

## EVIDENCE-BASED ACCESS TO JUSTICE

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### I. The Need for Information Regarding When to Use Which Access to Justice Tools

The call for evidence-based practice permeates the fields of medicine, social services, education and criminal justice.<sup>1</sup> The 2010 federal healthcare reform legislation, for example, funds research regarding the effectiveness of medical treatments, as did the 2009 federal stimulus bill.<sup>2</sup> The No Child Left Behind Act and Individuals With Disabilities Education Act (“IDEA”) each encourage the use of scientifically validated education methods.<sup>3</sup> The Education Sciences Act of 2002 even created a unit within the Department of Education charged with using scientifically valid methods to investigate “the effectiveness of Federal and other education programs.”<sup>4</sup> The National Institute of Justice promotes the use of criminal justice methods that have been proven effective.<sup>5</sup>

As this article discusses, a comparable evidence-based approach is notably absent from the many efforts to expand access to the justice system for people facing such civil legal problems as foreclosure, eviction, child custody disputes, domestic violence, or consumer fraud claims. During the past decade, state courts and civil legal aid programs around the nation have begun using a variety of tools to expand access, including simplified court procedures, advice-only

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<sup>1</sup> See Jeanne Charn & Jeff Selbin, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, MGMT. INFO. EXCH. J., Winter 2007, at 31, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1126444](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1126444) (“Sister professions — including medicine and social work — are in the midst of evidence-based movements which can inform our thinking and action.”).

<sup>2</sup> See H. COMMS. ON WAYS AND MEANS, ENERGY AND COMMERCE, AND EDUC. AND LABOR, 111TH CONG., HEALTH INSURANCE REFORM AT A GLANCE: INNOVATIVE DELIVERY SYSTEM REFORM (2010), available at [http://docs.house.gov/energycommerce/DELIVERY\\_REFORM.pdf](http://docs.house.gov/energycommerce/DELIVERY_REFORM.pdf); Robert Pear, *U.S. to Study Effectiveness of Treatments*, N.Y. TIMES, Feb. 16, 2009, at A1. See also Alvin I. Mushlin & Hassan Ghomrawi, *Health Care Reform and the Need for Comparative-Effectiveness Research*, 362 NEW ENG. J. MED. E6 (2010) (arguing for cost-effectiveness research in order to ensure the goals of health care reform are met).

<sup>3</sup> See, e.g., 20 U.S.C. § 1416(e)(1)(A)(ii) (2000) (authorizing the Secretary of Education to provide assistance to states in “identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically based research” under the IDEA); 20 U.S.C. § 6301(9) (2000) (including among the purposes of the No Child Left Behind Act, “ensuring the access of children to effective, scientifically based instructional strategies”).

<sup>4</sup> Education Sciences Reform Act of 2002, Pub. L. No. 107-279, §§ 111(b), 112 (2002).

<sup>5</sup> See NAT’L INST. OF JUST., NIJ TESTS AND EVALUATES PROGRAMS, PRACTICES AND EQUIPMENT (2010), available at <http://www.ojp.usdoj.gov/nij/about/testing-evaluation.htm>; U.S. GEN. ACCOUNTING OFFICE, JUSTICE OUTCOME EVALUATIONS: DESIGN IMPLEMENTATION OF STUDIES REQUIRE MORE NIJ ATTENTION 1 (2003) (stating that “it is important to know which programs are effective in controlling and preventing crime so that limited federal, state, and local funds not be wasted on programs that are ineffective.”).

hotlines, pro se clerks' offices and help desks, form pleadings, self-help manuals and computer terminals (including guided, online interviews resulting in filled-out court forms), nonlawyer assistance, unbundled legal services (in which the attorneys perform some lawyering tasks but not others), and full legal representation.<sup>6</sup> In the absence of a standard name for these tools, I will call them "access to justice interventions" or "access to justice tools."

The overwhelming unmet need for civil legal aid and the courts' desire to improve the ways they handle pro se cases have spurred the development of these access to justice tools.<sup>7</sup> Views about when courts and legal aid programs should use these tools vary widely. Some observers argue that at least some of the tools will always be necessary to try to level the playing field not only between unrepresented and represented parties, but also between parties who can afford high-quality representation and those whose financial limitations force them to pay for less competent representation.<sup>8</sup> Some view the tools as emergency measures necessitated by the shortage of civil legal representation for the poor.<sup>9</sup> Others assert that, at least in some cases, full representation is not necessary, and other access to justice tools may suffice.<sup>10</sup> What litigants need, they argue, is a graduated approach, in which they receive only the level of assistance necessary to litigate their cases successfully.<sup>11</sup> Under this scenario, litigants with more complicated cases or with fewer abilities would receive more assistance. Litigants with less complicated cases or greater abilities would receive less assistance. In some scenarios, the level of assistance would depend, too, on the importance of the matter at stake in the litigation.<sup>12</sup> Yet others warn that using access to justice tools, in lieu of full representation, may amount to no more than "a fig leaf over the shame of a fundamentally unfair judicial process."<sup>13</sup>

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<sup>6</sup> Russell Engler, *Toward a Context-Based Civil Right to Counsel Through Access-to-Justice Initiatives*, 40 CLEARINGHOUSE REV., July-Aug. 2006, at 196, 200. See generally DEBORAH L. RHODE, ACCESS TO JUSTICE 100 (2004).

<sup>7</sup> Margaret Lucas Agius, *Michigan Supreme Court Announces Solutions on Self-Help Task Force*, DETROIT LEGAL NEWS EXAM'R, Apr. 14, 2010, available at <http://www.examiner.com/x-14309-Detroit-Legal-News-Examiner~y2010m4d14-Michigan-Supreme-Court-announces-Solutions-on-SelfHelp-Task-Force>.

<sup>8</sup> Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 78 FORDHAM L. REV. 969, 972 (2004).

<sup>9</sup> Reeve Hamilton, *Many Texans 'Going It Alone' In the Courtroom* (CBS11 (TX) Apr. 14, 2010), available at <http://cbs11tv.com/local/legal.representation.lawyers.2.1631994.html> (discussing views of lawyer Stewart Gagnon).

<sup>10</sup> Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 CLEARINGHOUSE REV., Mar.-Apr. 1997, at 1178, 1179.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Russell Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 ROGER WILLIAMS U. L. REV. 472 (2010); MODEL STATE EQUAL JUST. ACT § 301.4.4 (Calif. Access to Justice Comm'n), available at [http://www.brennancenter.org/page/-/download\\_file\\_38656.pdf](http://www.brennancenter.org/page/-/download_file_38656.pdf).

<sup>13</sup> Jonathan Smith, *Lawyers Should Not Only Be for the Rich*, MAKING JUSTICE REAL BLOG, (Mar. 31, 2010) <http://www.makingjusticereal.org/lawyers-should-not-only-be-for-the-rich>; See also Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 873 (2004) ("Believing that we are doing something effective can reduce our perceptions of injustice, whether or not our beliefs are factually justified.").

Regardless of their differing fundamental philosophies, leaders in the “self representation movement,” judges, and academics all agree that there is insufficient evidence about what type of intervention is appropriate when.<sup>14</sup> This lack of evidence is a problem not only for justice system planners, but also for the civil legal aid, pro bono, and judicial self-help programs which must constantly choose which type of access to justice intervention to offer to which litigants.<sup>15</sup>

One reason for this lack of evidence is that no generally accepted metric for evaluating access to justice tools exists. Courts and civil legal aid programs implement access to justice interventions for a wide variety of reasons, such as ensuring the fairness of the judicial process; moving judges’ dockets with the smallest drain on judicial budgets and judicial staff time;<sup>16</sup> and ensuring that litigants leave with a positive view of the judicial process.<sup>17</sup> These are all essential functions. However, in order to substitute adequately for full representation, an access to justice intervention must also ensure that litigants are able to obtain an accurate decision from the court, and this accuracy is only possible when the litigants are able to make necessary decisions and present relevant information and legal arguments.<sup>18</sup>

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<sup>14</sup> See, e.g., Connie J.A. Beck et al., *Collaboration Between Judges and Social Science Researchers in Family Law*, 47 FAM. CT. REV. 451, 454-58 (2009) (stating that “most interventions used in family law have not been subjected to” randomized, controlled trials); SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS AND RESOURCES 35 (2008), available at [http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/best\\_practices\\_7-08.pdf](http://www.abanet.org/legalservices/sclaid/atjresourcecenter/downloads/best_practices_7-08.pdf) (“In particular, we do not know what situations and what litigants require what levels of service to ensure access to justice.”); See generally, BONNIE HOUGH, EVALUATION OF INNOVATIONS DESIGNED TO INCREASE ACCESS TO JUSTICE FOR SELF-REPRESENTED LITIGANTS 9, available at <http://www.ajs.org/prose/Midwest%20Notebook%20Contents/Tab%207/Paper%209.pdf> (analyzing effectiveness of self-help services for self-represented litigants and suggesting direction of future research in the field); Jeanne Charn, *Legal Services for All: Is the Profession Ready?*, 42 LOY. L.A. L. REV. 1021, 1048 (2010) (discussing the need for “an examination of cost and quality trade-offs among different modes of service delivery”); Deborah Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1021 (2004) (“[W]e know far too little about the performance of programs for the delivery of legal aid and pro bono services: the satisfaction of clients, the quality of assistance, and the impact on parties and their communities.”); RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FOR THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 137 (2002), available at [http://www.lri.lsc.gov/pdf/03/030111\\_selfhelpct.pdf](http://www.lri.lsc.gov/pdf/03/030111_selfhelpct.pdf) (noting that while many self-help innovations have been developed, “it has been largely impossible to research and compare their effectiveness”); Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617, 2646 (1997) (“Despite thirty years of organized legal services for the poor, poverty lawyers have not adequately measured the effectiveness of our work.”).

<sup>15</sup> See discussion *infra* Part IV.

<sup>16</sup> JOHN M. GRAECEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 11-12 (2002).

<sup>17</sup> See Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1019-20 (2002) (describing the role that the judiciary’s desire to engender public trust plays in motivating the courts to adopt access to justice innovations).

<sup>18</sup> This is not the same as litigants believing that they have been provided with the tools they need. As the British legal aid expert Richard Moorhead reminds us, “[c]lient viewpoints, while important, tell us very little about the key issues for quality, such as correct advice and appropriate help.” Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765, 785 (2003). Nor do client viewpoints tell us whether litigants receiving help actually were able to

Many judicial and academic commentators have endorsed this goal. In 1979, for instance, the European Court of Human Rights issued a groundbreaking decision holding that Council of Europe member states must provide lawyers for civil litigants who cannot afford them unless the litigant's "appearance before the [court] without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily."<sup>19</sup> Likewise, the California Access to Justice Commission's Model State Equal Justice Act states that limited representation, as opposed to full representation, can be provided if it "is sufficient to provide fair and equal access to justice."<sup>20</sup> Justice Earl Johnson offers a similar formulation, writing that there should be a presumption against self-representation that "could only be overcome where a court can legitimately certify the particular forum deciding the dispute can and does provide a fair and equal opportunity for justice to those who lack representation."<sup>21</sup> And the ABA has written that in deciding whether an access to justice intervention other than full representation is adequate, "the test is whether it can be honestly said the litigant can obtain a fair hearing without being represented by a lawyer."<sup>22</sup>

If ensuring the fairness of a proceeding were the only criterion, we would probably choose to offer lawyers to all litigants, because many judges and scholars agree that representation by a competent lawyer is the best way to achieve that goal.<sup>23</sup> However, cost is also an important factor, given the severe, ongoing national shortage of funding for both civil legal aid and the courts.<sup>24</sup> For this reason, our goal must be an access to justice system that uses the least amount of legal aid and court resources necessary to enable judges to render fair and accurate decisions.<sup>25</sup>

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perform the tasks required of them or whether they prevailed in their cases as a result. See Hazel Genn, *Tribunals and Informal Justice*, 56 MOD. L. REV. 393, 410 (1993) (questioning "whether subjective perceptions of fairness on the part of applicants or litigants in informal hearings should be a sufficient goal, or whether fair procedures must be related to just outcomes"); Blasi, *supra* note 13, at 870 (discussing differences between "objective" and "subjective" justice).

<sup>19</sup> *Airey v. Ireland*, 2 Eur. Ct. H.R. 305, 315 (1979).

<sup>20</sup> MODEL STATE EQUAL JUSTICE ACT § 301.4.4, *supra* note 12.

<sup>21</sup> Earl Johnson, *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201, 220 (2003). See also James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. OF SOC. JUST. 383, 388 (2005) (proposing a "meaningful access" standard that assesses whether the litigant can make important choices and present appropriate facts and evidence to the judge); Andrew Scherer, *Report of the Working Group on Assessment of Systems for Delivering Legal Services*, 67 FORDHAM L. REV. 1869, 1870 (1999).

<sup>22</sup> American Bar Association Task Force on Access to Civil Justice et al., *Report to the House of Delegates*, 15 TEMP. POL. & CIV. RTS. L. REV. 507, 522 (2006).

<sup>23</sup> See *Pruitt v. Mote*, 503 F.3d 647, 655 (7th Cir. 2007) (en banc) (stating that in deciding whether to appoint counsel under 28 U.S.C. § 1915(e)(1), "[t]he question is not whether a lawyer would present the case more effectively than the pro se plaintiff; if that were the test, district judges would be required to request counsel for every indigent litigant.") (quoting *Johnson v. Doughty*, 433 F.3d 1001, 1006 (7th Cir. 2006)) (internal quotation marks omitted); Ronald Staudt, *All the Wild Possibilities: Technology That Attacks Barriers to Justice*, 42 LOY. L.A. L. REV. 1117, 1130 (2001) ("When our design students observed the justice system in action in five different courts, they quickly decided that the complexity was so daunting that everyone in the system should have a lawyer.").

<sup>24</sup> LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP 4, 18 (2007), available at <http://www.lsc.gov/justicegap.pdf> (documenting the severe shortage of funding for civil legal aid); Elizabeth

In section II, below, I propose an outcome-based metric to measure whether a particular access to justice intervention enables judges to render fair and accurate decisions: whether a particular access to justice intervention leads to the same rate of wins and losses as full and competent attorney representation.<sup>26</sup> The outcome of cases involving full and competent attorney representation is an appropriate baseline measurement because we generally assume that attorney representation is a key indicator of fairness.<sup>27</sup> In proposing this metric, I acknowledge that it can be difficult to determine whether the result of a particular proceeding constitutes a win or a loss, particularly for the many proceedings or in which a party wins on some issues but not others.<sup>28</sup> Nonetheless, I am confident that social scientists and lawyers working together can identify reliable indicators of wins or losses for many types of cases.

Social scientists view the use of comparisons and control groups as the best empirical method for isolating the effectiveness of a particular intervention while excluding other explanations for the intervention's claimed effects. A social scientist using this method would randomly assign participants either to a group which receives the intervention (i.e. the "treatment group") or to a group which does not receive the intervention (i.e. the "control group"), compare the performance of the members of the two groups, and observe changes over time.<sup>29</sup> Variations

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Stawicki, *Minnesota's Court Budget Woes Are Part of Nationwide Trend*, (Minnesota Public Radio Dec. 30, 2008), available at [http://minnesota.publicradio.org/display/web/2008/12/29/national\\_court\\_budget\\_woes/](http://minnesota.publicradio.org/display/web/2008/12/29/national_court_budget_woes/).

<sup>25</sup> See Shriver Civil Counsel Act, 2009 Cal. Stat. 590, § 1(l) (eff. July 1, 2011) (finding that the state has an important interest in "ensuring the level and type of [access to justice] service provided is the lowest cost type of service consistent with providing fair and equal access to justice").

<sup>26</sup> Similar suggestions have been made by Gary Blasi, Jeanne Charn, Russell Engler, Deborah Rhode, and others. See, e.g., Blasi, *supra* note 13, at 876-77.

<sup>27</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."); Blasi, *supra* note 13, at 879 ("[T]he most practical way to operationalize 'access to justice,' at least in the short term, may be to equate it with 'access to lawyers' and recognize why we are evaluating second-best and third-best options for those who cannot afford to obtain legal services in the private market.").

Of course, measures in addition to attorney representation are necessary, such as fair procedural rules and, in some cases, court interpreters and experts. Moreover, there is a vast range of attorney competence, which can affect case outcomes. See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145 (2007); RADHA IYENGAR, AN ANALYSIS OF THE PERFORMANCE OF FEDERAL INDIGENT DEFENSE COUNSEL (National Bureau of Economic Research Working Paper 13187, 2007).

<sup>28</sup> Gregg G. Van Ryzin & Marianne Engelman Lado, *Evaluating Systems for Delivering Legal Services to the Poor: Conceptual and Methodological Considerations*, 67 FORDHAM L. REV. 2553, 2561 (1999).

<sup>29</sup> According to the National Institute of Justice, "[t]he scientific validity of evaluations is measured along a continuum from strong to weak. Randomized controlled trials provide the strongest measure of a program's effects. Randomly assigning test subjects to the experimental and control groups helps to isolate and measure the effectiveness of the program or intervention. However, this 'gold standard' is hard to achieve in some research situations. In these cases, we have other 'quasi-experimental' methods that may provide acceptable precision in detecting and measuring the program's effects." NIJ TESTS AND EVALUATES PROGRAMS, PRACTICES AND EQUIPMENT, *supra* note 5, at 1. See also Van Ryzin & Engelman Lado, *supra* note 28, at 2564-65, 2569-70; Education Sciences Reform Act of 2002, *supra* note 4, at § 102(19) (defining a "scientifically valid education evaluation" as one that "employs experimental designs using random assignment, when feasible, and other research methodologies that allow for the strongest possible causal

on this method, sometimes used when random assignment is impossible, include the use of statistical methods to account for differences in the composition of the treatment and control groups,<sup>30</sup> the use of econometric tools to consolidate and draw conclusions from the results of many different studies,<sup>31</sup> and the use of a “pre/post” methodology to examine a judicial system before and after implementation of a new access to justice intervention.<sup>32</sup>

In section III below, I discuss a second, process-based metric for assessing the fairness of proceedings in which litigants use a particular access to justice intervention: whether the intervention enables litigants to perform the tasks necessary to enable judges to reach accurate decisions. Of course, the utility of a particular intervention depends on both the nature of the litigant’s case and his abilities. Accurately assessing either is no simple matter. However, as this article suggests, we may achieve economies of scale by determining the tasks required of pro se litigants and the tools necessary to enable the typical pro se litigant to perform those tasks, and then screening litigants to identify those who need additional assistance.

## II. Outcome Analysis

In the United States there has only ever been one random assignment study using a control group to examine whether providing lawyers in a particular type of civil case affects the outcomes of those cases.<sup>33</sup> In that study, social scientists worked with the Legal Aid Society of New York to randomly assign tenants facing eviction to one of two groups: tenants in one group received legal representation; tenants in the other did not.<sup>34</sup> The results were striking: courts issued final judgments of eviction against roughly half of the unrepresented tenants, but against only a third of the represented tenants.<sup>35</sup> Because of the study’s randomized design, the researchers were able to conclude that “these differences in outcomes can be attributed solely to the presence of legal counsel and are independent of the merits of the case.”<sup>36</sup>

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inferences when random assignment is not feasible”); JUSTICE OUTCOME EVALUATIONS, *supra* note 5, at 2 (stating that the methodological quality of outcome evaluations depends on “whether evaluation data were collected before and after program implementation; how program effects were isolated (i.e., the use of nonprogram participant comparison groups or statistical controls); and the appropriateness of sampling, outcome measures, statistical analyses, and any reported results”).

<sup>30</sup> Van Ryzin & Engelman Lado, *supra* note 28, at 2569-70 (1999) (describing the use of “statistical controls” when random assignment is infeasible); Rebecca L. Sandefur, Elements of Expertise: Lawyers’ Impact on Civil Trial and Hearing Outcomes 15-16 (March 26, 2008), (unpublished manuscript) (on file with the author).

<sup>31</sup> See, e.g., Sandefur, *supra* note 30, at 2.

<sup>32</sup> CALIF. CTR. FOR FAMILIES, CHILDREN & THE CTS., MODEL SELF-HELP PILOT PROGRAM – A REPORT TO THE LEGISLATURE 232 (March 2005), available at <http://www.courtinfo.ca.gov/programs/equalaccess/evalmod.htm> (describing “pre/post design”); JASON A. OETJEN, IMPROVING PARENTS’ REPRESENTATION IN DEPENDENCY CASES: A WASHINGTON STATE PILOT PROGRAM EVALUATION 5 (National Council of Juvenile and Family Court Judges ed., 2003), available at <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/watabriefcolorfinal%5B1%5D.pdf>.

<sup>33</sup> Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC’Y REV. 419, 419 (2001).

<sup>34</sup> *Id.* at 423-24.

<sup>35</sup> *Id.* at 426-27.

<sup>36</sup> *Id.* at 429. However, the authors do caution readers about generalizing the study’s results too broadly because, among other things, “the cases were selected in part on the basis of a [legal aid] attorney’s

Another study — a meta-analysis in which Stanford professor Rebecca Sandefur used econometric methods to deal with the fact that most existing studies in the area rely on non-randomized, non-controlled methods — upends common assumptions about the types of proceedings in which lawyers are most useful.<sup>37</sup> Common wisdom holds that the more formal a tribunal and the more complicated the substantive and procedural law, the greater the likelihood that legal representation will be the determining factor as to whether a litigant wins or loses.<sup>38</sup> Put differently, there is a common assumption that lawyers do not convey much, or any, advantage in relatively informal adjudicatory settings, such as administrative hearings.<sup>39</sup> Sandefur's study produced the surprising result that representation by a lawyer played the largest role in affecting case outcome, not when the case was more complicated, but rather when a tribunal handled cases in a routine, "perfunctory" manner or often violated its own procedures.<sup>40</sup> Sandefur attributes this outcome to the role a lawyer's presence plays both by requiring the tribunal to adhere to its own rules and predisposing the judge to believe that the client's case has merit because the lawyer took the case.<sup>41</sup>

These two studies provide reliable evidence regarding the types of cases in which full representation by lawyers makes a difference for their clients. However, no other studies have used similarly rigorous empirical methods to examine the outcomes of access to justice interventions other than full representation. As a result, we do not know definitively whether those interventions alter the outcomes of the cases in which they are used.<sup>42</sup> Nor can we know whether some interventions have a greater effect than others on case outcomes.<sup>43</sup>

The studies that have been performed to assess the outcomes that litigants achieved using access to justice tools other than full representation have all used non-experimental methods. Those methods include: 1) asking litigants, court personnel, and attorneys whether they believe the interventions affect case outcomes<sup>44</sup> and 2) reviewing the court files of litigants who used a

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judgment regarding expected benefits from the provision of legal assistance," the study took place only in one borough of New York City, some of the lawyers did not have much Housing Court experience, and the judges "have a reputation for fairness and for providing guidance to pro se litigants." *Id.* at 429-30.

<sup>37</sup> Sandefur, *supra* note 30, at 13-14.

<sup>38</sup> Genn, *supra* note 18, at 395-96, 398. *See, e.g.,* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 333-34 (1985) (stating the Court's belief that the risk of error in the absence of a lawyer is low, and consequently "counsel is not required in various proceedings that do not approximate trials, but instead are more informal and nonadversary").

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

<sup>40</sup> Sandefur, *supra* note 30, at 13-14.

<sup>41</sup> *Id.* at 30-32. *See also* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 48-50 (2010).

<sup>42</sup> *See* JUSTICE OUTCOME EVALUATIONS, *supra* note 5, at 50 (noting that because a National Institute of Justice-funded study of the domestic violence Civil Legal Assistance Program did not include any comparison groups, "NIJ cannot expect a rigorous assessment of outcomes from this evaluation").

<sup>43</sup> One exception is Rebecca Sandefur's meta-analysis, which reached the unsurprising conclusion that lawyers obtain higher win rates than non-lawyers. *See* Sandefur, *supra* note 30, at 28. Carroll Seron's New York City Housing Court study, discussed above, initially aimed to compare the effects of advice-only assistance from a lawyer, and paralegal assistance, to full attorney representation. Seron, *supra* note 33, at 423. However, Seron abandoned that goal during the study because the intake staff could not distinguish between cases that required a lawyer and those that needed only a lesser amount of representation. *Id.*

<sup>44</sup> *See, e.g.,* UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, EVALUATION OF THE VAN NUYS LEGAL SELF-HELP CENTER FINAL REPORT 4 (2001), available at <http://www.courtinfo.ca.gov/programs/>

particular intervention, and then comparing the outcomes to those of litigants who did not use the intervention.<sup>45</sup> None of the studies randomly assigned litigants to receiving or not receiving the intervention. The studies had a range of conclusions, finding that litigants who relied on specific access to justice tools achieved more,<sup>46</sup> less,<sup>47</sup> or the same level of success<sup>48</sup> compared with litigants who did not receive any assistance. One study had the remarkable finding that none of the fifty-one tenants receiving paralegal help in drafting papers at the Los Angeles Municipal Court were able to successfully raise warranty of habitability defenses in their eviction cases.<sup>49</sup>

Although these are interesting conclusions, none of these studies can definitively show whether an intervention itself (as opposed to other factors) altered a case's outcome.<sup>50</sup> In particular, because none of the studies used random assignment, we do not know whether any of the reported outcomes resulted from the access to justice tools used in the case or from some other factor, such as the service provider's case selection (self-help programs might select cases with merit and reject those without) or litigant self-selection (those with stronger cases may have the confidence to represent themselves, or conversely may tend to seek help from self-help centers).<sup>51</sup>

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equalaccess/documents/Final\_Evaluation\_Van\_Nuys\_SHC2001.doc. See also Engler, *supra* note 41, at 66 (“Until the past few years, the effectiveness of limited assistance initiatives seemed to be measured by the impressions people had of programs, rather than hard data.”).

<sup>45</sup> See, e.g., UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, *supra* note 44, at 4.

<sup>46</sup> Engler, *supra* note 41, at 70, n.142 (describing study that found that a higher percentage of family court litigants assisted by a courthouse-based self-help center received child support than litigants who did not visit the center, and that litigants who visited the center had higher child support payments on average).

<sup>47</sup> *Id.* (describing a study that found that tenants assisted by a courthouse-based self-help center agreed to pay landlords more back rent than pro se tenants did).

<sup>48</sup> See, e.g., GRAECEN, *supra* note 16, at 25 (citing SUSAN LEDRAY ET AL., HENNEPIN COUNTY DISTRICT COURT PRO SE PROGRAMS: INFORMATION AND AN EVALUATION OF EFFECTIVENESS (2002)) (failing to find “systematic differences in outcome” between users of unbundled legal advice clinic at Hennepin County District Court and other litigants); UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, *supra* note 44, at 12 (“The outcomes of Center-assisted cases are . . . similar to those cases of defendants who did not seek the Center’s help . . .”).

<sup>49</sup> McNeal, *supra* note 14, at 2642 (describing results of an unpublished Executive Summary of the Report of the Blue-Ribbon Citizens’ Committee on Slum Housing).

<sup>50</sup> A similar problem occurs in medicine, where patients who have received a particular medical treatment and then been cured or injured further believe that the intervention led to the result. See Scott R. Sehon & Donald Stanley, *A Philosophical Analysis of the Evidence-Based Medicine Debate*, 3 BMC HEALTH SERV. RES. 14 (2003), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC169187/> (“With something as complex as the human body, we will not be able to simply *observe* the exact effect of a particular therapy. (Of course, some people fail to understand this. Some people think that they can just *see* that, e.g., their breast implant caused some awful condition that developed subsequently.)”) (internal citations omitted) (emphasis in original).

<sup>51</sup> Genn, *supra* note 18, at 398-99 (noting the criticism of many studies “for failing to take account of the possibility that representatives select the strongest cases”); Sandefur, *supra* note 30, at 15 (stating that “some evidence suggests that people choose forms of representation based on their own assessment of how complex the case will be, electing to handle cases themselves when they believe them to be relatively straightforward,” while “[o]n the other hand, lawyers select cases on the basis of, among other things, whether they think their potential client has a chance of actually winning”) (internal citations omitted); Blasi, *supra* note 13, at 876.

The results of these studies are, undoubtedly, useful for a variety of purposes. They may, for example, generate information regarding obstacles that litigants face when attempting to use a particular intervention. Such information can enable program administrators to improve the functioning of the intervention.<sup>52</sup> And the results may provide information regarding the extent to which access to justice interventions achieve goals other than affecting case outcomes. User surveys, in particular, appear to provide useful data regarding the extent to which litigants provided with various access to justice interventions leave court with a favorable view of the judicial process.<sup>53</sup> However, the results cannot provide definitive evidence regarding the effect of a particular access to justice intervention on case outcomes.

In contrast to the access to justice field, a large and growing body of evidence based on randomized controlled experiments guides the work of professionals in medicine, education, social services, and criminal justice.<sup>54</sup> Sometimes the evidence demonstrates that the most expensive approach is not necessary, providing promise that someday we might be able to rely on particular access to justice interventions with similar confidence. For example, a controlled experiment in Canada revealed that an entire community receives a sufficient level of protection against the flu when doctors vaccinate only the children in that community.<sup>55</sup> Based on that study, public health systems could justifiably vaccinate all children, without vaccinating all adults. Another controlled experiment revealed that reading out loud improves children's reading skills, but that the improvement does not depend on whether children read texts at their grade levels or more difficult texts.<sup>56</sup> One can imagine that such a study would help teachers decide what pedagogical approach to take with poor learners. Teachers might, for example, have slower learners read out loud to an adult every day, but not bother to exercise rigorous control over the difficulty of the books the children select.

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<sup>52</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 217 (containing “examples of how pilot self-help center staff have used . . . evaluation results to make adjustments to their programs”); JUSTICE OUTCOME EVALUATIONS, *supra* note 5, at 23 (noting that although National Institute of Justice-funded evaluations “were not sufficiently reliable or conclusive. . . . DOJ program administrators told [the authors] that they found some of the process and implementation findings from the completed studies to be useful”).

<sup>53</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 209 (reporting results of user survey in connection with assessment of the role of self-help centers in “promot[ing] public trust and confidence in the court system”).

<sup>54</sup> See Beck et al., *supra* note 14, at 454-58; *About NIJ*, U.S. DEPARTMENT OF JUSTICE, <http://www.ojp.usdoj.gov/nij/about/welcome.htm> (last visited Sept. 28, 2010) (saying that the National Institute of Justice “provide[s] objective, independent, evidence-based knowledge and tools to meet the challenges of crime and justice, particularly at the state and local levels”); *What Works Clearinghouse*, U.S. DEPARTMENT OF EDUCATION SCIENCES, <http://ies.ed.gov/ncee/wwc/> (last visited May 30, 2010) (describing What Works Clearinghouse as “[a] central and trusted source of scientific evidence for what works in education”); *Evidence-Based Medicine for Primary Care and Internal Medicine*, BMJ JOURNALS, <http://ebm.bmj.com/> (last visited Sept. 28, 2010) (“Evidence-Based Medicine surveys a wide range of international medical journals applying strict criteria for the quality and validity of research. Practising clinicians assess the clinical relevance of the best studies. The key details of these essential studies are included in a succinct, informative expert commentary on their clinical application.”).

<sup>55</sup> See Mark Loeb et al., *Effect of Influenza Vaccination of Children on Infection Rates in Hutterite Communities: A Randomized Trial*, 303 J. AM. MED. ASS'N. 943 (2010), available at <http://jama.ama-assn.org/cgi/content/full/303/10/943>.

<sup>56</sup> Rollanda E. O'Connor et al., *Improvement in Reading Rate Under Independent and Difficult Text Levels: Influences on Word and Comprehension Skills*, 102 J. EDUC. PSYCHOL. 1, 13 (2010).

Reliable evidence can also save money and protect clients by revealing that some treatments are ineffective or even dangerous.<sup>57</sup> For example, in March 2010, New York City Mayor Michael Bloomberg announced that he had abandoned his plans to expand one of his administration's signature programs intended to bring families out of poverty: paying for behaviors such as sending children to school, looking for jobs, and visiting the doctor regularly. Mayor Bloomberg based his decision on the results of a controlled experiment, which found that the program did not improve the school performance of most of the participating children.<sup>58</sup>

### III. Process Analysis

The outcome studies described above can reveal whether a particular intervention has a particular result, such as an increase in litigants' success rates in court. They do not, however, explain how that success rate is achieved. And without understanding that, we may not know whether we the results of an outcome study conducted in one jurisdiction on one set of litigants can be generalized to other jurisdictions or litigants.<sup>59</sup> For this reason, scientists also study how various interventions affect the processes which create a particular outcome. In medicine, such studies might attempt to identify the biological or other causes of a particular disease and then to examine whether and how a particular medical treatment affects those causes.<sup>60</sup> In the access to justice field, such studies would attempt to identify the tasks a litigant must perform, the obstacles litigants face when performing those tasks, and whether various access to justice interventions enable litigants to overcome those barriers.<sup>61</sup>

As with outcome studies, the legal profession is in the very early stages of learning how to conduct this type of process studies regarding access to justice interventions. We do not know

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<sup>57</sup> Beck et al., *supra* note 14, at 457 (stating that randomized controlled trials are "the primary source of evidence for identifying therapies that cause harm").

<sup>58</sup> Julie Bosman, *City Will Stop Paying Poor for Good Behavior*, N.Y. TIMES, March 30, 2010, at A1, available at <http://www.nytimes.com/2010/03/31/nyregion/31cash.html?scp=1&sq=Bloomberg%20gibbs%20%22opportunity%20nyc%22&st=cse>; JAMES RICCIO ET AL., TOWARD REDUCED POVERTY ACROSS GENERATIONS 6 (2010), available at <http://www.mdrc.org/publications/549/execsum.pdf>.

<sup>59</sup> See Jeremy Howick et al., *The Evolution of Evidence Hierarchies: What Can Bradford Hill's 'Guidelines for Causation' Contribute?*, 102 J. ROYAL SOC'Y OF MED. 186, 189 (2009), available at <http://jrsm.rsmjournals.com/cgi/content/full/102/5/186> ("[U]nderstanding the mechanism guides our generalization of a tightly controlled study to a wider population.").

<sup>60</sup> See *id.* (describing what they call "mechanistic evidence" that a medical treatment works); Sehon & Stanley, *supra* note 50, at 6 ("From our knowledge of human physiology, disease, and pharmacology we might be able to infer whether a particular drug would be effective in treating a given condition. With the basic science approach, we work up from our knowledge of physiology and biochemistry to a prediction of what will happen.").

<sup>61</sup> Staudt & Hannaford, *supra* note 17, at 1026-29 (describing attempts to identify tasks involved in civil litigation and then design web tools to help litigants perform those tasks); Millemann et al., *supra* note 10, at 1181 (describing evaluation of Maryland experiment conducted to "help pro se litigants protect basic rights, to identify the types of cases in which the assisted pro se approach might work, and to give our students experiences with alternative representational models"); McNeal, *supra* note 14, at 2641 ("One should ask what impediments hinder the client in translating the limited legal assistance into a successful resolution of the problem. The nature and extent of these impediments then determine the viability of appropriate limited legal assistance.").

enough about the tasks involved in litigating a particular case, the ability of litigants to conduct those tasks, or the extent to which particular access to justice tools enable litigants to overcome the obstacles facing them. Consequently, even if we are able to demonstrate that a particular access to justice intervention enables litigants to overcome a particular litigation obstacle, we cannot know whether that is sufficient to enable litigants to overcome all other obstacles and obtain a fair hearing. For example, we might determine that providing a simplified form pleading will enable litigants to adequately plead uncomplicated debt cases. However, based on that evaluation alone, we would not know whether the litigants will be able to conduct discovery, write briefs, conduct evidentiary hearings, or make informed decisions about whether to settle.<sup>62</sup> Nonetheless, because this sort of process analysis can provide valuable information, particularly when paired with outcome studies, I discuss below several pioneering attempts to develop this sort of analysis.

#### A. *Identifying the tasks required*

In 2000, a group of law students, graduate design students, and National Center for State Courts researchers identified 193 discrete tasks that pro se litigants must perform in various types of civil cases.<sup>63</sup> The tasks, identified through visits to five civil courts in different parts of the country, “rang[ed] from very simple tasks like, ‘wait in line,’ ‘take notes’ and ‘find appropriate court’ to more sophisticated tasks like, ‘develop strategy and position,’ ‘interpret and apply law,’ and ‘negotiate settlement.’”<sup>64</sup>

This list appears to be the most comprehensive list of self-representation tasks developed to date. The breadth of the list may result in part from the fact that the researchers, like many pro se litigants, were unfamiliar with the courts they visited. As the Self-Represented Litigation Network warns, “a judge or administrator may not even observe barriers that may exist for uninitiated members of the public in an environment that is so familiar to him or her.”<sup>65</sup> Indeed, courts routinely underestimate the tasks required for self-representation.<sup>66</sup>

Of course, the specific tasks a litigant must perform depend on the nature of the case. If the goal of an access to justice regime is to provide the cheapest intervention that will allow a litigant to successfully complete all tasks in the case, then we must know which tasks that case requires. Sometimes categorizing a case according to the tasks it requires is a relatively simple matter. For example, litigants generally know whether their divorces are contested or not and

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<sup>62</sup> A similar problem plagues medicine, where “we rarely, if ever, can be certain of both the safety and efficacy of a treatment without clinical testing, for our knowledge of the human body and how it interacts with the environment is far from complete.” Sehon & Stanley, *supra* note 50, at 6. See also Howick et al., *supra* note 59, at 189 (“Obviously, having evidence for a part of the mechanism is not as strong as evidence for all the links in the causal chain.”).

<sup>63</sup> Staudt & Hannaford, *supra* note 17, at 1021, 1027.

<sup>64</sup> *Id.* at 1023, 1027.

<sup>65</sup> *Tour Guide: A Self-Guided Tour of Your Courthouse from the Perspective of a Self-Represented Litigant*, SELF-REPRESENTED LITIGATION NETWORK (Apr. 2008), <http://www.courtinfo.ca.gov/programs/equalaccess/documents/tourguide.doc>.

<sup>66</sup> See Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMPLE POL. & CIV. RTS. L. REV. 733, 742-43 (2006) (noting that in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Supreme Court underestimated the “risks of error . . . in most contested and litigated cases when litigants are unrepresented”).

whether they involve child custody issues.<sup>67</sup> An uncontested divorce with no children may require the performance of only a few, relatively simple tasks, while a contested divorce with child custody issues may require the performance of additional, complicated tasks.<sup>68</sup>

For some types of cases, attorney review — and sometimes even fact investigation and discovery — are necessary to determine what kind of tasks the case will entail. For example, a residential foreclosure with no legal defenses may require only negotiation with the lender, which a trained financial counselor may be able to conduct.<sup>69</sup> On the other hand, if a homeowner has defenses to foreclosure under the Truth in Lending Act or Fair Debt Collection Practices Act, tasks may involve close reading of complicated loan documents, discovery, motion practice, and conducting evidentiary hearings.<sup>70</sup> However, the existence of such potential defenses may not be apparent until an attorney has obtained and reviewed loan documents.<sup>71</sup> A researcher would have difficulty distinguishing between the two types of foreclosure cases.<sup>72</sup>

### B. *Identifying the obstacles preventing litigants from completing the required tasks*

Once the tasks involved in a case have been identified, an evaluator could identify which tasks litigants can conduct on their own and which require help. A litigant's ability to conduct specific tasks depends on characteristics such as the litigant's level of education, familiarity with computers, language skills, cognitive abilities, and communication skills.<sup>73</sup> Researchers should thus try to develop a profile of the typical litigant in that particular type of case in that particular jurisdiction. Reviewing dockets or court files can reveal some information regarding the typical litigant, such as the extent to which litigants appear pro se, the percentage of cases in which one party has representation and the opposing party does not, and the percentage of cases which are contested.<sup>74</sup> To obtain relevant information that is unavailable from court files, researchers can

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<sup>67</sup> Even these case attributes are not always apparent: “Any family law attorney can tell tales of the labyrinth of couplings, both marital and non-marital, that can underlie a response to so simple a question as, ‘Are there children of the marriage?’” Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 500 (1996).

<sup>68</sup> See McNeal, *supra* note 14, at 2643 (“[L]itigants without children, resources, and property can end their marriages relatively easily, and those litigants may be successful with pro se assistance.”) (citing Millemann et al., *supra* note 10, at 1183).

<sup>69</sup> But see MELANCA CLARK & MAGGIE BARRON, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 19-21 (2009), available at [http://brennan.3cdn.net/a5bf8a685cd0885f72\\_s8m6bevkvx.pdf](http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkvx.pdf) (explaining that “[h]omeowners represented by legal counsel are often better able to negotiate meaningful loan modifications”).

<sup>70</sup> *Id.* at 18.

<sup>71</sup> Mark Ireland, *Foreclosure Defense: Understanding TILA Basics Is Essential*, 43 CLEARINGHOUSE REV., May-June 2009, at 20, 23-24 (2009) (explaining the basic steps a lawyer must take to identify and file a TILA claim).

<sup>72</sup> Similar issues confront civil legal aid programs, courts, and others attempting to assign particular access to justice interventions to particular cases. For this reason, it may be advisable to provide a consultation with an attorney – or an attorney-supervised paralegal or housing counsel – to all low-income homeowners facing foreclosure before deciding what level of representation or access to justice intervention is warranted. CLARK & BARRON, *supra* note 69, at 38-39.

<sup>73</sup> See discussion *supra* at p. 7.

<sup>74</sup> See generally UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, *supra* note 44, at 17-18 (assessing a self-help center located in Van Nuys, CA).

interview a random sample of litigants at the courthouse.<sup>75</sup> Relevant information might include income level, primary language spoken in the household, education level, and familiarity with computers.<sup>76</sup> A drawback of this method is that it does not capture the many people who are served with papers but default.<sup>77</sup> In most instances, however, locating those individuals would be prohibitively expensive. Moreover, researchers must be aware that for some possibly relevant characteristics, such as literacy, self-reporting may be unreliable and more formal screening may be necessary.<sup>78</sup>

C. *Identifying the access to justice interventions that can enable a litigant to overcome the obstacles*

Once a researcher has identified the tasks involved in a particular type of case and the abilities of the typical litigant, a researcher using a process-oriented approach would seek to determine which access to justice tools will allow that litigant to perform those tasks. The few evaluations that researchers have performed to date provide intriguing evidence that some self-help interventions improve the ability of some litigants to perform certain tasks.<sup>79</sup> However, the evaluations do not show whether the interventions enabled the litigants to perform those tasks at a level sufficient to enable the court to reach a fair and accurate decisions.<sup>80</sup> For example, according to the California Center for Children and Families, plaintiffs in civil harassment cases who received assistance from self-help centers at various California courts

were able to prepare declarations containing enough specificity to greatly reduce the need for filing supplemental declarations. In unlawful detainer cases, self-help center assistance appears to contribute to defendants' abilities to raise affirmative defenses and to encourage landlords and tenants to reach settlements in such cases. Data also suggest that when dissolution petitioners receive assistance, they are more likely to raise all relevant issues correctly in their

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<sup>75</sup> OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE NEW YORK CITY FAMILY COURT AND NEW YORK CITY HOUSING COURT 2 (2005), available at [http://www.nycourts.gov/reports/AJJI\\_SelfRep06.pdf](http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf); KIRA KRENICHYN & LAURA K. ABEL, RESULTS FROM THREE SURVEYS OF TENANTS FACING EVICTION IN NEW YORK CITY HOUSING COURT: EXECUTIVE SUMMARY 1 (2007), available at <http://www.brennancenter.org/page/-/Justice/Executive%20Summary%202012-14-07.pdf>.

<sup>76</sup> See discussion *infra* at Part III.C.

<sup>77</sup> See NEW YORK APPLESEED & JONES DAY, DUE PROCESS AND CONSUMER DEBT: ELIMINATING BARRIERS TO JUSTICE IN CONSUMER DEBT CASES 2 (2010), available at <http://ny.appleseednetwork.org/LinkClick.aspx?fileticket=dFHdRj22CXY%3d&tabid=252> (reporting high levels of default in consumer debt cases in New York City); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 463 (2003) (describing large number of tenants who simply move out after receiving an eviction notice from their landlord).

<sup>78</sup> GRAECEN, *supra* note 16, at 20 (reporting on evaluation of civil legal aid client education program, in which evaluator concluded that some clients "may have been misrepresenting the level of their comprehension").

<sup>79</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 208.

<sup>80</sup> *Id.*

initial pleadings, to file proper accompanying paperwork, and to accomplish service of process.<sup>81</sup>

Of course, without the sort of controlled experiment described above, we cannot know whether these results were the product of the access to justice tool used, selection bias, or some other factor.

For certain types of tasks, early research suggests that self-help innovations may be ineffective, regardless of a litigant's abilities.<sup>82</sup> The tasks in this category include:

- conducting factual investigation, complicated discovery, or contested hearings;<sup>83</sup>
- presenting evidence in those courts that strictly adhere to the rules of evidence,<sup>84</sup> and
- drafting and filing traditional pleadings and motions.<sup>85</sup>

Similarly, for certain categories of litigants, some types of interventions may work better than others:

**Hotlines:** Hotlines are not particularly effective for litigants with low literacy, limited proficiency in English, or difficulty traveling to the courthouse because of transportation problems or inflexible work, school, or childcare schedules.<sup>86</sup>

**Pro se help offices and other forms of advice and assistance:** As with hotlines, studies have found that low levels of literacy, very low education levels, or low intelligence reduce the likelihood that a pro se litigant can represent himself after receiving legal advice and limited assistance.<sup>87</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> Staudt & Hannaford, *supra* note 17, at 1021 (“[S]elf-represented litigants face a variety of obstacles in their attempts to resolve disputes and problems through the courts, only some of which are helped by the availability of model forms and instructions.”).

<sup>83</sup> See CAL. ADMIN. OFFICE OF THE CTS., GUIDELINES FOR THE OPERATION OF SELF-HELP CENTERS IN CALIFORNIA TRIAL COURTS 7 (2008) (“Complicated discovery, characterization of mixed community assets, valuation and division of stock options, qualified domestic relations orders, medical malpractice, or product liability complaints — all are examples of cases and issues that may not be suitable for self-representation.”); NATHALIE GILFRICH ET AL., EXECUTIVE SUMMARY OF THE REPORT ON THE UNIVERSITY OF MARYLAND SCHOOL OF LAW’S FAMILY LAW ASSISTED *PRO SE* PROJECT IN ANNE ARUNDEL AND MONTGOMERY COUNTIES, AND RECOMMENDATIONS 5 (1996) (“We do not claim that pro se parties generally have the ability to conduct thorough factual investigations, complete discovery and represent themselves effectively at contested, or even some uncontested, hearings.”).

<sup>84</sup> Of the litigants who sought help from a self-help center in Los Angeles, “57% were not allowed to present any evidence they took to court.” GRAECEN, *supra* note 16, at 25.

<sup>85</sup> Millemann et al., *supra* note 10, at 1182 (reporting that lay advice and assistance was insufficient to help pro se litigants file pleadings and motions where plain English forms were not available).

<sup>86</sup> JESSICA PEARSON & LANAE DAVIS, THE HOTLINE OUTCOMES ASSESSMENT STUDY, FINAL REPORT PHASE III, ii (2002), available at <http://www.nlada.org/DMS/Documents/1037903536.22/finalhreport.pdf>.

<sup>87</sup> Millemann et al., *supra* note 10, at 1183.

**Web sites:** People who lack experience with computers and the Internet have difficulty using self-help web sites. However, when self-help center staff or other people are available to assist with access to the web sites, the results are better.<sup>88</sup>

Literacy is a barrier to using many of these interventions. Likewise, people with limited proficiency in English generally are unable to use any self-help tools or tribunals that are not available in a language they understand.<sup>89</sup> And large power imbalances between the parties, such as those created by domestic violence or present in landlord-tenant or employer-employee disputes, can also render self-representation impossible.<sup>90</sup>

As this section has made clear, more than one access to justice intervention may be necessary to ensure that a particular litigant can adequately present his or her case. Thus, any process-oriented evaluation of access to justice must take into account whether individual litigants are being screened to determine whether they need more assistance than the typical litigant does.<sup>91</sup>

#### IV. Conclusion

This article has described two types of empirical studies that would shed light on which access to justice interventions work for which litigants. These studies are desperately needed by civil legal aid programs and courts around the country, which constantly make decisions about which access to justice interventions to employ and when to employ them.<sup>92</sup> Here are just a few examples:

- **Delaware courts:** In June 2008, Delaware's Chief Justice created the Delaware Courts: Fairness for All Task Force, charging it with studying, among other things, "the needs of self-represented civil litigants in Delaware courts," and then "oversee[ing] implementation of efforts by the court system to address

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<sup>88</sup> MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 215 ("In-person support appears to be needed to assist people who are not traditional computer users. Self-help Web site content currently appears to be used by people who are regular users of the Internet.").

<sup>89</sup> McNeal, *supra* note 14, at 2642 (describing inability of pro se tenants to proceed in court that did not provide interpreters).

<sup>90</sup> *Id.* at 2643-44.

<sup>91</sup> PEARSON & DAVIS, *supra* note 86, at iii (recommending that pro se hotlines "should routinely question clients about a variety of barriers that affect their ability to address their legal problems and obtain successful outcomes").

<sup>92</sup> Laura K. Abel & Susan Vignola, *Economic and Other Benefits Associated With the Provision of Civil Legal Aid*, 9 SEATTLE J. OF SOC. JUSTICE (forthcoming); American Bar Association, *Principles of a State System for the Delivery of Civil Legal Aid*, Comment to Principle 10 (2006), available at <http://www.abanet.org/legal/services/sclaid/downloads/06A112B.pdf> (requiring that "[r]esearch and evaluation of civil legal aid delivery methods and providers are undertaken to assure the quality, efficiency and effectiveness of the services provided and the system responds appropriately to the results"); CAL. GOV'T CODE § 68651 (b)(7)(D) (effective July 1, 2011) (providing that in determining eligibility for services under the Shriver Civil Counsel Act, civil legal aid programs must take into account "[t]he availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case").

identified concerns and needs.”<sup>93</sup> The Task Force’s final report recommends that “[t]he Judicial Branch should expand the ways in which information is provided and the types of information available to assist self-represented litigants,” including through the use of “informational web sites,” “interactive forms,” and “a call-in line.”<sup>94</sup> It also suggests seeking additional funding for full representation by civil legal aid attorneys, and “expanding limited assistance by attorneys.”<sup>95</sup> The ultimate decisions about which intervention to offer when, and how much to invest in each intervention, will be made by court administrators, civil legal aid programs, and civil legal aid funders in Delaware.

• **Neighborhood Legal Services:** The services offered by Neighborhood Legal Services of Los Angeles County include full attorney representation, assistance filling out court forms and conducting legal research, workshops for domestic violence victims regarding how to prepare for restraining order hearings, and a hotline for people wanting to enforce healthcare rights.<sup>96</sup> Each year, the board and executive director must decide how much funding to allocate for each type of intervention.

• **Essex County Legal Aid Association:** This small New Jersey civil legal aid program, which does not receive federal Legal Services Corporation funding, operates out of a county courthouse. It describes its operation as: “perform[ing] a form of triage similar to an emergency room. Every one of our clients receives immediate emergency legal advice, legal paperwork preparation, and counseling from our small legal staff. . . . When appropriate, we also refer our clients to other organizations when it becomes clear to us that full legal representation is needed.”<sup>97</sup> Thus, staff must make decisions on a daily basis about which sort of access to justice intervention each client needs.<sup>98</sup>

It is critically important that resource allocation decisions such as these are made accurately because the stakes are high. The problems low-income individuals frequently face

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<sup>93</sup> Del. Super. Ct., Admin. Directive 168 (2008), available at <http://courts.delaware.gov/Courts/Supreme%20Court/Administrative%20Directives/?ad168.pdf>.

<sup>94</sup> DEL. SUPER. CT., DELAWARE COURTS: *FAIRNESS FOR ALL TASK FORCE 2* (2009), available at <http://www.nlada.org/DMS/Documents/1268922407.03/FAIRNESS%20Task%20Force%20Report%209%2009-1.doc/>.

<sup>95</sup> *Id.* at 3.

<sup>96</sup> *Special Projects*, NEIGHBORHOOD LEGAL SERVICES, <http://www.nls-la.org/special.php> (last visited Aug. 28, 2010); *Announcing . . . Health Consumer Center of LA County*, NEIGHBORHOOD LEGAL SERVICES, [http://www.nls-la.org/special\\_hcc.php](http://www.nls-la.org/special_hcc.php) (last visited June 28, 2010).

<sup>97</sup> *Welcome*, ESSEX COUNTY LEGAL AID, [http://eclanaj.org/Home\\_Page.html](http://eclanaj.org/Home_Page.html) (last visited Aug. 28, 2010).

<sup>98</sup> This is a typical function of a well-operating civil legal aid program. American Bar Association, Standards for the Provision of Civil Legal Aid, Standard 4.1, available at <http://www.abanet.org/legalservices/sclaid/downloads/civillegalaidstds2007.pdf> (stating that there should be an intake system that can “identify accurately the nature of each applicant’s legal problem and make a prompt decision regarding who will be helped and the type of assistance that will be offered”).

without legal representation tend to involve their most basic needs. Across the nation, most low-income people facing the loss of their homes as a result of eviction or foreclosure do so without a lawyer.<sup>99</sup> So do most victims of domestic violence seeking restraining orders.<sup>100</sup> A high proportion of child custody and other family matters involve at least one unrepresented party.<sup>101</sup>

Despite these high stakes, the legal academy has not yet viewed its mission as encompassing rigorous assessments of the utility of different access to justice tools.<sup>102</sup> Others have documented the incentives predisposing most legal academics to eschew empirical research.<sup>103</sup> The fact that poverty lawyers and the nation's civil trial courts are forced to innovate with little or no analytic support from the nation's law schools brings this trend into particularly sharp focus. It would be inconceivable for similar advances in education or medicine to proceed without empirical analysis of their effects by schools of education or medicine.

The government also bears some of the blame for the absence of the sort of rigorous empirical assessments I describe in this article. The Department of Education's Institute of Education Sciences uses its \$200 million budget to fund studies regarding the efficacy of educational interventions.<sup>104</sup> Other federal entities, such as the National Science Foundation, fund education research as well.<sup>105</sup> The National Institute of Health ("NIH"), which spends approximately \$30.5 billion annually on medical research, funds studies regarding the efficacy of medical interventions.<sup>106</sup>

The federal resources available for studies of access to justice tools are minuscule by comparison.<sup>107</sup> In FY 2010, the Legal Services Corporation ("LSC") will provide approximately \$3.4 million in Technology Incentive Grants to cover the development, testing, and implementation of new technology to provide civil legal aid.<sup>108</sup> During the same period, the State

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<sup>99</sup> Engler, *supra* note 41, at 47; CLARK & BARRON, *supra* note 69, at 2.

<sup>100</sup> Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 557 (2006).

<sup>101</sup> GRAECEN, *supra* note 16, at 6-7; OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, *supra* note 74, at 1.

<sup>102</sup> See Charn & Selbin, *supra* note 1, at 28-30; Charn, *supra* note 14, at 1045.

<sup>103</sup> Susan Chambliss, *When Do Facts Persuade? Some Thoughts on the Market for "Empirical Legal Studies,"* 71 LAW & CONTEMP. PROBS. 17, 30-31 (2008).

<sup>104</sup> *About IES: Connecting Research, Policy and Practice*, INSTITUTE OF EDUCATION SCIENCES, <http://ies.ed.gov/aboutus/> (last visited Mar. 5, 2010).

<sup>105</sup> *NSF at a Glance*, NATIONAL SCIENCE FOUNDATION, <http://www.nsf.gov/about/glance.jsp> (last visited Sept. 5, 2010).

<sup>106</sup> *NIH Budget*, NATIONAL INSTITUTES OF HEALTH, (last visited Sept. 5, 2010). The 2009 federal stimulus bill contained approximately \$1 billion for research aimed at comparing the effectiveness of various treatments for illness and disease. See Robert Pear, *U.S. to Compare Medical Treatments*, N.Y. TIMES, Feb. 15, 2009, available at <http://www.nytimes.com/2009/02/16/health/policy/16health.html>.

<sup>107</sup> While the National Institute of Justice funds empirical research aimed at "improving the justice system and preventing crime," it generally does not fund such research on the civil side. *Research Agenda and Goals*, NATIONAL INSTITUTE OF JUSTICE, <http://www.ojp.usdoj.gov/nij/about/research-agenda.htm>; 42 U.S.C. § 3721(1) (2006) (stating that the purposes of the NIJ include "improving Federal, State, and local criminal justice systems and related aspects of the civil justice system").

<sup>108</sup> *Technology Incentive Grants Program*, LEGAL SERVICES CORPORATION, <http://tig.lsc.gov/> (last visited Sept. 5, 2010). The awards are available only to civil legal aid programs that already receive other LSC funding. *Technology Incentive Grants Program: Process*, LEGAL SERVICES CORPORATION, <http://tig.lsc.gov/process.php> (last visited Sept. 5, 2010). LSC's Research Institute, headed by Alan

Justice Institute, which funds state courts and their partners to engage in a variety of activities, including research regarding the effectiveness of court services, will have a \$5.1 million budget.<sup>109</sup> While other federal agencies have small amounts of money available for related research, little of that funding is spent to evaluate access to justice tools.<sup>110</sup> Even if all available TIG and SJI funds were used to evaluate access to justice interventions, the \$8.6 million available this year would constitute just 4% of the Institute of Education Sciences' budget and a tiny fraction of a percent of the NIH's budget. The lack of a significant federal role in funding assessments of access to justice tools contrasts unfavorably with the national governments of Great Britain and other developed countries, which do support such research.<sup>111</sup>

State governments are just starting to step into the void, but their own persistent and growing funding shortfalls — particularly for the judiciary — make any significant dedication of resources difficult.<sup>112</sup> The California judiciary is leading the way by using surveys, case file reviews, and other methods — although not yet controlled, random assignment studies — to assess the quality and efficacy of the many self-help tools the courts are adopting.<sup>113</sup> This effort received a boost in October 2009, with the enactment of the Shriver Civil Counsel Act, which requires California's Judicial Council to study the effectiveness of the legal representation and range of self-help services offered by new pilot projects that provide legal assistance in civil cases concerning basic human needs.<sup>114</sup> One goal of the evaluation is to determine “the impact of

Houseman, was de-funded in the early 1980's and has never been re-established. ALAN W. HOUSEMAN, PAST AND CURRENT EFFORTS TO ENSURE QUALITY WITHIN THE CIVIL LEGAL ASSISTANCE COMMUNITY 4 (2004), available at [http://www.lri.lsc.gov/pdf/04/04houseman\\_quality.pdf](http://www.lri.lsc.gov/pdf/04/04houseman_quality.pdf).

<sup>109</sup> *FY 2010 Appropriation Will Enable SJI to Continue Focusing on National Court Issues*, STATE JUSTICE INSTITUTE, [http://www.sji.gov/article-sji\\_continued\\_focus.php](http://www.sji.gov/article-sji_continued_focus.php) (last visited Sept. 5, 2010).

<sup>110</sup> For example, the Department of Health and Human Services' Court Improvement Project funds some evaluations of lawyer representation in abuse and neglect cases. See Abel & Vignola, *supra* note 92, at 9. The Department of Justice has funding available to improve court functioning in juvenile justice, domestic violence, drug, mental health, and other types of cases. See *Grant Solicitation/Alternative Funding Resource Guide*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsconline.org/WC/CourTopics/ResourceGuide.asp?topic=GrtSol> (last visited Sept. 5, 2010). However, that funding is also available to a wide range of law enforcement and community organizations, so that only a small fraction goes to courts for evaluation purposes.

<sup>111</sup> Charn & Selbin, *supra* note 1, at 30.

<sup>112</sup> See William M. Welch, *Court Budget Cuts Swift Hand of Justice*, USA TODAY, Mar. 31, 2010, available at [http://www.usatoday.com/news/nation/2010-03-31-court-cuts\\_N.htm](http://www.usatoday.com/news/nation/2010-03-31-court-cuts_N.htm).

<sup>113</sup> See Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts*, 1 CALIF. L. REV. 15, 24 (2010); MODEL SELF-HELP PILOT PROGRAM, *supra* note 32, at 13-14 (describing California Administrative Office of the Courts' dedication of funding for implementation and evaluation of five pilot courthouse-based self-help programs). Washington State also has funded some interesting evaluations of the effect of improvements in the quality of representation for parents in dependency cases. OETJEN, *supra* note 32, at 7; CAROL J. HARPER ET AL., DEPENDENCY AND TERMINATION PARENTS' REPRESENTATION PROGRAM EVALUATION REPORT 31 (2005), available at <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2005%20Evaluation%20Report.pdf>.

<sup>114</sup> CAL. GOVT. CODE § 68651(c) (effective July 1, 2011). The Act is expected to generate approximately \$10 million for three years to fund the pilot projects. Mike McKee, *Assemblyman Introduces Civil Gideon Bill*, LEGALPAD, Mar. 4, 2009, [http://legalpad.typepad.com/my\\_weblog/2009/03/assemblyman-introduces-civil-gideon-bill.html](http://legalpad.typepad.com/my_weblog/2009/03/assemblyman-introduces-civil-gideon-bill.html) (last visited Aug. 2, 2010).

counsel on equal access to justice.”<sup>115</sup> Given that goal, the use of experimental techniques incorporating random assignment and control groups seems appropriate, although the judiciary has not yet settled on which methodology it will use.

Bar associations and nonprofit organizations also are trying to fund empirical examinations. In 2009, the Boston Bar Association began a pilot project using random assignment and control groups to examine the impact of providing legal representation to disabled and other at-risk tenants facing eviction from their homes.<sup>116</sup> And Oregon-based NPC Research has created a detailed proposal for a similar study and is in the process of seeking foundation support.<sup>117</sup> Neither effort has generated results yet.

Across the nation, courts are adjudicating rights, and in many cases extinguishing them, while people of goodwill try to provide a broad range of tools to help. But goodwill and common sense can only take us so far. The pressing question of our time is, simply, “What works?” The need for research is intense. We must identify the financial resources sufficient to fund the necessary inquiries. Our courts, our communities, and the most vulnerable members of our society should not have to feel their way.

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<sup>115</sup> CAL. GOV'T. CODE § 68651(c) (effective July 1, 2011). Other goals of the evaluation are examining the “effect on court administration and efficiency, and enhanced coordination between courts and other government service providers and community resources, . . . the benefits of providing representation to those who were previously not represented, both for the clients and the courts, . . . the impact of the pilot program on families and children [and] . . . the continuing unmet needs.” *Id.*

<sup>116</sup> BOSTON BAR ASS'N, NEWS RELEASE: MA CIVIL RIGHT TO COUNSEL PILOT PROJECTS LAUNCHED (July 13, 2009), available at [http://www.bostonbar.org/prs/nr\\_0809/PilotProject071309.htm](http://www.bostonbar.org/prs/nr_0809/PilotProject071309.htm).

<sup>117</sup> NPC RESEARCH, CIVIL RIGHT TO COUNSEL SOCIAL SCIENCE STUDY DESIGN REPORT 9-10 (2009).