

## Trapped in Marriage

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With special thanks to Cassandra Wolos Pattanayak and Jessica Zhang

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This paper benefited from feedback received at the University of Arizona School of Law, at the 2017 Experimental Methods in Legal Scholarship Workshop at Columbia Law School, at Harvard Law School, and at the University of California at Los Angeles School of Law. The authors thank the Laura & John Arnold Foundation for supporting this research through its grant to create the Access to Justice Lab at Harvard Law School.

This study would not have been possible absent the extraordinary cooperation and courage of individual pathbreakers within two institutions. First, the First Judicial District of Pennsylvania, Family Division, Domestic Relations Branch, particularly the Honorable Margaret T. Murphy, Administrative Judge, and Ed Lehmann, Director, Data Management and Case Processing, both of whom showed leadership and a thirst for truth in agreeing to cooperate with this study. Their dedication is a model for court systems nationwide. Second, the staff of the Philadelphia VIP, particularly then Managing Attorney Ourania Papademetriou and former staff attorney Michael L. Viola, dedicated time and energy essential to making this project happen, and former Philadelphia VIP Executive Director Sara Woods provided the catalyst. Note: Ms. Papademetriou is now The Honorable Ourania Papademetriou, a judge in the First Judicial District, Family Division. Mr. Viola is a Master of Custody and Support in the First Judicial District, Family Division. Judge Papademetriou and Mr. Viola's work with this project was solely in their capacities at the time as attorneys with Philadelphia VIP. In particular, Mr. Viola provided information based on his prior experience in the private sector and in his capacity as a lawyer for Philadelphia VIP, not as an employee of the First Judicial District.

Note: As of the time of this draft, the First Judicial District of Pennsylvania, Family Division, Domestic Relations Branch is conducting its own review of the data described in this study, which is not yet complete.

All mistakes in this paper are the sole responsibility of the authors.

## Introduction

Over four decades ago, the United States Supreme Court decided a trio of cases addressing the constitutionality of a court system's imposition of filing fees without a corresponding *in forma pauperis* ("IFP") process. The combination of *Boddie v. Connecticut*,<sup>1</sup> *United States v. Kras*,<sup>2</sup> and *Ortwein v. Schwab*<sup>3</sup> established that a court system could condition access to itself on a would-be litigant's paying a mandatory (non-waivable) filing fee, but that the due process clause required an exception (meaning an IFP process) for cases involving constitutional rights that could be effectuated only by resort to the courts. An example of a right within the exception was divorce, it being a feature of the United States legal system that when two spouses (even if childless and penniless) both affirmatively desire to exercise their constitutional right to terminate their marriage, one must sue the other in a court.

Subsequent scholarship, particularly a set of two articles by Frank Michelman, dismantled the reasoning of these three cases. With characteristic precision, eloquence, and length, Michelman demonstrated (among other things) that a right's constitutional status was a poor indicator of its importance, and that a focus on whether a right could be effectuated only by resort to the courts involved contradictions both theoretical (consider repossession law) and commonsensical (consider a non-waivable filing fee in a bankruptcy court).<sup>4</sup> By analyzing how written rules, written and unwritten procedures, and facts on the ground could wall off the indigent from judicial processes that formal law compelled them to use to effectuate their rights and desires, Michelman laid part of the intellectual foundation for what many now call the field of "access to justice."

In the forty-plus years since the trio of filing fee cases, the legal system responded to the intellectual foundation Michelman and others provided. In the judiciary, many court systems with filing fees have IFP processes, and much else has changed besides. Further, beginning in the 1980s, a flood of *pro se* litigants<sup>5</sup> coincided with the beginning of a long stagnation of budgets to support free or low-cost legal services,<sup>6</sup> refocusing a debate that had previously zeroed in on the extent of a constitutional compulsion for more procedure<sup>7</sup> onto questions about whether procedure, existing or additional, might be responsible for preventing

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<sup>1</sup> 401 U.S. 371 (1971).

<sup>2</sup> 409 U.S. 434 (1973).

<sup>3</sup> 410 U.S. 656 (1973).

<sup>4</sup> Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Right*, Part I, 1973 *Duke L. J.* 1153, 1160 (1973); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, Part II, 1974 *Duke L. J.* 527 (1974).

<sup>5</sup> See, e.g., Bruce D. Sales, Connie J. Beck, Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 *St. Louis U. L.J.* 553, 594 (1993).

<sup>6</sup> See Kristin Booth Glen, *To Carry It On: A Decade of Deaning After Haywood Burns*, 10 *N.Y. City L. Rev.* 7, 9–10 (2006).

<sup>7</sup> See, e.g. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication: Three Factors in Search of a Theory of Value*, 44 *U. Chi. L. Rev.* 28 (1976).

pro se litigants from effectuating substantive rights.<sup>8</sup> The Bar and the Bench responded to the pro se flood by amending ethical rules to legitimate already-extant forms of lawyer representation;<sup>9</sup> by experimenting with non-lawyer representation;<sup>10</sup> by opening self-help centers;<sup>11</sup> by (over some Bar opposition) creating uniform court forms;<sup>12</sup> by composing self-help materials of varying quality;<sup>13</sup> by leveraging technology, including online interfaces;<sup>14</sup> by increasing pro bono efforts;<sup>15</sup> and by pursuing a host of other initiatives.<sup>16</sup> In the academy, the rise of the empirical legal studies movement, and a commitment among some of its proponents to a “credibility revolution,”<sup>17</sup> promised better data and more reliable inferences therefrom, including the potential for more gold-standard randomized control trials (“RCTs”)<sup>18</sup> on, among other things, access to justice subjects.<sup>19</sup> Even the United States Supreme Court responded, placing a civil right to counsel, the holy grail of some in the access to civil justice movement, within the broader context of a legal system’s procedural complexity. In doing so, the Court offered adjudicatory systems the choice between procedural simplification or a right to counsel at state expense, at least in cases in which crucial rights were at issue.<sup>20</sup> Most recently, the Conferences of Chief Judges and State Court Administrators passed a joint resolution adopting “the aspirational goal of 100 percent access to effective assistance for essential civil legal needs.”<sup>21</sup>

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<sup>8</sup> See, e.g., Russell Engler, Turner v. Rodgers and the Essential Role of the Courts in Delivering Access to Justice, 7 Harv. L. & Pol’y Rev. 31 (2013).

<sup>9</sup> See, e.g., Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825 (2012).

<sup>10</sup> Brooks Holland, The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice, 82 Miss. L. J. 75 (2013).

<sup>11</sup> See, e.g., Meehan Rasch, *A New Public-Interest Appellate Model: Public Counsel’s Court-Based Self-Help Clinic and Pro Bono “Triage” for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461 (2010).

<sup>12</sup> See generally Family Law Section of the State Bar of Texas, et al., RESPONSE TO THE REPORT OF THE UNIFORM FORMS TASK FORCE SUBMITTED TO THE TEXAS SUPREME COURT AS OF JANUARY 11, 2012, <http://www.texasatj.org/sites/default/files/FLGResponsetoForms041012.pdf>.

<sup>13</sup> Dalié Jiménez, et al., *Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach*, 20 GEO. J. POVERTY L. & POL’Y 449, 471 (2013).

<sup>14</sup> See generally Melissa A. Moss, *Can Technology Bridge the Justice Gap?*, 90 FLA. B.J. 83 (2016).

<sup>15</sup> Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know –And Should Know – About American Pro Bono*, 7 HARV. L. & POL’Y REV. 83, 99–103 (2013).

<sup>16</sup> See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 1815–19 (2001).

<sup>17</sup> Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17, 20 (2011).

<sup>18</sup> Daniel E. Ho & Becky Elias, *Improving Governance by Peer Review: Food Safety and Beyond*, SLS BLOGS: LEGAL AGGREGATE (July 6, 2016), <https://law.stanford.edu/2016/07/06/improving-governance-by-peer-review-food-safety-and-beyond/>; D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 ANN. REV. L. & SOC. SCI. 295 (2016).

<sup>19</sup> For recent work, see D. James Greiner & Andrea Matthews, *The Problem of Default*, Part I (June 21, 2015) (unpublished manuscript) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622140](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622140)), but the idea has been around for some time. W. Vaughan Stapleton & Lee E. Teitelbaum, *In Defense of Youth: A Study of the Role of Counsel in American Juvenile Courts* (1972).

<sup>20</sup> *Turner v. Rogers*, 564 U.S. 431 (2011).

<sup>21</sup> Conferences of Chief Judge & Conference of State Court Administrators, *Resolution 5: Reaffirming the Commitment to Meaningful Access to Justice for All* (2015),

One might have been excused for a hope that the reasoning Michelman dismantled over forty years ago, and the corresponding practices in court systems, were behind us.

Alas. In at least some areas, pessimists can draw comfort in an adage beginning, “The more things change.” The flurry of activity described above masks marrow-deep problems threatening the vitality of the access to justice movement, particularly (i) how little we know about the follow-through implementation of possibly access-to-justice-promoting interventions, and (ii) how little we know about whether possibly access-to-justice promoting interventions work. New ideas are only as useful as they are used. Ideas, old or new, are only as useful as they are effective. Things could still be amiss. This paper demonstrates that they are. They are amiss in a progressive county with respect to a constitutional right possible to effectuate only by resort to the courts, and in the context of one of the simplest of judicial proceedings. If things are amiss in this setting, where else are they amiss?

We report here the results of an RCT evaluating the effectiveness of a pro bono initiative’s oversubscribed divorce practice in Philadelphia County from January of 2011 until, effectively, July of 2016. The legal subject area in our study, divorce, is the same as that in Boddie, and it remains the quintessential example of a constitutional right that can be effectuated only by resort to the courts. Our study randomized an individual seeking assistance to pursue a divorce to either an effort by the service provider to find a pro bono attorney to represent her (treated group) or a referral to existing self-help or low bono<sup>22</sup> resources coupled with an offer to answer questions by telephone (control group). Our study partner was the provider of last resort for free legal services in the Philadelphia County: it accepted intakes primarily via referrals from other organizations, and it required that service seekers exhaust all other options.

Treated and control groups experienced different outcomes. If one limits one’s focus to Philadelphia County, where state venue laws<sup>23</sup> “required” study participants and their opposing spouses to file, and where filing should have been most convenient for our study participants (who were all Philadelphia County residents), then we observe the following. Eighteen months after randomization, 54.1% of the treated group, as opposed to 13.9% of the control group, had a divorce case on record. Three years after randomization, 45.9% of treated group, as opposed to 8.9% of the control group, had achieved a termination of a marriage. The p-values for these differences (representing the probabilities that one would observe the numbers we observed, or numbers more extreme, if there were in fact no true difference between treated and control groups) were so low as to make them almost impossible to estimate; effectively, we observed

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[https://www.ncsc.org/~media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20AI\\_final.ashx](https://www.ncsc.org/~media/Microsites/Files/access/5%20Meaningful%20Access%20to%20Justice%20for%20AI_final.ashx).

<sup>22</sup> Luz E. Herrera, *Encouraging the Development of Low Bono Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 2–3 (2014).

<sup>23</sup> 231 PA. CODE § 1920.2 (1989) (aka Pa. R.C.P. 1920.2). A defending spouse could waive a venue objection by prior written agreement (*i.e.*, with a forum selection clause) or by participating in the proceeding without raising a venue defense. *Id.*

instances of  $p = 0$ . If one expands one's focus to other Pennsylvania counties, and thus considers filings by Philadelphia County residents who risked a dismissal due to improper venue and who abandoned the system they support as taxpayers, results remain statistically and substantively significant: 60.8% of the treated group, versus 36.3% of the control group, had a divorce case on file after 18 months,  $p < .00002$ ; 50.0% of the treated group, versus 25.3% of the control group, succeeded in terminating the marriage in 36 months,  $p < .00002$ . When we account for the block randomization scheme we deployed, estimated effect sizes are a few percentage points larger than the numbers above would suggest.

Our study is an evaluation of the effectiveness of a pro bono matching service's divorce program, and under any reasonable definition, the program is effective. But there are other aspects of our study.

*First*, by setting an explicitly numerical goal, the 100% access resolution by the Conferences of Chief Justices and Court Administrators suggests a need to measure numerically the accessibility of adjudicatory processes. In this study, we propose and implement one such measuring stick, as follows: In a 100% (or reasonably) accessible system, the presence or absence of traditional attorney-client representation should not make too big of a difference in the outcome a litigant or would-be litigant experiences, particularly when the matter at hand is a simple transition from one legal state (*e.g.*, married) to another legal state (*e.g.*, unmarried). We should measure the size of the difference full representation makes via a random allocation of an effort to supply full representation to some cases but not others. The randomization provides the firmest possible backbone for the statistical modeling needed to draw inferences about the difference in outcomes as between litigants experiencing the system mitigated by a traditional attorney-client relationship versus those experiencing the system without mitigating legal services (or, perhaps, with mitigating services cheaply available to everyone in the system, such as the provision of self-help materials).<sup>24</sup>

Evaluating the accessibility of the Philadelphia County and Pennsylvania divorce systems with this measuring stick, our research suggests a problem of a magnitude that we, at least, did not anticipate. The size of the effects reported above (which evaluate the effort to provide an attorney *vel non*, not the presence or absence of an attorney) would be startling enough. But differences are larger once we implement the modeling required to estimate the effect due to the presence or absence of a lawyer (which we did not directly randomize). We find the following. If one looks only in Philadelphia County, would-be litigants with lawyers were on average about 87.7 percentage points more likely to reach the courthouse in 18 months and about 87.4 percentage points more likely to achieve a divorce within 36 months.<sup>25</sup> Including data from six other likely counties in Pennsylvania, the corresponding figures are 55.9 and 63.9

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<sup>24</sup> See D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference does Representation (Offer and Actual Use) Make?*, 121 Yale L.J. 2118, 2121–22 (2012).

<sup>25</sup> The above figures are the means for the posterior distribution of the so-called complier average causal effect or local average treatment effect. The corresponding 95% posterior intervals for the effect sizes are (.710, .984) and (.708, .985).

percentage points.<sup>26</sup> Other figures making the same point require no modeling: only 12 of the 237 participants in our control (no effort to find an attorney) group, or 5.1%, managed to obtain a divorce with 36 months of entering our study without having either (i) an attorney of record, or (ii) the opposing spouse initiate the divorce lawsuit. Of these 12, only 1, or .4% of control group participants, was able to do so in Philadelphia County. Under any reasonable numerical definition of accessibility, as measured against the 100% access goal, these figures define failure.

As a corollary, our results demonstrate that one cannot measure the accessibility of an adjudicatory system to low-income individuals by examining the number or fraction of low-income pro se litigants, even successful low-income pro se litigants, who enter or who pass through it. In other words, the response to the argument, “Our system must be accessible to low-income pro se litigants, look how many low-income pro se’s we have in it!”, is, “How many low-income pro se’s should be in the system, were it accessible?”. Our results suggest that at least with some court systems, the answer to the last question is, “More.”

*Second*, our results cannot be explained by the cry, perhaps popular among family law attorneys and lawyers more generally, that divorce cases appearing simple at first are actually complex due to child custody, child support, spousal support, alimony, domestic violence, and/or financial allocation issues. In Pennsylvania, the state in which our study took place, child custody, requests for financial support (for children or a spouse), and domestic violence protection were separate legal proceedings. Unsurprisingly, we observed no child custody, support, or a domestic violence litigation in the divorce case files that made up our dataset.<sup>27</sup> Meanwhile, 40.1% of our treated (lawyer-effort) group succeeded in divorcing (inside or outside of Philadelphia County) with no agreement or order allocating assets or income streams, despite the presence of a free attorney willing to pursue such an allocation arrangement. This 40.1% of our treated group who divorced without a financial arrangement represented over 80% of all divorces in our treated group. These figures suggest that in our treated group, there were few whose circumstances warranted a financial arrangement (not surprising, given our participants’ very low-income profile), and recall that our treated and control groups were equivalent apart from statistical variation. We conclude that the applicable procedural system trapped participants in marriage, even those seeking only the simplest possible court action, *i.e.*, orders ending marriages and doing nothing else with respect to that marriage.

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<sup>26</sup> The corresponding 95% posterior intervals are (.286, .835) and (.267, .903).

<sup>27</sup> See 23 PA. CONS. STAT. § 1915 (2016) (actions for custody of minor child); 23 PA. CONS. STAT. § 1920 (2016) (actions of divorce or for annulment of marriage); 23 PA. CONS. STAT. § 108 (2016) (family violence). As these statutes demonstrate, would-be divorce plaintiffs could combine divorce lawsuits with actions for custody or support, but did not have to do so.

To clarify: At a meeting with Philadelphia County Family Court personnel on August 23, 2018, court officials informed us that there were several support, child custody, and other proceedings involving our study participants. Our point here is not that such proceedings did not occur, but rather that such proceedings were separate from divorces. To illustrate this separation: family law private attorneys who volunteered with Philadelphia VIP could, and sometimes did, volunteer to handle a participant’s divorce case only, choosing not to involve themselves in the participant’s need for assistance with respect to custody or support.

*Third*, our study contributes evidence on a debate regarding the purposes lawyers serve on behalf of their clients. With a reminder that oversimplification is inevitable in any summary of alternative explanations of the world, we offer the following cartoon-level synopsis of competing narratives. On one side is the Bar and, perhaps, the court system. In this version of the world, law is necessarily and desirably complex. The need to further competing and powerful policy goals, or to satisfy competing and powerful interest groups, or to further justice, leads to substantive complexity and fine distinctions. Lawyers and judges, with their professional training, experience, and judgment, mediate this necessarily and desirably complex legal system on their clients' behalf. One must sacrifice some accessibility to achieve the complexity the legal system requires. That is just the way it has to be.

On the other side is a narrative less kind to lawyers and to the legal profession. In this view, procedural complexity difficult to justify by reference to non-trivial policy goals makes an adjudicatory system inaccessible to pro se litigants. The procedural complexity might be due to formal rules or to day-to-day practices or both. It might be intentional and dastardly, or it might stem from habit, neglect, indifference, ignorance, and/or stupidity. Regardless, ordinarily, only someone with experience or training in the system can navigate it. Typically, this individual is the Galanterian repeat player<sup>28</sup> and, due to a state-enforced cartel-like system of educational requirements and tests, a lawyer. The result is that procedural complexity, a complexity untethered to useful substantive policies, imposes on would-be users a cost in the form of obtaining a lawyer. Obtaining a lawyer is the price of admission into the system, just like a filing fee without an IFP process.

One form of evidence to inform the debate between these two competing narratives should arise from a study assessing the effect of having a lawyer in a system in which substantive complexity is absent but procedural complexity, procedural complexity difficult to justify by reference to non-trivial policy goals, remains. Our study fits the bill. As noted above, a strong majority of the treated group participants in our study who had lawyers and who succeeded in terminating their marriages within 36 months in any county (30 of 37, or 81.1%) did so by obtaining the simplest possible legal order, an order ending the marriage and doing nothing else. In other words, for these participants, who had access to counsel some of whom were willing to engage in navigation of complex issues for them, there were no domestic violence issues, no child custody issues, no questions of support, no financial settlements or orders, nothing of the kind in their divorce cases. That is an absence of substantive complexity.

On the procedural side, we describe the procedural system applicable in Philadelphia County for obtaining divorces below, but by way of a preview, it features:

- multiple waiting periods, even for a divorce premised on both a two-year separation and on both parties' affirmative desire to end the marriage;

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<sup>28</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–98 (1974).



- no statewide, court-approved pro se forms for divorce available on the court's website;<sup>29</sup>
- no self-help center, in the courthouse or anywhere else, providing assistance in divorce matters (there is an assistance center, but it did not provide assistance in simple divorces);
- the need for a command of jargon that might cause a lawyer to shudder, such as a "Praeceptum to Transmit the Record to the Prothonotary";<sup>30</sup> and
- the coup-de-grace, what amounted to requirement<sup>31</sup> that a pro se divorce litigant use a typewriter to fill out, flawlessly, a required form obtainable only from the court.

To understand the latter point: at a certain stage in the divorce process in Philadelphia, a pro se litigant was instructed that she had to obtain a blank form from the court. She was instructed that the court did not allow the litigant to produce a facsimile of this form (at least not a black and white one). The litigant was instructed that she had to fill in portions of the form with a typewriter. Neither handwriting nor computer printing will do. If the litigant made a mistake while typing, she was instructed that she had to return to the court to obtain another form. Whiteout was not an option. Other Pennsylvania counties made clear that they allowed litigants to use a pen to fill out a black and white form printed from the Internet.<sup>32</sup>

This is procedural complexity difficult to justify by reference to non-trivial substantive goals.

Our study provides evidence to support the second viewpoint articulated above. That is, our results support the proposition that at least in some circumstances, procedural systemic complexity difficult to link to non-trivial substantive policy goals imposes on would-be litigants a cost of access analogous to a filing fee without an IFP process, namely, a requirement that the litigant obtain a lawyer. In the Philadelphia County system with respect to the cases involved in our study, there was procedural but not substantive complexity. And the overwhelming fraction of our study participants did not achieve the goal of terminating their marriages unless they had lawyers.

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<sup>29</sup> The basic format of pleadings for civil actions in Pennsylvania appear in the Pennsylvania Rules of Civil Procedure and was available at <http://www.pacourts.us/learn/representing-yourself/divorce-proceedings>. But there are no divorce pleading forms for Philadelphia County on, for example, the court's website, the way that there are in other Pennsylvania Counties. See *infra* note 83 and accompanying text.

<sup>30</sup> See Pa.R.C.P. 1920.42(a)(2) and Pa.R.C.P. 1920.73(b).

<sup>31</sup> It turns out that the Philadelphia VIP (our legal services provider partner, see below) website has a version of this form that can be downloaded as a fillable pdf. See Philadelphia VIP, Resource Toolbox, <https://www.phillyvip.org/resources/>. But the resulting printout must be done with a color printer, something not likely to be easily accessible to low-income individuals. Phone interview with Mike Viola (July 17, 2017). Further, it is hard to see how a typical pro se litigant, even one with ready access to the Internet and to a color printer, would know to consult Philadelphia VIP's website for the particular form.

<sup>32</sup> See *infra* notes 77-83 and accompanying text.

*Fourth*, although some will disagree, we see little support in our findings for a civil right to counsel.<sup>33</sup> True, lawyers unquestionably made a difference, an enormous difference, to low-income would-be divorcees in Philadelphia. But as we explain below, for the majority of our study's duration, the Philadelphia VIP resources were sufficient to attempt to find an attorney for 15% of the low-income individuals who sought its assistance. We do not foresee a day in which the resources of legal services organizations like Philadelphia VIP will be more than sextupled. The response to an access to justice problem of the magnitude we analyze here must come from a battery of remedies. Increased resources to civil legal services providers might be part of the picture, but this problem and, we suspect, others like it in the civil legal system cannot be solved with lawyers in the foreseeable future.

*Fifth*, if we are right to draw a direct analogy between a non-waivable filing fee and the requirement that litigants obtain a lawyer to transition from a state of married to unmarried in Philadelphia, then that system may be unconstitutional.

We proceed as follows. In Part I, we describe the setting for and implementation of our study. In Part II, we describe our results. In Part III, we speculate as to what might explain our results. In Part IV, we expand on the themes previewed in the introduction, offer possible solutions for the problems our study uncovers, and provide greater detail on the possible use of legal services RCTs as a measuring device for the accessibility of an adjudicatory system.

## **Part I: Study Setting, Design, and Implementation**

### **A. Pennsylvania Divorce Law**

The following describes marriage termination law in Pennsylvania as it existed from approximately January 1, 2011 (when our study began) to July 15, 2016, the cutoff point for information that could be incorporated into our study.<sup>34</sup>

During our study, Pennsylvania law allowed for no-fault divorce. The grounds for no-fault divorce were: institutionalization, meaning one spouse was hospitalized for eighteen months or more; mutual consent, meaning both parties agreed that the marriage was irretrievably broken; and irretrievable breakdown (also known as "two-year separation"<sup>35</sup>), meaning the parties have lived separate and apart for two or more years and one party did not deny the other's allegation that the marriage was irretrievably broken.<sup>36</sup> In addition, Pennsylvania law provided for several fault-based grounds: willful and malicious desertion or abandonment of one or more years; adultery; cruel and barbarous treatment that endangered

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<sup>33</sup> See <http://civilrighttocounsel.org/> for advocacy on this subject.

<sup>34</sup> The structure of the law has remained the same, although some details may have changed. See, e.g., Act of Oct. 4, 2016, Pa. Pub. L. No. 865-102 (reducing length of a separation that would justify a divorce from two years to one year).

<sup>35</sup> This time period was recently changed from two years to one, but the change occurred too recently to have affected our study participants. *Id.*

<sup>36</sup> 23 PA. CONS. STAT. § 3301(b)-(d) (2016).

the spouse's life or health; knowingly entering into a bigamous marriage; being sentenced to imprisonment for a term of two or more years for committing a crime; or indignities that made life intolerable or extremely burdensome.<sup>37</sup> All study participants who obtained divorces within the 36-month post-enrollment window of our study did so on the grounds of mutual consent or a two-year separation, meaning they obtained no-fault divorces. Almost all study participants, successful or otherwise, responded to questions at intake that made clear that either or both of these two grounds applied to them.

As we explain below, laws governing the monetary consequences of divorce were of limited relevance to our study participants, but we summarize them here in the interest of completeness. Pennsylvania was an equitable distribution state, meaning that marital property was divided, regardless of title, in an "equitable fashion" by a court's determination, rather than split 50/50. In deciding how to split marital property, a court considered thirteen listed factors (numbered 1-11) when distributing the property, including the economic circumstance of each party at the time the division of the property was to become effective and whether each party would have custody over dependent minor children.<sup>38</sup> Property was divided without regard to marital misconduct such as adultery, although misconduct could factor into determinations of alimony.<sup>39</sup> Only marital property, which encompassed all property acquired by either party during the marriage, was divided.<sup>40</sup> If a marriage terminated without a property disposition agreement or order, then all property in a first spouse's name was retained by the first spouse, all property in the second spouse's name was retained by the second spouse, and all property held jointly or not subject to some sort of formal registration of ownership was held jointly by the now-divorced couple.<sup>41</sup>

## **B. Divorce Procedure Applicable in Philadelphia County (from pro se viewpoint)**

The following describes the procedures for obtaining a divorce in Philadelphia County as they existed from approximately January 1, 2011 (when our study began) to July 3, 2016, the cutoff point for information that could be incorporated into our study.<sup>42</sup> Our description is from the point of view of a would-be low-income pro se divorce litigant; we focus on what such a litigant would have perceived given available information, noting that in some cases such information was inaccurate.

A would-be pro se divorce litigant might have begun the process of finding needed information in a variety of ways, perhaps by going online, perhaps by talking to a friend or relative, perhaps by visiting the court's self-help center. We suspect many litigants who began elsewhere ended up visiting the court's self-help center, so we begin there. Court clerks and the

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<sup>37</sup> 23 PA. CONS. STAT. § 3301(a) (2016).

<sup>38</sup> 23 PA. CONS. STAT. § 3502(a) (2016).

<sup>39</sup> *Id.*

<sup>40</sup> See 23 PA. CONS. STAT. § 3501.

<sup>41</sup> See 23 Pa.C.S.A. § 3507(a).

<sup>42</sup> The general procedure for obtaining a divorce is set forth in the Pennsylvania Rules of Civil Procedure and is applicable to all 67 counties in PA.

self-help center ordinarily referred a pro se litigant seeking information about divorces to the Jenkins Law Library; the self-help center did not itself provide assistance with straightforward divorces.<sup>43</sup> When our study began the Jenkins Law Library was located three blocks from the courthouse; three became ten when the courthouse moved in 2014.<sup>44</sup> Courthouse policy (a policy, we suspect, stemming from concerns of unauthorized practice of law<sup>45</sup>) prohibited clerks from providing legal advice, a prohibition interpreted as not allowing clerks to answer questions about, for example, which forms were appropriate for the type of divorce the would-be litigant sought.<sup>46</sup>

When a would-be pro se filer reached the Jenkins Law Library, library staff ordinarily told her that if she had a computer and printer at home, she could find a self-help guide written by the Women's Law Project online<sup>47</sup> (including via a link on the court's website) that included some useful forms.<sup>48</sup> Otherwise, she could purchase the self-help packet and forms from the library for \$16.20. The guide covered two types of divorce: mutual consent and two-year separation. The 166-page document had to be purchased as a whole.<sup>49</sup> In 2014, the Jenkins Law Library sold 86 packets; in 2015 it sold 125 packets.<sup>50</sup>

Jenkins Law Library policy (a policy, we suspect, stemming from concerns of unauthorized practice of law<sup>51</sup>) prohibited library staff from providing legal advice, a prohibition interpreted as not allowing library staff to answer questions about, for example, which forms were appropriate for the type of divorce the would-be litigant sought.<sup>52</sup> Would-be litigants who returned to the courthouse to query the clerks were directed to the Jenkins Law Library.

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<sup>43</sup> The courthouse has an on-site self-help center but it only assists with custody filings. Phone interview with Mike Viola (July 17, 2017).

<sup>44</sup> Before 2014, the courthouse was located at 1133 Chestnut Street (three blocks away); since 2014 it has been at 1501 Arch Street (ten blocks away). Phone interview with Mike Viola (July 17, 2017).

<sup>45</sup> 42 PA. CODE § 2254, available at

<http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=42&div=0&chpt=25&sctn=24&subctn=0> (last visited July 15, 2018).

<sup>46</sup> See Citizens' Guide to Court Procedure Court of Common Pleas Family Division - Domestic Relations Divorce, available at [https://www.courts.phila.gov/pdf/guides/Citizens\\_Guide-Divorce.pdf](https://www.courts.phila.gov/pdf/guides/Citizens_Guide-Divorce.pdf) ("Court staff is not permitted to provide legal advice. To receive legal advice, you should contact a licensed attorney."). The Jenkins Law Library's website also informed pro se litigants that they could turn to the clerks for help, but not legal help: "You can contact the Office of the Clerk of Court, Domestic Relations Division of the Family Court, which is part of the Court of Common Pleas in Philadelphia, if you have specific questions about the divorce procedures. This is a source for information about what, how and where to file – not for legal advice. No one in the clerk's office will answer legal questions." <https://www.jenkinslaw.org/services/public/self-help-divorce-manual>.

<sup>47</sup> Leslie Engle & Gloria Gilman, WOMEN'S LAW PROJECT, *Philadelphia Self Help No-Fault Divorce Manual*, available at <http://files.jenkinslaw.org/files/divorce-manual/full-manual/philadelphia-self-help-no-fault-divorce-manual-updated.pdf>.

<sup>48</sup> See The Philadelphia Courts, Forms Center, <http://courts.phila.gov/forms/> (showing that manual is available).

<sup>49</sup> Email correspondence with Ida Weingram, Jenkins Law librarian (August 17, 2017)

<sup>50</sup> *Id.*

<sup>51</sup> See supra note 45.

<sup>52</sup> Phone interview with Mike Viola (July 17, 2017).

Assuming the litigant was able to locate the relevant self-help materials, she learned that the first step was drafting the Complaint in Divorce. The step-by-step instructions for how to accomplish this first step spanned ten pages. Subsequent pages instructed litigants in how to prepare the Notice to Plead, the Counseling Notice, a photocopy of the marriage certificate (and how to label it “Exhibit A”),<sup>53</sup> and the Domestic Relations Information Sheet. Those who sought a divorce based on a two-year separation also had to file a Plaintiff’s Affidavit Under Section 3301(d) of the Divorce Code, which notified the non-filing spouse that she had twenty days to challenge the statement that they had been separated two years.<sup>54</sup>

After drafting a complaint, the litigant considered the filing fee. A litigant could pay the filing fee in Philadelphia (\$328.98, as of August 2014) by debit card, credit card, or a money order. Cash and personal checks were not accepted.<sup>55</sup> For litigants in circumstances of financial hardship, there were two processes available, depending on whether the litigant was represented. For a litigant with a lawyer, the lawyer could file the client’s complaint along with an attestation that paying the filing would impose financial hardship; for at least a portion of our study’s duration, the court accepted the attorney’s attestation without further inquiry and proceeded without the fee.<sup>56</sup> Pro se litigants, in contrast, needed to file an In Forma Pauperis (“IFP”) Petition,<sup>57</sup> which required photo identification and proof of limited income. The proof of limited income required additional paperwork: documents showing that the litigant was receiving government assistance, for example, or an additional affidavit with documents attached.<sup>58</sup> After completing these forms, the litigant found a photocopier to make two copies

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<sup>53</sup> According to the Court, the local rule requiring a photocopy of the marriage certificate was abrogated on May 23, 2014, approximately 60% of the way through our study period. Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author).

<sup>54</sup> Engle & Gilman, *supra* note 47, 6. Pa.R.C.P. 1920.42(d)(2).

<sup>55</sup> Engle & Gilman, *supra* note 47, 7 (“If you are not asking for permission to file IFP, you must pay the filing fee (currently \$328.98) when you file the Complaint. Cash and personal checks are not accepted; you will need your debit or credit card or a money order.”).

<sup>56</sup> Pa. R. C. P. 240(d)(1) sets out the procedure for IFP petitions for those represented by attorneys: “If the party is represented by an attorney, the prothonotary shall allow the party to proceed in forma pauperis upon the filing of a praecipe which contains a certification by the attorney that he or she is providing free legal service to the party and believes the party is unable to pay the costs.” The rule provides a form, available at <http://www.pacode.com/secure/data/231/chapter200/s240.html>.

<sup>57</sup> Pa.R.C.P. No. 240,

<sup>58</sup> Engle & Gilman, *supra* note 47, at 18. (“If you can’t afford the filing fees for this divorce action, you may be entitled to file without charge. To find out if you qualify, you must show the court that you have very little income or are receiving cash assistance (welfare, SSI, or Social Security). You must fill out the In Forma Pauperis Petition (also called an IFP Petition) and take that, along with some type of photo identification (such as a driver’s license) and some proof that you are getting cash assistance (such as your welfare card) to show the clerks when you filed these papers. If you are not receiving cash assistance, then you will also have to fill out the Poverty Affidavit . . . and attach proof of your limited income.”).

The Court reported the situation as follows: “The Philadelphia Family Court requires proof of public assistance and a photo ID. If same are not available the clerical staff will electronically verify whether the litigant is receiving benefits. Administrative Regulation No. 00-02.” Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author).

(one for her own records, one for service).<sup>59</sup> The litigant was now ready to file the divorce lawsuit.

A litigant could file a divorce case in person with the clerk's office,<sup>60</sup> which closed at 4pm on weekdays and had no weekend hours.<sup>61</sup> A litigant could also file by mail, but had to know that it was possible to do so despite instructions to the contrary in the Women's Law Project manual to which clerks and librarians referred all pro se litigants.<sup>62</sup> The litigant also had to know to include a self-addressed and postage prepaid return envelope with the filing (the same rule applied with all court papers filed by mail).<sup>63</sup>

Next, the litigant had to effectuate service within 30 days (90 days if the spouse lived in another state),<sup>64</sup> the format of which depended on the opposing spouse's willingness to participate in the divorce. If the nonfiling spouse was willing to sign an Affidavit of Acceptance of Service, service could be completed by regular mail or in person.<sup>65</sup> If the nonfiling spouse was unwilling to sign the Acceptance of Service form, the filing spouse served by certified mail or by personal service.<sup>66</sup> Service by certified mail required a trip to the post office during limited hours to send relevant documents by return receipt requested, deliver to addressee only.<sup>67</sup> If the return receipt came back unclaimed, the litigant had to use a different method, ordinarily personal service.<sup>68</sup> For personal service, someone other than the litigant herself and other than a relative of hers personally handed the paperwork to the opposing spouse, then completed an Affidavit of Acceptance of Service in the presence of a Notary Public.<sup>69</sup>

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<sup>59</sup> Engle & Gilman, *supra* note 47, at 8.

<sup>60</sup> Engle & Gilman, *supra* note 47, at 6. ("These forms must be filed at the office of the Clerk of Family Court IN PERSON. You cannot file them by mail.").

<sup>61</sup> "Petitions dealing with family court matters are filed at the Office of the Clerk of Family Court, located on the 11th floor. The Clerk's office hours are 8am-4pm, Monday thru Friday." <http://courts.phila.gov/common-pleas/family/>.

<sup>62</sup> See *supra* note 60.

<sup>63</sup> Phone interview with Mike Viola (July 17, 2017). There was apparently some different of opinion on whether the self-addressed and postage prepaid return envelope was required: "Clerical staff do print mailers from Philadelphia County DRS, if mailers are missing from the Praeipce to Transmit packet" Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author).

<sup>64</sup> Divorce Procedure, available on the PA Courts website at <http://www.pacourts.us/assets/files/page-760/file-5373.pdf?cb=1493552468914>. See Pa.R.C.P 1930.4.

<sup>65</sup> *Id* at 2.

<sup>66</sup> Engle & Gilman, *supra* note 47, at 26, 33.

<sup>67</sup> Engle & Gilman, *supra* note 47, at 45. 33.

<https://tools.usps.com/go/POLocatorDetailsAction!input.action?locationTypeQ=all&address=19106&radius=20&locationType=po&locationID=1436417&locationName=CONTINENTAL&address2=&address1=615+CHESTNUT+ST+LB+BY&city=PHILADELPHIA&state=PA&zip5=19106&zip4=9997&tollFree=&fax=&latitude=39.949308026000494&longitude=-75.15100532599968&sWithin=20&&&&&&&>

<sup>68</sup> Phone interview with Mike Viola (July 17, 2017). This procedure is not specific to divorce cases. See Pa. Rs. Civ. P. 403, 412; PA R.C.P 1930.4.

<sup>69</sup> Engle & Gliman, *supra* note 47, at 38. According to the Court, there was no requirement of a notary public. Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author).

If service was not completed within 30 days the litigant had to file a “Praeipce to Reinstate Complaint in Divorce” and try again.<sup>70</sup> This might happen if, for instance, the litigant had trouble locating the defendant.<sup>71</sup>

What happened after service depended on the legal grounds for divorce. For divorces premised on a mutual desire to end a marriage, the Pennsylvania Rules of Civil Procedure required a mandatory 90-day waiting period starting from the date of service.<sup>72</sup> On the 91st day, the parties could sign affidavits of consent asserting their mutual desire to divorce. The affidavits of consent had to be filed within 30 days of being signed; otherwise new consents were required.<sup>73</sup> The defendant could also sign a “waiver of notice,” and could do so at the same time as they signed the consent; if they did not, there was another 20-day waiting period.<sup>74</sup> (Philadelphia VIP volunteer attorneys were instructed not to bother with the waiver step, because it often took more than 20 days to get the waiver signed).<sup>75</sup>

Assuming there was no waiver, the litigant then prepared a set of documents: (1) a Notice of Intent to File Praeipce to Transmit Record; (2) a Praeipce to Transmit Record for Entry of Divorce Decree; and (3) an unsigned Final Divorce Decree. The “Praeipce to Transmit Record for Entry of Divorce Decree” was the legal term for a document notifying the judge that a divorce case should move forward.<sup>76</sup>

The self-help materials to which the court’s self-help center referred pro se litigants instructed that the unsigned divorce decree form could be obtained only from the court because the Philadelphia Court’s clerk’s office rejected any proposed decree lacking an official red seal.<sup>77</sup> Once she obtained the form, the litigant had to fill in the party names via typewriter.

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<sup>70</sup> Divorce Procedure, *supra* note 64, at 2. That form is called the “Praeipce to Reinstate Complaint in Divorce.” Engle & Gilman, *supra* note 47, at 26, 30. Pa.R.C.P. 1930.4(g) and 1920.4 (b).

<sup>71</sup> Phone interview with Mike Viola (July 17, 2017).

<sup>72</sup> Divorce Procedure, *supra* note 64, at 5 (“The Pennsylvania Rules of Civil Procedure require both parties to wait ninety (90) days from the service of the Complaint before filing the consent forms.”). Pa.C.S. 23 §3301 (c) & Pa R.C.P. 1920.

<sup>73</sup> Divorce Procedure, *supra* note 64, at 5; Pa.R.C.P. 1920.42(b)(1)(2); IN RE: ESTATE of Michael J. Easterday, 171 A.3d 911.

<sup>74</sup> Engle & Gilman, *supra* note 47, at 41.

<sup>75</sup> Phone interview with Mike Viola (July 17, 2017).

<sup>76</sup> Phone interview with Mike Viola (July 17, 2017); Pa.R.C.P. 1920.73(b)

<sup>77</sup> “You must get this form from the Office of the Clerk of Court at Family Court, where you have been filing all of your papers. DO NOT use the form in this manual, as it will not be accepted by the clerks.” Engle & Gilman, *supra* note 47, at 48. See also email from Todd Nothstein, Philadelphia VIP Family Law Staff Attorney, to D. James Greiner, of Sep. 1, 2018 (on file with authors).

According to the First Judicial District of Pennsylvania, Family Division, Domestic Relations Branch, this instruction was inaccurate. According to the Court, “The Court does accept black and white decrees generated by litigants as long as the decree substantially conforms to the form decree provided by Pa.R.C.P 1920.76. If a decree is submitted with errors, the court staff routinely produces new decrees for the litigant.” Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author). According to the Court, “Pro se litigants [so] are advised.” *Id.* Nevertheless, the fact that the instructions quoted above appeared in the pro se materials to which the court’s self-help center referred materials (after informing them that the center could not otherwise help them) suggests that many pro se individuals either contemplating filing for

Neither computer printing nor handwriting was acceptable.<sup>78</sup> If the litigant made a typing error, she had to return to court to obtain a new form; white-out was not an option.<sup>79</sup> The Women’s Law Project self-help booklet instructed the litigant to use the typewriter available for public use at the Jenkins Law Library,<sup>80</sup> closed at 6pm most weekdays with no weekend hours.<sup>81</sup> As of September 1, 2018, a Philadelphia VIP family law staff attorney believed that the Court did enforce a requirement that the proposed decree have a red seal and that the form be filled out via typewriter without typing error, and could find no basis for it.<sup>82</sup> Other counties in Pennsylvania, including Cameron and Potter Counties (discussed below), made clear that they allowed litigants to file forms printed from the Internet and filled out with pens.<sup>83</sup>

Assuming she was able to obtain and fill out a Final Divorce Decree, the litigant made photocopies of it and of the Praecepte to Transmit Record for Entry of Divorce. She sent these copies along with the original Notice of Intent to File Praecepte to Transmit Record to the defendant. If the defendant was not represented by an attorney, the litigant also needed to send a blank Counter-Affidavit, which reminded the defendant that he had to raise economic claims if he wished not to forfeit them.<sup>84</sup> Failure to provide the Counter-Affidavit to the

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divorce or attempting to push a filed case to completion would not have been aware of the court’s attitude on this point.

<sup>78</sup> “You cannot use the form in this manual; you must get this form from the same office where you have been filing your papers. It has a red seal on it. It must be typed. You can find a typewriter for public use at Jenkins Law Library, 833 Chestnut Street, Suite 1220. Call 215- 574-1505 for hours.” Engle & Gilman, *supra* note 47, at 98.

As noted below, see *infra* note 80, this statement does not appear to be completely accurate. In addition to the court’s statement noted above, see *supra* note 77, the Philadelphia VIP maintained a version of the form on its website that could be used if printed out by a color printer. As also noted above, however, it is not clear how a pro se litigant would know of this option.

<sup>79</sup> Phone interview with Mike Viola (July 17, 2017).

<sup>80</sup> “You can find a typewriter for public use at Jenkins Law Library, 833 Chestnut Street, Suite 1220. Call 215- 574-1505 for hours.”

Philadelphia VIP constructed a clever workaround so that litigants would not need to go to the courthouse to obtain this special form or locate a typewriter to fill it out. They created an editable PDF of the form that would allow the litigant or her attorney to type her name and print it out using a colored printer. This workaround was only of use, however, to those who know to search Philadelphia VIP’s website for the editable PDF. When one navigated to Philadelphia VIP’s online “resource toolbox” in search of this form, one encountered sixty-three separate forms for filing for divorce in Philadelphia. By contrast, the website housed only sixteen forms for filing for guardianship and only three forms for driver’s licenses. <https://www.phillyvip.org/resources/>. Four of the sixty-three divorce-related forms were Divorce Decrees; a litigant had to know which of the four decrees was the correct one to print out, depending on the grounds for divorce—3301(c) vs. 3301(d)—and depending on whether there was a property agreement. And she had to have access to a color printer.

<sup>81</sup> <https://www.jenkinslaw.org/>. In other counties, a divorce decree was sent to the parties if they checked a box on their Praecepte to Transmit Record form requesting that it be provided to them. Phone interview with Mike Viola (July 17, 2017).

<sup>82</sup> Nothstein to Greiner, *supra* note 77. Again, the requirement may not have ever existed. See *supra* note 77.

<sup>83</sup> Memorandum from Ellen Degnan to File of July 17, 2018 (reporting the results of telephone conversations with the Potter County Clerk and the Cameron County Prothonotary on the same date).

<sup>84</sup> Phone interview with Mike Viola (July 17, 2017); see also Pa. R. Civ. P. 1920.42(d)(1).



defendant meant re-notifying the defendant and another 20-day waiting period unless appropriate waivers were signed.<sup>85</sup>

For divorces based on a two-year separation, the next step after service was to prepare a set of four documents: a Notice of Intent to Request Entry of Divorce Decree, a blank Counter-Affidavit, a Praecipe to Transmit Record for Entry of Divorce Decree, and a Final Divorce Decree. The filing litigant sent the defendant originals of the Notice of Intent and Counter-Affidavit and photocopies of the Praecipe to Transmit and the Final Divorce Decree.

Then, regardless of the grounds for divorce, the litigant had to wait 20 days (unless she was able to get the defendant to sign a waiver).<sup>86</sup> After the twenty days had passed, she sent the court the original Praecipe to Transmit Record for Entry of Divorce Decree, the original Final Divorce Decree, and photocopies of the Notice of Intent and the Counter-Affidavit. She had to enclose two self-addressed-stamped-envelopes so that she and the defendant each received certified copies of the divorce decree in the mail. The fee for filing these remaining documents was \$66.22 (as of 2013) filing fee, subject to the fee waiver process described above.<sup>87</sup>

Once she filed these documents, the clerks checked to see that everything was in order. If the litigant made a mistake, such as sending an original instead of a copy or vice versa, the process could be delayed.<sup>88</sup> A major mistake would result in her having to complete a new Notice of Intent, mail it to the defendant, wait an additional twenty days, and then send it back to the court.<sup>89</sup> A minor mistake would result in her receiving a form letter from the court informing her of what she had done wrong. At that point, she would be required to bring the corrected paperwork back to the court. It was not unheard of for a litigant not to be notified of a mistake in the paperwork; in such cases it was incumbent on the litigant to call the court and ask why she had not yet received her divorce decree in the mail.<sup>90</sup>

Next, for the majority of the time period of our study,<sup>91</sup> the file went into the clerks' "ten-day drawer,"<sup>92</sup> where it sat for another mandatory waiting period, during which the opposing spouse could object to the divorce.<sup>93</sup> After this ten-day waiting period, the clerk's office sent the case to an administrative judge for review; it was not possible to predict how

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<sup>85</sup> Phone interview with Mike Viola (July 17, 2017). The counter-affidavit was prescribed by Pa.R.C.P. No. 1920.42(d)(2) for divorces based on mutual assent and the complaint was prescribed by 231 PA. CODE §1920.71 (2016).

<sup>86</sup> If she got the waiver, she could skip the 20-day waiting period and send the court the signed Waiver, the original Praecipe to Transmit Record for Entry of Divorce Decree, and the original Final Decree of Divorce. Engle & Gilman, *supra* note 47.

<sup>87</sup> Engle & Gilman, *supra* note 47, at 46.

<sup>88</sup> Phone interview with Mike Viola (July 17, 2017).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> The local rule requiring this waiting period was rescinded on May 23, 2014. Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author).

<sup>92</sup> *Id.*

<sup>93</sup> Engle & Gilman, *supra* note 47, at 56.

long this process would take.<sup>94</sup> If the judge approved the decree, the now-former spouses each received a copy by mail. One lawyer reported that he had experienced as long as six weeks between filing and receiving the decree by mail.<sup>95</sup>

After the decree was issued, the divorce could be appealed within 30 days.<sup>96</sup> As the self-help materials noted, “[I]f your spouse has not opposed the divorce before now, it is unlikely that this will happen.”<sup>97</sup>

If at any point during the process the litigant failed to file paperwork needed to move the case forward, the case neither moved forward, nor was dismissed, nor became the subject of court action (such as a notice of inactivity). Instead, the case sat inert in the court’s files. We observed several such cases in our study.

We pause here to discuss the procedure in Philadelphia Family Court for an individual who sought not just a divorce but also a protection from abuse (“PFA”) order or an order regarding child custody, or support (child support, spousal support, or alimony). As mentioned above, PFA, custody, and support were not part of a divorce case’s administration.<sup>98</sup> More specifically: in Philadelphia Family Court, PFA matters were entirely separate actions from start to finish.<sup>99</sup> When a divorce complaint included requests regarding custody or support, the filer had to include extra copies of the filing documents that were then diverted to the appropriate Family Court branch, meaning to a custody master or to a support hearing officer or to both; from there, the proceedings would be separated procedurally.<sup>100</sup> In addition, support and custody actions could be filed without a corresponding divorce filing.<sup>101</sup>

It was theoretically possible for custody or support litigation to affect the timing of the filing or the completion of a divorce case. Regarding filing, a would-be divorce litigant could file a custody or support action, achieve a desired custody or support arrangement in that litigation, and then decide that pursuing a divorce was risky or not worth the trouble. Regarding completion, a litigant might file a divorce case that also sought an order regarding custody or support or both, achieve a desired custody or support arrangement in that administratively separate litigation, and then decide that pushing the divorce case forward was risky or not worth the trouble.<sup>102</sup> We explain below why we believe that these theoretical possibilities are unlikely to explain the results of our study.

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<sup>94</sup> Phone interview with Mike Viola (July 17, 2017).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* See 23 Pa.C.S. 3331, 3332 and Pa.R.A.P. 903.

<sup>97</sup> Engle & Gilman, *supra* note 47.

<sup>98</sup> See *supra* note 27.

<sup>99</sup> Memorandum from Todd W. Nothstein, Esq., Ph. D. to D. James Greiner, “Reactions to ‘Trapped in Marriage’”, August 31, 2018.

<sup>100</sup> *Id.* See *supra* note 27 for citations to relevant Pennsylvania procedural law.

<sup>101</sup> Memo, Nothstein to Greiner, *supra* note 99.

<sup>102</sup> *Id.*

### C. Philadelphia VIP's Divorce Practice

For the duration of our study, Philadelphia Volunteers for the Indigent Program (“Philadelphia VIP”) was the only legal aid organization in Philadelphia dedicated to securing legal assistance from private attorneys working pro bono for low-income individuals, families, businesses, and nonprofits. Created by the Philadelphia Bar Association in 1981, Philadelphia VIP maintained a staff of 5-10 attorneys and around 10 non-attorneys. Most of VIP’s service delivery came from a stable of volunteer attorneys, non-lawyer service providers, and students, who help serve about 3,500 individuals and families annually.<sup>103</sup>

Philadelphia VIP’s range of legal matters covered family law (adoption, child custody, divorce, guardianship, name change, spousal support), eviction, incorporation, and small business assistance, among others.<sup>104</sup> During the study, in Philadelphia VIP’s divorce practice, potential participants underwent a 45-60-minute interview covering marital history; current and past living arrangements; income streams; assets of all types; retirement benefits; children; reasons for divorce; pets; and the participant’s goals. Our effort to reduce the contents of these interviews to a spreadsheet resulted in approximately 220 columns’ worth of information.

Philadelphia VIP offered eligible potential divorce clients two levels of assistance. The first, and preferred, level of assistance was an effort by VIP to find a volunteer attorney. This effort required the drafting of a one-paragraph description of the matter, which was posted on Philadelphia VIP’s website, included in Philadelphia VIP’s monthly case list sent to all volunteers and pro bono contacts, and circulated to individual volunteer attorneys. That said, most Philadelphia VIP matters – and, particularly, divorce matters – ultimately placed with a volunteer attorney were the result of Philadelphia VIP staff’s personalized outreach, via phone and email, to individual volunteers. In these outreach efforts for divorce cases, Philadelphia VIP staff focused on volunteers who had previously expressed interest in handling, or had handled, a divorce matter. The effort to match participants with a volunteer attorney typically took Philadelphia VIP staff anywhere from 1 to 6 months, due to high participant demand and low volunteer supply. 87.8% of study participants randomized to the treated group, meaning a Philadelphia VIP effort to match them with an attorney, experienced an attorney-client relationship.

If VIP staff was not able to find a volunteer attorney to handle a particular case, VIP offered its second level of assistance – connecting participants with alternative resources. The most common and accessible resource was the self-help materials identified above and an offer to answer questions and provide general direction (usually by telephone) – so-called “counsel and advice” service by VIP staff. In a limited number of cases, another resource offered was referral to the Philadelphia Bar Association’s Modest Means Program, through which a low-

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<sup>103</sup> <https://www.phillyvip.org/about-us/mission-priorities-history/> (last visited March 21, 2018).

<sup>104</sup> <https://www.phillyvip.org/content/quick-facts> (last visited August 7, 2016).

income participant may obtain a private attorney on a reduced-fee basis (*i.e.*, a low bono<sup>105</sup> program). The fee, while below market rate, was nevertheless significant for persons in the financial situation of study participants.<sup>106</sup>

At least with respect to divorce, Philadelphia VIP was the legal services provider of last resort. Philadelphia VIP received referrals in divorce matters from other service providers, including Philadelphia Legal Assistance (“PLA”), a legal aid provider that provided legal services via its permanent staff. Ordinarily, if Philadelphia VIP offered its second level of assistance to a participant, there was no other organization to which an individual seeking divorce could turn to seek free attorney representation.

As discussed below, we obtained files for all divorce cases involving study participants in the Family Division of the Court of Common Pleas of the First Judicial District of Pennsylvania (the “Court”) filed with 18 months of randomization.<sup>107</sup> Although we cannot independently verify that the case files were complete, and we had occasional questions regarding the organization of the files, our examination of them provided a picture of the services Philadelphia VIP volunteer attorneys typically offered in study cases. We supplemented this picture with information obtained by Philadelphia VIP staff, who at our request asked questions of the attorney volunteers about their general practices.

As discussed below, 74 participants were randomized to a Philadelphia VIP effort to find a volunteer attorney. Philadelphia VIP matched a volunteer to 62 of these participants (three other treated group participants found lawyers elsewhere), and we found 45 corresponding case filings within 18 months of filing. In all of those 45 case records, we found evidence of three contested motion files, none of which were ever ruled upon; four master’s reports; seven financial dispositions (order or settlement); and a single live court hearing. In only three of the 45 cases was there evidence that the opposing spouse had counsel. In the divorce files we reviewed, there were no child custody or domestic violence dispositions (again, such custody and domestic violence issues are the subject of separate legal proceedings in Philadelphia), and no spousal support or alimony matters.<sup>108</sup> Thus, it appeared from our review that in the

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<sup>105</sup> See *supra* note 22 & accompanying text.

<sup>106</sup> Eligibility for the “Modest Means Program” was as follows: “income greater than 187.5% of the official poverty threshold (OPT) guideline but no more than 250% of the OPT or income below 187.5 % of the OPT who are nevertheless ineligible for free legal services.”

<http://www.philadelphiabar.org/page/PIDirectoryEntry?appNum=2&id=1000100> (last visited July 24, 2017).

Regarding fees, see

<http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/ModestMeansProgramSept2011.pdf> (last visited July 24, 2017). By way of example, a no-fault divorce with no financial issues cost \$500.00. *Id.*

<sup>107</sup> This 18-month period was sufficient to understand the divorce process in Philadelphia County. As noted *infra*, see note 116, 56% of our participants had been separated more than two years by the intake interview, and almost none had been separated for less than six months. Moreover, in Pennsylvania, a divorce action based on a two-year separation can be filed before the two years have elapsed, so long as the decree is not entered without the full two-year period.

<sup>108</sup> See footnote 27, clarifying the relationship between custody and support proceedings versus divorce cases.

overwhelming majority of cases in our dataset, the volunteer attorneys filled out and filed uncontested paperwork (probably after a client interview), assured service of process, engaged in infrequent negotiations directly with an opposing spouse, and kept the case moving. Nothing more was, apparently, required.

## D. Study Participant Profile

### 1. Demographics and Finances

We opened enrollment in the study in January of 2011 and closed it in July of 2013. Our study population consists of 311<sup>109</sup> Philadelphia County residents, each of whom completed an intake interview with Philadelphia VIP. Intake data<sup>110</sup> revealed the modal study participant was a middle-aged,<sup>111</sup> English-speaking,<sup>112</sup> black<sup>113</sup> woman<sup>114</sup> who had been married about a decade<sup>115</sup> and no longer lived with her spouse.<sup>116</sup> Close to half of potential participants had a minor child within the marriage, and of these, almost all desired custody over the child.<sup>117</sup>

Consistent with Philadelphia VIP's service population,<sup>118</sup> participants were poor. The majority earned zero income,<sup>119</sup> with 95 percent earning less than \$23,000 annually. Two-thirds

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<sup>109</sup> We completed intake, and randomized, 311 Philadelphia County residents, each of whom reported as of the time of their intake interviews that she or he (i) desired a divorce, and (ii) had not been sued by an opposing spouse. We randomized eight others who reporting having been sued and who hoped to reconcile with their opposing spouses. Finally, we randomized 60 residents who reported having been sued by an opposing spouse in Philadelphia County and who desired a divorce. We discuss this latter group below.

<sup>110</sup> All measures were self-reported.

<sup>111</sup> The average age was 42 years old.

<sup>112</sup> 16 percent of participants required an interpreter.

<sup>113</sup> 59 percent of participants were black; 22 percent Hispanic; 15 percent white. The population of Philadelphia at large was 43 percent black; 11 percent Hispanic; 37 percent white.

<http://statisticalatlas.com/place/Pennsylvania/Philadelphia/Race-and-Ethnicity>

<sup>114</sup> 80% of participants were female.

<sup>115</sup> The average length of marriage was 12 years.

<sup>116</sup> 8 percent cohabitated with the opposing spouse. 56 percent had been separated for over two years. This divorce would be the second for 19 percent of the sample, suggesting a non-trivial number of participants were already familiar with the process.

<sup>117</sup> 43 percent had minor child; 38 percent had minor child over whom custody desired.

<sup>118</sup> Philadelphia VIP clients could earn at most 200% of federal poverty guidelines. *Mission, Priorities, History*, PHILADELPHIA VIP, <https://www.phillyvip.org/about-us/mission-priorities-history/> (last visited Sept. 4, 2016). The U.S. Department of Health and Human Services federal poverty guidelines for a family of one in 2013, when study intake ended, was \$11,490. <https://www.federalregister.gov/articles/2013/01/24/2013-01422/annual-update-of-the-hhs-poverty-guidelines>. In 2014, 26 percent of Philadelphians lived below the poverty level. US Census Bureau, *Poverty Status in the Past 12 Months by Sex by Age American Community Survey 1-year estimates (2014)*, [http://censusreporter.org/data/table/?table=B17001&primary\\_geo\\_id=16000US4260000&geo\\_ids=16000US426000,05000US42101,31000US37980,04000US42,01000US](http://censusreporter.org/data/table/?table=B17001&primary_geo_id=16000US4260000&geo_ids=16000US426000,05000US42101,31000US37980,04000US42,01000US).

<sup>119</sup> The median participant income was 0, the mean monthly income was \$410. Monthly income at the 95th percentile was \$1,906, or \$22,872 per year. We assumed earned income was zero for unemployed participants. We did not collect data on the amount of unearned income.

received some form of public income support.<sup>120</sup> While nearly all were under retirement age,<sup>121</sup> only 35 percent were employed.<sup>122</sup> Median earned income for these, the most financially secure participants, was approximately \$12,000 per year.<sup>123</sup> To provide an imperfect comparison,<sup>124</sup> median household income in the poorest Philadelphia neighborhood during the same period was \$15,700.<sup>125</sup> Unbanked individuals were also overrepresented in our sample, at 33 percent, compared to 14 percent of households in Philadelphia at large.<sup>126</sup> Including these unbanked (and counting them as having \$0 in a bank account), three-quarters of the sample held less than \$500 in bank accounts.<sup>127</sup>

Given this income and asset poverty, homeownership<sup>128</sup> was higher than might be expected:<sup>129</sup> slightly under one-third of study participants owned a housing unit. Even among the 65 percent of the sample not working, 25 percent were homeowners. These figures may seem less anomalous when compared to the share of Philadelphia residents living in owner-occupied homes citywide: 53 percent, the highest among the 11 most populous metropolitan areas in the U.S.<sup>130</sup>

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<sup>120</sup> Categories reported included food stamps (38 percent), cash assistance (16 percent), and SSI or SSDI (34 percent). Across Philadelphia, 23.2 percent of households received food stamps. The rate was as high as 59.9% in one neighborhood. <http://statisticalatlas.com/place/Pennsylvania/Philadelphia/Food-Stamps> (last visited Sept. 4, 2016)

<sup>121</sup> Age ranged from 20 to 78. 96 percent of the sample was between ages 20 and 64.

<sup>122</sup> Our survey did not distinguish unemployment from labor force participation. In Philadelphia, 50.3 percent of the population aged 25 to 64 years was employed, and 49.7% was either unemployed or not in the labor force. *Employment Status: Table 1*, <http://statisticalatlas.com/place/Pennsylvania/Philadelphia/Employment-Status> (last visited Sept. 4, 2016)

<sup>123</sup> Mean monthly income of employed participants was \$1,186, the median was \$1,014. Participant monthly earned income was missing in 1 percent of cases.

<sup>124</sup> We report individual earned income, whereas the figure cited captures household income from any source, earned or unearned.

<sup>125</sup> *Household Income by Neighborhood in Philadelphia: Table 20*, <http://statisticalatlas.com/place/Pennsylvania/Philadelphia/Household-Income>

<sup>126</sup> Among the 35 largest cities in the nation, Philadelphia was the sixth-most unbanked city. <http://localdata.assetsandopportunity.org/place/4260000> (last visited Sept. 4, 2016).

<sup>127</sup> Seventy-nine percent of bank accounts were checking accounts; 13 percent were savings. The rest were retirement, money market or "other."

<sup>128</sup> The actual figure was 29%. Ownership here refers to both sole and joint ownership by the study participant, as distinct from sole ownership by the opposing spouse. Intake questions asked potential participants to report real estate holdings. Considering the approximately \$50,000 median purchase price and low levels of liquid assets, it seems reasonable to infer that most if not all of the real estate holdings potential participants reported were the homes in which they lived. The homeownership rate was 35 percent among employed respondents and 25 percent among unemployed respondents.

<sup>129</sup> Household asset poverty, defined as insufficient net worth to subsist at the poverty level without income for three months, exceeded income poverty in all but one state in 2011. <http://scorecard.assetsandopportunity.org/latest/measure/asset-poverty-rate>.

<sup>130</sup> Table B25003: Tenure, 2010-2014 American Community Survey 5-Year Estimates, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_B25003&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_B25003&prodType=table) (last visited Sept. 4, 2016); Sean Capperis et al., NYU Furman Center/Capital One, *Renting in America's Largest Cities* 6-7 (May 28, 2015). [http://furmancenter.org/files/CapOneNYUFurmanCenter\\_\\_NationalRentalLandscape\\_MAY2015.pdf](http://furmancenter.org/files/CapOneNYUFurmanCenter__NationalRentalLandscape_MAY2015.pdf).

By report of study participants, opposing spouses were more financially stable than participants.<sup>131</sup> Nearly 50 percent of opposing spouses worked,<sup>132</sup> and of those, half earned more than \$28,800 annually. The corresponding figures for participants, as mentioned above, were 35 percent and \$14,000. Opposing spouses were twice as likely as participants to anticipate a pension payout in retirement.<sup>133</sup> Less pronounced disparities persisted for durable and liquid assets. While these economic imbalances by law might well have entitled study participants to alimony and a share of the marital estate, most expressed no desire to assert economic claims. The primary desire our study participants expressed was to transition from a state of married to one of not married.

## 2. Grounds for Divorce

During its interview, Philadelphia VIP questioned potential participants regarding grounds for possible divorce. Philadelphia VIP forward a file to us for participation only if it believed that such legal grounds existed. Participants often identified more than one grounds for divorce.

175 of the 311 participants seeking to initiate a divorce lawsuit identified two-year separation, and 158 identified mutual consent, the two so-called “no-fault” grounds under Pennsylvania law. Recalling that participants could cite more than one ground to support a divorce, 250 of 311, 80.4%, identified either two-year separation or mutual consent. Of the 61 who cited other than no-fault grounds, 42 cited “indignities,” 8 cited “desertion,” and 15 selected “other,” which (upon inspection of textual comments by Philadelphia VIP intake staff) corresponded in most cases to domestic violence.

In summary, all of the participants seeking to initiate divorce actions satisfied Philadelphia VIP intake staff that they had legally sufficient bases to initiate a divorce lawsuit, with the strong majority of them citing the simplest, no-fault, grounds.

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<sup>131</sup> Of the 378 participants who completed the intake process, 67 reported that the *opposing spouse* had already filed a court case. We excluded these 67 “already filed” participants from analysis. Although case files show this number was actually much smaller (33), both study participants and opposing spouses in the “already filed” group were significantly richer than their counterparts in the “not yet filed” group. Opposing spouses who had already filed were more likely to be employed (+22 percentage points), earn higher incomes (+\$1231 per month), and have a pension (+40 percentage points) than opposing spouses who had not filed. They were also likelier to be the policyholder of the participant’s health insurance. The pattern continues for asset and liability ownership. For instance, 79 percent of participants or spouses in the “already filed” group owned real estate, compared to 42 percent of couples in the “not yet filed” group. Furthermore, that participants were less likely to receive food stamps but not more likely to be working or earning higher income suggests that these “already filed” opposing spouses provided financial support to participants, voluntarily or by court order. Indeed, participants in the “already filed” group were 14 percentage points more likely to be a current beneficiary of a spousal support order. If greater opportunity for economic disputes portends a more adversarial and complicated divorce proceeding, then the 67 participants who *believed* their spouse had already filed for divorce presented more difficult and time-consuming cases than the 311 participants who did not.

<sup>132</sup> This is on par with the Philadelphia employment rate, *infra* note 51.

<sup>133</sup> 17% of opposing spouses anticipate a pension, while only 8% of participants did.

## E. Study Design and Operation

Our simple study design replicated that of previous effect-of-representation studies: we randomized participants to a higher level of service or a lower level of service and followed results via examination of adjudicatory system records.<sup>134</sup>

As noted above, Philadelphia VIP offered two levels of service to participants seeking divorces, an effort to obtain a volunteer attorney who would engage in a traditional attorney-client relationship (treated condition), and a referral to either existing self-help materials or (if qualified and the participant so desired) to the Modest Means, together with an offer to provide instructions and answer questions, usually over the telephone (control condition). After a consenting participant completed the intake process, Philadelphia VIP used a secured file transmission protocol to provide us with a record of the intake, and we randomized the condition that the Philadelphia VIP would provide.

Our randomization scheme was simple. We created blocks of 10-20 observations and programmed a computer to allocate randomly 0's and 1's within each block. How many 0's and 1's depended on the expected volume of cases and Philadelphia VIP's capacity.

When randomization began in January of 2011, Philadelphia VIP had the capacity to offer the treated condition to half of eligible potential participants who completed intake, and we randomized accordingly. Matters changed a little over a year later. In early 2012, Philadelphia Legal Assistance, the legal aid staff-based service provider identified above, responded to budget cuts by terminating its representation of individuals in divorce cases not involving domestic violence or certain other special circumstance. The result was an increased referral flow of divorce-seeking individuals to Philadelphia VIP. From January to July of 2013, Philadelphia VIP went from being able to offer the treatment condition to 50% of eligible participants to being able to offer the treatment condition to 15% of eligible participants, and we randomized accordingly.<sup>135</sup> Study intake lasted from January of 2011 until July of 2013, allowing us to randomize 311 participants, 74 assigned to the treated group and 237 to control.<sup>136</sup>

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<sup>134</sup> D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: a Randomized Study In A Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Hennessy, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1880078](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078); Greiner & Pattanayak, *supra* note 24.

<sup>135</sup> We had anticipated a need to vary the randomization probability during the study. Accordingly, we randomized in batches ranging in size from 12-20 cases (we did not inform Philadelphia VIP of the batch sizes), and stayed in contact with Philadelphia VIP to adjust the randomization probabilities as required.

<sup>136</sup> Our memorandum of understanding with the Court limited the total number of cases as to which we could request a search for case files to 380 total. Our study protocol agreement with Philadelphia VIP called for us to randomize all participants. During the randomization period, there were eight participants who reported being sued by opposing spouses but who did not desire to divorce, and sixty who reported being sued by their opposing spouse and who did desire to divorce. Thus, we stopped randomization when we approached total case limit of 380. The eight and the sixty just mentioned are not included in the 311 figure reported above.



Starting eighteen months after randomization, on a periodic basis, we provided personal identifying information on study participants to the Court's remarkably patient and dedicated staff, who searched for divorce case files involving study participants. Upon finding a file, Court staff copied it, redacted confidential information about the opposing spouse, and sent the redacted copy to us. With respect to study participants who had case files in the initial 18-month search, we requested follow-up documents from the court for up to 36 months after randomization. A review of these case files provided us with a primary source of outcome information.

Additionally, we received some information about treated cases from Philadelphia VIP itself. Specifically, Philadelphia VIP provided us with information on whether it was able to match treatment participants with a volunteer attorney and the corresponding date (if the match was made) along with the basis for the closure of Philadelphia VIP's file (*i.e.*, whether the participant abandoned the case, or reconciled, or continued to seek the divorce, or moved away from Philadelphia). In addition, Philadelphia VIP provided us with non-confidential information on each telephone call or other contact it received from a study participant in which it provided legal information. Finally, at our request, Philadelphia VIP staff attorneys contacted the volunteers who provided the representation in study cases to ask if parties had agreed to unfiled, "side" asset or income stream allocation agreements. The answer was that all such agreements were filed with the court (and thus visible to us).

Finally, conversations with Philadelphia VIP and the court led us to search the records of six additional counties: Bucks, Chester, Delaware, Montgomery, Cameron, and Potter. Bucks, Chester, Delaware, and Montgomery were the four counties immediately adjacent to Philadelphia, and we were concerned that participants might have filed nearby. That concern was not well-founded; the search of these four counties yielded only one participant case file.

Matters were different in Cameron and Potter Counties. During the time period of our study, family lawyers in Philadelphia knew that the court systems in these two counties had cheap filing fees. For example, in 2016 and for simple no-fault divorces, Cameron's was \$86.00,<sup>137</sup> Potter's \$84.00.<sup>138</sup> Further, either county would process a no-fault consent divorce case by mail, meaning that if both parties agreed to the divorce and asserted no economic claims, there need be no trip to the courthouse. There were drawbacks. Neither county would process an IFP petition from a plaintiff living outside the county, so payment of the county's filing fee was mandatory. Because venue was improper, if the opposing spouse objected, the case would be dismissed, and the filing fee lost. If something went awry, such that the court did require an appearance, the study participant faced a choice between losing the filing fee (and failing to obtain a divorce) or a ten-hour round trip drive into rural country. Record

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<sup>137</sup> <https://www.co.elk.pa.us/forms/2016%20Cameron%20Divorce%20Fees.pdf>. Note that Elk and Cameron Counties are in one judicial district, which is why this Elk County website includes information for Cameron County. Email from Honorable Margaret T. Murphy, Administrative Judge to D. James Greiner of October 4, 2018 (on file with author).

<sup>138</sup> [http://www.pottercountypa.net/post/\\_docs/UPDATEDProthFeeSchedule.pdf](http://www.pottercountypa.net/post/_docs/UPDATEDProthFeeSchedule.pdf).

systems in Cameron and Potter Counties did not allow us to assess how frequently venue objections or court appearances occurred. Despite these dangers, it appeared that the chance to avoid the Philadelphia procedural system described above was tempting for many study participants, particularly those in the control group. We found 21 divorce filings in Cameron (20 in our control group) and 35 in Potter (31 in our control group).

One final note: our communications with Philadelphia VIP gave us strong information about which treated group participants actually experienced a traditional, attorney-client relationship. Thus, we observed study participants represented by counsel but who, for whatever reason, chose not to file for divorce. Because we ascertained results for the control group only by looking for and examining case files, we could not observe representation status for control group participants who did not file lawsuits. Thus, the representation numbers quoted below are a lower bound for control group participants. We address this missing data issue statistically, as we discuss below.

## Part II: Study Results

### A. Balance Checks

Randomization tends to create experimental groups that are identical up to statistical noise on observable and unobservable characteristics. This balance on background characteristics is a key advantage to randomized controlled trials offered over observational studies: when two groups are the same except for treatment, we can conclude up to statistical uncertainty that the treatment caused any observed differences in outcomes. Observational studies, by contrast, usually produce dissimilar treatment and control groups, in part because study participants self-sort into the comparison groups. This self-selection leads to systematic differences in background variables that are difficult to disentangle from a causal effect of a treatment.

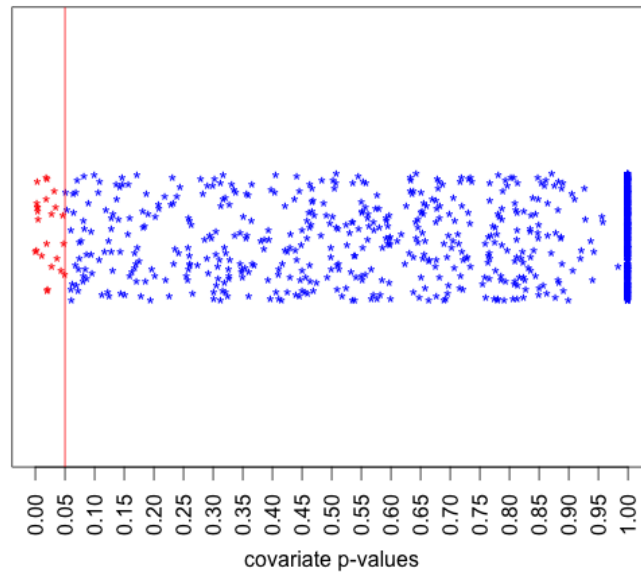
We say randomization "tends" to equalize treatment and control groups because we expect chance variation to produce dissimilarity on the occasional variable. As study population size grows, these discrepancies tend to even out, similar to how with repeated (fair) coin tossing, the proportion of heads may start off skewed but inexorably approaches .5 as the number of tosses increases. Here, our moderate sample size of 311 participants and the multitude of background variables examined for balance make some differences across experimental groups likely.

Figure 1 shows the results of a test for statistically significant difference (in means) on each of the dozens of background variables, also called "covariates," available from the Philadelphia VIP intake interview. If the randomization served its intended purpose of balancing covariates as between treated and control groups, we would expect to see a few covariates with p-values below the traditional .05 level, but most above that level. That is in fact what we see.<sup>139</sup>

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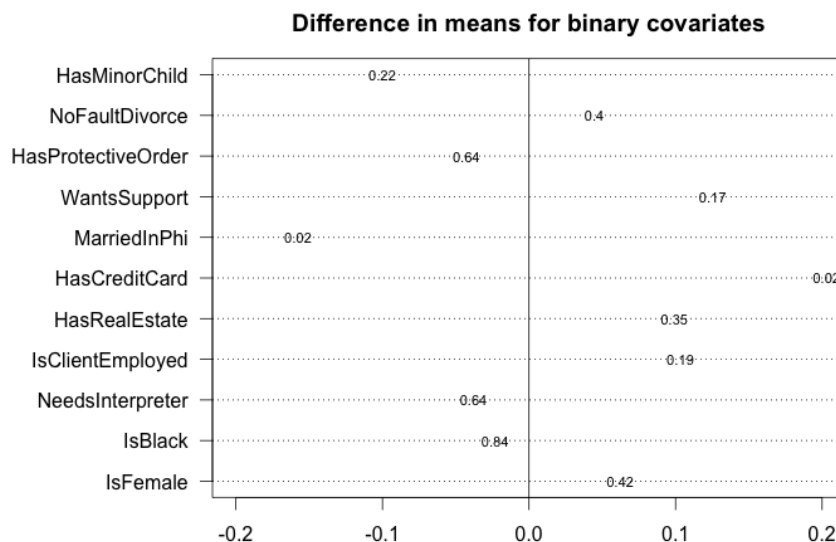
<sup>139</sup> Of 423 comparisons, 19 (3.9 percent) showed imbalance.

### P-values for Covariate Balance Checks



*Figure 1: Covariate Balance Checks: P-values for t-tests for difference in means for each covariate observed in our study. Placement of the dots on the y-axis is irrelevant. As one hopes would be true in a randomized study, only a handful of p-values are below .05, indicating that randomization effectively balanced most background covariate distributions as between treated and control groups.*

Figure 2 shows the results of tests for difference in proportions for categorical covariates, meaning background variables that can take on only values of 0 or 1 (such as gender, or whether a participant owns real estate). Again, random variation is likely to produce some differences that, if viewed in isolation, would seem statistically significant. Overall, however, all appears well.



*Figure 2: Binary Covariate Balance: In this graph, the position of a number on the x axis shows the fraction of 1's in the treated group minus the fraction of 1's in the control group for the variable identified. The number plotted is the p-value for a permutation test for difference in proportions. For example, consider the variable "MarriedInPhi," signifying whether the participant and the opposing spouse's original marriage was licensed in Philadelphia County. Figure 2 demonstrates that the fraction of treated group participants original married in Philadelphia County was about .17 less than in the control group, and that the p-value for a difference-in-proportions permutation test was .02. Two of the eleven variables shown have p-values below .05 (or .025, given that we are testing differences in which the treated group proportion is above or below that in the control group), roughly what we would expect from an effective randomization.*

## B. The Study as an Evaluation of Philadelphia VIP's Practice

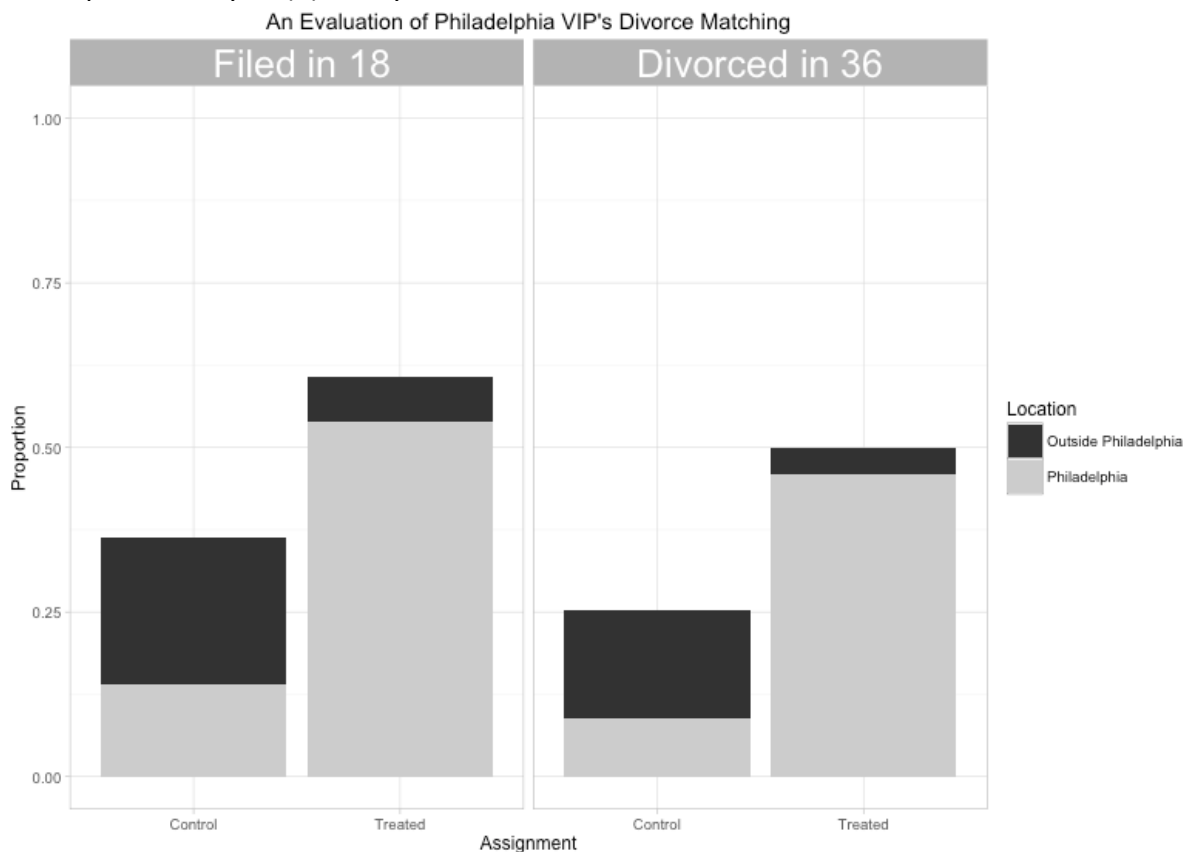
Philadelphia VIP attempted to find volunteer lawyers who could offer pro bono legal assistance to our treated group study participants. Our RCT is straightforwardly an evaluation of whether Philadelphia VIP's efforts made a difference in participants' legal outcomes. Were those randomized to a promise of a Philadelphia VIP effort to find a matching lawyer (treated group) more likely to obtain a divorce than those randomized to an offer to answer questions via the telephone and a referral (if the participant qualified) to the Modest Means Program (control group)?

To answer this question, we compare outcomes for participants randomized to the treated condition to participants randomized to the control condition, without regard to whether participants experienced a traditional attorney-client relationship. The reasons for this "as-randomized" or "intention-to-treat" comparison are discussed elsewhere.<sup>140</sup> Briefly,

<sup>140</sup> Greiner & Pattanayak, *supra* note 24.

Philadelphia VIP could not completely control whether it was able to match a participant with an attorney, nor could it control whether the participant responded to an attorney’s effort at representation. Philadelphia VIP could control only what it did, not how others responded. Thus, to evaluate Philadelphia VIP’s program, we analyzed what Philadelphia VIP did, which is what we randomized, namely, the presence or absence of an *effort* by Philadelphia VIP to obtain an attorney.

Figure 3 summarizes the results for our primary outcome variables, which are whether participants filed for divorce within 18 months of randomization, and whether participants succeeded in terminating their marriages within 36 months of randomization, either (a) in Philadelphia County or (b) in any of the seven counties we searched.



*Figure 3: Outcomes for an Evaluation of Philadelphia VIP’s Divorce Practice: This figure compares outcomes experienced by treated (Philadelphia VIP attorney match attempt) versus control (no such attempt) groups, specifically whether participants reached the courthouse within 18 months and succeeded within 36 months. The light shading reflects filings in Philadelphia County only, the dark shading the filings in counties outside of Philadelphia. For all comparisons, the treated group success rate greatly exceeded that in the control group. This figure plots unweighted results; estimated treatment effects that include weighting either by*

*probability of selection or size of randomization group are a few percentage points larger than the differences depicted here.*

Figure 3 plots raw figures, unweighted either by randomization probability or the block randomization scheme we used. Accounting for either leads to similar estimated treatment effects for the difference in treated versus control success rates, all of which are a few percentage points larger than what Figure 3 would suggest. Table 1 reports treatment effects found with weighting by randomization block size, which had confidence intervals a few tenths of percentage points wider than those from weighted with randomization probability. For those interested in p-values (we prefer the confidence intervals), the third column of Table 1 reports the results of Fisher’s Exact Tests. As noted in the introduction, our estimated p-values were so low in the Philadelphia-County-only comparisons that the computer reported them to be 0, so we report 0 as well, even though a truly 0 p-value is theoretically (for distribution-based comparisons) or essentially (for permutation-based comparisons) impossible.

Table 1: Estimated Effect, Treated Mean – Control Mean, As-Randomized Comparison

Comparison	95% Interval Lower	Point Estimate, Difference in Means	95% Interval, Upper	Permutation p-value
Filed in 18 months, Philadelphia	.329	.443	.557	0
Divorced in 36 months, Philadelphia	.287	.403	.519	0
Filed in 18 months, seven counties	.200	.309	.419	.000024
Divorced in 36 months, seven counties	.176	.292	.409	.000012

One reads Table 1 as follows, taking the row “Filed in 18 months, seven counties” as an example. The best estimate for the average difference in success rates, treated group minus control group, for whether a study participant had a divorce case on file within 18 months of entering the study was .309. In other words, a treated group participant was on average 30.9 percentage points more likely to have a divorce case on file than a control group participant in any of the seven counties we searched. The true value is 95% likely to lie somewhere within the interval (.200, .419). The probability of observing numbers this extreme or more extreme, if it were true there were no difference in treated and control group success probabilities, is about .000024, or less than 3 in 100,000. Note that Table 1 reports figures weighted by inverse probability of selection, so they are slightly different from the unweighted figures reported in the Introduction. The intervals are based on asymptotic normality assumptions; the p-values are from a permutation test with 10,000 iterations.

The Philadelphia VIP’s divorce representation program was effective, spectacularly so. The program made a difference in its participants’ lives. There is little more to say.

### C. The Study as a Measure of Adjudicatory System Accessibility

The previous section reported results best understood as an evaluation of the effectiveness of Philadelphia VIP's effort to obtain divorces for participants. These results are of interest to all who focus on access to justice, but especially so to legal services providers seeking to understand the effectiveness of representation programs for various subject matters, for various participant portfolios, and for various representation settings. These results also provide some sense of the accessibility of the Court's divorce adjudicatory system. But for the purpose of assessing the accessibility of an adjudicatory system, there are better measures, measures almost always impossible to estimate (without implausibly heroic assumptions) via observational studies, but measures sometimes possible using RCTs of the type we implemented here.

The idea is as follows: Suppose one defines an accessible adjudicatory system as one in which a would-be litigant can achieve roughly the same adjudicatory output with and without full attorney representation. In other words, for a typical would-be litigant facing a justiciable problem resolvable by an adjudicatory system, one defines the "correct" adjudicatory output to be the output the system would produce for that would-be litigant in that matter were competent counsel to provide a traditional, attorney-client relationship. This competent counsel output is the benchmark against which to measure the system's output in potential variations of that same would-be litigant's matter, such as when no form of legal assistance is present, or when only self-help-materials are available.

Why choose this benchmark? A bedrock assumption of the United States adjudicatory system, including in our death penalty administration, is that a competent legal team cures all ills regarding justice system accessibility.<sup>141</sup> Moreover, we are unaware of a realistic way to construct or reveal the "right" result in any legal matter, even if one indulges (which we are not sure that we would) the assumption that such a "right" results exists. We know of no super-adjudicator that can create or discover the "right" answer. The best approximation we can construct to the "right" result is one that emerges from a "right" process. Here, our process-based definition focuses on the result produced when competent counsel provides a traditional, attorney-client relationship. This definition might not function for all types of matters, such as those requiring more than one attorney, or perhaps an attorney plus a team of investigators and expert witnesses. But the definition is serviceable when one considers the types of matters frequently encountered by low- and moderate-income individuals and families, which for better or worse are ordinarily handled by a single attorney on her own (if serious legal assistance is available at all): summary eviction, government benefits, divorce, child custody, spousal and child support, debt collection defense, unpaid wages, and so on.

If one accepts this measuring system, how does one implement it in practice? The best way would be to compare the result experienced by each would-be litigant for a particular legal matter with competent counsel providing a traditional attorney-client relationship to the result

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<sup>141</sup> See *Powell v. Alabama*, 287 U.S. 45, 53, 58–59 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

experienced under other conditions, such as with self-help. For each matter, of course, one can observe only a single treatment condition, *e.g.*, either with or without a lawyer but not both.<sup>142</sup> So measurements for a particular matter are out. The best one can do is to estimate average (or median or modal or xth quantile) differences in outcomes for a group of matters by comparing the adjudicatory outputs of some cases with competent lawyers providing traditional attorney-client relationships to some cases with whatever level of legal assistance is most prevalent for pro se litigants in the system in question, such as self-help materials.

Ideally, one would like to randomize which matters have attorney-client relationships and which do not. Ethically, one (probably) cannot force would-be litigants to accept attorney representation against their wishes, nor in most<sup>143</sup> courts could one prevent would-be litigants from retaining counsel if they had the desire, the luck, or the resources, to do so. So one does what we did in this study, which is to take a group of would-be litigants unlikely to be able to retain counsel on their own and randomize some of them to an organization's effort to provide an attorney-client relationship.

Such a study provides estimates of the effect of the organization's efforts to provide a lawyer (versus no such effort) with no modeling. It does not provide model-free estimates of the effect of the presence (versus the absence) of a lawyer. We have explored this distinction at length in other work.<sup>144</sup> Essentially, an effort to find a lawyer does not always succeed, and even if a lawyer is found, the potential client may not allow herself to be represented. Much else may happen besides that is separate from whether a competent lawyer ends up on the scene. An analysis of the effect of an organization's efforts to provide a lawyer, like that reported in the previous section, mixes the "lawyer-on-the-scene" effect in with all of these other factors. Again, such an analysis is well-suited to measure the efficacy of the organization that is attempting to find the lawyer. And in terms of measuring accessibility, if this were all that could be done with respect to a particular adjudicatory system, we would argue that the results would be informative on that score as well.

In this study, however, if we are willing to risk some modeling assumptions, we can come closer to a study in which we randomized the presence of a lawyer (as opposed an effort to provide one), and thus closer to a study that measures system accessibility. What assumptions? Two are key. First, we must assume that no participant would always receive a treatment opposite the one randomized to her, *i.e.*, no participant would fail to experience an attorney-client relationship if randomized to an organization's effort to find one for her, but would experience an attorney-client relationship if randomized to no such effort. Second, we must assume that Philadelphia VIP does not make a participant randomized to the treatment condition more likely to reach the courthouse within 18 months (or achieve divorce within 36 months) except by means of the effort to find an attorney. This condition could be violated if,

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<sup>142</sup> Cite to fundamental problem of causal inference literature.

<sup>143</sup> *But see* HAW. REV. STAT. ANN. § 633-28 (West 2017) (forbidding representation by licensed practitioners in residential landlord-tenant disputes over security deposit); IDAHO CODE ANN. §1-2307 (West 2017) (prohibiting representation of parties in small claims court); MICH. COMP. LAWS ANN. § 600.8408 (West 2017) (same).

<sup>144</sup> Greiner & Pattanayak, *supra* note 24.



for example, Philadelphia VIP staff provided to treated (not control, treated) group participants large amounts of telephone advice, help in filling out forms, or other forms of assistance. Finally, the statistical modeling we must risk to get estimates of a lawyer-on-the-scene effect tends to work better when most study participants randomized to an organization's effort to find an attorney-client relationship end up with one, and when most participants randomized to no such effort do not end up with such a relationship.<sup>145</sup>

All of these assumptions are plausible in the present study. Regarding the first key assumption, the above discussion of the divorce system study participants confronted provides little reason to suspect that participants behaved like two-year-olds, *i.e.*, always demanded and obtained the treatment opposite to the one assigned to them. Regarding the second key assumption, as noted above, Philadelphia VIP summarized the results of each telephone or other contact in which it provided legal information to a study participant. It reported very few contacts in the treated group, which makes sense, given that it was attempting to find a lawyer for each treated group participant. Finally, the previous discussion demonstrated that 87.8% of participants randomized to a Philadelphia VIP effort to find a lawyer ended up with one, while roughly 36.7% of those randomized to no such effort found one. These latter figures demonstrate that most participants "followed" their assigned treatments. Under such conditions, we risk the assumptions need to estimate the causal effect of the presence of a lawyer in a would-be divorce matter in the Court for our set of study participants.

One additional word about the measurement we propose here: As noted in the introduction, an adjudicatory system made uncomfortable by our proposed yardstick of accessibility, which might depend in part on factors that are beyond its control (such as the level of complication in the substantive law), might respond as follows: "Of course our adjudicatory system is accessible to pro se litigants. Look how many pro se litigants we have in the system!". We find this response question-begging: how many pro se litigants should there be in any system? It could be that a sizeable number of pro se litigants are engaged in an adjudicatory system, but that an even larger number of pro se litigants would engage with it if they could figure out how to do so, or how to do so in a way that did not impose an undue burden on their time, mental bandwidth, and self-esteem.

With all of this in mind, we provide results. We focus on the same two primary outcomes as in the previous section, meaning first, whether we found in court files a divorce case involving the participant within 18 months of randomization, and second, whether court files showed that the participant's marriage had been terminated within 36 months of randomization. As the previous section, we report results for Philadelphia County alone as well as for all seven counties we searched. Under the accessibility theory articulated above, the Philadelphia County results measure the accessibility of that county's system, while the seven-county results measure the accessibility of the Pennsylvania system as a whole for study participants (poor

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<sup>145</sup> Those trained in econometrics or statistics will recognize our overall discussion as one contrasting intention-to-treat versus complier average causal effect, monotonicity, the exclusion restriction, and strong instruments.

Philadelphians), so long as one is willing to assume that it is unlikely that many of our study participants would have filed divorce cases in counties other than the seven we searched.

Figures 4, 5, 6 and 7 summarize the results. Some clarifications to help understand these graphs. First, recall that we are measuring the difference between two rates of success: the success rate for those with a lawyers group minus the success rate for those without. The largest that this difference can be is 1.0 (corresponding to what would happen if the with-representation group were always successful and the no-representation group were never successful,  $1.0 - 0.0$ ). The smallest it can be is -1.0 (corresponding to what would happen if the with-representation group never succeeded and the no-representation group always succeeded,  $0.0 - 1.0$ ). For this reason, Figures 4-7 show a scale of -1.0 to 1.0. Estimates on the right-hand side of these figures, closer to 1.0, correspond to the with-representation group succeeding more often than the no-representation group. That is what these graphs depict: a with-representation group succeeding more often, much more often, than the no-representation group.

Second, it turns out that it is not possible to estimate a with-representation minus no-representation effect for all study participants. Some of our participants will always find representation, even if randomized no Philadelphia VIP effort match. For these “always-takers,” it is not possible to estimate a with-representation versus no-representation effect, any more than one can estimate the effect of a new drug in a set of patients who all receive it. Similarly, some of participants will never find representation, even if randomized to a Philadelphia VIP effort to find it. For these “never-takers,” it is not possible to estimate a with-representation versus no-representation effect, any more than one can estimate the effect of a new drug in a set of patients who never receive it. A with-representation versus no-representation effect is possible only for a group that will sometimes but not always get representation, specifically, a group that will receive representation if randomized to receive it and not representation if not so randomized. Figure 4 show estimates for this group of “compliers,” meaning the group that “complies” with the treatment to which it was randomized.

Third, for those who care about the debates on the meaning of probability (we count ourselves among this group, barely), Figure 4 show Bayesian estimates of the mean with-representation versus no-representation effect from the posterior predictive distribution of the compliers among the participants in our study. That means that we are modeling our knowledge of the mean of the with-representation minus no-representation success rate. We shift our language accordingly.

Fourth, Figure 4 uses modeling to account for the fact that we did not observe whether members of our control group had representation unless they succeeded in filing divorce lawsuits. In other words, if a member of our control group consulted a lawyer and decided not to file, we would know that she did not file but not that she consulted a lawyer. One of us has extended prior work on so-called “non-compliance” with treatment assignment to address the statistical challenges posed by our inability to observe whether non-filers in our control group

retained counsel. Note that we hypothesize that this uncertainty regarding whether some of the members of our control group had lawyers is likely responsible for the spread-out nature (meaning the long left tails) of the distributions appearing below.

With all that in mind, our responses were as previewed above. In Philadelphia alone or in all seven counties we searched, for both the filed-in-18-months and divorced-within-36-months outcomes, Figure 4 shows estimates on the right-hand side of the graphs, corresponding to large with-representation versus no-representation effects. In each graph, the outmost two vertical lines correspond to the end points of 95% credible intervals. The inner vertical lines represent the mean and the median.

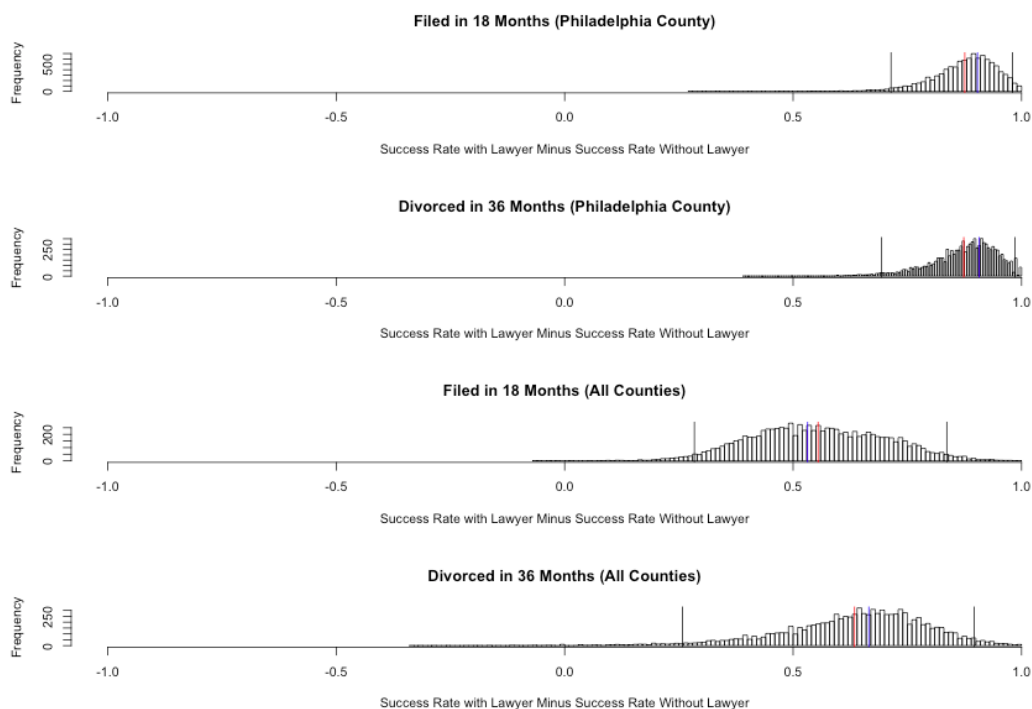


Figure 4: Effect of having an attorney-client relationship on the probability of filing with 18 months in Philadelphia County, obtaining a divorce within 36 months in Philadelphia County, filing within 18 months in any of seven counties, and obtaining a divorce within 36 months in any of seven counties. The inner vertical spikes are the mean and the median. The outer vertical spikes represent the .025 and .975 quantiles. Effect sizes are large for all four quantities.

Figure 4 shows that the estimated effects are large. From the point of view of those who care about the accessibility of the Philadelphia County and Pennsylvania divorce systems, large effects are bad. Large effects indicate that having representation determines whether would-

be litigants are able to transition from a state of married to a state unmarried (or even to initiate that process in court), in accordance with their desires and constitutional rights.

There is more. Recall that, for both Philadelphia County and the seven counties, we measured whether a participant had a divorce case on record within 18 months of randomization. This is a rigorously defined outcome in the statistical sense because it focuses strictly on what we can observe, avoiding assumptions about difficult-to-observe phenomenon. But no one outcome can tell the whole story, and this one suppresses the fact that not all “successful” participants had much to do with their success. To clarify, for this “filed-in-18” outcome variable, we looked for whether a study participant had a divorce case on record, regardless of whether the study participant initiated the case. If the opposing spouse filed the divorce suit, we counted this as a “success” for the participant, even though she had little to do with that success. Moreover, recall that some of our control group obtained attorneys. The following question arises: how many of our 237 control group participants succeeded in initiating a divorce case within 18 months on their own, meaning without attorneys of record to represent them and without having the opposing spouses sue for them? The answer is 15 of 237, or 6.3%, in all seven counties. The answer for Philadelphia County is 1 of 237, or less .4%.

Our proposed measuring stick for accessibility does not specify how much of a difference in lawyer-versus-non-lawyer figures is too big of a difference. Specifying how much is “too much” requires a balancing of the complexity inherent in substantive law, geographic and demographic characteristics of an adjudicatory system’s potential users, the goals of the potential user population, and many other considerations. That said, the figures reported above are too large under any reasonable understanding of our measuring stick. This much is too much.

#### D. Additional Findings

We provide some additional results from our field operation.

All of the results discussed in this article thus far come from the 311 study participants who reported at intake that they wanted a divorce and that their opposing spouses had not sued them. We focused on this group of participants because they were sufficiently numerous to allow plausible causal inference on outcomes of interest.

We separately randomized a second group of study participants, those who reported at intake that they wanted a divorce and that their opposing spouses had sued them. There were sixty such cases, too few for rigorous causal inference. We report two non-causal results.

First, of the sixty participants desiring divorces who reported at intake that their opposing spouses had sued them at the time of intake, our search of the case files found case files filed prior to intake for only 28, or just under half. Thus, more than half of study participants in this set were mistaken in their belief that they had been sued. The two most likely explanations for

this unexpected finding are (i) knowing strategic behavior (*i.e.*, lying) by participants hoping that a report of a pending case would make attorney representation more likely to be forthcoming and (ii) confusion about whether a court case has been filed. We have no information about which is more likely. We speculate, however, that not all of the 32 participants who reported inaccurate information were lying. If our speculation is correct, then the Bench and the Bar should take note that non-lawyers find confusing issues that those with legal training would find screamingly obvious, such as whether one has been sued already. Even simple matters of law are complex.

Second, in this 60-participant dataset, orders or agreements affecting property were still the exception, not the norm. Of these 60 participants, 52 ended up with cases before the court within 18 months of randomization, but only 9 ended up with property agreements or orders, and there were no orders or agreements on child custody or support in the divorce case. Assume for the moment the unlikely proposition that all eight of the 60 cases in which there was no case filing involved unusually complex fact patterns, such that all eight, had they resulted in cases, would have resulted in property agreements or orders. Then in even this more-litigious set of cases, 43 of 60, or 72% of matters, were simple terminations of marriages. Any suggestion of substantive complexity in these cases would appear misplaced.

### **Part III. Why Can't Pro Se Litigants Get to the Courthouse, or Succeed Once There?**

Why can't pro se litigants get to the courthouse, or succeed once there? For reasons that will become apparent, we address these two questions in reverse order. A warning: the second question is something of a trick; the large majority of our study participants who got to the courthouse within 18 months succeeded in getting a divorce within 36 months.

#### **A. Succeeding Once There**

Research from psychology has long shown that seemingly minor roadblocks can have large effects on how successful people are in pursuing their goals. In 1951, psychologist Kurt Lewin proposed the term "channel factor" to describe how small changes in the environment can ease people toward some goals and away from others.<sup>146</sup> In the current era, a discussion of this phenomenon would include the term "nudge" with the standard citation.<sup>147</sup>

Logistical channel factors take a variety of shapes. One is knowledge of where to go, coupled with a measure of physical distance. Over five decades ago, public health researchers found that educating the public about the importance of getting a tetanus shot succeeded in changing people's beliefs and attitudes about vaccination, yet only 3% of respondents actually took the step of getting vaccinated. That number rose to 28%, however, when participants

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<sup>146</sup> KURT LEWIN, FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS (1951).

<sup>147</sup> Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2009).

were given a map showing how to get to the health care center.<sup>148</sup> Later research has confirmed that attitudes toward inoculation “rarely predict who will show up at the clinic, whereas the mere distance of people from the clinic is a strong predictor.”<sup>149</sup> Another study suggested that increasing distance to a benefit application center reduced the number of people who applied, even though the value of the benefit objectively outweighed costs associated with the increased distance.<sup>150</sup>

Another kind of logistical channel factor is waiting times. One study showed that closing a local Social Security branch led to fewer disability benefit applications and distributions from that area. The authors pointed to a variety of factors to explain this result, including increased travel time and information gathering costs. But the authors’ primary culprit was increased congestion and wait times at remaining offices.<sup>151</sup>

If waiting times are problematic, mandatory waiting periods are particularly so. Mandatory waiting times typically involve a double-whammy of delay plus an interruption from goal identification to task completion. Accordingly, studies have shown that the frustration of delays makes waiting harder.<sup>152</sup> Seconds-long interruptions cause original goal memories to decay,<sup>153</sup> and the longer the interruption period, the more the goal is forgotten over time.<sup>154</sup> With longer waiting periods, resumption of goals also implicates other extrinsic costs, as the literature on waiting periods in abortion suggests. Most mandated waiting periods require women to appear for multiple appointments before receiving an abortion. After Tennessee passed a mandatory waiting period law, women who obtained abortions reported increased costs associated with transportation, child care, and lost wages.<sup>155</sup> Similar laws passed in Mississippi were associated with a 22% drop from expected abortions for the year after passage.<sup>156</sup>

A third type of channel factor is decision complexity. Researchers find that too many options “may prove confusing and menacing” to decision-makers who have little experience

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<sup>148</sup> Howard Leventhal, Robert Singer, & Susan Jones, *Effects of Fear and Specificity of Recommendation Upon Attitudes and Behaviour*, 2 J. PERSONALITY & SOC. PSYCHOL. 20 (1965).

<sup>149</sup> Marianne Bertrand, Sendhil Mullainathan, & Eldar Shafir, *Behavioral Economics and Marketing in Aid of Decision Making Among the Poor*, 25 AM. MARKETING ASSN 8, 10 (2006).

<sup>150</sup> Vivi Alatas, et al., *Self-Targeting: Evidence from a Field Experiment in Indonesia*, 124 J. POL. ECON. 373–74 (2016).

<sup>151</sup> Manasi Deshpande & Yue Li, *Who is Screened Out? Application Costs and the Targeting of Disability Programs* 3-4 (March 2017) (unpublished manuscript) (on file with author). These costs create a larger burden for those with lower incomes and education levels, and more severe disabilities – often, those who are most likely to qualify for the benefit. Id, at 29.

<sup>152</sup> Walter Mischel & Ebbe B. Ebbesen, *Attention in Delay of Gratification*, 16 J. PERSONALITY & SOC. PSYCHOL. 329 (1970).

<sup>153</sup> Erik M. Altmann & J. Gregory Trafton, *Memory for Goals: an Activation-based Model*, COG. SCI. 39 (2002).

<sup>154</sup> Christopher A. Monk, J. Gregory Trafton, & Deborah A. Boehm-Davis, *The Effect of Interruption Duration and Demand on Resuming Suspended Goals*, 14 J. EXPERIMENTAL PSYCHOL. 299, 309 (2008).

<sup>155</sup> Michael Lupfer & Bohne Goldfarb Silber, *How Patients View Mandatory Waiting Periods for Abortion*, 13 FAM. PLAN. PERSP. 75, 77 (1981).

<sup>156</sup> THEODORE J. JOYCE, ET AL., GUTTMACHER INST., *THE IMPACT OF STATE MANDATORY COUNSELING AND WAITING PERIOD LAWS ON ABORTION: A LITERATURE REVIEW*, 7 (2009).

navigating the choices in front of them.<sup>157</sup> Employee participation in retirement savings plans increases as the number of investment options offered by the employer decreases.<sup>158</sup> Conversely, automatically enrolling employees in retirement savings programs with an opt-out option causes a stunning increase in participation and savings.<sup>159</sup> In day-to-day work decisions, the story is the same: increased hassle is correlated with increased levels of burnout.<sup>160</sup>

Professionals and subject matter experts might underappreciate the impact of seemingly minor hassles when evaluating the accessibility of a legal process.<sup>161</sup> Roadblocks that seem de minimis to a lawyer can have behavioral effects. We hypothesize that when court procedures are complex and/or ambiguous, when they require extensive documentation and record-keeping, when they require multiple visits to the courthouse and to the post office and to the public library photocopy machine (none of which stays open much beyond the workday) and to some place with a typewriter—these are all channel factors that can hinder people from advancing through the process, whatever their attitudes, motivation, or goals.<sup>162</sup>

It is not difficult to apply the research summarized above to the system in pro se litigant in Philadelphia County faced. There are multiple waiting periods, even if the parties have been separated for more than two years and both desire to end their marriage. There are no mandatory court forms, “mandatory” in the sense of forms that the Supreme Court of Pennsylvania has mandated that lower courts accept, forms designed with an eye toward pro se accessibility. The self-help center in the Philadelphia County courthouse does not provide assistance in divorce cases. The Philadelphia County divorce system uses jargon that would have made William Blackstone shudder. A filing that could be called a “Notice that this Divorce Case Is Ready for a Final Order” is called a “Notice of Intention to File a Praecipe to Transmit the Record to the Prothonotary.” Divorce litigants who are not hyper-informed must find a typewriter to fill out, flawlessly, a form available only from the Court itself.

Pro se self-help materials can go a long way toward remediating complex procedures. One of us has co-authored an article on the state of the art with respect to pro se materials.<sup>163</sup> By the principles described in this prior research, not all is well in Philadelphia. The Women’s Law Project’s divorce self-help manual is thorough and uses helpful simplified language in its step-by-step instructions for completing and filing the various forms necessary to complete a divorce in Philadelphia. But best practices for self-help materials involve more than detailed

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<sup>157</sup> Bertrand, et al., *supra*, note 149, at 12 (citing Bernice E. Van Dort & Rudolph H. Moos, *Distance and the Utilization of a Student Health Center*, 24 J. AM. COLLEGE HEALTH ASSN 159 (1976)).

<sup>158</sup> *Id.* (citing Sheena S. Iyengar, Wei Jiang, & Gur Huberman, *How Much Choice Is Too Much: Determinants of Individual Contributions in 401K Retirement Plans*, in PENSION DESIGN AND STRUCTURE: NEW LESSONS FROM BEHAVIORAL FINANCE 83 (Olivia Mitchell & Stephen Utkus eds., 2004)).

<sup>159</sup> John Beshears, James J. Choi, David Laibson, & Brigitte C. Madrian, *The Importance of Default Options for Retirement Saving Outcomes: Evidence from the United States*, in LESSONS FROM PENSION REFORM IN THE AMERICAS 59 (Stephen J. Kay & Tapen Sinha eds., 2008).

<sup>160</sup> Dov Zohar, *Predicting Burnout with a Hassle-based Measure of Role Demands*, 18 J. ORG. BEHAV. 101 (1997).

<sup>161</sup> Bertrand, et al., *supra*, note 149, at 19.

<sup>162</sup> *Id.*

<sup>163</sup> D. James Greiner, Dalié Jiménez, and Louis R. Lupica, *Self-Help, Reimagined*, 92 Ind. L. J. 1119 (2017).

and simplified instructions. First, the instructions themselves could be organized such that they are easier for the reader to digest. Diagrams, flow charts, or even choose-your-own adventure gamification might be helpful. More emphasis and detail on the instructions for physically filing the forms would also add clarity, as laypeople may be unfamiliar with how courts and filings work. This is true with respect to the rules applicable to a pro se would-be filer in Philadelphia, where (as detailed previously) people were required to jump through several unintuitive hoops, such that filing required forms might have been trickier than filling them out.

Additionally, alterations in the overall organization of the Women's Law Project materials might also help the layperson follow the many steps required for a successful divorce. The layperson might benefit from an introductory overview or "road map", outlining both the process and the various sections of the materials that follow. Given that the materials cover two different types of divorces, a check-list that clarified which forms cover which situation might be simpler for the layperson to follow. Finally, it might be helpful to add materials that address the reader's psychological state. As described in the prior research cited above, self-affirmation exercises, role-playing, and visualization can all help overcome emotional and cognitive barriers to participating in the legal system. These improvements in organization and information presentation would increase the efficacy of the Women's Law Project's materials.

What else can an examination of the divorce process from the point of view of a would-be pro se litigant in Philadelphia tell us? To begin, the reading level and vocabulary used in many court forms and processes were too abstruse for ordinary citizens to understand. For instance, and as noted above, the form one files to notify a judge that the parties are ready to have their divorce paperwork reviewed is called the "Praecipe to Transmit Record for Entry of Divorce Decree." Even someone with legal training could be forgiven for failing to realize that this "Praecipe" is the correct form for this purpose

In addition, some of the forms required as part of its divorce proceedings seem to serve little purpose. These unnecessary steps operated as hassle factors channeling plaintiffs away from their goal of obtaining a divorce. In Philadelphia, individuals who wanted a divorce decree were instructed that they were required to travel to the court to get a copy of the decree impressed with the court's seal. They could not print a form on their own. They were instructed that they had to locate a typewriter—not a computer—so that they could type their names onto the court-supplied form. If they made a mistake, which is not unusual for many people using a typewriter for the first time, they were instructed that they had to go back to the court to get a new form. In other counties, a divorce decree was sent to the parties if they checked a box on their Praecipe to Transmit Record for Entry of Divorce Decree record requesting that it be provided for them. In these counties, people did not need to go to the courthouse to get the form, find a typewriter, and go back to the courthouse to file it.

Regarding waiting periods, defendant spouses were given a remarkable number of second (and third and fourth) chances to contest the divorce. Take the waiting periods in a consent divorce. In these cases—where both parties wanted to end the marriage—the



opposing spouse would have already signed the Affidavit of Consent, showing that she had been notified and agreed to the plaintiff's request for a divorce. After both parties had signed, there was a statutorily mandated 90-day waiting period intended to give the parties a chance to cool off and consider whether they truly want to divorce. In addition, the opposing spouses had ten days after the Praeceptum is filed to object to the divorce. Following the divorce decree, she had an additional 30 days to appeal.

## B. Getting to the Courthouse

The previous section applied behavioral theory to the process that a would-be divorce filer faces when contemplating the initiation of the court case the law requires to terminate her marriage, concluding that features like waiting periods, inaccessible forms, and complex self-help materials could explain why divorce plaintiffs fail to complete the process. As an explanation of the results we observed in our study there is a problem with such reasoning: however counted, roughly 80% of divorce plaintiffs (meaning those who succeeded in filing) in our study did complete the process of obtaining divorces. True, almost all did so with the help of a lawyer. Nevertheless, a story focusing exclusively on barriers to completion of already-filed cases must still explain a primary result in our data, which is that so many low-income individuals who had the motivation and organization skills to initiate and complete Philadelphia VIP's non-trivial intake process failed to file divorce cases.

We lacked the resources to attempt to contact study participants 18+ months after randomization to ask them why they did not file. We are skeptical that, had we attempted to do so, we would have reached many of them or obtained useful information from any of them. It is hard for anyone to know why she does not do something. We therefore offer our speculation as follows. For the low-income individuals with high demands on their mental bandwidth, a process that is complex at a single glance, a process that forces one to focus on something that many find shameful and depressing (a failed marriage), is simply too overwhelming to initiate without more help than currently exists in Philadelphia. In other writings, one of us has discussed the feelings of shame and guilt associated with debt collection lawsuits<sup>164</sup> as well as the mental demands on low-income individuals.<sup>165</sup> We speculate that the magnitude of the debilitating emotions of fear, anger, regret, embarrassment, and shame experienced by debt collection defendants is less than that experienced by would-be divorce plaintiffs. The formal legal system should be kinder in such a setting.

## C. Implausible Explanations for Our Findings

We pause here to discuss briefly alternative possible explanations for our findings, none of which we find persuasive.

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<sup>164</sup> Greiner & Matthews, *supra* note 19.

<sup>165</sup> D. James Greiner, Dalíe Jiménez, and Louis R. Lupica, *Self-Help, Reimagined*, 92 *Ind. L. J.* 1119 (2017).

After we completed our data analysis, we received information suggesting that some number of participants had already divorced from their “spouses” prior to enrollment in our study. This assertion, if true,<sup>166</sup> would explain one aspect of our results but not our principal findings. Specifically, individuals who had already divorced from their opposing “spouses” could not obtain a second divorce (having no need of one), and that fact might explain why some participants in our both Philadelphia-VIP and our no-Philadelphia-VIP groups never filed for divorce. But this fact would not explain the differences we observed between the Philadelphia-VIP and no-Philadelphia-VIP groups. The purpose of our randomization was to distribute participants characterized by ineligibility for divorce (or by any other trait or characteristic) more or less evenly across our two treatment arms. Thus, while the existence of already-divorced participants is interesting, primarily because of what it says about the level of confusion non-lawyers may have about simple legal facts, it does not affect our conclusions.

We view similarly the possibility that some of our participants may have sought support (child, spousal, or alimony) or PFA or child custody orders. As noted above,<sup>167</sup> it was theoretically possible for the filing and disposition of a divorce to be delayed or abandoned if a participant had previously achieved a satisfactory resolution of custody, support, or PFA litigation. While this fact might explain why some participants did not file for divorce, it is an unlikely cause for the difference between the results in our two treatment arms. Recall that our randomization distributed participants who would likely seek something other than a simple divorce more or less evenly across our two treatment arms, so it is unlikely that a far greater fraction of our no-Philadelphia-VIP group than our Philadelphia-VIP group entered the study with a desire to seek non-divorce relief. With this fact understood, it is hard to think of how or why our no-Philadelphia-VIP group, which lacked ready access to a lawyer to help, could or would disproportionately seek non-divorce relief, succeed in obtaining it, and then decide strategically not to pursue a divorce. Our guess is that if either group of participants was to behave this way, it would have been the Philadelphia-VIP group, most of whom had access to a lawyer to advise them on how to proceed. And the hypothesis that success in non-divorce litigation disproportionately deterred those in the no-Philadelphia-VIP group from seeking divorces is inconsistent with our finding that so many of this group’s participants sought divorces in Cameron and Potter Counties, where they could obtain only a divorce and nothing else.<sup>168</sup> Meanwhile, over 80% of participants in our study who filed within 18 months succeeded in obtaining a divorce within 36 months, a percentage roughly the same across our two treatment arms. So non-divorce litigation is unlikely to explain our finds vis-à-vis filings or decrees.

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<sup>166</sup> At a meeting on August 23, 2018, the Philadelphia Family Court informed us that its own review had uncovered some such cases. As of the time of this writing, we are hoping to obtain specific numbers from the Court.

<sup>167</sup> See *supra* notes 98-102 and accompanying text.

<sup>168</sup> Email from Nothstein to Greiner, *supra* note 77. More specifically, any of non-divorce lawsuit in Cameron or Potter would trigger a requirement that a plaintiff attend at least one live hearing, meaning a 10-hour-round-trip for a Philadelphia County resident. *Id.*

## Part IV: Broader Implications: Government Regulation of Divorce, Divorce Mills, and the Unconstitutionality of the Current System

We close this article with three short sections on broader implications, the first responding to a comment we received on several occasions regarding government regulation of divorce, the second discussing so-called “divorce mill” counties, the third arguing that our findings suggest a problem of constitutional dimension.

### A. Responding to a Comment on Government Regulation of Divorce

When we presented our findings to academic audiences, several economists, on multiple occasions and independently from one another, questioned whether we had proven a need for alteration of the status quo. They articulated some version of the same argument, which ran as follows: No one disputes that the state has an interest in regulating the circumstances under which a married couple can divorce. Theoretically, there must be a level of divorce that maximizes, or at least furthers, social welfare. Your findings suggest merely that divorce is not as accessible as it could be, but for all you know, that lower level of accessibility may correspond to the socially optimal, or a socially desirable, level of divorce. In short, you do not know that anything is amiss, so why fix anything?

The structure of this argument is puzzling. Under this reasoning, a visitor to a house hoping to ascertain the correct time should not ask the host to reset a stopped clock. The stopped clock might have the right time, so why fix anything?

The argument also ignores the roles of the policy making versus judicial branches in the Pennsylvania system of government. In Pennsylvania, as in most localities in the United States, policy making branches create substantive law governing socioeconomic interactions. The judicial branch effectuates those policies. With respect to divorce, no one, including us, disputes that the government may specify the circumstances under which a married couple may obtain a divorce, just as the government specifies the circumstances under which two individuals may become a married couple. Pennsylvania’s policy making branches have specified the circumstances under which a married couple may obtain a divorce through its eligibility laws, discussed in section I.A, above. It has also required a post-divorce-filing waiting period under certain circumstances, as discussed in section I.B, above. Under our system of government, the judiciary’s function is to provide divorces to those who meet those eligibility criteria and undergo the requisite waiting period, if applicable. No one disputes that the judiciary can set procedures and rules designed to effectuate this function. But as discussed above, the complexity in the procedures in place in Philadelphia, and the lack of guidance available to negotiate those procedures, is difficult to tie to a non-trivial justification vis-à-vis the will of the policy making branches. Put another way, if the economists who make the why-fix-anything argument above are correct about the existence of a socially optimal or desirable level of divorce, and if that level is something well-defined and knowable, then the policy making branches of government should investigate, accumulate information relevant to the issue, and legislate. The judicial branch seems a poor candidate for policy making of this kind.

The suggestion that Philadelphia has stumbled on a social optimal or desirable level of divorce, despite our evidence demonstrating the number of individuals who are eligible for the simplest kind of divorce under Pennsylvania law but who remained trapped in marriage, is harder to credit when one recalls that the barriers we identify impede only the poor. A minimally competent and minimally resourced individual familiar with Philadelphia procedures, one with or without legal training, would have access to documents used successfully in prior divorce cases to use as models in a new one; would keep track of multiple waiting periods; would be familiar with jargon (such as the “Praeceptum to Transmit the Record to the Prothonotary”); and would have access to a typewriter. Divorce-seekers with means can and do hire such individuals. For this situation to be justifiable on social policy grounds, one would need to construct an argument that it is socially beneficial to trap in marriage poor individuals who desire divorce and who are eligible for divorce under Pennsylvania law, but not to trap in the rich.

One can construct conceptual arguments to support almost any proposition, including this one, but the relevant question is whether there is any evidence to support the idea of using hurdles in the court system to trap legally eligible poor individuals in marriage, or of denying the poor access to divorce, or of denying married individuals more generally access to divorce. The issue is complex. Marriage eligibility criteria necessarily reflect a consideration of incentives to marry; incentives on how spouses behave before, during, or after marriage; financial relationships among married and unmarried couples; child care; resources available to support couples and potential couples financially and emotionally before, during, and after marriage; and a variety of other value judgments and policy considerations. The literature on these concerns is complex. A cursory review of the empirical literature on marriage versus divorce, a small subset of the research relevant to these concerns, suggests some limited empirical evidence indicating that divorced individuals and their children generally experience lower levels of happiness and socioeconomic success than do married individuals,<sup>169</sup> but that individuals and their children who remain in low quality marriages generally experience lower levels of happiness and socioeconomic success than do individuals who divorce from low-quality marriages.<sup>170</sup> Given likely and powerful selection effects, problems of measurement, a

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<sup>169</sup> See, e.g., Paul Amato, *The Consequences of Divorce for Adults and Children: An Update*, 23 *DRUSTVENA ISTRAZIVANJA* 5–24 (2014); Stephen J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 *JOURNAL OF LAW & FAMILY STUDIES* 5–363 (2002); Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 *JOURNAL OF MARRIAGE AND FAMILY* 1269–1287 (2000).

<sup>170</sup> See, e.g., Paul R. Amato & Bryndl Hohmann-Marriott, *A Comparison of High- and Low-Distress Marriages that End in Divorce*, 69 *JOURNAL OF MARRIAGE AND FAMILY* 621–638 (2007); Daniel N. Hawkins & Alan Booth, *Unhappily Ever After: Effects of Long-Term, Low-Quality Marriages on Well-Being*, 84 *SOCIAL FORCES* 451–471 (2005); Paul R. Amato & Juliana M. Sobolewski, *The effects of divorce and marital discord on adult children’s psychological well-being*.(Abstract), 66 *AMERICAN SOCIOLOGICAL REVIEW* 900 (2001); Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children’s Long-Term Well-Being*, 9 *71–587* (2001); Thomas L. Hanson, *Does Parental Conflict Explain Why Divorce Is Negatively Associated with Child Welfare?*, 77 *SOCIAL FORCES* 1283–1316 (1999); Susan M. Jekielek, *Parental Conflict, Marital Disruption and Children’s Emotional Well-Being*, 76 *SOCIAL FORCES* 905–936 (1998); David Mechanic & Stephen Hansell, *Divorce, Family Conflict, and*

difficulty in this literature of defining counterfactuals, and a focus on marriage and divorce as opposed to using law to regulate access to marriage and divorce, this literature does not begin to support the economists' argument articulated above. To us, at least, it is not clear what argument it supports. It may be that law is a blunt instrument in this area, one with limited effectiveness in terms of maximizing social welfare.<sup>171</sup>

We return to our central themes: our data demonstrate an access to justice problem of unusual magnitude. We cannot identify the causes of this access to justice problem with certainty, but the mechanisms that characterize the administration of divorce seem in Philadelphia seem a likely culprit. Some of those mechanisms stem from state statutes, some from statewide rules of procedure, others were (at least until the elimination of local rules of procedure) due to the Philadelphia Court system. In sum, though, we can find no evidence to justify the current system; speculating that such a justification might exist seems unhelpful. And if such a justification does exist, policy making branches of government, not the judiciary, seem better suited to perform the required balancing of value judgment and empirical guesswork.

#### B. Divorce Mills

Some members of the Philadelphia legal community, who we presume would prefer not to have these comments attributed to them, expressed discomfort with the roll that Cameron and Potter Counties apparently play in the Pennsylvania divorce system. Concerns expressed included that these counties were making money from divorce filing fees by processing divorces without enforcing the rules of civil procedure, that defendant-spouses might not receive adequate notice of divorces filed in Cameron and Potter, or that defendant-spouses might not understand that they could lose economic claims by allowing a divorce proceeding to proceed.

For some of these criticisms, we are uncertain as to why they would apply only to divorces filed in Cameron or Potter. But that seems beside the larger point. The issues raised by divorce mill counties, if indeed Cameron and Potter were such, are similar to those raised by settlement mill law firms, a subject the literature has explored thoroughly.<sup>172</sup> The primary question raised by mill-like behavior from legal institutions is, "as compared to what"? If one compares the systems in Cameron and Potter Counties to the real-world situation as described in our study, then one might argue that the two counties provide a valuable resource in the form of an accessible divorce system for low-income individuals who cannot find attorneys to help them effectuate their constitutional rights in counties of residence. If one compares the systems in Cameron and Potter to a hypothetical system in which every low-income would-be divorce litigant has a willing and able lawyer, then the Cameron and Potter systems looks suspect. We

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Adolescents' Well-Being, 30 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 105 (1989); F. Ivan Nye, Child Adjustment in Broken and in Unhappy Unbroken Homes, 19 MARRIAGE AND FAMILY LIVING 356–361 (1957).

<sup>171</sup> See, e.g., Robert Gordon, The limits of limits on divorce, 107 YALE LAW JOURNAL 1435–1465 (1998).

<sup>172</sup> See, e.g., Nora Freeman Engstrom, Sunlight and Settlement Mills, 86 N.Y.U.L. Rev. 805 (2011); Nora Freeman Engstrom, Run-of-the-Mill Justice, 22 Geo. J. Leg. Eth. 1485 (2009).

have our own view as to which comparison is more instructive; readers may make up their own minds.

### C. The Unconstitutionality of the Divorce System

As discussed in the Introduction to this article, divorce implicates “interests of basic importance to society”<sup>173</sup>—“constitutionally protected associational interests.”<sup>174</sup> Moreover, “[i]t is legally impossible to secure a divorce except through a judicial proceeding.”<sup>175</sup> Boddie emphasized these points, and reached the following conclusion: “Due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.”<sup>176</sup> The Boddie holding stands in contrast to the Court’s later decisions in *Kras* and *Ortwein*, which found that due process was not violated when indigent plaintiffs were required to pay a fee to file for litigation in the contexts of bankruptcy (*Kras*) or welfare benefits (*Ortwein*). We are not certain we agree with the Court’s reasoning. Taking it at face value, however, neither bankruptcy nor welfare benefits involve constitutional rights. Theoretically, indigent individuals can resolve debts and obtain subsistence without access to the courts. Divorce is different.

In *Turner v. Rogers*,<sup>177</sup> the Supreme Court held that at least with respect to adjudicatory proceedings involving important rights or interests, the state may choose either to appoint counsel for those who cannot afford it or to adopt “procedural safeguards” that notify pro se litigants as to the nature of the issues presented in a case and that allow such litigants to present facts crucial to a coherent adjudication. The procedural safeguard the Turner court contemplated, a form eliciting the defendant’s financial circumstances, is impossible to understand except as a means of simplifying the proceeding to something a non-lawyer might have a hope of comprehending. As others have noted,<sup>178</sup> the Turner court’s invocation of the due process clause to justify this result constitutes a reworking of due process jurisprudence, little of which the Turner majority opinion cites. The line of cases beginning with *Sniadach v. Family Finance Corp.*<sup>179</sup> and *Goldberg v. Kelly*<sup>180</sup> has largely concerned the presence, absence, approximation, or trappings of a pre-deprivation full-dress live trial-type hearing. But in *Turner*, a pre-deprivation full-dress live trial-type hearing is exactly what the South Carolina trial court provided to Mr. Turner. The Court’s finding of unconstitutionality, then, had to concern some other procedural defect, and its invocation of the power of a form demonstrated that what it

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<sup>173</sup> *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971).

<sup>174</sup> 401 U.S. at 374.

<sup>175</sup> Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect Ones Rights* 1153, 1159 (1973).

<sup>176</sup> 401 U.S. at 374.

<sup>177</sup> 564 U.S. 431 (2011).

<sup>178</sup> The arguments discussed above appears in various forms in an online symposium on *Turner* in the *Concurring Opinions* website, see <https://concurringopinions.com/archives/category/symposium-turner-v-rogers>.

<sup>179</sup> 395 U.S. 337 (1969).

<sup>180</sup> 397 U.S. 254 (1970).

had in mind was procedural simplification. If one takes Turner seriously, then at least for important constitutional rights, court systems face a choice: simplification or civil Gideon.

Boddie, Kras, and Ortwein established not just that the right to a divorce is an important one but also that it is different from other rights. Adjudicatory systems permissibly inaccessible in other areas (such as those featuring non-waivable filing fees) are unacceptable in divorce. It is hard to distinguish a requirement (imposed by formal law) that a would-be litigant pay a non-waivable filing fee to obtain a divorce from a requirement (imposed by formal law and by the structure of an adjudicatory system) that a litigant hire a lawyer to obtain a divorce.<sup>181</sup> Our study, viewed through the lens of the choice Turner offers to state and judiciaries, suggests problems of constitutional dimension.<sup>182</sup> Something must give, in Philadelphia and elsewhere around the nation.

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<sup>181</sup> We say “hire” here because, as the figures we report above make clear, by the end of our study the Philadelphia VIP had sufficient lawyer resources to represent about 15% of service-seekers. For the other 85%, the choices were, essentially, hire a lawyer or remain married.

<sup>182</sup> To be clear: We have little doubt that the Supreme Court, if faced with a case involving a litigant request to hold that the divorce procedures applicable in Philadelphia Family Court were unconstitutionally complex, would find a way mangle Turner so as to avoid the implications of the Turner opinion and uphold those procedures. Turner itself mangled beyond recognition the Court’s opinion in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). But just because the Supreme Court mangles its own cases does not mean that we should do so.