EVIDENCE-BASED ACCESS TO JUSTICE

LAURA K. ABEL *

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.1 The 2010 federal healthcare reform legislation, for example, funds research regarding the effectiveness of medical treatments, as did the 2009 federal stimulus bill.2 The No Child Left Behind Act and Individuals With Disabilities Education Act (“IDEA”) each encourage the use of scientifically validated education methods.3 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.”4 The National Institute of Justice promotes the use of criminal justice methods that have been proven effective.5

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

---

* Laura Abel is Deputy Director of the Justice Program at the Brennan Center for Justice at New York University School of Law.


3 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”).


5 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. 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. 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. Some view the tools as emergency measures necessitated by the shortage of civil legal representation for the poor. Others assert that, at least in some cases, full representation is not necessary, and other access to justice tools may suffice. What litigants need, they argue, is a graduated approach, in which they receive only the level of assistance necessary to litigate their cases successfully. 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. 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.”

---

11 Id.
13 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. 14 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. 15

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; 16 and ensuring that litigants leave with a positive view of the judicial process. 17 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. 18


15 See discussion infra Part IV.

16 John M. Graecen, Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know 11-12 (2002).


18 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.”

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.”

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.”

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.”

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. However, cost is also an important factor, given the severe, ongoing national shortage of funding for both civil legal aid and the courts. 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.
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. 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. 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. 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. Variations


25 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”).

26 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.

27 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).


29 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.” NJ 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,\textsuperscript{30} the use of econometric tools to consolidate and draw conclusions from the results of
many different studies\textsuperscript{31} and the use of a “pre/post” methodology to examine a judicial system
before and after implementation of a new access to justice intervention.\textsuperscript{32}

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.\textsuperscript{33} 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.\textsuperscript{34} 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.\textsuperscript{35} 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.”\textsuperscript{36}
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. 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 by the determining factor as to whether a litigant wins or loses. 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. 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. 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.

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. Nor can we know whether some interventions have a greater effect than others on case outcomes.

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 and 2) reviewing the court files of litigants who used a
particular intervention, and then comparing the outcomes to those of litigants who did not use the intervention. 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, less, or the same level of success 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.

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. 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).

References

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.”).

45 See, e.g., UCLA SCHOOL OF LAW EMPIRICAL RESEARCH GROUP, supra note 44, at 4.

46 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).

47 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).

48 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 . . . .”).


50 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.)”) (emphasis in original).

51 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. 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. 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. 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. 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. 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.

52 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”).


55 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.

56 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.\(^57\) 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.\(^58\)

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 the results of an outcome study conducted in one jurisdiction on one set of litigants can be generalized to other jurisdictions or litigants.\(^59\) 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.\(^60\) 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.\(^61\)

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

\(^{57}\) 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”).


\(^{60}\) 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.”).

\(^{61}\) 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. 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. 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.’" 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.” Indeed, courts routinely underestimate the tasks required for self-representation.

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

62 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.”).

63 Staudt & Hannaford, supra note 17, at 1021, 1027.
64 Id. at 1023, 1027.
66 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. 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.

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. 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. However, the existence of such potential defenses may not be apparent until an attorney has obtained and reviewed loan documents. A researcher would have difficulty distinguishing between the two types of foreclosure cases.

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. 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. To obtain relevant information that is unavailable from court files, researchers can

67 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).

68 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).

69 But see MELANCA CLARK & MAGGIE BARRON, FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 19-21 (2009), available at http://brennan.3cdn.net/a5bf8a685cd0885f72_s8m6bevkk.pdf (explaining that “[h]omeowners represented by legal counsel are often better able to negotiate meaningful loan modifications”).

70 Id. at 18.


72 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.

73 See discussion supra at p. 7.

interview a random sample of litigants at the courthouse. Relevant information might include income level, primary language spoken in the household, education level, and familiarity with computers. A drawback of this method is that it does not capture the many people who are served with papers but default. 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.

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. 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 decision.

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

---

76 See discussion infra at Part III.C.
77 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).
78 GRAESEN, 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”).
79 MODEL SELF-HELP PILOT PROGRAM, supra note 32, at 208.
80 Id.
initial pleadings, to file proper accompanying paperwork, and to accomplish service of process.\textsuperscript{81}

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.\textsuperscript{82} The tasks in this category include:

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

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.\textsuperscript{86}

**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.\textsuperscript{87}

\textsuperscript{81} Id.
\textsuperscript{82} 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.”).

\textsuperscript{83} See CAL. ADMIN. OFFICE OF THE LTS., 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.”).

\textsuperscript{84} 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.

\textsuperscript{85} 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).


\textsuperscript{87} 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.\(^{88}\)

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.\(^{89}\) 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.\(^{90}\)

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.\(^{91}\)

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.\(^{92}\) 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

---

\(^{88}\) 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.”).

\(^{89}\) McNeal, supra note 14, at 2642 (describing inability of pro se tenants to proceed in court that did not provide interpreters).

\(^{90}\) Id. at 2643-44.

\(^{91}\) 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”).

\(^{92}\) 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/legalservices/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.”93 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.” 94 It also suggests seeking additional funding for full representation by civil legal aid attorneys, and “expanding limited assistance by attorneys.”95 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.96 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.”97 Thus, staff must make decisions on a daily basis about which sort of access to justice intervention each client needs.98

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

---

95 Id. at 3.
98 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. So do most victims of domestic violence seeking restraining orders. A high proportion of child custody and other family matters involve at least one unrepresented party.

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. Others have documented the incentives predisposing most legal academics to eschew empirical research. 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. Other federal entities, such as the National Science Foundation, fund education research as well. The National Institute of Health (“NIH”), which spends approximately $30.5 billion annually on medical research, funds studies regarding the efficacy of medical interventions.

The federal resources available for studies of access to justice tools are minuscule by comparison. In FY 2010, the Legal Services Corporation (“LSC”) will provide approximately $3.4 million in Technology Incentive Grants to cover the development, testing, and comparison.


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”).


---

99 Engler, supra note 41, at 47; CLARK & BARRON, supra note 69, at 2.
101 GRAECE, supra note 16, at 6-7; OFFICE OF THE DEPUTY CHIEF ADMINISTRATIVE JUDGE FOR JUSTICE INITIATIVES, supra note 74, at 1.
102 See Charn & Selbin, supra note 1, at 28-30; Charn, supra note 14, at 1045.
107 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”).
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.\textsuperscript{109} 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.\textsuperscript{110} 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.\textsuperscript{111}

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.\textsuperscript{112} 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.\textsuperscript{113} 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.\textsuperscript{114} One goal of the evaluation is to determine “the impact of

---


\textsuperscript{110} 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/GntSolicitationAltFndResRsrcGuide.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.


\textsuperscript{114} 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 (last visited Aug. 2, 2010).
counsel on equal access to justice.”¹¹⁵ 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.¹¹⁶ And Oregon-based NPC Research has created a detailed proposal for a similar study and is in the process of seeking foundation support.¹¹⁷ 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.

¹¹⁵ 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.
¹¹⁷ NPC RESEARCH, CIVIL RIGHT TO COUNSEL SOCIAL SCIENCE STUDY DESIGN REPORT 9-10 (2009).