning of trial and was obviously not able to communicate about much of anything). The dissent in *Miller* noted the majority’s “crabbed view of constitutionally effective counsel.” *Id.* at 82 (Albin, J., dissenting).

⁸³ See, e.g., *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁸⁴ Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 16 (1997) [hereinafter *Competence of Adolescents*].

⁸⁵ *Youth (In)justice*, *supra* note 16, at 2.

⁸⁶ *What’s the Story?*, *supra* note 39, at 247.

by the characteristics of the individual listener.⁸⁷

These components are exactly why clients' narratives—or stories—are so important for lawyers. A defense case is not a law school exam with a checklist of objectively verifiable facts that can be matched up with the elements of an offense or an affirmative defense. More often than not, the defense case is found in the human factors—the story or stories—that lurk below the surface of timelines, police reports, and witness statements.

Narrative skills are often weak in individuals with language impairments.⁸⁸ In fact, poor narratives are frequently the first sign of previously undiagnosed language deficits in older adolescents and adults.⁸⁹ Narrative skills, or the lack of them, have been called "the canary down the coalmine" of language development,⁹⁰ and researchers have closely studied their effects.⁹¹ As a general matter, impaired individuals have difficulty relating a story that could be understood by a listener who does not share the same experience or knowledge.⁹² They tend to describe "significantly fewer bits of information about the *context* of the story and the events that initiated it."⁹³ Narratives from linguistically impaired individuals will be about what happened rather than why.⁹⁴ Of particular significance for lawyers is the fact that individuals "who lack adequate story grammar skills 'will have difficulty reconstructing their own experiences and sharing them with others.'"⁹⁵

Narrative difficulties have been identified as a particular source of difficulty for young men (thirteen to nineteen years old) involved in the criminal or juvenile justice systems. Studies have revealed that, when compared with non-offenders of the same age, or even younger, the offenders' narratives are noticeably poorer. Offenders are less able to describe a character's plan, the cause

⁸⁷ *Id.*

⁸⁸ *Young Speakers*, *supra* note 31, at 499.

⁸⁹ See, e.g., *What's the Story?*, *supra* note 39, at 248–49.

⁹⁰ *Young Speakers*, *supra* note 31, at 499.

⁹¹ See, e.g., Elsa Eme et al., *Oral Narrative Skills in French Adults Who Are Functionally Illiterate: Linguistic Features and Discourse Organization*, 53 *J. SPEECH, LANGUAGE, & HEARING RES.* 1349, 1352–53 (2010).

⁹² *Id.* at 1366.

⁹³ Doris Cole, *Narrative Development in Aggressive Boys*, 26 *BEHAV. DISORDERS* 332, 339 (2001).

⁹⁴ See generally Anne McKeough et al., *Conceptual Change in Narrative Knowledge: Psychological Understandings of Low-Literacy and Literate Adults*, 5 *J. NARRATIVE & LIFE HIST.* 21 (1995).

⁹⁵ *Young Speakers*, *supra* note 31, at 500 (citing Natalie L. Hedberg and Carol Stoel-Gammon, *Narrative Analysis: Clinical Procedures*, 7 *TOPICS IN LANGUAGE DISORDERS* 58, 68 (1986)).

and effects of the character's actions, and the character's motivations.⁹⁶ Researchers have expressed particular concern over how these young men would have fared when they attempted to tell their story in the forensic context, such as during an interrogation or a conversation with counsel.⁹⁷

The attorneys we met with were familiar with clients' narrative deficits, even if they did not use the term. They knew that they were missing large segments of many clients' stories because the clients simply could not tell them. When asked to elaborate, the lawyers gave descriptions that bore striking resemblance to the research findings discussed above.

Attorney C remarked that many clients "don't have narratives" and lack "the ability to think in narratives." According to Attorney B, clients often "can't tell the story well enough for the attorney to determine whether there's a defense." Attorney I described clients' narratives as "*thin*" and offered up an example: "He got in my face so I shot him.' And they are unable to explain how or why." Two attorneys specifically mentioned the lack of "narrative arc" in clients' stories. Instead, clients provide their lawyers with a series of chronologically connected but unexplained or underexplained events.⁹⁸ These are the "and then . . . and then . . . and then" types of narratives typically associated with children.⁹⁹

The paucity of detail was a particular source of difficulty, especially detail relating to inner states. In fact, the absence of "emotional content" or "an emotional layer" was specifically raised by a number of the lawyers. Attorney A observed that many of the young men she represented had "no emotional vocabulary. They have two major emotions—pleasure and anger—but anger may also mean fear." She suggested that the stock cliché "Tell us how you felt?" was "ridiculous" with these clients.

The impact of clients' "thin" narratives on the quality of representation can be substantial and far-reaching. A client's narratives are the raw materials of the case and when they are not available,

⁹⁶ See *What's the Story?*, *supra* note 39, at 246.; Cole, *supra* note 93, at 340.

⁹⁷ *What's the Story?*, *supra* note 39, at 247–48; see also *High-Risk Boys*, *supra* note 7, at 17 (describing the difficulties impaired offenders would have during interrogations).

⁹⁸ Milwaukee Public Schools (MPS) Special Education Teacher Arthur Gosselin works with Milwaukee County Jail inmates (who are twenty-one years old or younger) who are eligible for MPS services and are in jail awaiting trial. His specific focus is improving "thin narratives" that are common among his students. He helps his students build narratives that include character, motivation, and context. Interview with Arthur Gosselin, Special Education Teacher, MPS (Sept. 2011).

⁹⁹ See generally *What's the Story?*, *supra* note 39, at 246–47. See also *Young Speakers*, *supra* note 31, at 498.

the attorney operates from a distinct disadvantage throughout the representation. Attorney I’s offering of “He got in my face so I shot him” provides a textbook example.¹⁰⁰ On the surface, such a statement may paint a “stereotypical picture of a . . . gangbanger” with a blasé disregard for human life.¹⁰¹ But is that what the client is really saying? What if “got in my face” actually means threatening or assaultive behavior? What if the client did in fact feel and taste fear but lacks the language to describe it? Despite its seemingly callous exterior, “He got in my face so I shot him” may be the story of self-defense, and the basis for a finding of mitigation or even justification.¹⁰² But absent the narrative grist from the client, the lawyer may not see that possibility or may not be able to make the case in a credible fashion.¹⁰³

And the effects will not just be felt at trial. Negotiation will also suffer. Attorney D, a public defender, rhetorically asked, “How do you negotiate if the client can’t give you the details of the story?” Motion practice is likewise affected. Attorney B, an appellate defender, referred to a case where the client was unable to describe what the police said or did when they interrogated him, which left voluntariness and *Miranda* questions unanswerable for trial counsel.

Ironically, the attorneys we spoke with said very little about the effects of narrative deficits in what would be the most visible context—a client’s testimony. Perhaps this general silence is because, as Attorney H concluded, clients with language impairments “can’t testify.” That conclusion makes unfortunate sense since “the way in

¹⁰⁰ Attorney I was the second attorney interviewed. Her example of “He got in my face so I shot him” was mentioned in subsequent meetings and some of the attorneys used it as a reference point.

¹⁰¹ *United States v. Allen*, 603 F.3d 1202, 1210 (10th Cir. 2010).

¹⁰² *See, e.g.*, MODEL PENAL CODE §3.04(1) (1962) (“Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”). Depending on the circumstances, “He got in my face so I shot him” may also be the language of provocation or heat of passion. *See id.* §210.3(1)(b) (“Manslaughter. Criminal homicide constitutes manslaughter when . . . [it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”).

¹⁰³ Attorney J talked of negotiating a settlement in a homicide case that had a number of mitigating circumstances that could not adequately be presented at trial, because the client did not possess “enough language to get to the emotional aspect” necessary to build the defense.

which witnesses are allowed to tell their stories in court are ‘very strange, and are subject to a number of restrictions which do not exist in other storytelling contexts to anything like the same degree, if at all.’¹⁰⁴ Attorney E mused that even highly educated clients have trouble telling a story under the “very strange” formats of direct and cross-examination, subject to the equally strange rules of evidence. To ask an individual with already limited receptive and expressive skills to sit in front of a room full of people who will be judging his credibility by his words, demeanor, and ability to hold up under an arcane questioning form seems cruelly farcical.¹⁰⁵

C. *Understanding the Legal Process*

“*I can explain it to you but I can’t understand it for you.*”¹⁰⁶

Dusky and its progeny attempt to treat the ability to understand the legal process as a concept that exists independent of the attorney-client relationship—at least for purposes of competency to stand trial. In practice however, the two are inseparable. They are inseparable because the attorney bears responsibility for ensuring that the client does in fact grasp the elements of the offense, the nature of the defenses, the risks and benefits of a guilty plea versus a trial, the constitutional rights waived upon a plea of guilty, and the collateral consequences of any plea.¹⁰⁷ Even where the trial court is the final arbiter of the client’s understanding, the court is usually dependent on the work of counsel.¹⁰⁸

And indeed, no one has ever suggested that circumstances should be otherwise. As the Supreme Court observed in *Padilla v. Kentucky*, “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue[.]”¹⁰⁹ Where problems arise, however, are in those many instances in which an ostensibly “competent” client lacks the linguistic ability to process and apply

¹⁰⁴ *Young Speakers*, *supra* note 31, at 499 (citing Diana Eades, Telling and Retelling Your Story in Court: Questions, Assumptions, and Intercultural Implications, Presentation at the 25th Australasian Institute of Judicial Administration Conference, Melbourne, Austl. (Oct. 14, 2007), available at <http://www.aija.org.au/ac07/Papers/Eades.pdf>).

¹⁰⁵ See LaVigne & Van Rybroek, *supra* note 5, at 85–87.

¹⁰⁶ See “*I Can Explain it to You But I Can’t Understand it For You*” T-Shirt, ZAZZLE, http://www.zazzle.com/i_can_explain_it_to_you_but_i_cant_understand_tshirt-235130839083184659 (last visited Dec. 15, 2013) (also attributed to a proverb).

¹⁰⁷ See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010); *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012).

¹⁰⁸ See, e.g., *Hill v. Lockhart*, 474 U.S. 52 (1985); *Remington*, *supra* note 17, at 350–51.

¹⁰⁹ *Padilla*, 130 S. Ct. at 1484.

even the best advice and the clearest explanation from counsel. In these instances many of the lawyers we spoke with see judges abandoning their obligation to due process and quality control. Attorney H called it “judges tak[ing] cover behind the lawyer.”

It is no secret that legal concepts and the legal process do not lend themselves to ready explanation. They are abstractions couched in jargon. Attorney D, commenting on the difficulty of explaining legal concepts to anybody, including the most capable clients, suggested that even a concept as routine as “right” is opaque: “A right—who even knows what that is.” Nevertheless, attorneys have an ethical and constitutional obligation to translate not only the jargon, but the concepts behind it, and very often, the process itself.¹¹⁰

But the fact that a lawyer may have translated or explained the legal process is hardly the end of the inquiry. Translation is effective only when it is understood, and comprehension, especially in the legal context, takes a large quiver of sophisticated linguistic tools. First, the listener must have the receptive skills, including vocabulary and the ability to decipher a series of sentences, many of which will be complex or at least compound. The listener must also possess a fund of knowledge upon which to build his understanding of the new information. Similarly, the listener needs the knowledge base, in combination with the appropriate pragmatic skill, to grasp the inferences in the speaker’s language—i.e. the listener must be able to read between the lines. Physiologically, the listener must possess sufficient auditory processing capacity to enable him to make auditory sense of what the lawyer is saying. Finally, the listener must have auditory memory so that he can remember what he is told and incorporate it into his decision-making.¹¹¹

All the lawyers we spoke with recognized that many of their clients lacked some or all of the skills to allow them to adequately comprehend and work with the plethora of information that accompanies even a misdemeanor. Attorney B estimated that when dealing with adolescents and young adults, the number could be as

¹¹⁰ STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.8(b) (3d ed. 1993) (“Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

¹¹¹ See, e.g., Thomas Grisso, *What We Know About Youth’s Capacity as Trial Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 139, 146–50 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter *What We Know*]; *Restorative Justice Conferencing*, *supra* note 34, at 329–30.

high as 75%. The attorneys were also quite adamant about their own profession's lack of qualification and skill to address the problem.¹¹²

The lawyers were noticeably exasperated and at times angry about their clients' inability to understand legal information. This was the area where they could most readily recognize the implications of language impairment and could see the failure of the legal system to acknowledge the problem. The frustration was with both the competency process and the prevailing attitude that the lawyer can fix whatever deficits the client may have by "carefully explaining" the process.¹¹³ "The client has one, two, three deficiencies and rudimentary language, but if the lawyer explains then the client is 'competent.'"¹¹⁴ This so-called solution essentially says that "if you have the perfect lawyer, then you are competent."¹¹⁵ This approach, which has been called "facilitating competency," often asks the lawyer to do the impossible.¹¹⁶

At the same time, courts seem to turn a blind eye to the opacity of the entire legal process. Words and procedures that are carefully crafted by appellate courts, and which might make sense to the legally trained, have no substantive meaning to the individual whose spoken language comprehension is in the bottom tenth percentile of the entire population. Yet we continue to insist that such individuals can be made to understand.

Though it has no technical bearing on the attorney-client relationship, three of the lawyers offered *Miranda* as an iconic example of the opaque form-over-substance ritual that pervades so much of the criminal and juvenile justice systems; and of the systems' willingness to suspend disbelief in order to find that undereducated, linguistically deficient individuals have sufficient comprehension.¹¹⁷ Attorney A openly mocked the notion that *Miranda* warn-

¹¹² Commentators have suggested that lawyers are not particularly skilled at translating or explaining legal concepts to anyone, impaired or otherwise. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 99 (2007); THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 117 (Bruce Dennis Sales ed., 1st ed. 1981).

¹¹³ Cf. e.g., *Competence of Adolescents*, *supra* note 84, at 23–25.

¹¹⁴ Attorney I.

¹¹⁵ Attorney E.

¹¹⁶ Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 243, 253–62 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹¹⁷ Psychologist Richard Rogers has studied the *Miranda* warnings extensively and has found them widely incomprehensible, despite a general assumption that "everyone knows their *Miranda* rights." Richard Rogers et al., "Everyone Knows Their *Miranda* Rights": *Implicit Assumptions and Countervailing Evidence*, 16 *PSYCHOL. PUB. POL'Y & L.*

ings, however much they are a part of the national culture, convey constitutional rights to verbally deficient young men: “Oh yes, they’ve seen [the Miranda warnings] on TV and they know what it means—it means you are going to jail. It’s a mantra. It doesn’t say, ‘This is your lucky day; this is the day you get to assert your full rights as a citizen.’”¹¹⁸

The lawyers were perplexed that trial judges in particular (at least some of whom had been criminal defense lawyers earlier in their careers) seemed to have no idea how difficult communicating with clients could be. Attorney D quipped that judges seem to think “you just have to say it slower and louder.”¹¹⁹ He reported that judges also place great stock in the power of repetition, but this too is no solution: “It’s the evanescent nature of understanding [with clients]. You explain it and in that moment it’s OK. But a half an hour later, no. So you explain it again. And again.”¹²⁰

Research confirms the lawyers’ impressions about their clients’ poor comprehension and the lack of an easy fix. Simply repeating and explaining, even in plain English, does not necessarily work.¹²¹

300, 301–02 (2010). Rogers et al. tested 119 college students on their understanding of the Miranda warnings and found that barely one third had an “accurate working knowledge of their rights.” *Id.* at 305, 314. Meanwhile, courts continue to find knowing and voluntary waivers in cases where the defendants’ IQ is low enough to place them in the “retarded” category. *See, e.g.*, *Otis v. State*, 217 S.W.3d 839, 845–46 (Ark. 2005) (explaining that a fourteen-year-old defendant with an IQ of 68–69 validly waived Miranda rights); *Bevel v. State*, 983 So. 2d 505, 515–16 (Fla. 2008) (demonstrating that a defendant with an IQ of 65 validly waived Miranda rights); *In re MAC*, 761 A.2d 32, 34, 38–39 (D.C. 2000) (showing that a fifteen-year-old defendant who was mildly mentally retarded validly waived Miranda rights).

¹¹⁸ Comprehension of Miranda warnings is made all the more difficult because they do not mean what they say. *See, e.g.*, *Duckworth v. Eagan*, 492 U.S. 195, 203–05 (1989) (indicating that despite pre-interrogation language that says “you have the right to an attorney and if you cannot afford one, an attorney will be appointed,” defendants have the right to appointed counsel only if and when they go to court; otherwise, they have the right to pay for counsel prior to their proceeding); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–60 (2010) (explaining that in order to invoke his right to remain silent, a defendant must specifically state that intention; silence does not suffice). Attorney Michael Cicchini, a frequent contributor to the Marquette University Law School Faculty Blog, has posited that a “new and improved” Miranda would begin, “Actually, you really don’t have the right to remain silent, unless you first speak,” and would continue in that vein. Michael Cicchini, *The New Miranda Warning*, MARQ. U. L. SCH. FAC. BLOG (Nov. 8, 2010), <http://law.marquette.edu/facultyblog/2010/11/08/the-new-miranda-warning>. Of course, even the improved model would be difficult for an individual with auditory processing and memory deficits.

¹¹⁹ Attorney C was more irreverent: “Repeating to a person who can’t understand what you are talking about is like speaking loud to a deaf person.”

¹²⁰ This fleeting understanding is typical of individuals with auditory memory deficits.

¹²¹ *See* Barbara Kaban & Judith Quinlan, *Rethinking a “Knowing, Intelligent, and Vol-*

And contrary to the prevailing wisdom, prior experience with the juvenile or criminal justice systems does not necessarily improve an individual's comprehension of the process.¹²²

A defendant's youth is a widely known and widely accepted impediment to comprehension of legal information.¹²³ But it turns out that poor language skills can interfere with the ability to understand legal information as much as youth, and in certain instances, even more. Research on language impairments in correctional institutions has shown in that a significant percentage of older adolescent and adult inmates have language deficits that leave them with listening and comprehension levels below those of an average eleven-year-old.¹²⁴ These difficulties are especially likely to affect "the ability to 'decode' abstract language," a category which certainly includes most legal terminology.¹²⁵

All of the lawyers were asked about the types of legal information that cause the most difficulties, even after explanation. Noticeably absent from their responses were the civics catechism—e.g., "Who is the judge?" "What does your lawyer do?"—that often informs competency decisions and competency training.¹²⁶ Rather, the lawyers talked about ingredients essential to knowledgeable and rational decision-making: the real-life meaning of charges and defenses (as opposed to a recitation of statutory language),¹²⁷ the

untary Waiver" in *Massachusetts' Juvenile Courts*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 35, 45–49 (2004).

¹²² *What We Know*, *supra* note 111, at 151. An interesting aspect of this line of research is that, while its focus is juveniles (under eighteen) and whether juveniles "age in" to comprehension of legal information, the incidental findings about the comparison group of adult subjects clearly demonstrate that many individuals experience substantial impediments to comprehension well beyond age eighteen. *See, e.g.*, Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH ADOLESCENCE 685, 694–97 (2008).

¹²³ *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1160–66 (1980); *What We Know*, *supra* note 111, at 146–53.

¹²⁴ Bryan, Freer & Furlong, *supra* note 11, at 507; *Preliminary Study*, *supra* note 20, at 396. Note: the studies all controlled for performance or non-verbal IQ. Pamela C. Snow & Martine B. Powell, *Developmental Language Disorders and Adolescent Risk: A Public-Health Advocacy Role for Speech Pathologists?*, 6 INT'L J. SPEECH-LANGUAGE PATHOLOGY 221, 226 (2004) [hereinafter *Developmental Language Disorders*] (offenders with LI performed "significantly more poorly [on language measures] than a group of demographically similar youths who were 2 years younger.").

¹²⁵ *Developmental Language Disorders*, *supra* note 124, at 226.

¹²⁶ *See, e.g.*, *United States v. Duhon*, 104 F. Supp. 2d 663, 666, 673–74 (W.D. La. 2000).

¹²⁷ Attorney A believes that "a defendant's ability to articulate statutory defenses is a piss-poor way to determine ability to understand."

significance of a guilty plea, potential penalties, other direct and collateral consequences of a conviction, risks and benefits of a trial, and how a trial actually operates.

D. *Decision-Making*

In any criminal or delinquency case, the client must make all decisions regarding the “objectives of the representation.”¹²⁸ The ultimate decision is, of course, the decision whether to plead guilty (generally in connection with a plea offer) or to go to trial.

Informed and rational decision-making is a complicated process that depends on a well-developed skill set. Decision-making at the level required of juvenile and criminal defendants involves: 1) comprehending and communicating choices; 2) understanding relevant information; 3) appreciating the situation and its consequences; and 4) manipulating information rationally.¹²⁹ When decision-making is viewed in this light, it is easy to see the central role of expressive, receptive, and pragmatic language skills. It is also easy to see why the attorneys we spoke to were skeptical about many of their clients’ decision-making capacities.

As we might expect, the attorneys took client decision-making very seriously and repeatedly mentioned the chasm between clients’ capacities and the life-altering types of decisions they are expected to make. Lawyers are often taken to task for questioning the rationality of a client’s decision-making because the client does not agree with them,¹³⁰ but the lawyers we interviewed were very much in touch with the meaning of “rational decision making.”¹³¹ They also believed that courts and forensic specialists grossly underestimate the complexities of client decision-making in the criminal and juvenile justice arenas. Attorney C expressed the disconnect this way: “To say they have decision-making capability because they

¹²⁸ MODEL RULES OF PROF’L CONDUCT R. 1.2 (2012).

¹²⁹ Paul S. Applebaum & Thomas Grisso, *Assessing Patients’ Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635, 1635–36 (1988). As discussed in Applebaum & Grisso’s article, these four categories define legal standards for a patient’s competency to consent to medical treatment. However, this model applies equally to decision-making in the legal context. *See, e.g., Competence of Adolescents, supra* note 84, at 8–9; *What We Know, supra* note 111, at 157–62.

¹³⁰ *See, e.g., Kristin Henning, Denial of the Child’s Right to Counsel, Voice, and Participation in Juvenile Delinquency Proceedings*, 89 CHILD WELFARE 121, 131 (2010).

¹³¹ The lawyers tended to have a holistic view of decision-making. *See Maroney, supra* note 53, at 1400–08; *but cf. Poythress et al., supra* note 51, at 451 (showing that lawyers were more likely to express doubts about their clients’ competence when clients rejected their lawyers’ advice).

can repeat back is the same as saying that a child who knows that a red ball is not blue understands the truth.”

As a threshold matter, Attorney B saw insurmountable problems with “the things we ask [clients] to decide. We ask them to answer such hard questions.” She described how just the concept of a long versus a longer sentence can be difficult for a defendant to grasp.¹³² And on top of those years of incarceration, clients are “bombed with consequences.” Attorney B gave the example of a nineteen-year-old charged with having sexual intercourse with his fifteen-year-old girlfriend: “Do you want to claim third degree [sexual assault] which means no exemption from the [sex offender] registry or do you want to stick with second degree [sexual assault], which means you might be able to get exempt from the registry, or maybe not. But then you might be facing a [sexually violent persons commitment].” It boggles the mind to think of the level of linguistic processing that it takes to make sense of such a proposition.

Attorneys also voiced strong doubts about many clients’ ability to weigh the strength of their case and the risks of taking a case to trial. First, many clients lack complete factual information when they make their decisions. While they may know something about good facts and bad facts, clients do not have the same information as the professionals in the system. Attorney A compared a lawyer’s assessment of a case with that of a typical client: attorneys, unlike clients, have a broad fund of knowledge about “[other] cases, the judge and the judge’s reputation, and witnesses,” along with courthouse culture and prevailing trends. Adding to the clients’ disadvantage is the fact that “we [lawyers] rarely state the universe of information.” And even if lawyers did state that universe of information, clients with linguistic shortcomings could not begin to process and comprehend such a complex universe.

The other missing piece for many clients is the pragmatic language skill known as theory of mind, which has been called “the basis for human interaction as it underpins our ability to understand, predict, and interpret the thoughts and feelings of others in

¹³² Attorney K noted that written plea agreements in federal cases are even more difficult to understand since they deal with a guideline range that is stated in terms of months rather than years. Numeracy is a cognitive task that influences decision-making. Fabio Del Missier et al., *Decision-making Competence, Executive Functioning, and General Cognitive Abilities*, 25 J. BEHAV. DECISION MAKING 331, 333 (2012). Numeracy is also one of the functions that is negatively affected by language disorder. See *Preliminary Study*, *supra* note 20, at 392.

our world.”¹³³ Theory of mind is thought to be acquired “through the acquisition of social and linguistic competencies” and is the means by which one person can take the perspective of another.¹³⁴ Theory of mind and perspective-taking are as critical to client decision-making as legal and factual information because, as Attorney E reminds us, the legal system is ultimately “humans making decisions about you.” In functional terms, this means that a client “need[s] to know how others perceive the case . . . to assess whether an offer is good” or to realize “how the state could prove you guilty. [A client must be able] to have a conversation about alternatives . . . to look at a case technically and in the audience’s perspective.”¹³⁵

All of the lawyers reported that they regularly see clients with an underdeveloped ability to take the perspective of their audience. The attorneys’ observations match extensive research that has found poor theory of mind and perspective-taking among individuals likely to be in the criminal justice system.¹³⁶ Attorney F said that the “common thread” for so many clients is “no ability to grasp the other person, . . . no ability to understand someone else.” Attorney I described clients who “don’t know what other people think.” Attorney G concurred, noting the many clients who “do not understand what people are motivated by or what other people believe.”

The attorneys felt that as a result of their clients’ lack of complete information and their comprehension deficits, including deficiencies in theory of mind and perspective-taking, many of them made decisions with a deeply flawed understanding of the case against them and of the risks they faced, particularly the risks of going to trial. These decisions can have stark consequences since

¹³³ *Young Speakers*, *supra* note 31, at 499 (citing Janet Wilde Astington & Terri Barriault, *Children’s Theory of Mind: How Young Children Come to Understand that People Have Thoughts and Feelings*, 13 *INFANTS & YOUNG CHILD*, 1, 2 (2001)).

¹³⁴ *Young Speakers*, *supra* note 31, at 500 (citing Jay L. Garfield, Candida C. Peterson & Tricia Perry, *Social Cognition, Language Acquisition and the Development of the Theory of Mind*, 16 *MIND & LANGUAGE* 494, 496 (2001)).

¹³⁵ Attorney H.

¹³⁶ A substantial body of research correlates language deficits, behavior problems, and poor theory of mind. *See, e.g.*, Francesca Happé & Uta Frith, *Theory of Mind and Social Impairment in Children with Conduct Disorder*, 14 *BRIT. J. DEVELOPMENTAL PSYCHOL.* 385 (1996); *Young Speakers*, *supra* note 31, at 497–98 (probable theory of mind deficits among victims of childhood maltreatment); Dante Cicchetti et al., *False Belief Understanding in Maltreated Children*, 15 *DEV. & PSYCHOPATHOLOGY* 1067, 1086–87 (2003); Katherine C. Pears & Philip A. Fisher, *Emotion Understanding and Theory of Mind Among Maltreated Children in Foster Care: Evidence of Deficits*, 17 *DEV. & PSYCHOPATHOLOGY* 47, 49–50, 60–61 (2005); Dionne, *supra* note 35, at 333, 346–47.

“the trial penalty is very real.”¹³⁷ Attorney G probably spoke for attorneys everywhere when he called clients’ inability to appreciate the risks of their decisions “the most frustrating part” of his representation, especially since, in the end, it is the attorney’s role to facilitate those decisions.¹³⁸

E. Empathy, Trust, and Pragmatics

The success of an attorney-client relationship is as dependent on intangibles like empathy (a lawyer’s for her client) and trust (a client’s of his lawyer) as it is on substantive aspects like narrative ability and comprehension of legal information. Unfortunately, these intangibles are highly susceptible to a client’s communication deficits. The problem arises because both trust and empathy are built on a foundation of communication and mutual understanding; when that foundation is flawed, trust and empathy—and thus the attorney-client relationship itself—may not develop properly, or even at all.¹³⁹

Once again pragmatics is an important factor. Pragmatic deficits, as discussed earlier, are manifested by an inability to read social situations and social cues, to comprehend the perspective of others, and to conform to the rules of social engagement, making the person appear “uncooperative at the least, or more seriously, rude or insulting.”¹⁴⁰ Meanwhile, in keeping with the theory of pragmatics, the “other variable in the equation”—i.e., the lawyer—can be expected to react.¹⁴¹ The attorney-client relationship after all is “a two-way street; it is one of give and take. It is not the lawyer reciting constitutional rights.”¹⁴²

This can easily lead to a downward spiral in which the client then responds poorly to the lawyer, who reacts to the client, and so on. Such a chain reaction is virtually guaranteed to destroy empathy and trust, and can take a genuine toll on the quality of the

¹³⁷ Attorney F. See also *Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1978).

¹³⁸ MODEL RULES OF PROF’L CONDUCT Rs. 1.2(a), 1.4(b).

¹³⁹ For example, the first-known empirical study of attorney-client trust found that trust was more likely to occur where the defendant had sufficient knowledge of the process and of the role of defense counsel. Boccaccini & Brodsky, *supra* note 66, at 71 (citing Christine Schnyder Pierce & Stanley Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 BEHAV. SCI. & L. 89 (2002)).

¹⁴⁰ LaVigne & Van Rybroek, *supra* note 5, at 58; see also Kathleen Bardovi-Harlig et al., *Developing Awareness: Closing the Conversation*, in POWER, PEDAGOGY, AND PRACTICE 324 (Tricia Hedge & Norman Whitney eds., 1996).

¹⁴¹ Attorney I.

¹⁴² Attorney C.

relationship, and the quality of a lawyer’s legal work.¹⁴³ Attorney K believed that a lawyer’s negative reaction to a client’s inappropriate comments or behavior “can easily create bias, which will affect not only how the attorney perceives the client but the client’s case.” And of course we cannot simply command a lawyer to feel empathy for her client any more than we command a client to trust his lawyer. As Attorney F told us, “‘Trust me’ is stupid.”

All of the relational difficulties presented by the clients with language disorders are exacerbated in the context of indigent defense.¹⁴⁴ Whether the attorney is an institutional defender, appointed counsel, or a contract defender, time and resources are in short supply. Meanwhile, establishing an acceptable working relationship with a linguistically deficient client takes extra time. In addition, communicating with this person will take skill and, in many cases, special knowledge and assistance, neither of which is available in standard defender offices.¹⁴⁵

As a result, the needs of the linguistically impaired client can easily come into direct conflict with the attorney who has too many cases, is overscheduled, and lacks the necessary internal and external resources to adequately cope.¹⁴⁶ Consequently, the relationship will suffer. Attorney F believed that pragmatic deficits would be particularly toxic for the lawyer with an excessive caseload. With the client who is personally difficult and unrealistic in his or her demands, the lawyer’s lack of time and patience could easily play itself out as “[expletive] you, make your own mistakes.”¹⁴⁷

But even with a “polite” client, high caseloads and court-imposed time pressures will amplify the effects of communication deficits on the attorney-client relationship.¹⁴⁸ Attorney G, a part-time

¹⁴³ Trust is cultivated when the attorney is receptive to the input of the client. Boccaccini & Brodsky, *supra* note 66, at 82.

¹⁴⁴ For example, in one study, “[l]ow-attorney trust was associated with having a court-appointed attorney.” Boccaccini & Brodsky, *supra* note 66, at 82.

¹⁴⁵ Attorneys H and J, who are both training directors in statewide public defender systems, noted the lack of special assistance or training. Attorney J complained that “lawyers aren’t trained and law schools aren’t training students [to work with linguistically impaired clients]. And where is the support for lawyers with these clients?”

¹⁴⁶ See, e.g., Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT’G REP. 91, 91–92 (2012).

¹⁴⁷ During co-author Michele LaVigne’s conversations with the attorneys, they freely used language that might be considered vulgar or profane in another professional context. This was to be expected, since LaVigne is a former public defender and thus a member of the “closed subculture” of defense attorneys. See Dean A. Strang, *Becoming What We Pretend to Be: Signs of Values in the Casual Rhetoric of American Criminal Justice*, 24 WIS. J.L. GENDER & SOC’Y 313, 321, 329 (2009).

¹⁴⁸ Attorneys A and B both expressed concerns about the “polite” client. Attorney B

contract defender with a high felony caseload in an urban court system, was matter-of-fact about the grim realities of his practice: Court “starts at noon . . . Things need to keep plugging and chugging. . . With some clients who don’t really get it, I have to say ‘I can’t sit here any longer.’ In a perfect world we would do that of course, but I can’t. Do you ever have enough time?”¹⁴⁹

V. GETTING BEYOND “HE GOT IN MY FACE SO I SHOT HIM”

A. *For Lawyers*

In a perfect world, every attorney would have ready access to the services of an SLP who could assess clients’ communicative abilities and facilitate communication with any client. Of course, the world of indigent defense is far from perfect, and access to an SLP for even a small percentage of impaired clients is wishful thinking. This means that counsel will be forced to address clients with language impairments on a case-by-case basis and to develop an assortment of strategies for dealing with communication issues.

At the most extreme end will be the cases where the impairment interferes with the right to counsel at a fundamental constitutional level. Generally these cases will involve clients with severe language impairments that co-occur with other disabilities.¹⁵⁰ In those cases counsel should aggressively pursue the issue of competency and seek a court-ordered evaluation that includes a language assessment. A forensic evaluation that includes an evidence-based “second-generation adjudicative competency measure,”¹⁵¹ such as the MacArthur Competence Assessment Tool – Criminal Adjudica-

believes that judges conflate polite with intelligent. She gave a case example where the trial court said that the “polite” defendant was “highly intelligent,” but he had an IQ of 80. Attorney A said that “we confuse malleability with competence” and that judges overestimate the “kids who are well-behaved, looking intently, nodding.”

¹⁴⁹ Attorney G works half time as an associate in a law firm and half time as a contract defender. In his defender position, he is required to provide representation in 100 major felony cases, including child sexual assaults and non-capital homicides. At the time of the interview (Nov. 2011), he was paid \$250 per case. The National Legal Aid and Defender Association (NLADA) Standards for the Defense recommend a caseload of no more than 150 felonies per year for a full-time defender. STANDARDS FOR THE DEFENSE §§ 13.7, 13.12 (1973). NLADA also recommends that complex cases be given more “case points,” thereby reducing the number of felonies handled per year well below 150. NAT’L LEGAL AID & DEFENDER ASS’N, AM. COUNSEL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS 4–5 (2007), available at <http://www.nlada.org/DMS/Documents/1189179200.71/>.

¹⁵⁰ See LaVigne & Van Rybroek, *supra* note 5, at 42.

¹⁵¹ GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 149–55 (3d ed. 2007).

tion (MAC-CAT-CA)¹⁵² or the Evaluation of Competency to Stand Trial – Revised (ECST-R),¹⁵³ combined with a specialized language assessment by an SLP,¹⁵⁴ provides the best chance for accurate, reliable information about an individual’s actual abilities to consult with counsel, comprehend information, and make rational decisions.¹⁵⁵

Experience tells us, though, that clients with even severe language impairments can be found competent, especially in jurisdictions where courts and forensic examiners continue to rely on “crude method[s] of assessing [competency].”¹⁵⁶ What then? Counsel will still be facing communication deficits that make effective assistance a stretch, yet will be required to compensate. A responsible accommodation would be to hire an SLP as a consultant. SLPs are trained to work with areas “such as listening, understanding, vocabulary, narrative skills, speech production, fluency management, language skills, non verbal communication, appropriate assertive communication, social communication, and [even] interview[ing] and court preparation.”¹⁵⁷ An SLP would be able to assess a client’s communication levels, advise the attorney on her own communication methods to ensure maximum comprehension, and help the client provide a complete, meaningful narrative.¹⁵⁸

¹⁵² NORMAN G. POYTHRESS ET AL., *THE MACARTHUR COMPETENCE ASSESSMENT TOOL—CRIMINAL ADJUDICATION: PROFESSIONAL MANUAL* 6 (1999).

¹⁵³ RICHARD ROGERS ET AL., *EVALUATION OF COMPETENCY TO STAND TRIAL – REVISED: PROFESSIONAL MANUAL* (2004).

¹⁵⁴ For a description of standardized and non-standardized approaches for assessing communicative ability, see Vicki A. Reed, *Adolescents with Language Impairment*, in *AN INTRODUCTION TO CHILDREN WITH LANGUAGE DISORDERS* 168, 201–09 (3rd ed. 2005). We also recommend that counsel contact the examining psychologist to discuss the communication difficulties presented by the particular client.

¹⁵⁵ “Specialized tests of language functioning [used in conjunction with competency instruments] . . . often give a meaningful representation of what a defendant will actually hear or process, and what he or she will be able to communicate within the complexities of a real-time courtroom.” Mark Siegert & Kenneth J. Weiss, *Who Is an Expert? Competency Evaluations in Mental Retardation and Borderline Intelligence*, 35 J. AM. ACAD. PSYCHIATRY L. 346, 349 (2007). Even if the evaluating psychologist is not persuaded by the results of the language assessment, this information can be important fodder for cross-examination and the basis for arguing that the court should look beyond the psychologist’s opinion.

¹⁵⁶ Attorney H, who expressed serious doubts about the way competency is assessed in her state, used this phrase. Attorney F referred to these types of evaluations as “drive-bys.” Attorney B said that while competency assessments were improving for juveniles, they were still rudimentary for adults. Thus, in her experience, the issue was rarely raised in adult cases.

¹⁵⁷ Gregory & Bryan, *supra* note 8, at 207.

¹⁵⁸ See, e.g., Stone & Bryan, *supra* note 11, at 35–36. An SLP would also be an inval-

The SLP may also serve as an intermediary or “cognitive interpreter.”¹⁵⁹ This recommendation borrows from a model developed in Great Britain under the Youth Justice and Criminal Evidence Act 1999 for witnesses with learning disabilities.¹⁶⁰ The purpose of the act was to “improve the quality of a witness’s evidence in terms of completeness, coherence and accuracy.”¹⁶¹ Under the 1999 law, the intermediary helps the witness to understand the questions put to them by law enforcement or in court, and enables the court or police to understand the responses.¹⁶² In the attorney-client context, the intermediary would have a similar function. He or she could rephrase questions and comments from counsel and could actively participate in teasing out the client’s narrative.¹⁶³ When used in this fashion, the SLP has the same constitutional underpinnings as an interpreter.¹⁶⁴ The SLP/intermediary, just like an interpreter, may be necessary to ensure linguistically impaired defendants a meaningful right to counsel and justice.¹⁶⁵

And then there are the rest of the cases—the many cases in which the client is “competent” (though it is probably more accurate to say “not incompetent”) but impaired, and limited resources do not allow for an assessment, consultant, or intermediary. In these cases, counsel may feel that she is expected to handle yet another dilemma—for which she is not qualified—on her own. Luckily, speech-language experts who specialize in the forensic as-

able asset in helping counsel determine whether competency is an ongoing issue, whether a client’s statements to police were voluntarily made, and whether the client made a knowing, intelligent, and voluntary waiver of Miranda. Given the prevalence of language impairments among defendant populations, an in-house SLP would be a sound investment, at least in larger defender offices.

¹⁵⁹ Pamela Cooke & Graham Davies, *Achieving Best Evidence from Witnesses with Learning Disabilities: New Guidance*, 29 BRIT. J. LEARNING DISABILITIES 84, 85 (2001). Northern Ireland has begun using SLPs as intermediaries for defendants as well. Email from Alison McCullough, Northern Ireland Country Officer, Royal College of Speech & Language Therapists, Belfast, N. Ir. (Aug. 30, 2013) (on file with co-author Michele LaVigne).

¹⁶⁰ Cooke & Davies, *supra* note 159, at 84.

¹⁶¹ *Id.*

¹⁶² *Id.* at 85.

¹⁶³ In these cases, we envision that an SLP would function more as a deaf relay interpreter, used with a deaf client with limited language. See LaVigne & Vernon, *supra* note 28, at 880, 926.

¹⁶⁴ Most courts have refused to find a *per se* constitutional right to an interpreter. Rather, the right is derivative as a means of ensuring the right to counsel. See, e.g., *United States v. Mosquera*, 816 F. Supp. 168, 172–73 (E.D.N.Y. 1993).

¹⁶⁵ See AM. BAR ASS’N, STANDARDS FOR LANGUAGE ACCESS IN COURTS 19–25 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.

pects of language impairments have anticipated that lawyers and other legal professionals will often be forced to address the needs of linguistically deficient clients without the aid of a live speech-language professional, and have articulated techniques for addressing some of the issues.¹⁶⁶

The first task is to recognize a potential language disorder, bearing in mind that for many clients, the impairment will often not have been identified. There are well-established signs of language impairments that will be familiar to any experienced defense attorney.¹⁶⁷ These include: forgetting instructions; confusion when confronted with non-literal language such as idioms, metaphors, or sarcasm; talking a lot but saying little; difficulty asking questions; and a tendency to stray from the topic.¹⁶⁸ Narrative deficits may reveal themselves when the client “is required to respond to an unfamiliar topic or formulate answers to specific questions in extended discourse, especially when the answers are expected to be complete and fully explained.”¹⁶⁹

Where counsel suspects language and communication deficits, the initial step for the attorney is to not assume that the client is being difficult, although it may certainly appear that way, especially if the client is trying to hide his or her deficits.¹⁷⁰ In order to maximize the client’s comprehension, speech-language experts recommend that the attorney provide information in small chunks and make use of visuals such as gesture, role-play, and drawings.¹⁷¹ Attorneys are also encouraged to pay attention to the non-verbal signals that they themselves are giving.¹⁷² Individuals with language impairments, many of whom have gone through life labeled as “failures,” can be sensitive to facial expressions that show frustration or ridicule.¹⁷³

Professionals have similarly developed techniques for improving clients’ narratives. Sally Miles, a speech pathologist with a special interest in narrative deficits, describes the attorney seeking a narrative as “an archaeologist looking for shards.”¹⁷⁴ As this vivid analogy suggests, attorneys should not expect the client’s narrative

¹⁶⁶ Stone & Bryan, *supra* note 11, at 36.

¹⁶⁷ *Id.*; see also LaVigne & Van Rybroek, *supra* note 5, at 101–02.

¹⁶⁸ *Id.*

¹⁶⁹ *What’s the Story?*, *supra* note 39, at 247.

¹⁷⁰ Stone & Bryan, *supra* note 11, at 36.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Interview with Sally Miles, Ph.D., CCC-SLP, in Madison, Wis. (Apr. 18, 2012).

¹⁷⁴ *Id.*

to be delivered intact; rather, it will come in pieces and will emerge over time. Attorneys should be willing to revisit the narrative and to employ techniques such as role-playing and visuals. Where details are missing, the attorney should focus the client's attention to those areas and enlist the client's assistance in helping the attorney understand. This will often involve a combination of open-ended questions ("Tell me more about that.") with closed-ended directive questions ("When you say 'he got in your face,' show me exactly what he did.").¹⁷⁵

The lawyers we spoke with had their own ideas for improving the quality of communication. Narratives were of special concern, given their central role in the building of a defense. Attorney B likes to tell a client to "pretend that this is a movie," and asks for descriptions of what is on the screen.¹⁷⁶ She also tries to "walk [the client] back far enough" in order to develop context that might be missing from the client's original telling. Attorney A believes she can extract a meaningful narrative only if she and the client have a "long, slow conversation" geared primarily toward "uncovering the emotional content."¹⁷⁷ Attorney F uses a more formalized approach, putting the incident "into action" via the psychodrama technique taught at Gerry Spence's Trial Lawyer's College.¹⁷⁸ When confronted with a thin narrative like "He got in my face so I shot him," he will work with the client and shift the tense and person of the telling: "Dude shows up—what's he wearing? Become dude for me. Tell me what dude is thinking." If the client says some version of "I don't know," Attorney F will persist: "You can't give me that. What do you think dude is thinking? What's your guess?" Attorney F then asks the client to act out both roles. "You grab your gun. You have a little voice in your head. What's it saying?" Attor-

¹⁷⁵ Interview with Sally Miles, *supra* note 173. These are the same types of techniques found in programs designed to improve the narrative skills and overall communication abilities of adolescents and young adults in correctional institutions. *See, e.g.,* Gregory & Bryan, *supra* note 8, at 207 (intervention plans for youthful offenders include narrative skills). Special education teacher Arthur Gosselin uses a template with visual prompts to help inmates develop narratives that reflect more than just a time line. Interview with Arthur Gosselin, *supra* note 98.

¹⁷⁶ In contrast, Attorney J said she did not like the movie technique. However, Attorney J did agree with Dr. Miles' notion of "get[ting] the story in small pieces."

¹⁷⁷ Attorney D also emphasized the importance of eliciting "the emotional layer." Attorney A believed that "if you don't know how to uncover the emotional content, then the kid is incompetent."

¹⁷⁸ *See generally* Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1 (2001). Attorney F is a faculty member at the Trial Lawyer's College.

ney F believes that through this technique "a less verbal person can maybe get there, or can come close."

Making legal information comprehensible was the other obstacle the attorneys wrestled with. Attorney I suggested that attorneys develop "an array of ways of explaining" the myriad legal concepts, rules, and consequences. She saw this becoming all the more critical as the legal system moves toward increased reliance on densely worded forms and continues to impose "lists of rules that get longer." Attorney A recognized that "the language of informing the accused is difficult" whether in the police station or the lawyer's office, and described the job of the lawyer as "unpacking [the language and concepts] every step of the way." That means that attorneys cannot simply assume that "everybody knows that," but must start further back in explanations and should break free from legal language.¹⁷⁹ Attorney A also offered some very practical tips that she has picked up along the way in her extensive career:

Have the client describe non-criminal events in order to get a sense of his speech patterns and thought processes. This will give you a sense of the kind of language that may work with him.¹⁸⁰ And find out how the client covers "I don't understand." He may give a seemingly sophisticated response even though he doesn't get it.

Of course, we should not overlook the importance of training. As three of the lawyers told us, attorneys are not trained to either recognize or address language and communication deficits, despite the fact that they confront them regularly. The attorneys who discussed training were adamant that law school and continuing legal education programs need to incorporate communication with a range of clients, including those with limited language skills.

Finally, we would be remiss if we did not discuss the elephant in the room for all lawyers: time. There is no doubt that a meaningful, custom-designed conversation with a linguistically deficient client can take more time than a standard, checklist-type interview. But the attorneys who talked about this issue also believed that the extra time is worth it, paying dividends in important details, a deeper narrative, and enhanced comprehension by the client. Speech-language professionals concur, maintaining that because of the improved communication, taking the extra time and effort will

¹⁷⁹ LaVigne & Vernon, *supra* note 28, at 862–64 (knowledge deprivation is an effect of language deprivation); *see also* LaVigne & Van Rybroek, *supra* note 5, at 103–05.

¹⁸⁰ Attorney A's suggestion is similar to a recommendation made by noted SLPs Kathryn Stone and Karen Bryan. Stone & Bryan, *supra* note 11, at 36 ("[O]bserve what helps.").

often be more efficient and may, in the end, even save time.¹⁸¹ Moreover, as counsel becomes more familiar with techniques for recognizing and addressing language impairments, many interviews will become less of a struggle.

B. Not Just for Lawyers

Although the quality of communication within the attorney-client relationship rests primarily with the individual lawyer, we cannot overlook the fact that attorneys operate within a larger system, and too often that system is at odds with effective representation, especially for the client with special needs. The main problem is that all segments of the legal system place a premium on speed and numbers, and too often adequate communication, effective assistance of counsel, and due process are far down the priority list.¹⁸² More than one commentator has likened the criminal justice system “to fast-food restaurants.”¹⁸³ Attorney D described it as “a system built on ‘got to run these clients through.’”

Excessive attorney caseloads are of course a major contributor to poor attorney-client communication. The staggering number of cases shouldered by many public defenders and contract defenders often make it impossible to communicate in more than a perfunctory way.¹⁸⁴ And lack of resources for expert assistance only makes the situation worse.

But courts and prosecutors exert their own pressures that compromise the quality of communication. Attorney K offered the extreme example of a homicide case where, because of a scheduling conflict, he had not had the opportunity to discuss the presentence investigation with his client prior to the sentencing hearing. Rather than grant a continuance, the trial judge gave Attorney K “one hour to read the PSI [presentence investigation] in the bullpen¹⁸⁵ to [the] client before sentencing.” To which Attorney K could only

¹⁸¹ Stone & Bryan, *supra* note 11, at 36.

¹⁸² See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013) (describing the effects of inadequate funding and high volume on the quality of defense services).

¹⁸³ *Id.* at 2172.

¹⁸⁴ In some defender offices, caseloads are so high that the average amount of time spent per case is measured in minutes. Hannah Levintova, *Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013, 3:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts>.

¹⁸⁵ In Attorney K's county, the bullpen is a large holding cell for multiple jail inmates waiting to be brought into court. The PSI was not submitted to the court until three days before the sentencing. Meanwhile, Attorney K was in a three-day jury trial in another court.

say, “What am I supposed to do with that?” More routine are the judges who give defense attorneys “five minutes to explain the proceedings to your client” or prosecutors who make a plea offer “good for only a half an hour.”¹⁸⁶

Trying to improve the quality of communication within such an entrenched system of “McJustice”¹⁸⁷ can seem like a fool’s errand. Yet there are remedies that are not out of reach.

The first source of system improvement must be lawyers themselves. Four of the attorneys we spoke with thought that lawyers bear some responsibility for the external conditions that prevent adequate communication. Two of the attorneys used the word “complicit” as they talked about how attorneys accede to time and caseload pressures, knowing that communication has been substandard, that clients lack adequate comprehension, and that they (the lawyers) may have missed part of the client’s story. Another was perhaps less circumspect, but equally aware: “Sometimes [expletive] just has to proceed . . . I just proceed.” Attorney C posited that attorneys have both an ethical and a constitutional obligation to stop the conveyor belt—to inform supervisors and courts when there are communication problems and to advocate for additional time and resources. Attorney C’s position is supported, and in fact mandated, by the Rules of Professional Conduct.¹⁸⁸

Governmental agencies and funding sources have a corresponding constitutional and ethical obligation to bring defender caseloads within acceptable limits, as countless others have argued.¹⁸⁹ But clients with language disabilities present an additional layer that requires a more nuanced approach beyond pure numbers. Resources for speech-language experts would obviously be an important start. We also recommend case weighting or “case points” for a client with severe language disabilities. Case weighting is a system that acknowledges that certain types of cases take more time than others, and should be worth more points when calculat-

¹⁸⁶ As a former public defender, co-author Michele LaVigne is well-acquainted with these practices. Commonly, plea offers have expiration dates and times. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

¹⁸⁷ Bright & Sanneh, *supra* note 182.

¹⁸⁸ *See State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 607–12 (Mo. 2012); MODEL RULES OF PROF’L CONDUCT RS. 1.1, 1.3, 1.4, 1.7 (2011); Bright & Sanneh, *supra* note 182.

¹⁸⁹ Even *USA Today* has bemoaned the fact that “[a]n explosion in the number of criminal cases has overwhelmed the indigent defense system, which represents about 80% of all accused.” Rick Hampson, *You Have the Right to Counsel. Or Do You?*, *USA TODAY* (Mar. 12, 2013, 7:09 PM), <http://www.usatoday.com/story/news/nation/2013/03/12/you-have-the-right-to-counsel-or-do-you/1983199/>.

ing an attorney's workload.¹⁹⁰ A client with serious language and communicative deficiencies warrants that same attention. This type of approach would create incentives for identifying and meeting the myriad needs connected with language impairments.

Judges have their own obligation to improve the quality of communication. Judges frequently make a determination of a client's comprehension on the attorney's assurances that she has "explained" the process, the charges, and the consequences, and that she has had enough time with her client. Those assurances are not sufficient.¹⁹¹ The judge should make an independent inquiry to determine whether the client in fact understands. As part of this inquiry, judges should engage in a dialogue with the defendant, even if for only a short period. If done properly, these conversations can reveal language and communication deficits that require further exploration.¹⁹² And if more time is needed, it should not be treated as a crisis. While "most trial judges are under considerable calendar constraints," the client's constitutional rights are of "paramount importance."¹⁹³

The same can be said of prosecutors, whom Attorney J maintains have been "insulated" from the communication problems that attorneys confront with clients. After *Missouri v. Frye*¹⁹⁴ and *Laf-ler v. Cooper*,¹⁹⁵ a lawyer's ability to communicate effectively with her client is an issue that prosecutors can no longer ignore. A prosecutor's acquiescence to, or insistence on, "meet 'em and plead 'em" deals flies in the face of a client's right to effective assistance of counsel. The lawyer who wisely says, "I need more time with my client," should not be risking enhanced penalties for her client.¹⁹⁶ To place counsel in such an untenable position may be depriving

¹⁹⁰ See, e.g., NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 140–151 (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/lis_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

¹⁹¹ *State v. Brown*, 716 N.W.2d 906, 921–22 (Wis. 2006); but cf. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

¹⁹² Judges, like lawyers, should also be trained about language impairments. Judges should be encouraged to deviate from "the standard script of 'yes-and-no' type colloquies that permeate so many of our judicial tasks." *Strook v. Kedinger*, 766 N.W.2d 219, 231–32 (Wis. 2009); see also LaVigne & Van Rybroek, *supra* note 5, at 116–17.

¹⁹³ *State of Wisconsin v. Bangert*, 389 N.W.2d 12, 28 (Wis. 1986) (citing *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969)).

¹⁹⁴ 132 S. Ct. 1399, 1408 (2012) ("Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

¹⁹⁵ 132 S. Ct. 1376, 1383–84 (2012) (finding lawyer's performance deficient when he erroneously told defendant the state could not prove intent).

¹⁹⁶ Prosecutors have wide latitude to condition plea offers on waivers of rights, ac-

the client not only of his right to effective assistance of counsel, but of his right to counsel period.¹⁹⁷

VI. CONCLUSION

It is probably inevitable that the attorney-client relationship is the aspect of the legal system hardest hit by the insidious effects of language impairments. By its very nature, the defense function depends on the ability of two human beings to interact at a deeply intimate and complex level. Attorney F put it this way: "What is the attorney-client relationship? It's us trying to help [clients] through a minefield and to help them find ways to make the best possible choices . . . to help them manage an impossible situation." Though he did not use the words "communication" or "language," Attorney F was telling us in no uncertain terms that in the attorney-client relationship, communication matters.

At first glance, the problems posed by language impairments may seem insurmountable, especially for lawyers who are already under tremendous caseload, resource, and time pressures. But adequate communication is so essential to the effective operation of the attorney-client relationship, and ultimately to the overall quality of justice, that we cannot ignore the prevalence of language impairments among the people on attorney caseloads and court dockets. We cannot let ourselves be satisfied with fractured comprehension of legal information, inability to work meaningfully with counsel, uninformed decision-making, and "thin narratives." Addressing communication and language issues will never be a complete fix for all impaired clients whose multitude of needs are in direct conflict with an overloaded legal system; but for many it can improve the connection between attorney and client, increase the quality and quantity of information exchanged, and facilitate better-informed analysis and decision-making. That would be a good result all around.

cess to information, and acceptance by a certain date and time. *See* Bright & Sanneh, *supra* note 182. *See also* Bordenkircher v. Hayes, 434 U.S. 357, 363–64 (1978).

¹⁹⁷ United States v. Cronin, 466 U.S. 648, 659–60 (1984) (noting circumstances when, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate").

**SINGLE-ROOM OCCUPANCY HOUSING
IN NEW YORK CITY: THE ORIGINS AND
DIMENSIONS OF A CRISIS**

Brian J. Sullivan[†]
Jonathan Burke^{††}

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INTRODUCTION

Single-room occupancy (SRO) housing once dominated the New York City housing market. As recently as the mid-twentieth century, there were hundreds of thousands of SROs spread throughout the City. Today, following a half-century of concerted attacks by City government, SROs constitute a fraction of a single percent of New York's rental housing stock.¹

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¹ In the mid-twentieth century there were approximately 200,000 SRO units in New York City. See Malcolm Gladwell, *N.Y. Hopes to Help Homeless by Reviving Single Room Occupancy Hotels*, L.A. TIMES (Apr. 25, 1993), http://articles.latimes.com/1993-04-25/news/mn-27098_1_single-room-occupancy-hotels. By 1993 there were approximately 46,744 SRO units. ANTHONY J. BLACKBURN, SINGLE ROOM LIVING IN NEW YORK CITY 15 (1996). By 2002 this number had dropped to 35,227. See U.S. CENSUS BUREAU, SER. IA, TBL. 15, NEW YORK CITY HOUSING AND VACANCY SURVEY (2002), <http://www>.

The City's decimation of SRO housing has amplified the ongoing housing crisis, constricting the low-income housing market and contributing to the ballooning homelessness problem. The overall effect on poor and working-class residents has been tragic.

The current dearth of SRO units is not the inevitable result of impersonal or unalterable market forces. City policy, acting dynamically with market forces, is responsible for the crisis, and a change in policy can undo the damage. If City and State are serious about confronting New York City's housing crisis, existing SRO policies need to be changed and their legacy confronted. City and State must take steps to permit and encourage the expansion of the SRO housing stock. This effort will require stemming the conversion of existing SROs to other (higher profit) uses and creating legal avenues for the construction or reconversion of additional units.

This Article will analyze the role of SROs in the City's housing market. We will discuss the importance of SRO housing and the history of SRO policy. We will briefly describe the nature of the City's housing crisis and the role SROs play in that crisis. Finally, we will make several suggestions as to how SRO policies should be changed to alleviate the impact of the housing crisis on low-income City residents.

census.gov/housing/nychvs/data/2002/s1at15.html. See also Corey Kilgannon, *Be It Ever So Humble. O.K., It's Shabby*, N.Y. TIMES (Aug. 25, 2005), <http://www.nytimes.com/2005/08/25/nyregion/25hotel.html>. The best available census data suggests that between 2000 and 2010 the number of SROs ranged between approximately 25,000 and 35,000 units. See U.S. CENSUS BUREAU, SER. IA, TBL. 15, 2005 NEW YORK CITY HOUSING AND VACANCY SURVEY (2005), <http://www.census.gov/housing/nychvs/data/2005/s1at15.html>; U.S. CENSUS BUREAU, SER. IA, TBL. 15, 2008 NEW YORK CITY HOUSING AND VACANCY SURVEY (2008), <http://www.census.gov/housing/nychvs/data/2008/ser1a.html> (follow link at "New York City Structure Class"); U.S. CENSUS BUREAU, SER. IA, TBL. 15, 2011 NEW YORK CITY HOUSING AND VACANCY SURVEY (2011), <http://www.census.gov/housing/nychvs/data/2011/ser1a.html> (follow link at "New York City Structure Class"). Current estimates used by advocates and government agencies range from approximately 15,000 to 35,000 units. See, e.g., GODDARD RIVERSIDE WEST SIDE SRO PROJECT, Testimony by Tenant Organizer Yarrow Willman-Cole and Former Supervisor of Organizing Terry Poe (May 2, 2008) (on file with co-authors). The variance is at least in part attributable to the fact that estimates of the number of SROs frequently measure different things, such as the number of occupied or habitable units versus the number of units registered with the State pursuant to the rent regulation laws. Overall, there are more than 2.1 million rental units (not owner occupied) in New York City. FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, RENT STABILIZATION IN NEW YORK CITY 3 (2012) [hereinafter N.Y.C. RENT STABILIZATION], available at http://furmancenter.org/files/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf.

I. THE BASICS OF SRO HOUSING

*“I have principally, over my lunch break, gone to the books in order to learn how you become a tenant in a stabilized hotel [SRO]. And the law in the hotel context is very, very different from the law in the apartment context.”*²

SROs are perhaps the most basic form of housing available in New York City.³ Generally, an SRO is a “unit with one or two rooms . . . lacking complete bathroom and/or kitchen facilities for the exclusive use of the tenant.”⁴ Most SRO tenants live in single rooms and share bathroom facilities located in the common areas of the building; lack of access to kitchen facilities of any sort is common.

Beyond these basic similarities, SROs vary significantly.⁵ They exist in hotels, rooming houses, apartment buildings, lodging houses, and so forth.⁶ Some SROs, such as Bowery flophouses, are simply beds in a cubicle with a wire mesh ceiling, while others more closely resemble traditional hotel rooms with linen and other services (though this form of SRO is very rare). Some appear as small studios without private bathrooms. City and State laws do a poor job of coherently dealing with this heterogeneity.⁷

SRO units are subject to rent stabilization if they meet certain

² 1234 Broadway v. Kruttack, No. L&T 94541/06, slip. op. at 3 (N.Y. Civ. Ct. Hous. Part Jan. 25, 2008) (Schneider, J.).

³ Even the most rudimentary SRO room—four plywood walls and a chicken wire ceiling—constitute dwelling units that must be maintained by property owners in a habitable condition. See N.Y.C. ADMIN. CODE §§ 27-2004(3), 27-2005 (2013).

⁴ BLACKBURN, *supra* note 1, at 13.

⁵ *The New York Times* has disparagingly characterized SRO heterogeneity as follows: “They range from the squalid, degrading and dangerous at the bottom to the spare, poor but reasonably clean and safe at the top.” Richard Bernstein, *At S.R.O.’s, Quality Varies Yet Squalor Is Common*, N.Y. TIMES (June 12, 1994), <http://www.nytimes.com/1994/06/12/nyregion/at-sro-s-quality-varies-yet-squalor-is-common.html>.

⁶ SROs may exist in both Class A (permanent occupancy) and Class B (temporary occupancy) multiple dwellings. See N.Y. MULT. DWELL. LAW § 4(7)–(9) (McKinney 2013).

⁷ There is no common definition of *SRO* in the basic housing laws. In the Multiple Dwelling Law (MDL) and Housing Maintenance Code (HMC), “Single Room Occupancy” is a form of occupancy, not a type of unit:

[T]he occupancy by one or two persons of a single room, or of two or more rooms which are joined together, separated from all other rooms within an apartment in a multiple dwelling, so that the occupant or occupants thereof reside separately and independently of the other occupant or occupants of the same apartment.

N.Y. MULT. DWELL. LAW § 4(16). See also N.Y.C. ADMIN. CODE § 27-2004(17) (2013). Subject to several exceptions, the HMC and MDL use *rooming unit* in place of *SRO*. The Rent Stabilization Code (RSC) uses an entirely different set of terms, which are inconsistent with the MDL and HMC, to refer to SROs. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 9, § 2521.3(c) (2013) (suggesting that “single room occupancy facilities” may be defined as “hotels”).

criteria.⁸ SRO units located within hotels⁹ are regulated if the rent was less than \$350 per month, or \$88 per week, on May 31, 1968; if the hotel was built before July 1, 1969; and if the hotel contains six or more units.¹⁰ All other SRO units are subject to regulation if located in a building containing six or more units that was constructed prior to January 1, 1974.¹¹ The New York State Division of Housing and Community Renewal (DHCR) together with New York State Courts, have the authority to determine, upon application, whether an SRO unit is subject to rent stabilization.¹²

In recognition of the unique nature of SRO housing, the rules governing SRO tenancies are “very different” from those governing

⁸ N.Y. UNCONSOL. LAW § 26-506(a) (McKinney 2013); N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11. The rent regulatory status of SROs was, for some time, contested. The issue was not settled with any degree of certainty until the late 1990s. City and State enacted various rent regulation laws between 1946 and 1974. In 1981, the Court of Appeals held that (most) SROs were not covered by these laws and thus they were not regulated. *La Guardia v. Cavanaugh*, 53 N.Y.2d 67, 76–80 (1981) (applying holding to Class B multiple dwellings). The New York State legislature almost immediately passed a law intended to reverse the decision. *See Tegreh Realty Corp. v. Joyce*, 451 N.Y.S.2d 99, 100 (1st Dep’t 1982). Then, in 1997, the Court of Appeals ruled that even the most basic SROs were regulated. *See Gracecor Realty Co. v. Hargrove*, 90 N.Y.2d 350, 354 (1997) (holding that a “partitioned space” in a lodging house was subject to rent stabilization).

⁹ *Hotel* is not defined in the Rent Stabilization Law (RSL) except in the following passing statement:

[A]ny Class A multiple dwelling . . . commonly regarded as a hotel, transient hotel or residential hotel, and which customarily provides hotel service such as maid service, furnishings and laundering of linen, telephone and bell boy service, secretarial or desk service and use and upkeep of furniture and fixtures[.]

N.Y. UNCONSOL. LAW § 26-504(a)(1)(e). Note that all Class B units are exempt from this definition. The RSC expands *hotel* to include “[a]ny class A or Class B [unit] which provides all of the services included in the rent as set forth in section 2521.3 of this Title.” *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(b). The services enumerated in section 2521.3 are “maid service . . . linen service, furniture and furnishings . . . and [a] lobby staffed 24 hours a day, seven days a week.” N.Y. COMP. CODES R. & REGS. tit. 9, § 2521.3(a). Subsection (c) further complicates matters by providing that SRO facilities “such as single-room occupancy hotels or rooming houses . . . shall be included in the definition of hotel as set forth in section 2520.6(b) . . . except that the four minimum services enumerated in such section shall not be required to be provided . . .” N.Y. COMP. CODES R. & REGS. tit. 9, § 2521.3(c).

¹⁰ N.Y. UNCONSOL. LAW § 26-506(a); N.Y. RENT STAB. § 2520.11(g) (McKinney 2013).

¹¹ N.Y. UNCONSOL. LAW § 8625(a)(4)–(a)(5) (McKinney 2013); *see also* N.Y. UNCONSOL. LAW § 26-504(b).

¹² *See* N.Y. UNCONSOL. LAW § 26-506(b); *see generally* *Gracecor*, 90 N.Y.2d 350. *See also* Marti Weithman & Gerald Lebovits, *Single Room Occupancy Law in New York City*, 36 N.Y. REAL PROP. L.J. 21 (2008) (discussing SRO law).

apartments.¹³ An individual residing in an SRO may become a stabilized tenant—referred to as a *permanent tenant*—by requesting a six month lease or continuously residing in the building as her permanent residence for six months.¹⁴ All SRO residents who are not permanent tenants are classified as “hotel occupant[s]” and have a protected right to become a permanent tenant.¹⁵ The New York City Housing Court has gone so far as to hold that an individual need not be a legal occupant of an SRO unit in order to become a permanent tenant.¹⁶

II. THE NEED FOR SRO HOUSING

“Inside New York City’s remaining . . . units of single-room-occupancy housing—often criticized for their squalor—are some of the city’s most vulnerable people. The poor and the elderly mix with the crippled and the alcoholic, the drug-addicted and the mentally ill, each holding on to a fragile independence. . . . Until a decade ago the hotels were hardly considered a valuable resource. . . . But their vital role as shelters for the poor [has become] evident[.]”¹⁷

SROs are housing of last resort—the safety net at the bottom of the market providing shelter for the poor and near-poor. Rents for SRO units are lower than those for any other form of unsubsidized housing. The median rent for an SRO unit is between \$450 and \$705 per month.¹⁸ By comparison, the median

¹³ 1234 Broadway v. Kruttack, No. L&T 94541/06, slip. op. at 3 (N.Y. Civ. Ct. Hous. Part Jan. 25, 2008) (Schneider, J.).

¹⁴ N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.6(j), (m); *see also id.* § 2522.5(a)(2) (stipulating that a hotel occupant renting a room who has never had a lease may request a lease and then become a permanent tenant for a term of at least six months, but the lease need not be renewed).

¹⁵ *Id.* § 2520.6(m).

¹⁶ *See Kruttack*, slip. op. at 6; *but see* 1234 Broadway LLC v. Pou Long Chen, 938 N.Y.S.2d 228 (Table), 2011 WL 4026908 (App. Term 1st Dep’t Sept. 9, 2011) (holding that someone who came into possession of an SRO unit through an illicit arrangement with a long-absent prime tenant and who had in no way communicated with, made herself known to, or received permission from the landlord was not entitled to possession of the SRO unit).

¹⁷ Suzanne Daley, *Court Ruling Brings Fear to S.R.O. Hotel Rooms*, N.Y. TIMES (July 10, 1989), <http://www.nytimes.com/1989/07/10/nyregion/court-ruling-brings-fear-to-sro-hotel-rooms.html>.

¹⁸ *See* Memorandum from N.Y.C. Rent Guidelines Board for All Board Members 4 (June 12, 2012) (on file with co-authors). These figures are based on testimony offered to the Rent Guidelines Board by Goddard-Riverside’s West-Side SRO Law Project in 2008 and data they derived from the 2002 Housing and Vacancy Survey. We cite a range rather than a single figure here for two reasons. First, there is a high degree of variance in SRO units and an accordingly high variance in rent charged. Second, unlike other units, SROs are rarely singled out or disaggregated from census rent data, and therefore precise information on rental rates is more difficult to find.

rent for a rent-controlled unit is \$895 per month; for a rent-stabilized unit is \$1,160; and for an unregulated unit is \$1,510.¹⁹

SROs are frequently the *only* form of housing affordable to poor households. Rent is affordable for a poor New York City household at the (maximum) rate of \$600.60 per month.²⁰ The median rent-controlled unit (the next cheapest form of housing after SROs) is therefore almost \$300 per month too expensive for a poor household.²¹ For New Yorkers who live on Social Security or public assistance, there are few affordable rental units in the City. As of January 2014, the SSI benefit rate for a one-person household is \$808 per month.²² New York City's Human Resources Administration (HRA or Public Assistance) pays a shelter allowance of \$215 per month for a single individual.²³

There is an uncontested relationship between the availability of SRO housing and homelessness.²⁴ The loss of SRO units over recent decades has opened a gaping hole at the affordable end of the housing market, with predictable effects: the loss of low-rent SRO units simultaneously pushed poorer households into the streets and (temporarily) into higher-rent units, which put pressure on the middle of the market. Now, the City is suffering

In the past, the Rent Guidelines Board has refused to base estimates of SRO rents on registered rents on the ground they are unreliable. N.Y.C. RENT GUIDELINES Bd., EXPLANATORY STATEMENT—HOTEL ORDER #37, at 8 n.4 (June 27, 2007), *available at* <http://www.nycrgb.org/downloads/guidelines/orders/hotelES37.pdf>.

¹⁹ MOON WHA LEE, N.Y.C. DEP'T OF HOUS. PRES. & DEV., SELECTED INITIAL FINDINGS OF THE 2011 NEW YORK CITY HOUSING AND VACANCY SURVEY 6 (2012), *available at* <http://www.nyc.gov/html/hpd/downloads/pdf/HPD-2011-HVS-Selected-Findings-Tables.pdf>. We use gross rather than contract rent as the vast majority of SRO rents includes utilities.

²⁰ *See id.* at 4. The annual median income for all households in 2010 was \$48,040. A poor or low-income household is one with annual income of 50% or less of Area Median Income (AMI). Fifty percent of AMI is \$24,020 annually, or approximately \$2,002 per month. Thirty percent of \$2,002 is \$600.60. This calculation uses the AMI reported in the 2011 Housing and Vacancy Survey. Except where otherwise noted, when AMI is used in this paper it will refer to the 2011 Housing and Vacancy Survey. Regarding the rate at which rent is affordable, *see infra*, note 104.

²¹ *See* LEE, *supra* note 19, at 5–6.

²² SOC. SEC. ADMIN., SUPPLEMENTAL SECURITY INCOME (SSI) IN NEW YORK 2 (2014), *available at* <http://www.ssa.gov/pubs/EN-05-11146.pdf>.

²³ CMTY. SERV. SOC'Y, PUBLIC BENEFITS FOR LOW-INCOME INDIVIDUALS AND FAMILIES: APPLYING FOR AND USING PUBLIC BENEFIT PROGRAMS: CASH ASSISTANCE 3 (2013), *available at* <http://benefitsplus.cssny.org/system/files/benefit-tools/attachments/Cash%20Assistance.pdf>.

²⁴ In 1980, a survey of the City shelter population indicated that approximately 50% of homeless men had previously resided in an SRO. *See* Gladwell, *supra* note 1. *See also* Daley, *supra* note 17 (recounting that large numbers of the City's homeless once lived in rooming houses); BLACKBURN, *supra* note 1, at 8.

through “all-time record high”²⁵ levels of homelessness.²⁶ More than 50,000 New Yorkers sleep in homeless shelters each night.²⁷ Contrary to former Mayor Michael Bloomberg’s diagnosis, this crisis is not due to “pleasurable” conditions in City shelters.²⁸ Rather, it is, in part, a result of the City’s short-sighted SRO and affordable housing policies.

III. THE DESTRUCTION OF SRO HOUSING

*“What happened in New York was a great irony. We had literally hundreds of thousands of SRO units that provided housing to large segments of the population. Then the city decided that it was inadequate and unsuitable and developed zoning provisions and incentives to put them out of business. The result is the enormous homeless mess we have now.”*²⁹

SRO housing is as old as New York City itself. For a significant period of the City’s history, a majority of the housing stock consisted of shared-living units that would today be considered SROs.³⁰ Until the twentieth century, SROs housed a broad,

²⁵ According to Coalition for the Homeless, in 2012 “New York City’s homeless shelter population soared to its highest levels ever, with more than 43,000 homeless New Yorkers—including a record 17,000 children—bedding down each night in municipal shelters.” PATRICK MARKEE, COAL. FOR THE HOMELESS, STATE OF HOMELESSNESS 2012, at 2 (2012), <http://www.coalitionforthehomeless.org/pages/state-of-the-homeless-2012>.

²⁶ Gladwell, *supra* note 1 (quoting a housing advocate attributing the “homelessness mess” to the loss of SRO units).

²⁷ COAL. FOR THE HOMELESS, NEW YORK CITY HOMELESSNESS: THE BASIC FACTS 1 (last updated March 2014), *available at* http://coalhome.3cdn.net/82168330ff3993c0c8_2nm6bn760.pdf. This figure marks the high point thus far in a disturbing upward climb in the homeless population over the past two decades. *See also* N.Y.C. RENT GUIDELINES Bd., 2012 INCOME & AFFORDABILITY STUDY 13 (2012), *available at* http://www.nycrgb.org/downloads/research/pdf_reports/ia12.pdf (indicating that each night, an average of 37,765 persons stayed in City shelters during 2011, up 1,589 persons from a year earlier, and up considerably from the average of 20,000 to 25,000 found in the 1990s).

²⁸ Edgar Sandoval & Erin Durkin, *Rats Are Coming Through the Walls and Worms Infest the Bathrooms at City’s Homeless Shelters. But Mayor Bloomberg Says They’re So Pleasurable that No One Wants to Leave*, N.Y. DAILY NEWS (Aug. 23, 2012), <http://www.nydailynews.com/new-york/rats-coming-walls-worms-infest-bathrooms-city-homeless-shelters-mayor-bloomberg-pleasurable-leave-article-1.1143270>.

²⁹ Direct quote of Dan Margolis, director of the Community Housing Improvement Program, as reported by Gladwell, *supra* note 1.

³⁰ In an interview with *The New York Times*, Dr. Anthony Blackburn, *see supra* note 1, said:

If you go back 150 years, most housing involved some form of shared living. . . .

 There were tenements where people shared water taps and water closets . . . boarding houses, where residents received dining-room service; rooming houses, which were typically converted brownstones with one

socioeconomically diverse population.³¹ From the early 1900s SROs increasingly became housing for single, working-class, and poor men (and, to a lesser extent, women).³²

Inchoate hostility toward “congregate living” has been a feature of City politics since at least the mid-nineteenth century.³³ However, City housing policy only turned comprehensively against SROs in the mid-1950s. Beginning around 1955, and continuing for nearly three decades thereafter, the City attempted to eliminate SRO housing.³⁴

The City’s anti-SRO policy was born out of the explosive growth of low-rent SRO units during the Great Depression and the WWII era. In the 1920s, landlords began (largely illegally) dividing larger units into small SROs to rent to the unemployed and newly poor. Through the 1930s and 1940s, landlords continued to convert units to accommodate workers seeking jobs in the City’s wartime munitions factories, and then returning soldiers, migrants from the South, and immigrants (largely from Puerto Rico).³⁵

The appearance of the new SROs had two important effects. First, the new units greatly increased the visibility of SRO housing. By mid-century, the total number of SRO rooms had risen above 200,000—more than 10% of the City’s rental stock.³⁶ Second, when added to the existing stock of low-rent units in rooming and lodging houses, the new SROs intensified connections between

bath per floor and no cooking facilities. . . . Basically, all these forms would, by today’s definition, be called SROs.

Dennis Hevesi, *Building Homes for the Single Homeless*, N.Y. TIMES (Apr. 25, 1999), <http://www.nytimes.com/1999/04/25/realestate/building-homes-for-the-single-homeless.html>.

³¹ As late as 1926, *The New York Times* could editorialize that “the perfect apartment, at least in New York, is probably in a residential hotel.” PAUL GROTH, *LIVING DOWNTOWN: THE HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES* 3 (1999); *see id.* 20–24.

³² BLACKBURN, *supra* note 1, at 6–7; *see also* GROTH, *supra* note 31, at 104–05.

³³ *See* GROTH, *supra* note 31, at 221, 238 (citing examples of hostility to SROs in New York City, particularly among police and judges, dating back to the nineteenth century); *see id.* at 13 (“Although the term ‘SRO’ is relatively new, for at least one hundred years . . . commentators have railed against the real and implied dangers of single room housing.”).

³⁴ BLACKBURN, *supra* note 1, at 7; *see generally* Hevesi, *supra* note 30.

³⁵ *See* Hevesi, *supra* note 30; *see also* BLACKBURN, *supra* note 1, at 6.

³⁶ *See, e.g.*, Gladwell, *supra* note 1 (reporting that “[b]y the post-war 1940s, there were almost 200,000 [SROs]”); *see also* U.S. CENSUS BUREAU, 1950 CENSUS OF HOUSING, VOL. II: NON-FARM HOUSING CHARACTERISTICS, PT. 4, SEC. 3, TBL.G-2, CONTRACT MONTHLY RENT OF RENTER-OCCUPIED DWELLING UNITS, FOR THE CITY OF NEW YORK (indicating that there were approximately 1,885,000 renter-occupied units in New York City).

“SRO housing,” “bad housing,” and the poor.³⁷

SRO growth thus worked to focus the hostility of “good government types” discomfited by the living conditions of the poor—and the poor themselves.³⁸ New York’s anti-SRO activists and officials were the heirs of its Progressive Era reformers.³⁹ While animated by a desire to do good, their actions reflected the Progressive conception of the “housing problem,”⁴⁰ informed by class biases, social prejudices, and varying degrees of xenophobia and racism.⁴¹ The tipping point for these reformers was crossed when poor families—particularly, and not inconsequentially, immigrant families—began moving into the new SROs in large numbers.⁴² By the early 1950s, families with children had replaced

³⁷ See Gladwell, *supra* note 1 (reporting that in the post-WWII era SROs were known as “short term housing for the working poor” and “soon acquired an unsavory reputation”).

³⁸ This characterization is Blackburn’s. See generally BLACKBURN, *supra* note 1.

³⁹ GROTH, *supra* note 31, at 203–33, 238–46 (describing nineteenth and twentieth century origins and details of housing reform movement, and noting central role of reformers and activists based in New York).

⁴⁰ *Id.* at 241.

⁴¹ *Id.* Groth recounts the influence of the Progressive Era view that “the solution of the housing problem . . . is to be found chiefly in legislation preventing the erection of objectionable buildings and securing the adequate maintenance of all buildings.” He also traces the heritage of the anti-SRO movement:

[Early SRO critics] were generally self-appointed and wealthy businessmen—or their wives or minions—who volunteered their time and considerable talents for public good. . . . Given their personal class origins, most progressive reformers did not see low wages, uneven work availability, or industrial leadership as being primarily culpable for the urban chaos. . . . Like other Progressive Era figures, urban activists initially attacked the problems of downtown [or SRO] living as moral and cultural failures. They saw new ethnic, religious, and political subcultures as threatening to hard-won changes in polite family life. . . . The reformers were convinced that stronger, centrally ordained, and better-enforced building rules would bring uplift to the lower class and civic betterment to the city as a whole. . . . Better housing meant not only better environmental health but also better social control. Promotion of material progress became a prime tool of social engineering. . . . Even when they were not acting en masse in some political agitation, hotel people seemed to be forming subcultures that deepened the social schisms of the time and weakened the cultural hegemony of the middle and upper class. Reformers saw these dangers as an assault on the urban polity as a whole Stated most simply, to its critics the continued existence of hotel life worked against the progress of the grand new city. In the biological analogies of the day, the residential hotel buildings themselves served as incubators of old-city pathologies. For the reformers working on the new city, single-room dwellings were not a housing resource but a public nuisance.

Id. at 202–31.

⁴² Gladwell, *supra* note 1 (“In a few celebrated cases, chaotic conditions resulted

single adults as the predominant occupants of the new SROs.⁴³

The City quickly moved to put SROs “out of business.”⁴⁴ Beginning in 1955, and continuing through the 1970s, the City enacted a series of measures that drastically shrank the SRO housing stock and irreversibly altered patterns of SRO occupancy. The City banned the construction of new SRO units,⁴⁵ restricted SRO occupancy to exclude families,⁴⁶ mandated the reconversion of many of the new SRO units,⁴⁷ altered building and zoning codes to discourage SRO occupancy,⁴⁸ and, from the mid-1970s until the 1980s, provided tax incentives to encourage the conversion of all SRO units to (higher rent) apartments.⁴⁹

The 1970s were particularly disastrous for SROs. By the end of the decade, the City was granting tax breaks to landlords to convert more than 40 SRO buildings a year.⁵⁰ According to one study by the State Assembly, between 1976 and 1981 the City’s tax program caused the elimination of nearly two-thirds of all remaining SRO units.⁵¹

The City’s tax program amplified the impact of market forces pushing landlords away from SRO housing. Throughout the 1960s, landlords were tempted to convert SROs into high rent apartments as demand for luxury housing increased in previously marginal neighborhoods. The interplay between market forces and government policy was dynamic: landlords, responding to market and government signals, quickly emptied and converted the most desirable buildings. The remaining SROs (increasingly occupied by regulated tenants) came to be seen as a poor investment and were left to rot.⁵² As the condition of these SROs deteriorated, tenants who could afford to leave moved out. The buildings were increasingly occupied by “the poorest people.”⁵³ The City’s tax policies gave owners an extra push to remove these tenants and

when owners on the Upper West Side of Manhattan rented SROs to families with children, largely Latino immigrants.”).

⁴³ BLACKBURN, *supra* note 1, at 7.

⁴⁴ See Gladwell, *supra* note 1.

⁴⁵ N.Y.C. ADMIN. CODE §§ 27-2077, 27-2078 (2013).

⁴⁶ BLACKBURN, *supra* note 1, at 7.

⁴⁷ *Id.* at 7 (citing N.Y.C. LOCAL LAW 56 of 1967).

⁴⁸ See Gladwell, *supra* note 1.

⁴⁹ BLACKBURN, *supra* note 1, at 8.

⁵⁰ *Id.*

⁵¹ Mark Malone, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749, 762 n.59 (1981).

⁵² *Id.* By the mid-1970s, more than one-fourth of all remaining SRO units (approximately 13,000) were vacant because they were uninhabitable.

⁵³ See Hevesi, *supra* note 30.

convert the remaining buildings. As summarized by Anthony J. Blackburn:

There were terribly deteriorated buildings . . . which could be incredibly valuable if they were rented to young professionals [Landlords forced SRO tenants out] by creating unimaginably dreadful conditions in the building. They turned the heat off, they let units to prostitutes [and] drug dealers. Some hired thugs to simply throw tenants out⁵⁴

Even more seriously, as the City admitted, the tax program encouraged a large number of owners to simply burn down their SROs as a method of removing tenants.⁵⁵

By the 1980s, the consequences of the anti-SRO crusade were painfully evident: harassment, homelessness, and misery. As the City later acknowledged, it had abjectly failed to plan for a post-SRO New York. The ideological baggage of the anti-SRO movement had effectively blinded it to the foreseeable consequences of its policies.⁵⁶ In 1965, an aide to then-Mayor Robert F. Wagner told a reporter that the campaign to eliminate SRO housing was necessary because “[n]o community should equate [SRO] housing with the acceptable living standards of the 1960s [modern society].”⁵⁷ Nearly three decades later, housing activist George McDonald acerbically observed: “In the city of New York there were laws passed to push the private sector out of the SRO business [and eliminate SROs] on the theory that SROs were inhumane. Consequently, people sleep on grates outside.”⁵⁸

The scale of the disaster was staggering. By 1985, the City government had engineered the elimination of more than 100,000 units of affordable housing⁵⁹—and replaced them with nothing.⁶⁰

⁵⁴ Hevesi, *supra* note 30 (direct quote of Dr. Anthony Blackburn). See also Debra S. Vorsanger, *New York City’s J-51 Program, Controversy and Revision*, 12 FORDHAM URB. L.J. 103, 143 (1983) (discussing the official reaction to a study that found a correlation between J-51 eligibility in occupied SROs and arson).

⁵⁵ Sydney H. Schanberg, *New York; Arson and J-51*, N.Y. TIMES (July 20, 1982), <http://www.nytimes.com/1982/07/20/opinion/new-york-arson-and-j-51.html> (discussing New York City Arson Task Force preliminary report confirming link between J-51 benefits and arson in SROs).

⁵⁶ Gladwell, *supra* note 1. In the article, Gladwell quotes Anne Teicher, the deputy director of SRO housing for the Mayor’s Office on Homelessness, as saying, “In the context of the time, it [the 1955 SRO construction ban] may have made sense. They were looking to upgrade certain neighborhoods that had a high concentration of this kind of housing. But I don’t think people thought through that policy at the time and realized what impact it would have.” *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ There is little dispute that SROs were overwhelmingly—even exclusively—converted into high rent apartments. See, e.g., Lynette Holloway, *With New Purpose and*

Between 1955 and 1985, wages had stagnated, poverty and unemployment had increased, and the State had “dumped” more than 125,000 low-income patients from mental-health hospitals into the City.⁶¹ Consequently, the homeless population spiked to by far the worst levels in the country. Study after study found that large numbers of the homeless, including “about half” of homeless men entering shelters in 1980, had lived in SROs before being pushed out onto the street.⁶²

Responding to the crisis, the City attempted to reverse course. Over the course of several years, it cancelled the mandate to convert new SRO units, stopped providing tax credits to convert SRO buildings, passed a new tenant anti-harassment law, and funded legal services offices dedicated to providing representation to SRO tenants.⁶³ Then, in 1985, the City Council passed an ambitious law that temporarily banned the “conversion, alteration, or demolition” of SRO buildings.⁶⁴ The ban was subsequently made permanent and an anti-warehousing provision, which required landlords to rent vacant units, was added.⁶⁵

Unfortunately, the City’s actions were too little, too late. The SRO housing stock was already critically depleted. Market forces were pushing landlords harder than ever toward apartment conversions. The anti-harassment law was ineffective as landlords violated, and the City failed to effectively enforce, its provisions.⁶⁶ Finally, in 1989 the conversion ban and anti-warehousing provisions were struck down by the New York Court of Appeals.⁶⁷

Since the Court of Appeals decision, the City’s SRO policy has

Look, SROs Make a Comeback, N.Y. TIMES (Nov. 10, 1996), <http://www.nytimes.com/1996/11/10/nyregion/with-new-purpose-and-look-sro-s-make-a-comeback.html> (discussing “wholesale conversion” of SROs into luxury apartments); BLACKBURN, *supra* note 1, at 8 (“A 1980 audit of the J-51 program indicated that 41 SRO conversions received J-51 abatements in FY 1979 alone.”).

⁶⁰ BLACKBURN, *supra* note 1, at 8. *See also* Gladwell, *supra* note 1; Daley, *supra* note 17; MARKEE, *supra* note 25.

⁶¹ Malone, *supra* note 51, at 761–67 (discussing increasing unemployment and an effort to empty mental-health hospitals).

⁶² Gladwell, *supra* note 1 (discussing a 1980 survey of men entering homeless shelters); Daley, *supra* note 17 (reporting that “many studies have shown that large numbers of the city’s homeless once lived in rooming houses”).

⁶³ BLACKBURN, *supra* note 1, at 7–9.

⁶⁴ *Id.* at 1 (citing N.Y.C. LOCAL LAW 59 of 1985).

⁶⁵ *Id.* at 9 (citing N.Y.C. LOCAL LAW 22 of 1986 and N.Y.C. LOCAL LAW 9 of 1987).

⁶⁶ *Id.* at 7–8; *see also* Alan Finder, *S.R.O. Tenants Lose Homes Despite Ban on Conversions*, N.Y. TIMES (Jan. 22, 1987), <http://www.nytimes.com/1987/01/22/nyregion/sro-tenants-lose-homes-despite-ban-on-conversions.html> (“Residents of single-room-occupancy hotels continue to be harassed and forced out . . .”).

⁶⁷ *See* *Seawall Assoc. v. City of New York*, 74 N.Y.2d 92, 117 (1989).

been in disarray. On the one hand, there is now broad recognition that SROs are vitally important. The City regrets the loss of SROs and tends to encourage the development of new units—largely in non-profit, “supportive” SROs—to the limited extent permitted by law.⁶⁸ At the same time, there is a real sense that, with the numbers having fallen so far, the whole situation is a lost cause. SROs also continue to have a negative reputation: former Mayor Michael Bloomberg’s recent proposals to build SRO-type housing—two-room, 275-square-foot units designed for occupancy by single individuals at affordable rents—have studiously avoided the use of the word “SRO.”⁶⁹

The result, as illustrated by the following three examples, is a toxic mix of paralysis and dysfunction.

A. Rent Regulation

The full and effective incorporation of SROs into the rent regulation system remains an unfinished project. The RSL and RSC contain gaps and ambiguities that owners can manipulate to run up rents and deregulate units.⁷⁰ Tenants, who are left with primary

⁶⁸ See, e.g., Alan Finder, *Experts on Homeless Push for an Old Idea: S.R.O.’s in New York*, N.Y. TIMES (Feb. 9, 1990), <http://www.nytimes.com/1990/02/09/nyregion/experts-on-homeless-push-for-an-old-idea-sro-s-in-new-york.html>. See also Esther B. Fein, *Loans to Build S.R.O. Units May Be Ended*, N.Y. TIMES (Mar. 14, 1994), <http://www.nytimes.com/1994/03/14/nyregion/loans-to-build-sro-units-may-be-ended.html>; Shawn G. Kennedy, *New Look for S.R.O.’s: Decent Housing*, N.Y. TIMES (Mar. 28, 1995), <http://www.nytimes.com/1995/03/28/nyregion/new-look-for-sro-s-decent-housing.html>; Holloway, *supra* note 59; Hevesi, *supra* note 30; Harriet McDonald, *Micro Units Proposed to Make New York City Living Affordable*, HUFFINGTON POST (Nov. 5, 2012), http://www.huffingtonpost.com/harriet-mcdonald/nyc-affordable-housing_b_2044666.html.

⁶⁹ See Erin Durkin, *Mayor Bloomberg Launches Contest to Stir Development of Tiny 300-square-foot Apartments for Singles*, N.Y. DAILY NEWS (July 9, 2012), <http://www.nydailynews.com/new-york/mike-pushes-smaller-apts-young-singles-article-1.1110965>; see also Oshrat Carmiel, *Manhattan to Get First ‘Micro-Unit’ Apartment Building*, BLOOMBERG NEWS (Jan. 22, 2013), <http://www.bloomberg.com/news/2013-01-22/new-york-city-to-get-first-micro-unit-apartment-building.html>.

⁷⁰ The following two examples give some indication of the nature of the problem: First, owners frequently attempt to take the large “vacancy increases” provided under the Rent Regulation Reform Act of 1997. See N.Y. UNCONSOL. LAW § 26-511(c)(5-a) (McKinney 2013); *id.* § 2252.8(a). The Rent Guidelines Board has attempted to prohibit owners from taking these increases. See N.Y.C. RENT GUIDELINES BD., HOTEL ORDER #27 (June 23, 1997) (“No vacancy allowance is permitted under this order. Therefore, the rents charged for [new] tenancies . . . may not exceed . . . rent[s] . . . permitted under the applicable rent adjustment provided [in this Order].”). Similar language appears in Hotel Orders #27 through #42, which span the period between 1997 and 2012. DHCR contests the RGB’s authority to control vacancy increases but has no coherent policy of its own. The DHCR “Fact Sheet” applicable to SRO tenancies indicates that SRO owners cannot take vacancy increases. See DEP’T OF HOMES & CMTY. RENEWAL, FACT SHEET #42: HOTELS, SROs, AND ROOMING HOUSES (rev. July

2011), available at <http://www.nyshcr.org/Rent/FactSheets/orafac42.htm> (“As a permanent tenant, an owner may not charge you more than the most recent rent charged the prior permanent tenant . . . plus any lawful [RGB] guideline increases. . . .”). In rent overcharge cases, however, DHCR has frequently permitted vacancy increases without comment. More commonly, it has attempted to limit the increases using a mechanical application of the statute that makes little sense. An owner’s right to take a vacancy increase is triggered only when a tenant signs a vacancy lease. See N.Y. COMP. CODES R. & REGS. tit. 9, § 2522.8(a) (2013) (“The legal regulated rent for any vacancy lease [shall be] . . .”). The amount of the increase is set by a formula that turns upon (a) the length of the lease (one or two years); and (b) certain provisions of the RGB’s Apartment Orders. The formula can be straightforwardly applied to all apartment tenancies. It cannot be applied to the vast majority of SRO tenancies. All apartment owners are required to offer incoming tenants vacancy leases (one or two years); apartment tenants are required to sign the leases; and both are subject to the RGB’s Apartment Orders. In contrast, SRO owners are not required to offer incoming tenants leases and the term that must be offered in response to a lease request is six months. SRO tenants are never required to sign a lease. Finally, it is far from clear that the terms of RGB Apartment Orders can be applied to SRO tenancies. For these reasons, the courts have become increasingly critical of DHCR and any attempt to apply vacancy increases to SRO tenants. See, e.g., *Hous. Dev. Ass’n, LLC v. Gilpatrick*, 910 N.Y.S.2d 762 (Table), 2010 WL 1691595, at *1 (App. Term 1st Dep’t Apr. 28, 2010) (affirming lower court decision holding vacancy increases do not apply to SROs). In *Gilpatrick*, the court noted:

Even were we to assume, in the petitioner owner’s favor, that . . . vacancy increases . . . are available to owners of stabilized hotel units as well as stabilized apartment units, the vacancy increase formulas set forth in the cited provisions and DHCR’s own interpretation of . . . section 2522.8(a) confirm that no vacancy increase may be recovered unless a hotel owner offers an incoming tenant the option of a vacancy lease for a one- or two-year term.

Id. Second, owners take advantage of the special nature of SRO tenancies to surreptitiously deregulate units. The RSC states that the legal rent for a unit becomes the rent “agreed to by the owner and the . . . tenant” if the unit was “vacant or temporarily exempt” on the “base date.” N.Y. COMP. CODES R. & REGS. tit. 9, § 2526.1(a)(3)(iii). The “base date” is the date exactly four years prior to the date a tenant challenges a particular unit’s rental amount. *Id.* § 2520.6(f). The RSC also provides that units are deregulated once the rent goes above \$2,500. *Id.* § 2520.11(r). Owners claim that these provisions permit the deregulation of any unit that has been registered as vacant or exempt for four years: section 2526.1(a)(3)(iii) in combination with section 2520.6(f) permit the owner to unilaterally increase the legal (vacancy) rent for the unit above \$2,500; and section 2520.11(r) then mandates deregulation. Apartment owners are rarely able to take advantage of this combination of provisions, as the circumstances under which an apartment is “temporarily exempt” are limited. See, e.g., *id.* § 2520.11(f), (j), (m). Generally, the provisions come into play only where an apartment has been held vacant for years or has been rented to a superintendent. See, e.g., *McCarthy v. N.Y. State Div. of Hous. & Cmty. Renewal*, 736 N.Y.S.2d 353, 354 (App. Div. 1st Dep’t 2002) (stating that the “legal regulated rent was the rent listed in the initial lease” where apartment was vacant on base date). The situation is very different, and much more easily manipulated, in SROs. SRO units are “temporarily exempt” whenever they are not occupied by a permanent tenant—meaning whenever they are occupied by a person who has not requested a lease or lived in the unit for six months. N.Y. COMP. CODES R. & REGS. tit. 9, §§ 2520.11(g)(1), 2520.6(j), 2520.6(m); cf. *id.* § 2522.5(a)(2). It is, therefore, relatively easy for an SRO owner to create the impression that the rent-setting provisions of the regulatory code have

responsibility for enforcing the rent laws, are in a weak position to oppose even the most blatant violations.⁷¹ Large numbers of SRO tenants have no idea that SROs are regulated.⁷² SRO landlords uniformly ignore their obligation to provide occupants with a “Notice of Rights.”⁷³ Many refuse, without effective penalty, to even register their buildings with DHCR, leaving tenants in a difficult limbo.⁷⁴ As a result, even the most basic rent regulation protections frequently are not enforced.⁷⁵

been triggered. *See id.* § 2526.1(a)(3)(iii). Regulated commercial hotels claim that they have rented “exclusively to tourists,” while other owners simply register rooms as “temporarily exempt due to transient occupancy” no matter who is living there. DHCR reports indicate that typically only one-half to two-thirds of all registered SROs are registered as occupied and non-exempt. N.Y.C. RENT GUIDELINES BD., EXPLANATORY STATEMENT—HOTEL ORDER #39, at 8 (June 24, 2009) (indicating that 10,577 of a total 22,827 units were registered as “non-exempt rent stabilized units”); N.Y.C. RENT GUIDELINES BD., EXPLANATORY STATEMENT—HOTEL ORDER #42, at 8 (June 22, 2012) (stating that 12,148 of a total of 17,663 units were registered as “rent stabilized”). Though DHCR has been shockingly solicitous of this scheme, the courts have been much more critical. *See, e.g.,* Gordon v. 305 Riverside Corp., 941 N.Y.S.2d 93, 95–96 (App. Div. 1st Dep’t 2012) (rejecting the deregulation argument in the apartment context). As one lower court observed, owners cannot “create a loophole that undermines the goals of rent regulation” by manipulating the provisions of the Code to convert “temporary exemptions” into “permanent[] deregulat[ion.]” 656 Realty, LLC v. Cabrera, 911 N.Y.S.2d 696 (Table), 2009 WL 6489910, at *2 (N.Y. City Civ. Ct. Mar. 3, 2009). The authors note that section 2526.1(a)(3)(iii) of the regulatory code, at least as interpreted and used by owners, contradicts several provisions of the RSL and may be invalid.

⁷¹ The primary means of enforcement is for a tenant to file a complaint with DHCR. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2527.1. DHCR has the authority to bring proceedings on its own initiative but rarely does so.

⁷² SRO tenants’ ignorance of their rights was the primary justification for the creation of the Notice discussed in the next footnote and corresponding text. *See* 459 West 43rd St. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal, 544 N.Y.S.2d 346, 349 (App. Div. 1st Dep’t 1989) (holding that the Notice “furthers [the] goal of insuring that the rights of hotel occupants [are] not . . . frustrated due to the occupant’s ignorance of the law”).

⁷³ The authors have collectively worked with thousands of SRO tenants. Not a single one has reported receiving the Notice. *See also* Weithman & Lebovits, *supra* note 12.

⁷⁴ Tenants in unregistered buildings/rooms do not receive registration statements. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2528.3. The statements are frequently the prompt that causes tenants to contact legal services organizations about their rent or to pursue rent overcharges on their own. Unregistered tenants that inquire about their rent with DHCR are informed that the agency has “no record” of the unit—which is commonly (though incorrectly) interpreted to mean that the unit is not regulated. Tenants that continue to pursue the matter cannot file an RA-89 rent overcharge complaint. They must file a Request for an Administrative Determination. *See* N.Y. COMP. CODES R. & REGS. tit. 9, § 2521. This is a more complicated proceeding—and one which occasionally results in DHCR setting the “regulated” rent at whatever the landlord happens to be charging the tenant at the time.

⁷⁵ For example, DHCR data indicates that owners are increasing registered rents at a rate that greatly exceeds that permitted under the Rent Guidelines Board Hotel

B. *Certificate of No Harassment (CONH)*

The CONH program⁷⁶ was enacted after the City's reverse-course on SRO housing in the early 1980's.⁷⁷ Under the program, an owner cannot make certain changes to an SRO⁷⁸ (*i.e.*, demolish or convert SRO units or change the number of bathrooms or kitchens) without acquiring certification that there has been "[no] harassment of the lawful occupants of the property during [the preceding three years]."⁷⁹ Thus acquisition of a CONH is a necessary step in any legal conversion of an SRO to a higher-rent use. The program is primarily administered by the New York City Department of Housing Preservation and Development (DHPD), which investigates owners' applications.⁸⁰

The CONH program, in theory, presents a partial solution to the City's inability to simply bar all SRO conversions. It is meant to balance the public need for affordable housing with landlords' interests and constitutional rights. In practice, and putting to one side DHPD's inability, or occasional unwillingness, to prevent owners from simply ignoring the CONH requirement,⁸¹ the program has been a disappointment. The most recent available data indicates DHPD grants upwards of 99% of all applications.⁸²

Orders. Between 2009 and 2012, median registered rents increased by approximately four times the legal maximum. *Compare* N.Y.C. RENT GUIDELINES BD., EXPLANATORY STATEMENT—HOTEL ORDER #39, at 9 (June 24, 2009) (estimating median registered legal rent at \$977.00) *and* N.Y.C. RENT GUIDELINES BD., EXPLANATORY STATEMENT—HOTEL ORDER #42 9 (June 22, 2012) (providing median registered legal rent of \$1,094.00), *with* N.Y.C. RENT GUIDELINES BD., HOTEL ORDER #1, at 42 (showing that the RGB approved a single 3% increase between 2009 and 2012). As discussed above, DHCR registered rents do not equate to actual rents. *See supra* note 18 and accompanying text. However, the fact that owners feel safe registering rents that are (at least in the aggregate) flatly illegal should give some indication of the state of enforcement.

⁷⁶ N.Y.C. ADMIN. CODE § 27-2093 (2013).

⁷⁷ The program was enacted through Local Law 19 (1983) (codified at N.Y.C. ADMIN. CODE § 27-2093).

⁷⁸ The specific changes are set forth in DHPD rules regarding CONH. *See* N.Y.C. DEP'T HOUS. PRESERV. & DEV, RULES PERTAINING TO CERTIFICATIONS OF NO HARASSMENT § 10-02 (2013), *available at* <http://www.nyc.gov/html/hpd/downloads/pdf/certification-of-no-harassment-rules.pdf>.

⁷⁹ N.Y.C. ADMIN. CODE § 27-2093(a), (c).

⁸⁰ *Id.*

⁸¹ In the authors' professional experience, some owners have gone beyond simple non-compliance and have begun attempting to use the CONH program as a means to harass tenants. An owner will demolish part of the building (frequently the bathrooms) and then refuse to rebuild, (falsely) citing an inability to get permits because of the CONH requirement. Owners' attorneys occasionally use a variation on this argument in lawsuits brought by tenants to force compliance with housing standards laws.

⁸² Documents provided to MFY Legal Services, Inc. by DHPD show that the agency denied 23 of the 1480 applications it processed between 1998 and 2008.

The flaws in the CONH program are immense. DHPD is obligated to prove harassment occurred in order to block an owner's application. The Agency's ability to do this depends primarily upon current tenants coming forward to provide information to its staff.⁸³ Harassment, by definition, involves conduct designed to force tenants to forfeit their rights—and generally (at least in the conversion context) to move out. A contradiction is, therefore, built into the very base of the program. If a landlord is successful in harassing its tenants, those tenants will probably no longer live at the building and will be difficult for DHPD to reach; the Agency will not be able to secure the information or testimony of tenants who a landlord has successfully harassed into leaving. Therefore, successful landlord harassment will be the most difficult to identify and punish. In many cases, DHPD can prove harassment occurred only where it was unsuccessful. Other factors add to the problem. Owners routinely pull units off the market, holding them vacant for long periods of time, until the entire building is “naturally” emptied. The process can be sped up—and problematic information suppressed—by paying off tenants. With an empty building (or cooperating tenants), DHPD has no way to contradict an owner's assertion of no harassment.⁸⁴ The value of a CONH—which can be the difference between owning a low-rent, regulated SRO and a boutique hotel⁸⁵—more than offsets the cost of the lost rent and bribes.

C. Homelessness Policy

The City's response to the homelessness crisis threatens the remaining stock of regulated SRO housing. The Department of Homeless Services (DHS) and other City agencies are increasingly contracting with SRO owners to temporarily house homeless peo-

⁸³ Documents provided to MFY Legal Services by DHPD indicate that the vast majority of information contained in investigation files comes from current tenants. It appears that investigators do make an effort to reach out to prior tenants, but receive few substantive responses.

⁸⁴ These statements are based upon the authors' discussions with DHPD officials and their experience investigating CONH applications.

⁸⁵ For example, between 2008 and 2009 the owners of the Riverview Hotel (113 Jane Street) received a CONH that cleared the way for its conversion into a boutique hotel. At “The Jane,” which now includes a popular bar, rooms that used to rent for as little as \$215.00 per month cost \$99.00 a night. Christopher Gray, *Popeye Slept Here and Now Olive Oyl Can, Too*, N.Y. TIMES (July 14, 2009), <http://www.nytimes.com/2013/02/09/nyregion/for-some-landlords-real-money-in-the-homeless.html>; see also Dan Berry, *On Bowery, Cultures Clash as the Shabby Meet the Shabby Chic*, N.Y. TIMES (Oct. 12, 2011), <http://www.nytimes.com/2011/10/13/us/at-bowery-house-hotel-flophouse-aesthetic-of-old.html> (discussing the conversion of the Prince Hotel).

ple.⁸⁶ Individuals placed through these programs have no permanent rights to their rooms—they cannot become stabilized tenants.⁸⁷ The City thus helps create the problem it claims it is trying to solve: it removes affordable, regulated units from the market—increasing homelessness—and converts them into unregulated, temporary homeless “warehouses.”⁸⁸

The incentives the City provides to induce participation in what has become a private shelter system are both staggering and puzzling. The City guarantees SRO owners a profit and pays rents that exponentially exceed the stabilized rates for rooms—as much as \$3,000 per month as far back as the 1980s.⁸⁹ This willingness to spend contrasts sharply with City policy toward more cost-effective nonprofit shelters and rent subsidy programs. City funding for nonprofits is relatively modest and “constantly at risk.”⁹⁰ In 2011, the City, pleading poverty, terminated rent subsidies for previously homeless families that had found permanent housing.⁹¹ The City

⁸⁶ The Coalition for the Homeless has released multiple pamphlets on this issue. *See generally* LINDSEY DAVIS, COAL. FOR THE HOMELESS, WAREHOUSING THE HOMELESS: THE RISING USE OF ILLEGAL BOARDING HOUSES TO SHELTER HOMELESS NEW YORKERS (2008), available at <http://www.coalitionforthehomeless.org/pages/warehousing-the-homeless>.

⁸⁷ Subsections (b) and (f) of section 2520.11 provide that housing accommodations owned, operated, or leased by the United States or New York State government or pursuant to governmental funding in certain circumstances are exempted from rent stabilization. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11(b), (f) (2013). Recently the Appellate Division overturned an Appellate Term decision that denied an SRO occupant rent-stabilized status when the tenant was placed in the unit by the City as part of its homelessness prevention plan. *See Branich Int'l Realty Corp. v. Pitt*, 963 N.Y.S.2d 210, 213–15 (App. Div. 1st Dep't 2013). At the time of publishing, the Appellate Division's decision in this matter is on appeal before the New York Court of Appeals. While this is a positive decision and hopefully marks a turn in New York courts' willingness to waive the clear protections of the RSC, the City and the State will likely continue to whittle away the SRO housing stock with programs that can apply subsections (b) and (f).

⁸⁸ The characterization is from Coalition for the Homeless. *See* DAVIS, *supra* note 86.

⁸⁹ *See, e.g.*, Anna Quindlen, 'Give Us a Shot at Something,' N.Y. TIMES (Jan. 31, 1988), <http://www.nytimes.com/1988/01/31/books/give-us-a-shot-at-something.html> (“The city of New York spends as much as \$3,000 a month for a family to live in a welfare hotel . . .”); Joseph Berger, *For Some Landlords, Real Money in the Homeless*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/nyregion/for-some-landlords-real-money-in-the-homeless.html> (“The city's Department of Homeless Services pays many times the amount the rooms would usually rent for – spending \$3,000 a month for each threadbare room without a bathroom or kitchen . . .”).

⁹⁰ Bobby Watts, *Letter to the Editor: Housing the Homeless*, N.Y. TIMES (Feb. 24, 2013), <http://www.nytimes.com/2013/02/25/opinion/housing-the-homeless.html>.

⁹¹ *See* Michael Howard Saul, *End of Rent Subsidies Has Critics Pouncing*, WALL ST. J. (Feb. 4, 2012), <http://online.wsj.com/article/SB10001424052970203889904577201593329240970.html>.

still has the money, however, to pay a premium to displace “long-term [SRO] residents.”⁹² As a policy analyst for Coalition for the Homeless observed:

The crisis that’s causing the city to open so many new [SRO] shelters is mostly of the mayor’s own making. . . . Instead of moving families out of shelters and into permanent housing, as previous mayors did, the city is now paying millions to landlords with a checkered past of harassing low-income tenants and failing to address hazardous conditions.⁹³

This problem shows no signs of abating. In conversation with the authors, SRO operators and their attorneys have suggested that capitalizing on City homelessness prevention subsidies is the most profitable operating strategy for many SROs, and thus the strategy that they plan to pursue. One SRO operator’s attorney lamented the protections offered by rent stabilization because they made it more difficult to take advantage of these subsidies. History has shown that when City policy incentivizes the conversion of SRO units, owners will jump at the opportunity; current homeless policy is thus repeating past mistakes.

The problem does not stop there. Over the last several years, DHS and other City agencies have cooperated with an even more predatory scheme. In increasing numbers, SRO buildings have been (unlawfully) taken over by so-called Three-Quarter Houses.⁹⁴ These operations falsely hold themselves out as supportive housing to draw tenants from prisons, homeless shelters, and so forth.⁹⁵ Three-Quarter Houses uniformly deny residents rent stabilization, and even basic tenancy rights. Three-Quarter House tenants report that harassment and other abuses are common.⁹⁶ Nonetheless, until recently, the City looked to Three-Quarter Houses as a means to reduce the shelter population.

To make matters worse, anecdotal evidence suggests that

⁹² Berger, *supra* note 89.

⁹³ *Id.*

⁹⁴ Patrick Arden, *Lawsuits Target Three-Quarter Operators*, CITY LIMITS (Mar. 6, 2012), <http://www.bkbureau.org/2012/03/07/lawsuits-target-three-quarter-operators/>.

⁹⁵ Patrick Arden, *Deep Concerns about ‘Three-Quarter’ Housing*, CITY LIMITS (Mar. 9, 2012), <http://www.bkbureau.org/2012/03/07/deep-concerns-about-three-quarter-housing/>.

⁹⁶ Cindy Rodriguez, *Drug Rehab for Housing: Alleged Scheme Targets City’s Most Vulnerable*, WNYC (Dec. 15, 2010), www.wnyc.org/story/104149-jerome-david/. See also PRISONER REENTRY INST., JOHN JAY COLL. OF CRIM. JUSTICE, *THREE QUARTER HOUSES: THE VIEW FROM THE INSIDE* 19–24 (2013), <http://johnjayresearch.org/pri/files/2013/10/PRI-TQH-Report.pdf> (reporting, based on multiple interviews with Three-Quarter House tenants, severe and persistent abuses such as illegal evictions, verbal and physical harassment, and coerced participation in certain treatment programs).

Medicaid fraud may be rampant in Three-Quarter House operations. Many operators require Three-Quarter House residents to participate in substance abuse or other so-called rehabilitative programs in order to maintain residency in a facility. The choice of which program to attend is not left to the resident. Rather, the operator forces the resident to attend a program that it either runs or with which it has a relationship. Each time that the resident visits the program, Medicaid makes a payment on her behalf. If a resident refuses to attend the program, she risks being evicted.

IV. NEW YORK CITY'S PERMANENT HOUSING CRISIS

*“The council hereby finds that a serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York . . . [and] that such emergency [has] necessitated the intervention of federal, state and local government in order to prevent speculative, unwarranted and abnormal increases in rents. . . .”*⁹⁷

The City’s devastating SRO policies must be viewed in the context of—and as a cause of—its ongoing housing crisis. More than sixty years after the federal government first intervened in the City’s housing market and froze rents, a “serious public emergency continues to exist in the housing of a considerable number of persons within the city of New York”⁹⁸

New York City’s low vacancy rate provides some measure of the severity of the housing crisis. Vacancy rates are frequently used as a general measure of the health and viability of a city’s rental market.⁹⁹ As approximately 68% of New York City residents live in rental housing—more than double the national average—the importance of the City’s rental market to overall housing conditions cannot be overstated.¹⁰⁰ Nationally, the average vacancy rate has ranged between approximately 9% and 11% in recent years.¹⁰¹ The average vacancy rate for large cities is frequently

⁹⁷ Rent Stabilization Law of 1969 (codified at N.Y.C. ADMIN. CODE LAW § 26-501 (2013)).

⁹⁸ *Id.*

⁹⁹ The RSL, for example, uses the vacancy rate as a measure of the severity of the housing crisis.

¹⁰⁰ N.Y.C. COMPTROLLER’S OFFICE, RENTS THROUGH THE ROOF: A STATISTICAL ANALYSIS OF UNAFFORDABLE RENTS IN NEW YORK CITY (2012), available at <http://comptroller.nyc.gov/wp-content/uploads/documents/Rents-through-the-Roof.pdf>. New York City homeowners are much wealthier than most City residents. Compare LEE, *supra* note 19, at 5, with *id.* at 4.

¹⁰¹ U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP 2012, <http://www.census.gov/housing/hvs/data/ann12ind.html> (follow “Rental and Homeowner Vacancy Rates by Area” hyperlink to the right of “Table 1” under “Detailed Tables”).

above 10%.¹⁰² In New York City, the vacancy rate is just above 3%.¹⁰³

The shortage of rental units is inextricably tied to a crisis of affordability. Housing is considered affordable if it costs less than 30% of household income.¹⁰⁴ The median household in New York City pays 33.8% of its income for rent.¹⁰⁵ Fully one-third of renter households pay 50% or more of their income for rent.¹⁰⁶

Although these citywide figures are grim, the reality is that New York City's housing crisis does not affect all residents equally. The City's housing market is heavily skewed in favor of high-income households. Crisis conditions are concentrated toward the bottom of the market where a severe shortage of affordable units leads to very low vacancy rates and very high rent burdens. Well under half of the City's rental units are affordable to the median renter household.¹⁰⁷ For poor households, defined as those living at or below 50% of the Area Media Income (AMI),¹⁰⁸ there is a shortfall of affordable housing on the magnitude of several hundred thousand units.¹⁰⁹

¹⁰² FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, KEY FINDINGS ON THE AFFORDABILITY OF RENTAL HOUSING FROM NEW YORK CITY'S HOUSING AND VACANCY SURVEY 2008, at 2 (2009) [hereinafter RENTAL HOUSING AFFORDABILITY], available at http://furmancenter.org/files/publications/Key_Findings.pdf.

¹⁰³ LEE, *supra* note 19, at 3.

¹⁰⁴ See, e.g., *Affordable Housing*, U.S. DEPT. OF HOUS. & URBAN DEV. (2013), <http://www.hud.gov/offices/cpd/affordablehousing/> (last visited Jan. 24, 2014) ("Families who pay more than 30 percent of their income for housing are considered cost burdened . . .").

¹⁰⁵ LEE, *supra* note 19, at 7. The figure is calculated as gross, not contract, rent. Based on House and Vacancy Survey (HVS) data from 2011, the Furman Center concludes that 55.7% and 58% of market rate and rent-stabilized tenants pay over 30% of their household income to rent. See N.Y.C. RENT STABILIZATION, *supra* note 1.

¹⁰⁶ LEE, *supra* note 19, at 7.

¹⁰⁷ *Id.* at 4. According to the 2011 HVS, the median annual income for renter households was \$38,500. An affordable monthly rent for these households is thus \$962.50. There were 14,383 vacant units renting for \$999 (contract rent) or less per month and 807,719 occupied units renting for \$999 (contract rent) or less per month. There were a total of 2,172,634 rental units (occupied and vacant) in 2011. This means that approximately 37.8% of rental units are affordable to the median renter household.

¹⁰⁸ Except where otherwise indicated, AMI in this paper refers to AMI as determined by the U.S. Census Bureau's 2011 New York City Housing and Vacancy Survey, see *supra* note 1, and used in the 2009 study by the Furman Center for Real Estate and Urban Policy. See generally N.Y.C. RENTAL HOUSING AFFORDABILITY, *supra* note 102. This measure of the AMI may be different than that set by the U.S. Department of Housing and Urban Development (HUD). See *cf.* *HUD Program Income Limits*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://www.huduser.org/portal/datasets/il.html> (last visited Jan. 24, 2014).

¹⁰⁹ Data compiled in the U.S. Census Bureau's 2005–2007 American Community Survey indicates that there were well in excess of 880,000 households with incomes at

There is no housing crisis for those who can afford high rents. At no point during the last decade has the vacancy rate for high-rent units (currently greater than \$2,500 per month¹¹⁰) fallen below the crisis-threshold of 5%;¹¹¹ it has often matched or exceeded the combined urban and non-urban rate for the entire Northeast region of the United States (7.3% in 2012).¹¹² Meanwhile, the vacancy rate for units affordable to those living at the AMI is below 4%,¹¹³ the rate for units affordable to households living at or below 50% of the AMI is approximately 1%,¹¹⁴ and the rate for units affordable to households living at or below the poverty line is less than 1%.¹¹⁵

The degree of rent burden experienced by households predictably tracks the availability of affordable units. As of 2005, the median rent burden for the wealthiest, middle, and poorest thirds of renter households was 16%, 27%, and 44%, respectively.¹¹⁶ In 2008, approximately 50% of low-income New Yorkers paid more than 50% of their income for rent.¹¹⁷ Jumping forward to 2011, the median rent burden for poor renters in private, unsubsidized housing was 68%.¹¹⁸

This places additional stress on low-income families. After paying rent, “poor renters . . . [are] left with an average of just \$4.40 per household member per day to pay for food, transport[ation], medical and education costs, and all other

or below \$25,000 per year, which is roughly equivalent to 50% of the AMI (\$24,020). But the Furman Center reports that, as of 2008, there were only 364,961 units affordable to families living at or below 50% of the AMI. See RENTAL HOUSING AFFORDABILITY, *supra* note 102, at 4. It is worth nothing that, as early as 2002, Coalition for the Homeless was already reporting a shortfall of more than 400,000 “low-cost rental housing units.” PATRICK MARKEE, COALITION FOR THE HOMELESS, HOUSING A GROWING CITY: NEW YORK’S BUST IN BOOM TIMES 57–58 (2002), available at http://coalhome.3cdn.net/9cde22b5c4c86f39af_0cm6ynl8u.pdf.

¹¹⁰ See N.Y.C. ADMIN. CODE LAW § 26-504.2 (2013), available at http://72.0.151.116/nyc/adcode/Title26C4_26-504_2.asp.

¹¹¹ New York State law defines a “crisis” as a vacancy rate of less than 5%. N.Y. UNCONSOL. LAW § 8623(a) (McKinney 2013).

¹¹² U.S. CENSUS BUREAU, *supra* note 101.

¹¹³ LEE, *supra* note 19, at 4 (vacancy rate of 3.61%).

¹¹⁴ *Id.* (vacancy rate for less than \$800 per month is 1.1%).

¹¹⁵ *Id.*

¹¹⁶ VICTOR BACH & THOMAS J. WATERS, CMTY. SERV. SOC’Y, MAKING THE RENT: WHO’S AT RISK 3 (2008), available at http://b.3cdn.net/nycss/2ad98a52b2cf4d9889_j0m6i6jhgq.pdf.

¹¹⁷ RENTAL HOUSING AFFORDABILITY, *supra* note 102, at Table F (noting that in 2008 almost 80% of low-income renters in the private rental market were paying more than 30% of their income on rent, and nearly half were paying more than 50% of their income on rent).

¹¹⁸ See LEE, *supra* note 19 at 4, 22 (¶ C1 and Table 12).

necessities.”¹¹⁹ Because of this situation, even very small increases in rent can be devastating.

The crisis is only getting worse for low-income households. Between 2002 and 2008, the only segment of the City’s housing stock that grew was that affordable to the relatively affluent (150% of the AMI and up).¹²⁰ The number of units affordable to the median renter household decreased by more than 15%.¹²¹ Due to these losses, the bottom third of the population can now afford approximately 17.3% of the (rental) housing stock.¹²²

At least part of this crisis is attributable to the nature of the City’s “affordable housing” programs. Frequently these programs target the construction of units that are not only unaffordable to poor New Yorkers, but are actually unaffordable to the median renter household. An important goal of former Mayor Michael Bloomberg’s affordable housing plan (the New Housing Marketplace Plan) was the construction of housing for “low-income households.”¹²³ However, the Plan defined a “low-income household” as one earning less than 80% of the Area Median Income determined by the U.S. Department of Housing and

¹¹⁹ VICTOR BACH & THOMAS J. WATERS, *CMTY. SERV. SOC’Y, MAKING THE RENT: BEFORE AND AFTER THE RECESSION* 3 (2013), available at http://b3cdn.net/nycss/2b541395152c0a6d1e_vpm6b5w43.pdf. The situation for poor renters has devolved since 2005, when a poor household had just under \$5 to spend on necessities after paying the rent. BACH & WATERS, *supra* note 116, at 9.

¹²⁰ RENTAL HOUSING AFFORDABILITY, *supra* note 102, at 4.

¹²¹ *Id.*

¹²² Data from the Fiscal Policy Institute (in 2005 dollars) indicates that the upper income boundary for the bottom third of households was between \$14,115 and \$26,430. TRUDI RENWICK, *FISCAL POL’Y INST., PULLING APART IN NEW YORK: AN ANALYSIS OF INCOME TRENDS IN NEW YORK STATE* 13 (2008), available at http://www.fiscalpolicy.org/FPI_PullingApartInNewYork.pdf. In 2005 approximately 18% of the housing stock was affordable to households with an income of \$20,000 or below (50% AMI) and in 2008 approximately 17.3% of the housing stock was affordable to households with an income of \$22,500 or below (50% AMI). See RENTAL HOUSING AFFORDABILITY, *supra* note 102, at 4.

¹²³ N.Y.C. DEP’T OF HOUS. PRESERV. & DEV., *A GUIDE TO THE PROGRAMS AND SERVICES OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT* 5 (2004), available at <https://partner.hpdnyc.org/whalecom81b846a8d7ea6a1bb1b6bf/whalecom0/download/311/HPD/HPD%20Guide%20to%20Programs%20and%20Services.pdf> (estimating that “46% of the new and preserved units” under the New Housing Marketplace Plan will be affordable to low-income households). See also N.Y.C. DEP’T OF HOUS. PRESERV. & DEV., *THE NEW HOUSING MARKETPLACE: CREATING HOUSING FOR THE NEXT GENERATION* (2002), available at <http://www.nyc.gov/html/hpd/downloads/pdf/10yearHMplan.pdf>; N.Y.C. DEP’T OF HOUS. PRESERV. & DEV., *MAYOR BLOOMBERG’S AFFORDABLE HOUSING PLAN 2* (2009), available at <http://www.nyc.gov/html/hpd/downloads/pdf/New-Housing-Market-Place-Plan.pdf> (“Nearly three quarters of the units created under the Mayor’s plan will serve low-income families . . .”).

Urban Development—a measure different than the AMI used in the U.S. Census Bureau’s Housing and Vacancy Studies and referenced above.¹²⁴ In 2008, 80% of the HUD-AMI for a single-person household was \$43,000 and for a family of four was \$61,450.¹²⁵ According to the Census Bureau’s 2008 Housing Vacancy Survey, the median renter household in New York City had an income of \$36,300.¹²⁶ Therefore, the City can simultaneously construct “low-income housing” while still doing nothing to address the real housing crisis. In fact, between 2004 and 2013, less than one-third of the “affordable housing” built or preserved in New York City was affordable to the median renter household.¹²⁷

V. SROs AND THE CRISIS

“The people you see sleeping under bridges used to be valued members of the housing market. They aren’t anymore.”¹²⁸

The City’s turn against SRO housing shaped the nature of the current housing crisis. To provide perspective, the approximately 175,000 SRO units the City eliminated from 1955 on were roughly equivalent in number to New York’s entire public housing system.¹²⁹ The number of units affordable to low-income residents is fully one-third lower than it would have been had SRO housing

¹²⁴ Compare A GUIDE TO THE PROGRAMS AND SERVICES OF THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, *supra* note 123 with *supra* text accompanying note 20 and ASS’N FOR NEIGHBORHOOD & HOUS. DEV. INC., REAL AFFORDABILITY: AN EVALUATION OF THE BLOOMBERG HOUSING PROGRAM AND RECOMMENDATIONS TO STRENGTHEN AFFORDABLE HOUSING POLICY 20 (2011), available at <http://www.anhd.org/wp-content/uploads/2011/07/Real-Affordability-Evaluation-of-the-Bloomberg-Housing-Program2.pdf>.

¹²⁵ U.S. DEP’T OF HOUS. & URBAN DEV., 2008 ADJUSTED HOME INCOME LIMITS 2 (2008), available at <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/limits/income/2008/ny.pdf>.

¹²⁶ U.S. CENSUS BUREAU, SER. IA, TBL. 9, 2008 NEW YORK CITY HOUSING AND VACANCY SURVEY (2008), <http://www.census.gov/housing/nychvs/data/2008/ser1a.html> (follow link at “2007 Total Household Income”).

¹²⁷ Based on the 2008 income figures cited above, it may be assumed that median renter household income is generally 60% or less of HUD AMI. Only 34.2% of the “affordable housing” claimed by the Bloomberg administration was affordable to households at 60% HUD AMI. See REAL AFFORDABILITY, *supra* note 124, at 20. Similarly, though applying a slightly different focus, approximately two-thirds of the “affordable housing” was “too expensive for the majority of local neighborhoods residents.” *Id.* at 2.

¹²⁸ Direct quote of Mary Brosnahan, executive director of Coalition for the Homeless, as reported by Gladwell, *supra* note 1.

¹²⁹ The New York City Housing Authority estimates that there are 178,914 public housing units as of March 1, 2013. *About NYCHA Fact Sheet*, N.Y.C. HOUS. AUTH., <http://www.nyc.gov/html/nycha/html/about/factsheet.shtml> (last visited Jan. 24, 2014).

been preserved.¹³⁰

SROs remain an integral part of the low-income market. Although rent-regulated SROs are a tiny fraction of the City's total rental stock, they still make up a significant percentage (5 to 15%) of all units affordable to poor New Yorkers.¹³¹ Thus, the ongoing—though slowed—loss of units continues to have a devastating impact upon the availability of truly “affordable” housing.

And then there are the illegal units: the City's destruction of legal, regulated SROs caused an explosion in the number of illegal SROs. Illegally subdivided apartments and other SRO-type units currently house as many as 500,000 poor New Yorkers.¹³² The City ignores their existence, including the danger they present, because it desperately needs these units. City officials rightly contend that illegal SROs present a “serious danger” to tenants and neighborhoods,¹³³ yet the City depends on illegal SROs to ward off a homeless crisis that would “dwarf” anything seen before.¹³⁴ As *The New York Times* reported in 2008:

For decades, Bowery flophouses [one type of SRO]—typically offering as little as a bed in a cubicle with wire-mesh ceilings—were home to some of the city's most down and out. But as rents began to rise, the flophouses were converted to condos. . . .

. . . .

[Now] illegally converted houses [are] being used [to house the poor]

. . . .

[T]he Buildings Department alone has issued more than 226 violations to 47 boarding houses for illegal use as a “homeless shelter,” “single-room occupancy,” or “rooming house[.]”

. . . .¹³⁵

¹³⁰ See RENTAL HOUSING AFFORDABILITY, *supra* note 102, at 4. Approximately 17% of the rental housing stock (3,352,041) is affordable to the bottom third. The 175,000 lost SRO units represent approximately 31% of the affordable units in the City.

¹³¹ The authors estimate that SROs constitute between 5% and 10% of all units affordable to households earning less than 50% of the AMI and a significantly higher percentage of all units affordable to households living below the poverty line.

¹³² Manny Fernandez, *Partitioned Apartments Are Risky, But Common in New York*, N.Y. TIMES (Feb. 22, 2009), <http://www.nytimes.com/2009/02/23/nyregion/23partitions.html>; see also Leslie Kaufman & Manny Fernandez, *Illegal Boarding Houses Pit City's Laws Against Lack of Alternatives*, N.Y. TIMES (Jan. 22, 2008), <http://www.nytimes.com/2008/01/22/nyregion/22homeless.html>.

¹³³ Javier C. Hernandez, *City to Crack Down on Illegally Divided Apartments*, N.Y. TIMES CITY ROOM BLOG (June 7, 2011), <http://cityroom.blogs.nytimes.com/2011/06/07/city-to-crack-down-on-illegally-divided-apartments/>.

¹³⁴ Hevesi, *supra* note 30, at 5.

¹³⁵ Kaufman & Fernandez, *supra* note 132. The HVS study also concluded that “[t]he crowding situation in the City was serious in 2011.” LEE, *supra* note 19, at 8.

VI. BRINGING SROs BACK

The solution to the housing crisis is in some sense simple: create more truly affordable housing. There is certainly room, and a need, for more moderately priced, “gentrified” SROs like former Mayor Michael Bloomberg’s “small apartments.” However, to have a real impact on the housing crisis, the City needs to dedicate significant resources to promoting the construction of low-rent units. Over the last several decades the City has spent¹³⁶ hundreds of millions, if not billions, of dollars subsidizing the construction, renovation, and rehabilitation of high-rent and luxury housing.¹³⁷ These dollars would be better spent subsidizing private (low-rent) SRO development or—perhaps preferably—building SROs for public ownership.¹³⁸

Any resolution of the City’s housing crisis will require a sea change in SRO policy. It will take years to rebuild the SRO housing

11.5% of renter households were crowded in 2011, with rates as high as 14.7% in one category of rent-stabilized units. *Id.*

¹³⁶ This spending has primarily taken the form of tax exemptions.

¹³⁷ VICTOR BACH & THOMAS J. WATERS, *CMTY. SERV. SOC’Y, UPGRADING PRIVATE PROPERTY AT PUBLIC EXPENSE: THE RISING COST OF J-51*, at 6 (2012), available at http://b3cdn.net/nycss/b3347d0b9b1c3a863d_ffm6ivtrh.pdf. This policy brief concludes that a significant percentage of J-51 benefits, see *id.* at 1 (explaining J-51 tax breaks), go to condos, co-ops, and “apartments with very high rents.” *Id.* at 6. The program has subsidized the “gentrif[ication of] Upper Manhattan.” *Id.* See also Michael Powell, *Luxe Builders Chase Dreams of Property Tax Exemptions*, N.Y. TIMES (June 24, 2013), <http://www.nytimes.com/2013/06/25/nyregion/luxe-builders-chase-dreams-of-property-tax-exemptions.html>; Elizabeth A. Harris, *As Prices Soar to Buy a Luxury Address, the Tax Bills Don’t*, N.Y. TIMES (Oct. 15, 2012), <http://www.nytimes.com/2012/10/16/nyregion/many-high-end-new-york-apartments-have-modest-tax-rates.html> (discussing State and City laws that subsidize the construction of luxury buildings and mandate their systematic undervaluation for property tax purposes and concluding that “the overall city valuation for condos and co-ops is only about 20 percent of what it would be were the city allowed to” accurately appraise the value of luxury buildings).

¹³⁸ Other than noting that new SRO units would need to be low-rent in order to have a real impact on the housing crisis, a discussion of the ideal regulatory and ownership structure of new units is beyond the scope of this Article. We strongly believe that any new units should be permanently subject to rent regulation or some other rent-setting mechanism. This would require making changes to the housing and rent regulation laws. See N.Y.C. ADMIN. CODE LAW § 26-504 (2013) (excluding most new construction from regulation). Under existing law, new units built with public subsidies would probably be temporarily subject to regulation. See N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11(c), (o)–(p) (2013); N.Y.C. ADMIN. CODE LAW § 27-2077. Publicly owned units would not be regulated, but would have other distinct benefits. See N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.11(b). Public housing is, in theory at least, subject to greater democratic control; rents for public housing are generally set at an affordable rate by law; public housing residents enjoy tenancy rights that are in many ways superior to those of even regulated tenants; and the conversion or demolition of public housing is, in some ways, more difficult than with private, affordable housing.

stock, and the recommendations that follow are meant as the first step down that path.

While the return of SRO housing may provoke opposition, the facts are clear: New York City needs SROs—and SROs are not going away. SROs are as old as the modern City, and demand for basic, no-frills housing is a constant. The City's half-century-long attempt to eliminate SROs has contributed to unprecedented homelessness, and led to the explosive return of illegal and unsafe units. Opposition to SRO living must be reconsidered in light of the unique benefits SRO hotels provide.

A. *Lift the Ban on the Construction of New SRO Units*

The first step in restoring SRO housing is to lift the ban on the construction of new SRO units. In addition to allowing new units to be built, this change would permit the legalization of the existing yet illegal SRO stock.¹³⁹

Even without the construction of a single new unit, the City would benefit from the legalization of existing SRO-type housing. New York City relies on illegally converted SROs in order to house its citizens. Refusing to acknowledge the necessity of these units only strips residents of rights and exacerbates public safety problems. Legalization would simultaneously help remove a public safety threat and boost the stock of affordable, regulated housing.¹⁴⁰ Currently, residents of illegal SROs have few rights and po-

¹³⁹ The construction ban denies tenants living in illegal SROs remedies available to tenants living in all other types of illegal units. Non-SRO tenants are entitled to come forward and claim stabilization rights. It would then be the landlord's burden to prove that the unit cannot be legalized if she wishes to evict. *See Commercial Hotel, Inc. v. White*, 752 N.Y.S.2d 779, 780–81 (App. Term 2d Dep't 2002); *840 West End Ave. v. Zurkowski*, N.Y.L.J., Feb. 28, 1991, at 24, col. 4 (App. Term 1st Dep't.). The situation is less clear with SROs. Because New York Multiple Dwelling Law § 248 and subsections 22-2077 and 27-2078 of the New York Administrative Code make all new SROs illegal by definition, this route appears foreclosed to SRO tenants. At least one court has ruled (in an unreported decision) that a regulated tenancy can be created in an illegal SRO, though the decision does not specifically address the construction ban. *See Wright v. Lewis*, 873 N.Y.S.2d 516 (Table), 2008 WL 4681929 (Sup. Ct. Kings Cnty. Oct. 23, 2008). However, the right is far from clearly defined and an amendment of the legal framework would significantly advance the goal of rebuilding the SRO housing stock. Especially in the outer boroughs, a building's particular zoning classification can also be a legal hurdle.

¹⁴⁰ In 2008, Chhaya Community Development Corporation, together with the Pratt Center for Community Development and Citizens Housing & Planning Council, released two excellent reports on the legalization of currently illegal dwelling units. The reports primarily discuss the legalization of basement units in the outer boroughs, but provide a compelling argument for such legalization and an essential perspective on illegal dwelling units. *See generally* CHHAYA CMTY. DEV. CORP. & CITIZENS HOUS. & PLAN-

tentially face illegal eviction, or evacuation, if they report building violations. If the new-construction ban were lifted, many previously illegal SRO tenants would automatically qualify for rent-stabilization protection.¹⁴¹ In the event the “legalized” units violated building codes, a landlord would have to prove that curing the violations was either physically or economically impossible before residents could be evicted.¹⁴² Given these protections, it is more likely that tenants would report building violations to the City.

Changing the City’s housing laws to permit the legalization of SRO units would not be without precedent. The current housing crisis closely mirrors the crisis that drove New York City to legalize the “new SROs” in the 1930s and 1940s. This process involved major changes to the City’s Multiple Dwelling Law.¹⁴³

B. Preserve Existing Units

In addition to creating new units, City and State need to stem the loss of existing affordable units. Affordable units are lost in two primary ways: (1) through demolition or conversion, which implicates the CONH program, or (2) through illegal rent increases, which implicates the rent regulation laws.

The CONH program needs to be significantly reformed in order to bring policy into line with real-world conditions. As discussed above, one of the primary deficiencies in the program revolves around DHPD’s inability to effectively investigate harassment in empty, or near empty, buildings. This issue could be dealt

NING COUNCIL, *ILLEGAL DWELLING UNITS: A POTENTIAL SOURCE OF AFFORDABLE HOUSING IN NEW YORK CITY* (2008), available at http://www.chhayacdc.org/pdf/Chhaya_reportHPD.pdf; CHHAYA CMTY. DEV. CORP. & PRATT CTR. FOR CMTY. DEV., *NEW YORK’S HOUSING UNDERGROUND: A REFUGE AND RESOURCE* (2008), available at http://www.prattcenter.net/sites/default/files/housing_underground_0.pdf.

¹⁴¹ This assumes most illegal SROs are in buildings that were constructed before 1974.

¹⁴² See, e.g., *McDonnell v. Sir Prize Contracting Corp.*, 300 N.Y.S.2d 696, 697 (App. Div. 2d Dep’t 1969) (holding that tenant could not be evicted where landlord failed to prove that removing relevant violations would be unduly burdensome or economically impossible); *Seckin v. Davenport*, N.Y.L.J., Mar. 18, 1999 at 31, col. 2 (App. Term 2d Dep’t) (same); *K&G Co. v. Reyes*, 276 N.Y.S.2d 20, 23–24 (N.Y. Civ. Ct. 1966) (interpreting parallel requirement in Rent Control Law to hold the same).

¹⁴³ The Pack Law, which legalized the conversion of apartments into SROs, was driven in major part by the Survey of Vacancies in Class A Multiple Dwellings, conducted by the City’s Tenement House Department in 1933. The survey found high vacancy rates (over 14%) in higher-rent, larger apartments at a time when affordable housing was in short supply, and homelessness was a major problem. N.Y.C. CITIZENS HOUS. PLANNING COUNCIL, *SURVEY OF VACANCIES IN CLASS-A-MULTIPLE DWELLINGS 3* (1933), available at http://www.chpcny.org/wp-content/uploads/2010/01/1933_NYC_Vacancy_Study.pdf.

with by shifting the burden of proof. A presumption of harassment could be imposed on any CONH application where more than 30% of the building is empty, or where more than half of existing tenants moved out during the preceding three years.¹⁴⁴

The program could be further strengthened by tightening the definition of harassment. DHPD has complained that it is forced to prove that an owner “intended” to harass tenants by not keeping the building up to code. In light of the history neglect has played in SRO landlord-tenant relations, the law should be amended to make neglect, whatever the owner’s intent, a form of harassment. Moreover, a presumption of harassment should apply in any case where: (1) a “C” violation (the most serious) has not been timely cured; or (2) a tenant has moved out of the building while there were more than five unresolved building violations per resident. In addition, failure to provide occupants with the Notice of Rights—an attempt to deny those rights if there ever was one—should be explicitly codified as a form of harassment.

Finally, to supplement DHPD’s investigative capacity, and to give tenants a more active voice in the program, current and former tenants¹⁴⁵ should be made parties to CONH applications. Tenants should be allowed to appear at hearings with counsel as named parties rather than solely as witnesses DHPD may call at its own discretion. They should be allowed to submit evidence, examine witnesses, and appeal adverse decisions. Owners should be compelled to pay tenants’ legal fees in any case where an application is denied.

The rent regulation laws also need to be reformed. The RSL and RSC need to be clarified to adequately account for differences between SROs and apartments. Loopholes that allow landlords to improperly increase SRO rents, or deregulate units, need to be closed. To start, the vacancy increase and “transient deregulation” schemes discussed in Part III above (particularly footnote 70), need to be prohibited. Vacancy increases allow SRO owners to take a permanent increase to the regulated rent when a unit becomes vacant. In light of SROs’ unique position in the low-income market, and a long history of owner abuse, this increase needs to be explicitly prohibited. In the case of transient deregulation, owners

¹⁴⁴ The presumption would (a) recognize that a previously occupied building rarely “naturally” empties, and (b) reflect the overwhelming public interest in preserving existing SRO housing.

¹⁴⁵ By “preceding three years,” we mean the three-year period prior to the submission of the CONH application.

claim the RSC allows them to unilaterally raise the “regulated” rent after a room has been registered (accurately or not) as “temporarily exempt due to transient occupancy” for a period of four years. If the owner chooses to set the rent above the high-rent destabilization threshold (currently \$2,500 per month), the unit is effectively deregulated solely as a result of a period of transient occupancy.

As the issue of transient deregulation suggests, the rent registration system for SROs needs to be overhauled. Currently, SRO owners are required to file the same annual registration statements with DHCR as apartment owners. This makes little sense as SRO tenancies are different than apartment tenancies. The existing registration system allows SRO owners to use the dual, transient-permanent nature of SRO tenancies to deny SRO tenants their rights. Owners routinely register units as “temporarily exempt due to transient occupancy” even while they are occupied by permanent tenants.¹⁴⁶ Because DHCR checks the accuracy of registration statements, and because SRO tenants are poorly positioned to police owner conduct, there is relatively little risk to this scheme.¹⁴⁷ However, as discussed above,¹⁴⁸ the rewards are significant: a “temporarily exempt” registration can make it more difficult, or impossible, for a tenant to prove they are stabilized or are being overcharged. A simple change could help prevent this abuse. SRO owners should be required to register a regulated rent for each room, each year. In other words, each annual SRO registration should set forth the last rent paid by a permanent, rent regulated tenant for the room. This “room rent,” rather than the accidental, and frequently false, regulatory status of a former occupant, would determine the outcome of any complaint. The legal regulated rent for a room would simply be the “room rent” plus applicable DHCR increases. To increase owners’ incentives to comply with the rules, if a tenant successfully proved that a unit was improperly registered (or if an owner failed to file a registration), the rent for the unit should be set at the lowest legal rate in the building or \$215, whichever is less, and treble damages applied for any overcharge.¹⁴⁹

¹⁴⁶ For example, between approximately 2000 and 2010, most of the almost 200 rooms at the Greenpoint Hotel in Brooklyn were falsely registered as “temporarily exempt due to transient occupancy.” The Greenpoint’s owners used these false registrations to deny tenants’ regulatory status and dispute rent overcharge complaints both before DHCR and in Housing Court proceedings. (DHCR Registration on file with authors).

¹⁴⁷ See generally *supra* notes 70–75 and accompanying text.

¹⁴⁸ *Id.*

¹⁴⁹ \$215 per month is the shelter allowance for a one-person household provided by New York City Public Assistance. See CMTY. SERV. SOC’Y, PUBLIC BENEFITS FOR LOW-

Finally, in order to inform all of these changes, a large-scale study similar to the invaluable Blackburn report¹⁵⁰ should be commissioned. DHPD's Housing and Vacancy Survey and the RGB's occasional memoranda about SRO units are helpful, but lack depth and scope. The report should not extrapolate from past studies, as Housing and Vacancy Survey reports have done, nor rely solely on rent registration data, as a recent RGB study has.¹⁵¹ In the authors' experience, it is not uncommon for rent registration data to be inaccurate.¹⁵² In order to gauge the actual state of the SRO market, a more finely tuned study is required. Furthermore, it would be helpful to understand the exact scope of the illegal SRO market and the exact number of rent-regulated SRO units that are being used for purposes other than affordable housing.

CONCLUSION

Though often misunderstood, SRO housing has played an integral role in New York City's housing market. A more robust SRO housing stock would provide truly affordable housing to thousands of poor and low-income New Yorkers and could significantly alleviate the City's homelessness crises. Bringing SROs back to New York City is possible, but will require significant changes in City and State policy. A new attitude towards and understanding of SROs is necessary to ensure that such housing can once again serve its vital function.

INCOME INDIVIDUALS AND FAMILIES: APPLYING FOR AND USING PUBLIC BENEFIT PROGRAMS: CASH ASSISTANCE 3 (2013), *available at* <http://benefitsplus.cssny.org/system/files/benefit-tools/attachments/Cash%20Assistance.pdf>.

¹⁵⁰ See *supra* note 1.

¹⁵¹ See generally N.Y.C. RENT GUIDELINES BD., *supra* note 75.

¹⁵² Indeed, in 2011 Make the Road New York found that 45% of apartments were registered with inflated rents and that 64% of a sample of 200 apartments had registration irregularities, including 33% with gaps in rent registration. MAKE THE ROAD N.Y., RENT FRAUD: ILLEGAL RENT INCREASES AND THE LOSS OF AFFORDABLE HOUSING IN NEW YORK CITY 5 (2011), *available at* http://www.maketheroad.org/pix_reports/DHCR%20Report.pdf.

FOSTERING THE HUMAN RIGHTS OF YOUTH IN FOSTER CARE: DEFINING REASONABLE EFFORTS TO IMPROVE CONSEQUENCES OF AGING OUT

Ramesh Kasarabada[†]

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"It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."

—U.S. Supreme Court Associate Justice Wiley Rutledge, in
Prince v. Massachusetts (1944)¹

"When you make a decision, you go home. I don't. I live your decisions!"
—L.B., speaking to the juvenile court of Baltimore City (2007)

INTRODUCTION

Seventeen-year-old L.B.² stood before a juvenile court judge in Baltimore City during one of his child welfare hearings, or permanency hearings. That day, the judge was deciding where and with whom L.B. would live. Frustrated with the child welfare³ system,

¹ *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

² L.B.'s story is adapted from an earlier article by the author. See Ramesh Kasarabada, *Maryland's Recognition of Children's Human Rights*, MD. FAM. L. MONTHLY, Nov. 2010, at 4. L.B.'s story has been modified slightly to protect his confidentiality and that of his family.

³ This Article uses *foster care* and *child welfare* interchangeably. The federal definition of "foster care" is

24-hour substitute care for children placed away from their parents or guardians and for whom the title IV-E [42 U.S.C. § 670 (1997) *et seq.* of the Social Security Act, as amended] agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions, and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are

L.B. loudly reminded the judge that he—and not the professionals making the decisions about his life—experienced the consequences of her decision. L.B. lived in foster care since he was two years old. The state child welfare agency placed him initially in foster homes, but then, as he grew older, mainly in group homes. On the day L.B. made his above-quoted declaration, he returned to Maryland after living for eighteen months in an out-of-state group home. He wanted to live with Ty, his twenty-five-year-old cousin and one of the few family members with whom he had contact. Although Ty was working, had a two-bedroom apartment, and had himself lived in foster care for a time, the state agency argued he could not provide the “structure” of a group home. That structure was three staff persons working in eight-hour shifts in a house with six youth in foster care. L.B. countered that Ty’s experiences in foster care and in becoming self-sufficient would help him do the same. The court deferred to the state agency, however, and placed L.B. in a group home. Ty eventually lost contact with L.B., as L.B. was moved from group home to group home. At subsequent permanency hearings, the court found that the state agency made reasonable efforts towards L.B.’s long-term plan in foster care by simply finding a group home in which L.B. would live. The court did not determine the specific services L.B. needed to become self-sufficient, such as what he needed to obtain his high school diploma, employment, or housing. When he exited foster care at age twenty-one,⁴ or aged out, L.B. did not have his high school diploma or GED and did not have a job; he did not have a stable home or family support. L.B. became homeless within months of aging out. Within one year of aging out, he was incarcerated for failing to pay restitution for a delinquency charge he had while in foster care. Within two years, L.B. was incarcerated for theft and unlawful possession of firearms.

Every year, tens of thousands of youth⁵ leave foster care when

made by the State, Tribal or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

45 C.F.R. § 1355.20(a) (2013).

⁴ Maryland sets the age at which youth age out of foster care at twenty-one. Md. CODE ANN., CTS. & JUD. PROC. § 3-804(b) (West, Westlaw through chapter 1, 4, 9, 40, 41, 44, 45, 48, 49, 62, 67, 68, 72, 88, 90, 95, 127, 146, 233, 241, 246, 254, and 255 of the 2014 reg. sess. of the General Assembly). For the age at which youth will age out of each jurisdiction’s foster care system, see *infra* note 29.

⁵ In this Article, *youth* refers to those young people between the ages of sixteen and twenty-one years of age.

they reach the maximum age limit to remain in their state's foster care system, or "age out."⁶ Like L.B., many grew up in foster care and aged out without having a stable home in which to live, employment, or the skills to be self-sufficient.⁷ Youth aging out of foster care experience high rates of homelessness, incarceration, and underemployment; they are likely to become entrenched in poverty.⁸ This result is the opposite of what child welfare laws require for youth aging out of foster care.⁹ The overarching purpose of child welfare law is that all children in state care be provided permanency.¹⁰ Permanency includes one of the federally defined goals for each child in foster care.¹¹ Permanency for youth means preparing them to be self-sufficient once they age out.¹² To ensure children have permanency, state courts must find at least annually that state agencies have made "reasonable efforts" towards a child's permanency plan.¹³ Federal law does not define reasonable efforts, however,¹⁴ and, as a result, courts find that state agencies make reasonable efforts without ensuring those agencies provide the ser-

⁶ *Aging out* of foster care refers to those youth who remain in foster care until the age of majority (or the age at which their specific state ends foster care services to youth) or the age at which the state emancipates them into independent living. Mark E. Courtney, *The Difficult Transition to Adulthood for Foster Youths in the US: Implications for the State as Corporate Parent*, 23 SOC. POL'Y REP., no. 1, 2009, at 3, 3-4, available at <http://files.eric.ed.gov/fulltext/ED509761.pdf>. For a state survey of the "age out" ages in each jurisdiction, see *infra* note 29.

⁷ See Foster Care Independence Act of 1999, Pub. L. 106-169, § 101(a)(4), 113 Stat 1822. See generally MARK E. COURTNEY ET AL., CHAPIN HALL AT UNIV. OF CHICAGO, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 23 AND 24 (2010), available at http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf (describing the outcomes of aging out by following a group of former foster youth from age seventeen through twenty-six; the authors issued several reports when the youth reached certain ages, including twenty-three and twenty-four).

⁸ COURTNEY ET AL., *supra* note 7.

⁹ See 42 U.S.C. § 675(1)(D), (H) (2012); 45 C.F.R. § 1355.25(c) (2013).

¹⁰ See *In re Yve S.*, 819 A.2d 1030, 1045 (Md. 2003) (citing *In re Adoption/Guardianship No. 10941*, 642 A.2d 201, 205 (Md. 1994)).

¹¹ The permanency plan may be reunification with a parent or guardian; adoption (with the state filing a petition to terminate parental rights); referral for legal guardianship, including with a relative; or in cases where the state has documented a compelling reason that the aforementioned plans are not in the child's best interests, another planned permanent living arrangement. See 42 U.S.C. § 675(5)(C)(i); 45 C.F.R. § 1355.20(a) (defining "permanency hearing" and describing the permanency plans available for a child in foster care).

¹² See 42 U.S.C. § 675(1)(D) .

¹³ *Id.* § 671(a)(15); 45 C.F.R. § 1356.21 (b)(2)(i) ("The [state] agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect . . . at least once every twelve months thereafter while the child is in foster care.").

¹⁴ *Suter v. Artist M.*, 503 U.S. 347, 360-61 (1992) (holding that Congress did not

vices youth need to be self-sufficient. Moreover, current federal law only requires state agencies to develop a “transition plan” that identifies the youth’s needs in housing, education, and employment, within ninety days of the date they will age out.¹⁵ This plan does not require actually providing any specific services the youth needs.¹⁶ Further contributing to the poor consequences of aging out is that a youth’s wishes regarding services they need may be reported to the court, but those wishes are subordinate to the state’s determination of what is in their best interests. Youth are often passive participants in proceedings meant to protect them, even though youth experience all of the consequences of the decisions. Although this approach to decision-making and service provision may be justified for very young children in foster care, it must change for youth aging out of foster care to ensure they age out safely. L.B.’s statement to the juvenile court is a reminder to all in the child welfare system of this reality.

This Article argues that courts and advocates for youth in foster care should utilize a human rights approach to determining and providing services youth need to age out safely. The “reasonable efforts” requirement in child welfare cases is the best method for incorporating human rights in domestic law and improving the consequences of aging out of foster care because the requirement is part of the regular review of the child’s circumstances.¹⁷ What is needed is a definition of “reasonable efforts” for youth that ensures aging out of foster care safely instead of into the poverty, instability, and struggle too many have long experienced. Using internationally-recognized and accepted human rights standards applicable to youth, this Article defines reasonable efforts that state agencies must provide to youth aging out of foster care. The efforts necessary to help youth become self-sufficient must be youth-directed, consistent with the maturity and needs of the specific youth. The approach in this Article requires courts to determine whether state agencies actually provided services to prepare youth

intend to create a private right of action for the reasonable efforts requirement in federal child welfare law).

¹⁵ 42 U.S.C. § 675(5)(H).

¹⁶ *Id.*

¹⁷ 42 U.S.C. § 675(5)(B) (requiring a state’s “case review system” review the placement, circumstances, and progress towards permanency for a child in foster care at least every six months); *see also id.* § 671(a)(15); 45 C.F.R. § 1356.21 (b)(2)(i) (“The [state] agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect . . . at least once every twelve months thereafter while the child is in foster care.”).

for self-sufficiency instead of simply creating a plan that lists the needs of the youth who is aging out.

Part I will describe the consequences of aging out of foster care and will also describe the role of reasonable efforts in enforcing child welfare laws. Part II will describe the three-part human rights approach¹⁸ that defines reasonable efforts for youth aging out. The approach first identifies specific rights as values the world community shares and for which the world community expressed its acceptance through the Convention on the Rights of the Child (CRC),¹⁹ the International Covenant on Civil and Political Rights (ICCPR),²⁰ and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²¹ The approach next incorporates these rights into existing child welfare law using accepted methods of statutory construction to clarify the ambiguity of “reasonable efforts.” The approach then advocates utilizing community-based supports for youth as part of the broader children’s rights and anti-poverty movements. Part III will explain how courts in other countries have applied human rights of youth in their domestic cases. Part IV will illustrate how this approach would have affected L.B. by providing examples of questions courts should ask at each child welfare hearing for youth, beginning when he or she turns sixteen years old. The Article concludes by advocating that courts incorporate into child welfare laws the internationally-recognized human rights of youth who are aging out of the child welfare system.

I. THE UNREASONABLE CONSEQUENCES OF AGING OUT OF FOSTER CARE

This section first describes “reasonable efforts” and the ambiguity of the term. It then describes the known consequences of

¹⁸ This framework was articulated by staff at the Maryland Legal Aid Bureau to improve the services it provides to its clients and intended for lawyers and non-lawyers to use. It was developed after the Bureau’s “needs assessment” of the communities it serves and in collaboration with legal services advocates nationwide.

¹⁹ Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC], *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%201577/v1577.pdf> (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).

²⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/v999.pdf>.

²¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR], *available at* <https://treaties.un.org/doc/Publication/UNTS/Volume%20993/v993.pdf>.

aging out of foster care, attributing these consequences to the lack of a clear definition for “reasonable efforts.”

A. *The Realities of Aging Out of Foster Care*

The consequences of aging out are poor and have been for decades.²² Congress first enacted legislation specifically directed to assist youth aging out of foster care in 1986, after major changes to the federal child welfare law only a few years earlier.²³ Despite the services Congress encouraged, the results remained poor. Therefore, in 1999, Congress passed the Foster Care Independence Act of 1999,²⁴ in response to findings that the nearly twenty thousand youth who age out of the foster care system annually²⁵ did so with “high rates of homelessness, non-marital childbearing, poverty, and delinquent or criminal behavior.”²⁶ Youth aging out of foster care also were “frequently the target of crime and physical assaults.”²⁷ For many years, states varied their age-out age between sixteen to twenty-one, with most setting the age at eighteen.²⁸ Most states now have extended their age of aging out to twenty-one.²⁹ The results of

²² See Mari Brita Maloney, Note, *Out of the Home onto the Street: Foster Children Discharged into Independent Living*, 14 FORD. URB. L.J. 971 (1985) (describing stories of youth who age out of New York City’s foster care system and into homelessness, poverty, and incarceration, while advocating for legislative and programmatic changes to the foster care system that would provide youth more support as they age out).

²³ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, § 12307(a), 100 Stat. 82.

²⁴ Pub. L. No. 106-169, 113 Stat 1822.

²⁵ *Id.* § 101(a)(3).

²⁶ *Id.* § 101(a)(4).

²⁷ *Id.*

²⁸ At the time of the 1986 legislation, the overwhelming majority of states set the age for leaving the foster care system at eighteen. See Maloney, *supra* note 22, at 980 n.81. Approximately one-third of states allowed youth to remain in state care beyond eighteen. See *id.* Still, a number of states—including Colorado, Nebraska, and Mississippi—remarkably required youth to age out when they turned sixteen years old. *Id.*

²⁹ Today, most jurisdictions establish twenty-one as the age at which youth will age out of foster care: Alabama (ALA. CODE § 38-7-2(1) (West, Westlaw through Act 2014-191 of 2014 reg. sess.) (age twenty-one, defining “child” as those under age twenty-one who are still in foster care)); Alaska (ALASKA STAT. § 47.10.080(c) (West, Westlaw through legis. eff. Apr. 17, 2014, passed during the second reg. sess. of the 28th Legislature) (age nineteen, but can extend to age twenty-one with the youth’s consent)); Arizona (ARIZ. REV. STAT. ANN. § 8-501(B) (West, Westlaw through legis. eff. Apr. 23, 2014 of the second reg. sess. of the 51st Legislature) (age twenty-one)); California (CAL. WELF. & INST. CODE § 303(a) (West, Westlaw incl. urgency legis. through Ch. 11 of 2014 reg. sess.) (age twenty-one)); Colorado (COLO. REV. STAT. § 19-3-205(2)(a) (West, Westlaw through laws eff. Apr. 11, 2014) (age eighteen, but when youth turns seventeen, the court determines whether he or she is independent or whether it should continue jurisdiction until age twenty-one)); Connecticut (CONN. GEN. STAT. ANN. § 17a-93(a) (West, Westlaw incl. enactments through Public Act 14-1 of the 2014

Feb. reg. sess. of Conn. Gen. Assembly) (defining “child” as those younger than age eighteen or under twenty-one if he or she is enrolled in an education, vocation, or job training program)); Delaware (DEL. CODE ANN. tit. 10, § 929(a) (West, Westlaw through 79 Laws 2014, ch. 21) (age eighteen, but can extend to age twenty-one through motion with the court)); Washington, D.C. (D.C. CODE ANN. § 16-2303 (West, Westlaw through February 21, 2014) (age twenty-one)); Florida (FLA. STAT. ANN. § 39.013(2) (West, Westlaw incl. chapters in effect from the second reg. sess. of 2014 of the 23rd Legislature through March 31, 2014) (age twenty-one, unless the youth elects to leave foster care or does not meet other eligibility requirements)); Georgia (GA. CODE ANN. § 15-11-2(10)(c) (West, Westlaw through Acts 343 to 346 and Acts 348 to 357 of the 2014 reg. sess.) (youth can remain in state care until age twenty-two, or twenty-three if he or she is receiving independent living services)); Guam (19 GUAM CODE ANN. § 4202(b) (West, Westlaw through Public Law 31-285) (age eighteen)); Hawaii (HAW. REV. STAT. ANN. § 587A-35 (West, Westlaw with amends. through act 5 of the 2014 reg. sess.) (age nineteen)); Idaho (IDAHO CODE ANN. § 39-1202(3), (9) (West, Westlaw through the 2014 second reg. sess. of the 62d Idaho Legislature) (age eighteen, but age twenty-one if youth is living in a foster home, group home, or transition living arrangement when he or she reaches age eighteen)); Illinois (705 ILL. COMP. STAT. ANN. § 405/2-31(1) (West, Westlaw through P.A. 98-628 of the 2014 reg. sess.) (age nineteen, but can extend to twenty-one if a court determines the youth and public’s best interests require continuation of wardship)); Indiana (IND. CODE ANN. § 31-28-5.8-5(a) (West, Westlaw through second reg. sess. of 118th General Assembly, eff. through May 1, 2014) (age eighteen, but can be extended to age twenty if the youth is employed, attending an educational or vocational program, or has a medical condition excusing such a program)); Iowa (IOWA CODE ANN. § 234.1(2) (West, Westlaw incl. immediately eff. legis. signed as of Apr. 11, 2014 from the 2014 reg. sess.) (age nineteen if youth is in educational program)); Kansas (KAN. STAT. ANN. § 38-2203(c) (West, Westlaw through 2013 reg. and special sess.) (age twenty-one)); Kentucky (KY. REV. STAT. § 620.140(1)(d)–(e) (West, Westlaw through the end of the 2013 reg. sess. and the 2013 extraordinary sess.) (age eighteen, but up to twenty-one if youth asks the court for an extension before he or she turns nineteen)); Louisiana (LA. REV. STAT. ANN. § 46:231 (West, Westlaw through the 2013 reg. sess.) (age eighteen, or nineteen if enrolled in school)); Massachusetts (MASS. GEN. LAWS ANN. ch. 119, § 23 (West, Westlaw through ch. 70 of the 2014 second annual sess.) (age eighteen, or nineteen if enrolled in school)); Maine (ME. REV. STAT. tit. 22, § 4037-A(1), (5) (West, Westlaw through ch. 554 of the 2013 second reg. sess. of the 126th Legislature) (age twenty if youth is enrolled in an education or vocation training program, is employed, or has a documented medical condition justifying extended services, but no guardians ad litem during extended-care period)); Maryland (MD. CODE ANN., CTS. & JUD. PROC. § 3-804(b) (West, Westlaw through chapter 1, 4, 9, 40, 41, 44, 45, 48, 49, 62, 67, 68, 72, 88, 90, 95, 127, 146, 233, 241, 246, 254, and 255 of the 2014 reg. sess. of the General Assembly) (age twenty-one, unless court terminates case)); Michigan (MICH. COMP. LAWS ANN. § 722.981-85 (West, Westlaw through P.A.2014, Nos. 93, 95–96, 98–100, 102–115, and 117–119 of the 2014 reg. sess. of the 97th Legislature) (age twenty-one)); Minnesota (MINN. STAT. ANN. § 260C.451 (West, Westlaw incl. laws of the 2014 reg. sess. through ch 166, except chs. 149, 152, 157, 161, and 164) (age twenty-one if enrolled in school or employed)); Mississippi (MISS. CODE ANN. § 43-21-105 (West, Westlaw through the 2014 reg. sess.) (age eighteen)); Missouri (MO. ANN. STAT. § 110.04 (12) (West, Westlaw incl. amends. received through Mar. 15, 2014) (defining “juvenile” as those under age twenty-one and within family court jurisdiction)); Montana (MONT. CODE ANN. § 41-3-102(6) (West, Westlaw through the 2013 sess.) (age eighteen)); Nebraska (NEB. REV. STAT. ANN. §§ 43-905, 43-4502 (West, Westlaw through end of 2013 reg. sess.) (age nineteen, but allows youth and former foster youth to receive services until they reach

twenty-one if they are participating in education, vocational, or other independent living services)); Nevada (NEV. REV. STAT. ANN. § 432B.594 (West, Westlaw through the 2013 77th reg. sess. and the 27th special sess. of the Nevada Legislature) (age twenty-one)); New Hampshire (N.H. REV. STAT. ANN. § 169-C:4 (West, Westlaw through ch. 2 of the 2014 reg. sess.) (age eighteen, until he or she completes high school, or otherwise age twenty-one)); New Jersey (N.J. STAT. ANN. § 30:4C-2.3 (West, Westlaw incl. laws eff. through L. 2014, c. 1 and J.R. No. 1) (age twenty-one if youth was receiving foster care services at age sixteen and has not refused or requested services end at age eighteen or after)); New Mexico (N.M. STAT. ANN. § 32A-4-25.3 (West, Westlaw through all 2013 legis.) (age nineteen if the court determines youth's need for transition services prior to age eighteen)); New York (N.Y. FAM. CT. ACT § 1087(a) (McKinney, Westlaw through L. 2014, chs. 1–19 and 50–58) (age twenty-one)); North Carolina (N.C. GEN. STAT. ANN. § 7B-201(a) (West, Westlaw through the end of the 2013 reg. sess. of the General Assembly) (age eighteen or youth is otherwise emancipated, whichever occurs first)); North Dakota (N.D. CENT. CODE ANN. § 27-20-02(4) (West, Westlaw through the 2013 reg. sess. of the 63rd Legislative Assembly) (under age eighteen and unmarried)); Ohio (OHIO REV. CODE ANN. § 2151.81 (West, Westlaw through Files 1 to 94 of the 130th General Assembly (2013–2014)) (age twenty-one for youth who was in temporary or permanent custody of public or private placement agency or in a planned permanent living arrangement through the same agency)); Oklahoma (OKLA. STAT. ANN. tit. 10A, § 1-4-101(2)(a) (West, Westlaw through ch. 23 of the first extraordinary sess. of the 54th Legislature (2013)) (age eighteen)); Oregon (OR. REV. STAT. ANN. § 419B.328 (West, Westlaw incl. emergency legis. through ch. 80 of the 2014 reg. sess.) (age twenty-one for “ward” of the state)); Pennsylvania (42 PA. CONS. STAT. ANN. § 6302 (West, Westlaw through 2014 reg. sess. acts 1–21, 23, 24, 26, 27, and 30) (age twenty-one for youth adjudicated dependent before age eighteen, asked for services to continue, and is in education program, is employed, or has medical condition that prevents either education or employment)); Puerto Rico (P.R. LAWS ANN. tit. 8, § 444(v) (West, Westlaw through Dec, 2011, except for Act No. 136 of the 2010 reg. sess.) (age eighteen as definition of “minor”)); Rhode Island (R.I. GEN. LAWS ANN. § 40-11-2(2) (West, Westlaw with amends. through ch. 534 of 2013 reg. sess.) (defining “child” as those under age eighteen)); South Carolina (S.C. CODE ANN. § 63-7-20(3) (West, Westlaw through end of 2013 reg. sess.) (age eighteen as definition of “child”)); South Dakota (S.D. CODIFIED LAWS § 26-6-6.1 (West, Westlaw through the 2013 reg. sess.) (age twenty-one, if any child welfare agency determines the youth needs continued services)); Tennessee (TENN. CODE ANN. §§ 37-1-102(4)(G), 37-2-417(b) (West, Westlaw with laws from the 2014 second reg. sess., eff. through Feb. 28, 2014) (age of majority set at eighteen, but expanded to age twenty-one for youth wishing to receive transition services from the child welfare agency on a voluntary basis only)); Texas (TEX. FAM. CODE ANN. § 263.602 (West, Westlaw through the end of the 2013 third called sess. of the 83d Legislature) (age twenty-one for youth to receive transition services)); Utah (UTAH CODE ANN. § 78A-6-105(6) (West, Westlaw through 2013 second special sess.) (age eighteen as definition of “child”)); Vermont (VT. STAT. ANN. tit. 33, § 4904 (West, Westlaw incl. all laws eff. upon passage through No. 95 of the 2013–2014 sess. (2014) of the Vt. General Assembly) (age twenty-two for youth who was in state custody at age eighteen or has spent at least five years in state custody between age ten and eighteen, provided the youth is employed or attending an education or vocational program)); Virgin Islands (V.I. CODE ANN. tit 34, § 104(a) (West, Westlaw through act 7471 of the 2012 reg. sess.) (age eighteen as definition of “child”)); Virginia (VA. CODE ANN. § 63.2-905.1 (West, Westlaw through end of 2013 reg. sess. and the end of 2013 special sess., and incl. 2014 reg. sess. chs. 1, 2, 8, 23, 29, 47, and 59) (mandating state agencies to provide independent living services to youth between ages eighteen and twenty-one, where before such provision was only discretionary)); Washington (WASH. REV. CODE ANN.

this extension have been mixed at best with some studies concluding that prolonging a stay in foster care only delayed homelessness and other negative consequences instead of reducing them.³⁰ In 2011, approximately 26,286 young people aged out of foster care, accounting for eleven percent of the total number of children who left foster care during that same year.³¹ Many of these youth found themselves in the same circumstances as their predecessors nearly thirty years ago: at risk for homelessness, incarceration, and continued poverty.³²

A strong contributor to this instability is that youth in foster care have high rates of school drop-out because they so often change foster placements.³³ Changing foster placements often leads to changing schools, which then negatively affects academic performance and increases the likelihood of dropping out of school.³⁴ Nearly one in four youth formerly in foster care lack a high school diploma or GED by age twenty-three or twenty-four.³⁵ One in five young women formerly in foster care do not have a high school diploma or GED by age twenty-one.³⁶ These poor out-

§ 74.13.031(16) (West, Westlaw incl. 2014 legis. eff. before June 12, 2014, the general eff. date for the 2014 reg. sess.) (age twenty-one for “nonminor dependent” who is receiving extended foster care services under this section)); West Virginia (W. VA. CODE ANN. § 49-2B-2(x) (West, Westlaw incl. laws of the 2014 reg. sess., S.B. 623) (age twenty-one, defining “transitioning adult” as youth found abused and neglected, in state custody at age eighteen, and who enters contract with the state to participate in an educational, training, or treatment program started before age eighteen)); Wisconsin (WIS. STAT. ANN. § 48.355(4) (West, Westlaw through 2013 act 146, published Mar. 28, 2014) (age nineteen if youth was in state custody at age eighteen and enrolled in education or vocational program)); and Wyoming (WYO. STAT. ANN. § 14-3-431(b) (West, Westlaw through the 2013 general sess.) (age twenty-one if youth is participating in transitional services program)).

³⁰ AMY DWORSKY & MARK COURTNEY, CHAPIN HALL AT UNIV. OF CHICAGO & PARTNERS FOR OUR CHILD, AT UNIV. OF WASH., *ASSESSING THE IMPACT OF EXTENDING CARE BEYOND 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY 1*, 1–2 (2010), available at http://www.chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf.

³¹ See Courtney, *supra* note 6.

³² See Maloney, *supra* note 22, at 972.

³³ See generally Arthur J. Reynolds et al., *School Mobility and Educational Success: A Research Synthesis and Evidence on Prevention*, INST. CHILD DEV. AT U. MINN. (2009), available at <http://www.iom.edu/~media/Files/Activity%20Files/Children/ChildMobility/Reynolds%20Chen%20and%20Herbers.pdf>; DAVID KERBOW, CTR. FOR RESEARCH ON THE EDUC. OF STUDENTS PLACED AT RISK, *PATTERNS OF URBAN STUDENT MOBILITY AND LOCAL SCHOOL REFORM 20* (1996), available at <http://www.csos.jhu.edu/crespar/techReports/Report5.pdf> (finding children who change schools four or more times by the sixth grade lose approximately one year of educational growth).

³⁴ Arthur J. Reynolds et al., *supra* note 33, at 11.

³⁵ COURTNEY ET AL., *supra* note 7, at 22.

³⁶ *Id.*

comes in school lead to less secure employment for youth formerly in foster care compared to their peers in the general population.³⁷ Nearly fifty-two percent of youth formerly in foster care are unemployed.³⁸ Those who are employed have a mean income of \$12,064 compared to \$20,349 for their general population peers.³⁹ Unemployment and underemployment jeopardize youth's access to health care, as well. Only fifty-seven percent of youth formerly in foster care have health insurance compared to seventy-eight percent of their peers in the general population.⁴⁰ Fewer than half have dental insurance.⁴¹ Moreover, nearly seventy-seven percent of young women formerly in foster care become pregnant by age twenty-four compared to approximately forty percent of their general population peers.⁴² Repeat pregnancies are "more the rule rather than the exception" for young women in and aging out of foster care, according to one researcher, with two-thirds experiencing multiple pregnancies.⁴³ Equally troubling is that many youth are discharged from foster care because they are "runaways" and state agencies do not know where those children are, let alone whether they are safe. In fiscal year 2011, for example, approximately 1,387 young people were "runaway" discharges from foster care.⁴⁴ What becomes of these children is unknown.

Additionally, youth formerly in foster care have higher incidents of involvement in the criminal justice system than their general population counterparts.⁴⁵ Incarceration rates of former foster care youth range from eighteen to forty-one percent⁴⁶ in some jurisdictions. Incidences of mental health issues and mental illness are also high.⁴⁷ They are, unsurprisingly, twice as likely to experi-

³⁷ See ADRIENNE L. FERNANDES, CONG. RESEARCH SERV., RL 34499, *YOUTH TRANSITIONING FROM FOSTER CARE: BACKGROUND, FEDERAL PROGRAMS, AND ISSUES FOR CONGRESS* (2008). See also EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 34704, *CHILD WELFARE: THE FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008*, at 10 (2008).

³⁸ COURTNEY ET AL., *supra* note 7, at 27.

³⁹ *Id.* at 32.

⁴⁰ *Id.* at 41–42.

⁴¹ *Id.*

⁴² *Id.* at 49–50.

⁴³ *Id.* at 49.

⁴⁴ See Courtney, *supra* note 6.

⁴⁵ COURTNEY ET AL., *supra* note 7, at 68.

⁴⁶ *Youth After Foster Care*, CHILD WELFARE LEAGUE OF AM., <http://www.cwla.org/programs/fostercare/factsheetafter.htm#> (last visited Nov. 25, 2013) (citing studies of incarceration rates among youth formerly in foster care).

⁴⁷ PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, *ASSESSING THE EFFECTS OF FOSTER CARE: MENTAL HEALTH OUTCOMES FROM THE CASEY NATIONAL ALUMNI STUDY* (2003), available at <http://www.casey.org/Resources/Publications/pdf/CaseyNa>

ence economic hardships such as difficulty affording rent⁴⁸ and paying bills in general. Nearly twenty percent of youth formerly in foster care, or one out of every five, are homeless within one year of leaving foster care.⁴⁹ Homelessness does not abate the older they get. By age twenty-four, nearly forty percent of youth formerly in foster care report being homeless or without a stable place to live at least once since leaving foster care.⁵⁰ Becoming homeless multiple times is unfortunately common.⁵¹ Many frequently have to move from short-term residence to short-term residence, staying with friends or relatives.⁵²

In short, youth aging out are at a significant disadvantage when they leave foster care. To successfully age out means, among other things, having a stable home upon aging out.⁵³ It means earning a high school diploma or GED, receiving job-training, and having life skills necessary to live independently.⁵⁴ Notably, youth who have a close relationship with an adult, particularly a family member, were half as likely to be homeless as those without such support.⁵⁵ The reality for most, however, is that few have such support and are left to find their own way for necessary services and assistance.

tionalAlumniStudy_MentalHealth.pdf (stating that “the rate of post-traumatic stress disorder (PTSD) among alumni was nearly five times that of the general population and, at 21.5%, exceeded the rates for American war veterans (Vietnam—15%; Afghanistan—6%; and Iraq—12–13%)”).

⁴⁸ Courtney, *supra* note 6, at 9.

⁴⁹ *Id.* at 6.

⁵⁰ COURTNEY ET AL., *supra* note 7, at 10.

⁵¹ *Id.*

⁵² Such transient living spaces are described as “precarious” housing because of the high rates of residential mobility. See AMY DWORSKY ET AL., MATHEMATICA POLICY RESEARCH, U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, HOUSING FOR YOUTH AGING OUT OF FOSTER CARE: A REVIEW OF THE LITERATURE AND PROGRAM TYPOLOGY 5–7 (2012), available at http://www.huduser.org/publications/pdf/HousingFosterCare_LiteratureReview_0412_v2.pdf (listing studies since 1990 that describe the conditions of homelessness, including for those aging out of foster care).

⁵³ PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY 45 (2003), available at http://www.casey.org/Resources/Publications/pdf/CaseyNationalAlumniStudy_Summary.pdf.

⁵⁴ *Id.*

⁵⁵ DWORSKY ET AL., *supra* note 52, at 7–8.

B. *The Role of Reasonable Efforts in the Child Welfare System*

i. A Brief History of Reasonable Efforts

The modern American child welfare system is comprised of state systems implementing two federal spending clause acts,⁵⁶ specifically the Child Abuse Prevention and Treatment Act (CAPTA)⁵⁷ and the Adoption Assistance and Child Welfare Act (AACWA).⁵⁸ The purpose of CAPTA was to provide financial assistance for the prevention, identification, and treatment of child abuse and neglect throughout the United States.⁵⁹ Among other things, CAPTA established that a child's interests would be represented by an independent guardian *ad litem*.⁶⁰ AACWA, on the other hand, was more ambitious. Congress intended AACWA to limit the number of children in a state of "foster care drift" or "foster care limbo," the phenomenon of children moving from foster home to foster home throughout their childhood and literally growing up in foster care without a permanent home.⁶¹ Key to eliminating foster care drift was requiring that state agencies make "reasonable efforts" to prevent removal of the child from the home in order to receive federal funding for foster care programs.⁶² The Act also

⁵⁶ The origins of the American foster care system are in the Social Security Act of 1935, which Congress enacted to address the economic consequences of the Depression. See Maloney, *supra* note 22, at 976. While not solely for children in state care, the Act was concerned with the effect of the economy on children and provided financial assistance for children and not the family. *Id.* at 976–77 (citing *King v. Smith*, 392 U.S. 309, 328 (1968) and *Burns v. Alcala*, 420 U.S. 575, 581–84 (1975), both of which address the history of the Act and its focus on assisting dependent children, including those with their biological family).

⁵⁷ Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. 93-247, 88 Stat. 4 (1974). CAPTA is currently codified in 42 U.S.C. §§ 5101–19.

⁵⁸ Adoption Assistance and Child Welfare Act (AACWA) of 1980, Pub. L. No. 96-272, 94 Stat. 500. The Act was codified in scattered sections of Title 42 of the U.S. Code. AACWA provided federal funds for state adoption assistance programs and attempted to strengthen the programs for foster care by requiring states to have a state plan approved by the Secretary of Health and Human Services. *Suter v. Artist M.*, 503 U.S. 347, 350–51 (1992); *L.J. v. Wilbon*, 633 F.3d 297, 308 (4th Cir. 2011). AACWA's focus was on preserving families and on reunifying them when children are removed from their parents. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. Tol. L. Rev. 321, 324 (2005).

⁵⁹ 88 Stat. 4.

⁶⁰ *Id.* at 4(B)(2)(G). Congress has repeatedly reauthorized CAPTA since its enactment in 1979. See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 33–34 (Int'l. 3d ed. 2006); *id.* at 34 n.13 (noting summary of legislation reauthorizing CAPTA).

⁶¹ See Bean, *supra* note 58, at 324–25.

⁶² See Adoption Assistance and Child Welfare Act of 1980 § 471(a)(15) (codified at 42 U.S.C. § 671(a)(15)).

conditioned federal funding for foster care programs on a judicial determination that the child's return to the home is "contrary to [his or her] welfare."⁶³ Congress did not define "reasonable efforts" in the statute, nor did the Secretary of Health and Human Services define the term in subsequent regulations.⁶⁴ Nonetheless, the "reasonable efforts" provision is the principal enforcement mechanism for providing services to children and families involved in the foster care system.⁶⁵

In 1997, Congress amended AACWA and passed the Adoption Safe Families Act (ASFA) to provide reasonable efforts towards the permanency plans of youth who, like L.B., remain in foster care.⁶⁶ ASFA instituted limits for the reasonable efforts state agencies had to provide to parents for reunification.⁶⁷ Important to youth in foster care—and central to this Article—is that ASFA required that state agencies make reasonable efforts to finalize all permanency plans and for all youth in foster care, and not simply prior to removing children from their parents or guardians.⁶⁸ Courts could now better ensure that state agencies were actively moving to finalize a permanency plan once a child is in foster care. This requirement is particularly important for those youth who will age out.⁶⁹ ASFA requires courts to determine whether state agencies have provided reasonable efforts for each child "at least once every

⁶³ 42 U.S.C. § 672(a)(2)(A)(ii).

⁶⁴ See Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 259, 271–73 (2003).

⁶⁵ *Id.* at 271–73.

⁶⁶ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115. This Act was codified throughout 42 U.S.C. §§ 671–79. Congress passed ASFA because it was concerned that too many children continued in "foster care drift" or "limbo" because state agencies were too often making extraordinary efforts to reunify kids with parents who were unable to provide for their children. See Crossley, *supra* note 64, at 261, 278 (discussing how erroneous representations of high profile cases of child maltreatment and death resulted in the belief that state agencies were making "extraordinary efforts" in reunification). State agencies must, as a result, seek to terminate parental rights if the child, or children, remained out of the parents' home for fifteen of the previous twenty-two months from filing the petition to terminate parental rights, unless certain exceptions apply. 42 U.S.C. § 675(5)(E); *In re James G.*, 943 A.2d 53, 79 (Md. Ct. Spec. App. 2008) (recognizing the same).

⁶⁷ Adoption and Safe Families Act § 101(a) (excusing reasonable efforts prior to removal where, among other things, the parent subjects the child, or children, to aggravated abuse); see also *id.* § 103(a) (requiring states to initiate termination of parental rights proceedings, unless the state documents a compelling reason otherwise, where the child is in state care for fifteen of the previous twenty-two months).

⁶⁸ *Id.* § 101(a) (codified at 42 U.S.C. § 671(a)(15)(C)); see also 45 C.F.R. § 1355.21(b)(2)(i) (2013).

⁶⁹ *Cf.* Adoption and Safe Families Act § 101(a).

twelve months thereafter while the child is in foster care.”⁷⁰ Congress did not, however, define “reasonable efforts” for a given permanency plan.⁷¹ The porous consequences for youth aging out remained the same. Congress later passed the Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections) to require that state agencies create a transition plan that lists the youth’s housing, employment, education, and medical needs.⁷² Fostering Connections requires state agencies to develop these transition plans three months before the youth ages out, but does not require that the state agency actually provide services towards each of the areas needed for youth to become self-sufficient.⁷³ The requirement for reasonable efforts, therefore, remains the primary, albeit under-utilized, enforcement mechanism for providing timely and meaningful services to youth.⁷⁴

1. Reasonable Efforts as Enforcer of Child Welfare Laws

The “reasonable efforts” requirement in federal law is the

⁷⁰ 45 C.F.R. 1356.21(b)(2)(i).

⁷¹ *In re James G.*, 943 A.2d at 74.

⁷² Pub. L. 110-351, 122 Stat. 3949 (2008). Specifically, the Act requires: [D]uring the 90-day period immediately prior to the date on which the child will attain 18 years of age, or such greater age as the State may elect under [this section], whether during that period foster care maintenance payments are being made on the child’s behalf or the child is receiving benefits or services under section 677 of this title, a caseworker on the staff of the State agency, and, as appropriate, other representatives of the child provide the child with assistance and support in developing a transition plan that is personalized at the direction of the child, includes specific options on housing, health insurance, education, local opportunities for mentors and continuing support services, and work force supports and employment services . . . and is as detailed as the child may elect[.]

42 U.S.C. § 675(5)(H).

⁷³ 42 U.S.C. § 675(5)(H). Maryland’s high court, the Court of Appeals, recently made this point that the federal law only requires a plan, not transition services. *In re Ryan W.*, 76 A.3d 1049, 1056 n.6 (Md. 2013). This case involved the state agency actions as representative payee of social security survivor benefits belonging to a child beneficiary in foster care. *Id.* at 1051. The state agency received federal survivor benefits and automatically applied those payments to the child’s cost of foster care without providing notice to the child or his attorney. *Id.* at 1056. The child beneficiary sought relief before the juvenile court that heard his foster care case, which created a constructive trust over the amount the state received, \$31,693.50. *Id.* at 1057. The state agency appealed, arguing its use of the funds towards the child’s cost of care was authorized by the Social Security Act. *Id.* The child argued, among other things, that the state agency had to use his benefits to prepare him for transitioning from foster care under federal child welfare law. *Id.* The Court of Appeals disagreed with the child and found that federal child welfare laws require only a transition plan and not transition services. *Id.* at 1056 n.6.

⁷⁴ See Crossley, *supra* note 64, at 271–73.

most appropriate method of ensuring youth aging out receive the services they need. The provision is too infrequently used to hold state agencies accountable for providing appropriate services to youth aging out. One reason for this infrequent use of the provision to help youth age out may be the decision in *Suter v. Artist M.*, a case in which the Supreme Court considered whether the reasonable efforts provision could be enforced through a private right of action.⁷⁵ *Suter* involved a class action suit brought pursuant to 42 U.S.C. § 1983 by children in Illinois against the Illinois Department of Children and Family Services (DCFS), which investigated allegations of child abuse and neglect as well as provided foster care services for children and families.⁷⁶ The plaintiff class alleged that DCFS violated the AACWA by failing to provide reasonable efforts to prevent their removal from their homes and by failing to provide reasonable efforts to facilitate their return to their home, as 42 U.S.C. § 671(a)(15) (the reasonable efforts provision) required.⁷⁷ In other words, the class of children alleged they had an individual right for the state to provide reasonable efforts, and, accordingly, they sought declaratory and injunctive relief.⁷⁸ In a 7-2 decision, the Supreme Court found that Congress did not intend to create a private right of action and, therefore, held that the reasonable efforts provision was not enforceable through a private right of action.⁷⁹ The Court held that because Congress did not define “reasonable efforts” in federal law, it did not intend for plaintiffs to enforce the provision through a private right of action.⁸⁰ The Court held other AACWA sections allowed for enforcing the “reasonable efforts” requirement, including the Secretary of Health and Human Services’ authority to reduce or eliminate payments to states that do not comply with the requirement.⁸¹ Notably, the Supreme Court cited the ability of juvenile (or other state) courts to determine whether the state agency’s actions were reasonable.⁸² In

⁷⁵ *Suter v. Artist M.*, 503 U.S. 347, 347 (1992).

⁷⁶ *Id.* at 351.

⁷⁷ *Id.* at 352.

⁷⁸ *Id.* at 353. The District Court held that AACWA had an implied cause of action of the sort the class brought and that the class could bring suit under § 1983. *Id.* at 353. It entered an injunction requiring DCFS to assign a caseworker to each child placed into its custody within three business days of the date the juvenile court hears the case. *Id.* at 354. It also required DCFS to reassign a caseworker within three business days of the day a caseworker ends his or her work with the child. *Id.* The Court of Appeals for the Seventh Circuit affirmed. *Id.*

⁷⁹ *Suter*, 503 U.S. at 360–61, 364.

⁸⁰ *Id.* at 364–65.

⁸¹ *Id.* at 360.

⁸² *Id.* at 360–61. Congress then amended the Social Security Act to allow a private

doing so, the Supreme Court not only recognized the importance of state courts' authority in child welfare cases, but also provided the way to enforce child welfare laws.

Admittedly, other reforms have improved the child welfare system over the years. Children's lawyers and advocates have successfully pursued § 1983 actions based upon provisions of AACWA.⁸³ Such actions include claims pursuant to provisions requiring a written description of services a child over age sixteen requires to transition from foster care to independent living.⁸⁴ However, § 1983 litigation has been protracted and, in some cases, lasts for decades.⁸⁵ While important, such protracted litigation does not timely provide young people, such as L.B., the services they need to age out successfully.⁸⁶ Other reform efforts include legislative and programmatic changes.⁸⁷ These include, of course, the major fed-

right of action for some legislation that required state plans to provide efforts as part of that plan. Congress also invalidated the portion of *Suter* that held a provision of the Social Security Act did not create a private right of action if the provision is part of a State plan. See 42 U.S.C. § 1320a-2 (2012). The provision states in relevant part:

In an action brought to enforce a provision of this chapter [of the Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of [the Act] requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.* . . . [T]his section is not intended to alter the holding in *Suter v. Artist M.* that section § 671(a)(15) of this title [section 471(a)(15) of the Act] is not enforceable in a private right of action.

Id. (italization added). However, Congress explicitly upheld the holding in *Suter*.

⁸³ See, e.g., *L.J. v. Massinga*, 699 F. Supp. 508, 529 (D. Md. 1988); *L.J. v. Wilbon*, 633 F.3d 297, 309 (4th Cir. 2011) (citing *White v. Chambliss*, 112 F.3d 731, 739 n.4 (4th Cir. 1997)). Courts have found that other provisions of case plan requirements in the foster care laws can be enforced through a private action. See, e.g., *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 290 (N.D. Ga. 2003) (alleging § 675(1)(D) provided enforceable rights including for services needed to transition from foster care to independent living).

⁸⁴ "Case plan" must include "[w]here appropriate, for a child age 16 or over, a written description of the programs and services which will help such child prepare for the transition from foster care to independent living." 42 U.S.C. § 675(1)(D).

⁸⁵ See, e.g., *Wilbon*, 633 F.3d at 299–304 (describing the long history of litigation against the Baltimore City Department of Social Services for its failure to comply with AACWA. The litigation began in 1984 and resulted in a consent decree in 1991 that required on-going compliance monitoring for more than two decades).

⁸⁶ *Id.*; see also *Maloney*, *supra* note 22, at 990–1002 (discussing state and federal court litigation aimed at improving foster care outcomes, including *Palmer v. Cuomo*, 121 A.D.2d 194 (1st Dep't 1986)).

⁸⁷ See, e.g., Alice Bussiere, *Permanency for Older Foster Youth*, 44 FAM. CT. REV. 231 (2006) (advocating that youth in foster care be allowed to be active participants in their care and reviewing California Welfare and Institutions Code § 16501(b)(11) that required children in foster care not leave care without a "lifelong connection to a

eral legislation AACWA, ASFA, and Fostering Connections. Again, while important, the legislative and § 1983 litigation have not resulted in timely enforcement of services for individual youth who are aging out.

Under *Suter*, state courts can (and should) enforce services through findings pursuant to the “reasonable efforts” requirement. While reasonable efforts are undefined, permanency plans must dictate to courts and state agencies the services that are reasonable for youth aging out of foster care.⁸⁸ Permanency plans establish the goal towards which the parties work to facilitate the child’s safe exit from the foster care system.⁸⁹ A permanency plan must be established within twelve months of the child’s entering foster care and must be reviewed at least annually thereafter until the youth exits the foster care system.⁹⁰ Permanency plans for youth age sixteen and older must list services they need to transition into independence.⁹¹ Therefore, the permanency plan allows courts to specify the services that state agencies must provide children and fami-

committed adult as well as local initiatives throughout California and New York City aimed at the same”); Keely A. Magyar, *Between and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557 (2006) (advocating that federal law subsidize foster care until the youth turns twenty-one and, notably, condition funding for foster care on state laws that accurately utilize research on human development from adolescence to adulthood); Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183 (2008) (advocating policy reform that provides a “safety net” for youth aging out of foster care, including providing support beyond age eighteen, housing and financial assistance for students to achieve academic success, universal health care for former youth in foster care until age twenty-four, assistance to obtain part-time employment beginning at age sixteen, less frequent court hearings for transitioning youth in favor of using an ombudsman or social workers specializing in working with older youth, mentoring system in the community, and allowing foster youth to participate and be more directive in the planning for their transition); see also Maloney, *supra* note 22.

Commentators in other countries have also advocated that their domestic governments enact legislation to enforce human rights instruments including the Convention on the Rights of the Child. See, e.g., Mitchell Woolf, *Coming of Age? The Principle of “The Best Interests of the Child,”* 2 EUR. HUM. RTS. L. REV. 205, 208 (2003).

⁸⁸ See 42 U.S.C. § 675(5)(C)(i) (listing permanency plans available).

⁸⁹ *Id.* § 675(5)(C)(i). See *In re Damon M.*, 765 A.2d 624, 627–28 (Md. 2001) (stating that the permanency plan establishes the goal towards which all parties in a child welfare case must expend their resources).

⁹⁰ 42 U.S.C. § 675(5)(C).

⁹¹ *Id.* Furthermore, state agencies must provide a transition plan to youth who will age out of foster care at the youth’s direction in the areas of housing, health insurance, education, mentoring as well as employment supports. *Id.* § 675(5)(H). Additionally, in permanency planning hearings, courts must at least annually, and in an age appropriate manner, consult directly with a child in foster care regarding their hearing. *Id.* § 675(5)(C)(iii).

lies.⁹² Courts review the plan at least annually until the child leaves foster care.⁹³ The review includes determining whether the state agency made reasonable efforts towards that permanency plan.⁹⁴ Because federal law requires state court review at least annually of the services state agencies provide youth, the “reasonable efforts” provision is the most effective vehicle to obtain services for youth aging out.

II. THE HUMAN RIGHTS OF YOUTH

Human rights are those freedoms, immunities, and benefits that all human beings may claim in the society in which they live.⁹⁵ These rights belong to everyone, including youth in foster care.⁹⁶ Human rights can also be described as values shared by the world community.⁹⁷ Preparing youth to be self-sufficient is one such value, and the international community has expressed acceptance of this value through the CRC,⁹⁸ the ICCPR,⁹⁹ and the ICESCR.¹⁰⁰ Each of these conventions must be considered because “youth” as used in this Article includes minors and adults in international law. The CRC addresses the economic, social, and cultural rights of the “child,” or one under age eighteen.¹⁰¹ The ICCPR and the ICESCR address the economic, cultural, and social rights of minors and

⁹² *In re Damon M.*, 765 A.2d at 627–28.

⁹³ 42 U.S.C. § 675(5)(C)(i).

⁹⁴ *Id.* § 671(a)(15)(C).

⁹⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III), art. 25(1), U.N. Doc. A/810 (1948); BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “human rights”). See also David Sidorsky, *Contemporary Reinterpretation of the Concept of Human Rights*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 327 (Philip Alston & Henry Steiner ed., 2000) (noting that human rights are those rights that all individuals possess solely by virtue of being human and that no state should deny). Human rights are deemed by many to be inalienable, unalterable, and eternal. Burns Weston, *Human Rights*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 325 (Philip Alston & Henry Steiner eds., 2d. ed. 2000).

⁹⁶ See Universal Declaration of Human Rights art. 25(1); BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “human rights”).

⁹⁷ See *Baker v. Canada (Minister of Citizenship and Immigration)*, 2 S.C.R. 817 (1999), ¶ 73.

⁹⁸ See *supra* note 19.

⁹⁹ See *supra* note 20.

¹⁰⁰ See *supra* note 21. These are not the only international instruments that affect the rights of the youth who are the subject of this Article. One court has identified more than eighty international instruments in the twentieth century alone that implicate the rights and welfare of children. See *Judicial Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002, Inter-Am. Ct. H.R. (ser. A) No. 17, ¶ 26 n.19 (Aug. 28, 2002), available at http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf.

¹⁰¹ CRC, *supra* note 19, art. 1.

adults. The principles and values embodied in the provisions of these international instruments, much like the U.S. Constitution, preserve human dignity.¹⁰² Human dignity for youth aging out of foster care in the United States and internationally means the shared value of preparing youth for self-sufficiency. This value further requires involving local communities to enforce human rights for youth aging out.¹⁰³ Courts can and must use accepted international human rights to read existing national, state, and local laws, including constitutions and statutes.¹⁰⁴ Incorporating human rights into child welfare laws by defining “reasonable efforts” will improve outcomes for youth aging out of foster care.

A. *The Shared Human Rights and Values of Youth*

The international community has consented to be bound by the values and rights in the CRC, ICCPR, and ICESCR by signing or ratifying¹⁰⁵ the instruments, or applying provisions in members’ domestic laws.¹⁰⁶ Signing a convention indicates a country’s agree-

¹⁰² See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (noting that the Constitution “sets forth, and rests upon, innovative principles original to the American experience, such as federalism[,] a proven balance in political mechanisms through separation of powers[,] specific guarantees for the accused in criminal cases[,] and broad provisions to secure individual freedom and preserve human dignity”).

¹⁰³ This Article does not argue that the United States ratify the CRC or any other treaty or convention, although ratifying and passing implementing legislation would further the United States’ standing in the international community as protector of human rights.

¹⁰⁴ Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2282 (1991).

¹⁰⁵ Vienna Convention on the Law of Treaties art. 11, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/v1155.pdf> (“The consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.”). The United States, through courts and also the U.S. Department of State, views the Vienna Convention as customary international law and, accordingly, is bound by the Convention. See *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000); PETERS, *supra* note 62, at 46 n.42 (listing supporting authority from courts and scholars that the Vienna Convention is a codification of customary international law); Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT’L L. 431, 443–44 (2004).

¹⁰⁶ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 881–82 n.8 (2d Cir. 1980) (stating that international human rights instruments, such as the U.N. Charter and the U.N. Declaration of Human Rights, among others, advance principles of human rights upon which all nations agree). The same court previously cited the U.N. Charter and the Charter of the Organization of American States (a non-self-executing agreement) as expressions of binding international legal principles. See *United States v. Toscanino*, 500 F.2d 267, 277 (2d Cir. 1974) (cited with approval in *Filartiga*, 630 F.2d at 881–82 n.9).

ment that the text of the convention is authentic and definitive.¹⁰⁷ By signing a convention, the country assumes the responsibility to not frustrate the object and purpose of that convention.¹⁰⁸ Ratifying a convention means that the state has played a part in negotiating the instrument, has signed it, and will be bound by the convention upon concluding its domestic implementation process.¹⁰⁹ A state party to a convention may make reservations to the instrument that limit the extent to which that state agrees to be bound by its provisions.¹¹⁰ Reservations, however, cannot be “incompatible with the object and purpose of the treaty.”¹¹¹ State parties must not frustrate the object and purpose of these instruments.¹¹²

In the United States, ratification occurs with a vote of two-thirds of the Senate.¹¹³ Furthermore, these conventions are not self-executing in the United States, meaning that Congress must enact legislation implementing the convention into domestic laws.¹¹⁴ As explained below, the United States has accepted the values in the CRC, ICCPR, and ICESCR as those instruments’ provisions apply to preparing youth for self-sufficiency.

i. The Rights and Values in International Instruments

The value of preparing youth aging out of foster care for self-sufficiency is found in the following provisions of the CRC:¹¹⁵

- Article 2(1) that requires respecting and ensuring the

¹⁰⁷ MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 20 (3d ed. 1999).

¹⁰⁸ Vienna Convention, *supra* note 105, art. 18 (stating that signatories, or those States that only sign a treaty or convention, are obligated to not frustrate the object and purpose of the signed instrument).

¹⁰⁹ JANIS, *supra* note 107, at 21.

¹¹⁰ Vienna Convention, *supra* note 105, art. 2(1)(b) (defining “ratification”); *id.* art. 23 (explaining the legal effect of reservations if a state reserves as to the treaty’s application to specific parties).

¹¹¹ *Id.* art. 19(c).

¹¹² *Id.* art. 18.

¹¹³ U.S. CONST. art. II § 2 (noting the president has the power to make treaties “provided two-thirds of the Senators present concur”).

¹¹⁴ See *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (“Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”). The term “self-executing” was first used in *Bartram v. Robertson*, 122 U.S. 116, 120 (1887). See also JANIS, *supra* note 107, at 89 n.9.

¹¹⁵ See generally CRC, *supra* note 19.

rights of children irrespective of their race, religion, color, sex, and notably ethnic or social origin, property, or other status;

- Article 3(1) that requires public and/or private social welfare organizations, courts, and administrative authorities to protect the best interests of children;
- Article 4 that requires Parties to undertake, to the maximum extent of available resources, to implement a child's economic, social, and cultural rights;
- Article 6(2) that requires Parties to ensure to the maximum extent possible the child's development;
- Article 12 that requires Parties to consider and give due weight to the views of children capable of forming their own views according to the child's age and maturity;
- Article 20 that requires Parties to provide special care and assistance to those whom the State removes from their homes because the child's best interests required such removal;
- Article 23(1) that requires Parties to provide all children with mental and/or physical disabilities a quality of life that ensures their dignity, promotes self-reliance, and "facilitates the child's active participation in the community";
- Article 25 that requires Parties placing children for their physical or mental protection in state custody to regularly review all of the child's treatment and all circumstances related to that placement;
- Article 26 that establishes the right of a child to social security and obligates states to allow children the opportunity to "full realization" of this right;
- Article 27 that requires Parties to ensure a standard of living the child needs for physical, mental, moral, and social development; the article also requires Parties to take appropriate steps to assist parents and others responsible for the child to implement this standard of living, which includes material assistance and programs for nutrition, clothing, and housing; and
- Article 28 that requires Parties to provide access to education on the basis of capacity, including vocational information and guidance.

The value of preparing youth aging out of foster care for self-

sufficiency is found in the following provisions of the ICCPR:¹¹⁶

- Article 2 guaranteeing the right to recourse for violations of rights in the Convention;
- Article 6 guaranteeing the right to life and survival;
- Article 7 guaranteeing freedom from inhuman or degrading treatment;
- Article 18 guaranteeing freedom of thought and conscience; and
- Article 19 guaranteeing freedom of opinion and expression.

The value of preparing youth aging out of foster care for self-sufficiency is found in the following provisions of the ICESCR:¹¹⁷

- Article 1 guaranteeing the right of self-determination and the right to freely pursue economic, social, and cultural development;
- Article 2 requiring each Party to “take steps to the maximum of its available resource” to progressively achieve the rights in the Convention;
- Article 6 guaranteeing the right to work;
- Article 9 guaranteeing the right to social security;
- Article 10 guaranteeing special measures to protect children;
- Article 11 guaranteeing the right to an adequate standard of living, including food, clothing, housing, and being free from hunger; and
- Article 12 guaranteeing the highest attainable standard of physical and mental health.

A child in state care due to abuse or neglect by a parent is entitled to decisions made in that child’s best interests and decisions that protect the welfare of the child.¹¹⁸ Protecting the welfare of the child includes, as the child ages, preparing the child to be a self-sufficient adult.¹¹⁹ The above provisions from the CRC, ICCPR, and ICESCR establish that states must respect and enforce the rights belonging to children in state custody and that the child must be allowed to participate, if not direct, that treatment.¹²⁰

¹¹⁶ See generally ICCPR, *supra* note 20.

¹¹⁷ See generally ICESCR, *supra* note 21.

¹¹⁸ CRC, *supra* note 19, art. 3(1); ICCPR, *supra* note 20, art. 6; ICESCR, *supra* note 21, art. 10.

¹¹⁹ CRC, *supra* note 19, arts. 4, 6, 26–27; ICCPR, *supra* note 20, art. 6; ICESCR, *supra* note 21, art. 2, 9, 11–12.

¹²⁰ See Woolf, *supra* note 87, at 208.

These provisions reflect the world community's acceptance of the obligation to affirmatively ensure children can fully exercise their economic, social, and cultural rights. International norms require that older youth in foster care have the right to be prepared to live independently, and international norms also require specific assistance for older youth in foster care to find housing, employment, obtain education, medical care and those other services needed to become self-sufficient. Self-sufficiency means being able to independently meet basic needs such as food, clothing, shelter, and medical care.¹²¹ Self-sufficiency requires, at a minimum, education, employment, and housing. To help a young person realize the shared value of self-sufficiency, those involved in the care of youth must do more than nominally consider their desires or wishes. Administrators and courts must be directed by the young person's desires and wishes in each of the essential self-sufficiency areas.¹²² States must maximize their resources to help youth in foster care achieve these objectives *because* they are in state custody and the state is raising the child.¹²³ The above-listed values are by no means the only values shared by the international community regarding older youth. They are, however, the most relevant to the present discussion on how to improve outcomes for youth aging out of foster care.

ii. The Rights and Values at Work in the United States

As stated above, members of the international community have expressed their acceptance of these values by ratifying treaties or conventions, by signing them, or through their domestic practice.¹²⁴ As explained below, the United States has demonstrated its acceptance by both signing these instruments and including related requirements in federal child welfare law.

¹²¹ CRC, *supra* note 19, arts. 26–28; ICCPR, *supra* note 20, arts. 6–7; ICESCR, *supra* note 21, arts. 1–2, 6, 9, 11–12.

¹²² CRC, *supra* note 19, arts. 2–3, 12; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 1–2, 10. Federal law already requires that courts consult “in an age-appropriate manner, with the [youth] regarding the proposed permanency plan or transition plan for the [youth].” 42 U.S.C. § 675(5)(C)(iii) (2012). While federal law does not explicitly require services be child or youth directed, extending federal law to do so is consistent with the trend that child welfare services be directed by the youth.

¹²³ CRC, *supra* note 19, art. 6; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 2, 11–12.

¹²⁴ *See supra* note 106.

1. *Signing and Ratification Expresses Acceptance of the Values*

Regarding the CRC, one hundred and forty countries have signed this document and have thereby shown their acceptance of the values expressed in it.¹²⁵ One hundred ninety-three countries have ratified the CRC.¹²⁶ No other human rights treaty has been implemented faster than the CRC.¹²⁷ The United States signed the CRC on February 16, 1995, but has not yet ratified it.¹²⁸ Given the obligations of a signatory to a treaty, the international community, including the United States, has accepted the values expressed in the CRC.

Regarding the ICCPR, one hundred and sixty-seven countries have shown their acceptance of the values expressed in the ICCPR by ratifying the document.¹²⁹ Another seventy-four are signatories to the ICCPR.¹³⁰ The United States signed the ICCPR on October 5, 1977 and ratified it on June 8, 1992.¹³¹ The ICCPR is not a self-executing instrument in the United States and requires Congress to enact legislation to fully implement it into domestic law.¹³² Nonetheless, the United States has agreed to not frustrate the object and purpose of the ICCPR.¹³³ The United States has accepted the values expressed in the ICCPR.

Regarding the ICESCR, one hundred and sixty countries have demonstrated their acceptance of the provisions and values in the ICESCR by ratification.¹³⁴ Another seventy countries have demonstrated their acceptance of the values in the ICESCR's provisions by

¹²⁵ See *Convention on the Rights of the Child*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en (last visited Nov. 25, 2013) (official treaty status page). See also PETERS, *supra* note 60, at 45, 75 (citing CYNTHIA PRICE COHEN, *CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW*, at ii (Howard A. Davidson ed., 1990) (noting that the CRC broke records for gaining the highest number of signatories on the day it opened for signature)).

¹²⁶ See *Convention on the Rights of the Child*, *supra* note 125.

¹²⁷ PETERS, *supra* note 60, at 45, 75.

¹²⁸ See *Convention on the Rights of the Child*, *supra* note 125.

¹²⁹ See *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Nov. 25, 2013) (official treaty status page).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (Declaration 1 of the United States regarding the ICCPR.); *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (explaining the meaning of non-self-executing treaties and conventions).

¹³³ Vienna Convention, *supra* note 105, art. 18.

¹³⁴ See *International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Nov. 25, 2013) (official treaty status page).

signing.¹³⁵ The United States signed the ICESCR on October 5, 1977, but has not ratified it.¹³⁶ Furthermore, unless the United States ratifies the ICESCR as a self-executing instrument, Congress would have to enact implementing legislation to give full effect to the ICESCR domestically.¹³⁷ As a signatory to the ICESCR, however, the United States accepts the values expressed in the ICESCR and has agreed to not frustrate the object and purpose of its provisions.¹³⁸ Therefore, the United States has accepted the values expressed in the ICESCR.

2. *The United States' Acceptance of International Values*

The clearest expression of the United States' acceptance of the international rights and values of ensuring youth become self-sufficient is in child welfare laws. Congress amended AACWA in 1986 to specifically address the needs of older youth in foster care.¹³⁹ States that created programs to prepare youth for self-sufficiency received additional federal funding.¹⁴⁰ Congress intended for youth in foster care to receive services to help them age out safely.¹⁴¹ This amendment was a response to the concern, even at

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *Foster*, 27 U.S. at 314 (describing non-self-executing nature of most international instruments in domestic law).

¹³⁸ Vienna Convention, *supra* note 105, art. 18.

¹³⁹ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 12307(a), 100 Stat. 82 (1986). This amendment added § 477 to Title IV-E of AACWA and provided funding for states for the express purpose of helping young people in foster care who have reached age sixteen transition into independent living.

¹⁴⁰ *Id.* (amending § 477(d)). The amendment specifically allowed funding for programs that

- (1) enabled participants to seek a high school diploma or its equivalent or to take part in appropriate vocational training;
- (2) provided training in daily living skills, budgeting, locating and maintaining housing, and career planning;
- (3) provided for individual and group counseling;
- (4) integrated and coordinated services otherwise available to participants;
- (5) established outreach programs designed to attract individuals who are eligible to participate in the program;
- (6) provided each participant a written transitional independent living plan which shall be based on an assessment of his needs, and which shall be incorporated into his case plan, as described in section 475(1); and
- (7) provided participants with other services and assistance designed to improve their transition to independent living.

Id.

¹⁴¹ The amendment only provided additional funds for independent living services only for fiscal years 1987 and 1988. See *id.* § 12307(a) (amending § 477(a)).

that time, that older youth in foster care simply were not receiving needed services to age out safely.¹⁴² However, Congress did not mandate providing these services to all youth aging out. Regarding aging out, the case plans for transition aged youth required only “a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.”¹⁴³ Congress included “transitional independent living” as one of purposes of AACWA in addition to providing foster care and adoption assistance.¹⁴⁴ There was, however, no enforcement mechanism for this requirement.

More than a decade later, Congress reaffirmed its commitment to the value of preparing youth for self-sufficiency by enacting the Foster Care Independence Act.¹⁴⁵ The Act created the Foster Care Independence Program and directed state and local governments to provide youth aging out of foster care programs for education, training, employment, and financial support.¹⁴⁶ Youth in foster care were to begin receiving these services “several years before high school graduation and continuing, as needed, until the young adults emancipated from foster care establish independence or reach 21 years of age.”¹⁴⁷ States were “to supplement, and not supplant, any other funds” available for the same general purposes regarding foster care in the state.¹⁴⁸

In 2002, Congress continued its commitment to prepare youth for self-sufficiency by adding the Educational and Training Vouchers Program (ETV) to the Independence Program.¹⁴⁹ The ETV program provided post-secondary education and training vouchers to youth likely to remain in foster care until age eighteen to assist them with their transition out of foster care.¹⁵⁰ The ETV Program provided vouchers for up to \$5000 annually¹⁵¹ for eligible youth in foster care.¹⁵² It also gave states the option of allowing youth partic-

¹⁴² See Maloney, *supra* note 22 (describing the poor consequences of those aging out of foster care and into homelessness, unemployment, and incarceration).

¹⁴³ Pub. L. No. 99-272, § 12307(b).

¹⁴⁴ *Id.* § 12307(d).

¹⁴⁵ Foster Care Independence Act of 1991, Pub. L. No. 106-169, §§ 101(b), 1305, 113 Stat. 1824 (2002) (codified in 42 U.S.C. § 677 (2012)).

¹⁴⁶ *Id.* § 101(a)(5).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 101(b).

¹⁴⁹ Promoting Safe and Stable Families Amendments of 2001, Pub. L. 107-133, §§ 201(b), 202, 115 Stat. 2413 (2002) (codified in 42 U.S.C. § 677(d),(i)).

¹⁵⁰ See generally *id.* § 201(b).

¹⁵¹ *Id.* § 201(b) (codified in 42 U.S.C. § 677(i)(4)(B)).

¹⁵² The program also provided funds to those adopted from foster care after age sixteen years. *Id.* (codified in 42 U.S.C. § 677(i)(2)).

ipating in the program on their twenty-first birthday to continue participating until they turned twenty-three years old, as long as they were enrolled in a postsecondary education or training program.¹⁵³ States varied in their use of funds under the Independence Act, including the number of eligible youth served and the quality of services they provided.¹⁵⁴ A survey of child welfare directors reported gaps in the quality of services independent living programs provide to young people in the areas of mental health services, mentoring, securing safe and suitable housing, and engaging the youth themselves to participate in such programs.¹⁵⁵ Child welfare directors reported the same “gaps” in services for years.¹⁵⁶ This continued gap led to the latest amendment to the federal law to improve the ability of older youth to age out safely.

In 2008, Congress passed the Fostering Connections to Success and Increasing Adoptions Act to improve outcomes for youth aging out of foster care because the evidence showed those youth needed more help than what they were receiving.¹⁵⁷ Fostering Connections provides funds to states so they can improve outcomes for children in foster care.¹⁵⁸ The Act’s required individualized plan is laudable because it specifically addresses housing, education, insurance, employment, and other services the youth needs to become self-sufficient.¹⁵⁹ State agencies must develop this transition plan at the direction of the child.¹⁶⁰ But this case plan requirement applies only ninety days before the young person ages out.¹⁶¹ The effect of Fostering Connections is unknown given it only recently went into

¹⁵³ *Id.* (codified in 42 U.S.C. § 677(i)(3)). The ETV Program also authorized an additional \$60 million for post secondary educational and training vouchers so youth aging out of foster care can develop the skills necessary to lead “independent and productive lives.” *Id.* § 201(d).

¹⁵⁴ *Child Welfare: HHS Actions Would Help States Prepare Youth in the Foster Care System for Independent Living: Hearing Before the Subcomm. on Income Security and Family Support of the H. Comm. on Ways and Means*, 110th Cong. 23 (2007) (statement of Cornelia M. Ashby, Dir. Educ., Workforce & Income Sec. Issues), available at <http://www.gao.gov/assets/120/117294.pdf>.

¹⁵⁵ *Id.* at 14–15.

¹⁵⁶ *Id.* at 14 n.15 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, HEHS-00-13, FOSTER CARE: EFFECTIVENESS OF INDEPENDENT LIVING SERVICES UNKNOWN (1999), which found independent living programs fell short in areas including employment, daily living skills, and housing services)

¹⁵⁷ See Pub. L. No. 110-351, 122 Stat. 3949 (2008).

¹⁵⁸ The Act also provides funding for youth age sixteen and older who are placed into guardianship or adoption. *Id.* § 201, 122 Stat. at 3951–58.

¹⁵⁹ *Id.* § 202 (codified as 42 U.S.C. § 675(5)(H)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* See also *supra* text accompanying note 73.

effect.¹⁶² At the very least, it reinforces the value of making youth self-sufficient and is a positive step in meeting that commitment to that value. However, Fostering Connections is limited because it only requires state agencies to develop a “plan,” not necessarily provide services.¹⁶³ Also, state agencies only need to develop this plan three months before the youth ages out, which in many cases is not enough time to age out safely. Youth aging out must be able to enforce services written in any plan. Reasonable efforts must include providing timely services the youth needs for self-sufficiency, meaning housing, education, employment, and medical care, not simply a written description of those needs.

B. *Incorporating Human Rights into Child Welfare Law*

The human rights belonging to youth are part of existing child welfare laws with some rights more explicitly in the law than others. The “best interest of the child” standard in decisions regarding children in state custody is an example of an internationally accepted principle that is also part of domestic law. Similarly, the child-directed service provision is appropriate because the youth aging out often have the maturity to make decisions regarding their needs in becoming self-sufficient.¹⁶⁴ Furthermore, the *Charming Betsy*¹⁶⁵ canon of statutory construction allows human rights to resolve the ambiguity in federal law regarding the definition of reasonable efforts for youth aging out of foster care.¹⁶⁶ Fi-

¹⁶² See generally May Shin, Note, *A Saving Grace? The Impact of the Fostering Connections to Success and Increasing Adoptions Act on America's Older Foster Youth*, 9 HASTINGS RACE & POVERTY L.J. 133, 160–62 (2012) (noting the differences between states in implementing Fostering Connections). One effect has been that several states have amended their laws to allow youth to remain in state care until at least age twenty-one. See *supra* note 29 for a listing, by jurisdiction, of the age at which services to youth in foster care terminate.

¹⁶³ See *In re Ryan W.*, 76 A.3d 1049 (Md. 2013). See also *supra* note 73 for a discussion of this case.

¹⁶⁴ See *Planned Parenthood v. Danforth*, 428 U.S. 52, 72 (1976) (holding that girls of sufficient maturity may determine for themselves whether to obtain an abortion). Currently, courts must, at a minimum, consult with all children regarding their permanency plans and the transition plans established for them. 42 U.S.C. § 675(5)(C)(iii) (2012).

¹⁶⁵ See *infra* Section II.B.2.

¹⁶⁶ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (holding that whenever possible, an act of Congress must be read to not violate international law); see also *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001) (interpreting immigration detention statute to include a “reasonable time limitation” 90-days relying in part on *Charming Betsy* rule of statutory construction, because indefinite detention is against international norms); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987). While the canon is framed in the negative, i.e., Congressional action should not be read inconsistently with interna-

nally, the Supreme Court's use of international law in interpreting the rights of individuals provides more support for using human rights to define ambiguous domestic law. In short, advocates for youth in foster care, as well as decision-makers in the child welfare system, have ample legal support to enforce the right of youth in foster care to be self-sufficient.

i. Defining Reasonable Efforts For Youth Aging Out

Youth *should have* a right to self-sufficiency for their well-being and for the well-being of society, as the Supreme Court has suggested.¹⁶⁷ When the state affirmatively assumes custody of a child in foster care, it owes a duty to protect that child.¹⁶⁸ In *DeShaney vs. Winnebago County Department of Social Services*, the Supreme Court held that a state taking a child into its custody through the child welfare laws has a "duty to assume some responsibility for his [or her] safety and general well-being."¹⁶⁹ This duty has led to explicit recognition of the procedural due process rights of youth in foster care from the state agency¹⁷⁰ and substantive due process to protec-

tional law, the conclusion that Congressional action must be read consistently with international law is implied. *But see* Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1151–52 (7th Cir. 2001).

¹⁶⁷ Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

¹⁶⁸ See *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989); see *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

¹⁶⁹ *DeShaney*, 489 U.S. at 199–200. In *DeShaney*, the mother of four-year-old Joshua, who was beaten into a coma by his father, sued the local social services agency that was responsible for carrying out child protective services in her area. *Id.* at 193. In the fourteen months before the last beating that put Joshua into a coma, the local department documented repeated instances of physical injuries Joshua suffered while in his father's custody. *Id.* at 192–93. The caseworker assigned to Joshua's family recorded her suspicions that someone in the DeShaney household was physically abusing Joshua, but the caseworker did not seek his removal from his home. *Id.* at 192–93. Joshua's father beat him so badly that he fell into a life-threatening coma that required emergency brain surgery. *Id.* The surgery revealed a number of hemorrhages that indicated Joshua was the victim of repeated traumatic brain injuries over a long period of time. *Id.* Joshua did not die, but he was expected to spend the rest of his life in a facility for those with profound mental disabilities. *DeShaney*, 489 U.S. 192–93. Joshua's mother sued, alleging that the local department's officials deprived Joshua of liberty without due process of law under the Fourteenth Amendment by not protecting him when they knew he was at risk of serious injury. *Id.* The District Court granted the state's motion for summary judgment, and the 7th Circuit Court of Appeals affirmed the dismissal. *Id.* The Supreme Court affirmed and held that a state does not owe a duty to protect its citizens from private violence, and that its failure to do so does not violate the Due Process Clause. *Id.* at 197.

¹⁷⁰ See *In re Ryan W.*, 76 A.3d 1049, 1069–70 (Md. 2013) (finding that a child in foster care has the due process right to notice from a state foster care agency acting as the child's representative payee for his social security survivor benefits—the notice is of the agency's appointment as representative payee and its receipt of benefits).

tion while in foster care.¹⁷¹ Furthermore, the state must not only provide those in state custody adequate food, shelter, clothing, and medical care, but also training to help the person meet these needs.¹⁷² The Court has explained that “[w]hen a person is . . . wholly dependent on the State[,] . . . a duty to provide certain services and care does exist.”¹⁷³ Youth in foster care, because they are in state custody, certainly depend on the state to meet their basic needs for food, shelter, clothing, and medical care.¹⁷⁴ For those aging out, the state’s obligation to prepare them to live independently (as demonstrated through child welfare laws and case law) requires providing services to ensure they have food, housing, clothing, education, and employment.¹⁷⁵ As the Maryland Court of Appeals has explained, youth in state care have “a right to reasonable stability in their lives.”¹⁷⁶ When reunification, adoption, and guardianship are no longer permanency options, stability for that youth means self-sufficiency and preparation for living independently. Allowing youth to direct the services or types of services he or she receives is essential to ensuring that the youth will become

¹⁷¹ See, e.g., *Doe v. South Carolina Dep’t of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010). This case established for the first time in the Fourth Circuit that “when a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child’s liberty, triggering the protections of the Due Process clause and imposing ‘some responsibility for [the child’s] safety and general well-being.’” *Id.* at 175 (citing *DeShaney*, 489 U.S. at 200) (alterations in original). The Fourth Circuit also recognized the following federal circuits that had previously held that children in foster care had substantive due process rights to protection from harm in foster care: the Sixth Circuit in *Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); the Seventh Circuit in *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) and in *Hutchinson ex rel. Baker v. Spink*, 126 F.3d 895, 900 (7th Cir. 1997); the Tenth Circuit in *Yvonne L. v. New Mexico Dep’t of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992); the Eighth Circuit in *Norfleet v. Arkansas Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993); and the Third Circuit in *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000).

¹⁷² *Youngberg*, 457 U.S. at 324.

¹⁷³ *Id.* at 317.

¹⁷⁴ See *id.* at 315, 324 (cited with approval in *DeShaney*, 489 U.S. at 199).

¹⁷⁵ See *supra* Part II.A.1–2.

¹⁷⁶ *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 501 (2007). This case concerned a petition to terminate the parental rights of parent and whether the services the state agency provided to the parent were adequate to preserve the parent-child relationship. The high court of Maryland held that the services the state agency provided the parents were inadequate. The court reasoned that parents involved with the child welfare system need help in maintaining family stability. Parents needed services in the following areas to become stable: housing, employment, medical, and mental health services. *Id.* at 500. Youth aging out of foster care need meaningful services in those same areas in order to become self-sufficient and stable.

self-sufficient.¹⁷⁷

In *Planned Parenthood v. Danforth*, the Supreme Court found that a minor with sufficient maturity may make medical decisions for herself, including determining whether she should have an abortion.¹⁷⁸ It explained that a minor has a constitutional right to make certain decisions for him- or herself, such as medical decisions.¹⁷⁹ Decisions regarding pregnancy affect the young woman in such a unique and personal manner that she has the right to determine whether to continue the pregnancy.¹⁸⁰ Minors of sufficient maturity can make that medical decision for themselves.¹⁸¹ Similarly, youth of sufficient maturity and youth over age eighteen must be allowed to direct services offered in housing, education, and employment because of the personal nature of the consequences to that youth.¹⁸² The youth would be better served by directing the services they need after discussing their needs with the state court and other decision makers. Such a deliberative process that includes the youth minimizes concerns adults may have with youth-directed service provision.

Furthermore, the “reasonable efforts” analysis in cases involving youth aging out requires identifying the specific services state agencies provide youth to help them become self-sufficient.¹⁸³ One state court has said of reasonable efforts regarding services state agencies must provide (albeit in the context of services to parents):

Implicit in [the reasonable efforts] requirement is that a reasonable level of those services, designed to address both the root causes and the effect of the problem, must be offered—educational services, vocational training, assistance in finding suitable housing and employment, teaching basic parental and daily living skills, therapy to deal with illnesses, disorders, addictions,

¹⁷⁷ See generally *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

¹⁷⁸ *Id.* at 74–75.

¹⁷⁹ *Id.* at 74 (“Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”)

¹⁸⁰ *Id.*

¹⁸¹ *Id.* The Court in *Danforth* stated that not all minors of any age and maturity may consent to terminating their pregnancy. *Id.* at 75. Thus, an exception may have to be made for youth with severe mental illness or developmental disabilities. This exception should only be utilized, however, based upon a judicial determination that the youth is unable to make such decisions. The judicial determination would follow an evidentiary hearing where the youth’s representative can provide and refute evidence regarding his or her client.

¹⁸² See Maloney, *supra* note 22, at 983 n.92.

¹⁸³ The provisions of the international conventions that support a child’s right to become self-sufficient are: CRC, *supra* note 19, arts. 26–28; ICCPR, *supra* note 20, arts. 6–7; ICESCR, *supra* note 21, arts. 1–2, 6, 9, 11, 12.

and other disabilities suffered by the parent or the child, counseling designed to restore or strengthen bonding between parent and child, as relevant.¹⁸⁴

Educational services, vocational training, housing assistance, and medical care are among those services that are necessary for all parents whose children have been removed from them.¹⁸⁵ Applying the importance of these services, the Maryland intermediate appellate court held in *In re James G.* that a single employment referral a case worker made to a father in support of the plan for reunification with his son was insufficient to find that a state agency made reasonable efforts.¹⁸⁶ In that case, the juvenile court found that the local department made reasonable efforts for monitoring the father's employment.¹⁸⁷ The appellate court found these efforts were not reasonable because the state agency did not verify that the referral was appropriate for the father's individual needs and did not make any other affirmative effort to help him obtain employment.¹⁸⁸ Reasonable efforts must be tailored to the specific needs of the person involved, whether a parent or child in state custody.¹⁸⁹ In *In re Tiffany B.*, the Tennessee appellate court found that the state agency did not provide reasonable efforts to parents who were addicted to crack, homeless, unemployed, and facing criminal charges.¹⁹⁰ In so finding, the court stated:

While the Department's efforts to assist parents need not be "herculean," the Department must do more than simply provide the parents with a list of service providers and then leave the parents to obtain services on their own. The Department's employees must bring their education and training to bear to assist the parents in a reasonable way to address the conditions that required removing their children from their custody and to complete the tasks imposed on them in the permanency

¹⁸⁴ *In re Adoption/Guardianship of Rashawn H. and Tyrese H.*, 402 Md. 477, 500 (2007).

¹⁸⁵ *Id.*

¹⁸⁶ *In re James G.*, 178 Md. App. 543, 550–51 (Md. Ct. Spec. App. 2008).

¹⁸⁷ *Id.* at 591.

¹⁸⁸ *Id.* at 592.

¹⁸⁹ *In re Adoption/Guardianship Nos. J9610436 & J9711031*, 796 A.2d 778, 798 (Md. 2002). This case involved the reasonable efforts a state agency provided to a cognitively impaired father. He also had a limited ability to read. *Id.* at 789. The Court held that the state agency did not make reasonable efforts towards reunification where it referred him to parenting classes and to a domestic violence class, and to drug and alcohol evaluations. *Id.* at 787. The state agency offered "untailored" services to the father and should have provided timely and a sufficiently extensive array of programs to assist the father with his individual needs. *Id.*

¹⁹⁰ *In re Tiffany B.*, 228 S.W.3d 148, 160 (Tenn. Ct. App. 2007).

plan.¹⁹¹

The Court stated that the Department simply cannot expect parents with these particular needs to navigate and initiate efforts on their own.¹⁹² Services must go beyond simply scheduling meetings and appointments,¹⁹³ or providing a list of services. Services must be individualized to be reasonable and must be directed by the youth's needs and wishes in housing, employment, education, and becoming self-sufficient.¹⁹⁴ Educational services, vocational training, housing assistance, and medical care are services that promote stability. These services are necessary in order for youth to successfully transition into adulthood. States must expend resources to provide youth in foster care services towards these objectives *precisely because* they are in state custody.¹⁹⁵

ii. Charming Betsy and Child Welfare

Over one hundred years ago, the Supreme Court stated unequivocally that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”¹⁹⁶ International law “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”¹⁹⁷ As Chief Justice Marshall explained, “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁹⁸ Human rights norms can define “reasonable efforts” under the *Charming Betsy* canon of statutory construction.¹⁹⁹ Under the *Charming Betsy* canon, courts can read federal child welfare laws consistent with international norms, or vice

¹⁹¹ *Id.* at 158 (internal citations omitted).

¹⁹² *Id.* at 160.

¹⁹³ *In re Welfare of J.A.*, 377 N.W. 2d 69, 73 (Minn. Ct. App. 1985).

¹⁹⁴ See CRC, *supra* note 20, arts. 2–3, 12; ICCPR, *supra* note 21, art. 2; ICESCR, *supra* note 21, arts. 1–2, 10.

¹⁹⁵ CRC, *supra* note 19, art. 6; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 2, 11, 12; see also, *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989); cf. *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982).

¹⁹⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁹⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d. Cir. 1980) (citing *United States v. Smith*, 18 U.S. 153, 160–61 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963)). See also STAT. OF INT’L CT. OF JUSTICE (1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&>.

¹⁹⁸ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); see also *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1151–52 (7th Cir. 2001).

¹⁹⁹ *Sampson*, 250 F.3d at 1153–55.

versa.²⁰⁰ In other words, international law can be read into ambiguous federal laws.²⁰¹ This canon does not allow a cause of action based upon provisions of the CRC, ICCPR, or ICESCR, in part because of their non-self-executing character.²⁰² However, that the CRC, ICCPR, and ICCPR are not self-executing does not end of the inquiry of a state's obligations under that treaty or convention.²⁰³ These international instruments can define the otherwise ambiguous "reasonable efforts" provision of domestic child welfare law.

The use of the *Charming Betsy* canon when interpreting the Constitution and statutes, while subject to debate, is not uncommon.²⁰⁴ Some commentators advocate for broad use of the *Charming Betsy* canon in statutory construction,²⁰⁵ others call for its limited use,²⁰⁶ while others call for its elimination altogether.²⁰⁷ The place for the *Charming Betsy* canon when interpreting child welfare laws is to use international norms to clarify and define "reasonable efforts," an otherwise vague term in federal child welfare law. While the Supreme Court provided state courts considerable latitude in defining "reasonable efforts" on a case-by-case basis, clarifying the factors that courts must consider in that analysis does not

²⁰⁰ *Id.*

²⁰¹ See *Serra v. Lapin*, 600 F.3d 1191, 1199 (9th Cir. 2010) (finding the *Charming Betsy* canon did not apply because statute regarding inmate pay was not ambiguous); Brilmayer, *supra* note 104, at 2282.

²⁰² See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) (finding that although the United States ratified the ICCPR and therefore is bound by it under international law, one cannot bring a claim to enforce its provisions in federal courts); *Serra*, 600 F.3d at 1196–97.

²⁰³ See *Filartiga*, 630 F.2d at 881–82.

²⁰⁴ See generally Ingrid Brunk Wuerth, *Authorization for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293 (2005) (arguing for application of the *Charming Betsy* canon when Congress provides a general authorization for the president to use force). Specifically, Professor Wuerth discusses the Supreme Court's use of international law when it considered general authorizations in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), arguing that under the *Charming Betsy* canon "courts should presume that general authorizations for the use of force do not empower the President to violate international law." *Id.* at 293.

²⁰⁵ See generally Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (arguing that the *Charming Betsy* canon, under Supreme Court precedent, requires using international law to read federal law).

²⁰⁶ See generally Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (rejecting the "internationalist conception" of the *Charming Betsy* canon that posits that international law supplements domestic law, calling instead for a more limited use of the canon based on separation of powers).

²⁰⁷ See generally Jonathan Turley, *Dualistic Values in the Age of International Legislation*, 44 HASTINGS L.J. 185 (1993) (arguing for eliminating the *Charming Betsy* canon).

restrict the case-specific analysis. International courts have applied a similar principle in construing their statutes.²⁰⁸ Given that Congress has long stated the importance of preparing older youth for self-sufficiency and the persistently porous results of states' attempts to meet that objective, using international human rights law to aid in interpreting and enforcing domestic child welfare law is both appropriate and necessary.

iii. The Supreme Court's Acceptance of International Law

Nearly a half-century ago, Justice Fortas stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."²⁰⁹ The Supreme Court has accordingly held that children have enforceable rights.²¹⁰ These include the right of children to protest,²¹¹ due process protections for education,²¹² to counsel in delinquency proceedings,²¹³ and potentially the right to special education under federal law independent of a parent.²¹⁴ Furthermore, the Supreme Court has long utilized international law, including conventions and the practice of other countries, to inform its interpretations of the Constitution.²¹⁵ The Court has also

²⁰⁸ See, e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 Can.

²⁰⁹ *In re Gault*, 387 U.S. 1, 13 (1967).

²¹⁰ See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (affirming the right of children to be free from compulsory flag salutes in school); *In re Gault*, 387 U.S. at 41 (affirming that children have the right to an attorney in delinquency proceedings).

²¹¹ *Tinker vs. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (holding that a student had the right to wear an armband as a sign of protest to war).

²¹² *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (holding that children have a property interest in education such that the state may not deprive them of education, either through expulsion or suspension, without first providing due process protections; the Court did not define the amount of process that was due in all school discipline cases, but nonetheless affirmed that schools must provide students notice and an opportunity to be heard before depriving them of education).

²¹³ *In re Gault*, 387 U.S. at 36–37.

²¹⁴ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 528 (2007).

²¹⁵ See *Trop v. Dulles*, 356 U.S. 86, 102 n.35 (1958) (finding unconstitutional a federal statute authorizing denationalization of a person convicted of desertion by military court martial, finding that statelessness is a "condition deplored in the international community of democracies"); see also *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (finding unconstitutional statutes authorizing the death penalty for the crime of rape where the victim did not die, noting that "it is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty" in this case); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (noting that felony murder has been abolished in England and India, restricted in Canada, and is "unknown in continental Europe"); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (noting "within the world community, the imposition of the death penalty for crimes committed by

utilized international law when interpreting statutes.²¹⁶ The Court's jurisprudence primarily determines whether international law confirms its conclusions.²¹⁷ International law does not control outcomes regarding domestic law, but it "does provide respected and significant confirmation for [the Court's] conclusions."²¹⁸ Furthermore, the Supreme Court has not specifically invoked the *Charming Betsy* canon when applying international law, but it has nonetheless applied it.²¹⁹ The Supreme Court has utilized international law, without specifically referencing the *Charming Betsy* canon, to confirm its analysis of the Constitution.²²⁰ It has nonetheless applied international law. Utilizing international law as an aid in interpreting statutes is especially appropriate when an act of Congress is ambiguous.²²¹ The one certainty with regard to "reasonable efforts" is that the term is uncertain. Preparing youth

mentally retarded offenders is overwhelmingly disapproved"); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (state may not execute youth for crimes committed before they reach eighteen years of age); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (prohibiting life without parole sentences for non-homicide crimes committed by juveniles); *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (prohibiting mandatory life without parole for crimes committed before age eighteen).

²¹⁶ See *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001).

²¹⁷ *Graham*, 560 U.S. at 80 (citing *Roper*, 543 U.S. at 572) ("The question before us is not whether international law prohibits the United States from imposing the sentence at issue in this case. The question is whether that punishment is cruel and unusual. In that inquiry, 'the overwhelming weight of international opinion against' life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'). Subsequently in *Miller*, the Supreme Court struck down the sentence of mandatory life without parole for a juvenile convicted of murder. The majority did not rely upon international norms for its holding, but cited with approval its holdings and rationales in *Roper* and *Graham* that referenced international norms that, to use Justice Kennedy's words, confirmed the Court's holdings. 132 S. Ct. at 2469.

²¹⁸ *Roper*, 543 U.S. at 578. Speaking to sovereignty and federalism concerns, the Court held that "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id.*

²¹⁹ See *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (citing to opinion of the European Court of Human Rights that invalidated the laws of Northern Ireland banning "consensual homosexual conduct" as well as report from a committee in the British Parliament that recommended repealing laws banning consensual homosexual conduct); see also *Grutter v. Bollinger*, 539 U.S. 306, 344–46 (2003) (Ginsburg, J., concurring) (noting that the Court's observation that race-conscious programs must have an ending is consistent with international law).

²²⁰ See cases cited *supra* note 215.

²²¹ See *Serra v. Lapin*, 600 F.3d at 1199 (9th Cir. 2010); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295 (E.D. Pa. 1963). See also STAT. OF INT'L CT. OF JUSTICE arts. 38, 59 (1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&>.

for independence is a value that is certain in the United States and in the world community.²²² Therefore, human rights necessary for self-sufficiency can and should be used to clarify ambiguous federal and state child welfare provisions in the United States.²²³

In *Atkins v. Virginia*, the Court cited the growing international consensus against executing people with intellectual disabilities when it struck down that practice as a violation of the Eighth Amendment.²²⁴ The Court looks to and considers international norms particularly as it relates to the treatment of youth. In *Roper v. Simmons*, the Court considered whether a state may execute an older youth convicted of first-degree murder.²²⁵ The Court reviewed the practice of executing juveniles internationally, as well as the CRC's provisions against executing juveniles.²²⁶ While not striking down the juvenile death penalty because of international norms or instruments, the Court's consideration of international norms suggests its approval of the practice when analyzing the Constitution. The Court continued its consideration of international norms again in *Graham v. Florida* when it invoked the CRC in striking down the sentence of life without parole as a sentence for a juvenile convicted of murder.²²⁷ Again, the Court continued what it described as its "longstanding practice in noting the global consensus against" life without parole for juveniles.²²⁸ In noting this global consensus, the Court cited to the CRC's prohibition of the sentence and acceptance of the instrument by the world community.²²⁹

Similarly, other U.S. courts have used international norms to interpret federal statutes.²³⁰ In *Beharry v. Reno*, the district court

²²² See *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199 (1989).

²²³ See *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987).

²²⁴ *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002).

²²⁵ *Roper v. Simmons*, 543 U.S. 551, 575–79 (2005) (noting that the United States was at the time one of the few countries that executed juveniles and referencing the CRC's prohibition of executing juveniles).

²²⁶ *Id.*

²²⁷ *Graham v. Florida*, 560 U.S. 48, 79–80 (2010).

²²⁸ *Id.* at 79.

²²⁹ *Id.* at 80.

²³⁰ See *Brilmayer*, *supra* note 104, at 2296; see also Harold Kongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that federal courts regularly incorporate international norms into federal law, as has been their long-standing practice, responding to Curtis A. Bradley and Jack Goldsmith, *Customary International Law as Federal Common Law: a Critique of the Modern Position*, 110 HARV. L. REV. 815 (1999)).

held that provisions of the CRC were customary international law and, as such, required the Immigration and Naturalization Service to provide the petitioner a hearing to determine the impact of his deportation on his child.²³¹ While this case has been questioned,²³² other courts have suggested that the *Charming Betsy* canon may be appropriate where the law is ambiguous.²³³ Admittedly, using international norms as an interpretive tool, including the use of the *Charming Betsy* canon, is not accepted by all.²³⁴ Nonetheless, the use of international norms and law to interpret the Constitution and federal statutes has been utilized by U.S. courts, including the Supreme Court. Using international norms to interpret statutes is appropriate in circumstances in which they are consistent with federal law and when they clarify ambiguity in federal law. The ambiguity of “reasonable efforts” in federal child welfare law combined with the shared value of preparing youth for self-sufficiency is an appropriate opportunity for utilizing international law. Using international law to define “reasonable efforts” for youth aging out is especially appropriate because doing so can improve outcomes for youth aging out.

C. *The Need to Utilize Community Resources*

Improving outcomes for youth aging out of foster care also requires utilizing resources in the youth’s local community to break the cycle of poverty in which many find themselves. Foster care is meant to be temporary, but, as noted above, many youth remain in foster care (rather than reuniting with their families of origin or being adopted) until they age out. And for many who remain in foster care until aging out, poverty becomes their permanent placement.²³⁵ Youth aging out often remain in the same communities from which the state initially removed them. Courts and advocates, therefore, must better utilize community resources to help youth in the child welfare system integrate into their commu-

²³¹ 183 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2002).

²³² *Beharry v. Ashcroft*, 329 F.3d 51, 63 (2d Cir. 2003) (reversing *Beharry* on other grounds, but noting that its decision to do so is not an endorsement of that court’s analysis and application of international law); *see also* *Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 234 (2d Cir. 2005) (disapproving of *Beharry*).

²³³ *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 135 (2005) (rejecting the *Beharry v. Reno* analysis because Congress’ intent and language in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was clear and, therefore, the court should not have utilized international law in its analysis).

²³⁴ *E.g.*, *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1151–52 (7th Cir. 2001).

²³⁵ *See cf.* COURTNEY ET AL., *supra* note 7, at 32.

nity. Utilizing human rights of youth aging out is an assertion of the dignity of the individual youth. Dignity requires considering persons the youth may consider a resource for them, but who state agencies may otherwise overlook. Federal law recognizes the importance of connecting those aging out of foster care to another person.²³⁶ Identifying community members as a source of support (emotionally and otherwise) as well as a resource for services is necessary to help young people maintain themselves in the community through a means other than state agencies.

When the United States endeavored upon the “War on Poverty,” it infused funds and professionals into low-income communities in order to eliminate poverty. Almost immediately, community members and leaders cautioned against the use of this “military-like” strategy to overcome the complex issue of poverty. Edgar Cahn and Jean Camper Cahn were two of many who explained the need for a community-centered approach to overcome poverty.²³⁷ They agreed that the influx of outside funds and outsiders may be useful in addressing the complexity that is poverty.²³⁸ However, they argued that providing services to those in low-income communities in and of itself would be insufficient to overcome the problem without utilizing the skills and assets of the members of the community.²³⁹ They referred to this as utilizing a civilian perspective (as opposed to the military-like “War on Poverty”) that recognized the “dignity and worth” of the people in the communities to be “served.”²⁴⁰ Stringent “comprehensive action programs” that are devised by those in the dominant social, political, education, and economic institutions lack essential information about the effectiveness of the programs devised.²⁴¹ Those in the dominant institutions of a given system do not directly experience how these programs work and, therefore, are limited in fully appreciating the effectiveness and limitations of the problem. Or, as L.B. reminded the court, “you make your decision and go home . . . I live your decisions.” Communities and community members have skills, abilities, and resources too often overlooked by those in the dominant

²³⁶ See, e.g., 42 U.S.C. § 677(a)(4) (2012) (stating that one purpose of the independent living program is to provide youth emotional support as they age out, and this support is to come from mentors and encouraging “interactions with dedicated adults”).

²³⁷ Edgar Cahn & Jean Camper Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1317 (1964).

²³⁸ *Id.* at 1318.

²³⁹ *Id.*

²⁴⁰ *Id.* at 1330.

²⁴¹ *Id.*

institutions.²⁴²

Applied to all youth in foster care, but particularly those who will remain in state care until they age out, advocates and courts must be directed as much as possible by the skills, abilities, resources, and wishes of each individual youth. The resources include family and community resources that may not have been ideal for the individual youth when he or she was younger, but now pose less harm (if any) to the youth. Youth in state care must be placed in the most family-like environment, or least restrictive setting.²⁴³ Children removed from their parents' home must be placed near their homes to the extent possible.²⁴⁴ If children are placed far from home, then the state must explain the reasons for doing so.²⁴⁵ Having community support is essential for youth to navigate through society including working with landlords, housing searches, employment searches, and other such needs.²⁴⁶ Such family and community resources require state-support where possible. Mentoring and similar community social supports are slowly but surely becoming part of programs that providing independent living programs.²⁴⁷ Courts must look to these programs to assist with the transition to independent living, but not exclusively. They must look to family and non-family members who can be a support for the youth aging out of foster care. To this end, federal law prioritizes family placement. Some states expand the definition of a "relative" to be one with whom the child has a close relationship but is a blood relative.²⁴⁸ Such an expanded definition is an appro-

²⁴² See generally JOHN MCKNIGHT, *THE CARELESS SOCIETY: COMMUNITY AND ITS COUNTERFEITS* (1995); GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

²⁴³ 42 U.S.C. § 675(5)(A) (2012).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ DWORSKY ET AL., *supra* note 52, at 11.

²⁴⁷ *Id.* at 25.

²⁴⁸ MD. CODE REGS. 07.02.29.02(B)(11) (2013). The regulation defines "relative" as: an adult who is at least 21 years old, or is at least 18 years old and married to an adult who is at least 21 years old, and who is:

- (a) Related by blood, marriage or adoption within the fifth degree of consanguinity or affinity as set forth in the Estates and Trusts Article, §1-203, Annotated Code of Maryland; or
- (b) An individual who makes up the family support system, including:
 - (i) Adults related beyond the fifth degree of consanguinity or affinity;
 - (ii) Godparents;
 - (iii) Friends of the family; or
 - (iv) Other adults who have a strong familial bond with the child.

Id.

priate legal basis for courts and advocates to better utilize community members in improving outcomes for youth aging out.

For any reform of the child welfare system to be effective, and not continue the porous consequences of the previous decades, decision-makers in that system, but particularly courts, must incorporate the community into young people's lives. The consequence of not doing so is to leave young people more susceptible to victimization, poverty, and incarceration.²⁴⁹

III. APPLYING HUMAN RIGHTS TO THE TREATMENT OF YOUTH IN STATE CARE

A. *How Courts Abroad Have Enforced Human Rights of Youth*

The objective of protecting children through international instruments is the "harmonious development of their personality and the enjoyment of their recognized rights."²⁵⁰ To this end, the "best interests of the child" standard, which is used in all child welfare related proceedings,²⁵¹ is intended to protect the dignity of the child by fostering his or her development.²⁵² Courts and tribunals abroad have applied human rights values, rights, and instruments as an aid to interpreting domestic laws and other international treaties.

In the *Street Children Case*, the Inter-American Court of Human Rights (IACHR) applied the values and rights expressed in the CRC and ICCPR to determine that Guatemala violated its obligations under the American Convention on Human Rights by its treatment of children living on its streets.²⁵³ The IACHR interprets

²⁴⁹ See generally *supra* Part I.A.

²⁵⁰ Judicial Condition and Human Rights of the Child, *supra* note 100, ¶ 53.

²⁵¹ See CRC art. 3; 42 U.S.C. § 675(5) (2012) (requiring that the states' "case review system" has a plan to ensure that the child's placement is consistent with their best interests and that the child's permanency plan be consistent with his or her best interests).

²⁵² Judicial Condition and Human Rights of the Child, *supra* note 100, ¶¶ 53, 56.

²⁵³ Villagran Morales et al. v. Guatemala (*Street Children Case*), Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 2 (Nov. 19, 1999), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_63_ing.pdf. This case was submitted to the Court by the Inter-American Commission on Human Rights from a petition filed by the Secretariat of the Organization of American States. *Id.* ¶ 1. The Commission is responsible for promoting respect for and defending human rights primarily in the Americas. Organization of American States, American Convention on Human Rights (ACHR) art. 41, Nov. 22, 1969, 1144 U.N.T.S. 144, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201144/volume-1144-I-17955-English.pdf>. To this end, the Commission appears in all cases before the IACHR. *Id.* art. 57. It also submits cases to the IACHR for interpretation and enforcement of human rights. *Id.* art. 61.

and applies the American Convention on Human Rights. The Court found that Guatemala tortured, persecuted, and engaged in systemic aggression against five people, three of whom were minors (under age eighteen).²⁵⁴ The IACHR also addressed the right of children to adequate support and treatment by the state. Specifically, it applied the child's rights under CRC Articles 2 (nondiscrimination), 3 (protection by those legally responsible for him or her), 6 (right to life), 20 (special protection to those living outside of his or her family), 27 (standard of living for development), and 37 (freedom from torture and right to humane treatment) to define the "measures of protection" in Article 19 of the American Convention.²⁵⁵ The CRC applied because it was part of the international body of law that protects children and that should, therefore, be utilized in interpreting provisions of other instruments, in this case Article 19 of American Convention.²⁵⁶ Furthermore, for all of the victims, the Court applied the ICCPR's protection against arbitrary deprivation of life in determining that Guatemala violated Article 4 of the American Convention.²⁵⁷ Importantly, the IACHR found that the right to life includes the right to not be prevented from accessing services and conditions that lead to "a dignified existence."²⁵⁸ States have an affirmative obligation to create conditions to ensure the right to life is not violated, particularly for young people.²⁵⁹ The IACHR held that Guatemala violated its obligations to protect children living on the street and provide them an adequate standard of living.²⁶⁰

In *Baker v. Canada*, the Supreme Court of Canada reversed the decision of an administrative hearing officer's decision to deport an "illegal immigrant" (Ms. Baker) because the officer did not consider the best interests of Ms. Baker's children as the CRC required.²⁶¹ Canada ratified the CRC, but it was not a self-executing instrument. The Canadian Parliament had not implemented the

²⁵⁴ *Street Children Case*, *supra* note 253, ¶ 198.

²⁵⁵ *Id.* ¶ 196.

²⁵⁶ ACHR art. 19 ("Every minor child has the right to the measures of protection required by his condition to be part of his family, society, and the state.").

²⁵⁷ *Id.* art. 4 ("Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.").

²⁵⁸ *Street Children Case*, *supra* note 253, ¶ 144; *see also id.* Joint Concurring Op. of Cançado Trindade & Abreu-Burelli, JJ., ¶¶ 2, 4–8 (describing the positive obligation of states to ensure children have conditions of a life with dignity)).

²⁵⁹ *See id.* ¶ 196 (lead opinion).

²⁶⁰ *Id.* ¶ 198.

²⁶¹ *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, ¶ 73 (Can.).

CRC into domestic law.²⁶² The Court, however, held that “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.”²⁶³ The Court justified its application of the CRC into domestic law in part because courts in other countries have similarly utilized international law to inform constructions of domestic statutes.²⁶⁴ As a result, the Supreme Court held that the hearing officer had to utilize international law because of the importance of protecting children in Canada.²⁶⁵

Similarly, English courts have applied the CRC’s provisions to explain, clarify, and reaffirm provisions of the European Convention on Human Rights.²⁶⁶ English courts have used the CRC to clarify ambiguities in domestic law relating to children.²⁶⁷ England, like Canada, ratified the CRC but has not incorporated it specifically into its domestic laws.²⁶⁸ Nonetheless, their use of the CRC and other international instruments as a tool in interpreting international and domestic laws indicate England’s acceptance of its obligations to protect the rights of children, including those in state care.²⁶⁹ These rights include a child’s economic, social, and cultural rights.²⁷⁰ Courts in India also apply international law as part of Indian domestic law unless the two directly conflict and cannot be reconciled with each other.²⁷¹ Thus, courts abroad enforce the

²⁶² *Id.* ¶ 69.

²⁶³ *Id.* ¶ 70.

²⁶⁴ *Id.* (citing *Tavita v Minister of Immigration*, [1999] 2 NZLR 257, 266 (CA), and *Vishaka v Rajasthan*, (1997) 3 S.C.R. 361, 367 (India), as two “common law countries” that have used international law as an aid to interpret their domestic laws).

²⁶⁵ *Id.* ¶ 73.

²⁶⁶ See Woolf, *supra* note 87, at 215 (citing *R. (on the application of The Howard League for Penal Reform) v. Secretary of State for the Home Department*, [2002] EWHC (Admin) 2497, ¶ 51 (Eng.)).

²⁶⁷ *Id.* at n.58 (citing *Ex parte Venables* [1998] A.C. 406 at 499).

²⁶⁸ *Id.* at 219.

²⁶⁹ *Id.*; see also *Street Children Case*, *supra* note 253, ¶ 183 n.32.

²⁷⁰ Woolf, *supra* note 88, at 219. Furthermore, youth with disabilities who are in state care may have additional rights under international law to independent living. See generally Camilla Parker, *The UN Convention on the Rights of Persons with Disabilities: A New Right to Independent Living?*, 4 EUR. HUM. RTS. L. REV. 508 (2008).

²⁷¹ See JANIS, *supra* note 107, at 107 (citing R.C. HINGORANI, MODERN INTERNATIONAL LAW 30 (1979)). On the application of international law in Australia, see Michael Kirby, *The Role of International Standards in Australian Courts*, in INTERNATIONAL HUMAN RIGHTS IN CONTEXT 1015 (Henry J. Steiner & Philip Alston eds., 2000) (noting the application of the Bangalore Principles that courts may utilize international law to determine the domestic law where there is ambiguity in domestic statutes or common law). On the use of international human rights law by Japanese courts, see *id.* at 1006–08; see also YUJI IWASAWA, INTERNATIONAL LAW, HUMAN RIGHTS LAW AND JAPANESE LAW: THE IMPACT OF INTERNATIONAL LAW ON JAPANESE LAW 288–306 (1998).

human rights of youth, particularly in regard to the obligation of states to provide for the development and self-sufficiency of youth.

B. Revisiting L.B.'s Preparation for Self-Sufficiency

Applying the human rights expressed in the CRC, ICCPR, and ICESCR to domestic foster care hearings would require state courts to begin addressing housing, education, work force supports, and local community resources when a youth turns sixteen and his or her case plan requires planning for independence.²⁷² The court's and state agency's provision of services must be consistent with the youth's maturity and ability to make decisions.²⁷³ In L.B.'s case, the court would have asked the following inquiries at every hearing starting when he turned sixteen until he aged out:

1. *Housing:*²⁷⁴ Here, the state agency would produce a specific plan for L.B. to obtain independent housing well before he ages out of foster care.²⁷⁵ The plan would include how L.B. would afford rent, utilities, and living expenses for a one-year lease. The court would consider evidence of referrals the state agency made for housing that L.B. could afford. The housing options could range from apartments to rooms in a house. L.B. could have looked to his cousin Ty, for example, as someone with whom he could live;
2. *Education:*²⁷⁶ Here, the state agency would identify the ser-

²⁷² 42 U.S.C. § 675(1)(D) (2012). *Cf.* 42 U.S.C. § 675(5)(H).

²⁷³ *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74–75 (1976).

²⁷⁴ Convention on the Rights of the Child (CRC), *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic rights among others); *id.* art. 6(2) (maximize to the extent possible youth's development); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for youth's physical, mental, moral, and social development); International Covenant on Civil and Political Rights (ICCPR), *supra* note 20, art. 6 (right to life and survival); *id.* art. 7 (from inhuman and degrading treatment); International Covenant on Economic, Social, and Cultural Rights (ICESCR), *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security); *id.* art. 11 (embodying the right to adequate standard of living that includes food, clothing, housing, and freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

²⁷⁵ In Maryland, that age is twenty-one. MD. CODE ANN., CTS. & JUD. PROC. § 3-804 (West, Westlaw through chapter 1, 4, 9, 40, 41, 44, 45, 48, 49, 62, 67, 68, 72, 88, 90, 95, 127, 146, 233, 241, 246, 254, and 255 of the 2014 reg. sess. of the General Assembly) (establishing the jurisdiction of the juvenile court in foster care proceedings as twenty-one).

²⁷⁶ CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic rights among others); *id.* art. 6(2) (maximize

vices L.B. needs to obtain, at the very least, his high school diploma or GED. It would identify his education goals and the services he needs to achieve these objectives (such as tutoring or college visits). L.B. and the state agency would provide his current education status (grade, progress towards graduation, etc.). L.B. was planning to earn his GED because he struggled in a conventional academic setting. The court would determine whether he needed additional help to study for and pass the GED exam. It would ensure payment for the exam, if needed.

When he attended school, L.B. received special education services.²⁷⁷ In such a case, advocates and the court would have to identify the nature of the disability, the services he received through his IEP, and, given his age, consider the transition services he received through his individualized education program (IEP).²⁷⁸ For students with disabilities, state child welfare agencies have an opportunity to coordinate services for older youth to prepare them for independent living;²⁷⁹

3. *Medical Care*.²⁸⁰ The state agency would provide informa-

to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, moral, and social development); *id.* art. 28 (provide access to education, including vocational information, based upon capacity of the youth); ICCPR, *supra* note 20, art. 6 (right to life and survival); and ICESCR, *supra* note 22, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security), and 12 (right to the highest attainable standard of physical and mental health).

²⁷⁷ See Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(1) (2012) (requiring all local education agencies receiving federal funds to provide a free and appropriate public education to eligible students with disabilities that is individualized to meet the student's specific learning needs).

²⁷⁸ See 34 C.F.R. §§ 300.120–24 (2013) (describing the IEP and its components).

²⁷⁹ For all students eligible for special education services who are sixteen years old and older (and in some circumstances younger), the local education agency must provide transition services that will prepare the student for life after graduation. *See id.* Transition services are a coordinated set of activities based on the student's needs, abilities, and desires that will prepare the student for post-secondary education, vocational training, independent living, and/or community involvement. *Id.* § 300.43.

²⁸⁰ CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic, social, and cultural rights); *id.* art. 6(2) (maximize to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, and social development); ICCPR, *supra* note 21, art. 6 (right to life and survival); *id.* art. 7 (freedom from inhuman and degrading treatment); ICESCR, *supra* note 22, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to

tion on L.B.'s medical needs, including dates of physical exams. It would identify any medical issues, both chronic and acute, he has and the manner in which he would meet those needs. This information would also include information on L.B.'s dental care. The state agency would also ensure L.B. had therapeutic or mental health care as appropriate. It would identify the specific manner by which the state will provide for L.B.'s needs in each of these areas. As he gets older, the state agency would provide, or help L.B. devise a method of obtaining, health care after he aged out. Upon aging out, the state agency would provide L.B. with all of his medical records;

4. *Employment*:²⁸¹ Here, the state agency would develop with L.B. his long-term and short-term employment objectives. Based on his strengths and skills, the state agency would help L.B. identify jobs to which he can apply, help him apply for the jobs, including resume writing or completing the application, and with interviewing skills. The agency would provide a job coach to help L.B. with the day-to-day aspects of working; and
5. *Life Skills*:²⁸² Here, the state agency would explain whether

maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security); *id.* art. 11 (right to adequate standard of living including freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

²⁸¹ CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize resources to implement youth's economic, social, and cultural rights), 6(2) (maximize to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, and social development); *id.* art. 28 (right to education and vocational information); ICCPR, *supra* note 20, art. 6 (right to life and survival); *id.* art. 7 (freedom from inhuman and degrading treatment); ICESCR, *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 6 (right to work); *id.* art. 9 (right to social security); *id.* art. 11 (right to adequate standard of living including freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

²⁸² CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 3(1) (requiring social welfare organizations, courts, and administrative authorities to protect the youth's best interests); *id.* art. 4 (maximize resources to implement youth's economic, social, and cultural rights); *id.* art. 6(2) (maximize to the extent possible the youth's development); *id.* art. 12 (give weight to youth's views); *id.* art. 20 (special protection to those states remove from their homes to protect the youth's best interests); *id.* art. 26 (right to full realization of social security); *id.* art. 27 (standard of living for the youth's physical, mental, and social development); ICCPR, *supra* note 20, art. 6 (right to life and survival); *id.* art. 18 (freedom of thought and conscience); *id.* art. 19 (freedom of opinion and expression); and ICESCR, *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring

L.B. had the day-to-day life skills needed to live independently. It would provide evidence of the same through, for example, producing a realistic budget it helped him develop. It would help L.B. establish and maintain both a savings and checking account. It would ensure that L.B. knows and understands the bills for which he is responsible and that he has means to meet those obligations, including through employment and education funding. The state agency would also provide continuing education on retirement planning.

If youth aging out of foster care are to be self-sufficient, then states must provide them the services they need to live independently. States owe this obligation to all youth *precisely because* they are in state custody.²⁸³ Youth aging out need assistance in obtaining housing, appropriate educational services, medical care, employment, and life skills if they are to be self-sufficient. At a minimum, courts must require state agencies to produce evidence of their efforts in the aforementioned areas at each permanency review hearing beginning when the youth turns age sixteen. Moreover, courts must direct state agencies to refer each individual youth to appropriate community members to develop the skills necessary to live independently.²⁸⁴ For example, if L.B. had been provided a mentor through a particular non-profit or state agency, or someone he may have known through a religious institution²⁸⁵ who was supportive of him and could guide him after he ages out. Ty could have been that adult support, as could other relatives or members of the community L.B. trusted.

states to maximize resources to achieve the rights in the Convention); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

²⁸³ See generally CRC, *supra* note 19, art. 6; ICCPR, *supra* note 20, art. 2; ICESCR, *supra* note 21, arts. 2, 11–12; see also *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

²⁸⁴ CRC, *supra* note 19, art. 2(1) (non-discrimination); *id.* art. 4 (maximize the youth's economic, social, and cultural rights); *id.* art. 6(2) (ensure the youth's development); *id.* art. 27 (providing a standard of living for the youth's physical, mental, and social development, and requiring states to help parents and those responsible for caring for the youth's standard of living); ICCPR, *supra* note 20, art. 6 (right to life and survival); *id.* art. 7 (freedom from inhuman and degrading treatment); ICESCR, *supra* note 21, art. 1 (right to self-determination and to pursue economic, social, and cultural development); *id.* art. 2 (requiring states to maximize resources to achieve the rights in the Convention); *id.* art. 9 (right to social security); *id.* art. 11 (right to adequate standard of living including freedom from hunger); *id.* art. 12 (right to the highest attainable standard of physical and mental health).

²⁸⁵ Religious institutions in a local community could be a resource to assist L.B., or any other youth in foster care. For that matter, anyone who has a positive relationship with young people can be a resource for that young person.

Had the state court made these inquiries at each of L.B.'s permanency hearings beginning when he turned sixteen, then it could have timely required the state agency to provide the services L.B. needed to become self-sufficient. The court would have understood that Ty could have provided better support for L.B. than would staff persons at his latest group home. The court could have placed L.B. with Ty and ordered the state agency to provide them assistance to maintain that placement, which would likely cost less than group care. Enforcing L.B.'s human rights through the existing child welfare laws would likely have led to more stability for him than what he actually had when he aged out. Courts' obligation to ensure youth receive these services is clear. Using human rights to define reasonable efforts for youth aging out is the legal mechanism to uphold the obligation to provide permanency that states promise children when removing them from their homes.

CONCLUSION

Older youth in foster care need help transitioning out of foster care. Many youth transition from foster care into instability, incarceration, unemployment, and homelessness. They become entrenched in poverty. State and federal efforts to combat these outcomes, although well-intentioned, have been ineffective. In order to meaningfully address the problems facing youth aging out of foster care, courts must enforce youth's right to self-sufficiency. Courts must enforce the human rights of young people through a clearer, more particularized, and more expansive understanding of the reasonable efforts provision of child welfare laws. By recognizing that the human rights and human dignity for aging out youth means being in a stable home, with stable and adequate employment to provide for basic needs, courts have the means of identifying efforts that are reasonable for youth transitioning from foster care. The Supreme Court's practice and the *Charming Betsy* canon of statutory construction provide the legal basis for implementing and enforcing human rights. Doing so would have allowed L.B. to remain with family members, could have helped him begin planning for life after foster care in a timely manner, and likely would have led to his safe transition into independence when he aged out. Instead, L.B. aged out of foster care and into instability.

As the Supreme Court has stated, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those

same rights within our own heritage of freedom.”²⁸⁶ Applying human rights will not solve all of the problems associated with child welfare or poverty.²⁸⁷ By recognizing the human rights of youth to become self-sufficient, however, those involved in implementing child welfare laws will be closer to improving outcomes for those aging out. The most effective way to implement the human rights of youth aging out is through the reasonable efforts provision of child welfare laws. Youth aging out of foster care need reasonable efforts in their transition to independence. The CRC, ICCPR, and ICESCR establish the human rights of youth to housing, employment, education, and medical care, among others. Courts must enforce these rights in order to meet the goal of federal child welfare law: becoming self-sufficient adults. By incorporating human rights into domestic child welfare laws, we can bridge the gap between the promise of Justice Rutledge’s declaration and the realities about which L.B. reminded the court nearly seventy years later. Youth aging out of foster care deserve no less than the dignity of being self-sufficient members of society.²⁸⁸

²⁸⁶ *Roper v. Simmons*, 543 U.S. 551, 554 (2005).

²⁸⁷ See Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don't Expect Miracles*, 20 EMORY INT'L L. REV. 43 (2006).

²⁸⁸ See *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944).

**CONSIDERING THE INDIVIDUALIZED
EDUCATION PROGRAM: A CALL FOR APPLYING
CONTRACT THEORY TO AN ESSENTIAL
LEGAL DOCUMENT**

Bonnie Spiro Schinagle[†]

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INTRODUCTION

The IDEA¹ has revolutionized the way children with disabilities are educated in the United States. A unique statutory scheme requiring public schools to open their doors to children with disabilities, the IDEA rejected a one-size-fits-all concept of education and armed families with an unprecedented right to an education.²

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¹ Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2012) (referred to throughout as “the IDEA” or “the Act”).

² Prior to enactment of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (the IDEA’s predecessor in name), students who were deemed “uneducable and untrainable” were segregated from the general population and, in the early 1970s, suspensions of thousands of students were employed to exclude special needs children from education. S. REP. NO. 104-275, at 7, 10–11 (1996), available at <http://www.gpo.gov/fdsys/pkg/CRPT-104srpt275/pdf/CRPT-104srpt275>

Public schools would be required to figure out how to educate students with a myriad of differences through classroom accommodations, services and supports in the “least restrictive environment.”³ The Act seeks to empower the weakest parties in the administrative process: children with disabilities and their parents.⁴ The primacy of this value is explicit in the precatory section of the current IDEA, which states that “[a]most 30 years of research and experience ha[ve] demonstrated that the education of children with disabilities can be made more effective by . . . strengthening the role and responsibilities of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home.”⁵

To effectuate its goals, the statute establishes by positive mandate a collaborative process in which schools and parents identify, evaluate, and determine each child’s educational needs and needs for related services. The end product of this process is a document called an Individualized Educational Program (IEP).⁶ The IEP provides a “written statement”⁷ of a student’s educational goals as well

.pdf. See also Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415, 421–22 (2011); Gabriela Brizuela, Note, *Making the “IDEA” a Reality: Providing a Free and Appropriate Public Education for Children with Disabilities Under the Individuals with Disabilities Education Act*, 45 VAL. U. L. REV. 595, 597–600 (2011); Jeffrey A. Knight, Comment, *When Close Enough Doesn’t Cut it: Why Courts Should Want to Steer Clear of Determining What is—and What is Not—Material in a Child’s Individual Education Program*, 41 U. TOL. L. REV. 375, 377–388 (2010); Michael A. Rebell & Robert L. Hughes, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J. L. & EDUC. 523, 531–32 (1996); Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 603–04 (1995).

³ 20 U.S.C. § 1412(a)(5). See generally Melvin, *supra* note 2.

⁴ See Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J. L. & PUB. POL’Y 171, 174–75 (2005); Debra Chopp, *School Districts and Families Under the IDEA: Collaborative in Theory, Adversarial in Fact*, 32 J. NAT’L ASS’N ADMIN. L. JUDIC. 423, 425 (2012); Romberg, *supra* note 2, at 438; Martin A. Kotler, *The Individuals with Disabilities Education Act: A Parent’s Perspective and Proposal for Change*, 27 U. MICH. J. L. REF. 331, 340 (1994); David M. Engel, *Law Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 168 (1991).

⁵ 20 U.S.C. § 1400(c)(5). See also S. REP. NO. 104-275, at 14–15 (1996) (recognizing that parents often “feel largely left out of the IEP process” and “their unsuccessful efforts to obtain appropriate services for their children”). But see Philip T.K. Daniel, *Education of Students with Special Needs: The Judicially Defined Role of Parents in the Process*, 29 J.L. & EDUC. 1, 5 (2000) (considering the expanded protection for parents under the 1997 amendments to the IDEA and stating that a lack of effective consequences encourages school districts to “take only minimal steps” toward “collaboration with parents”). The paucity of effective consequences remains a truth under the subsequent 2004 amendments to the IDEA.

⁶ 20 U.S.C. § 1401(14).

⁷ *Id.*

as the educational program and related services that will be provided by the school district.⁸ Thus, execution of the IDEA mandates occurs at the local school district level, subject to state regulations and the IDEA.⁹ Each state's regulations are unique.¹⁰

The IDEA requires states to establish procedures parents may use to challenge decisions made by their local education agency relative to their child's education, including the sufficiency of the education offered to their child as expressed in the child's IEP.¹¹

⁸ The IDEA encompasses a continuum, starting with identification and evaluation of a student to determine whether they qualify to be classified as disabled under the IDEA. See 20 U.S.C. § 1414(a). Once a determination has been made that a student is disabled within the meaning of the statute, the process of formulating an individualized program begins. 20 U.S.C. § 1401(14). The statute provides no standard with regard to implementation, and this issue has been addressed through litigation. Parents can challenge a school district at any point along the continuum, from refusal to evaluate or classify through failure to implement an IEP. See N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(i) (2013). The most common dispute arises over the legal adequacy of an IEP, and parents most commonly seek "specialized services, private school tuition and compensatory education." See David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student of a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 75, 86–87 (2010). Note also that the terms "district" and "school" will be used interchangeably in this Article.

⁹ Local determinations, however, are informed by regulations promulgated by the U.S. Department of Education and regulations promulgated by state education departments, which vary by state.

¹⁰ Regulations of the New York State Education Commissioner will be the ones referred to in this Article, since the case that is the subject of this Article arose in New York. Massachusetts regulations, for example, differ from New York's. Whereas New York regulations contain absolutely no substantive, qualitative standard for what a school must provide, Massachusetts requires an education that permits a student to progress effectively in the general education program, which means the acquisition of knowledge and skills "according to the individual educational potential of the student." 603 MASS. CODE REGS. 28.02(17) (2011). Massachusetts regulations also confer upon parents the "right to observe any program(s) proposed for their child." *Id.* 28.07(1)(a)(3). Differences are also seen in the IEP forms developed by each state. Though the contents are primarily dictated by the IDEA, forms vary among the states. The Massachusetts form, for example, includes a "vision statement" for each student based on prospective educational expectations. New York's form asks for identification of the student's "expected rate of progress in acquiring skills and information and learning style." N.Y. COMP. CODES R. & REGS. tit. 8, § 2001(i)(a).

¹¹ 20 U.S.C. § 1415(b)(6). These complaints are referred to, interchangeably, as "due process complaints" or "impartial hearing requests." New York has a two-tiered administrative process for resolving disputes between parents and school districts. A dispute, if not resolved by mediation or within the thirty-day resolution period commencing upon filing of a complaint, is heard by an Impartial Hearing Officer (IHO) and may be appealed to a State Review Officer (SRO), with a right to appeal to state supreme or federal district court. See N.Y. EDUC. LAW §§ 4404.1–4404.3 (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)–(k). Massachusetts, in contrast, has a single level of review by the Bureau of Special Education Appeals, which promulgates its own rules. See MASS. GEN. LAWS ch. 71B, § 2A (2010); 603 MASS. CODE REGS. 28.08. The right to appeal to a state or federal district court is found in Rule

In general, parents who reject an IEP may select an alternative placement and proceed against the school district for tuition reimbursement.¹² Though the IDEA plainly specifies that the IEP serve as a written statement of, among other things, the services the school will provide to the child, an open issue is whether contract law concepts should be called upon in this area of jurisprudence.¹³

The recent case of *R.E. v. New York City Department of Education*,¹⁴ decided in September 2012, expressly addressed this issue. The case consolidated the claims of three different families. The families had asserted that their children's IEPs failed to include services necessary to an educational program for their children that could meet the IDEA's requirements. One of the issues addressed concerned whether school district testimony about how those very services—which were not described in the respective children's IEPs—would have been provided had the children enrolled in the public program.¹⁵ Thus, the court was presented with the issue of whether the sufficiency of an IEP is to be judged exclusively by reference to the writing, or whether to consider testimony given after formulation of an IEP about how a child might have been given supports and services that were not otherwise provided for in the written document. The Second Circuit rejected a rule that would have restricted evaluation of the offered education to an IEP document, but stated that after-the-fact testimony could not be offered to remedy an otherwise defective IEP.

To place the discussion in perspective, this Article will first dis-

XIV of the Massachusetts Department of Elementary and Secondary Education Hearing Rules for Special Education. See 603 MASS. CODE REGS. 28.08(6).

¹² 20 U.S.C. §§ 1412, 1415(a)(10)(C)(iii).

¹³ Congress did not intend for the IEP to be a contract between parent and school or a guarantee of any particular outcome; instead, the writing was to “ensure adequate involvement” of the parent and child. S. REP. NO. 94-168, at 11–12 (1975), available at <http://files.eric.ed.gov/fulltext/ED112561.pdf>. The Senate Committee further recognized that outcomes could not be guaranteed, but that the written plan would “emphasize the process of parent and child involvement and . . . create a written record of reasonable expectations.” *Id.* The statutory requirement of a writing is not “merely technical”; instead, it creates “a clear record of the educational placement and other services offered to the parents.” *Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001) (citing *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994)).

¹⁴ *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167 (2d Cir. 2012), cert. denied, 133 S. Ct. 2802 (2013). In this Article, the New York City Department of Education will be referred to as the DOE.

¹⁵ *Id.* at 185. The court also considered the level of deference to be accorded to administrative decisions in the IDEA context and whether failure to strictly adhere to state regulations constitutes a per se IDEA violation. See *id.* at 188–90. This Article evaluates the court’s decision relative to retrospective testimony only.

cuss the IDEA's history, with special attention to the legislative history as it pertains to the intended legal function of the IEP. The next section will discuss the current IDEA statutory framework, also focusing primarily on IEP formulation and content requirements and provisions for dispute resolution procedures. The *R.E.* decision will then be discussed in detail. Finally, the Article will analyze the legal import courts should confer upon the IEP document, taking into consideration legislative intent and additional case law.

The fuzzy terminology in the IDEA has impeded the efficacy of the IEP as a protective device. Notwithstanding provisions for administrative procedures to resolve disputes between families and school districts,¹⁶ the IDEA, in fact, has blunt teeth.¹⁷ This Article will argue that courts should recognize IEPs as quasi-contracts and apply contract law concepts to IEP disputes. Alternatively, Congress should rephrase its characterization of the IEP, calling it—at a minimum—a written agreement. This appellation would promote the IDEA's normative values, recognize the descriptive constructs that have developed over the thirty years of the IDEA's existence,¹⁸ and empower and protect parents of children with disabilities.

I. HISTORY OF THE IDEA

Prior to the 1960s, exclusion of people with disabilities from mainstream education was accepted and even upheld.¹⁹ In fact, at that time, special education was reserved for students with behavioral problems. The physically or intellectually disabled were barred from mainstream schools, as well.²⁰ The 1960s ushered in an overall progressive societal shift. A movement emerged that was bent on eradicating political structures that marginalized minorities and the poor, with the objective of opening the doors of opportunity to all. Education did not escape this shift.

¹⁶ 20 U.S.C. §1415(b)(6)(A).

¹⁷ See Daniel, *supra* note 5.

¹⁸ See Caruso, *supra* note 4, at 175–76. (“The use of contractual jargon makes and is designed to make a powerful impression upon both parents and school district personnel . . . IEPs are referred to as contracts; therefore parents are led to believe they must be different. Administrators also share the sense that a contract is a higher, more immediate and accountable form of commitment toward children with disabilities than their generic duty to implement state and federal laws . . . an IEP is not a contract in a formal sense.”)

¹⁹ See Romberg, *supra* note 2, at 421–22 (citing Kotler, *supra* note 4, at 343); Ferster, *supra* note 8, at 77; Daniel, *supra* note 5, at 5. See also *Levine v. State Dep't of Insts. & Agencies*, 84 N.J. 234 (1980) (stating that the constitutional right to an education does not extend to children classified as “subtrainable”).

²⁰ Knight, *supra* note 2, at 378; Melvin, *supra* note 2, at 603–04.

*Brown v. Board of Education*²¹ addressed the inequities of educational systems that segregated black children, holding that separate educational facilities were inherently unequal and thus violated the Fourteenth Amendment.²² In *Brown*, the Supreme Court noted the importance of education to society, stating:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²³

Brown also introduced a conceptual tension between education as an exclusively local service as opposed to a broader matter implicating constitutional rights and served to encourage people with disabilities to seek parity.²⁴

President Johnson's Great Society program continued the trend and led to enactment of educational programs for economically disadvantaged children in 1965 through the Elementary and Secondary Education Act (ESEA).²⁵ Through amendments to the ESEA in 1966, Congress added a grant program for education of

²¹ 347 U.S. 483 (1954).

²² *Id.* at 493–95.

²³ *Id.* at 493.

²⁴ See Knight, *supra* note 2, at 377–78. See also Romberg, *supra* note 2, at 421–22; Brizuela, *supra* note 2, at 597–98; Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 161 (2010); Melvin, *supra* note 2, at 606–07; PETER W.D. WRIGHT & PAMELA DARR WRIGHT, SPECIAL EDUCATION LAW 12–13 (Harbor House Law Press, 2d ed. 2010).

²⁵ Knight, *supra* note 2, at 378 (calling the ESEA a “centerpiece of President Lyndon Johnson’s ‘Great Society,’” and noting that President Johnson played an integral role in introducing the ESEA bill into Congress and seeing to its rapid passage—with no amendments and little debate—in just eighty-seven days). Knight notes, however, that none of the programs developed by the states under the ESEA “produced the results that Congress, and advocates alike, sought to achieve.” *Id.* See also Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343, 1358 (2010) (noting that the ESEA was the federal government’s first attempt to equalize funding in public schools through provision of supplemental funds).

handicapped children.²⁶ The Education of the Handicapped Act (EHA) was enacted in 1970, and continued the grant for development of programs for students with disabilities by the states, but set neither substantive educational standards nor procedural requirements.²⁷

In this atmosphere, parents of children with disabilities sought to effect radical social change in the direction of inclusion.²⁸ The seeds of what ultimately became the IDEA are attributed to two cases, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (P.A.R.C.)* and *Mills v. Board of Education of D.C. (Mills)*.²⁹ The courts in these two cases held that due process and equal protection under the United States Constitution require what have become the basic articles of faith in special education: where a state has undertaken to educate its children, children with disabilities living within the state are entitled to a free, appropriate education in public schools that meets their individual needs and capacities; that states have an obligation to identify children with disabilities; and that parents are entitled to involvement in decision-making and can seek to enforce their children's rights.³⁰

The germs of the phrase "free and appropriate public education," now firmly entrenched in the law of special education, are found in the *P.A.R.C.* decree.³¹ Other elements of the *P.A.R.C.* de-

²⁶ See S. REP. NO. 104-275, at 7 (1996).

²⁷ *Id.* See also Engel, *supra* note 4, at 170-71.

²⁸ DeMonte, *supra* note 24, at 160-61. See also Knight, *supra* note 2, at 380; Lauren A. Larson, Comment, *Beyond Conventional Education: A Definition of Education Under the Education For All Handicapped Children Act of 1975*, 48 LAW & CONTEMP. PROBS. 63, 67-68 (1985); Melvin, *supra* note 2, at 606-07.

²⁹ 334 F. Supp. 1257 (E.D. Pa. 1971) [hereinafter *P.A.R.C.*]; 348 F. Supp. 866 (D.D.C. 1972). See also Romberg, *supra*, note 2, at 422-24 (noting that after the decisions in *P.A.R.C.* and *Mills*, Congress enacted the EAHCA, incorporating "many of the robust procedural rights granted to disabled children" in those decisions); Knight, *supra* note 2, at 379 (noting that these two landmark cases signaled the advent of change); Engel, *supra* note 4, at 171-73 (noting that the EHA adopted the use of procedural protections to promote the legal rights of children with disabilities); Brizuela, *supra* note 2, at 598-600 ("*P.A.R.C.* and *Mills* established the principle that students with disabilities are entitled to a FAPE."). See also Daniel, *supra* note 5, at 6 (noting the "sordid history" of parental exclusion from educational decision-making until the advent of *P.A.R.C.* and *Mills*, as well as persistence of other advocates, leading to the ESEA's enactment).

³⁰ See Knight, *supra* note 2, at 379; Brizuela, *supra* note 2, at 598-600; Engel, *supra* note 4, at 171-73.

³¹ *P.A.R.C.*, 334 F. Supp. at 1266. The consent decree obligated Pennsylvania to provide a "free public education of education and training appropriate to [the child's] learning capacities" to the mentally retarded and "exceptional" children. Pennsylvania was further barred from applying statutes denying exceptional children access to public education and was charged with developing programs to educate

cree that were ultimately incorporated into the IDEA were the concept of notice and a parental due process right concerning educational decisions, biennial evaluations and reimbursement of private school tuition if the public school could not accommodate the child's learning needs.³²

Plaintiffs in *Mills*³³ also asserted that they were deprived of their due process rights when their exceptional children were excluded from the public general education school system without hearings. Some were intellectually disabled and others had behavioral problems resulting from hyperactivity or emotional disturbance. The District of Columbia ultimately conceded its obligation to provide education suited to the respective needs of the individual plaintiffs and entered into a consent decree that it then failed to implement. Summary judgment was ultimately entered enforcing the *Mills* decree.³⁴

By granting summary judgment enforcing the decree, the court extended the *Brown*³⁵ principle of education as a civil right; excluding exceptional students from compulsory education was tantamount to segregation and rose to the level of a deprivation of due process, contravening the Fifth Amendment.³⁶ The decree in *Mills* required staffing of a special education department, an identification component, a due process and hearing procedure, and individual plans for each child.³⁷ The prospect of educational benefit, a precursor of the *Rowley*³⁸ standard, was another factor to be considered in determining a child's educational placement under the *Mills* decree.³⁹

The final decree in *Mills* required the District of Columbia to provide any child with "a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or

exceptional children. Notice to the affected class was also mandated. *Id.* at 1258–60. The decree called for biennial evaluation of exceptional students enrolled in Pennsylvania's programs. *Id.* at 1266.

³² *Id.* at 1262–63.

³³ *Mills*, 348 F. Supp. at 866.

³⁴ *Id.* at 878.

³⁵ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); Melvin, *supra* note 2, at 606 ("Constitutional theories of equal educational opportunity for children with disabilities are rooted in the United States Supreme Court's decision in *Brown*.").

³⁶ *Mills*, 348 F. Supp. at 875.

³⁷ *Id.* at 878–83.

³⁸ *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) (establishing that the substantive standard for an "appropriate" education was one that induced progress).

³⁹ *Mills*, 348 F. Supp. at 878.

emotional disability or impairment.”⁴⁰ The District of Columbia was ordered to compile a list identifying causes for nonattendance, including “educable mentally retarded, trainable mentally retarded, emotionally disturbed, specific learning disability, crippled/other health impaired, hearing impaired, visually impaired, multiple handicapped.”⁴¹ This list provided the footprint for the various classifications of disabilities currently found in today’s IDEA.⁴²

Mills also enumerated what would become the IDEA’s procedural foundations and the elements of the IEP. Specifically, all students were to be “provided with a publicly-supported educational program suited to his needs” and parents were to be notified of the proposed program, with an opportunity to have a hearing if they found the proposal objectionable.⁴³ Notice of the program had to be in writing and the notice had to advise the parent of their right to object.⁴⁴

Though *P.A.R.C.* and *Mills* established a public obligation to educate children with disabilities, no supportive statute existed. The Rehabilitation Act of 1973 prohibited discrimination on the basis of disability, but did not mandate inclusion of children with disabilities in public school or expressly address the educational needs of those children.⁴⁵ Congress held additional hearings exam-

⁴⁰ *Id.*

⁴¹ *Id.* at 879.

⁴² The IDEA defines a child with disabilities as a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A) (2012). Children ages 3 through 9 are considered disabled if they experience

developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development . . . who, by reason thereof, need [] special education and related services.

Id. § 1401(3)(B).

⁴³ *Mills*, 348 F. Supp. at 878–80.

⁴⁴ *Id.* at 880–81. *Mills* also placed the burden upon the school district to establish the sufficiency of the offered educational program. As in the current state of the law, the *Mills* decree gave parents the right to cross-examine a school district’s witnesses and to present their own witnesses. *Id.*

⁴⁵ See Knight, *supra* note 2, at 381; WRIGHT & WRIGHT, *supra* note 24, at 294.

ining the status of children with disabilities in education, resulting in the passage of the Education for All Handicapped Children Act (EAHCA)⁴⁶ in November of 1975. The EAHCA incorporated the elements articulated in *P.A.R.C.* and *Mills*, conferring a legal right to a free, appropriate education and, in effect, codified the holdings of those cases and afforded parents a means of enforcement.⁴⁷ The primary objective of the law was to guarantee parents a say in their children's education and to foster the collaborative process.⁴⁸

The lynchpin of the EAHCA was a prescribed meeting between parents and school districts at which an "individualized education program" would be planned and developed. From the outset, the IEP had to be formulated by the beginning of the school year,⁴⁹ and the formulation needed to be in writing.⁵⁰ However, the Senate Committee that considered the EAHCA explicitly stated in its report to the Senate: "It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship."⁵¹

An IEP formulated under the EAHCA encompassed merely five components:

- (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including

⁴⁶ Education for All Handicapped Children Act (EAHCA) of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400-1485 (2000 & Supp. 2005)). See also WRIGHT & WRIGHT, *supra* note 24, at 14; Knight, *supra* note 2, at 381; Romberg, *supra* note 2, at 424.

⁴⁷ See S. REP. NO. 94-168, at 8 (1975) ("The Education Amendments of 1974 incorporated the major principles of the right to education cases. That Act added important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped; and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature of severity of the handicapped is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . ." *Id.*). See also Knight, *supra* note 2, at 381; Rebell & Hughes, *supra* note 2, at 534-35 ("[*P.A.R.C.*] and *Mills* led directly to Congress' passage of the Education of All Handicapped Children's Act . . . the predecessor of the IDEA, in 1975.").

⁴⁸ See S. Rep. No. 94-168, at 11.

⁴⁹ See 20 U.S.C. § 1414(d)(2)(A) (2012).

⁵⁰ EAHCA § 602(19), 89 Stat. at 776.

⁵¹ S. REP. NO. 94-168, at 11.

short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.⁵²

The IEP team envisioned by the EAHCA was also simple: an IEP could be formulated in “any meeting” of “a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child.”⁵³ The EAHCA included procedural safeguards to protect parents. Educational agencies could not evaluate a child, change their classification or educational placement without first notifying the parent in writing.⁵⁴ The EAHCA also provided for an enforcement procedure, mandating states to develop administrative venues for resolving disputes under the Act and permitting appeals to either state or federal court.⁵⁵

The EAHCA resulted in an increase in the number of children receiving special education, but this progress was far from perfect, and the EAHCA was fine-tuned in successive amendments.⁵⁶ The 1990 amendments⁵⁷ introduced the name by which the Act is currently known—the Individuals with Disabilities in Education Act or IDEA.⁵⁸

The IEP requirements remained unchanged until the 1997

⁵² EAHCA § 602(19), 89 Stat. at 776.

⁵³ *Id.*

⁵⁴ *See* EAHCA § 615(a), 89 Stat. at 788.

⁵⁵ *See id.* § 615(b)–(e), 89 Stat. at 788–89.

⁵⁶ *See* 20 U.S.C. § 1400(c)(2) (2012). Between 1976 and 1977, 3,694,000 students were provided with special education; for the period between 2009 and 2010, this figure increased to 6,481,000. *See Students with Disabilities*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=64> (last visited Oct. 29, 2013). *See also* Ferster, *supra* note 8, at 78 (“Today, over six million students with disabilities are served under the Act in public schools.”); 20 U.S.C. § 1400(3) (“Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children [have] access to a free appropriate public education and in improving educational results for children with disabilities.”).

⁵⁷ Pub. L. 101-476, 104 Stat. 1103 (1990).

⁵⁸ *See* H.R. REP. NO. 101-544, at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1723, at 1783.

amendments,⁵⁹ in which the IEP requirements were greatly amplified. The 1997 amendments combined provisions referring to evaluations, reevaluation, and IEP development and review into section 614 and called for a more comprehensive, sophisticated IEP document.⁶⁰ The law introduced a nominal substantive educational standard; the plan had to foster advancement in “attaining the annual goals,” as well as enable the child “to be involved and progress in the general curriculum.”⁶¹ Identification of the participants in the IEP team was also expanded. The team was now mandated to include the parents, teachers familiar with the child in the educational setting, and special education teachers or other specialists involved in addressing the child’s special needs.⁶² The 1997 amendments required that IEPs include measurable goals, benchmarks, and short-term objectives and specification of how progress would be reported to parents.⁶³ However, an overly rigid document was not envisioned by Congress; the need for “specific day-to-day adjustments” was acknowledged, but no adjustment mechanism was codified.⁶⁴

The last amendments of note were made in 2004.⁶⁵ The 2004 amendments further refined the IEP development process.⁶⁶ The Amendments added procedures that allowed the IEP to be a more

⁵⁹ Pub. L. 105-17, 111 Stat. 37 (1997).

⁶⁰ *See id.* at 81, 86–88. The 1997 amendments also added 20 U.S.C. § 1412(a)(10)(C), predicated reimbursement of tuition for parents who unilaterally enroll their children in private schools upon notice to the school district. *See id.* at 63. *See also* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (holding that reimbursement for the cost of private-school special education is authorized under the IDEA “when a school district fails to provide a [free appropriate public education] and the private-school placement is appropriate”).

⁶¹ 111 Stat. at 84.

⁶² *See id.* at 85.

⁶³ *See id.* at 83.

⁶⁴ *See* S. REP. NO. 105-17, at 19–21 (1997), available at <http://www.gpo.gov/fdsys/pkg/CRPT-105srpt17/pdf/CRPT-105srpt17.pdf> (“Specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child’s IEP team. However, if changes are contemplated in the child’s measurable annual goals, benchmarks, or short term objectives, or in any of the services or program modifications, or other components described in the child’s IEP, the [local educational agency] must ensure that the child’s IEP team is reconvened in a timely manner to address those changes.” *Id.* at 20.)

⁶⁵ Pub. L. No. 108-446, 118 Stat. 2647 (2004). The 2004 amendments renamed the act the Individuals with Disabilities in Education Improvement Act, but the act is still generally referred to as the IDEA.

⁶⁶ While recitation of benchmarks and short-term objectives were eliminated to reduce paperwork, periodic progress reports remained for parent protection. S. REP. NO. 108-185, at 28–29 (2003), available at <http://www.gpo.gov/fdsys/pkg/CRPT-108srpt185/pdf/CRPT-108srpt185.pdf>.

fluid document. Informal, interim changes to the IEP are now permitted upon agreement with the parents.⁶⁷ States were permitted to apply to participate in a pilot, multi-year IEP program.⁶⁸ Parental participation in meetings by telephone or video conference was permitted and, with written consent from the parent, IEP team members whose areas would be unaffected by any IEP changes were excused from development meetings.⁶⁹ Unlike earlier versions, the current act emphasizes performance and advancement in alignment with the No Child Left Behind Act of 2001.⁷⁰ Also, a qualitative element was added; the services provided must be “based on peer-reviewed research to the extent possible.”⁷¹ Overall, both the process of IEP development and the IEP document itself have increased in complexity since 1975.

Throughout its history, the IDEA required states to maintain an administrative procedure for resolution of disputes between parents and school districts.⁷² Under this section, states are required to establish procedures for resolution of complaints concerning “identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,” including mediation.⁷³ Appeal may be taken from the administrative proceedings to state or federal court.⁷⁴ Written notification must be given to parents informing them of their procedural rights.⁷⁵

The IDEA has wrought remarkable change. Its procedures and procedural protections have evolved in complexity. However, the statute’s primary mechanism, the IEP, is still referred to as merely a written statement, and this seriously undermines the potential for forceful protection for families of students with disabilities.

II. IEPs AND PROCEDURAL PROTECTIONS IN THE CURRENT IDEA

At its most basic, the overall objective of the IDEA is to level the educational playing field for students with disabilities relative

⁶⁷ 20 U.S.C. § 1414(d)(3)(D) (2012).

⁶⁸ *Id.* § 1414(d)(5).

⁶⁹ *Id.* § 1414(d)(1)(C)(ii)–(iii); *id.* § 1414(d)(C).

⁷⁰ Knight, *supra* note 2, at 386; WRIGHT & WRIGHT, *supra* note 24, at 15, 19.

⁷¹ 20 U.S.C. § 1414(d)(1)(A)(IV); Knight, *supra* note 2, at 386.

⁷² *Id.* § 1415. *See also supra* note 11.

⁷³ 20 U.S.C. § 1415(b)(6); *id.* § 1415(b)(5).

⁷⁴ *Id.* § 1415(i)(1)–(3).

⁷⁵ *Id.* § 1415(d)(1)(A).

to their peers without disabilities.⁷⁶ The ultimate aim is to provide these students with a better, long-term outcome in terms of productivity in adulthood.⁷⁷ The federal statute sets forth a mandate and prescribes structures to effectuate that mandate, but execution is accomplished at a very local level, with state oversight and federal support.⁷⁸ The IDEA's procedural structures also attempt to redress the imbalance of power between parents and school districts.⁷⁹

The overarching mandate of the IDEA is provision of a free and appropriate public education, or FAPE, to children who have been classified as disabled.⁸⁰ This is to be accomplished in the "least restrictive environment."⁸¹ Specifically, the statute states:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.⁸²

The statute proscribes four elements of a FAPE, namely an education with related services that have been a) provided at public expense; b) that meet state standards; c) delivered at an appropriate school in the state; and d) that are "provided in conformity with the individualized education program."⁸³ Twice, the statute re-

⁷⁶ See *id.* § 1400(d).

⁷⁷ See *id.* § 1400(a)(5)(A)(ii); S. REP. NO. 94-168, at 9 (1975) ("With proper education, many [children with disabilities] would be able to become productive citizens, contributing to society instead of being forced to remain burdens."). See also WRIGHT & WRIGHT, *supra* note 24, at 14; S. REP. 104-275, at 7 (1996); *Accountability and the IDEA: Hearing Before the S. Comm. on Health, Education, Labor and Pensions*, 107th Cong. (2002), 2002 WL 1265416 (statement of Sen. Edward M. Kennedy) (discussing the need for an educational system for students with disabilities that enables success in school and later in life).

⁷⁸ 20 U.S.C. § 1400(c)(6); *id.* § 1400(d). Section 1402 established an Office of Special Education Programs within the Office of Special Education and Rehabilitative Services of the U.S. Department of Education. *Id.* § 1402.

⁷⁹ See generally *supra* note 4.

⁸⁰ See 20 U.S.C. § 1412(a)(1). The substantive dimension of "appropriateness" is not specified in the statute and is instead provided by case law that will be discussed later in this section.

⁸¹ *Id.* § 1400(a)(5) (stating that funding allocations cannot "limit or condition the right of a child with a disability . . . to receive a free appropriate public education . . . in the least restrictive environment").

⁸² *Id.* § 1412(a)(5).

⁸³ 20 U.S.C. § 1401(9). *But see* M. C. *ex rel.* v. Voluntown Bd. of Educ., 226 F.3d 60

fers to the IEP as “a written statement”⁸⁴ setting forth exactly what will be provided in the educational sphere. Thus, the IEP is the cornerstone, expressing the deliverables and outcomes that constitute a FAPE for each particular child.

As for content, the IDEA currently requires that an IEP include an exhaustive description of the child from an academic and social-emotional perspective, as well as an explanation of how the child’s disability impacts her education and social-emotional development, referred to as “present levels of performance.”⁸⁵ It must describe the impact of the child’s disability on her “involvement and progress in the curriculum.”⁸⁶ A set of “measurable annual goals” must be included in the IEP, along with a statement of what supports, related services, aids and/or modifications will be provided to attain the specified goals.⁸⁷ Any decision to educate a student outside of the general population must be explained in the IEP.⁸⁸ The IEP must state its effective date, the frequency, location and duration of all services and include transition service plans starting at age fourteen with annual revision.⁸⁹

The statutory scheme emphasizes the rights and obligations of parents and school districts in the IEP formulation process and in

(2d Cir. 2000) (stating that where FAPE has not been provided, an otherwise appropriate private school selected by the parent need not meet state standards).

⁸⁴ 20 U.S.C. § 1402(14). Section 1414 further refines the definition of IEPs and specifies the information they must minimally contain. *Id.* § 1414(d)(1).

⁸⁵ *Id.* § 1414(d). The language of the statute, which specifies what an IEP must contain, is repeated in 34 C.F.R. § 300.320, the federal regulation that supplements the IDEA. New York State regulations also repeat the language contained in 20 U.S.C. § 1414(d), but add a requirement that the IEP formulation committee “must consider the results of the initial or most recent evaluation; the student’s strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental and functional needs of the student.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.4(d)(2) (2013). “Functional performance” is defined as a student’s learning characteristics or learning style. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(w)(3)(i)(a).

⁸⁶ 20 U.S.C. § 1414(d)(1)(A)(ii). Plans are also provided for preschool children that must describe how the child’s disability impacts the child’s engagement in “appropriate activities.” *Id.* § 1414(d)(1)(A)(i).

⁸⁷ *Id.* § 1414(d)(1)(A). In theory, these objectives are laudable. However, goals are often amorphous in both content and measurability. Material helpful to parents is available on the Internet, providing examples of specific measurable goals. *See, e.g., Smart IEPs*, WRIGHTS LAW, <http://www.wrightslaw.com/bks/feta2/ch12.ieps.pdf> (last visited Nov. 2, 2013).

⁸⁸ 20 U.S.C. § 1414(d)(1)(A)(i)(V).

⁸⁹ 20 U.S.C. § 1414(d)(1)(A)(i)(VII)–(VIII). Transition services under the IDEA contemplate activities that will help a child move beyond school into the community or college. *Id.* § 1401(34). Transition services in New York include services directed toward helping a child move to less restrictive environments. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(fff).

dispute resolution procedures. States must adopt procedures guaranteeing parents and children procedural safeguards, including a guarantee that parents be allowed to attend all meetings concerning, *inter alia*, the “educational placement of the child, and the provision of a free appropriate public education to such child.”⁹⁰

The development of an IEP is supposed to be a collaborative process with a temporal element, within statutorily specified parameters.⁹¹ Participants in the IEP development process must include the child’s parents, at least one “regular education teacher” of the child, one special education teacher of the child, and a representative of the local educational agency, such as the school district.⁹² The district’s representative must have supervisory authority in regard to special education, must be knowledgeable about the general curriculum, and must have knowledge of the available resources. One member of the team must be able to interpret the “instructional implications of evaluation results.”⁹³ Significantly, a sufficient IEP must be in effect by the beginning of the school year.⁹⁴ In New York, IEP teams are called the “committee on special education,” or CSE.⁹⁵

Neither the IDEA nor its predecessor statute, the EAHCA, include language defining an “appropriate” education. Instead, this issue has been decided by the courts. In the seminal case of *Board of Education of Hendrick Hudson Center School District v. Rowley*,⁹⁶ the

⁹⁰ 20 U.S.C. § 1415(b)(1).

⁹¹ See Chopp, *supra* note 4, at 424.

⁹² 20 U.S.C. § 1414(d)(1)(B)(i)–(vi); 34 C.F.R. § 300.321(a) (2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.2. Inclusion of the child at the IEP development meeting is discretionary. 20 U.S.C. § 1414(d)(B)(vii). However, one year before the child attains the age of majority, the child must be informed of his or her rights under the IDEA. 20 U.S.C. § 1414(d)(1)(A)(VII)(cc). Moreover, if the purpose of an IEP meeting is to discuss transition goals, the child must be invited. 34 C.F.R. § 300.321(b).

⁹³ 20 U.S.C. § 1414(d)(1)(B)(v) (2012); 34 C.F.R. § 300.321(a)(5).

⁹⁴ 20 U.S.C. § 1414(d)(2)(A).

⁹⁵ See N.Y. EDUC. LAW § 4402.1.b.(1) (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(k).

⁹⁶ 458 U.S. 176 (1982) (decided under the Education of the Handicapped Act). Amy Rowley was a hearing impaired child who was enrolled in mainstream education. Asserting the need for an in-class interpreter, her parents initiated an impartial hearing and did not prevail at the administrative level. *Id.* at 185. The district court, however, found that the disability was interfering with Amy’s education. They looked to whether there was a disparity between the child’s level of performance as compared to her potential. *Id.* at 185–86. The Second Circuit affirmed by a split panel. *Id.* at 186. Certiorari was granted specifically so that the Supreme Court could examine the substantive confines of a FAPE. The Supreme Court held that Amy had been provided with an appropriate education since she was provided with “personalized instruction and related services” meeting her personal needs and permitting her to advance from grade to grade. *Id.* at 209–10. Justice Blackmun’s concurrence agreed that Amy had

Supreme Court provided guidance on the issue. After extensive examination of the legislative history, the Court, in a decision by Justice Rehnquist, found that the term “appropriate” did not require maximization of each child’s potential. In fact, equal educational opportunity was rejected as an unworkable standard.⁹⁷ The standard set was minimal, relying on legislative history indicating that FAPE was to provide a “basic floor of opportunity” and that attaining grades sufficient to advance generally is indicative of “educational benefit.”⁹⁸ However, the Court stated that the education must be personalized, provide supports and services, and “must comport with the child’s IEP.”⁹⁹ Qualitatively, the Court concluded that the education must enable the child to make progress and not induce regression.¹⁰⁰

States must establish procedures for parents to contest “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child,”¹⁰¹ with a two year limitations period.¹⁰² There are ample opportunities for parents and school districts to resolve their differences before relief is pursued through the administrative process. Under the IDEA, a parent who rejects the IEP and wishes to enroll their child in a private school must provide ten days’ notice prior to the withdrawal, to which the school district may respond.¹⁰³

been provided with a FAPE through an IEP permitting her educational opportunity but argued for a strict standard affording greater deference to the administrative hearing officers. *Id.* at 210–12 (Blackmun, J., concurring). The dissent of Justices White, Brennan and Marshall argued that the statute’s objective was to provide “full educational opportunity” and noted that, without a sign language interpreter, Amy comprehended “less than half of what [was] said in the classroom – less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.” *Id.* at 213–16 (White, J., dissenting).

⁹⁷ *Id.* at 198–200.

⁹⁸ Justice White’s dissent, which was joined by Justices Brennan and Marshall, asserts that the “basic floor of opportunity” contemplated by Congress was one that eliminated “the effects of the handicap” to the extent possible. *Id.* at 215 (White, J., dissenting). States are permitted to adopt a higher standard. The Massachusetts standard is an education that assures maximum development. *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 987 (1st Cir. 1990); *Stock v. Mass. Hosp. Sch.*, 392 Mass. 205, 211 (1984).

⁹⁹ *Rowley*, 458 U.S. at 202–03.

¹⁰⁰ *Id.* at 203–04.

¹⁰¹ 20 U.S.C. § 1415(b)(6)(A) (2012). *See also* N.Y. EDUC. LAW § 4404.1 (McKinney 2007).

¹⁰² 20 U.S.C. § 1415(b)(6)(B). *See also* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(1) (2013).

¹⁰³ *See* 20 U.S.C. § 1412 (a)(10)(C)(iii). *See also* 34 C.F.R. § 300.148 (2007); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985); *Flo-*

New York has established a two-tiered administrative hearing process along the continuum embraced by the IDEA; parents may file an administrative complaint¹⁰⁴ “with respect to any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student.”¹⁰⁵ A thirty-day resolution period follows.¹⁰⁶ If the dispute is not resolved during that time, an impartial hearing is held before a hearing officer and mediation is available as an alternative.¹⁰⁷ At the hearing, witnesses testify under oath and other evidence may also be received.¹⁰⁸ In New York, “any party aggrieved” by the Impartial Hearing Officer’s decision may appeal to the State Review Officer (SRO).¹⁰⁹ The SRO’s review is based upon the appellate pleadings and the impartial hearing record and the SRO may ask the parties to present oral argument or additional evidence beyond the impartial hearing record.¹¹⁰ The decisions of the State Review Officer are appealable to either New York State Supreme Court or federal district court.¹¹¹

*School Committee of the Town of Burlington v. Department of Education of Massachusetts*¹¹² established the standard for determining whether a parent who rejects an IEP and unilaterally places their child in private school is entitled to tuition reimbursement. In *Burlington*, the Supreme Court held that courts have the latitude to award tuition reimbursement “where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate.”¹¹³ The Court also stated “equitable considerations are

rence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12–13 (1993); M.C. *ex rel.* v. Voluntown, 226 F.3d 60 (2d Cir. 2000).

¹⁰⁴ The complaint is called a “due process complaint” and the proceeding is referred to as an “impartial due process hearing” or an “impartial hearing.” N.Y. COMP. CODES R. & REGS. tit. 8 § 200.5(i), (j)–(k).

¹⁰⁵ N.Y. EDUC. LAW § 4404.1 (McKinney 2007); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(i)(1).

¹⁰⁶ N.Y. EDUC. LAW § 4404.1; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(2)(v).

¹⁰⁷ N.Y. EDUC. LAW § 4404; N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(3)(iii). Mediation is voluntary and cannot be used to deny or delay a due process hearing. *Id.* § 200.5(h)(1)(i)–(ii).

¹⁰⁸ N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(j)(3)(xii)(c).

¹⁰⁹ *Id.* § 200.5(k)(1). *See also* N.Y. EDUC. LAW § 4404.2.

¹¹⁰ N.Y. COMP. CODES R. & REGS. tit. 8, §§ 279.9–279.10.

¹¹¹ N.Y. EDUC. LAW § 4404.3-a; N.Y. COMP. CODES R. & REGS. tit. 8, §§ 279.9–279.10. *See also* 20 U.S.C. § 1415(i)(2)(A) (2012) (conferring the right to appeal the administrative decision through a civil suit in state or federal court).

¹¹² 471 U.S. 359 (1985).

¹¹³ *Id.* at 370, 373–74.

relevant in fashioning appropriate relief.”¹¹⁴ Subsequently, this decision gave rise to the three-pronged *Burlington* test, which considers: (1) whether the school district offered an appropriate program in the IEP; (2) whether the alternative selected by the parents was appropriate; and (3) whether the equities favor the parents.¹¹⁵

The IDEA provides that if a parent enrolls their child in a private school without consent from a public agency, then

a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.¹¹⁶

Reimbursement may be “reduced or denied” if the parent fails to object to the education offered in the IEP at the IEP formulation meeting or fails to provide written notice of the basis for their objections to the IEP within ten business days prior to enrolling their child in a private school.¹¹⁷ Reimbursement of private school tuition may also be reduced or denied if the parent has been notified that the district intends to evaluate the child or “upon a judicial finding of unreasonableness with respect to actions taken by the parents.”¹¹⁸ The initial inquiry, however, is always whether the public educational authority offered a FAPE in the first instance.

Where a child has been identified as having a qualifying disability, the logical starting point of the determination of whether a FAPE has been offered should be the IEP. However, as reflected in the *R.E.* case, school districts have been known to offer testimony about how a child might be provided with services not reflected within the IEP document.¹¹⁹ *R.E.* purports to resolve the issue of whether the determination is restricted to the information con-

¹¹⁴ *Id.* at 374.

¹¹⁵ *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12–13 (1993); *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998). *See also* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 237–38 (2009); *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012). In addition, the statute provides that, after consideration of “a preponderance of the evidence” a court “shall grant such relief as it determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii).

¹¹⁶ 20 U.S.C. § 1412(a)(10)(C)(ii). This is so even if the student was never classified as disabled under the IDEA nor received special education services in the public school. *See Forest Grove Sch. Dist.*, 557 U.S. at 237–39 (citing *Burlington* in noting that parents are entitled to tuition reimbursement where they had provided school district with independent evaluations and the school district’s refusal to provide an IEP deprived plaintiff of a FAPE).

¹¹⁷ 20 U.S.C. § 1412(10)(C)(iii)(I)(aa)–(bb).

¹¹⁸ 20 U.S.C. § 1412(10)(C)(iii)(II)–(III).

¹¹⁹ *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012).

tained within the four corners of the IEP document only.¹²⁰

III. *R.E. v. NEW YORK CITY DEPARTMENT OF EDUCATION*: DISCUSSION

R.E. is comprised of three companion cases brought by parents of autistic children. All three cases were ultimately appealed to the Second Circuit. In each case, the plaintiff parents claimed that the IEPs created by the New York City Department of Education (DOE) were deficient and failed to offer all of the services necessary to meet the complainant children's educational needs. Instead of placing their children in public schools, the plaintiff parents opted, providing the requisite notice, to place them in private schools.¹²¹ Each of the children involved attended private schools specializing in working with autistic children. The cost of providing specialized education is extremely high, and some tuitions ran into six figures.¹²² Parents of these children challenged the IEPs in administrative hearings, claiming that they did not comply with the IDEA's requirements of offering a FAPE. The DOE offered testimony explaining how the children's needs would have been met, even though the services described in the verbal testimony did not appear in the written IEPs.

A. *Facts and Procedural History of the Companion Cases*

At issue in the lead case was the IEP developed for the 2008–2009 school year for J.E., an autistic child. The challenged IEP offered placement in a 6:1:1 special class and a full-time, behavior-management paraprofessional, as well as two 30-minute ses-

¹²⁰ *Id.* at 185.

¹²¹ *Id.* at 175–84. New York City has a bifurcated IEP development and school placement process. In addition to parents, IEP development teams include administrators responsible for the various zones within the DOE's purview in addition to the other required IEP team members. See *Who Attends the IEP Team Meeting*, N.Y.C. DEP'T OF EDUC., http://schools.nyc.gov/Academics/SpecialEducation/SEP/meeting/who_attends.html (last visited Nov. 5, 2013). After the IEP has been developed and provided to the parent, a separate document called a Final Notice of Recommendation (FNR) is mailed to the parent. The FNR identifies the school that the DOE proposes the child attend and where both education and related services will be delivered. See *Final Notice of Recommendation (FNR)*, N.Y.C. DEP'T OF EDUC., <http://schools.nyc.gov/Academics/SpecialEducation/SEP/determination/fnr.html> (last visited Nov. 5, 2013).

¹²² See *R.E. and M.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28, 37 (S.D.N.Y. 2011) (noting that tuition at issue was \$104,167 for a ten-month program and \$125,000 for a twelve-month program); see also *R.K. v. N.Y.C. Dep't of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at *2 (E.D.N.Y. Jan. 1, 2011) (noting that full tuition at the private program at issue was \$85,000).

sions of group counseling each week with the following related services: five 30-minute individual sessions of speech therapy and five 30-minute occupational therapy sessions.¹²³ R.E. and M.E. rejected the IEP and enrolled their son in a private school, McCarton, specializing in teaching children with autism.¹²⁴ The parents notified the DOE that they objected to the offered program and placement because it did not provide the necessary 1:1 teaching instruction or sufficient speech therapy,¹²⁵ and that J.E. was being reenrolled in McCarton.¹²⁶

J.E.'s parents initiated an impartial hearing, which was held in March of 2009. The special education teacher from J.E.'s proposed classroom testified about methodologies used in his classroom.¹²⁷

¹²³ *R.E. and M.E.*, 785 F. Supp. 2d at 35–36. The IEP was formulated by consideration of reports from McCarton and a report of an observation of J.E. made by the DOE at McCarton. *Id.* at 35.

¹²⁴ *Id.* at 37. J.E.'s IEP for 2007–2008 offered placement in a 6:1:1 classroom in a special public school. The DOE conceded that the 2007–2008 placement was inappropriate, and J.E. was enrolled in McCarton for the 2007–2008 school year. *See id.* at 35. A 6:1:1 class has six students, one teacher and one paraprofessional. These classes serve students who are “aggressive, self-abusive or extremely withdrawn and with severe difficulties in the acquisition and generalization of language and social skill development. These students require very intense structured individual programming [and] continual adult supervision.” *Description of Class Staffing Ratios*, N.Y.C. DEP’T OF EDUC., http://schools.nyc.gov/documents/d75/district/staffing_ratios.pdf (last visited Nov. 5, 2013). Paraprofessionals assist in classrooms for children with emotional, cognitive, and/or physical handicaps, autism, and other special needs. They assist with teaching under a teacher’s direction, but otherwise function primarily as aides. Qualifications are minimal. Only a high school diploma or its equivalent, like a GED, is required. Paraprofessionals must pass the New York State Assessment of Teaching Skills exam and take a three-hour online paraprofessional training course given by the New York City Department of Education. *See Substitute Paraprofessionals*, N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/Careers/SubPara> (last visited Nov. 5, 2013).

¹²⁵ *R.E. and M.E.*, 785 F. Supp. 2d at 36–37.

¹²⁶ *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 176 (2d Cir. 2012). J.E.’s class at McCarton had five children and a 1:1 student/teacher ratio. J.E. received about thirty hours of applied behavior analysis (ABA) therapy, plus five 60-minute individual speech therapy and language sessions weekly and individual occupational therapy for 45 minutes, five times weekly, in addition to three afterschool sessions for reinforcement. *Id.* at 175–76. *See also R.E. and M.E.*, 785 F. Supp. 2d at 34.

¹²⁷ *R.E. and M.E.*, 785 F. Supp. 2d at 36. The teacher testified that he used TEACCH, ABA and DIR, but that he was not certified or formally trained in those methodologies. DIR stands for “developmental,” “individual differences,” and “relationship based.” DIR is a trademarked methodology addressing social, emotional, and intellectual capacity. *What is DIR Floortime?*, THE INTERDISCIPLINARY COUNCIL ON DEVELOPMENTAL AND LEARNING DISORDERS, <http://www.icdl.com/DIRFloortime.shtml> (last visited Nov. 5, 2013). ABA therapy teaches behaviors by establishing goals and providing constant reinforcement. The parent is an essential part of the program and must be trained to reinforce lessons. *See What Is ABA Therapy?*, APPLIED BEHAVIOR STRATEGIES, <http://appliedbehavioralstrategies.com/basics-of-aba.html> (last visited Nov. 5, 2013); *see also R.K. v. N.Y.C. Dep’t of Educ.*, No. 09-CV-4478 (KAM), 2011 WL

The IHO found in favor of the parents.¹²⁸ The DOE appealed to the SRO,¹²⁹ who reversed and denied reimbursement, determining instead that the 6:1:1 class was appropriate.¹³⁰ The parents appealed and the district court reversed the SRO.

The district court held that the DOE had failed to offer a FAPE in the first instance and that the SRO erred in relying on “after-the-fact testimony of . . . what the teacher . . . would have done if J.E. had attended his class.”¹³¹ The district court noted “the only information the parents can rely upon as determining whether the proposed program is appropriate for their child is the IEP document itself.”¹³² The district court concluded that the SRO improperly relied on the teacher’s testimony “to remedy deficits found by the IHO in the IEP.”¹³³

The second plaintiff, R.K., was entering kindergarten in 2008–2009. The CSE meeting held to develop her IEP for the 2008–2009 school year was contentious and resulted in an IEP offering placement in a 6:1:1 class.¹³⁴ At the CSE meeting, R.K.’s par-

1131492, at *2 (E.D.N.Y. Jan. 1, 2011) (“ABA methodology is frequently 1:1 in nature, and is inherently individualized, as the instructor or therapist assesses the particular child’s behavior; breaks desired skills down into small, discrete steps; and reinforces positive behavior according to the needs and progress of that child. ABA is extremely intensive, often involving 25 to 40 hours of effort per week.”). TEACHH stands for Training and Education of Autistic and Related Communication Handicapped Children and uses visual supports to help autistic students to communicate in highly structured environments in class or at home. See *Training and Education of Autistic and Related Communication Handicapped Children (TEACCH)*, AUTISM SPEAKS, <http://www.autismspeaks.org/what-autism/treatment/training-and-education-autistic-and-related-communication-handicapped-children> (last visited Dec. 8, 2013). Martin Kotler explains that the approach used to teach impaired students either presumes that their abilities are fixed, which he characterizes as passive-acceptant, or can seek to modify and improve their function. A passive-acceptant approach does not admit the possibility of improvement and, in Kotler’s view, is simply another form of exclusion. In contrast, the “active-modificational approach” permits the possibility of functional improvement. Kotler, *supra* note 4, at 333–38, 348–50. TEACCH ultimately seeks to “teach autistic children skills sufficient to avoid institutionalization.” *Id.* at 334. Dr. O. Ivar Lovaas’s behavioral approach (ABA), for its part, was so successful that many of the children he studied were fully integrated into public schools. *Id.* at 334–35.

¹²⁸ *R.E. and M.E.*, 785 F. Supp.2d at 38. Among other things, the IHO found that the program offered by the DOE was not appropriate. *Id.* at 37; *R.E.*, 694 F.3d at 177.

¹²⁹ New York law provides for appeal to a State Review Officer from an adverse impartial hearing officer’s decision by either party. See N.Y. COMP. CODES & REGS. tit. 8, § 200.5(k)(1) (2013).

¹³⁰ *R.E.*, 694 F.3d at 177.

¹³¹ *R.E. and M.E.*, 785 F. Supp. 2d at 41.

¹³² *Id.* at 41–42.

¹³³ *Id.* at 42.

¹³⁴ *R.K. v. N.Y.C. Dep’t of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at *2, *7–8 (E.D.N.Y. Jan. 1, 2011). The CSE considered evaluations performed in late 2007 and early 2008 by a DOE psychologist and R.K.’s service providers, all of which con-

ents had objected to the 6:1:1 placement, asserting that a private evaluation from the McCarton Center recommended 1:1 attention.¹³⁵ The IEP noted R.K.'s need for constant supervision, but a Functional Behavioral Assessment (FBA) was not performed nor was a behavioral intervention plan (BIP) developed for inclusion in the IEP.¹³⁶ Nor did the IEP specify provision of parent training.¹³⁷ The parents objected to a lack of an FBA, a BIP or provision of parent training in the IEP.¹³⁸ They rejected the IEP as insufficient, enrolled their child at Brooklyn Autism Center (BAC) and initiated a due process hearing seeking tuition reimbursement.¹³⁹

cluded that R.K.'s extreme inattentiveness required a year-round, highly structured, specialized program with individualized attention and individualized occupational therapy and speech and language therapy sessions each week. *Id.* at *5–7. *See also supra* text accompanying note 124, which describes a 6:1:1 class.

¹³⁵ *See R.E.* 694 F.3d at 179; *R.K.*, 2011 WL 1131492, at *7 (“The McCarton Report recommended, among other things, ongoing intervention 12 months per year, 7 days a week, in an ABA-based program, with 40 hours of 1:1 ABA therapy weekly, including 15 hours at home; ‘manding’ sessions within each ABA teaching session; [occupational therapy] and speech and language therapy, 60 minutes each, five times a week; and two hours of parent training per week.”).

¹³⁶ *R.K.*, 2011 WL 1131492, at *8. A “functional behavioral assessment means the process of determining why a student engages in behaviors that impede learning and how the student’s behavior relates to the environment.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(r) (2013). New York regulations prescribe the methodology for conducting the assessment and specifies that the assessment should identify a baseline of the student’s problem behaviors with regard to frequency, duration, intensity and/or latency across activities, settings, people and times of the day” and must permit formulation of a behavioral intervention plan. *Id.* § 200.22(a)(3). The code defines a behavioral intervention plan as a plan based upon an FBA that “at a minimum includes a description of the problem behavior, global and specific hypotheses as to why the problem behavior occurs and intervention strategies that include positive behavioral supports and services to address the behavior.” *Id.* § 200.1(mmm).

¹³⁷ The NYCRR states that “parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child’s individualized education program.” N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(kk). To the extent that parent training is provided, it must be specified in the IEP. *Id.* § 200.4(d)(2)(v)(b)(5). Parent training must be provided for parents of autistic children. *Id.* § 200.13(d) (“Provision shall be made for parent counseling and training . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home.”).

¹³⁸ *R.K.*, 2011 WL 1131492, at *8. The IEP noted that R.K. engaged in self-stimulation, which interfered with her attention and social interaction, but concluded that her behavior could be addressed by the classroom teacher. *See R.E.*, 694 F.3d at 179.

¹³⁹ *R.K.*, 2011 WL 1131492, at *1. Among other things, the parents claimed that the IEP’s contents were deficient because the DOE failed to perform an FBA for development of a BIP; that mandated services of parent counseling, parent training, and speech and language therapy were either missing or insufficient; and that the 6:1:1 class ratio would not provide sufficient individualized attention. *Id.* at *8, 14–25. BAC is a school with five teachers serving four students using 1:1 ABA instruction; the school has students rotate among the teachers every thirty minutes and seeks to de-

At the impartial hearing, the DOE offered testimony of R.K.'s proposed public school teacher. She testified about her teaching methodologies, how she would have provided attention to R.K., and how the speech and language therapy would be supplemented through daily classroom instruction.¹⁴⁰ The public school's parent coordinator testified that the school provided referrals to outside agencies, occasional workshops, and parent training on request.¹⁴¹ The IHO ruled in favor of the parents, holding that the IEP was insufficient.¹⁴²

The DOE appealed and the SRO reversed, relying on the DOE testimony in the record of the impartial hearing to cure deficiencies in the IEP in regard to formulation of a BIP and provision of speech and language services.¹⁴³ Relying on hearing testimony of the school's parent coordinator about the availability of parent training services, the SRO determined that failure to list parent training and counseling as a related service in the IEP was immaterial.¹⁴⁴ Tuition reimbursement was denied completely, and the parents appealed to the district court.

The district court reversed the SRO's decision, granting summary judgment to the parents.¹⁴⁵ Significantly, the district court opined that DOE testimony could not cure deficiencies in the IEP.¹⁴⁶ The district court rejected the SRO's conclusion that R.K.'s behavior did not interfere with learning and criticized reliance

velop "self-care, language skills, socialization, play skills, and pragmatic language." *Id.* at *9. Parents are required to come to the school for at least two hours monthly for training. *Id.* The DOE refused to consider BAC as a possible placement. *Id.*

¹⁴⁰ The teacher had never observed ABA teaching methods and used a different method called TEACHH. *See* R.K. v. N.Y.C. Dep't of Educ., No. 09-CV-4478 (KAM), 2011 WL 1131492, at *2, *9 (E.D.N.Y. Jan. 1, 2011); *R.E.*, 694 F.3d at 180.

¹⁴¹ *R.K.*, 2011 WL 1131492, at *10. Additionally, the parent coordinator testified that no home visits were provided. *Id.*

¹⁴² The IHO only awarded partial tuition reimbursement, however, computed by awarding only that part of the tuition covering the shortfall between the amount of 1:1 ABA therapy offered by the DOE and the amount of 1:1 ABA therapy provided by the private school. The parents were awarded \$32,400. BAC's full tuition was \$90,000. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 180 (2d Cir. 2012); *R.K.*, 2011 WL 1131492, at *11.

¹⁴³ *R.E.*, 694 F.3d at 180–81.

¹⁴⁴ *R.K.*, 2011 WL 1131492, at *21. New York law requires that parent training be included as part of an educational program for autistic students. "Parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program." N.Y. COMP. CODES R. & REGS. tit. 8, § 200.1(kk) (2013).

¹⁴⁵ *R.K.*, 2011 WL 1131492, at *30; *R.E.*, 694 F.3d at 181.

¹⁴⁶ *R.K.*, 2011 WL 1131492, at *2, *30; *R.E.*, 694 F.3d at 181.

upon the teacher's prospective testimony of how she would have developed a BIP once the child was in her classroom.¹⁴⁷ Nor could failure to identify parent training as a related service in the IEP be cured by DOE testimony about the availability of services at the proposed school.¹⁴⁸ The district court further held that the SRO erred in relying on testimony about classroom activities targeting speech and language skills to make up for deficient provisions for speech and language therapy in the IEP.¹⁴⁹ The court found that the hearing evidence supported a finding that a 6:1:1 class would not afford the attention R.K. required.¹⁵⁰ The district court concluded that the compounded omissions in the IEP constituted a denial of a FAPE and awarded tuition reimbursement.¹⁵¹

Like the two other plaintiffs, the third plaintiff, E. Z.-L., was autistic and enrolled in a specialized private school. E. Z.-L.'s mother rejected the 2008–2009 IEP and offered placement in writing, stating her intent to enroll E. Z.-L. in The Rebecca School and to seek tuition reimbursement.¹⁵² The parents then filed an Impartial Hearing request.¹⁵³

The issues in E. Z.-L.'s case, however, differed slightly from the companion cases. E. Z.-L. challenged the ability of the offered placement to implement the IEP and the failure to comply with New York regulations mandating conduct of an FBA in order to formulate a BIP.¹⁵⁴ The IHO found that E. Z.-L. was denied a FAPE

¹⁴⁷ *R.K.*, 2011 WL 1131492, at *17–20; *R.E.*, 694 F.3d at 181.

¹⁴⁸ *R.K.*, 2011 WL 1131492, at *20–21.

¹⁴⁹ *Id.* at *21.

¹⁵⁰ *Id.* at *22.

¹⁵¹ *Id.* at *2, *21–22, *30. The district court also noted that the speech and language instruction incorporated into classroom instruction was insufficient because it was not individualized. *Id.* at *21–22.

¹⁵² The IEP offered placement in a 6:1:1 special class with four 30-minute sessions of individualized occupational therapy, three 30-minute sessions of individualized speech-language therapy, one 30-minute session of 3:1 speech-language therapy, one 30-minute session of individualized counseling and one 30-minute session of 2:1 group counseling. *E. Z.-L. ex rel. R.L. v. N.Y.C. Dep't of Educ.*, 763 F. Supp. 2d 584, 590 (S.D.N.Y. 2011).

¹⁵³ *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167,182–83 (2d Cir. 2012). E. Z.-L.'s hearing was held between September 2008 and January 2009. DOE special education teacher, Feng Ye, who had participated in the CSE, and Susan Cruz, the assistant principal at the public school location offered to E. Z.-L., testified. Ye explained the CSE's conclusion that E. Z.-L.'s behavioral issues did not interfere with learning and Cruz testified about the programs and services that would be available at the proffered school. *Id.* at 183–85

¹⁵⁴ New York regulations predicate formulation of a behavioral intervention plan upon a functional behavioral assessment. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.22 (2013).

and awarded tuition reimbursement.¹⁵⁵ The DOE appealed to the SRO, who reversed the IHO's decision.¹⁵⁶ E. Z.-L.'s parents appealed to the district court, which affirmed the SRO's finding that the CSE team properly determined that E. Z.-L.'s behaviors did not interfere with learning and had properly integrated management strategies into the IEP.¹⁵⁷

B. The Second Circuit's Treatment of Each Case

The Second Circuit arrived at different results in each of the three cases. As to J.E., the Second Circuit determined, in essence, that the SRO had reached the right conclusion for the wrong reason; though he relied on improper testimony, the SRO properly found that the record did not support the parent's claim that J.E. required 1:1 teacher support.¹⁵⁸ In *R.K.*, the Second Circuit affirmed the district court's decision that R.K. was denied a FAPE. The Second Circuit concluded that the SRO had erred in relying on testimony of what would have been provided to R.K. in the classroom, rather than the written contents of the IEP, and the Second Circuit reinstated the reimbursement award.¹⁵⁹ The Second Circuit held that E. Z.-L. had been afforded a FAPE, but also distinguished her claims.¹⁶⁰

Addressing the overarching evidentiary issues, the DOE argued before the Second Circuit that, as a general matter, an IEP

¹⁵⁵ *R.E.*, 694 F.3d at 183. The basis of the IHO's decision was the failure to comply with the procedural requirements relative to the formulation of a BIP, failure to provide parent training or to provide for a transition plan to help the child change schools. The IHO further found that the private school and after-school programs selected by the parents were appropriate. *E. Z.-L.*, 763 F. Supp. 2d at 592–93.

¹⁵⁶ *R.E.*, 694 F.3d at 183. The Second Circuit stated that the proposed classroom teacher had testified that neither the FBA nor the BIP were necessary. *Id.*

¹⁵⁷ *Id.* at 184. Additionally, the court held that parent training was provided on an as-needed basis and that lack of a transition plan was not fatal. *E. Z.-L.*, 763 F. Supp. 2d at 596–98.

¹⁵⁸ *R.E.*, 694 F.3d at 192–93. The Second Circuit also addressed the issue of the degree of deference that should be accorded to administrative decisions. *Id.* at 192. That discussion is beyond the scope of this Article.

¹⁵⁹ *Id.* at 194. The Second Circuit likewise held that reliance on the prospective teacher's testimony that a BIP would have been created once R.K. was enrolled in the class contributed to the deficiencies that cumulatively denied R.K. a FAPE, stating that "failure to conduct an FBA is a particularly serious procedural violation for a student who has significant interfering behaviors." *Id.* at 193–94.

¹⁶⁰ *Id.* at 195. E. Z.-L.'s claims were that the IEP could not be implemented and that failure to comply with procedures requiring an FBA to formulate a BIP amounted to a denial of a FAPE. The Second Circuit held that the IEP was substantively sufficient and that the implementation claim was speculative. The court further determined that, since testimony established that the child's behaviors did not interfere with learning, there was no need for an FBA and thus no procedural violation. *Id.*

should not be the sole benchmark in measuring whether the District had fulfilled its obligations under IDEA's substantive standards.¹⁶¹ Instead, the DOE contended that testimony about what the child "would have received" in a public school setting, including testimony about services or accommodations not identified in the IEP, should be considered. The plaintiffs urged enunciation of a "four corners" rule, which would have limited the court's determination of IDEA compliance exclusively to examination of the sufficiency of the terms of the IEP. The court struck a balance, adhering to a middle ground:

[W]e hold that testimony regarding state-offered services may only explain or justify what is listed in the written IEP. Testimony may not support a modification that is materially different from the IEP, and thus a deficient IEP may not be effectively rehabilitated or amended after the fact through testimony regarding services that do not appear in the IEP.¹⁶²

The court was influenced by cases from the Ninth, Third, and First Circuits, all of which dealt with the issue of whether a child's progress or lack of progress may be considered in determining whether an IEP afforded a FAPE and concluded that past or present progress was irrelevant to the determination.¹⁶³ The Second Circuit found in these three cases a temporal dimension to the determination of an IEP's sufficiency, calling for examination of an IEP solely by reference to conditions known at the time the IEP was created.¹⁶⁴ Additionally, the court noted a trend of rejecting retro-

¹⁶¹ See *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012).

¹⁶² *Id.*

¹⁶³ *Id.* at 186. None of the three cited cases involved testimony about services that weren't listed in a child's IEP. Instead, they all dealt with the issue of whether a child's progress or lack of progress may be considered in determining whether an IEP afforded a FAPE and all three cases held that past or present progress were irrelevant to the determination. See *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (noting that an individualized educational program should be examined to see whether it was sufficient at the time it was written, and that progress or provision of supplemental private services are irrelevant to the determination); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) (ruling that appropriateness of an IEP is determined prospectively, such that any lack of progress on the part of the child has no bearing on the sufficiency of the IEP); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) (noting that neither lack of progress under previous, identical IEP nor subsequent improvement at a private school permit an inference that the program offered in the IEP was insufficient). The First Circuit further noted: "An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated." *Id.*

¹⁶⁴ *R.E.*, 694 F.3d at 185–86.

spective testimony in the Second Circuit's district courts.¹⁶⁵ Though the court declined to adopt a strict four-corners test, it nonetheless found in these cases a limitation permitting examination of the IEP document in determining whether a FAPE had been offered. Thus, the core holding of the *R.E.* decision is that "retrospective evidence" materially altering an IEP is not permissible.¹⁶⁶

The court properly acknowledged the centrality of the IEP. It noted that the IEP is the primary factor upon which parents base their decisions to enroll their child in a private or public program.¹⁶⁷ By barring testimony about delivery of services not included in the IEP, the decision promotes fairness in the IEP formulation process, admonishing districts not to engage in "bait and switch" tactics. However, application of the rule to each of the cases serves as a cautionary tale to parents and their attorneys to provide a clear record establishing their child's educational needs and that those needs have not been sufficiently met by the child's IEP.¹⁶⁸

¹⁶⁵ See *R.E. and M.E. v. N.Y.C. Dep't of Educ.*, 785 F. Supp. 2d 28, 37 (S.D.N.Y. 2011); *R.K. v. N.Y.C. Dep't of Educ.*, No. 09-CV-4478 (KAM), 2011 WL 1131492, at *2 (E.D.N.Y. Jan. 1, 2011); *Antonaccio v. Bd. of Educ.*, 281 F. Supp. 2d 710, 724 (S.D.N.Y. 2003); *J.R. v. Board of Educ. of Rye Sch. Dist.*, 345 F. Supp. 2d 386, 395 (S.D.N.Y. 2004) ("[W]e therefore must not engage in Monday-morning quarterbacking guided by our knowledge of S.R.'s subsequent progress at Eagle Hill, but rather consider the propriety of the IEP with respect to the likelihood that it would benefit S.R. at the time it was devised.")

¹⁶⁶ *R.E.*, 694 F.3d at 188. Testimony from the proposed classroom teachers was deemed unreliable to justify the programs and services contained in an IEP, since placement with a particular teacher cannot be guaranteed at the time an IEP is drafted. *Id.* at 187.

¹⁶⁷ *Id.* at 188.

¹⁶⁸ Despite the correct result in this core holding, the *R.E.* court improperly stated that good-faith IEP errors and omissions could be remedied during the thirty-day resolution period that follows after a parent has filed a due process complaint, as required by 20 U.S.C. §1415(f)(1)(B). See *R.E.*, 694 F.3d at 188. Permitting reformation of an otherwise deficient IEP—all under the guise of good faith—would be as improper as permitting the after-the-fact testimony barred by the *R.E.* decision. A motion for rehearing *en banc* on this issue was supported by an amicus brief filed by Partnership for Children's Rights, The Legal Aid Society, Advocates for Children of New York, New York Legal Assistance Group, Queens Legal Services, Legal Services NYC-Bronx, and Southern Bronx Legal Services. The amici argued that

the resolution period exception carved out by the panel's decision contravenes the timeliness element of the IDEA's FAPE requirement and could be read to effect a new FAPE standard for private school tuition cases: FAPE may be offered *either* through an appropriate IEP prepared prior to the start of the school year (and prior to the student's enrollment in the private school) *or* through an IEP later modified to remedy the deficiencies, as long as the IEP modifications are made during the

IV. ANALYSIS

A. *Why the Language of the IEP Should Control*

Valid and important policy objectives are well served by a strict standard limiting resolution of FAPE disputes to examination of the written IEP. In disputes over IEP sufficiency, the initial issue is whether the school district afforded a FAPE.¹⁶⁹ The only evidence relevant to a district's claim that its IEP offered a FAPE is evidence showing that, at the time it was drafted, the IEP provided the services and supports necessary to enable a child to make progress. Thus, a sound rule would limit the evidence to the IEP document and testimony justifying or refuting whether the IEP components would promote the child's progress.¹⁷⁰ This, in fact, is the rule that was announced in *R.E.* and it is the correct result. A restrictive rule promotes the normative values of the IDEA to protect the less powerful party, the parents, giving primacy to the actual IEP in determining whether school districts have complied with the IDEA mandates.

Three cases cited by the *R.E.* court as decisions disfavoring consideration of retrospective evidence were not particularly recent. *Adams v. Oregon*,¹⁷¹ *Carlisle Area School v. Scott P.*,¹⁷² and *Roland M. v. Concord School Committee*,¹⁷³—from the Ninth, Third, and First Circuits, respectively—emphasized that the IEP should be examined by reference to conditions existing at the time of development only. The *Roland M.* court stated the standard clearly:

30-day resolution period following the filing of the paren's [sic] due process complaint.

Brief for Partnership for Children's Rights et al. as Amici Curiae Supporting Plaintiffs-Appellants, *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012) (Nos. 11-1266-cv, 11-1474-cv, 11-655-cv), 2012 WL 4901037, at *6. This would allow a school district to reform an IEP in the context of litigation. Additionally, permitting reformation during the resolution period ignores the fact that the IDEA gives parents two years to assert their claims and would thus permit reformation of an IEP for a school year that might have already ended. Furthermore, 20 U.S.C. § 1412 (a)(10)(C)(iii) (2012) permits reduction in the award of tuition to parents who fail to give their school district advance notice of their intent to remove the child to a private school and give the opportunity to cure. The *en banc* motion was denied in an unreported order dated January 8, 2013. See *R.E. v. N.Y.C. Dep't of Educ.*, No. 11-1266-cv (2d Cir. Jan. 8, 2013) (denying petition for rehearing *en banc*).

¹⁶⁹ See *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359 (1985); see also *supra* note 115 (listing cases employing the three-prong *Burlington* test).

¹⁷⁰ See *R.E.*, 694 F.3d at 186–87.

¹⁷¹ 195 F.3d 1141 (9th Cir. 1999) (seeking reimbursement for privately secured supplemental services).

¹⁷² 62 F.3d 520 (3d Cir. 1995) (seeking reimbursement of tuition for residential private school).

¹⁷³ 910 F.2d 983 (1st Cir. 1990) (seeking private school tuition reimbursement).

An IEP is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.¹⁷⁴

*Carlisle*¹⁷⁵ and *Roland M.*¹⁷⁶ also noted that a student’s subsequent performance—either under an IEP or in a parent-selected program—are likewise irrelevant in determining whether a disputed IEP afforded a FAPE.¹⁷⁷

More recent decisions have consistently held that the IEP document is decisive in determining whether a student has been offered an “appropriate” education, though none of these cases were cited by the *R.E.* court. The Tenth,¹⁷⁸ Fourth,¹⁷⁹ and Sixth Circuits¹⁸⁰ resolved the issue of whether a FAPE had been offered by reference to the IEP only, even if the IEP was in draft form. Courts have also rejected evidence of oral representations about services that might have been provided but could not be considered in determining whether the district had offered a FAPE.¹⁸¹ In fact, an early Ninth Circuit case, *Union School District v. Smith*,¹⁸² held that failure to identify in the IEP all of the services and programs being offered was not excused by the school district’s presumption that the parents would reject the IEP.¹⁸³ The *Union* court explained that the requirement of a written offer should be “rigorously enforced”

¹⁷⁴ *Id.* at 992.

¹⁷⁵ *Carlisle*, 62 F.3d at 520.

¹⁷⁶ *Roland M.*, 910 F.2d at 983.

¹⁷⁷ *See* *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 188 (2d Cir. 2012).

¹⁷⁸ *Systema v. Academy Sch. Dist.*, 538 F.3d 1306, 1309 (10th Cir. 2008).

¹⁷⁹ *A.K. v. Alexandria Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007); *Sch. Bd. of Henrico v. Z.P.*, 399 F.3d 298, 306 n.5 (4th Cir. 2005) (stating services not included in the written draft IEP that had been gratuitously provided could not be considered in determining whether the student had been offered a FAPE).

¹⁸⁰ *Knable v. Bexley Sch. Dist.*, 238 F.3d 755 (6th Cir. 2001). All parties in that case agreed that private school was appropriate but could not agree on which school would be suitable. On the particular facts of that case, identification of the school was deemed critical. Programs that were discussed but not incorporated into the IEP were irrelevant to the issue of whether the district had offered a FAPE.

¹⁸¹ *See, e.g.,* *Clev. Heights, Univ. Heights S.D. v. Boss*, 144 F.3d 391, 398 (6th Cir. 1998) (noting that a draft IEP was inadequate). *Cf. Burlovich v. Bd. of Ed. of Lincoln Consol. Sch.*, 208 F.3d 560, 568 (6th Cir. 2000) (rejecting parents’ argument that verbal representations made by the district in a March meeting superseded written offer contained in IEP drafted after a subsequent meeting in May; IEP and inquiry was limited to subsequent written document in determining that a FAPE had been offered).

¹⁸² 15 F.3d 1519, 1526 (9th Cir. 1994).

¹⁸³ *Id.* The school district claimed that it had omitted a particular program from the IEP because it presumed the parents would reject the IEP. Claiming that they had been deprived a FAPE, the parents did, in fact, reject the IEP, enrolled their child in private school and successfully sued for tuition reimbursement.

because it creates a record of “when placements were offered, what placements were offered and what educational assistance was offered to supplement a placement.”¹⁸⁴ However, none of these cases explicitly applied contract law tests to IEP disputes.

*John M. v. Board of Education of Evanston Township*¹⁸⁵ did apply “four-corners” language in determining whether a student had been afforded a FAPE. The student at issue had received co-teaching services at the middle school level that had not been expressly provided for in the child’s IEP.¹⁸⁶ District representatives maintained that co-teaching could not be provided in high school. The parents sued, asserting that the “stay-put” provisions of the IDEA in 20 U.S.C. §1415(j) mandated provision of co-teaching at the high school level.¹⁸⁷ The court employed contract law terminology in its analysis, stating that it would usually determine the sufficiency of an IEP solely by examination of the information within “the four corners of the document” and would permit extrinsic evidence if the IEP was vague “with respect to how its goals are to be achieved.”¹⁸⁸

The *John M.* standard gives some protection to parents and motivates school districts to exercise care in drafting IEPs. However, permitting an explanation of “intent” to explain ambiguity opens the door to retrospective testimony rewriting an unclear IEP document. Attempted reformation of an otherwise deficient IEP is easy to envision. Consider, for example, the facts in *R.K.*, where the parents claimed that the IEP was insufficient because it did not provide daily speech and language instruction. The DOE could have argued that *R.K.*’s IEP was merely unclear and offered testimony explaining that the *intent* was to provide daily speech and

¹⁸⁴ *Id.*

¹⁸⁵ 502 F.3d 708, 715 (7th Cir. 2007).

¹⁸⁶ *See id.* at 716–17. Integrated Co-Teaching (ICT), also known as Collaborative Team Teaching (CTT) consists of a two-teacher team. One teacher is a general education teacher and the other is a special education teacher. The class consists of both general education and education aimed at students with disabilities. *See Integrated Co-Teaching (ICT)*, UNITED FED’N OF TEACHERS, <http://www.uft.org/teaching/integrated-co-teaching-collaborative-team-teaching-ctt> (last visited Dec. 15, 2013). New York limits the total number of students with disabilities that may be in the class. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 200.6(g)(1) (2013) (limit of twelve students with disabilities in a CTT class).

¹⁸⁷ *See John M.*, 502 F.3d at 712–14. The IDEA’s “stay put” provisions require that a child remain in the “same educational setting” pending the outcome of any proceedings brought under 20 U.S.C. § 1415 when the status quo has changed, such as when the child has progressed from one educational level to another. *See id.* at 714.

¹⁸⁸ *Id.* at 715–16. The court allowed the possibility that, though not included in the written document, co-teaching was an essential component to the IEP and remanded for further consideration. *Id.* at 716–17.

language instruction through classroom activities. A strict rule of IEP construction would not create a hardship for school districts. Instead, it would promote careful drafting practices. Returning to the *R.K.* example, the school district could have included a statement in the IEP reflecting the intent to provide supplemental speech and language instruction through classwork, and the parents would have been fully advised of the full scope of the offer.

Because the *John M.* rule has the potential to excuse omissions and permit subsequent cure of IEP deficiencies after the fact, its standard is not entirely satisfactory. In contrast, *R.E.* limits extrinsic testimony to “explain or justify”¹⁸⁹ the IEP’s written contents, but not to correct or modify the document after the fact. Under *R.E.*, the terms of the document properly drive the analysis. By permitting IEP deficits to be explained away and gaps filled in by testimony in post-IEP formulation challenges, congressional intent to protect parents would be completely undermined.¹⁹⁰

Parental structural due process rights, expressed through the IEP document, were intended to be central to the policies promoted by the IDEA.¹⁹¹ Strict rules of IEP construction serves those the statute was designed to protect. Recognition of a “contractualization”¹⁹² right and enforcement of this component of the IDEA’s structural due process is essential to redress power inequities that are anathema to the IDEA. Both *John M.* and *R.E.* attempted to articulate rules consistent with these ideals but refused to characterize the IEP as an agreement or a quasi-contract. In this respect, both decisions fall short.¹⁹³ By the same token, the judiciary is lim-

¹⁸⁹ *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012).

¹⁹⁰ *See S. REP. NO. 94-168*, at 12 (1975) (noting that “individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child”); *see also* Brief for Partnership for Children’s Rights et al., *supra* note 168. The resolution period following the filing of a due process complaint is an improper time to modify an IEP. Parents and school districts have the opportunity to settle differences before administrative process is pursued and permitting reformation once litigation has been commenced invites absurd results, especially if the due process hearing relates to a school year that has already ended.

¹⁹¹ *See* Daniel, *supra* note 5, at 7.

¹⁹² *See* Romberg, *supra* note 2, at 421 (noting “contractualization” as a procedural process for direct implementation).

¹⁹³ The standard for determining whether failure to implement an IEP results in a denial of a FAPE implicates the issue of whether contract law should be applied to IDEA disputes. It is a significantly complex question that is tangential to this Article. Others have discussed the issue at length, concluding that the IDEA acknowledges a right to contractualization that carries with it a parental enforcement right. *See* Romberg, *supra* note 2, at 419, 451–64. The IDEA, however, does not confer specific enforcement rights or establish standards for actionable breach. Instead, enforcement

ited by the statutory language provided by Congress, and Congress chose to call IEPs a “written statement,” rather than an agreement or contract. The problem, therefore, lies with Congress and the issue is whether the IDEA should be amended to reflect the cultural construct that has developed over the past thirty years.

B. IEPs Are Quasi-Contractual

Notwithstanding legislative history explicitly stating that IEPs are not to be considered contracts,¹⁹⁴ scholars have expressed a different view. Romberg suggests that the analogy of contract enforcement principles in the IDEA context is “compelling.”¹⁹⁵ David Neal and David L. Kirp have described the IEP as “a contract-like document.”¹⁹⁶ Part of the due process right conferred by the IDEA is a right to a writing that is “in effect” a contract for “services and placement” that the school district was otherwise not obligated to provide.¹⁹⁷

IEPs have significant contract-like qualities. Market-force qualities are present; families compete for resources and some have

rights have been developed in litigation and there is no consistent standard. See Brizuela, *supra* note 2, at 607–16. See also Ferster, *supra* note 8. Three standards have been recognized. The substantial or significant failure standard was recognized in *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2001) (requiring more than *de minimus* implementation failures and finding fulfillment if significant IEP provisions have been followed). A justifiable failure standard was applied in *Melissa S. v. School District of Pittsburgh*, 183 F. App’x 184 (3d Cir. 2006) (school district’s explanations sufficed to excuse failure to provide daily aide, even though failure required child to stay home on occasion). This standard was rejected in *Manalansan Board. of Education v. Baltimore*, No. Civ. 01–312–cv (AMD), 2001 WL 939699 (D. Md. Aug. 14, 2001). Finally, a materiality standard was applied in *Van Duyn v. Baker School District 5J*, 502 F.3d 811, 822 (9th Cir. 2007) (rejecting argument that an IEP contract should be construed against the school district drafter and holding that provision of education cannot “materially” differ from IEP provisions). Judge Ferguson, however, wrote a forceful dissent in *Van Duyn*, admonishing that “judges are not in a position to determine which parts of an agreed-upon IEP are or are not material.” *Id.* at 827 (Ferguson, J., dissenting). Thus, articulation of contractualization as part of the package of procedural rights conferred upon parents by the IDEA would also provide consistency in the area of implementation disputes. See Romberg, *supra* note 2, at 419.

¹⁹⁴ Providing statutory remedies suggests that violations of an IEP are not to be governed by contract law. Cf. S. REP. NO. 94-168, at 11 (1975) (noting how individualized planning conferences were meant for the purpose of “developing, reviewing, and when appropriate and with the agreement of the parents or guardian, revising a written statement of appropriate educational services to be provided for each handicapped child”).

¹⁹⁵ See Romberg, *supra* note 2, at 459.

¹⁹⁶ David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 LAW & CONTEMP. PROBS. 63, 66 (1985).

¹⁹⁷ *Id.* at 71–73.

greater resources to inform their negotiating positions.¹⁹⁸ The process of creating an IEP can take on the feel of a contractual negotiation. IEPs have been described as “written offers” that parents may or may not accept.¹⁹⁹ As Daniela Caruso stated, “IEPs are as close to contracts as it gets in the realm of public services governed by federal law.”²⁰⁰ Powerful parents—those with resources or experience with the system—arguably exchange consideration with school districts by forbearing suit in exchange for the educational setting and related services they demand.²⁰¹

There are differences, however. Whereas contract law permits latitude in the form of an agreement,²⁰² the IDEA requires that an IEP must be written, be sufficient at the time of creation, and be in effect by the beginning of the school year.²⁰³ Oral agreements are not permitted by the IDEA and provision of a written offer is the “centerpiece” of the statute and the negotiation stems from a “legal right” rather than a free-market relationship.²⁰⁴ Moreover, the IEP is part of an administrative process and reflects an individually designed entitlement.²⁰⁵ Depending on the advocacy skills of the family involved, the end result may or may not comprise a bargained-for benefit.²⁰⁶ The subject of the IEP is pre-defined—an education that is “appropriate.” Contract law does not concern itself with the appropriateness of the contractual exchange, whereas “appropriateness” of the bargained-for education is central to the examination of every IEP.

In contract law, the “four corners” rule comes into play only when an agreement has been memorialized in writing and only when the terms of that writing are unambiguous.²⁰⁷ A determina-

¹⁹⁸ See Caruso, *supra* note 4, at 178–180; Chopp, *supra* note 4, at 429–30.

¹⁹⁹ *Knable v. Bexley Sch. Dist.*, 238 F.3d 755, 768 (6th Cir. 2001).

²⁰⁰ Caruso, *supra* note 4, at 177.

²⁰¹ *Id.* at 179–80.

²⁰² See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 1.1, at 3 (4th ed. 1998) (“The term ‘contract’ is . . . used by lay persons and lawyers alike to refer to a document in which the terms of a contract are written. The use of the word in this sense is by no means improper so long as it is clearly understood that rules of law utilizing the concept ‘contract’ rarely refer to the writing itself. Usually the reference is to the agreement; the writing being merely a memorial of the agreement.”).

²⁰³ 20 U.S.C. §1414(d)(2)(A) (2012).

²⁰⁴ *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 188 (2d Cir. 2012); *Knight*, *supra* note 2, at 378. See also *Engel*, *supra* note 4, at 168; *Daniel*, *supra* note 5, at 7–8.

²⁰⁵ *R.E.*, 694 F.3d at 175.

²⁰⁶ See generally Caruso, *supra* note 4 (explaining that assertive families can drive a bargain, whereas weaker families tend to accept whatever is offered).

²⁰⁷ See 11 SAMUEL WILLISTON & RICHARD A. LORD, *A TREATISE ON THE LAW OF CONTRACTS*, WILLISTON ON CONTRACTS § 30:5 (4th ed. 1993) (explaining that “a clear and unambiguous writing may not be amplified by extrinsic evidence,” but extrinsic evi-

tion of ambiguity considers the extent to which the bargaining parties are conversant in the “particular trade or business” involved.²⁰⁸ This rule bars consideration of parole evidence beyond the four corners of a written document, limiting resolution of contractual disputes to application of the four corners of a writing that embodies an agreement. Evidence external to the writing may be admitted only to explain ambiguities or to aid understanding of the language.²⁰⁹ There are sound reasons to borrow elements of this rule in resolving disputes over the sufficiency of IEPs offered to parents by school districts.

“[F]ormalistic procedures to protect parental rights” should “level the playing field between parents and educators.”²¹⁰ However, the legal and procedural protections afforded by the Act have done little to redress the imbalance of power and adversarial atmosphere that pervades the IEP development process.²¹¹ Contractualization responds to crucial concerns. First, it provides a document affording greater protection for parents. Additionally, contractualization encourages greater specificity in drafting IEPs and fosters communication between school districts and parents.²¹²

dence may be considered in determining whether a writing is ambiguous); 17A AM. JUR. 2D CONTRACTS § 331 (West, WestlawNext 2013) (a contract is ambiguous if its language is capable of more than one meaning).

²⁰⁸ 17A AM. JUR. 2D CONTRACTS § 331 (West, WestlawNext 2013).

²⁰⁹ 17A C.J.S. CONTRACTS § 394 (West, WestlawNext 2013); 11 WILLISTON & LORD, *supra* note 207, § 32:5; *id.* § 33:4 (the writing is the agreement). *See also* 36 AM. JUR. PROOF OF FACTS 3d § 331 (West, WestlawNext 2013).

²¹⁰ Kotler, *supra* note 4, at 341.

²¹¹ Romberg, *supra* note 2, at 438.

²¹² A primary objective of the 2004 amendments to the IDEA was to improve and foster cooperation among parents and school districts. In reporting the amendments to the full Senate for passage, the Senate Committee on Health, Education, Labor, and Pensions noted:

The committee is discouraged to hear that many parents, teachers, and school officials find that some current IDEA provisions encourage an adversarial, rather than a cooperative, atmosphere, in regards to special education. In response, the committee has made changes to promote better cooperation and understanding between parents and schools, leading to better educational programs and related services for children with disabilities.

S. REP. NO. 108-185, at 6 (2003). But precedents have not followed suit. Two cases from the Southern District of New York held that information readily known to the parents need not be included in the IEP. In *M.F. v. Irvington Union Free School District*, 719 F. Supp. 2d 302 (S.D.N.Y. 2010), the court found that procedural concerns of notice were satisfied when a reading program was in the student’s written schedule. *Id.* at 310–11. And in *M.C. v. Katohah/Lewisboro Union Free School District*, No. 10-CV-6268, 2012 WL 834350 (S.D.N.Y. Mar. 5, 2012), the court found no need to specify provision of a reading program in the IEP where the parent was aware that reading was part of the program’s services—and even though reading instruction was speci-

Finally, contractualization recognizes the social construct that has developed over the thirty-year history of the IDEA that views IEPs as contracts.²¹³ For example, the IEP Process Guide appearing on the website for the Massachusetts Department of Elementary and Secondary Education explicitly states, in bold print, “the IEP is a contract between the school district and the parent.”²¹⁴

R.E. made a positive, but not sufficiently forceful contribution to a body of law aimed at parent protection. In addition to precluding retrospective testimony, the *R.E.* court should have declared that an IEP represents an enforceable agreement between school districts that cannot be modified by extrinsic testimony or evidence. At the same time, the court was limited by the IDEA’s terms. Thus, future amendments to the IDEA should characterize the IEP as an “agreement” rather than merely a “written statement.”

CONCLUSION

The IDEA has had massive, positive social impact. Opening schools to people of various abilities has profoundly impacted society, making disability “a normal part of the broad range of human experience and personality.”²¹⁵ People who would have been hidden away from society in the 1970s are seen in schools, the economic workforce, and even in popular culture.

For those parents who have had to advocate for their children, however, the process often remains daunting, overwhelming and

fied in a subsequent IEP. *Id.* at *9–10. These cases illustrate how precedent can erode parental protections.

²¹³ Caruso, *supra* note 4, at 174–77.

²¹⁴ MASS. DEPT. OF EDUC., IEP PROCESS GUIDE 13 (2001), *available at* <http://www.doe.mass.edu/sped/iep/proguide.pdf>. The guide further notes that “[t]he IEP should reflect the decisions made at the Team meeting and should serve as a contract between the school system and parent(s).” *Id.* The Texas Project FIRST is an informational website developed by the Texas Education Agency to provide accurate information to parents and families of students with disabilities. That site states that “the IEP is like a contract with the school” *Developing an IEP: The Five “W”s*, TEXAS PROJECT FIRST, <https://texasprojectfirst.org/DevelopingAnIEP.html> (last visited Jan. 28, 2014). Moreover, the Rutgers University School of Law Special Education Clinic has posted an informational pamphlet on its website stating that “[t]he IEP is a contract between the child’s parent/guardian and the school district.” *See* RUTGERS UNIV. SCH. OF LAW, INDIVIDUALIZED EDUCATION PROGRAM (I.E.P.): A GUIDE FOR PARENTS AND GUARDIANS (n.d.), *available at* <http://specialeducation.rutgers.edu/ieppamphlet2.pdf>.

²¹⁵ Engel, *supra* note 4, at 204. *See also* S. REP. NO. 104-275, at 7–8 (1996) (noting that since the enactment of the EHCA and the IDEA “children with disabilities are now much more likely to be valued members of school communities, and the Nation can look forward to a day when people with disabilities will be valued members of all American communities”).

exhausting. IEP formulation meetings are often fraught with tension. Parents are faced with the challenge of absorbing a tremendous amount of information; they need to learn about their children's disability, educational methodology, and the law.²¹⁶ The balance of resources and information greatly favors school administrators over parents. IEP formulation meetings often involve a lone parent facing a table of teachers and administrators in a meeting that is supposed to be collaborative, but is more often intimidating and tense. One way to redress this imbalance is to strengthen the legal structure intended for parent protection through terminology consistent with contractualization. Until then, however, the *R.E.* rule prohibiting retrospective testimony in disputes contesting IEP sufficiency creeps toward the ideal.

²¹⁶ My own experience advocating for my child from 2010 to 2012 is reflective of this opinion. I spent several years advocating in a public school system on behalf of a child who is gifted but dogged by non-visible, brain-based disabilities. It was unpleasant, aggravating, and tiring for everyone involved. It fell to me to tell the school district how to work with my child. I also met individually with teachers to discuss the disabilities at issue. My impression was that they had no understanding whatsoever of the disabilities identified in the IEP which, being extremely charitable, I will assume they read—and this was in a small, affluent school district. I wish I could say that my experience was unique, but it wasn't—and isn't. In the end, faults in the system fortuitously led to a better situation for my child when the district permitted her to leave early to attend college. I do hope that my efforts at that particular school have led to positive improvements to the benefit of all of the students there. I must also refer to the acknowledgment of similar experience in the works of David M. Engel, *supra* note 4, at 187–89, and Martin A. Kotler, *supra* note 4, both of which were written over twenty years ago.

MALE ASYLUM APPLICANTS WHO FEAR BECOMING THE VICTIMS OF HONOR KILLINGS: THE CASE FOR GENDER EQUALITY

Caitlin Steinke†

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INTRODUCTION

Ahmet Yildiz was a twenty-six-year-old gay man living in Turkey. In 2008, he came out to his family and friends. Shortly thereafter, he began receiving death threats from his family, so he filed a complaint with the prosecutor’s office.¹ The office refused to inves-

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¹ Nicholas Birch, *Was Ahmet Yildiz the Victim of Turkey’s First Gay Honour Killing?*,

tigate the complaint or provide any protection for Yildiz.² Three months after the complaint was filed, Yildiz was killed after being shot five times upon leaving his apartment to go buy ice cream.³ Prosecutors believe that it was Yildiz's father who traveled 600 miles to find and murder his son.⁴ Soon after the murder, prosecutors suspected that Yildiz's father was on the run and possibly hiding in northern Iraq.⁵ Yildiz's father has still not been located, and has been tried *in absentia* in a trial that continues "at a glacial pace."⁶

An honor killing is a form of premeditated murder with a unique motivation: to cleanse the dishonor that has been cast upon the perpetrator's family as a result of the actions (real or perceived) of the victim.⁷ If Ahmet Yildiz had come to the United States and filed for asylum, claiming that he feared becoming the victim of an honor killing at the hands of one of his family members in Turkey, would his claim have been recognized as legitimate? Or would the court, relying on the fact that honor killings are predominately directed towards women, find Yildiz's claim lacking in merit because he was male?

This Note examines the unique dimensions of honor killing asylum claims and focuses on the claims brought by men who fear becoming the victims of such violence. While honor killings certainly have an overwhelming gender element (as women are most often the victims), men have also been victims of this form of violence.⁸ Much of the current legal scholarship dealing with the threat of an honor killing as a basis for asylum has argued that asylum law largely ignores the many forms of persecution and threats of persecution that women face simply because they are women.⁹ However, men are not only killed by their family members

INDEPENDENT (July 19, 2008), <http://www.independent.co.uk/news/world/europe/was-ahmet-yildiz-the-victim-of-turkeys-first-gay-honour-killing-871822.html>.

² Dan Bilefsky, *Soul-Searching in Turkey After a Gay Man Is Killed*, N.Y. TIMES (Nov. 25, 2009), <http://www.nytimes.com/2009/11/26/world/europe/26turkey.html?pagewanted=all>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Pelin Turgut, *Turkish Taboos Challenged by Success of Gay 'Honor Killing' Movie*, TIME (Feb. 28, 2012), <http://www.time.com/time/world/article/0,8599,2107434,00.html>.

⁷ See AMNESTY INTERNATIONAL USA, CULTURE OF DISCRIMINATION: A FACT SHEET ON "HONOR" KILLINGS 1 (2012) [hereinafter CULTURE OF DISCRIMINATION], available at http://www.amnestyusa.org/sites/default/files/pdfs/honor_killings_fact_sheet_final_2012.doc.

⁸ See *infra* Part I.B.

⁹ See, e.g., Crystal Doyle, *Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE

for their homosexuality, but for marrying or dating women against the wishes of the women's families. This Note argues that the courts should not view honor killings as a form of persecution that targets women exclusively, but as a form of persecution that subjects an individual to the ultimate act of violence solely because of a sense of shame that that individual's action (or unconfirmed, rumored action) has brought upon another individual or family.

Part I provides a comprehensive background about honor killings, including their cultural significance, circumstances in which men are the victims of honor killings, and how honor killings differ from domestic violence.

Part II focuses on asylum claims that have been based on the fear of becoming the victim of an honor killing. This Part analyzes the unique difficulties posed by these claims and includes a survey of all such cases that have been heard by the U.S. Courts of Appeals. It also includes an overview of the honor killings claims that have been brought by male applicants. This Part demonstrates that thus far, not only have the rulings rendered by the circuit courts in honor killing asylum cases been entirely inconsistent, but for male applicants, the very definition of "honor killings" used by the court can significantly influence the outcome of the case.

Finally, Part III argues that while there should indeed be a heavier focus on recognizing the various forms of gender-based persecution suffered by female asylum seekers, courts should not limit the definition of "membership in a particular social group" to *women* who are threatened by honor killings. By focusing exclusively on women's rights and construing "membership in a particular social group" so narrowly as to only include women, the courts risk creating an untenable distinction between the male and fe-

J. CIVIL RTS. & SOC. JUST. 519 (2009) (arguing that the underlying purpose of asylum would be better served through the elimination of the causal nexus requirement between the persecution and one of the "five grounds," especially since women claiming asylum predicated on gender-based persecution are disproportionately disadvantaged by this requirement); Valeria Plant, *Honor Killings and the Asylum Gender Gap*, 15 J. TRANSNAT'L L. & POL'Y 109 (2005) (highlighting arguments that adding "gender" as a protected ground for asylum would be almost entirely symbolic, but that recognizing a state's failure to protect a victim as a form of persecution and providing asylum adjudicators with more gender-sensitivity training would significantly improve the chances of women gaining asylum); Shira T. Shapiro, *She Can Do No Wrong: Recent Failures in America's Immigration Court to Provide Women Asylum from "Honor Crimes" Abroad*, 18 AM. U. J. GENDER SOC. POL'Y & L. 293 (2010) (arguing not only that courts hearing honor killing asylum claims should pay more attention to the meaning of honor killings specifically within the context of the applicant's country of origin, but that the courts should also prohibit a female applicant's delayed report of sexual abuse from harming her credibility).

male victims of this form of persecution. However, by defining “honor killings” in a gender-neutral way, the courts would avoid creating such an indefensible distinction while properly keeping the focus of their inquiry on the reality of honor killings in the applicant’s country of origin and the credibility of the threat faced by the applicant. This effort can and should be supported by federal agencies, such as the Department of State and the U.S. Citizenship and Immigration Services, whose own human rights terminology helps influence these asylum decisions.

I. HONOR KILLINGS

Human Rights Watch calls honor killings “the most extreme form of domestic violence, a crime based in male privilege and prerogative and women’s subordinate social status.”¹⁰ Before examining how the courts analyze asylum claims based on the fear of persecution in the form of an honor killing, it is important to understand the underlying purpose of such violence. After examining honor killings in general, this section highlights that honor killings are not directed exclusively at women, a fact that is essential to the underlying validity of this type of asylum claim brought by a male applicant. This section concludes by focusing on the crucial distinctions between honor killings and domestic violence, distinctions that must not be ignored when analyzing an honor killing asylum claim.

A. *The Cultural Significance*

The United Nations Population Fund estimates that worldwide, 5,000 women and girls are the victims of honor killings each year.¹¹ Many honor killings go unreported, making it extremely difficult to acquire accurate statistics.¹² It is especially difficult to obtain accurate statistics since honor killings are often viewed as private family affairs¹³ instead of crimes worthy of condemnation by society at large. Additionally, since honor killings are motivated by cleansing the dishonor and shame brought upon the family, co-

¹⁰ HUMAN RIGHTS WATCH, HONORING THE KILLERS: JUSTICE DENIED FOR ‘HONOR’ CRIMES IN JORDAN 1 (2004) [hereinafter HONORING THE KILLERS], available at <http://www.hrw.org/reports/2004/04/19/honoring-killers>.

¹¹ CULTURE OF DISCRIMINATION, *supra* note 7, at 1.

¹² AUSTRIAN CTR. FOR COUNTRY OF ORIGIN & ASYLUM RESEARCH & DOCUMENTATION (ACCORD), PAKISTAN: HONOUR KILLING OF MEN A-6813, at 2 (2009) [hereinafter ACCORD, PAKISTAN: HONOUR KILLING OF MEN], available at <http://www.unhcr.org/refworld/docid/4a5604292.html>.

¹³ Shapiro, *supra* note 9, at 310.

operating with researchers would only bring more attention to the family's tarnished reputation.¹⁴ A study conducted by the Aurat Foundation exemplifies these principles; it found that of the 1,636 honor killings believed to have occurred in Pakistan between 2008 and 2011,¹⁵ less than two percent were registered with the local police authorities.¹⁶

Honor killings are widely reported across the Middle East and South Asia, although they occur all around the world.¹⁷ Those who carry out and support such crimes share a deeply held belief in the importance of maintaining family honor, which is viewed as a shared responsibility.¹⁸ In cultures where women's lives literally depend on keeping their honor intact, men are expected to "fiercely defend" the honor of themselves and their families, "so as not to be reduced to women."¹⁹ Furthermore, the murder of a woman for any suspected transgression of social norms is a powerful way of demonstrating control over the entire female population, as "[o]ne only has to kill a few girls and women to keep the others in line."²⁰

Unni Wikan, a social anthropologist and professor at the University of Oslo, defines an honor killing as "a murder carried out as a commission from the extended family, to restore honor after the family has been dishonored. As a rule, the basic cause is a rumor that any female family member has behaved in an immoral way."²¹ It takes only a rumor or insinuation to defile honor, as it is the public perception of honor that matters.²² In Jordan, for example, about ninety percent of honor killings are based on mere suspicion or rumor of an illicit sexual relationship.²³

¹⁴ Phyllis Chesler, *Are Honor Killings Simply Domestic Violence?*, 16 MIDDLE E. Q. 61 (2009), available at <http://www.meforum.org/2067/are-honor-killings-simply-domestic-violence>.

¹⁵ See MALIHA ZIA LARI, A PILOT STUDY ON: 'HONOUR KILLINGS' IN PAKISTAN AND COMPLIANCE OF LAW 38 (2011), available at http://www.af.org.pk/pub_files/1366345831.pdf.

¹⁶ See *id.* at 42. The study used four Pakistani districts as the sample group. *Id.*

¹⁷ CULTURE OF DISCRIMINATION, *supra* note 7, at 1.

¹⁸ See *id.* at 2.

¹⁹ Rachel A. Ruane, *Murder in the Name of Honor: Violence Against Women in Jordan and Pakistan*, 14 EMORY INT'L L. REV. 1523, 1532 (2000).

²⁰ Phyllis Chesler, *Worldwide Trends in Honor Killings*, 17 MIDDLE E. Q. 3 (2010), available at <http://www.meforum.org/2646/worldwide-trends-in-honor-killings>.

²¹ Chesler, *Are Honor Killings Simply Domestic Violence?*, *supra* note 14.

²² Ruane, *supra* note 19, at 1531–32 (arguing that because it is the public perception of honor that matters, it is irrelevant whether women accused of illicit conduct are actually guilty of such, which is why most women are never given the opportunity to defend themselves from these allegations).

²³ Kathryn Christine Arnold, Comment, *Are the Perpetrators of Honor Killings Getting*

Human Rights Watch describes honor killings as “the most tragic consequence and graphic illustration of deeply embedded, society-wide gender discrimination.”²⁴ As would be expected in any culture that encourages men to control women’s independence and sexuality through violence, the sword rarely cuts both ways. Al Sisiwar, an Arab Women’s group, recognizes that there exists “a deeply-rooted double standard in Islamic culture that forbids pre-marital sex by both genders but seldom punishes men who transgress.”²⁵ Yet, while more rare than female victims of honor killings, men can find themselves the targets of those who feel that their honor has been tarnished.

B. Male Victims of Honor Killings

In 2004, the number of female honor killing victims in Pakistan was more than twice the amount of male victims.²⁶ But while the vast majority of honor killing victims worldwide are women, about seven percent are men.²⁷ Most male victims are killed by the family of the woman alleged to have been conducting an illicit relationship with the man.²⁸ And while the murder of Ahmet Yildiz has been categorized by some as Turkey’s first gay honor killing, a researcher of honor crimes in Turkey has confirmed that other men

Away with Murder? Article 340 of the Jordanian Penal Code Analyzed Under the Convention of the Elimination of All Forms of Discrimination Against Women, 16 AM. U. INT’L L. REV. 1343, 1369 (2001).

²⁴ HONORING THE KILLERS, *supra* note 10, at 1.

²⁵ Kenneth Lasson, *Bloodstains on a “Code of Honor”: The Murderous Marginalization of Women in the Islamic World*, 30 WOMEN’S RTS. L. REP. 407, 440 (2009). Lasson argues that the lack of worldwide public awareness about the prevalence of honor killings, as well as the hesitation by governments to prosecute those complicit in religiously motivated violence against women, is contributing to the violent repression of women in Islamic countries. Indeed, while Western cultures strongly condemn honor killings, some human rights advocates argue that the increase of globalization and immigration has led to a motivation among some in the West to use cultural relativism, political correctness, and themes of “tolerance” to justify certain foreign cultural traditions and practices that they would otherwise deem to be unequivocal violations of international human rights. Chesler, *Worldwide Trends in Honor Killings*, *supra* note 20. There can be no justification for honor killing in any open society that values human rights and the equality of women. Indeed, the Canadian government informs new immigrants upon arrival that “Canada’s openness and generosity do not extend to barbaric cultural practices that tolerate spousal abuse, ‘honour killings,’ female genital mutilation or other gender-based violence. Those guilty of these crimes are severely punished under Canada’s criminal laws.” *Id.*

²⁶ ACCORD, PAKISTAN: HONOUR KILLING OF MEN, *supra* note 12, at 3. Pakistan is one of the few countries that consistently publishes statistics related to honor killings in the country, and many such studies are carried out by the Human Rights Commission of Pakistan. Lasson, *supra* note 25, at 419.

²⁷ Chesler, *Worldwide Trends in Honor Killings*, *supra* note 20.

²⁸ *See id.*

have been victims of honor killings in the country.²⁹

According to Mazhar Bagli, a Turkish sociologist who has interviewed nearly 200 people convicted of honor killings, Ahmet Yildiz's murder was the first time that the term "honor killing" was being used to describe a murder motivated by the homosexuality of the victim.³⁰ Even so, Bagli believed that such a motivation did not necessarily disqualify the murder as an honor killing, since "[h]onour killings cleanse illicit relationships. For women, that is a broad term. Men are allowed more sexual freedom, but homosexuality is still seen by some as beyond the pale."³¹ While Yildiz's parents loved their son, his decision to be honest about his homosexuality was "the ultimate affront to both religious and filial honor."³²

Men are not often individually targeted for honor killings; eighty-one percent are killed along with their female companion.³³ The honor killing of a couple is often carried out by the family of the accused woman and is done to protect and restore that family's honor.³⁴ Between January and November 2009 in Pakistan, there were twenty-two incidents of both members of a male-female couple killed for honor, most often at the hands of a family member of the female.³⁵ In January 2010, a young couple was clubbed to death by the woman's family because the family did not approve of their marriage.³⁶ Both bodies were left hanging in the couple's village to ensure that the community was aware that the family had restored its honor.³⁷ There was even an incident in 2009 where a family who disapproved of their daughter's marriage killed *only* the husband.³⁸

Between January and March 2009, there were fifty-three reported honor killings in the Sindh province of Pakistan, thirteen of

²⁹ Palash R. Ghosh, *Honor Killings: The Scourge of Turkey*, ASSYRIAN INT'L NEWS AGENCY (Oct. 7, 2011, 9:06:25 PM), <http://www.aina.org/news/20110710160625.htm>.

³⁰ Birch, *supra* note 1.

³¹ *Id.*

³² Bilefsky, *supra* note 2.

³³ Chesler, *Worldwide Trends in Honor Killings*, *supra* note 20.

³⁴ See ACCORD, PAKISTAN: HONOUR KILLING OF MEN, *supra* note 12, at 4.

³⁵ HUMAN RIGHTS COMM'N OF PAKISTAN, STATE OF HUMAN RIGHTS IN 2009, at 196–204 (Adnan Adil ed., 2010), available at <http://hrcp-web.org/hrcpweb/wp-content/ar/pdf/ar09e.pdf>.

³⁶ HUMAN RIGHTS COMM'N OF PAKISTAN, STATE OF HUMAN RIGHTS IN 2010, at 207 (Najam U Din ed., 2011), available at <http://hrcp-web.org/hrcpweb/wp-content/pdf/ar/ar10e.pdf>.

³⁷ *Id.*

³⁸ *Id.* at 204.

which had male victims.³⁹ This was a vast decrease from the first few months of 2008, when there were 550 reported honor killings in the same province, 96 of which had male victims.⁴⁰ Over a period of ten months in 2007, a staggering 104 men were reported killed in the Sindh province for “harming family honour.”⁴¹

The name for “honor killing” varies around the world, but in the Sindh province it is referred to as *karo kali*, whereby *karo* refers to the dishonored man and *kali* refers to the dishonored woman.⁴² Another term used to describe an honor killing is *tor tora*, which is used in the North-West Frontier Province of Pakistan; *tor* refers to the accused man and *tora* to the accused woman.⁴³ These translations demonstrate that communities in Pakistan, in which honor killings are tragically common, understand the murders to be directed at both women and men.

C. Honor Killings versus Domestic Violence

For purposes of an asylum claim, it is important to understand the distinction between honor killings and domestic violence. For asylum seekers who fear being returned to a country in which they will suffer domestic violence, the main difficulty is that asylum courts generally view such abuse not as persecution but as a form of private violence.⁴⁴ Thus, while this Note is not intended to lend itself to the argument against recognizing domestic violence as a form of persecution worthy of asylum, it is important to distinguish honor killings from forms of violence *considered* to be purely “private,” such as domestic violence.

According to the Office of Violence Against Women, an agency of the U.S. Department of Justice, domestic violence is “a pattern of abusive behavior that is used by an intimate partner to gain or maintain power and control over the other intimate partner.”⁴⁵ Honor killings, however, are strikingly different. They are

³⁹ ACCORD, PAKISTAN: HONOUR KILLING OF MEN, *supra* note 12, at 1–2.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 2.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See, e.g.,* Marisa Silenzi Cianciarulo, *Batterers as Agents of the State: Challenging the Public/Private Distinction in Intimate Partner Violence-Based Asylum Claims*, 35 HARV. J.L. & GENDER 117, 120 (2012) (arguing that American asylum courts are hesitant to extend asylum to a woman who comes from a male-dominated society that condones and encourages violence against women because they view her abuse “not [as] a political act but merely an unfortunate situation that has occurred due to various psychological and social factors”).

⁴⁵ OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUSTICE, ABOUT THE OFFICE

uniquely motivated by moral and behavioral codes “that typify some cultures, often reinforced by fundamentalist religious dictates.”⁴⁶ They are rarely committed spontaneously, in a fit of rage, by a single individual, but instead often involve careful planning by multiple family members.⁴⁷ According to Zaynab Nawaz, who has worked on the women’s rights programs with both Amnesty International and Open Society Foundations, “[f]emales in the family—mothers, mothers-in-law, sisters, and cousins—frequently support the attacks. It’s a community mentality.”⁴⁸ And ultimately, the purpose of the killing fits within a clear framework of the restoration of family honor.⁴⁹

Perhaps the most glaring distinction between honor killings and domestic violence is that those who carry out honor killings generally do so in an environment in which they are expected to perform this act of restoring dishonor to their family’s tarnished reputation. Honor killings will not be eradicated until there is a cultural shift and the relevant societies no longer encourage or approve of such violence. Until then, male relatives have the approval from an accused woman’s family and large sections of the population to beat, stab, and shoot the accused woman.⁵⁰ For example, not only did the prosecutor’s office refuse to take Ahmet Yildiz’s complaints of death threats seriously, but Yildiz’s family refused to attend his burial, which, sadly is a very common response by the family of an honor killing victim.⁵¹ By contrast, the American legal system and the American public rarely tolerate the murder of daughters, sisters, and mothers for their sexual conduct—real or perceived.⁵²

Since domestic violence involves the abuse of one intimate

ON VIOLENCE AGAINST WOMEN (n.d.), <http://www.ovw.usdoj.gov/docs/about-ovw-fact-sheet.pdf> (last visited Apr. 4, 2013).

⁴⁶ Chesler, *Worldwide Trends in Honor Killings*, *supra* note 20.

⁴⁷ Chesler, *Are Honor Killings Simply Domestic Violence?*, *supra* note 14.

⁴⁸ Hillary Mayell, *Thousands of Women Killed for Family “Honor,”* NAT’L GEO. NEWS (Feb. 12, 2002), http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkilling.html.

⁴⁹ Chesler, *Are Honor Killings Simply Domestic Violence?*, *supra* note 14.

⁵⁰ See HONORING THE KILLERS, *supra* note 10, at 2 (explaining that not only does the society at large stand by while male relatives physically harm accused women, but the police themselves often treat these men as vindicated in their actions, and as such, honor crimes are rarely investigated by law enforcement).

⁵¹ Birch, *supra* note 1.

⁵² See Lama Abu-Odeh, *Comparatively Speaking: The “Honor” of the “East” and the “Passion” of the “West,”* 1997 UTAH L. REV. 287, 291 (1997); Chesler, *Are Honor Killings Simply Domestic Violence?*, *supra* note 14 (explaining that Americans generally perceive batterer-murderers as criminals, not heroes).

partner by another, there are rarely multiple victims. However, when it comes to honor killings, the targeted woman is not always the sole victim. Studies show that in Islamic countries, nearly one quarter of honor killings involve additional victims, including the woman's husband, fiancé, children, siblings, or parents.⁵³

Examining the differences between honor killings and domestic violence is not only crucial to understanding how honor killings can be prevented and dealt with; the distinction between these two forms of violence is specifically important when it comes to framing this type of persecution for asylum purposes. As the next section of this Note explains, not all violence is viewed as "persecution," and one crucial distinction relates to the exclusively private nature of the harm and the absence of government involvement, both of which can be difficult hurdles for asylum applicants with honor killing claims.

II. ASYLUM CLAIMS BASED ON THE THREAT OF AN HONOR KILLING

Ruling on asylum claims often involves having an immigration judge "examine the fear of 'potential' harm based on a cultural and societal practice that is so foreign to the American way of life."⁵⁴ This is especially true in the case of honor killings, and the decisions of U.S. courts denying these asylum claims reflect "a deep ignorance regarding the severity and prevalence of honor killings abroad."⁵⁵ Yet despite the lack of understanding of the practice and the cultural traditions that allow it to persist, the unique nature of honor killings makes it particularly difficult for these claims to meet the strict standards under asylum law. This section begins with an overview of the necessary elements of an asylum claim and then focuses on the outcomes of the honor killing cases that have been heard by the U.S. Courts of Appeals, exploring the difficulties faced by potential honor killing victims in satisfying these factors. It concludes with an overview of the honor killing asylum claims that have been brought by male applicants.

A. *The Elements of an Asylum Claim*

In order to be eligible for asylum, the applicant must show that his or her "life or freedom" would be threatened if the applicant were to return to his or her country of origin because the applicant would be persecuted on account of his or her race, relig-

⁵³ Chesler, *Worldwide Trends in Honor Killings*, *supra* note 20.

⁵⁴ Shapiro, *supra* note 9, at 295 (footnote omitted).

⁵⁵ *Id.* at 307.

ion, nationality, membership in a particular social group, or political opinion.⁵⁶ The Board of Immigration Appeals (BIA) has defined “persecution” as including “a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.”⁵⁷ Similarly, the United Nations High Commission for Refugees’ *Handbook on Procedures and Criteria for Determining Refugee Status* states that persecution *always* includes “a threat to life” or “[o]ther serious violations of human rights.”⁵⁸

The applicant can demonstrate a “well-founded fear of future persecution” by showing that (1) the applicant has suffered from past persecution, (2) there is a reasonable possibility that the applicant will be persecuted, or (3) the applicant’s home country has a pattern or practice of persecuting other individuals who are members of a statutorily defined group of which the applicant is also a member.⁵⁹

B. Case Survey

The research for this Note concluded that, at the level of the circuit courts, there has been a total of twenty-two cases in which the applicant claimed asylum based on the fear of becoming the victim of an honor killing.⁶⁰ Of these twenty-two cases, the claims were brought by twelve men⁶¹ and ten women.⁶² The majority of

⁵⁶ See 8 U.S.C. § 1231(b)(3)(A) (2012).

⁵⁷ *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), 1985 WL 56042, *overruled by* *Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987) (overruling *Matter of Acosta* insofar as it held that the “clear probability” of persecution standard for withholding of removal was equal to the “well-founded fear” of persecution standard for asylum).

⁵⁸ U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 51, U.N. Doc. HCR/1P/4/Eng/Rev.1 (Jan. 1992), available at <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

⁵⁹ 8 C.F.R. § 208.13(b)(1), (b)(2)(i) and (iii) (2013).

⁶⁰ This case survey was conducted by entering the following search query in the WestlawNext database, setting “All States” and “All Federal” as the jurisdictions: “*asylum*” AND “*honor killing*.” It is quite possible that there are more cases in which the persecution feared by the asylum applicant was the same as an honor killing in every way except in name. However, the only feasible way to conduct this case survey was to only include the cases in which the applicant or the court used the term “honor killing” to describe the form of persecution.

⁶¹ See *Jabri v. Holder*, 675 F.3d 20, 22 (1st Cir. 2012); *Bal v. Att’y Gen. of U.S.*, 406 F. App’x 640, 641 (3d Cir. 2011); *Ahmed v. Holder*, 611 F.3d 90, 93 (1st Cir. 2010); *Al Bustami v. Holder*, 385 F. App’x 719, 720 (9th Cir. 2010); *Ghouri v. Holder*, 618 F.3d 68, 68 (1st Cir. 2010); *Abdelghani v. Holder*, 309 F. App’x 19, 20 (7th Cir. 2009); *Al-Ghorbani v. Holder*, 585 F.3d 980, 983 (6th Cir. 2009); *Jamil v. Att’y Gen. of U.S.*, 327 F. App’x 336, 337 (3d Cir. 2009); *Khalili v. Holder*, 557 F.3d 429, 431 (6th Cir. 2009); *Haimour v. Gonzales*, 165 F. App’x 594, 595 (10th Cir. 2006); *Wawi v. Ashcroft*, 91 F.

the claims were brought by Jordanian⁶³ and Pakistani people.⁶⁴ Two claims were brought by Lebanese⁶⁵ and Turkish people, respectively,⁶⁶ and the remaining claims were brought by individuals from Yemen,⁶⁷ Syria,⁶⁸ Iraq,⁶⁹ Egypt,⁷⁰ and Indonesia.⁷¹ While most of the claims were brought by individual applicants, five of them were brought jointly with at least one other immediate family member.⁷²

Asylum was denied in all twenty-two cases. However, withholding of removal was explicitly granted to the claimants in two cases.⁷³ Furthermore, in three cases, the court remanded the cases for reconsideration of the applicants' claims.⁷⁴ Thus, in seventeen of the twenty-two honor killings cases that have been heard by the circuit courts, the applicants' claims for relief from removal were denied.

A common reason given by the courts for the denial of the

App'x 493, 493 (6th Cir. 2004); *Suhardy v. Ashcroft*, 263 F.3d 162 (Table), 2001 WL 803648, at *1 (5th Cir. 2001).

⁶² See *Abraham v. Holder*, 647 F.3d 626, 628 (7th Cir. 2011); *Sarhan v. Holder*, 658 F.3d 649, 651 (7th Cir. 2011); *Suradi v. Holder*, 437 F. App'x 549, 550 (9th Cir. 2011); *Badawy v. Att'y Gen. of U.S.*, 390 F. App'x 165, 166 (3d Cir. 2010); *Reda v. Att'y Gen. of U.S.*, 366 F. App'x 415, 417 (3d Cir. 2010); *Fatima v. Att'y Gen. of U.S.*, 332 F. App'x 784, 784 (3d Cir. 2009); *Dia v. Mukasey*, 292 F. App'x 468, 469 (6th Cir. 2008); *Vellani v. U.S. Att'y Gen.*, 296 F. App'x 870, 871 (11th Cir. 2008); *Aziz v. Gonzales*, 478 F.3d 854, 856 (8th Cir. 2007); *Yaylaci v. Gonzales*, 175 F. App'x 33, 33-34 (7th Cir. 2006).

⁶³ See *Jabri*, 675 F.3d at 22; *Sarhan*, 658 F.3d at 651; *Suradi*, 437 F. App'x at 550; *Al Bustami*, 385 F. App'x at 720; *Abdelghani*, 309 F. App'x at 20; *Khalili*, 557 F.3d at 431; *Haimour*, 165 F. App'x at 595; *Wawi*, 91 F. App'x at 493.

⁶⁴ See *Ahmed*, 611 F.3d at 92; *Ghouri*, 618 F.3d at 68; *Fatima*, 332 F. App'x at 784; *Jamil*, 327 F. App'x at 337; *Vellani*, 296 F. App'x at 871.

⁶⁵ See *Reda*, 366 F. App'x at 416; *Dia*, 292 F. App'x at 469.

⁶⁶ See *Bal*, 406 F. App'x at 641; *Yaylaci v. Holder*, 175 F. App'x at 34.

⁶⁷ See *Al-Ghorbani v. Holder*, 585 F.3d 980, 983 (6th Cir. 2009).

⁶⁸ See *Abraham v. Holder*, 647 F.3d 626, 628 (7th Cir. 2011).

⁶⁹ See *Aziz v. Gonzales*, 478 F.3d 854, 856 (8th Cir. 2007).

⁷⁰ See *Badawy v. Att'y Gen. of U.S.*, 390 F. App'x 165, 166 (3d Cir. 2010).

⁷¹ See *Suhardy v. Ashcroft*, 263 F.3d 162 (Table), 2001 WL 803648, at *1 (5th Cir. 2001).

⁷² See *Sarhan v. Holder*, 658 F.3d 649, 651 (7th Cir. 2011) (applicant's husband); *Ahmed v. Holder*, 611 F.3d 90, 93 (1st Cir. 2010) (applicant's wife); *Al Bustami v. Holder*, 385 F. App'x 719, 720 (9th Cir. 2010) (applicant's wife); *Al-Ghorbani*, 585 F.3d 980 at 983 (applicant's brother); *Yaylaci v. Gonzales*, 175 F. App'x 33, 33 (7th Cir. 2006) (applicant's husband and child).

⁷³ See *Sarhan*, 658 F.3d at 651; *Al-Ghorbani*, 585 F.3d at 984. The Seventh Circuit in *Sarhan* held that the female applicant was entitled to withholding of removal but remanded the case to the BIA to determine whether such relief extended to her husband as well. *Sarhan*, 658 F.3d at 651.

⁷⁴ See *Jabri v. Holder*, 675 F.3d 20, 26 (1st Cir. 2012); *Suradi v. Holder*, 437 F. App'x 549, 553 (9th Cir. 2011); *Al Bustami*, 385 F. App'x at 721.

claims was that the applicant had not presented enough evidence to show that he or she would actually be killed if deported.⁷⁵ The courts also denied the claims because of the applicant's lack of credibility,⁷⁶ the frivolous nature of the claim,⁷⁷ and a complete lack of evidence supporting any element of the claim.⁷⁸ However, several of the claims were denied after the courts concluded that the applicants had not met their burden of proving that their claims satisfied the various legal elements of an asylum claim.

i. Showing Membership in a Particular Social Group

A fundamental, yet difficult, argument an asylum applicant may have to make is that he or she will be persecuted on the basis of his or her membership in a particular social group. Like other forms of persecution that occur in the private sphere, honor killing claims pose the additional difficulty of proving the persecutor's intent, since the threat of death must be on account of the applicant's membership in a particular social group rather than purely personal reasons.⁷⁹

The BIA has interpreted "particular social group" to be defined "by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities."⁸⁰ Proving membership in a particular social group is complicated by the BIA's resistance to "classify[ing] people who are targets of persecution as members of a particular social group when they have little or nothing in common beyond being

⁷⁵ See *Abraham v. Holder*, 647 F.3d 626, 634 (7th Cir. 2011); *Bal v. Att'y Gen. of U.S.*, 406 F. App'x 640, 643 (3d Cir. 2011); *Ghouri v. Holder*, 618 F.3d 68, 70 (1st Cir. 2010); *Reda v. Att'y Gen. of U.S.*, 366 F. App'x 415, 418 (3d Cir. 2010); *Abdelghani v. Holder*, 309 F. App'x 19, 20 (7th Cir. 2009); *Fatima v. Att'y Gen. of U.S.*, 332 F. App'x 784, 786 (3d Cir. 2009); *Dia v. Mukasey*, 292 F. App'x 468, 471 (6th Cir. 2008); *Wawi v. Ashcroft*, 91 F. App'x 493, 494 (6th Cir. 2004).

⁷⁶ See *Abraham*, 647 F.3d at 633; *Dia*, 292 F. App'x at 471; *Aziz v. Gonzales*, 478 F.3d 854, 858 (8th Cir. 2007).

⁷⁷ See *Aziz*, 478 F.3d at 858.

⁷⁸ *Ahmed v. Holder*, 611 F.3d 90, 96 (1st Cir. 2010); *Badawy v. Att'y Gen. of U.S.*, 390 F. App'x 165, 167 (3d Cir. 2010).

⁷⁹ See *Doyle*, *supra* note 9, at 531 (arguing that discounting forms of persecution that occur within the private sphere, such as domestic violence, forced marriage, honor killings, and female genital mutilation as "private" violence not worthy of asylum protection is an outdated view that is inconsistent with the recognition of gender-based persecution, which so often occurs in the private sphere).

⁸⁰ *Fauziya Kasinga*, 21 I. & N. Dec. 357, 366 (B.I.A. 1996) (determining that having intact genitalia was fundamental to the applicant's identity).

targets.”⁸¹ That is to say, an asylum applicant cannot use the threat of a particular form of persecution as the characteristic that unites him or her with other individuals facing the threat of that same form of persecution. Additionally, the BIA prohibits courts from simply creating a particular social group; it must be a group currently recognized in that country as a social subdivision in the culture.⁸²

Some have postulated that “particular social group” has become “a malleable catch-all category for claims not falling squarely within one of the other enumerated grounds.”⁸³ Indeed, the BIA’s designation of the applicant’s “particular social group” in *Fauziya Kasinga*,⁸⁴ championed as the first asylum case recognizing female genital mutilation (FGM) as a form of persecution, was limited to “young women of the Tchamba-Kunsuntu Tribe who ha[d] not had FGM, as practiced by that tribe, and who oppose[d] the practice.”⁸⁵ That holding has been criticized for “the narrowness of the recognized social group and the opinion’s failure to provide rules for similar future cases” as well as the appearance that the BIA defined the social group so narrowly “in order to aid the [BIA] in granting asylum by alleviating fears of a potential slippery slope.”⁸⁶

It is thus unsurprising that the “particular social group” element of an asylum claim would prove to be equally troublesome in honor killing cases. This obstacle was unsuccessfully faced by the asylum applicant in *Haimour v. Gonzales*.⁸⁷ While he was living in Jordan, Haimour had committed adultery with an engaged woman.⁸⁸ After their sexual relationship became known to the wo-

⁸¹ *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009) (citing, as an example, debtors of the same creditor).

⁸² See *R-A-*, 22 I. & N. Dec. 906, 918 (B.I.A. 1999) (denying asylum to a Guatemalan woman whose husband physically and sexually abused her because the claimant had not shown that women in Guatemala who suffered from spousal abuse viewed themselves as being members of a particular social group, nor did the men who abused their wives recognize their female victims as a social group).

⁸³ Plant, *supra* note 9, at 118. See also Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 45 (1983) (arguing that “particular social group” was indeed *intended* to be a catch-all provision that “could include all the bases for and types of persecution which an imaginative despot might conjure up”).

⁸⁴ 21 I. & N. Dec. 357 (B.I.A. 1996).

⁸⁵ *Id.* at 358.

⁸⁶ Plant, *supra* note 9, at 119–20. Indeed, Plant points out that it is not likely that the Togolese themselves would recognize the social group created by the BIA in *Kasinga*, a prerequisite that the BIA has determined to be a crucial factor in any court-created social group. See *id.* at 120; *R-A-*, 22 I. & N. Dec. at 918.

⁸⁷ 165 Fed. App’x 594 (10th Cir. 2006).

⁸⁸ *Id.* at 595.

man's fiancé, the fiancé's family vowed to kill Haimour for bringing disgrace upon them.⁸⁹ When Haimour appealed to the Tenth Circuit, he argued that he would be persecuted on account of his membership in the following social group: "a person who has had sexual relations outside marriage and thereby brought dishonor upon the Abu Al-Fadel tribe or family."⁹⁰ The court rejected Hamour's proposed social group for two reasons. First, the court reasoned that being an adulterer is not a protected characteristic.⁹¹ Second, the woman's fiancé did not want to kill *all* men who had committed adultery; his threats were limited to Haimour, which in turn made Haimour's claimed social group "limited to himself."⁹²

The BIA made a similar argument when it held that an applicant's proposed social group was limited to herself since her brother had only threatened to kill her for her alleged adultery and not *every* woman who had similarly dishonored their families.⁹³ However, the Seventh Circuit rejected this reasoning on appeal, instead making the following analogy: a neo-Nazi who burns down the home of an African-American family does not do so because of a personal dispute with the family,⁹⁴ but because of the family's race and the perceived suffering to the neo-Nazi if no action is taken. Thus, it is important that the courts take into account the cultural context in which honor killings occur rather than focusing solely on the private parties involved.

That case posed a further problem for the applicant's proposed social group—should it matter whether the targeted individual actually committed the act for which she will be persecuted? The female applicant feared becoming the victim of an honor killing after she had been accused of adultery, which she claimed was a rumor invented by a vindictive in-law.⁹⁵ The Immigration Judge and the BIA had rejected the applicant's claim that she was a member of a particular social group for asylum purposes, holding that "Muslim women *falsely* accused of adultery" did not satisfy the statute.⁹⁶ However, the Seventh Circuit reversed the decision on appeal and granted withholding of removal to the applicant, holding that "the truth or falsity of the accusations against the woman who

⁸⁹ *Id.*

⁹⁰ *Id.* at 597.

⁹¹ *Id.* at 598.

⁹² *Id.*

⁹³ *See Sarhan v. Holder*, 658 F.3d 649, 656 (7th Cir. 2011).

⁹⁴ *See id.* at 656–57.

⁹⁵ *See id.* at 651.

⁹⁶ *Id.* at 654 (emphasis in original).

is targeted for an honor killing makes no difference.”⁹⁷ The court instead determined that the applicant’s social group was “women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing.”⁹⁸

ii. Showing that the Government Is Unwilling or Unable to Prevent the Harm

Navi Pillay, the High Commissioner for Human Rights at the United Nations, believes that honor killings are often viewed as a form of private family violence that is not included in the framework of international human rights, but that the same crimes would be condemned and punished if they were committed against strangers instead of family members.⁹⁹ The perception of honor killings as a form of revenge carried out by one private actor against another poses a significant difficulty for asylum claimants because “[a]sylum is not available to an alien who fears retribution *solely* over personal matters.”¹⁰⁰ Without demonstrating a nexus to a government system of persecution, “[p]urely personal retribution is, of course, not persecution.”¹⁰¹

Because there must be a nexus between the government and the persecution—the persecution can be directly or indirectly attributed to the government, through the government’s affirmative action or lack thereof—asylum seekers facing a threat of persecution that is commonly seen as a private act of violence are tasked with using the language of the public sphere to frame such violence.¹⁰² “Persecution is something a *government* does, either di-

⁹⁷ *Id.*

⁹⁸ *Id.* at 655.

⁹⁹ See *Impunity for Domestic Violence, ‘Honour Killings’ Cannot Continue – UN Official*, UN NEWS CENTRE (Mar. 4, 2010), <http://www.un.org/apps/news/story.asp?NewsID=33971&Cr=violence+against+women&Cr1> (“[T]here is a clear State responsibility . . . to prevent, protect and provide redress—regardless of sex, and regardless of a person’s status in the family.”).

¹⁰⁰ See *Zoarab v. Mukasey*, 524 F.3d 777, 781 (6th Cir. 2008) (emphasis added) (denying asylum because the harm feared by the applicant at the hands of an Emirati prince who owned a bank in which the applicant had invested was a result of the applicant’s outburst as an angry investor, not as a political dissident).

¹⁰¹ See *Grava v. INS*, 205 F.3d 1177, 1181 n.3 (9th Cir. 2000) (finding that the death threats faced by a Filipino law enforcement officer who acted as a “whistleblower” by uncovering and testifying about government corruption could constitute persecution).

¹⁰² See Lucy Akinyi Orinda, *Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law*, 17 WM. & MARY J. WOMEN & L. 665, 673–74 (2011) (explaining that asylum law tends to protect people from “public” harm instead of rape and other forms of sexual abuse, which are considered forms of “private” violence because they are committed in the “private” sphere).

rectly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct.”¹⁰³ In sum, persecution can be inflicted by a government or a private party that the government is “unwilling or unable to control.”¹⁰⁴

However, the Sixth Circuit has held that a claimant cannot prove that a government is unwilling or unable to control honor killings in the country simply by proving that honor killings exist in the country.¹⁰⁵ While still living in Turkey, every aspect of Mehriban Yaylacicegi’s life was controlled by her two brothers, who would abuse her when she disobeyed their orders or led them to believe she had done so.¹⁰⁶ When Yaylacicegi used the phone without her brothers’ permission, they attacked her with a knife; when she showed up at home not wearing the traditional Muslim clothing demanded by her brothers, they beat her until she could no longer move or speak.¹⁰⁷ After she came to the United States with her new husband, she converted to Christianity. She feared that if she returned to Turkey, her brothers would surely kill her for abandoning the religious beliefs they had previously imposed on her.¹⁰⁸

Despite presenting evidence of the prevalence of honor killings in Turkey and law enforcement’s minimal effort to prevent or prosecute the crimes, Yaylacicegi was unable to convince the court that she faced persecution. Such a precedent makes it especially difficult for applicants to prove that their home governments are accountable for the threatened persecution. Since mere proof that honor killings occur in a country is not sufficient, the asylum claimant must demonstrate a direct link between the occurrence of honor killings and the government’s unwillingness or inability to prevent them.¹⁰⁹

The foreign judiciary’s response to honor killings in the applicant’s country of origin is an important factor. For example, Mustafa Bal’s in-laws, who disapproved of his marriage to a woman in

¹⁰³ See *Hor v. Gonzalez*, 400 F.3d 482, 485 (7th Cir. 2005) (emphasis in original) (denying asylum to an Algerian man who feared being killed by a rebel group because the applicant was not only aligned with the government, but the government was trying to thwart the rebel group’s efforts).

¹⁰⁴ *Fauziya Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

¹⁰⁵ See *Yaylacicegi v. Gonzales*, 175 F. App’x 33, 35–36 (7th Cir. 2006).

¹⁰⁶ See *id.* at 34.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 35.

¹⁰⁹ See *id.* at 36 (holding that Yaylacicegi had not persuaded the court that the Turkish government was unwilling or unable to protect her from an honor killing).

their family, had beaten and threatened to kill him.¹¹⁰ Nonetheless, the Third Circuit denied Bal's honor killing asylum claim because Turkey had outlawed honor killings and imposed life imprisonment for the crime, which the court believed showed that the Turkish government *would* be able or willing to prevent his murder.¹¹¹

A common source of information used by both parties for evidence of a government's unwillingness or inability to prevent honor killings is the U.S. State Department's Country Reports on Human Rights Practices. Yet in the case of honor killing asylum claims, the use of these reports has been very favorable to the U.S. government in opposing the claimants' arguments for relief from removal. For example, even though an expert testified that the Turkish police usually would not become involved in preventing honor killings, the Immigration Judge who initially denied Mehriban Yaylacicegi's asylum claim relied on the U.S. State Department's 2002 Country Report on Human Rights Practices in Turkey, which showed that the applicant could obtain protection from the civil authorities in the country.¹¹²

The U.S. government's use of similar evidence relating to the Jordanian government's response to honor killings led to similar results. In 2009, the Sixth Circuit held in *Khalili v. Holder*¹¹³ that Hamdi Al Khalili, a Jordanian male, failed to show that the Jordanian government was unwilling or unable to prevent him from becoming the victim of an honor killing at the hands of his wife's family.¹¹⁴ Khalili testified that he believed the government would not protect him because "usually they don't interfere [with] honor things."¹¹⁵ The court found the State Department's 2005 Country Report on Human Rights Practices in Jordan instructive in its decision; the report concluded that of the fifteen honor crimes reported in 2004, the Jordanian authorities had prosecuted all of them.¹¹⁶ The court acknowledged the reality that the Jordanian legal system provided loopholes and lenient sentences for those accused of honor crimes, yet held that the "societal trend" toward the condemnation of honor crimes weakened

¹¹⁰ See *Bal v. Att'y Gen. of U.S.*, 406 F. App'x 640, 642-43 (3d Cir. 2011).

¹¹¹ *Id.* at 643.

¹¹² See *Yaylacicegi v. Gonzales*, 175 F. App'x 33, 35 (7th Cir. 2006).

¹¹³ 557 F.3d 429 (6th Cir. 2009).

¹¹⁴ See *id.* at 436.

¹¹⁵ *Id.* at 431-32.

¹¹⁶ *Id.* at 436.

Khalili's claim.¹¹⁷

Yet two years after *Khalili*, both the Seventh and Ninth Circuits determined that the Jordanian government *was* unable or unwilling to prevent the honor killings anticipated by two Jordanian women who brought asylum claims. First came *Suradi v. Holder*,¹¹⁸ in which Iman Khalil Suradi claimed that due to the extramarital affairs she had had while in the United States, both her husband and her own family had threatened to kill her in order to cleanse the dishonor she had brought upon them.¹¹⁹ Like the Sixth Circuit's holding in *Khalili*, the Immigration Judge in Suradi's case had found that the Jordanian government was not unwilling or unable to prevent her honor killing, since the U.S. State Department's Country Report on Human Rights Practices in Jordan showed that the Jordanian authorities had prosecuted all of the honor crimes that had been reported in 2008.¹²⁰ Yet on appeal, the Ninth Circuit held that it was error to place such heavy reliance on that report, since honor killings are drastically underreported (and often unreported) and just because the government had prosecuted the sixteen reported honor killings did not mean that there had only been sixteen honor killings.¹²¹ Additionally, the court noted that the Jordanian media had reported on far more than sixteen honor killings, which further weakened the reliance on the statistics from the State Department's report.¹²²

The Ninth Circuit further held that even if the Jordanian government did prosecute every single honor killing that was committed in the country, it would not show that the government was able or willing to *prevent* them from occurring in the first place.¹²³ The court relied on a Human Rights Watch report that concluded that "[p]olice rarely investigate 'honor' killings, seldom take any initiative to deter these crimes, and typically treat the killers as vindicated men."¹²⁴ And as for the lenient sentences for honor killings in Jordan, the Ninth Circuit noted that the government had blocked efforts at reform, with the Jordanian parliament itself refusing to repeal the leniency provisions because it believed that tougher sanctions would encourage more adultery in the coun-

¹¹⁷ *See id.*

¹¹⁸ 437 Fed. App'x 549 (9th Circ. 2011).

¹¹⁹ *See id.* at 551–52.

¹²⁰ *See id.* at 552.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *Id.* at 552–53.

try.¹²⁵ The Ninth Circuit ultimately held that both the Immigration Judge and the BIA had “misread” the State Department’s report, and thus remanded Suradi’s case for further factfinding.¹²⁶

Three months later, in *Sarhan v. Holder*,¹²⁷ the Seventh Circuit granted withholding of removal to “Disi,” a Jordanian woman who also alleged that she would become the victim of an honor killing if returned to her home country.¹²⁸ Disi’s story is a complicated tragedy that begins with an intense level of animosity between her and her sister-in-law, Nuha.¹²⁹ While Disi and her husband were living in the U.S., Nuha started a rumor in Jordan that Disi had committed adultery, thus bringing dishonor upon the family.¹³⁰ Upon hearing the allegation, Disi’s brother decided that when Disi returned to Jordan, he would kill her in order to restore the family’s honor.¹³¹ He not only told his parents about his plan, but visited Disi in Chicago in order to personally relay the message.¹³²

Disi testified that her brother had told her that while the laws of the United States would not permit him to kill her on American soil, it was a different story in Jordan.¹³³ The Seventh Circuit noted that Disi’s brother “cannot be deterred from murdering his sister in response to the rumors Nuha started,” as he was completely obsessed with family honor, and regardless of whether the rumors were true, his reputation had been harmed in such a way that “truth no longer matters.”¹³⁴

The Seventh Circuit’s very explanation of honor killings incorporated the “unwilling or unable government” element of the asylum claim; it stated that in countries where honor killings are commonplace, “government offers little protection for the victims; and killers receive light punishment, if charges are not dropped altogether.”¹³⁵ The court explained that Disi’s brother’s determination to kill his sister for the shame associated with the circulating rumor was in large part due to the passive encouragement of a

¹²⁵ *See id.* at 553.

¹²⁶ *See id.*

¹²⁷ 658 F.3d 649 (7th Cir. 2011).

¹²⁸ *See id.* at 651.

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* at 651–52.

¹³³ *See id.* at 652 (“[W]hen you come back to Jordan, I’m going to kill you. Here [in the United States], I can’t do, because there is a penalty for this, but in Jordan, nobody can do for another killing.”).

¹³⁴ *Id.* at 651.

¹³⁵ *Id.*

society that deemed the violence permissible and justified, as well as a government that “has withdrawn its protection from the victims.”¹³⁶

As was the case in both *Khalili* and *Suradi*, the U.S. government argued against relief from removal by using the State Department’s Country Report on Human Rights Practices in Jordan; and like the other reports, the one used in Disi’s case showed that the Jordanian authorities had prosecuted all of the seventeen honor crimes that had been reported in 2007.¹³⁷ Yet the Seventh Circuit labeled the information “unconvincing,” instead holding that “[p]rosecution at times is an empty gesture” and calling the six-month sentences for honor killings “little more than a slap on the wrist.”¹³⁸ By focusing on the punishment for honor killings, rather than the rate of prosecution, the court was able to support the contention that leniency in the judicial system supports the government’s toleration of the violence.

iii. Showing an Inability to Relocate

The Eighth Circuit has held that, for purposes of an asylum claim, “[r]elocating to another part of the country does not mean living in hiding.”¹³⁹ Yet in *Vellani v. United States Attorney General*,¹⁴⁰ the Eleventh Circuit held that the applicant had not proven that her honor killing could not be avoided by simply relocating within her country of origin.¹⁴¹ After becoming engaged in her home country of Pakistan, Zehra Vellani joined her fiancé in the U.S., where he forced her to perform oral sex on him.¹⁴² But when Vellani refused to have sexual intercourse with her fiancé, he told her brother that he would not marry Vellani because she had a boyfriend and was a “loose woman.”¹⁴³ Consequently, Vellani’s brother moved his family away from the home he had shared with his sister in Pakistan, claiming that he did not want his sister’s dishonor affecting the honor of his own daughter.¹⁴⁴ Vellani testified that after her fiancé falsely accused her of having a boyfriend, her brother

¹³⁶ *Id.* at 656.

¹³⁷ *Id.* at 658.

¹³⁸ *Id.*

¹³⁹ See *Agbor v. Gonzales*, 487 F.3d 499, 505 (7th Cir. 2007) (finding that the applicant, whose mother-in-law threatened to poison the applicant if she did not undergo FGM, would not have been able to safely relocate in Cameroon).

¹⁴⁰ 296 F. App’x 870 (11th Cir. 2008).

¹⁴¹ See *id.* at 877.

¹⁴² *Id.* at 872.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

threatened to kill her.¹⁴⁵

Despite this, the Eleventh Circuit held that “it is irrelevant that honor killings occur throughout Pakistan, as Vellani has not argued that people throughout Pakistan wish to kill her to avenge the dishonor of her family.”¹⁴⁶ The court stressed that it was only Vellani’s brother, and no other family members or members of the community, who had threatened to kill her; furthermore, Vellani’s brother had not threatened to track her down wherever she was in Pakistan.¹⁴⁷

Thankfully, the result was different for Disi, the claimant in *Sarhan v. Holder*.¹⁴⁸ In granting withholding of removal to Disi, the Seventh Circuit held that it would not be possible for her to relocate to another part of the country in order to avoid becoming the victim of an honor killing.¹⁴⁹ The court stressed that Disi’s home country of Jordan, which is the size of Maine, was so small that the only way Disi could avoid her brother—who intended to “track her down no matter where she is within Jordan”¹⁵⁰—was to “live in hiding,” an ongoing action that simply does not constitute mere “relocation.”¹⁵¹ While the decision in *Sarhan* is certainly commendable, its fault lies in the gendered definition of “honor killing” used by the court, since the way in which this form of persecution is framed can place male applicants at a severe disadvantage at having their honor killing asylum claims recognized.

C. Honor Killing Asylum Claims Brought by Men

When the Seventh Circuit granted withholding of removal to Disi, it expressly distinguished its holding from the Sixth Circuit’s decision to deny any form of relief to the male applicant in *Khalili v. Holder*.¹⁵² “The obvious difference between that case and this one is that the petitioner in the Sixth Circuit was not a female, and the problem we have identified is one that concerns *violence by men against women*.”¹⁵³ Similar minimization of the risk of honor killings

¹⁴⁵ *Id.* at 874.

¹⁴⁶ *Id.* at 877.

¹⁴⁷ *See id.*

¹⁴⁸ 658 F.3d 649 (7th Cir. 2011).

¹⁴⁹ *See id.* at 661.

¹⁵⁰ *Id.* at 661–62.

¹⁵¹ *See id.* at 661.

¹⁵² 557 F.3d 429, 431 (6th Cir. 2009). Unlike the Immigration Judge and the BIA, which both held that there was no evidence that honor killings extended to men, the Sixth Circuit denied Khalili’s claim on other grounds. *Id.* at 436.

¹⁵³ *Sarhan v. Holder*, 658 F.3d 649, 660 (7th Cir. 2011) (emphasis added).

extending to men has contributed to the denial of the honor killing asylum claims of three other men.

For example, although Yasser Abdelghani testified that several members of his family threatened to kill him because he did not prevent his sister from marrying an American Christian man,¹⁵⁴ the Seventh Circuit denied his claim because the U.S. Department of State's Country Report on Human Rights Practices in Jordan defined an honor crime as the "violent assault with intent to kill *against a female* by a relative for her immodest behavior or alleged sexual misconduct."¹⁵⁵

Similarly, the Sixth Circuit (in a decision prior to *Khalili*) denied any relief from deportation for Mohammed Al Wawi, who claimed that his extramarital affair with a woman made him fear that the woman's family would kill him in order to preserve their honor.¹⁵⁶ The court held that Wawi had not offered any objective evidence supporting his contention that honor killings extended to men.¹⁵⁷

Khurram Jamil also failed to convince the Third Circuit that honor killings extended to men.¹⁵⁸ Jamil's wife wanted a divorce, and Jamil complied; Jamil's former father-in-law, however, was outraged because he believed that Jamil had instigated the divorce.¹⁵⁹ The former father-in-law was associated with the Pakistani military and he sent soldiers to Jamil's house several times to look for Jamil and threaten his family.¹⁶⁰ Jamil feared that his former father-in-law would kill him if he returned to Pakistan, especially after the soldiers promised Jamil's father that they would make sure he never saw Jamil again.¹⁶¹ Nonetheless, the Third Circuit emphasized that the U.S. State Department's Country Report on Human Rights Practices in Pakistan described honor killings as usually involving women.¹⁶²

Yet there have been two instances in which the circuit courts have remanded the cases for further consideration where the applicants who feared honor killings were male. In *Jabri v. Holder*,¹⁶³ a Jordanian man feared that his grandfather perceived his conver-

¹⁵⁴ See *Abdelghani v. Holder*, 309 F. App'x 19, 20 (7th Cir. 2009).

¹⁵⁵ *Id.* at 22 (emphasis in original).

¹⁵⁶ See *Wawi v. Ashcroft*, 91 F. App'x 493, 494 (6th Cir. 2004).

¹⁵⁷ See *id.*

¹⁵⁸ See *Jamil v. Att'y Gen. of U.S.*, 327 F. App'x 336, 337 (3d Cir. 2009).

¹⁵⁹ *Id.* at 337-38.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See *id.* at 339.

¹⁶³ 675 F.3d 20 (1st Cir. 2012).

sion from Islam to Christianity as a disgrace to the family name, which the applicant feared may provoke an honor killing if he were to return to Jordan.¹⁶⁴ Without making any mention of whether honor killings can legitimately extend to men, the First Circuit remanded the case on the issue of the applicant's inconsistent testimony.¹⁶⁵ In *Al Bustami v. Holder*,¹⁶⁶ a couple jointly alleged a fear of becoming victims of an honor killing at the hands of the wife's family because the couple had had sex before they got married.¹⁶⁷ The Ninth Circuit remanded the case for reconsideration of the husband's withholding of removal claim, which had been denied even though his wife's claim had been granted.¹⁶⁸

Furthermore, in *Al-Ghorbani v. Holder*,¹⁶⁹ the Sixth Circuit explicitly granted withholding of removal to both applicants, a pair of brothers from Yemen.¹⁷⁰ The Al-Ghorbani brothers feared for their lives after one of the brothers had married a woman of a much higher social class against the direct orders of the woman's father, who also happened to be a general in the Yemeni army.¹⁷¹ While the BIA dismissed the anticipated honor killing as nothing less than a "personal vendetta . . . for marrying [the General's] daughter without his permission,"¹⁷² the Sixth Circuit held that the fear of persecution was based on the brothers' membership in a social group "that opposes the repressive and discriminatory Yemeni cultural and religious customs that prohibit mixed-class marriages and require paternal consent for marriage."¹⁷³ By examining the decisions of the circuit courts in honor killing asylum cases, and specifically focusing on the definition of "honor killing" used by the courts, it becomes clear that for male applicants, a gendered definition of this form of violence can be extremely detrimental to their claims. The final section of this Note examines the impact of these definitions more closely and advocates for a gender-neutral definition of "honor killing" in asylum cases.

¹⁶⁴ See *id.* at 22–23.

¹⁶⁵ See *id.* at 26.

¹⁶⁶ 385 F. App'x 719 (9th Cir. 2010).

¹⁶⁷ See *id.* at 720.

¹⁶⁸ See *id.*

¹⁶⁹ 585 F.3d 980 (6th Cir. 2009).

¹⁷⁰ See *id.* at 983–84. *Sarhan* and *Al-Ghorbani* are the only cases in which a circuit court has granted withholding of removal to the applicant bringing an honor killing asylum claim.

¹⁷¹ *Id.* at 984–85.

¹⁷² See *id.* at 991.

¹⁷³ *Id.* at 996.

III. ANALYZING HONOR KILLING ASYLUM CLAIMS IN GENDER-NEUTRAL TERMS

Violence against women has long been ignored as the basis for legitimate asylum claims; the purpose of this Note is certainly not to detract from the milestones that have been reached in granting asylum to women seeking a safe haven from gender-based persecution. However, it is important to continue to expand the protections offered by asylum law while keeping in mind that being part of the small exception to the rule should not invalidate an otherwise legitimate fear of persecution. In early 2012, the U.S. Department of Justice redefined rape to be gender-neutral; explaining this decision, Senior Advisor to President Obama, Valerie Jarrett said, “[d]efinitions matter because people matter.”¹⁷⁴ Like rape, honor killings are predominately committed against women, but they are not *exclusively* committed against women, unlike FGM or forced abortion, for example. This distinction is of paramount importance.

The holdings in the circuit court cases highlight glaring inconsistencies in the evaluation of honor killing asylum claims.¹⁷⁵ Yet there is an added level of unpredictability regarding the question of whether men’s honor killing claims can ever be as valid as women’s (or valid at all). As the evidence shows, distinguishing the validity of the claim based on the sex of the applicant is entirely unwarranted, since it is clear that honor killings are not exclusively aimed at women.¹⁷⁶ As such, relief from removal on the basis of the fear of an honor killing should not be limited to female applicants. Male asylum applicants who fear becoming the victims of honor killings should be afforded the opportunity to prove their case in the same manner as similarly situated female applicants.

For courts that disregard the possibility of male victims of honor killings, it is not that the standard is higher for these male applicants, but that it is impossible. This is unacceptable, and undermines the very purpose of asylum. It is thus necessary for the courts to apply a gender-neutral definition of honor killing, a decision that should be encouraged by the federal agencies whose own decisions and publications are authoritative in asylum cases.

¹⁷⁴ *US Updates Definition of Rape*, REDORBIT (Jan. 9, 2012), <http://www.redorbit.com/news/health/1112451614/us-updates-definition-of-rape/>.

¹⁷⁵ See *supra* Part II.B.

¹⁷⁶ See *supra* Part I.B.

A. *The Responsibility of Asylum Courts*

There is of course a certain level of unpredictability that is to be expected when it comes to asylum claims, yet it is quite inappropriate for there to be an additional dimension of inconsistency for asylum claims brought by men, instead of women, for the same form of persecution. It is unclear why the Sixth Circuit did not question the sex of the Al-Ghorbani brothers or why it did not define an honor killing in gendered terms,¹⁷⁷ yet this recent honor killing holding should set the stage for future asylum cases premised on the fear of this form of persecution.

It would certainly level the playing field for asylum applicants and remove the inconsistencies among the circuits if the courts began examining honor killings in the same way as the *Al-Ghorbani* court, which chose to focus on the underlying cultural and societal concepts of family honor, the way it can be tainted, and the acceptable ways in which honor can be restored.¹⁷⁸ The court did not define honor killings as “violence against women” or in other gendered terms; instead of focusing on the sex of the potential honor killing victims, the court stressed that “Yemeni society recognizes a father’s right to control who his daughter marries and permits a father to punish—and even kill—those who defy this tradition and insult the family honor.”¹⁷⁹

Thus, in determining the “particular social group” of which the Al-Ghorbani brothers were members, the Sixth Circuit focused on the motivation of the perpetrator of the violence, which is central to the understanding of any honor killing. When it comes to evaluating an honor killing asylum claim, the courts should of course continue to analyze the strength of the claim with respect to the legal elements described earlier in this Note.¹⁸⁰ But the courts should also focus on (1) whose honor has supposedly been tainted, (2) what action (real or perceived) was the cause of the perceived dishonor, and (3) whether that action is seen as so dishonorable within the applicant’s country of origin that murder is the acceptable remedy for restoring the honor. Ultimately, the focus should be on the nexus between the applicant’s allegedly dishonorable actions and the motivation of the potential murder; neither the sex

¹⁷⁷ See *Al-Ghorbani v. Holder*, 585 F.3d 980, 983–84 (6th Cir. 2009) (granting withholding of removal to two brothers who feared becoming the victims of honor killings if deported to Yemen).

¹⁷⁸ See *id.* at 996–99.

¹⁷⁹ *Id.* at 998.

¹⁸⁰ See *supra* Part II.A.

of the perpetrator nor that of the intended victim (the asylum applicant) should be relevant to this inquiry.

By framing honor killings the way it did, the Sixth Circuit recognized that while honor killings do stem from notions of family honor, unwavering patriarchy, and the violent repression of women, the resulting atmosphere necessarily implicates the men who either passively disregard or outright challenge this system by respecting the individual autonomy of women. These men, who have entered into consensual relationships or taken part in consensual acts with women (whether through marriage, premarital sex, dating, or simple hand-holding) even though society deems the women unfit to make such personal decisions, have effectively taken a stand against the pervasive and long-standing tradition of repressing women. These men deserve the same level of protection and the same respect by our courts as the women who fear becoming the victims of honor killings.

By announcing that he did not share the sexual orientation of the majority, the sexual orientation of the so-called pure and the respectable, Ahmet Yildiz had brought grave shame and dishonor upon his family.¹⁸¹ His life was at risk as he began receiving death threats.¹⁸² However, if he had brought an asylum claim in the United States, there would be no guarantee that the court would find that Yildiz could even be legitimately fearful of becoming the victim of an honor killing.

Perhaps the case of Ahmet Yildiz seems more straightforward because the persecution he feared was based partly on his sexual orientation. But the death threats made against him by his own family members were still made in reaction to shame, dishonor, and wounded pride. The atmosphere of homophobia that allowed for these death threats to be made, and ultimately acted upon, was not restricted within Turkey to the Yildiz family. Like the desire to control the lives of women, the demand for heterosexuality and disgust with homosexuality are deeply rooted in culture and can take generations to overcome. Instead of the sex of the potential victim, courts should examine the societal and cultural concept of honor in the applicant's country of origin and the ways in which it can be so damaged that it can only be restored through murder. As the former UN Special Rapporteur on Violence against Women has stated, honor killings "may not be exclusively committed against females, but they are almost exclusively committed to main-

¹⁸¹ See Birch, *supra* note 1.

¹⁸² See *id.*

tain a rigid, heterosexual, patriarchal gender order that [enforces] female subordination to and male compliance with the prevailing norms.”¹⁸³

B. The Responsibility of Federal Agencies

The responsibility to use a gender-neutral definition in order to accurately describe honor killings should not be limited to the courts hearing asylum claims. The U.S. State Department’s Country Reports on Human Rights are commonly entered into evidence by both parties to an honor killing asylum claim.¹⁸⁴ Yet the State Department has been defining honor killings in gendered terms, which, besides being inaccurate, has contributed to asylum courts’ inability to comfortably extend asylum protection to men who fear becoming the victims of such violence.¹⁸⁵ Asylum courts do view these reports as authoritative; it was precisely because the State Department had defined honor killings as a form of violence against women that the Third and Seventh Circuits denied the asylum claims of two male applicants.¹⁸⁶ It is imperative that the State Department choose its words carefully when describing honor killings in these country reports. It should make every effort to accurately describe this form of violence in a gender-neutral manner while still emphasizing that the majority of honor killing victims are women, although men are also targeted. The State Department is in a unique position to highlight that the murder of these men is no less atrocious and that their fear is no less legitimate than that of women.

Like the State Department, the United States Citizenship and Immigration Services (USCIS) categorizes honor killings as a form of violence often directed at women.¹⁸⁷ In light of the inconsistent circuit court decisions regarding the gendered application of asy-

¹⁸³ Ghosh, *supra* note 29.

¹⁸⁴ See *supra* Part II.B.ii.

¹⁸⁵ See *supra* Part II.C.

¹⁸⁶ See *Jamil v. Att’y Gen. of U.S.*, 327 F. App’x 336, 339 (3d Cir. 2009); *Abdelghani v. Holder*, 309 F. App’x 19, 23 (7th Cir. 2009). These holdings are described in more detail *supra* Part II.C.

¹⁸⁷ See U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM OFFICER BASIC TRAINING COURSE: FEMALE ASYLUM APPLICANTS AND GENDER-RELATED CLAIMS 10 (2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTCLesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf> (categorizing “honor killings” as one of the “[f]orms of harm that are unique to, or more common to, women,” along with rape or sexual violence, infanticide, FGM, forced abortion, forced marriage, bride burning, trafficking, slavery, and domestic violence).

lum for an honor killing claim, USCIS should consider releasing guidelines for how asylum courts should view a form of persecution that affects men and women at different rates. The first step would be to verify that honor killings are indeed directed at men as well as women. Denmark has already taken the first steps in clarifying the gendered terminology used to describe honor killings.

Like the United States, Denmark may grant asylum based on an honor killing claim if the court finds that the applicant meets the general standard for asylum.¹⁸⁸ When analyzing an honor killing asylum claim, the Danish asylum courts do not generally consider the gender of the applicant to be a factor in the legitimacy of the claim.¹⁸⁹ Instead, the courts focus on “whether the narrative of the applicant is coherent and reasonable and in conformity with known [country of origin] information concerning the applicant’s country of [sic] origin.”¹⁹⁰ This determination is made after “the conduction of a specific, individual assessment” of all the facts.¹⁹¹

In March 2009, the Danish Immigration Service (DIS) began noticing that in addition to the honor killing asylum claims filed by women from the Kurdistan Region of Iraq (“Kurdistan Region”), Kurdish men were also beginning to file such claims in Denmark.¹⁹² Thus, DIS undertook a fact-finding mission to determine the situation of male victims of honor killings in the Kurdistan Region.¹⁹³ The findings revealed that the men who had brought dishonor upon their families or the families of the woman with whom they were conducting an illicit relationship *did* fear for their lives.¹⁹⁴ It is unclear how the Danish asylum courts have incorpo-

¹⁸⁸ See E-mail from Nils Bak, Press Officer, Danish Immigration Serv., to author (May 30, 2012, 10:28 EST) (on file with author).

¹⁸⁹ See E-mail from Hans Peitersen, Chief Advisor, Ctr. of Asylum and Family Reunification of the Danish Immigration Serv., to author (May 31, 2012, 05:40 EST) (on file with author) (“The Danish asylum practice recognizes that both men and women may be the subjects of so-called honor-killings, and assessing claims from men differ little or not at all from assessing claims from women.”).

¹⁹⁰ *Id.*

¹⁹¹ E-mail from Nils Bak, Press Officer, Danish Immigration Serv., to author (May 30, 2012, 10:28 EST) (on file with author).

¹⁹² DANISH IMMIGRATION SERV., HONOUR CRIMES AGAINST MEN IN KURDISTAN REGION OR IRAQ (KRI) AND THE AVAILABILITY OF PROTECTION 2 (2010) (Den.), available at <http://www.nyidanmark.dk/NR/rdonlyres/3E22AAC6-C28F-420B-9EDB-B8D2274D3E2D/0/KRGrapportEresdrabjan2010SLUTRAPPORT.pdf>.

¹⁹³ *Id.*

¹⁹⁴ See *id.* at 3. The report further found that although honor crimes against men do indeed occur in this region, all of the focus on honor crimes and the protection of potential victims is directed exclusively towards women, making it very difficult for potential male victims to find adequate assistance and protection. See *id.* at 9. This has left many of these men in a position where they believed that their only source of

rated these findings into their analysis of honor killing asylum claims, but such an investigation is certainly a step in the right direction that should be emulated by federal agencies in the United States. An inquiry into the phenomenon of honor killings directed at men would not only verify that male applicants could be legitimately fearful of this persecution, but would provide powerful persuasive authority for the courts. Such authority is currently lacking, and its absence is allowing—if not outright encouraging—judicial decision makers to deny asylum to men who fear becoming the victims of this horrific form of violence simply because they are men.

CONCLUSION

Whether a man faces the threat of an honor killing because of his sexual orientation or because of an illicit relationship with a woman, the anticipated murder is still motivated by the dishonor that the man's action has brought upon another individual or family. It cannot be that the fear of murder would be cognizable before some courts and not before others solely based on the sex of the asylum applicant. When the motivation behind a murder is that "[b]lood cleanses honor,"¹⁹⁵ ratios and percentages relating to the sex of the victims simply should not matter. The purpose of asylum will be better served if the courts hearing honor killing asylum claims disregard the fact that the applicant is a member of the minority of honor killing victims and instead analyze whether the applicant has proven that he faces death because of the dishonor that his actions are believed to have brought upon another individual or family. Honor killings are such an astonishing form of violence because of their motivation; it is this same motivation that must be the focus of the courts.

protection existed outside Iraq, prompting them to flee their country and seek asylum protection elsewhere. *Id.* at 14.

¹⁹⁵ Ruane, *supra* note 19, at 1532.

**IF I MARRY A MAN IN NEW YORK,
COULD I MARRY A WOMAN IN KENTUCKY?:
THE PROBLEM OF THE FUNDAMENTAL
RIGHT TO (STRAIGHT) MARRIAGE**

Philip R. Hsiao†

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INTRODUCTION

The Supreme Court's rulings in *Hollingsworth v. Perry*¹ and *United States v. Windsor*² have had profound effects on the lives of same-sex couples and their families. That is, in California and in other states (including the District of Columbia) where marriage between two people of the same sex is legal, citizens now enjoy a very different legal landscape for their family planning. In my own life, the federal government can no longer treat my same-sex marriage as less of a marriage than an opposite-sex marriage. Now, my husband and I can enjoy the panoply of rights—state and federal—that stem from legal marriage. However, these cases had no effect on those individuals in U.S. jurisdictions whose laws hold as void any marriage contracted between parties of the same sex.

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¹ 133 S. Ct. 2652 (2013).

² 133 S. Ct. 2675 (2013).

The unique status of marriage as a legal institution in the United States allows for state governments to limit recognition of marriages performed outside their jurisdictions despite the Full Faith and Credit Clause.³ Though the typical rules of comity demand that most marriages be recognized as legally valid in a jurisdiction where some marriages would not be valid so long as they were lawful where they were celebrated,⁴ a long-standing exception has existed for marriages that violate the fundamental public policy of a state being asked to recognize the foreign marriage.⁵ Some thirty states have even codified their fundamental public policy opposition to same-sex marriage as amendments to their state constitutions.⁶ My home state of Kentucky, for example, incorporated the following language into its constitution in 2004: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”⁷

Of all the interesting questions that *Hollingsworth* and *Windsor* left unanswered about my marriage, then, the principal one to me is: What would my being married to a man in New York mean if I ever returned to Kentucky? The easy answer seems to be that my marriage would be meaningless; in Kentucky, it would be as though I were not married at all because I am not married to a woman. This apparently easy answer led me to think of a bizarre question: Does that mean I would have the right to be legally married to a woman in Kentucky? This question, though it may seem silly at first blush, is by no means new.⁸ However, the question has not yet been critically analyzed. With recent decisions that implicate the rights of marriage in America—and that bring directly

³ Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2146–47 (2005). See also U.S. CONST. art. IV, § 1.

⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

⁵ *Id.* § 283(2); *Beddow v. Beddow*, 257 S.W.2d 45, 47–48 (Ky. Ct. App. 1952).

⁶ See *Windsor v. United States*, 699 F.3d 169, 203–04 (2d Cir. 2012) (Straub, J., dissenting in part and concurring in part).

⁷ KY. CONST. § 233A.

⁸ See, e.g., Richard Cook, Comment, *Kansas's Defense of Marriage Amendment: The Problematic Consequences of a Blanket Nonrecognition Rule on Kansas Law*, 54 U. KAN. L. REV. 1165 (2006) (suggesting problems that could occur if Kansas did not recognize foreign marriages between same-sex partners); Michael J. Kanotz, Comment, *For Better or for Worse: A Critical Analysis of Florida's Defense of Marriage Act*, 25 FLA. ST. U. L. REV. 439 (1998) (analyzing what same-sex marriages, which were expected to begin occurring in Hawaii after *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), would mean under Florida law).

into question whether and to what extent any marriage must be recognized under the Constitution—we are in a critical historical moment where figuring out what it means to be queer in America not only implicates navigating the socio-legal structure that binds queer lives and identities, but also requires that conscientious work be done in determining the limits of that structure. After all, what takes precedence—opposite-sex marriage, with its status as a fundamental right, or my skim-milk marriage to a man?⁹

In this Note, I will examine what might happen to me if I were to move back to Lexington, Kentucky—the city of my birth—and apply for a marriage license with a woman. Would I be turned away for being currently married to a man? Would what I seek to do be criminal under Kentucky law? If so, would I have the right to compel the issuance of such a marriage license, despite the validity of my marriage in New York, or to stop criminal proceedings on constitutional grounds? These questions may seem silly, but the principles behind them have a very real importance for what it means to be married in America, where fundamentally irreconcilable state laws control our legal status.

I. NON-RECOGNITION OF MARITAL STATUS: IS MY INVALID
SAME-SEX MARRIAGE AN IMPEDIMENT TO
OPPOSITE-SEX MARRIAGE?

Kentucky law prohibits many types of marriages.¹⁰ Amid these, the law specifically states that marriage is “prohibited and void . . . [w]here there is a husband or wife living, from whom the person marrying has not been divorced.”¹¹ Kentucky’s law, finicky though one might expect it to be about such dickered terms, is surprisingly silent as to what a *husband* or a *wife* is. But *Black’s Law Dictionary* tells

⁹ See Oral Argument at 71:15–16, *United States v. Windsor*, 133 S. Ct. 2675 (No. 12-307), available at http://www.supremecourt.gov/oral_arguments/argument_audio_detail.aspx?argument=12-307&TY=2012 (audio of Justice Ginsburg’s comment to attorney Paul Clement, who defended the Defense of Marriage Act before the Supreme Court, in which she rhetorically referred to same-sex marriage as “skim-milk marriage”).

¹⁰ See, e.g., KY. REV. STAT. ANN. § 402.010 (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session) (prohibiting and voiding marriages between any people with a half- or whole-blood relationship of closer than second cousins); *id.* § 402.020 (prohibiting and voiding marriages where one of the parties has been declared mentally disabled by a court, when not solemnized or contracted in the presence of an authorized solemnizing person or body, between members of the same sex, between more than two persons, and—with certain exceptions—with a person under sixteen years of age).

¹¹ *Id.* § 402.020(1)(b).

us that *husband* means a married man and *wife* a married woman.¹² Thus, to determine if I could get married to a woman in Kentucky despite my being married to a man, I would need to determine if I have a *husband* as that term is used in Kentucky law. For this I turn to Kentucky's legal definition of marriage to determine if my husband, or I, qualify as married.

Luckily, for the definition of *marriage*, Kentucky has a statute on point:

As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.¹³

This definition is essentially adopted from case law in which Kentucky's highest court upheld a county clerk's determination denying two women a marriage license, not because a statute forbade it—or even defined marriage at all—but because the union they were seeking as members of the same sex did not meet the common dictionary definition of marriage.¹⁴ For this reason, my husband and I, under Kentucky law, fail to meet the legal standard for *married*. Our civil status as married is not predicated on being one man and one woman. Our association is therefore not even founded on the distinction of sex,¹⁵ a basic requirement of the civil status of *married* in Kentucky. As expected, my marriage in New York does not meet the definition of marriage in Kentucky.

The Commonwealth's Office of the Attorney General gives further guidance on the issue. In a 2007 opinion essentially forbidding the public university system from giving domestic partner benefits to same-sex partners on constitutional grounds, the Office stated: "We believe a substantially correct statement of the [law relating to status] is that the law of the state where the marriage is consummated establishes the 'relationship' of one to the other as

¹² BLACK'S LAW DICTIONARY 637 (9th ed. 2009) (defining "husband"); *id.* at 1370 (defining "wife").

¹³ KY. REV. STAT. ANN. § 402.005 (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

¹⁴ *Jones v. Hallahan*, 501 S.W.2d 588, 589–90 (Ky. 1973). Now that the state constitution and statutes explicitly adopt the *Black's Law* definition cited in *Jones*, a court may find itself hard-pressed to deviate from this precedent. The *Black's Law* definition of *marriage*, for its part, has been updated to "[t]he legal union of a couple as spouses." BLACK'S LAW DICTIONARY 1059 (9th ed. 2009).

¹⁵ For purposes of this Note, we can at least assume that Kentucky intended "distinction of sex" to mean a gender binary of male as distinguished from female.

husband and wife . . . which is universally recognized”¹⁶ Does this imply that Kentucky recognizes my husband’s status as my husband by grace of our New York marriage, though Kentucky attaches no rights to his status since it otherwise considers our marriage void? It seems not, because the Office goes on to state that, under Kentucky’s constitutional marriage amendment, “only marriage as defined in Kentucky law . . . shall be valid or recognized as a legal status.”¹⁷ Therefore, the existence of our marital relationship, in New York, is probably not cognizable as a legal status for the purpose of Kentucky law.

Further examination of Kentucky’s marriage laws supports this conclusion. A statute provides that marriages between members of the same sex are against Kentucky public policy;¹⁸ such a marriage occurring in another jurisdiction is void in Kentucky, and “[a]ny rights granted by virtue of the marriage . . . shall be unenforceable in Kentucky courts.”¹⁹ To the question of whether I am a married man for the purposes of Kentucky law, there can be little doubt: the answer is no.

However, in order to prevent my marriage to a woman, Kentucky may be able to recognize my husband and my status as married via a legal fiction. In a recent child custody case, the Court of Appeals overturned a family court’s decision to use the legal fiction that a same-sex couple was married for the purposes of naming one member of the couple a legal stepparent.²⁰ The Court of Appeals found this to be an inappropriate derogation from the very clear meaning of Kentucky’s bans on same-sex marriage.²¹ The court reasoned that a legal fiction so blatantly at odds with the express words of the General Assembly and the Constitution would only have been appropriate if it were necessary to stop an “absurd and unworkable” result from occurring that would be directly at odds with Kentucky public policy.²² No precedent exists to give an idea of whether having a legal marriage in Kentucky while also having a

¹⁶ Op. Att’y Gen. Ky. on State Health Insurance Coverage for Domestic Partners, OAG 07-004, 3 (2007), available at <http://ag.ky.gov/civil/opinions/2007/oag0704.doc> (analyzing whether a state university’s offering of health insurance coverage for “domestic partners” to its employees violates Section 233A of the Kentucky Constitution).

¹⁷ *Id.* at 5.

¹⁸ KY. REV. STAT. ANN. § 402.040(2) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

¹⁹ *Id.* § 402.045(1)–(2).

²⁰ S.J.L.S. v. T.L.S., 265 S.W.3d 804, 816 (Ky. Ct. App. 2008).

²¹ *Id.* at 818.

²² *Id.*

void marriage there that is valid in another state qualifies as an absurd and unworkable result for the purposes of Kentucky's domestic relations law. As such, it is unclear whether a court would allow a legal fiction to be used to recognize my husband and I as married for the purposes of preventing me from having two active marriages, even though one would be void in Kentucky.

Assuming I am not (at least fictionally) a married man under Kentucky law, then I am not anyone's husband there. If I am not anyone's husband, then neither is my husband—his being a married man is conditional on his being married to me, after all. Therefore, under Kentucky's law, I must not have a husband living. So long as the woman I would marry is no more closely related to me than a second cousin,²³ has not been adjudged mentally disabled,²⁴ is over eighteen years of age,²⁵ and—of course—is not married (to a man) herself,²⁶ we should be legally entitled to a Kentucky marriage license.

Applying for a marriage license in Kentucky requires applicants to appear at the relevant county clerk's office,²⁷ pay a fee,²⁸ and fill out a form that includes, among other things, information about the applicant's marital status.²⁹ The form requires the parties to certify that the information they provide on the form is true.³⁰ Were I to fill out this form, I would note that I am currently married in New York to a man. Considering the criminal penalties, including the loss of office, that can be assessed against a county clerk who knowingly issues a license forbidden by Kentucky law,³¹ a county clerk would most likely resolve the doubt in her favor and deny my application for a marriage license in light of the fact that I am a party to another, even if void, marriage. However, presuming a county clerk did issue the license to me, and my marriage were

²³ KY. REV. STAT. ANN. § 402.010(1) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

²⁴ *Id.* § 402.020(1)(a).

²⁵ *Id.* § 402.020(1)(f).

²⁶ *Id.* § 402.020(1)(b).

²⁷ *Id.* § 402.080 (granting power to a county clerk to issue marriage license).

²⁸ KY. REV. STAT. ANN. § 64.012(19) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session) (setting the fee for processing a marriage license).

²⁹ *Id.* § 402.100(1)(b) (requiring each county clerk to use a uniform form that requires the parties' vital information, including marital condition).

³⁰ Commonwealth of Kentucky Marriage License, Meade Cnty. Clerk, *available at* http://countyclerk.meadecounty.ky.gov/NR/rdonlyres/34E65687-7BE5-405D-8A4F-636E01AACA16/0/Marriage_License.pdf.

³¹ KY. REV. STAT. ANN. § 402.990(6)–(8) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

solemnized properly,³² would my legal problems end there?

II. BIGAMY: IS MY PROHIBITED AND VOID MARRIAGE THE BASIS FOR A FELONY?³³

In Kentucky, bigamy is the felony of marrying someone while knowing that one already has a husband or wife.³⁴ The current definition of this crime is most likely an adaptation of the corresponding section of the Model Penal Code.³⁵ An essential element of bigamy, which Kentucky must prove beyond a reasonable doubt, is that the defendant was validly married when the second marriage occurred.³⁶ While some commenters take for granted that this burden to prove a valid predicate marriage would prevent a state with a marriage-defining amendment such as Kentucky's from convicting a bigamist whose first marriage was to a same-sex partner in another state,³⁷ that proposition is not supported by the law.

The logically correct answer is that *husband or wife* as used in the criminal definition of bigamy must be controlled by the same meaning of *marriage* that would control for the invalidity of my New York marriage. How could it be that, if marriage were defined in Kentucky's Constitution and statutes as only a marriage between a man and a woman, the criminal law could recognize an out-of-state same-sex marriage as a valid marriage?

Kentucky criminal law is subject to the canon of construction that its provisions be liberally construed according to "the fair import of their terms . . . and to effect the objects of the law."³⁸ Thus, a court would have an easier time relying on a legal fiction of my New York marriage, of the type discussed above, to contradict the plain meaning of the Kentucky Constitution and statutory regime. However, a court may not even need to fictionalize my marriage, as it would also have a long history of common law rules that support

³² *Id.* § 402.010(1)(c).

³³ Throughout, I use the words *bigamy* or *polygamy* to refer only to crimes so titled by law.

³⁴ KY. REV. STAT. ANN. § 530.010(1)(a).

³⁵ See MODEL PENAL CODE § 230.1 (1962). Kentucky overhauled its criminal law in light of the Model Penal Code effective in 1975. See Paul H. Robinson & Markus Dirk Dubber, An Introduction to the Model Penal Code 5 (Mar. 12, 1999), <https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>. Kentucky's current definition of bigamy became effective on January 1, 1975. See KY. REV. STAT. ANN. § 530.010.

³⁶ *Tharp v. Commonwealth*, 45 S.W.2d 480, 482 (Ky. 1932).

³⁷ *Cook*, *supra* note 8, at 1187–88; *Kanotz*, *supra* note 8, at 461.

³⁸ KY. REV. STAT. ANN. § 500.030 (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

the notion that establishing the validity of a predicate out-of-state marriage is an issue of fact and not an issue of law.

If the predicate marriage for a bigamy prosecution occurred outside the state of prosecution, the validity of the marriage is an issue of fact: All that need be proved is that the marriage in fact took place and that such a marriage is in fact valid under the foreign law.³⁹ While this rule is old, it is still regarded as the valid common law rule by authoritative treatises.⁴⁰ If Kentucky courts adhere to the canon of construction that they are meant to give full effect to the objects of the law, adhering to a well-established doctrine that a foreign marriage need only to have been a valid marriage in the place where it was celebrated would foreclose the defense that the Kentucky Constitution precludes recognition of my same-sex marriage for any purpose, even in a criminal case for bigamy.

However, Kentucky's criminal bigamy statute contains a defense to the charge: the defendant believed he was legally eligible to remarry.⁴¹ This defense specifically includes the belief that the predicate marriage was void.⁴² At common law, this defense was not possible, as it was considered an impermissible mistake of law defense.⁴³ How this defense would work in Kentucky in light of its statutory and constitutional limitations on the definitions of marriage is unclear.⁴⁴

³⁹ *People v. Lambert*, 5 Mich. 349, 363 (1858). Also relevant is *Apkins v. Commonwealth*, 147 S.W. 376, 378 (Ky. 1912), where Kentucky's highest court opined that proof that the predicate Illinois marriage was void under the laws of that state would have been a sufficient defense to an indictment for contracting a bigamous marriage in Kentucky. However, if a valid foreign marriage would be void because the parties were married in the foreign jurisdiction to evade the marriage laws of their domicile, then that marriage could not be the predicate marriage for a bigamy prosecution. *State v. Fenn*, 92 P. 417, 417-19 (Wash. 1907).

⁴⁰ See, e.g., 11 AM. JUR. 2D Bigamy § 4 (2013); 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 232 (15th ed. 2013).

⁴¹ KY. REV. STAT. ANN. § 530.010(2) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session).

⁴² See *id.*, Ky. Crime Comm'n cmt.

⁴³ See *Staley v. State*, 131 N.W. 1028, 1029-30 (Neb. 1911). In *Staley*, the defendant entered into a marriage that was valid in Iowa. He then returned to Nebraska and, after consultation with several lawyers who made him believe that his Iowa marriage would be void in Nebraska, remarried there. His belief that his Iowa marriage was void in Nebraska was no defense to a charge of bigamy, as this was merely a mistake of law defense.

⁴⁴ The most recent reported case noting a bigamy prosecution in Kentucky is *Hollingsworth v. Commonwealth*, No. 2005-CA-001217-MR, 2007 WL 1207118 (Ky. Ct. App. Apr. 20, 2007). Before that, the most recent case was *Carroll v. Commonwealth*, 202 S.W.2d 404 (Ky. 1947), which predates the adoption of this defense to bigamy and it deals with issues surrounding burdens of proof.

III. THE FUNDAMENTAL RIGHT TO OPPOSITE-SEX MARRIAGE:
HOW MUCH CAN KENTUCKY INTERFERE?

Whether I were denied or granted a marriage license to a woman, I might run into legal problems giving rise to a constitutional claim. Could I have a court compel the county clerk to issue me the license? (The denial of a marriage license, at least theoretically, gives rise to a claim for injunctive relief of that nature.⁴⁵) Could I have a court enjoin Kentucky from prosecuting me under its bigamy laws for exercising my fundamental right to marry a woman in these circumstances? At first, it seems these questions would arise under different constitutional theories, but the history of the right to marriage as a constitutional question shows the analysis is much more unified.

Loving v. Virginia,⁴⁶ in which the Supreme Court established the fundamental right to enter into opposite-sex marriages,⁴⁷ was a challenge to the constitutionality of Virginia's criminal prohibitions against its residents entering into interracial marriages in other states.⁴⁸ The Court recognized, as did the Supreme Court of Appeals of Virginia in upholding the law, the white-supremacist policies behind these criminal "evasion" laws for interracial couples were the same as those that held such marriages void for civil purposes.⁴⁹ Of course, *Loving* did not just invalidate criminal marriage evasion statutes as applied to interracial couples: it invalidated the civil prohibitions on interracial marriage that were premised on the same policies and similarly interfered with the fundamental right to enter into opposite-sex marriage. Given this precedent, either the denial of a marriage license or a prosecution for bigamy may be analyzed under the same standard.

Under the Kentucky Constitution, no government official may exercise "arbitrary power" over the "lives, liberty and property of freemen."⁵⁰ The constitution equally guarantees that "no grant of

⁴⁵ This was, after all, the remedy sought in *Jones v. Hallahan*. See 501 S.W.2d 588, 589 (Ky. 1973).

⁴⁶ 388 U.S. 1 (1967).

⁴⁷ *Id.* at 12.

⁴⁸ See *id.* at 2-7.

⁴⁹ The *Loving* Court cites to *Naim v. Naim*, 87 S.E.2d 749 (Va. 1955), where the Supreme Court of Appeals of Virginia held that denying the validity of the North Carolina marriage of a white man and a woman whom the court describes only as "a Chinese" for its miscegenetic character did not violate federal constitutional guarantees of equal protection or due process. *Loving*, 388 U.S. at 7.

⁵⁰ KY. CONST. § 2. See also *Kentucky Milk Marketing & Antimonopoly Comm'n v. Kroger Co.*, 691 S.W.2d 893, 899 (Ky. 1985) (explaining that Article 2's restriction of exercises of arbitrary power binds all public officials exercising their political powers,

exclusive, separate public emoluments or privileges shall be made to any man or set of men.”⁵¹ While these are guarantees of equal protection and due process generally, they also represent substantive rights that go beyond what the federal Constitution recognizes: in fact, Kentucky courts have often been at the forefront of recognizing substantive rights and stopping the Commonwealth from interfering with the lives of its citizens.⁵²

However, in recent years, the Kentucky Supreme Court has held that, in reviewing Kentucky laws for their constitutionality under Kentucky’s equal protection guarantees for denials of a fundamental right, the same rules of constitutional scrutiny that would apply under the relevant federal constitutional law apply in Kentucky.⁵³ In any event, the Kentucky Constitution can guarantee no fewer rights than the federal Constitution.⁵⁴ While all states have a nearly plenary power to determine marital status within their borders, these regulations of marriage must comport with the federal Constitution.⁵⁵

It is axiomatic that the Fourteenth Amendment to the federal Constitution contains a fundamental and individual right to marry one person of the opposite sex.⁵⁶ This right is both a substantive due process right and an associational right under the First Amendment incorporated via the Fourteenth, though the standard of review under either theory is, apparently, the same.⁵⁷ In reviewing a state’s interference with the right to marry one opposite-sex partner under the Fourteenth Amendment, a court must determine whether the interference is a “direct and substantial burden”

and that this provision encompasses a guarantee of due process and equal protection of law).

⁵¹ KY. CONST. § 3. See also *Elk Horn Coal Corp. v. Cheyenne Res, Inc.*, 163 S.W.3d 408, 418–19 (Ky. 2005) (noting that Kentucky’s guarantees of equal protection can require higher scrutiny than similar federal standards because of the breadth of Section 3 and its support in other sections of the Kentucky Constitution).

⁵² For a glowing review of Kentucky’s track record on this issue, see the majority opinion in *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (holding that laws outlawing deviate sexual intercourse were a violation of Kentuckians’ rights against arbitrary power and to equal protection of laws, even if the federal Constitution did not embrace that right).

⁵³ *Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998).

⁵⁴ *Wasson*, 842 S.W.2d, at 492. See also *Maxwell’s Pic-Pac, Inc. v. Dehner*, 887 F. Supp. 2d 733, 752 (W.D. Ky. 2012) (holding that a law that violates the federal Equal Protection Clause would fail Kentucky’s standards for equal protection in Article 3 of the Kentucky Constitution).

⁵⁵ *Windsor*, 133 S. Ct. at 2691.

⁵⁶ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (characterizing marriage as one of the basic civil rights of man and a “fundamental freedom”).

⁵⁷ *Montgomery v. Carr*, 101 F.3d 1117, 1124 (6th Cir. 1996).

on that right to marry.⁵⁸ If the state's interference rises to this level, a reviewing court will presume the interference is unconstitutional "unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."⁵⁹ If the interference does not rise to that level, the interference will only be held unconstitutional if it cannot survive rational basis review.⁶⁰

The Sixth Circuit's conception of a "direct and substantial burden" on the right to marriage is an absolute bar to marriage based on a suspect classification (such as the criminal statute struck down in *Loving*) or where the state places such a financial or legal burden on individuals who wish to marry that they will probably never be able to get married, even if they theoretically could.⁶¹ Thus, mere economic disincentives to marry a particular person or financial burdens incident to being married, such as disqualifications for social welfare or for public employment based on being in or entering into a marital relationship, do not rise to the level of "direct and substantial" burden.⁶²

In my case, the county clerk would have refused to issue my marriage license or I would have been prosecuted for bigamy based on my marital status under New York law. Assuming I were living in Kentucky with my husband and my opposite-sex fiancée, I would not have a right to get a divorce in New York⁶³ or to have my New York marriage dissolved or invalidated by a Kentucky court.⁶⁴

⁵⁸ *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)). In *Zablocki*, Wisconsin forbade anyone who owed money under a child support judgment from being remarried unless the debtor both paid the amount owed and had a court clear the impediment by order. 434 U.S. at 375. The Supreme Court found that restriction interfered directly and substantially with the right to marry. *Id.* at 388–391.

⁵⁹ *Montgomery*, 101 F.3d at 1124. See also *Zablocki*, 434 U.S. at 388.

⁶⁰ *Montgomery*, 101 F.3d at 1124.

⁶¹ *Id.* at 1124–25.

⁶² *Id.* at 1125–26.

⁶³ New York law requires at least a year of continuous residency for one of the parties prior to the commencement of a divorce action of a New York marriage. N.Y. DOM. REL. LAW § 230 (McKinney, WestlawNext through L. 2014, ch. 1 to 2).

⁶⁴ Courts in Kentucky may only grant divorces to married couples. KY. REV. STAT. ANN. § 403.140(1) (West, WestlawNext through the end of the 2013 regular session and the 2013 extraordinary session). The statute provides that a Kentucky circuit court may declare a marriage invalid, or grant an annulment, where "[t]he marriage is prohibited." *Id.* § 403.120(1)(c). While the language of the statute is ambiguous as to whether that includes marriages that are void and prohibited (like a marriage where both parties are of the same sex), the statute is construed to reach such marriages. *Ferguson v. Ferguson*, 610 S.W.2d 925, 927 (Ky. Ct. App. 1980). However, it is not clear whether Kentucky's constitutional and statutory definition of marriage as extending only to relationships where the parties are opposite-sex would control in the applicability of the word *marriage* as used in this jurisdictional statute to exclude my marriage as eligible for this invalidation. Would a court apply the law of New York

Just as in *Zablocki*, where the plaintiffs could only theoretically have cleared the impediment to marriage by paying back money and obtaining a court order, the process of changing my marital status in New York would be so burdensome as to be nearly impossible. My husband and I would have to move to a jurisdiction that recognizes our New York marriage as a marriage for the purposes of obtaining the divorce. We would need to reside there long enough to establish the required residency and to see through the divorce proceedings. This process would require the entire uprooting of our lives in Kentucky and starting new (though perhaps temporary) lives in another state. This process could feasibly take years, and at unknowable costs.

The criminal and civil interferences with my right to marry in Kentucky would be, practically speaking, unavoidable. Unlike economic disincentives to marry a particular person, my case would present a situation where my same-sex marriage, void in the state I am living in and to which no state rights attach, would be all but irreversible, depriving me of the fundamental right to enter into an opposite-sex marriage or attaching severe criminal penalties to my exercise of that right. While it is true that any Kentucky man seeking to marry a woman while he is still legally married to a woman in another state would be expected to get a divorce, I would have no practicable access to divorce as a means to exercise my right to marry a woman like any other Kentucky man can. Thus, *Zablocki* would require that Kentucky's denial of my new marriage license or prosecution of me for bigamy be presumed to violate my constitutional right to opposite-sex marriage, unless Kentucky

to govern the definition of marriage for the limited purpose of granting us an annulment effective in Kentucky? Especially since Kentucky courts are forbidden to give *any* of the rights arising out of marriage "or its termination" to same-sex couples, the answer is even more muddled. *Cf.* KY. REV. STAT. ANN. § 402.045(1). This problem is not limited to Kentucky; several states' provisions limiting the definition of valid marriages to opposite-sex parties may have the effect of keeping same-sex couples, married in another state, from changing their legal status at all. *See generally* Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011); Colleen McNichols Ramais, Note, *'Til Death Do You Part . . . and This Time We Mean It: Denial of Access to Divorce for Same-Sex Couples*, 2010 U. ILL. L. REV. 1013 (2010). At any rate, Kentucky's circuit court jurisdiction for the invalidation of a marriage made prohibited and void by Kentucky law extends only to the parties to the marriage and is limited in time to within a year of the filing party's having learned of the impediment. KY. REV. STAT. ANN. § 403.120(2)(b). Though I have no citation for it, my husband and I learned of each other's being male much longer than a year ago. As such, it seems that we would not be entitled to an annulment in Kentucky regardless of the question of the meaning of *marriage* in the jurisdictional statute.

could show the interference protected sufficiently important state interests and is closely tailored to protect only those interests.

A. *Kentucky's Potential Interests in Preventing an Opposite-Sex Marriage*

As in all heightened constitutional scrutiny analyses, Kentucky would be required to offer reasons for its interference with my right to opposite-sex marriage based on my void-and-unavoidable same-sex marital status.⁶⁵ The Commonwealth would likely offer different arguments from those that same-sex marriage opponents would offer.⁶⁶ After all, I would be trying to marry a woman, not a man. Instead, the Commonwealth's reasons would likely be the arguments that are used to justify the prohibitions on plural marriage as a restriction in opposite-sex marriage.

In recent cases, state and federal courts have reviewed prohibitions on plural marriage for their constitutionality under various theories.⁶⁷ All of these cases start from the premise that the Supreme Court has ruled, and regularly affirmed, that Congress's prohibition of plural marriage in the territories of the United

⁶⁵ See Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359 (2006).

⁶⁶ Such arguments are well known, and they seem to mostly focus on the protection of the definition of marriage and promotion of procreation. See, e.g., *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1, 16–17 (N.Y. 2006); *Andersen v. King Co.* 138 P.3d 963, 981–83 (Wash. 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 22–25 (Ind. Ct. App. 2005); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 221 (N.J. 2006).

⁶⁷ *Bronson v. Swensen*, 500 F.3d 1099, 1110–13 (10th Cir. 2007) (holding that parties seeking to compel the issuance of a marriage license for a plural marriage did not have standing to challenge Utah's criminal bigamy statute because they could not establish the license would insulate them from prosecution); *Potter v. Murray City*, 760 F.2d 1065, 1070 (10th Cir. 1985) (finding a "network" of Utah laws based on monogamy and the deep tradition of monogamy in American society as compelling state interests to limit plural marriage); *State v. Holm*, 137 P.3d 726, 742–45 (Utah 2006), *cert. denied*, 549 U.S. 1252 (2007) (holding that Utah's criminalization of leading a plural-married life while only being legally married to one spouse was supported by compelling interests); *State v. Green*, 99 P.3d 820, 829–30 (Utah 2004) (refusing to review Utah's bans on plural marriage under strict scrutiny because those claims were not properly pleaded, but upholding those bans under rational basis review); *State v. Fischer*, 199 P.3d 663, 666–70 (Ariz. Ct. App. 2008) (holding that a defendant was not denied constitutional rights when he had not been entitled to the spousal defense in a proceeding for statutory rape on the theory that the girl he had had sex with was his celestial wife based on their plural marriage); *but see Brown v. Buhman*, 947 F. Supp. 2d 1170, 1217–25 (D. Utah 2013) (holding that Utah's prohibition on merely purporting to be married to multiple people was a facial violation of the Free Exercise Clause and the substantive due process right described in *Lawrence v. Texas*). These cases show state-interest reasoning that flows from both the First and Fourteenth Amendments.

States was not violative of the federal Constitution.⁶⁸ Even in the *Zablocki* opinion, the Court tends to agree that a state can legitimately outlaw plural marriages.⁶⁹

The various reasons the Supreme Court gives to prohibit plural marriage in *Reynolds v. United States* include that this restriction vindicates a longstanding tradition in Anglo-American law against permitting plural marriage, that plural marriage causes patriarchal despotism incompatible with American civil society, and that plural marriage is more suited to “African” and “Asiatic” life.⁷⁰ In *State v. Green*, the Supreme Court of Utah analyzed and approved the state’s putatively compelling reasons for outlawing plural marriage: the vast network of legal rights premised on monogamous marriage,⁷¹ preventing marital fraud and misuse of state benefits associated with marriage,⁷² and protecting “vulnerable individuals” (women and children) from “[c]rimes not unusually attendant to

⁶⁸ *Reynolds v. United States*, 98 U.S. 145, 166 (1878); see also *Potter*, 760 F.2d at 1069–70 (showing how frequently the Court has affirmed *Reynolds*). Congress would proceed not only to criminalize plural marriages in the territories, but would go on to enact laws that stripped the Church of Latter-Day Saints of its corporate status and seized its property. See *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 66 (1890) (upholding the statute). After the Church abandoned plural marriage as a tenet of the faith, Congress returned the property it had seized to the Church. See S. REP. NO. 95-1275, at 2 (1978). The federal bans on plural marriage were repealed in 1978. Act of Nov. 2, 1978, Pub. L. No. 95-584, 92 Stat. 2483. Congress repealed its criminal bans on plural marriage as part of repealing the law that allowed for seizures from churches in the territories because, as the sponsors of the repeal argued, those laws were “antiquated and constitutionally suspect.” 124 CONG. REC. 23816, 23895 (1978) (statement of Sen. Dennis DeConcini). The Office of the Solicitor for the Department of the Interior even opined that the Supreme Court might find these laws unconstitutional because Congress had clearly put them forward only to harm Mormons and had stopped enforcing the law since the Church disavowed plural marriage. S. REP. NO. 95-1275, at 6–7 (1978). However, the Committee on Energy and National Resources clarified in approving the repeal of the laws criminalizing plural marriage federally that it did not intend to express a lack of support for such bans generally. *Id.* at 3. Concordantly, regulations from the Bureau of Indian Affairs still prohibit and void any marriages that are celebrated before the dissolution of either party’s former marriage. 25 C.F.R. § 11.603(1)(a) (2013). However, tribes may use their powers to regulate domestic relations to permit marriages made void by this regulation. Law and Order on Indian Reservations, 58 Fed. Reg. 54406, 54409 (Oct. 21, 1993).

⁶⁹ “Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife.” *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring). However, on the same page, Justice Stewart disagreed with the majority that there was a constitutional right to marriage, calling it a privilege. *Id.*

⁷⁰ *Reynolds*, 98 U.S. at 164–66.

⁷¹ 99 P.3d at 830.

⁷² *Id.*

the practice of polygamy,” including incest, sexual assault, statutory rape, and failure to pay child support.⁷³ Two years later, the same court, in light of *Lawrence v. Texas*,⁷⁴ upheld Utah’s criminal ban on living as though married to multiple partners, citing the compelling interest of protecting minors from exploitation and protecting the public institution of marriage from private behavior that would harm it.⁷⁵

Courts have moved away from the bare assertions in *Reynolds* that plural marriage’s African, Asiatic, and despotic characteristics were enough to justify banning it, advancing toward a less moralistic—and more compelling—analysis focused on protecting women, children, and marriage itself.⁷⁶ But does this shift represent a genuine change in policy and reasoning behind these bans?

This change in analysis occurs, maybe coincidentally, after the establishment of the constitutional principle that a mere moral aversion or a simple desire to cause harm to a group are no longer recognized as valid state interests.⁷⁷ Dictum from the *Windsor* case even implies that protecting the definition of marriage itself is not a legitimate governmental interest, because it manifests a bare desire to harm a particular group based on moral aversion.⁷⁸ Recent

⁷³ *Id.* Here, the court cites to Richard A. Vazquez, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U.J. LEGIS. & PUB. POL’Y 225, 239–45 (2001). Mr. Vazquez takes the position that courts have done an “unsatisfactory job” of establishing that the state has a compelling interest in limiting plural marriage and should move away from moralistic arguments toward arguments about protecting women and children. *Id.* at 253.

⁷⁴ 539 U.S. 558 (2003).

⁷⁵ *State v. Holm*, 137 P.3d 726, 742–45 (Utah 2006). The Utah Supreme Court noted that these were two legitimate interests in limiting consensual sexual behavior specifically recognized by the U.S. Supreme Court in *Lawrence*.

⁷⁶ *See cf. Vazquez, supra* note 73.

⁷⁷ This principle, established in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), can be generally stated as a “bare congressional desire to harm” a particular group in exercising its rights is not a legitimate governmental interest, even under the low standards of rational basis review. *Id.* at 534–35. This doctrine has been applied to strike down laws that rest on “irrational” prejudices. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (invalidating a zoning ordinance that was suspected of resting on a bare desire to harm and exclude people with intellectual disabilities). The doctrine protects against state statutes that single out a particular minority group for broad legal disabilities. *Romer v. Evans*, 517 U.S. 620, 632 (1996). It has been extended to insulate private, consensual sexual relationships between adults from criminal laws founded only on moral disapproval of those relationships and the people most likely to engage in them. *Lawrence*, 539 U.S. at 583. It now also applies where Congress’s intent in passing a law is to harm a group based on moral disapproval of the exercise of one of its rights under state law. *Windsor*, 133 S. Ct. at 2693–94.

⁷⁸ *Windsor* uses evidence that the House of Representatives’ legislative intent in-

scholarship, even when it argues contra plural marriage recognition and decriminalization, details a history demonstrating that American prohibitions on plural marriage were strengthened, or even adopted, in order to express moral opposition to plural marriage and harm groups who practiced it.⁷⁹ In fact, much like the climate of suppressing same-sex marriages behind the Defense of Marriage Act a century later,⁸⁰ Congress's 19th-century assertion of its right to regulate some aspects of the family, despite the traditional state-law character of that body of law, was explicitly borne of the desire to eradicate the Mormon practice of plural marriage to safeguard the institution of marriage and an amorphous concept of national virtue.⁸¹

To no small extent, this idea of national virtue revolved around protecting what a moral American (i.e., white and Christian) life looks like from the perceived threat of multiculturalism.⁸² In refusing to recognize a validly celebrated out-of-state miscegenetic marriage, when such a marriage would be void under its law, the Tennessee Supreme Court famously ruled that to do otherwise could leave Tennessee in a situation where "[t]he Turk or Mohamadan, with his numerous wives, may establish his harem at the doors of the capitol," calling such a situation "revolting" and "un-

cluded the protection of traditional marriage from "homosexual couples" and their efforts to redefine marriage to sustain the Court's proposition that the Defense of Marriage Act's definition of marriage was adopted with inimical intent to harm same-sex couples who were validly married under state law. 133 S. Ct. at 2693.

⁷⁹ See Catherine Blake, Case Note, *I Pronounce You Husband and Wife and Wife and Wife: The Utah Supreme Court's Re-Affirmation of Anti-Polygamy Laws in Utah v. Green*, 7 J.L. & FAM. STUD. 405, 412-13 (2005); Cassiah M. Ward, Note, *I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America*, 11 WM. & MARY J. WOMEN & L. 131, 135-38 (2004); see also Vazquez, *supra* note 73, at 227-32.

⁸⁰ The parallels between, and the possibility of distinguishing, the moral disapproval of same-sex marriage and plural marriage led to much ado at the time of the passage of the Defense of Marriage Act. David L. Chambers, *Polygamy and Same-Sex Marriage*, 26 HOFSTRA L. REV. 53, 55-60 (1997).

⁸¹ Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1357-65 (1998).

⁸² *Reynolds* itself corroborates this with its focus on the "African and Asiatic" nature of plural marriage, which was a practice "odious" to countries in Europe's north and west, in holding that Mormon plural marriage was a major deviation from the well-established norms of Anglo-American society not worth protecting constitutionally as a religious practice. 98 U.S. at 164-65. Congress seemed to agree when it passed its ban on plural marriage in the territories in 1862, arguing just two years earlier that the Framers of the Constitution "surely . . . never intended that the wild vagaries of the Hindoo or the ridiculous mummeries of the Hottentot should be ennobled" by the protection of the constitutional guarantee of freedom of religion. H.R. REP. NO. 83, at 2 (1860).

natural.”⁸³ Plural marriage “was natural for people of color, but unnatural for White Americans of Northern European descent” being white and plurally married was to become non-white.⁸⁴

By contrast, state and federal governments as a matter of course recognized plural marriages as valid for both state and federal law purposes when they were validly contracted among Native Americans on their tribal lands in accordance with tribal customs, even when they would not recognize plural marriages occurring in other nations among those who later took up residence in the United States.⁸⁵ Courts also found ways to deal with the rights emanating from validly contracted plural marriages—so long as no one had to suffer the affront of normalized non-monogamous cohabitation.⁸⁶ Thus, while states and the federal government railed against recognizing plural marriages, they found ways to handle the occasional plural marriage and accorded rights to all the parties to it, so long as it was properly confined and could not pose a threat to public morals by seeming, for lack of a better word, normal.

The *Reynolds* Court found that criminalization and restriction of plural marriage in America vindicated the Anglo-American moral tradition preexisting the adoption of the federal Bill of Rights.⁸⁷ The European history of the criminalization of bigamy, which flipped between a civil (i.e., criminal) and ecclesiastical offense, gives insight into the original moralizing function of those laws.⁸⁸ Bigamy became a civil offense in England and the United

⁸³ *State v. Bell*, 66 Tenn. 9, 11 (1872). (To be fair, the court was characterizing plural marriage as revolting and unnatural along with interracial and incestuous marriage.) Whether the court conceived of “Turks” and “Mohammedans” as white is difficult to say. John Tehranian, *Compulsory Whiteness: Towards a Middle-Eastern Legal Scholarship*, 82 IND. L.J. 1, 3 (2007), discusses the “catch-22” of the simultaneous whiteness and racial othering that characterizes the Middle-Eastern and Arab experience in America much better than I ever could.

⁸⁴ Martha M. Ertman, *Race Treason: The Untold Story of America’s Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 289 (2010).

⁸⁵ See Mark P. Strasser, *Tribal Marriages, Same-Sex Unions, and an Interstate Recognition Conundrum*, 30 B.C. THIRD WORLD L.J. 207, 207–29 (2010).

⁸⁶ Common law courts all over the world, even in the United States, recognized that so long as the plurally married foreigner (who is assumed to be non-white) were merely passing through, and the public policy of the state were not burdened by the prolonged cohabitation of the members of the multiparty marriage, or so long as the marriage’s validity were limited to rights like succession, then there should be no reason to hold the marriage invalid. See the discussion in *In re Dalip Singh Bir’s Estate*, 188 P.2d 499, 500–02 (Cal. Dist. Ct. App. 1948).

⁸⁷ *Reynolds v. United States*, 98 U.S. 145, 164–65 (1878).

⁸⁸ The Supreme Court offered a lengthy and detailed discussion of the history of bigamy and polygamy as criminal offenses in medieval Spain and the Spanish possessions that would later become Louisiana in *Gaines v. Hennen*, 65 U.S. 553 (1860), which shows the political tensions inherent in morphing bigamy and polygamy from

States after long having been converted into only an ecclesiastic offense.⁸⁹

A similar history of an ecclesiastic offense becoming civil was relied on by the Supreme Court in its 1986 decision upholding Georgia's criminal law against sodomy, *Bowers v. Hardwick*.⁹⁰ In overturning *Bowers*, the Supreme Court called into doubt that long-standing history as it related to restricting only sex among queer people, and stated that, even if the historical reality were as the *Bowers* opinion described, a long history did not make sodomy bans constitutional as applied to consensual queer sex between adults.⁹¹ In doing so, Justice Kennedy quoted the Supreme Court's decision in a case protecting the right to abortion: "Our obligation is to define the liberty of all, not to mandate our own moral code."⁹²

Tellingly, since the fervor of 19th-century anti-Mormonism has waned, so have prosecutions for living in plural marriage, with government officials focusing on fighting the other crimes stereotypically associated with communities where plural marriage is common.⁹³ The Senate Judiciary Committee recently reviewed evidence of the crimes "not unusually attendant to the practice of" plural marriage in the American West cited by the *Green* court as a valid reason to limit marital rights, yet no one suggested the family form itself, rather than the isolation inherent to certain fundamentalist Mormon communities, is responsible for their supposed criminality.⁹⁴

In short, there seems to be little justification to keep one person from having multiple marriages other than to protect monogamous marriage by expressing moral disapproval of other family

canonical heresies (tried by the Inquisition along with such abominable acts as sorcery, Judaism, and Mahomedanism) to civil crimes. *Id.* at 580–88.

⁸⁹ *Reynolds*, 98 U.S. at 164–65. In fact, the English statute transforming bigamy into a civil crime, referred to in *Reynolds* as adopted in 1788 by the legislature of Virginia, may have been Kentucky's original law on bigamy, given that when Kentucky became independent of Virginia in 1792, it adopted all general Virginia laws that were not inconsistent with its new constitution. See An Act Concerning the Erection of the District of Kentucky into an Independent State (Approved Dec. 18, 1789), *Compact with Virginia*, KY. CONST. art. VIII § 6 (1792).

⁹⁰ See 478 U.S. 186, 196–97 (1986) (Burger, C.J., concurring).

⁹¹ *Lawrence v. Texas*, 539 U.S. 558, 567–73 (2003).

⁹² *Id.* at 571; *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion).

⁹³ Jaime M. Gher, *Polygamy and Same-Sex Marriage - Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 578–80 (2008).

⁹⁴ See *Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response: Hearing on S. 3313 Before S. Comm. on the Judiciary*, 110th Cong. 5–8 (2008) (statement of Sen. Harry Reid) (quoting *State v. Green*, 99 P.3d 820, 830 (Utah 2004)).

types.⁹⁵ Given the history of barring plural marriage as both an impediment to marriage and a crime to express moral disapproval for non-monogamy, to restrain specific religious practices, and to promote a majoritarian view of what constitutes proper civilized culture, a state might have difficulty in sustaining, under a purely legal analysis, that it has any bona fide, constitutionally permissible interests in maintaining restraints on plural marriage.⁹⁶

However, as the Utah cases demonstrate, courts—for whatever reason—have not yet been receptive to that analysis. The principles in *Windsor* expand language in *Lawrence* about the illegitimacy of moral disapproval as a government interest by applying it directly to marriage. Despite this fact, it seems unlikely that a court would find that there is not some sufficiently important governmental interest stemming from the prohibition on plural marriage to keep me from exercising my right to marry a woman. As such, Kentucky might be able to clear this hurdle.

B. The Relationship Between Kentucky's Interests and Its Interference

Though Kentucky might be found to have a sufficiently important interest in protecting against plural marriages to sustain its ban on that practice generally, denying marriage licenses to those who are in marriages void under Kentucky law, or prosecuting them for bigamy, would have to be closely tailored to give effect to only those interests. Tactically, because I am only looking for the narrow relief of ensuring that I have a right to marry a woman and not seeking to invalidate bans on plural marriage totally, I would focus on challenging the state's actions as applied to my case.⁹⁷ In *State v. Green*, the Utah Supreme Court was eager to point out how Utah's interests in preventing the "crimes not unusually attendant to" the practice of plural marriage were vindicated in prosecuting the defendant. The court noted that Green's conviction for bigamy

⁹⁵ Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 429–31 (2003).

⁹⁶ See Stephanie Forbes, Comment, "Why Just Have One?": An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause, 39 HOUS. L. REV. 1517, 1540–47 (2003); James Askew, Note, *The Slippery Slope: The Vitality of Reynolds v. U.S. after Romer and Lawrence*, 12 CARDOZO J.L. & GENDER 627, 647–51 (2006).

⁹⁷ As-applied challenges allow courts to give narrow relief, which may be better suited to a strange case about the right to marry in an environment dominated by the Roberts Court's perceived preference for a limited role for the judiciary. See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 796–98 (2009); see generally Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009).

accompanied convictions for rape of a child and nonpayment of child support.⁹⁸ The court further noted the levels of incest present in Green's marriages.⁹⁹ To keep Green from having the constitutional right to be married to multiple women, in his case, clearly vindicated Utah's interests in limiting plural marriage in the first place by protecting women and children from criminalities the court posited are associated with plural marriage.

However, no such facts would exist in my case. I would not be asking for the right to have multiple, concurrent marriages recognized as valid in Kentucky. I would not be seeking to live on a separatist compound with multiple, consanguineous wives under the age of consent. The only right I would be asking for is to have one marriage to a woman under Kentucky law, like any other Kentucky man whom the state deems unmarried has a right to have. There is no rational relationship, much less a closely tailored relationship, to vindicating a state's interest in preventing the exploitation of women and minors in such a situation.

My case also lacks any concern about wasting state benefits or implicating a state's potentially compelling interest in maintaining a vast network of laws predicated on monogamy.¹⁰⁰ Kentucky would not have to accord any rights to my New York marriage to my husband; the only rights and obligations arising from marriage would be from my Kentucky marriage to a woman. I would not be able to defraud the state from benefits or abuse state rights stemming from multiple marriages as the Utah court presumed that Green might.¹⁰¹ Kentucky's interests in keeping any wide swath of benefits it might suppose only belong to monogamous couples would not be threatened by my asking to have access to those benefits for only one marriage.

The only perhaps sufficiently important interest to be vindicated by denying me a marriage is to protect the traditional meaning of marriage as a monogamous institution. Even that reason would fail in this case, however, because I would not be validly married to two people. Under Kentucky law, I would only be validly married to one woman. Especially since I am not arguing that Kentucky must recognize both marriages, but only that it must recognize the type of marriage I am entitled to contract under Kentucky law and which is recognized under federal constitutional law as a

⁹⁸ *Green*, 99 P.3d at 830 n.14.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 830.

¹⁰¹ *Id.*

fundamental right, Kentucky does not advance its interests in defending traditional, opposite-sex, monogamous marriage by refusing to allow me to enter into one. While the state may want to keep me from having concurrent marital relationships as a means of protecting traditional morality about what marriage looks like, *Windsor* promotes the argument that the government has no legitimate interest in protecting and promoting one definition of marriage for only that reason.¹⁰² Denying me a marriage license to enter into, or punishing me for entering into, an opposite-sex, monogamous marriage does not advance the types of interests that, based on prior cases, Kentucky is likely to put forth in interfering with my fundamental right to opposite-sex marriage.

CONCLUSION: WHY DO THESE QUESTIONS MATTER?

Despite the weight of the legal analysis, I cannot say with confidence that any court would go along with my plan to marry a woman in Kentucky. Even with all the law on my side, a court would probably find a way to allow Kentucky to interfere with my fundamental right to marry a woman based on a marriage to a man that it would otherwise refuse to recognize. Such was the state of the fundamental right to marry when *Windsor* was handed down.¹⁰³

¹⁰² Cf. *United States v. Windsor*, 133 S. Ct. 2675, 2693–96 (2013).

¹⁰³ Of course, in the time since I wrote this Note on conflict of laws on marital status in July 2013, a lot has happened in the world of same-sex marriage recognition. Federal courts in Illinois, Ohio, Virginia, Oklahoma, and Utah have all decided, citing to *Windsor*, that state refusals to recognize or grant same-sex marriages are unconstitutional. See *Bostic v. Rainey*, No. 13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014) (applying facially to any Virginia law, the Commonwealth's constitution included, which bars granting or recognizing same-sex marriages); *Bishop v. United States ex rel. Holder*, No. 04-CV-848-TCK-TLW, 2014 WL 116013 (N.D. Okla. Jan. 14, 2014) (applying to all enforcement of the Oklahoma Constitution's same-sex marriage amendment, which limited marriages to opposite-sex couples); *Obergefell v. Wymyslo*, No. 13-CV-501, 2013 WL 6726688 (S.D. Ohio Dec. 23, 2013) (as applied to Ohio's refusal to recognize valid out-of-state marriages between same-sex couples on state death certificates); *Kitchen v. Herbert*, No. 13-CV-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013), *judgment stayed pending appeal*, *Herbert v. Kitchen*, 134 S. Ct. 893 (Jan. 6, 2014) (striking down Utah's Amendment 3, which prohibits same-sex marriage); *Lee v. Orr*, No. 13-CV-8719, 2013 WL 6490577 (N.D. Ill. Dec. 10, 2013) (allowing class of terminally ill patients to marry their same-sex partners earlier than the effective date of the statute permitting same-sex marriage by issuing preliminary injunctive relief); *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918 (N.D. Ill. Dec. 5, 2013) (same as *Lee*, but as applied to only one same-sex couple where one partner was terminally ill); *Obergefell v. Kasich*, No. 13-CV-501, 2013 WL 3814262 (S.D. Ohio July 22, 2013) (as applied to the state's refusal to recognize legal same-sex marriages from other states to denote a surviving spouse's marital status on a death certificate). Yes, even Kentucky's restrictions on marriage have been invalidated by a federal court in a way that could, if the case is upheld on appeal, completely render this Note meaningless much sooner than

Nevertheless, analogy shows that it is critical that we as legal technicians interrogate and flesh out these seemingly silly questions about the limits of our fundamental rights. Determining the “essentials” of the sport of golf for the purposes of accommodating people with disabilities seemed “silly” to Justice Scalia.¹⁰⁴ His dissent in that case has been characterized as outraged at the fact that the Supreme Court was being asked to figure out how to accommodate people with disabilities in a competitive sport under the Americans with Disabilities Act.¹⁰⁵ Justice Scalia’s opinion reflects a deep, ableist privilege: it is silly for people who can play golf without accommodation to reflect on how to include those who need it.

Straight married couples all over the United States have centuries of case law, endless statutes and regulations, and a wealth of cultural and historical knowledge that map out exactly what their marriages, celebrated in one state, mean in another state. Of all the privileges that inhere to living a straight life, one of them is knowing that moving to another state does not put one’s legal rights into limbo. Queers do not share that privilege. While the questions covered in this analysis might seem silly, figuring out what the limits of our fundamental rights are, as they are in a state of flux, has never been more important.

I had hoped. See *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014) (deciding, just in time for Valentine’s Day, that Kentucky’s refusal to recognize valid out-of-state same-sex marriages—such as mine—violates the Fourteenth Amendment). See also David S. Cohen & Dahlia Lithwick, *It’s Over: Gay Marriage Can’t Lose in the Courts*, SLATE (Feb. 14, 2014, 10:43 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/02/virginia_vs_gay_marriage_ban_ruled_unconstitutional_a_perfect_record_for_single.html (providing an accessible run-down of the changes *Windsor* has brought to the constitutional discussion in case law of same-sex marriage in America). As Judge John G. Heyburn II pointed out: “[S]ometime in the next few years at least one other Supreme Court opinion will likely complete this judicial journey.” *Bourke*, 2014 WL 556729, at *12. However, we can be certain that questions of marital status, marriage recognition, and the legal doctrines surrounding the family will continue to evolve long past the time when I am considered married in Kentucky.

¹⁰⁴ See *PGA Tour v. Martin*, 532 U.S. 661, 700 (2001) (Scalia, J., dissenting).

¹⁰⁵ Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 13005 (2003).