

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

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

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

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Kairos is shown as young, floating on air in a circuitous path. He was the spirit of opportune moments—of possibilities.<sup>2</sup> Thus, the concept of *kairos* in rhetoric centers on the opportune moment or the “right time and place.”<sup>3</sup>

The “opportune moment” concept of *kairos* has been part of rhetoric since the time of Aristotle, who took the view that the moment in time in which an argument was delivered dictated the type of rhetorical devices that would be most effective.<sup>4</sup> The sophists took a different view: *Kairos* is something to be manipulated by the speaker as part of adapting the audience’s interpretation of the current situation. *Kairos* assists the speaker in molding the persuasive message the speaker is communicating.<sup>5</sup> Modern rhetoricians hold a middle view—that a speaker must be inventive and fluid because there can never be more than a contingent management of a present opportunity.<sup>6</sup>

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

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

1. Our image of Father Time, although several paintings and sculptures depict Chronos with wings.

2. See, e.g., Francesco Salviati, *Kairos* (1552-1554) (fresco); CALLISTRATUS, DESCRIPTIONS 6 (Arthur Fairbanks trans., Harvard Univ. Press 1931) (circa fourth century CE), <http://www.theoi.com/Text/Callistratus.html> (describing a Fourth Century B.C.E. bronze statue of Kairos by Lysippus standing at Sicyon as “resplendent with the bloom of youth” and reddening cheeks).

3. Carolyn R. Miller, *Kairos in the Rhetoric of Science*, in *A RHETORIC OF DOING: ESSAYS ON WRITTEN DISCOURSE IN HONOR OF JAMES L. KINNEAVY* 310, 312-13 (Stephen P. Witte, Neil Nakadate & Roger D. Cherry eds., 1992).

4. James Kinneavy & Catherine Eskin, *Kairos in Aristotle’s Rhetoric*, 17 *WRITTEN COMM.* 432, 436-38 (2000).

5. ERIC CHARLES WHITE, *KAIRONOMIA: ON THE WILL-TO-INVENT* 14-15 (1987).

6. *Id.* at 13.

the temporal. But, the second half of the definition—the opportunity—is spatial.<sup>7</sup> To seize the opportunity at the right time requires one to be in the right place and under the right circumstances—including those of the situation and those of the actor. Rhetoricians commonly use visualizations of the penetrable openings needed for both the successful passage of the arrows of archery through loopholes in solid walls, and the productive shuttles of weaving through the warp yarns in fabric, as a way to describe the spatial aspect of *kairos*.<sup>8</sup> Modern rhetoric takes these metaphors and elaborates, defining *kairos* as “a passing instant when an opening appears which must be driven through with force if success is to be achieved.”<sup>9</sup> The idea is one of force and power.

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

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

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

It is fair for readers to know up front that the New Jersey Supreme Court ultimately denied certification in the matter.<sup>10</sup> So,

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7. Miller, *supra* note 3, at 313.

8. *Id.*

9. *Id.*

10. *D.N. v. K.M.*, 83 A.3d 825, 826 (N.J. 2014).

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

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

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

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

12. Miller, *supra* note 3, at 313.

missed target—all is not lost because the spirit Kairos is not confined to Chronos' linear path, but may reappear at the same location again. For that reason, Professor Linda Berger has suggested that the temporal and spatial metaphors may still be useful. What may look like missed opportunity may still have yielded enough success to snag a thread in the weave that can later be pulled to unravel the existing fabric of the social sky when the moment is right and the opportunity next presents itself.<sup>13</sup> And, that is precisely what has happened in the case of these three third-year law students and their brief filed as amici curiae. They created initial stray threads in the fabric of existing New Jersey domestic violence law that can be tugged in the future.

### I. THE RIGHT WRITERS: MEET THE THREE 3LS

The combined energy and skill set of these three students were critical components to the strategy and persuasion of this amicus brief. Had this been a different group of students, the project very likely would have ended over a cup of coffee. But all three of the students were among the most academically successful students in their class, balancing doctrinal knowledge and client-centered writing competency. They had law journal, law firm, and judicial internship experiences to draw upon. They studied persuasion theory and some rhetoric in their second year of law school as part of an experimental overhaul of our intramural moot court program.<sup>14</sup> Coincidentally—if one believes in coincidences—the moot court simulation that the students wrote about and argued was set in the New Jersey Supreme Court and explored aspects of state and federal guarantees of the right to a fair trial. In their third year, these students served as teaching assistants to the selected students in the second

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13. See Linda L. Berger, *Creating Kairos at the Supreme Court: The Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS (forthcoming 2015) (manuscript at 7) (on file with author). Part of this metaphor was relayed at Professor Berger's presentation on the same topic at the Fourth Biennial Applied Legal Storytelling Conference. Linda Berger, Professor, William S. Boyd Sch. of Law, Presentation at the Fourth Biennial Applied Legal Storytelling Conference at the City University Law School (July 2013) (materials on file).

14. The fall semester course was based on the course created by Michael R. Smith in his textbook, MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* (2d. ed. 2008), combined with other readings on persuasion and rhetoric written by legal writing and clinical scholars.

year of the program.<sup>15</sup> In short, these three students were among the most prepared the law school could offer in terms of written advocacy capabilities. Beyond that, each of the students brought other knowledge bases to the project.

- **Logan Elliott Pettigrew** worked on a pro bono amicus brief at a law firm between his second and third years of law school. His legal research skills were particularly well honed for someone at his level, described by one of the firm's partners as "uncanny."<sup>16</sup> Among his peers and the clinical faculty, Mr. Pettigrew was also well-known for his work ethic, his writing, and his attention to procedural details. He volunteered in several administrative capacities in the law school, including in the admissions department, and he served as a student representative at recruitment fairs where very few law students were present. For reasons explained below, the recruitment of students was of particular and critical significance in the 2012–2013 academic year at Rutgers–Camden.
- **Mark Gulbranson** interned between his second and third years of law school for a Superior Court judge assigned to the Family Part, and as a result witnessed over one hundred domestic violence trials. In one of his law school courses, Mr. Gulbranson wrote a brief set in New Jersey domestic violence law.<sup>17</sup> These experiences gave him a foundation in many of the documents used by the courts in domestic violence, including a procedure manual and directives. Mark also had a special interest in the art and form of writing and had moved beyond the often-rigid paradigms of first-year students by the fall of his second year when his fluid style took shape.
- **Mark Natale** was passionate about civil rights and during interviews for this Article remained so. He was the person most invested, initially, in the merits of the issues and inspired everyone else to become so. Mr. Natale excelled in his trial-advocacy course and thought like a trial attorney, something that became important knowledge to draw upon as he wrote his section of the legal argument. In his second year of law school,

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

16. Comment made by Barbara Gotthelf in her thanks, Barbara K. Gotthelf, *The Lawyer's Guide to Um*, 11 LEGAL COMM. & RHETORIC: JALWD 1, 1 n.\* (2014).

17. His first-year legal writing course (i.e., using a simulation trial transcript and exhibits that I wrote or created).

Mr. Natale and his moot court partner (Mr. Pettigrew) had won the oral argument competition in the law school's intramural moot court program.

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

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

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

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18. Students in the class published seven expanded issues of the main law journal *in one year* to cure a backlog of almost three volumes; started a 501(c)(3) pro bono program; and worked on more high-stakes matters and wrote more briefs in the clinical programs than the clinicians could keep up with when it came time to select honors at graduation.

Brunswick.<sup>19</sup> Not known for hesitation, Governor Christie announced this would all happen by the end of the legislative term and that Rutgers–Camden would be merged with Rowan at that time.<sup>20</sup> There was no warning on the Rutgers–Camden campus leading to this announcement: It was a thunderbolt to staff and the student body alike. As the story unfolded, it appeared that the Rutgers University president had resigned himself to this plan<sup>21</sup> and that legislators in our own county were falling into line with the Democratic leaders even though the net effect could economically hurt the county. What followed was a decision by the Rutgers–Camden chancellor to fight this announcement, and six months of grassroots campaigning, legal research, editorials, campaigning, and the retention of a nationally known attorney to represent the University Trustees who also opposed the action. During this time, there was a great deal of uncertainty about the future of the campus.<sup>22</sup> The law school's national reputation was in particular jeopardy, and admissions plummeted dramatically.<sup>23</sup> Faculty and students fielded constant questions about the merger, and many people thought it had already taken place. All of this contributed to members of the Class of 2013's commitment to proving they were still students of national caliber.

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19. See Press Release, Chris Christie, Governor, New Jersey, Governor Chris Christie Outlines Blueprint to Transform Medical Education in the State and Make New Jersey a National Leader (Jan. 25, 2012), <http://www.state.nj.us/governor/news/news/552012/approved/20120125b.html>. Other news agencies also covered the story of the press conference. See, e.g., Geoff Mulvihill, *Christie Seeks Rowan Takeover of Rutgers-Camden*, NBC PHILA. (Jan. 25, 2012, 12:41 PM), <http://www.nbcphiladelphia.com/news/local/Christie-Seeks-Rowan-Takeover-of-Rutgers-Camden-138053583.html>; Mark J. Magyar, *Christie Calls for Restructuring of Research Universities*, NJ SPOTLIGHT (Jan. 26, 2012), <http://www.njspotlight.com/stories/12/0126/0025/>.

20. See Kevin Riordan, *Christie Fast-Tracking Rutgers-Rowan Merger?*, PHILLY.COM (Oct. 17, 2012, 9:32 AM), <http://www.philly.com/philly/blogs/inq-bling/Fast-track-for-Rowan-Rutgers-merger.html>; *Gov. Christie Says Rutgers-Camden Will Lose Its Name When It Merges with Rowan University*, PRESS ATLANTIC CITY.COM (Apr. 11, 2012, 7:59 PM), [www.pressofatlanticcity.com/news/breaking/gov-christie-says-rutgers-camden-will-lose-its-name-when/article\\_320d1d8c-8432-11e1-9720-001a4bcf887a.html](http://www.pressofatlanticcity.com/news/breaking/gov-christie-says-rutgers-camden-will-lose-its-name-when/article_320d1d8c-8432-11e1-9720-001a4bcf887a.html).

21. See Perry Dane, Allan R. Stein & Robert F. Williams, *Saving Rutgers–Camden*, 44 RUTGERS L.J. 337, 340–41 (2014).

22. See *id.* at 356–72.

23. See *id.* at 355. The law school received only 25% of the applications it normally would have received during that year. Even with the downturn in law school applications nationwide, this was unprecedented and was attributed to the uncertainty caused by the announcement. The numbers stabilized the following year.

## II. THE RIGHT CIRCUMSTANCES: THE DOMESTIC VIOLENCE RESTRAINING ORDER HEARING SYSTEM IN NEW JERSEY

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

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

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24. N.J. STAT. ANN. §§ 2C:25-17 to -35 (West 2015).

25. § 2C:25-29.

26. § 2C:25-28.

27. § 2C:25-28(f)-(j).

28. N.J. CT. R. 5:5-1 (West 2015).

the hearing,<sup>29</sup> and to provide proper notice of any amendments to the complaint or motions. During the hearing itself, the *pro se* parties solicit testimony, cross-examine, object, and argue their cases in any closing statements—all of which is subject to the full body of the New Jersey Rules of Evidence.

The legal tests and standards trial courts must apply are no longer as simple as imagined when the Act was first enacted, but have increased over time since the passage of the Act. By way of illustration, approximately 200 published cases discuss issues related to just the entry of restraining orders.<sup>30</sup> As the New Jersey Supreme Court recognized in 2011, constitutional due process and notice considerations apply in these cases just as in any other.<sup>31</sup> The cases also require parties to present or refute evidence about a history of domestic violence and to argue that the history is related or not to the predicate acts of violence.<sup>32</sup> Last, the parties must engage in an inferential analysis of whether the plaintiff “needs” a restraining order.<sup>33</sup> What serves as an excellent and manageable learning challenge for third-year law students in a clinic setting often may be overwhelming to unrepresented parties who have little or no familiarity with legal proceedings.

The risk factors in these matters are very real for both parties. The plaintiff has made a calculated gamble of exposure and possible financial and community pressures by filing the action. The plaintiff bears the burden of proving the *prima facie* case in the action.<sup>34</sup> If the plaintiff loses, he or she faces the possibility of returning home to that defendant after the plaintiff has publicly announced the abuse, and after subjecting the defendant to eviction, expense, and potential stigma. For the plaintiff, the hearing itself poses some high-stakes hazards. By succeeding, she or he will secure some protections to live independently and safely, with the promise of assistance of heightened police intervention. By losing, she or he will be at the

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29. N.J. Ct. R. 1:9-1 to -2.

30. Per a search done for cases that cited the section of the statute governing the entry of a Final Restraining Order. N.J. STAT. ANN. § 2C:25-19, -28, -29.

31. See *J.D. v. M.D.F.*, 25 A.3d 1045, 1057 (N.J. 2011) (citing *H.E.S. v. J.C.S.*, 815 A.2d 405, 412-13 (N.J. 2003)).

32. See *Cesare v. Cesare*, 713 A.2d 390, 395 (N.J. 1998).

33. See *J.D.*, 25 A.3d at 1062 (citing *Silver v. Silver*, 903 A.2d 446, 456 (N.J. Super. Ct. App. Div. 2006)).

34. See N.J. STAT. ANN. § 2C:25-29(a). The evidentiary standard makes the burden of proof on the plaintiff abundantly clear, “the standard for proving the allegations in the complaint shall be by a preponderance of the evidence.” *Id.*

most vulnerable point—at the mercy of a defendant who has just succeeded.

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

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

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35. See § 2C:25-29b.(1)-(12), (14)-(18); § 2C:25-29.4; § 2C:25-29.1; § 2C:25-30.

36. § 2C:25-28(j), (k). These consequences, broadly speaking, range on limitations on liberty, monetary consequences, loss of right to occupy a residence, possess a weapon, or see one’s children. Direct parallels were drawn in the amicus brief.

37. §§ 2C:25-21, 23.

38. See, e.g., *D.N. v. K.M.*, 83 A.3d 825, 829 (N.J. 2014); *Wildoner v. Borough of Ramsey*, 744 A.2d 1146, 1158 (N.J. 2000).

39. § 2C:25-34.

40. § 2C:25-29(b).

time is limited to approximately two or possibly three weeks assuming the trial court grants a request of a short continuance.<sup>41</sup>

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

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

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

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41. The related Rutgers–Camden Pro Bono Domestic Violence Project trains interested law students to provide legal information—neither legal advice nor representation—to litigants who are in the restraining order process. Volunteer law students provide this information either over the phone or at the county courthouse. Volunteers also update literature produced by the Project, which are sent to police stations in the county and to wherever else they are requested.

42. N.J. Ct. R. 1:21-3(b) (West 2015).

43. In the interest of confidentiality, New Jersey courts have ceased using party names and instead use initials or pseudonyms for parties in cases involving domestic violence. See N.J. STAT. ANN. § 2C:25-33(a); N.J. Ct. R. 1:38-3(a), (d). No record cites appear in this section because the record is sealed under the same statute and court rule.

afford to retain counsel because she was unemployed. Both parties alleged assault as the basis for the restraints. Ms. D.N. alleged that Mr. K.M., driving his truck, pursued her to a Walmart parking lot, veered towards her, and struck her with the truck's side mirrors while she was standing on the truck's running boards. Mr. K.M. conceded that he pursued Ms. D.N. to the Walmart parking lot, but denied striking Ms. D.N. with his truck and alleged that Ms. D.N. had slapped him earlier that day at the home the parties formerly shared.<sup>44</sup> The record mentions at least two other TROs filed by Ms. D.N., which were dismissed by other judges, as well as two TROs filed by Mr. K.M. that were similarly dismissed. The judge hearing the matter on this particular occasion made note at the beginning of the hearing of the parties' return to court.<sup>45</sup>

From the early stages of the hearing, Ms. D.N. struggled with her responsibilities to represent herself *pro se*. When Mr. K.M.'s attorney attempted to admit police reports into evidence, Ms. D.N. attempted an untutored objection. When questioned on it by opposing counsel, she attempted to explain the objection but without a background was unable to articulate her reasoning until the judge eventually provided a prompt that objections are permitted when the document's writer is not present in court.<sup>46</sup> Ms. D.N. repeated these words back to the court, still not understanding the evidentiary requirements. The reports were then marked for identification, confusing Ms. D.N. Her attempts to object ultimately were fruitless. In a series of questions by his attorney, Mr. K.M. testified to the contents of the police reports, including the statements made by the police as well as the police officer's thoughts—all of which were inadmissible hearsay.

During the course of the hearing, the trial judge heard other inadmissible hearsay in the form of statements allegedly made by the parties' minor daughter, court personnel, and Division of Youth and Family Services personnel.<sup>47</sup> Mr. K.M.'s counseled testimony also contained improper speculation, leading questions, and most notably improper medical testimony about Ms. D.N.'s mental health.

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44. Brief of Amici Curiae, Domestic Violence Clinic, Rutgers School of Law et al., *D.N. v. K.N.*, 83 A.3d 825 (N.J. 2014) (No. A-003021-11T3) (citing the transcript). More facts are included in the Appellate Division decision. *D.N. v. K.M.*, 61 A.3d 150, 151-52 (N.J. Super. Ct. App. Div. 2012).

45. Brief, *supra* note 44, at 9.

46. *Id.* at 9-10.

47. Now renamed the Department of Children and Families. DEPARTMENT OF CHILDREN AND FAMILIES, <http://www.state.nj.us/dcf/> (last visited Dec. 10, 2015).

Specifically, Mr. K.M. testified to highly prejudicial statements in response to a leading question by his attorney that Ms. D.N. spent three weeks in a mental health hospital over a dozen years earlier, when the parties were first together. He also claimed, with no evidentiary support, that she had been diagnosed with bipolar disorder and exhibited “psychotic behavior,” for which she had taken a variety of medicines.<sup>48</sup> No foundation of relevance was provided for this testimony. More importantly, Ms. D.N. lodged no objections to any of this improper testimony, allowing testimony to remain unchallenged on the record.<sup>49</sup>

As a defendant to Mr. K.M.’s cross-complaint, Ms. D.N. conducted a similarly uninformed and ineffective cross-examination.<sup>50</sup> The trial judge corrected Ms. D.N. several times, as she repeatedly made arguments or issued statements rather than asked questions. The court neglected to allow Ms. D.N. an opportunity to cross-examine Mr. K.M. while she prosecuted her case against him on her own TRO. Instead, the trial judge moved directly into the ruling, without providing Ms. D.N. an opportunity to make a closing statement. Of course, attorneys are aware that their clients are permitted to cross-examine witnesses and give closing statements, and an attorney representing Ms. D.N. likely would have insisted on doing so.

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

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48. Brief, *supra* note 44, at 10.

49. *Id.* at 9-10.

50. *Id.* at 54. Very recently, a trial judge’s decision to grant a Final Restraining Order has been reversed for a failure to allow cross examination. C.H. v. J.S., No. A-5846-13T1, at \*10 (N.J. Super. Ct. App. Div. Aug. 28, 2015), <http://www.judiciary.state.nj.us/opinions/a5876-13.pdf> (concluding that the “defendant’s fundamental rights to be heard were trampled by the hearing procedures employed” when the defendant was not permitted to engage in cross-examination and when the plaintiff’s case was based on text messages she neither described nor showed).

of harassment. The trial judge included in the FRO several of the twenty possible consequences to Ms. D.N., including a prohibition from any and all future contact with Mr. K.M., from owning or possessing any weapons, and from returning to the marital home or to Mr. K.M.'s place of work. The court gave Ms. D.N. a limit of twenty minutes to remove her boxed belongings from the marital home. She was ordered to pay a fine—although it was suspended because the trial judge's uncertainty about Ms. D.N.'s ability to pay. Ms. D.N. was also told that she would be fingerprinted and photographed and that her name would be entered into a national registry.<sup>51</sup>

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

#### B. The Appellate Division's Affirmance

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

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

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51. Brief, *supra* note 44, at 11.

52. D.N. v. K.M., 61 A.3d 151, 152 (N.J. Super. Ct. App. Div. 2012).

53. *Id.* at 154.

contrast, the Appellate Division reasoned that because the type of relief granted with an FRO is designed to prevent future harm to the plaintiff rather than punish a perpetrator or pit a powerful state actor against an individual, the special situations that would warrant a civil right to counsel are not warranted in domestic violence matters.<sup>54</sup> Moreover, the Appellate Division, noting that the trial judge outlined to Ms. D.N. the possible consequences flowing from the entry of an FRO against her and offered her an adjournment to obtain counsel, concluded that Ms. D.N. understood what she was relinquishing when she moved forward with the hearing.<sup>55</sup> Thus, Ms. D.N.'s decision was deemed legally relevant despite her statements that she was unable to afford counsel. Never discussed were the relatively few pro bono options available to Ms. D.N.

### III. PERSUADING THE EXPERIENCED ADVOCATES WITH THE STUDENTS' UNIQUE PERSPECTIVE

News of the Appellate Division decision was reported in the local legal newspaper,<sup>56</sup> and while of interest to the two clinical professors, it was not something they saw as within their roles as clinical professors at that particular moment. They were soon persuaded otherwise by the three third-year law students. Those students did see it as a priority and saw the Rutgers Domestic Violence Clinic as the right organization to become involved.

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

The *D.N.* case originated in the county next to ours,<sup>57</sup> in the southern part of the state where there are relatively few organizations

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54. *Id.* at 158.

55. *Id.* at 159.

56. Mary Pat Gallagher, *Domestic Violence Litigants Have No Right to Counsel at State Expense*, N.J. L.J., Jan. 24 2013, at 1, LEXIS.

57. *D.N.*, 61 A.3d at 151.

that are equipped to handle appellate briefs in the area of domestic violence. The students thus felt some community responsibility and believed that if we did not become involved, then no other organization would. Soon, these three third-year law students had persuaded the professors and the deans that they should be permitted to approach the attorney representing Ms. D.N. in the petition for certification to the New Jersey Supreme Court and offer to work with him on the petition.

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

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

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

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58. John Pollock, Esq., Coordinator of the Public Justice Center's National Coalition for a Civil Right to Counsel Project.

59. This is permitted under N.J. Ct. R. 2:12-11 (West 2015).

consultation with the attorney representing Ms. D.N., nor communicate except to forward copies of the amicus brief.<sup>60</sup> The students had the clinicians to help guide them and serve as resources, but otherwise they were now in the role of activist attorneys developing arguments.

At the time, the students were disappointed, thinking that this was almost a wasted effort—they believed that the certification was such a foregone conclusion that the amicus brief was superfluous. In retrospect, filing the brief that way was serendipitous. The court rules limit petition briefs to a maximum of twenty of New Jersey's formatted pages in which to write an argument under any circumstances, which is equivalent to something around 6,000 words.<sup>61</sup> The petitioning brief was eleven pages and under 2,500 words.<sup>62</sup> In contrast, and based on Mr. Pettigrew's research into non-standard methods of filing amici curiae briefs, the New Jersey Supreme Court granted the students' motion to file the brief at the full length normally allowed to parties in appellate matters.<sup>63</sup> Given the outcome, the denial of certification, the amicus brief ended up offering the students the richest opportunity to make the strongest arguments.

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

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

62. Brief and Appendix of Plaintiff/Appellant, *D.N.*, 61 A.3d 151 (No. A-003021-11T3).

63. The filed brief was sixty-two pages in this formatting. Brief, *supra* note 44. Excluding the tables of contents and authorities but including everything from the statement of interest to the signature lines and credits, the word count shows at 13,053. Counsel has provided permission to the National Coalition for a Civil Right to Counsel to archive the briefs in the NCCRC's state-by-state resources. State Map, NCCRC, <http://www.civilrighttocounsel.org/map> (last visited Dec. 10, 2015).

IV. THE RIGHT TOOLS: THE CIVIL RIGHT TO COUNSEL IN NEW JERSEY IS BASED ON “CONSEQUENCES OF MAGNITUDE”

At the heart of the arguments is the historical approach that the New Jersey legal system has taken when examining an indigent party’s civil right to counsel. Per the 1971 watershed case, decided only eight years after *Gideon v. Wainwright*,<sup>64</sup> New Jersey already recognizes the right in a number of other legal scenarios. Guided by the New Jersey Supreme Court’s language, “[A]s a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact *or other consequence of magnitude* without first having had due and fair opportunity to have counsel assigned without cost.”<sup>65</sup>

That 1971 phrase has evolved into a legal standard unique to New Jersey and at the heart of the petition for certification. A court’s conclusion that a civil proceeding involves a potential “consequence of magnitude” will trigger a civil right to counsel for indigent clients because the court will have adjudged those instances to have adverse outcomes that “can be as devastating as those resulting from the conviction of a crime.”<sup>66</sup> The “consequences of magnitude” language appears in municipal court rules and judicial opinions, creating a right for indigent parties to state-appointed counsel in a variety of civil matters where the courts have found that right as part of a fair trial and equal justice. To date those situations include:

1. Any municipal matter that could result in incarceration;<sup>67</sup>
2. Loss of motor vehicle privileges or a substantial fine in municipal court in the aggregate of \$800;<sup>68</sup>
3. Child support enforcement proceedings;<sup>69</sup>
4. Involuntary civil commitment proceedings;<sup>70</sup>
5. Megan’s law tier classification hearings;<sup>71</sup>

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64. 372 U.S. 335, 335 (1963).

65. Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (N.J. 1971) (emphasis added).

66. Pasqua v. Council, 892 A.2d 663, 671, 675 (N.J. 2006).

67. Guidelines for Determination of Consequences of Magnitude in Municipal Court, Second Appendix to Part VII to N.J. Ct. R. 7:3-2(b) (2014), [https://www.judiciary.state.nj.us/rules/r7-2nd\\_appendix.htm](https://www.judiciary.state.nj.us/rules/r7-2nd_appendix.htm).

68. *Id.* At the time of the amicus brief filing the amount was \$750.

69. Pasqua, 892 A.2d at 671.

70. *In re* Civil Commitment of D.L., 797 A.2d 166, 167 (N.J. Super. Ct. App. Div. 2002).

71. Doe v. Poritz, 662 A.2d 367, 372-73, 378 (N.J. 1995). Megan’s law refers to the laws requiring public law enforcement officials to make certain types

6. Loss of liberty such as the ability to own weapons or to move freely;<sup>72</sup>
7. Criminal contempt for violations of FROs;<sup>73</sup> and
8. Proceedings regarding abuse, neglect, or termination of all parental rights.<sup>74</sup>

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

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

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

72. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

73. *State v. Ashford*, 864 A.2d 1122, 1125-26 (N.J. Super. Ct. App. Div. 2004).

74. N.J. STAT. ANN. § 9:6-8.43(a) (West 2015); N.J. Div. of Youth & Family Servs. v. B.R., 929 A.2d 1034, 1035, 1037 (N.J. 2007).

75. *Crespo v. Crespo*, 972 A.2d 1169, 1171 (N.J. Super. Ct. App. Div. 2008) (reviewing the procedural history of the case prior to appeal), *aff'd*, 989 A.2d 827 (N.J. 2010).

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

77. *Crespo*, 972 A.2d at 1180.

in the petition for certification.<sup>78</sup> It was therefore a novel issue when brought to the New Jersey Supreme Court in the petition for certification filed in 2013.

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

From the beginning, the one concern that I and the other clinical professor raised was that of doing no harm to the majority of the clients of the clinic with the brief. The entire purpose of the New Jersey Prevention of Domestic Violence Act is to provide victims of domestic violence with a method of accessing legal protections that does not require a criminal conviction or even, necessarily, criminal charges.<sup>79</sup> The idea of civil protections is one of using the court system to intervene when a power imbalance in the parties' relationship has resulted in one or more acts of violence.<sup>80</sup> Any brief we filed from the Domestic Violence Clinic had to argue for a right to counsel for *both* plaintiffs and defendants. The Rutgers Domestic Violence Clinic represents victims of domestic violence—plaintiffs in these matters for the most part. Although it may be easier to understand why an indigent defendant should be entitled to a right to counsel, we could not take that position by itself. At the same time, we did not believe that we could make a persuasive argument about indigent plaintiffs having access to counsel without also acknowledging the defendants' rights. One of the students' challenges became conceptualizing arguments that allowed them to present arguments for indigent defendants' civil right to counsel that would not appear to subtract from indigent plaintiffs' equal right. The theme of making the two arguments work in tandem was "symmetry."<sup>81</sup>

At the time, only New York had a statute that provided a right to counsel for both parties in domestic violence proceedings.<sup>82</sup> Otherwise, by common law, one of only two published cases allowing the right in domestic violence restraining order hearings

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78. *Id.* at 828.

79. *See* § 2C:25-18.

80. *See* § 2C:25-19. The definitions do not discuss power imbalance explicitly, but the definitions of victim and acts of violence allow the inference.

81. Interview with Mark Gulbranson, Esq., 2013 Graduate, Rutgers Sch. of Law-Camden (Oct. 27, 2014).

82. N.Y. FAM. CT. ACT § 262(a)(ii) (West 2012) (referring to Article 8, Family Offense Proceedings); § 1120(a) (West 2010) (referring to right on appeals).

was a largely unnoticed trial level case, serendipitously, in New Jersey.<sup>83</sup> The decision in that case turned on the plaintiff's young age. Plaintiff, who was seventeen at the time of the hearing, alleged that the defendant punched and broke her car windshield while she was sitting in the driver's seat. Plaintiff further alleged that this was not an isolated incident.<sup>84</sup> The judge was troubled by the imbalanced courtroom scene in front of him and halted the proceedings, noting that there was

no basis for this court to conclude that this minor plaintiff is in any way equipped to conduct this legal proceeding by herself, all alone against a represented adult. She has no legal experience with concepts such as direct and cross examination, introduction of evidence, or legal objections in a domestic violence case. She is a high school student and legally still a child, barely old enough to gain entry by herself into an R-rated movie fictionally depicting domestic violence.<sup>85</sup>

Using law students as the actors, Mr. Natale organized a re-enactment photograph of that imbalanced courtroom scene in the *J.L.* case, taken in the law school courtroom, and photographed as if the judge were the photographer, looking down from the bench. We kept the photograph propped up in my office during the drafting process to remind the trio about the policy reasons behind the arguments for indigent plaintiffs, as well as defendants, requiring access to counsel during domestic violence restraining order hearings.

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

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

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

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

84. See *J.L.*, 29 A.3d at 754.

85. *Id.* at 756.

Argument	Rhetorical strategy
<p><b>POINT I. The twenty different consequences an FRO may entail render domestic violence proceedings categorically different from proceedings previously addressed under New Jersey’s civil right to counsel principles</b></p>	<p>The argument began with what Kathy Stanchi has called a “Foot-in-door” technique. That is a way to organize the arguments by leading with premise or statement with which the audience is likely to agree, and then chaining other requests from that point.<sup>86</sup> It is easier to see how defendants are aggrieved by a lack of access to counsel, and therefore the brief began with this position. Making this decision to lead with an argument for the defendant was careful and deliberate—the Domestic Violence Clinic represents victims. The students and professors determined that the most credible way to argue for victims’ rights was to begin with the defendants’ rights.</p>
<p><b>A. The body of law in New Jersey broadly conceives the civil right to counsel</b></p>	<p>This section suggests logical consistency across New Jersey law. To show the current inconsistency, the section contains a comparison of the same act by the defendant in two parallel court hearings as a way to demonstrate the current inconsistencies and unfairness to indigent litigants facing charges stemming from the same incident. If a person is charged with the crime of harassment, a petty disorderly offense, the matter would be heard in municipal court, and an indigent defendant would be entitled to a court-appointed counsel because of the fines and remote possibility of incarceration (if a repeat offender, for example).</p> <p>The very same acts of harassment, however, if used by the victim for the purposes of seeking a restraining order, could result in twenty different</p>

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86. Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 418-19.

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

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

**B. Domestic violence proceedings give rise to myriad consequences in excess of the “consequences of magnitude” already recognized by this Court’s right to counsel jurisprudence**

In addition to setting out the general principles of the “consequences of magnitude” law, this section spent time noting that the municipal court rule codifying the standard was a key and memorable analogy to domestic violence restraining order hearings.

The analogy was designed to activate visualizations of municipal court hearings, which are also summary proceedings, with a long docket sheet of matters listed for hearing on the same day or evening. This is similar to the scene in a family courtroom on a day of domestic violence restraining order hearings. Persuasion is more effective when visualization is possible.

**1. Domestic violence orders result in a substantial loss of essential privileges**

These subsections used analogical reasoning to compare the loss of a driver’s license and the potential impact on employment to the loss of a professional license that the entry of a domestic violence restraining order has

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87. For more on visual organizers used for legal analysis, see Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING 57, 83-86 (2015) (including a discussion of the chart).

<p><b>2. Domestic violence orders carry significant monetary sanctions</b></p>	<p>on an aggressor who is in certain types of licensed professions.</p> <p>Similarly, the entry of an FRO carries with it financial penalties in the form of two separate fines. Also assessed will be living expenses including child support, temporary spousal support as appropriate, and payment for two housing costs because the defendant cannot live in the same home as the victim.</p>
<p><b>C. Even if domestic violence proceedings do not give rise to consequences of magnitude, such actions impact fundamental interests</b></p>	<p>This section reviewed the other situations in which New Jersey has recognized a civil right to counsel for indigent parties. The students grouped those situations according to the types of fundamental rights they touched upon: reputation, liberty, and parental/property rights</p>
<p><b>1. Domestic violence actions engender social consequences and stigma</b></p>	<p>The social stigma of being labeled a domestic violence batterer relates to the stigma of being adjudged a Megan’s Law violator or to being involuntarily committed.</p>
<p><b>2. FROs result in a loss of liberty for the defendant</b></p>	<p>In this section, the Constitutional right to bear arms is discussed as are the consequences of domestic violence restraining orders that impact the defendant’s speech (limitations on contacting certain persons) and on the defendant’s movements (restrictions on the defendant’s right to travel to certain locations such as where the plaintiff resides or works).</p>
<p><b>3. FROs impact fundamental parental and property rights that already carry a civil right to counsel</b></p>	<p>The argument in this section tied the custody changes caused by the entry of an FRO to the New Jersey Supreme Court’s language that the right to raise one’s child is more precious than property rights—language that created a right to counsel in parental termination cases. The entry of a restraining order normally involves</p>

	<p>material changes to custody following an initial period of disruption between the entry of the temporary and the conclusion of the final hearing and any required evaluations.</p>
<p><b>POINT II. The right to court-appointed counsel in domestic violence proceedings must flow to both parties</b></p>	<p>Point I was relatively straightforward and flowed from the appellate decision. It is relatively easy for readers to understand why a defendant might need a civil right to counsel in a domestic violence hearing. Point II's purpose was to connect the arguments to a civil right to counsel for plaintiffs as well as defendants. The theme in Part II was "symmetry," and everything that Mr. Gulbranson wrote was designed to create a symmetrical argument with Mr. Pettigrew's arguments in Point I.</p> <p>The argument began with the purpose of the Act itself: to provide a broad form of protective relief to victims. A crucial argument for the plaintiff appears up front: In other right-to-counsel situations, the plaintiff is already represented by the State and does not need to request counsel. Domestic violence restraining order hearings are different and require both parties to be granted the right.</p>
<p><b>A. Granting counsel to both parties in domestic violence proceedings fits within the protective framework established by the New Jersey Legislature and its Courts</b></p>	<p>The New Jersey Supreme Court and the Attorney General has promulgated an extensive (294-page) Domestic Violence Procedure Manual as a guide for judicial and law enforcement personnel.<sup>88</sup> Significantly, the manual outlines instructions for procedures involved with a two-tiered system based on a party's ability to retain an attorney. That procedure of "civil restraints" permits a</p>

88. SUPREME COURT OF N.J. & THE ATTORNEY GEN. OF THE STATE OF N.J., DOMESTIC VIOLENCE PROCEDURES MANUAL (2008), <https://www.judiciary.state.nj.us/family/dvprcman.pdf>.

represented party to negotiate a settlement despite a statutory prohibition on negotiations.<sup>89</sup>

**B. One New Jersey court has already found that parties in a domestic violence proceeding must be on equal footing**

The *J.L.* case was discussed with details selected to create the third visual impact moment in the legal argument.<sup>90</sup> The message is, “It would run contrary to common sense principles as well as equity to allow the courthouse mechanism of protection to re-victimize the victim.”

The case was not used as one of analogical reasoning but as policy-based reasoning. The same policies that led the trial judge to rule as he did in the *J.L.* case are pertinent to all domestic violence

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

90. *J.L. v. G.D.*, 29 A.3d 752 (N.J. Super. Ct. Ch. Div. 2010), discussed at note 83 and related text. For readings on visual impact moments, see Jason Parry Eyster, *Lawyer as Artist: Using Significant Moments and Obtuse Objects to Enhance Advocacy*, 14 LEGAL WRITING 87 (2008). Professor Eyster muses that it may be significant for lawyers that “static images are rated as significantly more vivid than active images.” *Id.* at 91 n.12 (citing David Pearson, Rossana De Beni & Cesare Cornoldi, *The Generation, Maintenance, and Transformation of the Visuo-Spatial Mental Images*, in IMAGERY, LANGUAGE, AND VISUO-SPATIAL THINKING 1, 10 (Michel Denis et al. eds., 2001)). For usage in legal writing, see RUTH ANNE ROBBINS, STEVE JOHANSEN, & KEN CHESTEK, *YOUR CLIENT’S STORY: PERSUASIVE LEGAL WRITING* 242-45 (2013).

	<p>hearings. The re-enactment photograph was the inspiration for this section.</p>
<p><b>C. Victims of domestic violence, in seeking the court’s protection, face significant consequences of magnitude</b></p>	<p>In this section, Mr. Gulbranson wove in non-adjudicative and non-legal research discussing the social science research of reclaiming one’s autonomy. The hearing itself is consequential because it is likely the first time the victim has seen the aggressor since the precipitating actions that led to the TRO filing and because the victim has to testify to facts that are, by their nature, demoralizing and humiliating. The consequences to the victim of the entry or denial of an FRO are significant because they affect custody, finances, living situations, safety, and relationships.</p> <p>Many law students would have had a hard time trying to discern an “IRAC” structure in this section. There wasn’t one.</p>
<p><b>POINT III. Both parties in domestic violence proceedings face the risk of egregious trial errors</b></p>	<p>Finally, the facts of the case were used in this section as a demonstrative illustration of the vulnerabilities of unrepresented parties who do not understand the consequences of moving forward without counsel and who cannot afford to retain counsel even when the consequences are explained to them.</p>
<p><b>A. The court admitted numerous hearsay statements into evidence and overlooked egregiously leading questioning</b></p>	<p>This was the first time that the facts of this particular case came back into the arguments. The facts were used to argue for granting certification of this case, rather than a future case. This case already presented the type of situation that highlights what can—and did—go wrong, procedurally, when a party requested counsel, but none was provided. This case was complex because the parties filed cross-complaints against each other. That the plaintiff filed two</p>
<p><b>B. Ms. D.N.’s lack of legal expertise meant that she was unable to effectively cross-examine</b></p>	
<p><b>C. The litany of preventable errors is a poignant example of</b></p>	

<p><b>the need for counsel in domestic violence cases</b></p>	<p>briefs as part of the primary certification package underscores the complexity.</p> <p>Because law students are more frequently asked to engage with facts for the purposes of analogical reasoning, i.e., fact-to-fact comparisons with prior case law, the use of the litigation-story facts in this alternative manner was not intuitive. Mr. Natale learned something about civil rights advocacy from writing this section and remembers this as a very interesting lesson. It was a very interesting teaching point, but also a more difficult one than the professors appreciated at the time.</p>
<p><b>Point IV. Providing counsel to domestic violence litigants is economically and practically feasible</b></p>	<p>The New Jersey Supreme Court has noted that practical considerations are relevant,<sup>91</sup> and we knew the Court would be concerned about the feasibility of creating a right when there are between 14,000 and 15,000 cases heard each year.</p> <p>The argument here was attempting to show that solutions are attainable through the statutory scheme of a domestic violence surcharge that could be used for funding.<sup>92</sup> The persuasive technique here was one of framing: We urged the court to frame the numbers county-by-county rather than statewide. Statistical data are kept on a countywide basis. The two counties with the largest caseloads also have multiple agencies, including the three law schools in the state.</p>

**B. The Students’ Reflections on the Process**

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

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91. See *Rodriguez v. Rosenblatt*, 277 A.2d 216, 220 (N.J. 1971).

92. N.J. STAT. ANN. § 2C:25-29.4 (authorizing a surcharge, proceeds to be used for program funding).

Pettigrew had dashed off a short motion brief during the fall semester Domestic Violence Clinic and received enough praise from a trial judge for other clinic students to try to mimic it. But, in discussions afterwards, the students noted that it is “remarkably different” in several respects to write a brief as *amici curiae* because their lawyering education to that point had focused on legal analysis in the context of client representation.

Mr. Natale, the student who was the most committed to civil rights issues, found that he particularly struggled with the format of the brief because, as he said afterwards, he kept “losing his place in the case” and trying to determine what his role was with his section of the argument.<sup>93</sup> It took him time to come to terms with the fact that his task was to focus on the small generic issues that happened at trial and to present them in the aggregate as representative of the problem with this group of litigants having no access to a right to counsel.<sup>94</sup> Initially he put a great deal of pressure on himself to win the case for Ms. D.N. based on her story. He kept forgetting, he reflected afterwards, that it was not his job to tell Ms. D.N.’s story for the merits—that was the role of her actual attorney. After the fact, Mr. Natale has spent the most time continuing to think about the issues and about what else could be done to build towards response-changing in this area of law.<sup>95</sup> In contrast, Mr. Gulbranson reported that when he agreed to write the section of the brief arguing the victim’s right to counsel, he did not fully appreciate the complexity of the arguments until he was mired in the material. He also found it difficult to maintain perspective while “inside the arguments” but used the symmetry theme as his way of staying grounded. As an aside, Mr. Gulbranson told me that until this brief he had not fully

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

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

95. Persuasion is an attempt by a speaker to elicit a response in the audience. To simplify, there are three types of possible responses: creation (when the audience has no prior knowledge), reinforcement of an existing behavior or belief, or change to a behavior or attitude. The last is the most difficult response to achieve. Gerald R. Miller, *On Being Persuaded*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 3-16 (James Price Dillard & Michael Pfau eds., 2002).

appreciated the importance of Brandeis Briefing. Although he had used the technique in other brief writing situations, he had done so because he felt it was expected rather than because it felt right.<sup>96</sup>

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

## VI. KAIROS PASSED BY . . . THE DECISION

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

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96. Interview with Mark Gulbranson, *supra* note 81.

97. That is, he had to shift his normal writing tone as part of responding to the rhetorical situation. The students were exposed to Lloyd Bitzer's idea of the rhetorical situation as applied in lawyering during the revamped moot court course. See Jason K. Cohen, *Attorneys at the Podium: A Plain-Language Approach to Using the Rhetorical Situation in Public Speaking Outside the Courtroom*, 8 *LEGAL COMM. & RHETORIC: JALWD* 73, 75-84 (2011), *relying on the work of* Lloyd F. Bitzer, *The Rhetorical Situation*, 1 *PHIL. & RHETORIC* 1, 6 (1968).

98. E-mail from Logan Elliott Pettigrew, Esq., 2013 Graduate, Rutgers Sch. of Law-Camden to Ruth Anne Robbins, Clinical Professor of Law-Camden (deleted from files) (June 2014) (sent in response to question for presentation preparation for Legal Writing Institute Biennial Conference, Phila., PA, July 2014).

99. Five semesters of legal writing for two of the students and six semesters for the other. Mr. Natale still likes to harangue me for not teaching him all six.

100. *D.N. v. K.M.*, 83 A.3d 825, 825-26 (N.J. 2014).

The *per curiam* opinion focused on pragmatic concerns it associated with permitting the parties a right to seek counsel provided by the State. For the 2012–2013 court year, the court noted that there were 15,800 FRO hearings, and the opinion noted that the Administrative Office of the Courts maintains records that the vast majority of both plaintiffs and defendants are unrepresented.<sup>101</sup> New Jersey operates a system of pro bono assignment of private counsel for indigent defendants, but assigns only 1,200 cases per year.<sup>102</sup> The opinion concluded with the statement that this case did not appear to be the right vehicle because Ms. D.N. did not assert that she was indigent nor ask the trial court to appoint counsel.

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

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

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

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

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

104. *D.N.*, 83 A.3d at 827 (Albin, J., dissenting). Comparable to the famous *Gideon v. Wainwright* decision in the United States Supreme Court, New Jersey’s germinal case articulating the right to counsel in state criminal cases is *Rodriguez v. Rosenblatt*, 277 A.2d 216 (1971). Justice Albin referenced both cases while writing to his colleagues, “Had the United States Supreme Court taken the cost-analysis approach, *Gideon* would not be on the books today, nor would *Rodriguez*.” *D.N.*, 83 A.3d at 828.

In his last major point, Justice Albin listed the many consequences that flow from the entry of an FRO and asked a rhetorical question, the language of which is telling. “How can our jurisprudence reconcile the right of appointed counsel to a defendant facing a \$750 fine or a one-day license suspension in municipal court with the denial of that right to a defendant who is facing much more serious consequences in Superior Court in a domestic violence cases?”<sup>105</sup> In that question, the students could see the effect of their persuasion. Justice Albin found persuasive the comparisons of summary proceedings in municipal courts and domestic violence courts. He was also persuaded by the comparison between a relatively minor matter handled in municipal court to the bullet-point list of twenty consequences flowing from FROs, although he might have preferred driving license suspensions to have appeared on the chart instead of harassment.<sup>106</sup>

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

#### A. The Wrong Moment in Time for New Jersey

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

At the time of the briefing, the state of New Jersey was facing serious financial woes—as were many states.<sup>107</sup> At the same time, the

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105. *Id.*

106. The driving license suspension comparison came up three times in the brief—it was argued.

107. *See, e.g.*, OFFICE OF PUB. FIN. OF THE STATE OF N.J., STATE OF NEW JERSEY DEBT REPORT, FISCAL YEAR 2013, at 67 (2014), <http://www.yourmoney.nj>.

New Jersey Supreme Court was still the unwilling participant of what one legal scholar has analogized to a three-ring circus<sup>108</sup> involving all three branches of government and lasting several years, beginning in 2010. The origin of the struggle with the New Jersey Supreme Court did not originate in one specific court action, although certain hot-button items exacerbated the tensions. Governor Christie has publicly criticized justices for what he sees as judicial activism particularly on issues involving state funding for public issues relating to some of the citizens with the least ability to speak for themselves. For example, he openly criticized Justice Albin in 2011 on the issue of school funding in poorer school districts,<sup>109</sup> and he criticized Chief Justice Rabner in July 2013 about the Court's decision on the issue of affordable housing.<sup>110</sup> Lambda Legal pointed to the same public justice hot-button items in a 2014 video

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

108. Roslyn F. Martorano, *The Three-Ring Circus: New Jersey's 2010 Judicial Retention Crisis*, 75 ALB. L. REV. 1837, 1837 (2011–12); Richard Pérez-Peña, *Christie, Shunning Precedent, Drops Justice from Court*, N.Y. TIMES, May 3, 2010, at A22.

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

110. Martin Bricketto, *NJ Court Checks Gov. Powers with Affordable Housing Ruling*, LAW360 (July 10, 2013, 7:52 PM), <http://www.law360.com/articles/456110/nj-court-checks-gov-powers-with-affordable-housing-ruling>. Governor Christie attempted to abolish the state's Commission on Affordable Housing (COAH). Instead, the Court ruled that the Governor could not do so without following a particular set of procedures, based on certain reorganization structures in the state that also govern Rutgers University and that prevented the Legislature from severing Rutgers–Camden from the university. Governor Christie's comments about Chief Justice Rabner on the decision were termed “blistering” by the reporter. *Id.* To put this in temporal context, this statement by Governor Christie was made approximately two months after the briefs were submitted in support of certification in the *D.N.* case.

discussing judicial independence issues in New Jersey.<sup>111</sup> To grant certification on this civil right to counsel case could very easily have opened a new chapter of bitter words directed at another group of underrepresented litigants in the state. While it does not lessen the students', nor this professor's continuing belief in the merits of the issue, it redirects some energies towards contemplating what an infrastructure might look like that could support a legal decision in favor of a civil right to counsel.

## B. The Thread, Pulled

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

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111. Lambda Legal, *Bullying the Bench: Gov. Christie's Attack on New Jersey's Court* (May 5, 2014), <https://www.youtube.com/watch?v=1Cfi7JAf9nM>. Lambda Legal was not lobbying for gay marriage when it made the video (gay marriage was already legal in New Jersey at the time), but was lobbying for the reappointment of Chief Justice Rabner, whose reappointment was in doubt not on the merits but for political concerns. Lambda Legal's concerns for Chief Justice Rabner stemmed from comments made by Governor Christie during the gay marriage case, who was open with his plans to "reshape the court," based on his belief that it "has repeatedly strayed from its purview and overstepped its role." Editorial, *Obvious Inequality*, N.Y. TIMES (Aug. 14, 2013), [http://www.nytimes.com/2013/08/15/opinion/obvious-inequality.html?ref=opinion&\\_r=2&](http://www.nytimes.com/2013/08/15/opinion/obvious-inequality.html?ref=opinion&_r=2&). Previously, Governor Christie had declined to reappoint two other justices: the first governor to decline to do so since New Jersey's 1947 Constitution. The video builds a theme that the success of civil rights in New Jersey turns on the independence of the judiciary. The history of judicial reappointments in New Jersey is part of the same history of the judicial crisis of 2010–2014 and has been the subject of several law review and mainstream press articles as well as a Rachel Maddow segment on MSNBC, but is outside the scope of this Article.

112. Editorial, *Domestic Violence Counsel*, N.J. L.J., Jan. 17, 2014), at 1, LEXIS.

113. John Pollock, *Parties in Domestic Violence Matters Should Have a Right to Counsel*, N.J. L.J. (Aug. 14, 2014), [http://www.civilrighttocounsel.org/uploaded\\_files/181/Parties\\_in\\_Domestic\\_Violence\\_Matters\\_Should\\_Have\\_a\\_Right\\_to\\_Counsel\\_Pollock\\_-\\_NJLJ\\_.pdf](http://www.civilrighttocounsel.org/uploaded_files/181/Parties_in_Domestic_Violence_Matters_Should_Have_a_Right_to_Counsel_Pollock_-_NJLJ_.pdf).

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

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

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

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

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

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

117. See *A.M. v. M.M.*, 2014 WL 2681274, at \*1 (N.J. Super. Ct. App. Div. 2014); *M.A.T. v. V.A.M.*, 2014 WL 1909553, at \*2 (N.J. Super. Ct. App. Div. 2014); *L.F. v. A.S.*, 2014 WL 1660468, at \*4 (N.J. Super. Ct. App. Div. 2014); *V.D. v. K.O.*, 2014 WL 982531, at \*4 (N.J. Super. Ct. App. Div. 2014) (citing *D.N.*, 61 A.3d at 159); *S.C. v. A.M.*, No. A-1870-12T4, 2014 WL 243093, at \*5 (N.J. Super. Ct. App. Div. 2014).

118. See *A.M.*, 2014 WL 2681274, at \*1 (citing *D.N. v. K.M.*, 61 A.3d 150, 159 (N.J. Super. Ct. App. Div. 2012)); *V.D.*, 2014 WL 982531, at \*4 (quoting *D.N.*, 63 A.2d at 159); *S.C.*, 2014 WL 243093, at \*5 (quoting *D.N.*, 61 A.3d at 159).

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

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

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119. *Id.* at \*6.

120. *S.C. v. A.M.*, 2014 WL 243093, at \*6 (citing *J.D. v. M.D.F.*, 25 A.3d 1045, 1057 (N.J. 2011)); *H.E.S. v. J.C.S.*, 815 A.2d 405, 412-13 (N.J. 2003).

121. See ABA RESOURCE CTR. FOR ACCESS TO JUSTICE INITIATIVES, AMERICAN BAR ASSOCIATION STATE ACCESS TO JUSTICE COMMISSIONS: CREATION, COMPOSITION, AND FURTHER DETAILS, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_atj\\_commissions\\_table\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_atj_commissions_table_authcheckdam.pdf) (last updated Sept. 2014).

122. ROBERT R. NEALL, REPORT OF THE TASK FORCE TO STUDY IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND 20-22 (2014), <http://www.mdcourts.gov/mdatjc/taskforcecivilcounsel/pdfs/finalreport201410.pdf>. The Maryland Commission on Child Custody Decision-Making has also endorsed the right to counsel in domestic violence cases. *Id.* at 9-10.

123. CON. RES. C776/B2995 (N.Y. 2015); see also Joel Stashenko, *Legislature's Resolution Supports Civil Gideon*, N.Y. L.J. (June 29, 2015), <http://www.newyorklawjournal.com/id=1202730718872/Legislatures-Resolution-Supports-Civil-Gideon>.

New York's Office of Court Administration priority list this year.<sup>124</sup> New York claims it leads the nation with the resolution and defines "essentials of life" very broadly, but the standard's wording sounds familiar, an echo of New Jersey's "consequences of magnitude" language. The Chief Justice of the Connecticut Supreme Court has also announced that the state is exploring the issue of providing counsel in all civil matters, calling it "particularly important when such issues as housing, family matters, access to health care, education and subsistence income are being decided."<sup>125</sup>

The students have accomplished something already by putting on New Jersey advocates' radar the problematic procedures in play when either party cannot afford to retain counsel for an FRO hearing. Any change to the law that could implicate legal services on a large scale will realistically take time and additional advocacy.<sup>126</sup> And, in reality, the issue was not waving brightly in New Jersey for any advocate to see as a priority problem before the students asked the Rutgers Domestic Violence Clinic to participate in the *D.N.* case. Advocates are now forced to address it, and at least a handful see it as a priority topic. The students' reach has extended beyond the walls of the building—something very few students can look back and say about their law school years. In the scheme of civil rights advocacy, that is a lot of bang for the buck. These students may not have ripped the fabric of the social sky, but they have at least snagged a thread in its weave.

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

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

126. NEALL, *supra* note 122. The Maryland recommendation, for example, proposes a four-year phase-in of funding and offers suggestions for ways to deliver cost-effective legal services to litigants using existing providers. *Id.*