Justice Through the Lens of the Next Generation

NITA®

National Institute for Trial Advocacy

> Our constitution begins with the words 'We the People of the United States, in Order to form a More Perfect Union.' So think how things were in 1787. Who were 'we the people?' Certainly not people who were held in human bondage because the original Constitution preserves slavery. And certainly not women, whatever their color and not even men who own no property. So, it was a rather elite group, 'we the people,' but I think the genius of our Constitution is what Justice Thurgood Marshall said. He said he doesn't celebrate the original Constitution, but he does celebrate what the Constitution has become now well over two centuries. That is the concept of 'we the people' has become ever more inclusive. So people who were left out at the beginning—slaves, women, men without property; Native Americans—were not part of 'we the people.' Now all the once left out people are part of our political constituency. And, 'we' are certainly 'a more perfect union' as a result of that."
>
> —JUSTICE RUTH BADER GINSBURG[1]

Perhaps the best we can say about our rule of law is that it is a work in progress. We recognize that many times we do not get it right the first time but still struggle to form a more perfect union. Our greatest achievement is that on a given day a single individual in a nation of 350 million can file a complaint or a motion or make a legal argument that will change the lives of countless. Often these folks struggle to find counsel only to be represented by the only lawyer who will take the case; that lawyer—inexperienced and scared—is driven by passion and fear of failure. This is our true achievement.

Current events remind us, as they so often do, that we need to do better—and so NITA convened a town hall to discuss access to justice and the legal system for society's most vulnerable.[2] This whitepaper is a response to that national town hall titled Access to Justice for the Vulnerable, which was prompted by President Biden's Executive Order to expand legal representation for impoverished individuals.[3] The topics discussed in this paper are not conclusions or set-in-stone solutions, but rather part of an ongoing discussion about how the legal profession can adapt to meet the needs of every American, not just a select few. How can we strive to form "a more perfect union?"

Our development of the town hall has been done with assistance from law students from Penn State, Rutgers, and Arizona Law. Because they represent the next generation of guardians for our rule of law, they have compiled this whitepaper.

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1 Clinton Foundation, *Justice Ruth Bader Ginsburg Explains How "We, The People" Has Become Ever More Inclusive*, YOUTUBE (Sep. 3, 2019), https://www.youtube.com/watch?v=LgTeSHF7PqE.

2 The National Institute for Trial Advocacy, *National Town Hall on Access to Justice for the Vulnerable* (Jul. 21, 2021), https://www.nita.org/webcasts/s71LEC140.

3 Restoring the Department of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable; 86 Fed. Reg. 27,793 (May 18, 2021).

I. A Lack of Properly Trained Lawyers Representing the Indigent

"The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him."[4]

The right to counsel is a fundamental element of our criminal justice system, one so ingrained in our constitutional and cultural framework that it is included in the requisite *Miranda* warnings read to all criminal defendants. However, living up to this promise of legal counsel for all has its hurdles, particularly when issues of training and effectiveness are raised. There are not enough properly trained lawyers to represent the indigent in criminal matters in this country. A combination of factors contributes to this, ranging from the financial to the academic. What needs to change in order to incentivize and properly train law students in a way that encourages public service as an attractive career option—carrying the same appeal as a partner-track white-collar firm position? Approximately 60 to 90 percent of all criminal cases involve an indigent defendant.[5] State and locally run public defender offices across the country face caseloads that far exceed the recommended per-attorney limits.[6] Private attorneys are contracted to help manage the workload, but both state-employed and private attorneys receive low compensation. Meanwhile, the percentage of criminal defendants requiring court-assigned counsel remains on the rise.[7] So how can the legal education system and public defender programs around the country coordinate their efforts to ensure that more of the approximately 38,000 newly matriculated law students each year are trained and incentivized to do this critical work?[8]

Law schools, including career development offices, should promote public defense careers from day one and should require relevant course curricula.

Notably, the standardized 1L curriculum does not include any courses on litigation or trial advocacy skills. In omitting this critical area of legal practice from the standard curriculum, students are implicitly told that courtroom skills are secondary, rather than an essential part of any lawyer's toolkit. When left as an elective course of study, trial practice education winds up relegated to primarily those who planned to be litigators at the outset of their legal education. If these courses were mandatory, many students could discover an unknown passion or otherwise undetected hidden talent for trial advocacy. Starting students down this path as early as possible would likely broaden the horizons of many who had not previously planned to litigate.

4 Powell v. Alabama, 287 U.S. 45, 73 (1932).
5 Department of Justice, Bureau of Justice Assistance, *Contracting for Indigent Defense Services*, 3 (Apr. 2000).
6 Department of Justice, Bureau of Justice Statistics, *State Public Defender Programs*, 1 (Sep. 2010).
7 *Id.*
8 *Law School Enrollment,* Law School Transparency, https://data.lawschooltransparency.com/enrollment/all/.

Unfortunately, it is often left to non-profit groups or post-JD programs to carry the burden of training future public defenders. The existence of groups such as Gideon's Promise or the training programs run by the National Association of Criminal Defense Lawyers, which attempt to reach and train young lawyers both during their legal education and upon graduation, demonstrates the slack that accredited law schools are leaving in their curricula.[9] In 2019, 15 of the top 20 ranked law schools in the country relied on Gideon's Promise to provide their students with public defender training rather than providing training within the schools' own curricula.[10]

Another avenue through which law schools can promote future public defenders is their career services offices. A review of several law schools' career services offices and their approach toward public defense positions show that the burden is placed on the interested student to enroll in the "relevant" classes and clinical programs beginning in their 2L year (never mind that clinics tend to have a reduced capacity as well as prerequisite courses which relegate them primarily to 3L students rather than being an ongoing part of legal education from the get-go).[11] Some career offices also state that students themselves should screen the public defenders' offices for viability and efficiency prior to applying for employment. Career guides suggest the student consider questions like, "[i]s the ratio of supervisory attorneys to staff attorneys less than one to five?" and "[w]hat legal research tools are available?"[12] This messaging promotes the notion that public defender offices which are under-resourced may be a poor placement for a graduating student and are not worthy of consideration. This tone seems concerningly misguided, diverting students away from under-resourced public defender offices rather than encouraging them to get involved only serves to exacerbate, rather than alleviate, the lack of adequate representation for the indigent.

States should invest in public defender programs that allow recent law school graduates to represent the indigent while earning a salary that offsets student debt obligations.

Figures from 2014 reveal that, "[i]n New Hampshire, an entry-level public defender earns $44,998. In Vermont, the starting salary is $45,510. It's $55,000 in Rhode Island and $62,000 in Connecticut. Georgia is the lowest in the nation at $38,000, while San Francisco County is among the highest at $98,000."[13] Meanwhile, the average law student graduates with approximately $160,000 in student debt.[14] For most law students, the math simply preempts the viability of a career as a public defender and will cause them to avoid taking any elective courses or public interest internships that might lead to a career as a public defender from the outset of their legal education. Students who enter the public sector tend to receive significantly lower starting salaries than those who work in private practice.[15] Solutions for this conundrum could include public service grants or scholarships offered from the government that would make up the difference between the average starting salary for recent law graduates in private practice and those in public service (data suggests this could be anywhere from $30,000 to $100,000).[16] If the main barrier between newly admitted lawyers and representation for indigent criminal defendants is purely financial, then strategic reallocation of state funds should be prioritized to address the lack of adequate representation.

9 National Association of Criminal Defense Lawyers, https://www.nacdl.org/Content/PublicDefenseTrainingPrograms (Jun. 9, 2021).
10 *Law School Partnership Project*, GIDEON'S PROMISE (2021), https://www.gideonspromise.org/programs/training/law-school-partnership-project.
11 Boston University School of Law, Office of Career Development and Public Service, *Public Defender Career Guide* (Apr. 2019).
12 Lisa D. Williams, *Careers in Indigent Defense: A Guide to Public Defender Programs*, HARVARD L. SCHOOL (2012).
13 Garbrielle Gurley, *Public Defender Blues*, COMMONWEALTH MAGAZINE (Jan. 15, 2014), https://commonwealthmagazine.org/uncategorized/004-public-defender-blues/.
14 Melanie Hanson, *Average Law School Debt,* EDUCATIONDATA.ORG (Jul. 10, 2021), https://educationdata.org/average-law-school-debt/.
15 Ilana Kowarski, *See the Price, Payoff of Law School Before Enrolling*, U.S. NEWS & WORLD REPORT (Mar. 21, 2021), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/law-school-cost-starting-salary/.
16 *Id.*

Private firms should require a public service period for all new hires prior to representing private clients.

For recent law graduates for whom employment with a private firm is the most viable option, both financially as well as professionally, it may be years before they have an opportunity to gain real courtroom experience. One model that could provide newly minted lawyers with a guarantee of trial advocacy experience in their first year, as well as help to provide effective representation for the indigent, would be a requisite public service fellowship period implemented by the private firm upon any offer of employment. The program would divert all new hires into a local public defender's office for a year, during which time the young lawyers would receive a reduced salary, but student debt obligations would be paid in large part by the firm. An initial intensive-training component would be followed by actual representation of indigent clients in criminal matters. Such a model would expose young lawyers to the public defense crisis in the country, provide them with an opportunity to observe and be trained by careers defense attorneys, all while allowing them to keep a handle on their debt payments as well as retain a lucrative position with the private firm. An extension of this model would also see that after the fellowship period ends, these young lawyers, upon entering private practice full-time, would have had enough exposure and experience in criminal defense work that would allow these large firms to expand their pro bono practice and share the burden of the local public defenders.

II. Public Defenders Face Overwhelming Caseloads, Few Resources, and Low Compensation, Which Undermine Adequate Representation

"Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure."[17]

The woes of public defense systems in the United States have been plastered on the news in recent years.[18] Various organizations have created comprehensive reports detailing these woes with statistics and anecdotes.[19] However, a lack of data and lack of systemic policy analysis still leads to confusion among state and federal policymakers who need to address issues concerning public defense.[20] These issues have been exacerbated by the COVID-19 pandemic since many courts were fully or partially closed, leading to overwhelming dockets upon reopening.[21] The literature in this area lacks empirical research relevant to improving public defense systems. However, in response to President Biden's Executive Order on Access to Justice, many associations and organizations, including the National Institute for Trial Advocacy, are initializing the discussions required to change public defense moving forward. Public defenders' role in forcing our criminal justice system to pass constitutional muster must always be at the forefront of reform considerations.[22]

Problems abound in an underfunded indigent defense system, but policymakers and lawyers disagree on possible solutions.

Public defense systems are underfunded, some so much so that they need to crowdfund to stay afloat during deficits.[23] Public defenders make some of the lowest salaries available for lawyers.[24] Some jurisdictions fund state offices that oversee all offices while others delegate to local offices. The problems inherent in the county-

17 Argersinger v. Hamlin, 407 U.S. 25, 35 (1972).

18 See, e.g., Eli Hager, *One Lawyer. Five Years. 3,802 Cases*, The Marshall Project (Aug. 1, 2019), https://www.themarshallproject.org/2019/08/01/one-lawyer-five-years-3-802-cases.

19 See, e.g., David Carroll, *Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers*, The Sixth Amendment Project (Mar. 2017), https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf.

20 Tony Fabelo, *What Policymakers Need to Know to Improve Public Defense Systems*, Papers from Executive Session on Public Defense (Dec. 2001), https://www.ojp.gov/pdffiles1/bja/190725.pdf.

21 *See* Melissa Chan, *"I Want This Over." For Victims and the Accused, Justice Is Delayed as COVID-19 Snarls Courts*, Time (Feb. 23, 2021), https://time.com/5939482/covid-19-criminal-cases-backlog/.

22 *See* Jonathan Rapping, *Reforming Public Defense Is Crucial for Criminal Justice*, Law 360 (Sep. 20, 2020), https://www.law360.com/articles/1307528/reforming-public-defense-is-crucial-for-criminal-justice.

23 Dylan Walsh, *On the Defensive*, The Atlantic (Jun. 2, 2016), www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/.

24 *New Findings on Salaries for Public Interest Attorneys*, NALP Bulletin (Sep. 2010), https://www.nalp.org/sept2010pubintsal.

funded systems have been likened to those within schools—since schools are funded by local property taxes, disparities in per-student spending abound. Similarly, smaller cities or counties in many states cannot keep up with the demand for services.[25] According to the Bureau of Justice Statistics, 40 percent of county-based public defender's offices had no investigators on staff.[26] Additionally, only 27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads.[27] "Funds dedicated to indigent defense constitute only about 3 percent of all criminal justice expenditures in our nation's largest localities."[28]

Many public defenders' caseloads are unsustainable, driving the quality of output down and costs up. In Kansas, for example, a November 2020 task force found there were 377 prosecutors in the state, compared to 95 full-time public defenders.[29] Heather Cessna, an executive director of the Kansas State Board of Indigents' Defense Services, mentioned that public defender's offices "can't compete with the resources the state has" to prepare for trials."[30] Similarly, in New Orleans in 2017, 60 public defenders managed roughly 20,000 cases per year.[31]

While some progress has been made to increase access to justice for those accused of crimes, many recent decisions from legislators and judges have detracted from that progress. For example, last year, a Missouri Federal Judge vetoed a consent decree that would have reduced public defender caseloads.[32] Moreover, in December 2020, the Louisiana Supreme Court denied relief to its state public defenders, who are overburdened with caseloads that make it nearly impossible to provide

25 Jessica Pishko, *The Shocking Lack of Lawyers in Rural America*, THE ATLANTIC (Jul. 18, 2019), https://www.theatlantic.com/politics/archive/2019/07/man-who-had-no-lawyer/593470/.

26 Lynn Langton & Donald Farole Jr., *County Based and Local Public Defender Offices, 2007*, BUREAU OF JUSTICE STATISTICS, 8 (2010), https://www.bjs.gov/content/pub/pdf/clpdo07.pdf.

27 *Id.* at 12 (finding that 15 of 19 reporting state public defender programs "exceeded the maximum recommended limit of felony or misdemeanor cases per attorney").

28 *Indigent Defense Grants, Training and Technical Assistance*, doj.gov (updated Oct. 24, 2018), https://www.justice.gov/archives/atj/indigent-defense-grants-training-and-technical-assistance.

29 Stan Finger, *Public Defenders Say Fair Trials in Jeopardy Due to Underfunding*, ACLU (May 20, 2021), https://www.aclukansas.org/en/publications/public-defenders-say-fair-trials-jeopardy-due-underfunding.

30 *Id.*

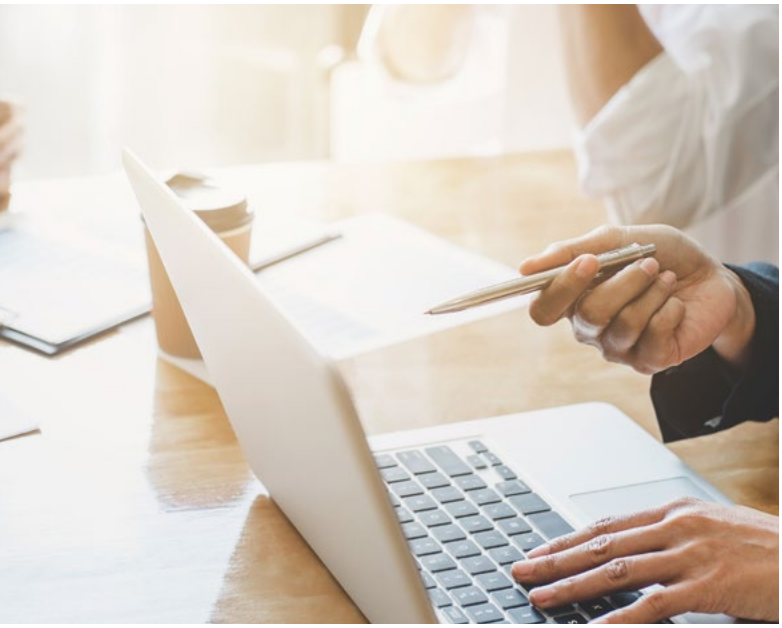
31 *Public Defender System "A Huge National Failure,"* CRIME & JUSTICE NEWS (Nov. 21, 2017), https://thecrimereport.org/2017/11/21/public-defender-system-a-huge-national-failure/.

32 Crystal Thomas, *Judge Vetoes Plan to Decrease Workloads for Missouri's "Inundated" Public Defender System*, KANSAS CITY STAR (Jan. 28, 2020), https://www.kansascity.com/news/politics-government/article239702543.html.

adequate representation.[33] Decisions like these lead to a culture of defeat within indigent defense spaces.[34] Furthermore, some state legislators appear to support public defense by dedicating state funds raised from court fees, only to later divert funding elsewhere.[35]

Not all delivery methods are created equal.

Jurisdictions in which there is no dedicated indigent defense office struggle to provide adequate representation. That is likely why the American Bar Association advocates against states paying private attorneys by the hour or by case and instead recommends establishing robust public defender offices where lawyers are full-time and receive a salary.[36] Although empirical studies are few, some studies have found that localities or states that moved away from contract work had decreased costs and increased quality of representation.[37]



Professional, established public defense offices are the best way to meet the needs of clients. There are two predominant methods of establishing indigent defense offices: creating statewide offices or allowing the state to delegate the tasks of creating offices to local governments.[38] At the very least, if a jurisdiction must have court-appointed lawyers, those lawyers should not be cherry-picked by individual judges in a process subject to bias. Rather, third parties, computers, or other random systems should be tasked with appointing lawyers. While the ethical duty to avoid excessive caseloads is clear, defense lawyers and public defender program directors may be reluctant to try to avoid court appointments or to withdraw from cases to which they have been appointed.

While the trend of firms creating dedicated pro bono offices may alleviate some strain, America's indigent defense system cannot rely solely on the private sector. The American Bar Association (ABA) has long recommended: "Every system [for legal representation] should include the active and substantial participation of the private bar."[39] The Honorable Michael W. Noble[40] mentioned that pro bono offices in firms can help overburdened systems and their own employees by providing junior associates more access to trial experience. However, panelist and trial attorney Whitney Untiedt cautioned that these systems may be unreliable since they lack focus on indigent defense and its unique contours.[41]

Some innovative systems have been touted as examples for the rest of the country to follow. However, these systems have only been shown to work anecdotally and on small scales. Consider one of those programs: the Bronx Defenders. The Bronx Defenders works almost like a charter school: it is an indigent defense program partially funded by the state and partially funded by private sources.[42] When an indigent person is represented by the Bronx Defenders, they are given a team of lawyers and social workers.

33 State v. Covington, 318 So.3d 21 (La. 2020).

34 Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 Minn. L. Rev. 1769, 1781, 1784 (2016) (arguing that substandard indigent defense is exacerbated by a culture of defeatism spurred by a combination of underfunding and structural impediments to zealous representation).

35 Steven Hsieh, *AZ Republicans Take Money from Public Defenders and Give It to Cops*, Phoenix New Times (May 28, 2019), https://www.phoenixnewtimes.com/news/arizona-takes-money-from-public-defenders-and-gives-it-to-cops-11302724.

36 Standards: ABA Principles of Indigent Defense, Principle 8.

37 *Indigent Defense and Technology: A Progress Report*, Bureau of Justice Statistics (1999), https://www.ojp.gov/pdffiles1/bja/179003.pdf.

38 David Carroll, Right to Counsel Services in the 50 States, The Sixth Amendment Project (Mar. 2017), https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf.

39 ABA Standards for Criminal Justice: Providing Defense Services, Std. 5-3.3 (b)(v) (3d ed., 1992).

40 Biography of Judge Michael Noble, 22nd Circuit Court St. Louis, Missouri (last visited Aug. 13, 2021), http://www.stlcitycircuitcourt.com/index2.html?XMLFile=xml/judges/Noble.xml.

41 Biography of Whitney M. Untiedt, *About the Firm*, Freidin Brown, P.A. (last visited Aug. 13, 2021), https://www.yourfloridatrialteam.com/about-the-firm/whitney-m-untiedt/.

42 *The Bronx Defenders, About Us*, https://www.bronxdefenders.org/who-we-are/.

This team collaborates to provide robust representation to those accused of crimes. This team even provides advice on collateral consequences of being accused of a crime and incarceration, including housing, family, and immigration issues.

If statewide public defender offices prove to be untenable, local level offices should at least be held to a statewide standard. Local offices tend to have the least productive outcomes because there are decreased opportunities for collaboration outside of a local office. Rural counties especially struggle to meet the demand for adequate representation. Moreover, training may be haphazard and vary greatly in each county or parish. If the state delegates Sixth Amendment responsibility, there should at least be statewide CLE requirements and meaningful oversight so that *Gideon*'s promise still prevails. Notwithstanding the importance of meaningful oversight, "as recently as 2017, 16 states lacked any entity which purports to oversee public defense services, and more than half the agencies that did exist lacked independence."[43]

Resource disparities between prosecutors and defenders exacerbate the problems inherent in an underfunded indigent defense system.

Many people assume that public defenders would be paid and supported to the same extent as prosecutors, especially given the important role they play in the criminal justice system. However, public defenders in many jurisdictions are paid less than their prosecutor counterparts.[44] Those issues are compounded by the lack of resources available for support staff against the best practices for indigent defense systems.[45] While prosecutors' offices may have victim advocates, forensic specialists, and the entire law enforcement body on their side, defense attorneys may have no more staff than a paralegal.

Using a common metaphor, Andrew LeFevre, executive director of the Arizona Criminal Justice Commission, likened funding for the criminal justice system to a three-legged stool composed of courts, prosecutors, and public defenders. "If you're not going to provide equal funding for all three legs of the stool, the stool is only as effective as the least effective leg."

Access to justice depends on evening the support among each leg of the criminal case. The federal government could create grant programs for jurisdictions to increase public defender pay and devote funds to support staff.

Lowering the need for public defense resources based on front-end reforms is not a panacea but could provide temporary relief for extremely stressed systems in the process of reform.

Some reformers have put forth proposals to decriminalize less serious offenses, change sentencing laws, and elect less punitive prosecutors.[46] These changes could reduce the strain put on our criminal justice system, thereby reducing strain on public defenders, by lowering the number of cases entering the system on the front end and promoting less severe punishment on the back end.[47] Prosecutors have discretion in charging and other vital stages. They can reduce how much bail they ask for in low-level cases, thereby reducing the risk that poor people are jailed for low-level offenses if their defenders cannot spend adequate time at that stage in the process. Prosecutors can also stop charging victimless crimes in periods where the public defenders cannot adequately keep up with their caseloads. Struggling defense organizations could also partner with prosecutors to help demand reform.[48]

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43 Ginger Jackson-Gleich & Wanda Bertram, *Nine Ways That States Can Provide Better Public Defense*, Prison Policy Initiative (Jul. 27, 2021), https://www.prisonpolicy.org/blog/2021/07/27/public-defenders/.

44 *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Center for Justice https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf.

45 *See* American Bar Association, *ABA Ten Principles of a Public Defense Delivery System* 3 (Feb. 2002).

46 Eli Hager, *One Lawyer. Five Years. 3,802 Cases*, The Marshall Project (Aug. 1, 2019), https://www.themarshallproject.org/2019/08/01/one-lawyer-five-years-3-802-cases.

47 *See* Bryan Altman, *Improving the Indigent Defense Crisis Through Decriminalization*, 70 Ark. L. Rev. 769 (2017).

48 Jon B. Gould, *When the Courts Are Indifferent and Legislators Apathetic: Partnering with Protectors to Protect Public Defense*, 57 Crim. L. Bulletin 4 (2021).

III. Law School's Curriculum, Culture, and Cost Fails Students

"Democracy in the United States depends upon our commitment to the rule of law, and good legal education helps to ensure that our commitment never wavers."

—JUDGE HARRY T. EDWARDS[49]

Law schools across the country have allowed *prestige,* above all else, to seep into every facet of their institution from faculty hiring processes to doctrinal teaching. The *U.S. News & World Report* rankings have pressured law schools into a drag race, where each vies for a spot in the coveted "top 14," or even just the "top 50." Students and faculty at these institutions are forced into a race of their own as a result of the rankings. Students vie for the top of their class, positions on law review and journal, and coveted jobs at large firms or esteemed prosecutor's offices. Faculty members, ranked on the number of times they are cited,[50] are pressured to put *scholarship* ahead of *practicality.* With a majority of their professors having not spent "any serious time in practice,"[51] students, equipped with perhaps only a semester of clinical experience or advocacy training, cannot conduct a direct or cross-examination, do not know what components make a deal, and cannot properly advise a client.[52] On top of that, most law students graduate with a heap of debt that tends to disrupt their moral compass. Some may enter law school saying they "want to help people," and rightfully so, but graduate with the notion that a career helping people doesn't quite pay enough for the financial burdens they already carry.

If legal professionals want to expand access to justice for those vulnerable members of our communities, they have to consider solutions that start with the culture of the legal education system.

Scholarship

The emphasis on pedigree and scholarship within the legal field existed before the *U.S. News* rankings came on the scene—even though they have proliferated the problem. Before *U.S. News* published its first list of rankings in 1983, the brand of "elite" law schools had already been established.[53] The nation's elite legal institutions—the Ivy Leagues and prestigious national universities like Harvard, Yale, Michigan, and Wisconsin—have "nearly a century of allegiance among the nation's corporate law firms."[54] These leading schools and corporate firms have a well-oiled system, where highly ranked law students—with law review or moot court stamps—are funneled into a promising summer associate program on track to a possible full-time offer. In order to maintain this system and their reputation as a whole, law schools must pay particular attention to the "amount and quality of the scholarship [they] produce[]."[55]

49 Ronald K. L. Collins, *On Legal Scholarship: Questions for Judge Harry T. Edwards,* 65 J. LEGAL EDUC. 637, 644 (2016), https://digitalcommons.law.uw.edu/faculty-articles/53.

50 *See* Gregory Sisk, Nicole Catlin, Katherine Veenis, & Nicole Zeman, *Scholarly Impact of Law School Faculties in 2018: Updating the Leiter Score Ranking for the Top Third,* 15 U. ST. THOMAS L. J. 95 (2018) ("The 'Scholarly Impact Score' for a law faculty is calculated from the mean and median of total law journal citations over the past five years to the work of tenured faculty members.").

51 *See* Collins, *supra* n. 49, at 645 ("In addition, because young scholars are discouraged from spending any serious time in practice, many know little about the real world of lawyering. A sampling of tenure-track professors hired during the past decade at forty law schools found that the median professor had three years' practice experience.").

52 David Segal, *What They Don't Teach Law Students: Lawyering,* N.Y. TIMES (Nov. 19, 2011), https://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html.

53 William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?,* ABA J. (July 1, 2012), https://www.abajournal.com/magazine/article/the_pedigree_problem_are_law_school_ties_choking_the_profession.

54 *Id.*

55 Segal, *supra* n. 52.

From the mid-1920s to the 1980s, the legal education realm went through vast changes directed toward expanding scholarship; the case-method style of teaching, the bar exam, and the LSAT were all developed during this period.[56] These developments created the modern legal education system we know and still use today. Between 1950 and 1965, 73 percent of New York City lawyers attended highly prestigious universities.[57] If law schools wanted to signal that they were a top player in the admissions game and their diplomas were of a high value, they were forced to subscribe to *scholarship.*[58]

Scholarship is certainly not all "bad." It only becomes useless when its theoretical roots are not put to practical use.[59] Harry T. Edwards, a former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, explained that for legal scholarship to be relevant,

"law professors should balance abstract scholarship with scholarly works that are of interest and use to lawyers, legislators, judges, and regulators who serve society."[60] In other words, if scholarship that is beneficial to society is produced, it might be worth saving. Otherwise, this profession will continue to be bombarded by articles like "The Influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria," which Chief Justice Roberts states, "[aren't] of much help to the bar."[61] Moreover, if law schools are going to continue valuing scholarship, they should at least "remain open to and respectful of diverse forms of [it]."[62] But this will not happen if law schools and firms continue to put such a heavy emphasis on tradition and fail to allow minorities access to coveted positions on law review, journal, or moot court. Scholarly work cannot attract a wide audience if there aren't members of diverse backgrounds writing for these publications.

This is not to say that there has been no change on the scholarship front; there has been. Clinics that emphasize practical over theoretical teaching are expanding at a number of institutions across the country, and barriers to get into law reviews might be easing as schools scale back on traditional write-on requirements to attract more diversity.[63] Yet the move away from scholarship isn't happening fast enough. Despite the legal innovation at work today in the education system, it won't matter until legal employers are on the same page, as well: ". . . legal employers don't reward law schools for the quality of their educational innovation . . . [they] decide where to interview based on where partners went to school or the school's reputation based on things like the *U.S. News Rankings."*[64] If the legal field continues to obsess over pedigree, the entire profession and what it stands for could be at risk.

56 Henderson & Zahorsky, *supra* n. 53.

57 *Id.*

58 *Id.*

59 *See* Collins, *supra* n. 49, at 652 ("I have also explained that I am not opposed to intensely theoretical scholarship that does not purport to have any practical value so long as other scholars are not discouraged from producing work that is of greater interest and use to wide audiences.").

60 *Id.* at 645 ("In order for legal scholarship to be relevant outside the legal academy, law professors should balance abstract scholarship with scholarly works that are of interest and use to lawyers, legislators, judges, and regulators who serve society through legal arguments, decision-making, regulatory initiatives, and enforcement actions. In other words, law schools, law reviews, and legal scholars should do a better job in producing scholarship that is of interest and use to wider audiences in society.").

61 Debra Cassens Weis, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship,* ABA J. (July 7, 2011), https://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship.

62 *Id.* at 642 ("Therefore, law schools should require and encourage scholarship. Law schools, however, should remain open to and respectful of diverse forms of scholarship to achieve the salutary goals of education.").

63 Charisma L. Miller, Esq., *Law Schools Expand Clinical Experience,* BROOKLYN DAILY EAGLE (Apr. 15, 2013), https://brooklyneagle.com/articles/2013/04/15/law-schools-expand-clinical-experience/; *Diversity and Inclusion at Georgetown Law Journals,* GEORGETOWN L. J. (Mar. 2021), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/03/Diversity-and-Inclusion-at-Georgetown-Law-Journals.pdf.

64 Henderson & Zahorsky, *supra* n. 53.

Doctrinal teaching issues/curriculum problems

The omission of practical training persists at law schools across the country. Theoretical teaching is the norm and has been for decades.[65] Therefore, the question becomes, how can the legal profession and NITA transition law school curriculum away from "overstuffed [] antiquated distinctions" toward practical and holistic training that equips students to become capable counselors? Without an answer to this question, Judge Edwards fears that law schools and law firms will continue to move in opposite directions.[66] In their current first-year classes, students will rarely encounter practical lessons, but they will spend a vast amount of time studying abstract theory.[67] For example, in Contracts, students might never encounter an actual contract, let alone learn how to draft and file one.[68] Additionally, a common Criminal Law class will focus largely on common law crime, but won't cover the process of plea bargaining, "even though a vast majority of criminal cases are resolved by that method."[69] Even though Civil Procedure and Evidence often work in tandem, these courses are taught separately at most institutions, thereby failing to teach students the art of solving procedural issues with evidentiary rules.[70]

Our system of law is about the "human experience"—humans like Jo Carol Nesset-Sale, Mildred and Richard Loving, and Fred Korematsu struggling for justice—yet, "somewhere along the way we began teaching law as if humans were an afterthought."[71] A majority of today's legal curriculum was developed in the 1870s, so instead of emphasizing that, Edward L. Rubin, former dean at the Vanderbilt Law School said, "We should be teaching what is *really going on* in the legal system."[72] The norms this profession is wedded to need to adapt as we begin to educate a new class of lawyers who have grown up with social media and advanced technological resources. Yesterday's law school curriculum will not be relevant to today's students unless they are given the tools necessary to "change the playing field" for humans across the country up against injustice.[73]

To put a bandage on this problem, many law schools have expanded their clinical training opportunities, which is a good thing.[74] However, these programs often account for only a few credit hours, and organizations like law review and journals gobble up the lion's share of funds and resources. It's unfortunate because, according to panelist Whitney Untiedt, law schools that are "flipping the model" and deciding how people can be effective in practice are

65 *See* Segal, *supra* n. 52 ("Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England.").

66 *See* Collins, *supra* n. 49, at 642 ("I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. The firms should be ensuring that associates and partners practice law in an ethical manner. But many law schools—especially the so-called "elite" ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.").

67 *Id.*

68 *See* Segal, *supra* n. 52.

69 *Id.*

70 Reuben A. Guttman & J.C. Lore, *Re-Thinking Procedure and How it is Taught,* American Constitution Society (Aug. 2, 2021), https://www.acslaw.org/expertforum/re-thinking-procedure-and-how-it-is-taught/ ("We teach procedure and evidence in isolation even though the rules at times reference one another.").

71 *Id.*

72 *Id.*

73 *Id.*

74 J.C. Lore III is a distinguished clinical professor and Director of Trial Advocacy at Rutgers Law School. He is the co-author of one of the nation's leading books on trial advocacy and has spent time training public and private attorneys, social service agency workers, law enforcement personnel, students, and judges. Lore has been a member of NITA since 2004, serving as both a Team Leader and Program Director.

producing the most successful graduates. Law students at schools without practical curricula often leave school with a legal degree and a heap of theoretical knowledge, but not the means to be a "provider of legal services."[75]

In addition to the failure to incorporate more practical training into their curriculum, law schools often struggle to expose their students to diverse people and ideas. In teaching such a world-renowned legal system, schools must remind students that even in the midst of its glory, it has its flaws. Because our "nation's problems are historic and run deep," students must be well-equipped with "practical knowledge" that can not only "better the lives of others," but also break the "culture of discrimination."[76] Instead of focusing merely on decisions where our nation got it right[77]—*Brown v. Board of Ed. of Topeka* and *Loving v. Virginia*, for example—it might do students a service to also learn about those cases where we got it wrong[78]—often referred to by scholars as "bad law."[79] As most know, we often learn from our mistakes, so instead of encouraging students to simply memorize the facts, issue, rule, analysis, and holding (the classic "IRAC") of a case, we might urge professors to push students to develop the critical thinking skills that would allow them to "make a difference."[80]

Rankings

The *U.S. News & World Report* rankings play the largest role in barring schools from focusing on practical education training. These rankings make for competitive school application processes and career recruitment atmospheres. Instead of deciding for themselves what is important to their audience, consumers and schools allow the *U.S. News* team to decide for them.[81]

And, of course, wealthy schools continue to dominate the rankings, as expert opinions account for 20 percent of the *U.S. News* survey.[82] Presidents, provosts, and deans of admissions—all academics in privileged positions—are asked to score the "academic quality of peer institutions."[83] Therefore, the same recognizable institutions—Yale, Harvard, University of Chicago, and New York University—continue to dominate the top 14 rankings time and time again. To remain in those positions, those law schools must subscribe to a scholarship agenda, as that is what they are ranked on every year.

While diversity among students is a critical component of a well-rounded legal education, the *U.S. News* devotes zero percentage points for diversity as a category in their methodology.[84] Lawyers serve as "ministers of justice," counseling diverse communities of people across the country. Therefore, it makes sense that they should feel comfortable with a "diversity of races, ethnicities and backgrounds that make up our society" in order to become a more effective lawyer.[85] Yet, "student diversity, the *[U.S. News]* suggests, detracts from academic excellence, despite the Supreme Court's own findings to the contrary."[86] And, law schools that do put diversity at the forefront of their mission, "pay a big *U.S. News* price for pursuing what most educators agree is best for all our students."[87] These rankings have in essence barred qualified candidates, who have grown up in diverse communities and actively volunteered within them, from pursuing a career in the legal profession by "encouraging restrictive admissions policies geared more towards gaming the rankings than doing what is right societally, and what is best pedagogically."[88]

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75 *See* Segal, *supra* n. 52.

76 Reuben Guttman, *On the Rule of Law: Now is the Time to Rethink the Role of Law Schools,* MEDIUM (Mar. 22, 2021), https://medium.com/@rguttman/on-the-rule-of-law-now-is-the-time-to-rethink-the-role-of-law-schools-1f9e707ee4a1.

77 *See* Table 1 *infra* pp. 24–25.

78 *See* Table 2 *infra* pp. 26–29.

79 Guttman, *supra* n. 76 ("We celebrate decisions by our courts that promote civil rights but too easily forget the ones which licensed oppression. Those decisions laden with ugly prose are often glossed over in law school curriculum—not read in entirety—because they are 'bad law.'").

80 *Id.*

81 Valerie Strauss, *U.S. News Changed the Way it Ranks Colleges. It's Still Ridiculous.,* WASHINGTON POST (Sep. 12, 2018), https://www.washingtonpost.com/education/2018/09/12/us-news-changed-way-it-ranks-colleges-its-still-ridiculous/.

82 *Id.*

83 *Id.*

84 Robert Morse, Kenneth Hines, Eric Brooks, Juan Vega-Rodriguez, & Ari Castonguay, *Methodology: 2022 Best Law Schools Rankings,* U.S. NEWS & WORLD REPORT (Mar. 29, 2021), https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology.

85 Tony Varona, *Diversity and Disgrace--How the U.S. News Law School Rankings Hurt Everyone,* 38 N.Y.U. REV. OF LAW & SOC. CHANGE (2014), https://socialchangenyu.com/harbinger/diversity-and-disgrace-how-the-u-s-news-law-school-rankings-hurt-everyone.

86 *Id.*

87 *Id.*

88 *Id.*

In order for law students to get out of the pack mentality that values scholarship above all else, these students have to be surrounded by peers and faculty with diverse views, experiences, and cultures.

Since its first list in 1983, the *U.S. News* system has slowly eroded the market for high-quality legal education, and has left behind "only a crude sorting system based on aptitude tests and law school brands."[89] Since it is clear that the rankings aren't going away, at least anytime soon, it is pertinent that law schools find a way to honor students who might take what is considered the "less scholarly" path—those pursuing careers in public interest and defending the "voiceless."[90] The legal profession at its core is about helping others. Somehow, amid arbitrary lists and a focus on pedigree, a commitment to service seems to have been lost. Yet, professionals within this field can play a role in bringing it back if they begin to reflect on and honor the graduates "who left the world in a better place."[91]

Faculty hiring

Additional barriers to law schools focusing on practical education training are their faculty hiring systems and the makeup of those faculty members. If you are a medical student, chances are you expect to be trained by a doctor who has not only stepped foot in a hospital but who has also spent a vast amount of their time and energy consulting and working on patients. So why is it that law students shouldn't expect to be trained by legal professionals who have not only stepped foot in a courtroom but have had years of experience representing clients?

The *New York Times* reported a study that from 2000 to 2010, nearly half the faculty members that taught at law schools across the country had "never practiced law for a single day."[92] Judge Edwards noted that law professors' distance from practical experience in the field is one of the "worst effects of the problems that [he] see[s] in legal education."[93] These "impractical scholars"[94] are pressured to focus on the number of times they are cited, rather than the quality of practical education their students receive.[95] In practice, lawyers are expected to think critically about the problems their clients present, yet professors keep classroom discussion at a swift pace, where students are expected to quickly regurgitate answers. This might keep students temporarily engaged in a classroom setting, but it fails to guide them in thinking "around a problem" from the lens of an experienced practitioner.[96] The Socratic method isn't the only way to get students thinking on their feet. Additionally, there is nothing to incentivize professors to focus their efforts on practical teaching, besides perhaps the goodness of their hearts—"it might earn them the admiration of students, but it won't win them any professional goodies, like tenure, a higher salary, prestige or competing offers from schools."[97] If law school deans transitioned to recruiting based on prior courtroom experience and ongoing problem-solving, rather than merely scholarship, law schools would "reflect a balance of talent" with professors who are well-prepared to educate students on becoming effective counselors.[98] Law school

89 Henderson & Zahorsky, *supra* n. 53.
90 Guttman, *supra* n. 76 ("[Law schools] should take pride in producing graduates who will speak out for the voiceless, become honorable public servants, thoughtful judges, and practitioners with integrity who make time to use their skills to help others.").
91 *Id.*
92 Segal, *supra* n. 52.
93 Collins, *supra* n. 49, at 637.
94 *Id.*
95 Sisk, Catlin, Veenis, & Zeman, *supra* n. 50.
96 Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law,* 50 LOY. L. REV. 623, 629 (2004), https://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1057&context=facschol.
97 Segal, *supra* n. 52.
98 Collins, *supra* n. 49, at 645.

leadership should set an example of being able to evolve with an ever-changing legal system and hire faculty with fresh perspectives derived from practical experiences. In the end, a client will receive no benefit from a dissertation on a scholarly topic their lawyer wrote during law school; lawyers have to be able to instead provide "immediately usable information."[99]

Student loan debt

Even if students receive the proper practical training needed to defend a client, there is still another barrier in the way of them making the decision to defend the vulnerable: student loan debt. The average law school graduate owes $160,000 in student debt.[100] For some, that may be the cost of a home. This financial burden weighs heavily on students and will continue to as their interest payments rise.[101] As a result of their debt, 48 percent of indebted lawyers have postponed or decided not to have children, 38.8 percent have decided to postpone their marriage or remain unwed, and 55.6 percent have put off purchasing property.[102]

You may be asking how this situation ties into access to justice for the vulnerable. The answer is simple: positions in public-interest fields offer little compensation compared with their Big Law counterparts. Grants for public interest internships and entry-level positions are limited and fail to adequately cover living expenses and ensure anything other than temporary funding.[103] This could render these internships as out of the question for a student facing financial hardships. Additionally, while the National Association for Law Placement (NALP) has reported that median salaries for entry-level public interest positions have increased since 2004, the most recent median salaries reported are $58,300 for an entry-level public defender and $48,000 for an entry-level civil legal services counselor.[104] Depending on the size of their firm, entry-level associates in the private sector have median salaries ranging from $85,000 to $190,000, often supplemented with large yearly bonuses.[105] Based on this information, it may come as no surprise that "roughly half or more of the incoming law students who state a preference for working in the public-interest sector will take positions in private law firms upon graduation."[106]

99 Guttman, *supra* n. 76.

100 Hanson, *supra* n. 14.

101 *Id.* ("40% of indebted law school graduates say they owe more than they did at graduation.").

102 *Id.*

103 Hon. Ann Jorgensen et. al., Final Report, Findings & Recommendations on the Impact of Law School Debt on the Delivery of Legal Services, ASSEMB. OF THE ILL. STATE BAR ASS'N (Jun. 22, 2013), https://www.lawschooltransparency.com/documents/cites/Illinois_SBA_Report_2013.pdf ("Others fear that the funding for their positions may disappear before ten years. Funding for legal aid attorneys is notoriously insecure, relying on deferral and state appropriations that can change with short notice.").

104 Press Release, *The Nat'l Ass'n for Law Placement, New Public Service Attorney Salary Figures from NALP Show Slow Growth Since 2004* (Jul. 9, 2018) (on file with NALP).

105 Holly D. Johnson, *What is Big Law and What are the Average Salaries?,* BANKRATE US (May 27, 2021), https://www.bankrate.com/loans/student-loans/big-law-salaries/; Meghan Tribe, *Lawyers Get $164,000 Bonuses to Keep Working 100 Hours a Week*, BLOOMBERG LAW (Jun. 3, 2021), https://www.bloomberg.com/news/articles/2021-06-03/how-much-do-lawyers-make-firms-offer-164-000-bonuses-time-off-in-wage-war.

106 John Bliss, *From Idealists to Hired Guns? An Empirical Analysis of "Public Interest Drift" in Law School,* 51 U.C. DAVIS L. REV. 1973, 1975 (2018) (discussing law students shift away from careers in public interest over the last few years).

NITA's role in possible solutions and better training

NITA could virtually expose law school students to those they would not otherwise meet: prisoners on death row, civil rights organizers, and practitioners dedicated to the public interest.

In order to get students to buy into advocacy programs set up by NITA or clinics at their schools:

- These programs could incorporate interesting and nuanced case files based on criminal law fact patterns, updated regularly to reflect the constantly evolving jurisprudence.
- Advocacy-on-a-Budget: training on how to effectively represent your client on a $0 budget in a high-volume practice.
- Advanced criminal procedure courses that get into the weeds on important substantive and procedural issues affecting the criminal justice system.
- Case investigation training: witness interviews, crime scene visits, extracting as much discovery as you can get from the prosecutor both formally and informally, etc.
- Doctrinal curricula exploring the roots and evolution of the American criminal justice system.
- Practical/clinical courses on cross-cultural representation.

Put more funding into grants that fund students interested in pursuing public interest internships.

Law schools should properly value those professors who have practical legal experience, rather than merely scholarship. These faculty members should have equal opportunities regarding higher salaries, prestigious titles, and control over the law school curriculum.[107]

Increased funding for Loan Repayment Assistance Programs (LRAPs)

- LRAPs can help law school graduates working in the public interest or government sector by providing partial debt relief for their work in the field.[108] Existing LRAPs are inadequate because while some offer lower monthly payments for borrowers, interest continues to accrue.[109]

Encourage genuine efforts for law schools to improve their clinical offerings.[110]

Encourage law schools to embrace the changing art of legal education

Law students should go on "field trips" with faculty or participate in field studies on legal issues (i.e., meet with prisoners, find out how they got arrested, etc.).

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107 Guttman & Lore, *supra* n. 70.

108 Curtis M. Caton et al., *Lifting the Burden: Law Student Debt as a Barrier to Public Service,* ABA Comm'n on Loan Repayment and Forgiveness (2003), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_lrap_finalreport.pdf.

109 Jorgensen, *supra* n. 103.

110 Collins, *supra* n. 49, at 644.

IV. The Lack of a Civil Right to Counsel Reduces Access to Justice and Results in Rampant Invisible Heartbreak in Society

"Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."[111]

While people have the right to an attorney in most criminal matters, there is no right to counsel in civil matters. Plaintiffs seeking damages can acquire counsel by agreeing to pay a contingency fee. Our system is unique in this respect as most other countries find this arrangement less than ideal, if not unethical.[112] However, contingency fee arrangements open the courts to litigants that have been harmed who otherwise would not be able to afford counsel. For defendants or those seeking non-damage remedies, the picture is more complex and access to justice is almost nonexistent. For many indigent people experiencing housing, family, or immigration matters, our system is a Kafkaesque nightmare.

Where civil access to justice fails.

Sixty-six percent of American adults experienced a justiciable civil legal need over the course of a two-year survey.[113] For those making less than $30,000 per year, 72 percent reported a legal need.[114] Fifty-eight percent of the low income bracket reported that they experienced hardship as a result of their legal need.[115] Eighty percent of litigants in poverty do not have counsel for matters involving evictions, mortgage foreclosure, child custody disputes, child support proceedings, and debt collection cases.[116]

In housing matters, 90 percent of tenants are unrepresented.[117] In contrast, in some cities, 90 percent of landlords are represented.[118] Unsurprisingly, in the four evictions filed per minute in the United States, outcomes highly favor landlords regardless of merit.[119] Represented tenants are up to 19 times more likely to win than unrepresented tenants.[120]

111 Powell v. Alabama, 287 U.S. 45, 69 (1932). The Court in *Powell* was referencing the criminal justice system and, in particular, a capital rape case. However, the words ring true for our civil justice system as well.

112 *Compare* John M. Wickerson, *Contingency Fees: An English View*, 11 INT'L LEGAL PRAC. 92 (1986) (discussing the English view of contingency fees), *with* William Reece Smith Jr., *Contingency Fees: A US View*, 11 INT'L LEGAL PRAC. 93 (1986) (discussing the American rule of contingency fees).

113 Rebecca L. Sandefur & James Teufel, *Assessing America's Access to Civil Justice Crisis*, 11 U.C. IRVINE L. REV. 753, 766 (2021).

114 *Id.* at 767.

115 *Id.* at 768.

116 AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 12 (2016).

117 Sandefur & Teufel, *supra* n. 113, at 755.

118 Rebecca Buckwalter-Poza, *Making Justice Equal*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/ (explaining that in Washington, D.C. 90% of landlords are represented).

119 Ericka Petersen, *Building a House for* Gideon*: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63, 67–68 (2020).

120 *Id.* at 89.

While states often cite budget shortfalls as a reason not to provide counsel, the financially responsible thing to do would be to provide counsel in housing matters. New York City passed a right to counsel statute in housing in 2017.[121] The city expects to save $320 million annually by providing tenants counsel in housing matters.[122] An independent consulting firm found that funding eviction representation in Massachusetts would save the Commonwealth nearly $3 for every $1 spent.[123] In housing, both fairness and economics support providing counsel for the indigent but, instead, we often let these litigants proceed pro se with unsuccessful results.

In family law cases, 75 percent of litigants are unrepresented.[124] Simply getting a protective order against an abusive intimate partner requires having counsel. In a study conducted in Baltimore, 83 percent of represented women successfully obtained their protective order.[125] However, only 32 percent of unrepresented women obtained one.[126] Thus, protection from abuse is contingent on one's ability to pay and not on how much danger the victim is in. Furthermore, indigent individuals who find themselves married to their abusers may be stuck in that abusive relationship. Professor James Greiner of Harvard's Access to Justice Lab conducted a study with Philadelphia Volunteers for the Indigent Program (VIP) that found only 9 percent of indigent clients not matched with a pro bono attorney were able to obtain a divorce pro se in Philadelphia County.[127] Conversely, 46 percent of clients Philadelphia VIP matched with a pro bono attorney obtained a divorce.[128]

Some may look at those statistics and ask themselves why it matters that someone gets divorced, but those stuck in an abusive relationship will find themselves unable to physically or financially separate from their abuser.

In immigration cases, only 37 percent of immigrants involved in deportation proceedings between 2007 and 2012 found representation.[129] The number was even lower for those already detained.[130] If an immigrant was represented, they likely paid out of pocket, because only 2 percent of those that found representation were represented pro bono.[131] Nonetheless, representation is important to seeking and obtaining relief from deportation. Those represented were 15 times more likely to seek relief and over five times more likely to actually obtain relief.[132] A poem on the Statue of Liberty asks other countries for their "poor huddled masses yearning to breathe free," but in actuality, those who can afford representation may stay, but those who likely cannot will be sent back to the countries they left behind. Immigrants often flee countries due to economic insecurity or fears for their lives and physical safety.[133] Our immigration process does not require counsel, even though sending people back to their home countries may be a death sentence.[134]

Support for providing counsel in civil matters.

Why do we not provide counsel in civil matters? The bar seems to support the right to counsel. The ABA House of Delegates voted unanimously in favor of a civil right to counsel more than a decade ago in 2006.[135] The international community seems supportive of a right to counsel. England has had a statute providing a right to

121 *Id.* at 91.
122 *Id.* at 89.
123 *Id.*
124 Sandefur & Teufel, *supra* n. 113, at 755.
125 Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 Am. U. J. Gender Soc. Pol'y & L. 499, 512 (2003).
126 *Id.*
127 Olga Khazan, *The High Cost of Divorce*, The Atlantic (June 23, 2021), https://www.theatlantic.com/politics/archive/2021/06/why-divorce-so-expensive/619041/.
128 *Id.*
129 Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 2 (2015).
130 *Id.*
131 *Id.*
132 *Id.*
133 *Refugees, Asylum-Seekers and Migrants*, Amnesty Int'l, https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/ (last visited Aug. 4, 2021) ("There are many reasons why people around the globe seek to rebuild their lives in a different country. Some people leave home to get a job or an education. Others are forced to flee persecution.").
134 Kirk Semple, *Asylum Seekers Say U.S. is Returning Them to the Dangers They Fled*, N.Y. Times (Jun. 27, 2020), https://www.nytimes.com/2020/03/17/world/americas/immigration-guatemala-us-asylum.html.
135 Raven Lidman, *Civil* Gideon *as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 Temp. Pol. & Civ. Rts. L. Rev. 769, 769 (2006).

counsel for the indigent in civil matters for 500 years.[136] The English right to counsel predates our country and constitution but has never been considered a fundamental right in our country. The European Court of Human Rights declared that the right to a fair hearing requires either procedures simple enough for a layperson to navigate or publicly provided counsel for low-income litigants.[137] Yet, in what many consider the greatest justice system in the world, many go unrepresented. In fact, the United States ranks 30th out of 37 high-income countries in civil access to justice.[138] In our country, low-income people often find themselves trapped in legal problems that hinder their well-being. The problems of the indigent are often ignored, resulting in an "invisibility of heartache" that underlies our society.[139]

Why is the heartache invisible?

The invisibility of this heartache results from a communication gap between the legal community and the lay community. The common layperson often believes that there is a general right to counsel. Additionally, the media tends to focus on infamous criminal cases or exonerations in its legal reporting rather than everyday problems that spiral into crises for unrepresented low-income people. The result is the belief that legal needs are being met in the United States. While it is important to publicize cases of public interest or our system's high rate of false imprisonment, it is imperative that the media begin to expose the legal issues low-income people often face without representation. Attorneys must play a role in highlighting the system's inadequacy and advocating for reform via the political process and educating the public.[140]

How can attorneys expand civil access to justice?

Various reforms to our current civil legal system may help increase access to justice. First, recognition of a federal civil right to counsel or "Civil *Gideon*" would be the largest and most absolute change. However, the Supreme Court mostly closed the door to this route in *Lassiter v. Department of Social Services*.[141] In that case, an indigent mother's parental rights were terminated in a proceeding where she was unrepresented.[142] On appeal, she argued that the state violated due process by not appointing her representation.[143] The Supreme Court held that the Constitution did not require appointment of counsel in every parental termination proceeding and that the trial court could determine if appointment was necessary on a case-by-case basis.[144] Justice Blackmun, writing in dissent, noted that our society is supposedly a maturing one and that "our notion of due process is, 'perhaps the least frozen concept of our law.'"[145] Ultimately, the Court may never recognize a right to counsel in civil matters for the indigent, and even if there is a remote chance, it is unlikely the current Court has the right makeup to do so.[146]

Second, pro se litigation reform may help in certain areas. However, some complexities in process may actually serve to protect due process. Therefore, identifying which processes protect due process and which processes are simply antiquated barriers is necessary. Harvard's Access to Justice Lab conducts randomized control trials to assess parts of the justice system in a regimented statistical analysis similar to those used in medicine.[147] Identifying processes that do not serve due process but are simply antiquated is only the first step in pro se litigation reforms. The second is convincing courts, politicians, and the public the reforms are necessary.

136 *Id*. at 773.
137 *Id*. at 774.
138 World Justice Project, Rule of Law Index 154 (2020).
139 National Institute for Trial Advocacy, *National Town Hall on Access to Justice for the Vulnerable* (Jul. 21, 2021), https://www.nita.org/webcasts/s71LEC140. During the town hall, attorney and civil rights plaintiff Jo Carol Nesset-Sale highlighted what she called the "invisibility of heartache" in our country. In Nesset-Sale's view, the problems of low-income people are often ignored by the news media and our society at large.
140 For example, retired federal judge Nancy Gertner's forthcoming book *Incomplete Sentences* reckons with her sentencing decisions under federal mandatory minimums. Nancy Gertner, *Unfinished Business*, Inquest (Aug. 3, 2021), https://inquest.org/nancy-gertner-unfinished-business/. Former family, housing, or immigration judges and attorneys should take note of Judge Gertner's candor and also begin to share stories about the inadequacy of the system.
141 Lassiter v. Dept. of Soc. Servs., 452 U.S. 18 (1981).
142 *Id.* at 21–24.
143 *Id.* at 24.
144 *Id.* at 31–32.
145 *Id.* at 58 (Blackmun, J., dissenting) (*quoting* Griffin v. Illinois 351 U.S. 12, 20 (1956)).
146 Alan Z. Rozenshtein, *The Great Liberal Reckoning Has Begun*, The Atlantic, (Sep. 22, 2020), https://www.theatlantic.com/ideas/archive/2020/09/liberal-reckoning-courts/616425/ (arguing that the death of Justice Ginsburg closed the door for a liberal reform minded judiciary).
147 Harvard Access to Justice Lab, About, A2JLab, https://a2jlab.org/about/ (last visited Aug. 5, 2021).

Third, imposing a right to counsel at the state level may help increase access to justice. Several jurisdictions have recognized a right to counsel in specific legal areas. New York City passed a right to counsel statute for eviction in 2017.[148] Philadelphia, San Francisco, Cleveland, and Newark have since followed suit.[149] If these statutes are successful, more cities may pass similar statutes. However, since these statutes only affect a single jurisdiction, and often a single legal area, the change in access would be limited. Nonetheless, as more jurisdictions recognize a civil right to counsel, the chances the Supreme Court will eventually recognize the right increases.[150]

Fourth, funding to legal aid agencies could be increased. The Legal Services Corporation (LSC) is a grant-making organization that distributes federally appropriated funds to 132 independent legal aid organizations.[151] In 2017, LSC grantees reported over one billion dollars in funding from LSC and non-LSC sources.[152] However, in the same year, LSC reported that 86 percent of the civil legal issues reported by low-income Americans received inadequate help.[153] Seventy percent of low-income Americans with a legal need said the legal issue significantly affected their lives.[154] Between 85 and 97 percent of inadequately addressed legal needs stemmed from lack of resources.[155] Obviously, legal aid services need more funding and increased resources to address the caseload. Again, politicians and the voting public may need to be persuaded that additional funding is necessary.

Fifth, access to justice might be increased if private firms increase their pro bono work. However, this model will only do so much. Currently, the majority of attorneys in private practice conduct fewer than 20 hours of pro bono work a year.[156] In a world where profit margins, revenue, and billable hours reign supreme, private practitioners will never do enough work to address the massive needs of low-income Americans. That conclusion does not suggest that private pro bono work is not essential but rather that it cannot alone address the massive need for legal services in our country.

Finally, and maybe most importantly, attorneys must support diverse progressive politicians in both local and national elections to increase access to justice. Eventual recognition of a federal civil right to counsel, pro se litigation reform, state level civil right to counsel, and increased funding to legal aid services all require political change. Additionally, supporting and electing politicians from marginalized communities and low-income backgrounds would mean those in power would understand the problems the poor face.[157] Addressing the needs of low-income Americans and marginalized

148 Petersen, *supra* n. 119, at 91.

149 *Id. See also Philadelphia Bar Association Applauds City Council for Passage of Historic Right to Counsel Bill*, PHILA. BAR ASS'N (NOV. 14, 2019), https://www.philadelphiabar.org/page/NewsItem?appNum=4&newsItemID=1001895.

150 Persuasive authority does affect the Supreme Court. Justice Kennedy cited the decisions of both the international community and majority of the states in his opinion holding the death penalty for juveniles unconstitutional. *See* Roper v. Simmons, 543 U.S. 551, 568-579 (2005).

151 *What We Do*, LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/who-we-are/what-we-do (last visited Aug. 6, 2021).

152 LEGAL SERVS. CORP., *By the Numbers: Data Underlying Legal Aid Programs* 12 (2017).

153 LEGAL SERVS. CORP., *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* 6 (2017).

154 *Id.* at 7.

155 *Id.* at 8.

156 ABA STANDING COMMITTEE ON PRO BONO & PUBLIC SERVICE, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 36 (2018). Private practice attorneys do conduct more pro bono than their corporate, government, non-profit, and academic counterparts. However, less than 20 percent report more than 80 hours of pro bono work per year.

157 *See* Kenneth Lowande et al., *Descriptive and Substantive Representation in Congress: Evidence from 80,000 Congressional Inquiries*, 63 AM. J. POL. SCI. 644, 645 (2019) ("[W]e find that in a given Congress, legislators are around 6–9 percentage points more likely to contact federal agencies on behalf of constituents with whom they share background characteristics."); Michael D. Minta & Valeria Sinclair-Chapman, *Diversity in Political Institutions and Congressional Responsiveness to Minority Interests*, 66 POL. RSCH. Q. 127 (2013) ("Diverse institutions produce better public policies than nondiverse institutions, confer greater legitimacy to public policies and organizations, enhance deliberative democracy and improve governmental responsiveness to marginalized groups.").

communities requires that people from those backgrounds are placed in positions of power. While society often focuses on national elections, the election of members of a local housing authority board, a local board of education, city commissioners, or other local level policymakers could affect the lives of low-income Americans immensely.

How can law schools increase civil access to justice?

Law schools may play a role in increasing access to justice in several ways. First, increasing the number of clinics available would expose students to the various legal problems of the indigent. If law schools increase the number of available clinical experiences, they will not only expose students to the need, but also help the indigent directly with their legal issues. The more students are engaged in clinics, the more low-income people will receive representation.

Second, law schools may stress legal aid or nonprofit work after graduation. Currently, law schools often stress on campus interviews with big firms. The view amongst law students is that the big firms are more prestigious and, thus, better for a resume and career. However, burnout in the big firms is high[158] and many young lawyers do not find the work rewarding. Stressing legal aid or nonprofit opportunities may slowly change the culture.

Finally, law schools may begin to offer postgraduate opportunities serving low-income individuals. Since 2014, Rutgers Law School has offered the Rutgers Law Associates Fellowship Program, which is a postgraduate residency program that allows students to practice under the supervision of an attorney and educator.[159] The program has served nearly 800 low- and moderate-income clients.[160] Schools should strive to provide these opportunities to top students that are interested in developing a solo or small community-based practice.

What role can NITA play in helping change the system?

Create a curriculum based on the needs of the indigent.

- Case files for students that cover family law, immigration, or housing issues.
- Simulated custody hearings, deportation proceedings, or eviction cases.
- Civil rights appellate materials based on cutting edge issues affecting the lives of low-income Americans and marginalized communities to ensure that law students understand modern issues and practice public interest arguments.

Create training materials for attorneys to help them grow their skills for local government.

- Training attorneys involved at the ground level on the issues faced by the indigent to advocate at local public meetings, such as city council or school board meetings.

Creating training materials that teach attorneys and law students to respectfully challenge antiquated procedures.

- Teaching attorneys about the procedures are likely to present issues to low-income or marginalized communities.
- Training attorneys to understand how and when to challenge the use of such procedures.

Educating partners of trial firms about the benefits of pro bono work for young attorneys.

- Pro bono experience will often allow young attorneys to spend more time in court sooner. Thus, allowing young associates to take on more pro bono work leads to greater professional development.

Incentivizing members of NITA, whether in practice or the academy, to push law schools to create more clinical opportunities and hire more professors with firsthand experience with issues affecting the indigent.

158 Dylan Jackson, *Law Firms Seek to Address the Root Cause of Burnout: Time*, Am. Law. (Apr. 27, 2021), https://www.law.com/americanlawyer/2021/04/27/law-firms-seek-to-address-the-root-cause-of-burnout-time/?slreturn=20210706141718.

159 *Rutgers Law Associates Fellowship Program*, Rutgers, https://law.rutgers.edu/rutgers-law-associates-fellowship-program (last visited Aug. 5, 2020).

160 *Rutgers Law Associates Celebrates Five Years of Providing Needed Legal Services at an Affordable Price*, Rutgers (Nov. 12, 2019), https://law.rutgers.edu/news/rutgers-law-associates-celebrates-five-years-providing-needed-legal-services-affordable-price.

V. Issues Regarding Representing Inmates

"Finally, I've come to believe that the true measure of our commitment to justice . . . cannot be measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned."[161]

Many issues exist regarding representing inmates in today's criminal justice system. Though the Constitution guarantees a right to counsel, that right is limited. From the pressure to take plea offers to the lack of representation post-adjudication, representing inmates poses unique challenges—and often comes with the highest stakes. The question then arises: how do we address these issues? What are the real, practical solutions?

When is a person considered an "inmate"?

It may be helpful to begin with the journey a person takes through the criminal justice system in order to understand when a person becomes an inmate. A person may be incarcerated beginning after their arrest and, if they cannot afford bail or no bail is set, they will remain incarcerated throughout the duration of their case. If their sentence includes jail time, they will remain incarcerated for the duration of their sentence. From detention awaiting trial to incarceration post-sentencing, representing inmates poses its own distinct challenges.

What makes representing inmates different?

There are several factors that make representing incarcerated individuals different from other clients, chief among which are the pressure to take pleas and the unique challenges with post-adjudication representation.

Studies show that "detainees plead guilty faster than defendants who are released before trial."[162] Pretrial detention often negatively affects both disposition and sentencing decisions; because many defendants cannot afford to pay bail, they choose to take a guilty plea, regardless of innocence, in order to avoid more jail time.[163]

There are often two dynamics that drive people's decisions to make pleas, according to New Jersey Public Defender Joe Krakora. First, when lawyers are paid a low, flat fee per case instead of hourly fees, the attorneys often do not have the incentive to take a case to trial and instead attempt to resolve it as quickly as possible. Second, there is often a massive disparity between the pleas offered early in a case and the sentences that are determined at trial. This disparity exists, in part, because of the mandatory minimum sentencing structure that exists in federal law and many state laws. Generally, because there may be such a vast difference between a plea offered at the outset of a case and the sentence a defendant receives if found guilty at trial, many people choose to take pleas instead of risking a trial sentence. Inmates specifically feel added pressure to take pleas;

161 Bryan Stevenson, Just Mercy: A Story of Justice and Redemption 17–18 (2015).

162 Nick Petersen, *Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas*, 31 Crim. Justice Policy Rev. 1015, 1016 (2019). *See also* Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 Law & Society Rev. 527, 528.

163 *Id.*

often, their primary motivation is to avoid another lengthy sentence, and in an effort to avoid more jail time than necessary, they take the lesser, initial plea.[164]

Further, in some states, it is difficult or even impossible for inmates to obtain post-adjudication representation. Often, the most critical stage of a criminal case is the work that takes place after sentencing. Inmates who do not receive a state-appointed attorney and cannot afford one post-sentencing may miss opportunities such as advocating for inclusion in prison-based rehabilitation programs, pre-release reentry plans with community support, and the medical needs of the client. Studies show that these programs reduce recidivism by 15 to 20 percent.[165] Without an attorney advocating on their behalf, inmates may struggle to gain access to these programs, and the likelihood that they will commit future crimes increases.

Prisoners also face issues with filing civil suits while incarcerated when they cannot afford representation. Recent studies show that inmates most often file suits against correctional facilities, with claims regarding the lack of medical treatment, physical insecurity, due process violations, assault or harassment, and denial of religious expression.[166] The federal Constitution ensures the right to representation on direct appeal but does not ensure the right to counsel on collateral consequences. In some jurisdictions, public defenders are even prohibited from representing inmates on such collateral issues.

Is pro bono work a viable solution to these issues?

Many believe that pro bono work may be the solution to the issues facing inmates. Perhaps if their attorney was volunteering to represent them, if the attorney was passionate about the cause and not limited by the heavy caseloads of many public defenders, cases would go to trial more often. Further, it's possible that pro bono work could make a noticeable difference in post-adjudication representation, especially in jurisdictions where public defenders are expressly prohibited. In order for a pro bono system to be successful, many issues must be addressed.

How do you identify the people with a legal need? To begin addressing the issues regarding representing inmates, we must first find a way to determine who has a legal need. A pro bono system is reliant on an intake process system where someone sorts through cases or applications and who has a legal need and requires access to pro bono legal services.

How do you assign volunteers? After the legal need is determined, there needs to be a way to sort through volunteer attorneys and assign them to cases. Again, there must be someone focused on looking through applications for aid and assigning attorneys to each case, meeting the needs of both the attorney and the inmate.

How are the volunteers trained? Often, pro bono volunteers are coming from a corporate environment and need extensive training in order to adequately represent inmates, which raises the issue of how to train those volunteers. This presents many difficulties, including the need for a standardized, consistent training curriculum, hiring someone to conduct the training, and ensuring that the volunteers actually understand the training they received.

Who is supervising the volunteers? After the volunteer attorneys are trained and begin representing inmates, they will likely need a supervisor who can answer any substantive or procedural questions that may arise and ensure that they are filing motions in a timely manner.

What is the standard of representation? There is no question that there needs to be some standard of representation; but which standard should these volunteers be held to? Are they held to the general competency standard or the higher, constitutionally required standard in a criminal proceeding of effective assistance of counsel?

How do you incentivize attorneys to volunteer to represent inmates? There are a multitude of areas where an attorney can volunteer their time. Representing inmates in civil litigation proceedings or ensuring their access to a rehabilitation program during incarceration is likely not high on many people's lists. Pro bono work can produce attorneys who go above and beyond for their clients, but if they are not incentivized to enter the field in the first place, they are unlikely to improve their skills within the profession.

164 *Id.*
165 Joan Petersilia, *Beyond the Prison Bubble*, NAT'L INST. OF JUSTICE (Nov. 2, 2011).
166 Roger Hanson & Henry Daley, *Challenging Conditions of Prisons and Jails*, BUREAU OF JUSTICE STATISTICS (1994).

Is this the best way to spend that money? The biggest question here comes down to funding. Each of the issues discussed above will require a system that can hire and pay individuals to ensure the success of pro bono representation for inmates. Intake workers, supervisors, and recruiters would all have to be paid to work with attorneys who will only likely be one-time volunteers. Is it worth it to invest so much money in attorneys who will, most often, only ever take on one case, or is it better to invest in professionals who represent inmates full time?

Representing inmates is a challenge that continues to search for a solution. The most pressing needs at the moment seem to be twofold. First, we must find a way to ensure that inmates are not taking pleas just to avoid jail time or because they lack access to their attorney while incarcerated. Second, we must find a way to work within the often-constricting structures of state legislatures that limit an inmate's access to representation post-adjudication. Whether it be through pro bono work, law school clinics, or another solution altogether, inmates face clear access to justice issues that must be addressed.

The Rule of Law Is a Work in Progress: Where did we get it ***right?*** Where did we get it ***wrong?***

Table 1: Supreme Court Cases Where We Got It Right

NAME	HOLDING	QUOTE	CITATION
Powell v. Alabama	Ozie Powell, an impoverished and illiterate African American boy, was denied his constitutional right to secure representation when he was withheld from contacting the outside world. The Due Process Clause requires a right to pretrial counsel.	"The United States by statute and every state in the Union by express provision of law, or by the determination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him."	287 U.S. 45 (1932)
Shelley v. Kraemer	Racially restrictive covenants, like the one that was imposed on the Shelleys' home, violate the Equal Protection clause of the Fourteenth Amendment.	"Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race and color . . ."	334 U.S. 1 (1948)
Brown v. Board of Education (I)	"Separate, but equal" is inherently unequal. Segregation of children in schools, solely on the basis of race, is a violation of the Equal Protection Clause of the Fourteenth Amendment. Overturned, Plessy v. Ferguson.	"In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."	347 U.S. 483 (1954), supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955)
Loving v. Virginia	States may not ban interracial marriages, as statutes enacting these bans are a violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment.	"Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the States' citizens of liberty without due process of law."	385 U.S. 986 (1955)
Heart of Atlanta Motel, Inc. v. United States	Congress has the power, under the Commerce Clause, to remove racially restrictive barriers to interstate commerce by way of the Civil Rights Act of 1964.	"The public accommodation provisions of the Civil Rights Act of 1964 do not, by requiring motel operator to render available rooms to Negroes against its will, subject operator to involuntary servitude in violation of the Thirteenth Amendment."	379 U.S. 241 (1964)
New York Times Co. v. Sullivan (1964)	The Alabama Supreme Court cannot impose safeguards on freedom of speech. The New York Times was not libelous in their actions.	"The maintenance of opportunity for free political discussion to the end that government may be responsive to [the] will of [the] people and that changes may be obtained by lawful means is a fundamental principle of the constitutional system."	376 U.S. 254 (1964)
Miranda v. Arizona	Americans like Ernesto Miranda, subject to custodial interrogation, must be given certain warnings about their rights to remain silent and to counsel. Otherwise, those statements are inadmissible at trial.	". . . if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."	384 U.S. 436 (1966)

NAME	HOLDING	QUOTE	CITATION
Jones v. Alfred H. Mayer Co.	42 U.S.C. § 1982 is a valid constitutional exercise by Congress and can be applied to private actors like Alfred H. Mayer Co., who refuse to sell property to African Americans.	"If Congress had power under Thirteenth Amendment to eradicate conditions preventing Negroes from buying and renting property because of their race or color, no federal statute calculated to achieve that objective can be thought to exceed constitutional power of Congress simply because it reaches beyond state action to regulate conduct of private individuals."	392 U.S. 409 (1968)
Roe v. Wade	A woman's right to elect to have an abortion is considered a constitutional right to privacy.	"The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."	410 U.S. 179 (1973)
Cleveland Board of Ed. v. LaFleur	The Cleveland Board of Education's mandatory leave rule for pregnant school teachers is unconstitutional. School boards cannot impinge on a woman's right to bear a child.	"In fact, since the fifth or sixth month of pregnancy will obviously begin at different times in the school year for different teachers, the present Cleveland and Chesterfield County rules may serve to hinder attainment of the very continuity objectives that they are purportedly designed to promote."	414 U.S. 632 (1974)
Lawrence v. Texas	Partners have a right to liberty concerning the intimacies in their physical relationships, guaranteed by the Due Process Clause of the Fourteenth Amendment.	"The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."	539 U.S. 558 (2003)
Obergefell v. Hodges	Same-sex marriages are lawful in all 50 states. States may not deny same-sex couples marriage licenses.	"In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."	576 U.S. 644 (2015)

Table 2: Supreme Court Cases Where We Got It Wrong

NAME	HOLDING	QUOTE	CITATION
Dred Scott v. Sandford	Dred Scott, and all other African Americans held as slaves, are not considered United States citizens.	"[African Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit."	60 U.S. 393 (1857), superseded (1868)
The Civil Rights Cases	Congress acted outside the scope of its power when it passed the Civil Rights Act of 1875 because they do not have the power, under the Fourteenth Amendment, to prohibit discrimination by private individuals.	"The Fourteenth Amendment, U.S.C.A. is not intended to protect individual rights against individual invasion, but to nullify and make void all state legislation and state action which impairs the privileges of citizens of the United States."	109 U.S. 3 (1883)
Plessy v. Ferguson	Distinctions may be made on the basis of color, as long as they are "equal." Separate railway cars for black and white passengers is allowed by the Fourteenth Amendment because even though the passengers are separated, the facilities are equal.	"The [plaintiff's] argument also assumes that social prejudice may be overcome by legislation, and that equal rights cannot be secured except by an enforced commingling of the two races. . . . If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." **Dissent Quote:** "What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana" (Harlan).[167]	163 U.S. 537 (1896), overruled by Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954)

167 Tiffany Manukure, an American University student studying Political Science and Government, compiled several lists of dissenting quotes from cases that reflect poorly on our nation's history.

NAME	HOLDING	QUOTE	CITATION
Lochner v. New York	New York States' Bakershop Act, limiting the working hours of bakers to 60 hours a week, violated the Due Process Clause of the Fourteenth Amendment.	"The limitation of employment in bakeries to 60 hours a week and 10 hours a day, attempted by Laws N.Y. 1897, c. 415, art. 8, § 110, is an arbitrary interference with the freedom to contract guaranteed by Const. U.S. Amend. 14, which cannot be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare."	198 U.S. 45 (1905), overruled in part by Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952), overruled in part by Ferguson v. Skrupa, 372 U.S. 726 (1963), abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)
Hammer v. Dagenhart	Congress' Keating-Owen Act, prohibiting goods made by children to be sold in interstate commerce, was unconstitutional. Congress could not regulate commerce for underlying purposes of reducing child labor, and child labor is a purely local issue nonetheless.	"The Child Labor Law cannot be sustained on the theory that Congress has power to control interstate commerce in the shipment of childmade goods because of the effect of such goods in states where the evil of child labor has been recognized by local legislation and the right to employ child labor has been more rigorously restrained than in the state of production." **Dissent Quote:** "The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor" (Holmes 6).[168]	247 U.S. 251 (1918), overruled by U.S. v. Darby, 312 U.S. 100 (1941)
Buck v. Bell	A Virginia state law, requiring the sterilization of mentally ill persons for the benefit of society, was held constitutional.	"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."	274 U.S. 200 (1927)

168 *Id.*

NAME	HOLDING	QUOTE	CITATION
Korematsu v. United States	Civilian Exclusion Executive Order No. 34, requiring Japanese Americans on the west coast to relocate to internment camps during World War II, was constitutional.	"Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger." **Dissent Quote:** "To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow" (Murphy).[169]	323 U.S. 214 (1944), abrogated by Trump v. Hawaii, 138 S. Ct. 2392 (2018)
San Antonio Independent School District v. Rodriguez (1973)	The San Antonio Independent School District's system of financing public schools on property taxes is constitutional even though it created significant discrepancies in the quality of education these children receive.	"At least where wealth is involved, the Equal Protection Clause of the Fourteenth Amendment does not require absolute equality or precisely equal advantages."	411 U.S. 1 (1973)
Lassiter v. Department of Social Services	Right to counsel only exists where physical liberty is at stake. Fourteenth Amendment due process does not require the state to provide the indigent counsel in proceedings where their parental rights may be terminated.	"[W]e [cannot] say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore . . . leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review."	452 U.S. 18 (1981)

169 *Id.*

NAME	HOLDING	QUOTE	CITATION
Bowers v. Hardwick	There is no fundamental right within the Constitution that allows for homosexual intercourse.	"Presumed belief of majority of Georgia electorate that homosexual sodomy is immoral and unacceptable provided rational basis for Georgia's sodomy statute." **Dissent Quote:** "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S., at 777, n.5, 106 S. Ct., at 2187, n.5 (STEVENS, J., concurring), quoting Fried, Correspondence, 6 Phil. & Pub. Affairs 288–289 (1977)" (Blackmun 7).[170]	478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003)
Kelo v. City of New London	The City of New London has the right to exercise its eminent-domain authority to take property from private individuals like Susette Kelo and Wihelmina Dery, who had lived on the land for decades, and give it to private developers to "promote the public welfare."	"[The] city's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement, even though city was not planning to open condemned land to use by general public, where plan served public purpose."	545 U.S. 469 (2005)
Citizens United v. FEC	Section 441(b) of the Bipartisan Campaign Reform Act of 2002 (BCRA) is unconstitutional because the First Amendment does not allow for the suppression of political speech based on a corporation's identity.	"The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers. There is no basis for the proposition that, in the political speech context, the Government may impose restrictions on certain disfavored speakers."	558 U.S. 310 (2010)
Shelby County v. Holder (2013)	Section 5 of the Voting Rights Act, requiring certain jurisdictions to obtain federal approval before making changes to their voting procedures, is not justified by current needs, and therefore, is unconstitutional.	"At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements."	570 U.S. 529 (2013)

170 *Id.*

Contributors

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