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When Does Representation Matter?

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Understanding the Question of *When Does Representation Matter?*

While a great deal of literature attempts to address the question of the importance of representation by lawyers in civil matters, the question framed that way masks the key Access to Justice concerns. Judges routinely report that they believe litigants are better off with lawyers, obtaining worse outcomes when they appear without counsel²; many judges have further identified the burdens on the legal system that flow from the pro se litigants.³ As a result, guidance for judges often counsels judges to warn litigants of the perils of self-representation.⁴ Legal services lawyers staunchly believe that their clients are better off with representation.⁵ Opposing lawyers not only report that the absence of representation can have an adverse impact on the represented parties,⁶ but are generally prohibited by the ethical rules from giving advice to unrepresented parties, other than the advice to obtain counsel.⁷

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² Report to the Chief Judge of the State of New York, 15-18 (November 2010) hereinafter “NY Report I”), available at <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf>; Report to the Chief Judge of the State of New York, 19-21 (November 2011) hereinafter “NY Report II”), available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011TaskForceREPORT_web.pdf Report to the Chief Judge of the State of New York, 15-16 (November 2012)(hereinafter “NY Report III”), available at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf; *Judges’ Views of Pro Se Litigants’ Effect on Courts*, 40 CLEARINGHOUSE REVIEW 228 (July-August 2006).

³ *Id.*

⁴ *See, e.g.* The Massachusetts Court System, Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, <http://www.mass.gov/courts/judguidelinescivhearingstoc.html> (last visited September 30, 2013).

⁵ *See, e.g.*, Clare Pastore, *California’s Sargent Shriver Civil Counsel Act Tests Impact of More Assistance for Low-Income Litigants*, 47 CLEARINGHOUSE REVIEW 97, 106 (July-August 2013)(“Several [legal services lawyers] mentioned the frustration of seeing substantial time and funding resources going to prove what they felt was obvious- that providing counsel to indigent clients makes a difference”).

⁶ *See, e.g.*, NY Report I, *supra* note ___, at 18-20.

⁷ American Bar Association’s Model Rules of Professional Conduct (MRPC), Rule 4.3, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

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The most common reason that litigants appear without counsel in civil matters is that they cannot afford a lawyer.⁸ While the concept of “unbundled” legal services offers the promise of providing choice to clients to retain lawyers for only those tasks for which they needed a lawyer’s expertise, the evolution of unbundling is two stories: a story about clients with resources, for whom choice might be a reality, and a story about clients with few to no resources for whom the choice is to received unbundled help or no help at all.⁹

In the Access to Justice context, therefore, the questions involving the importance of representation become more contextual than absolute. An inescapable reality embedded in the question is a scarcity of resources.¹⁰ Given that there are insufficient resources to provide full representation to all litigants in a given context, when should resources be allocated to full representation and when might lesser forms assistance suffice? The reality of scarcity is essential in understanding the empirical work regarding representation. Not surprisingly, it is perilous to attempt to draw too many conclusions from a few studies, as opposed to identifying trends that emerge from the body of work as a whole.

Overview of Empirical Work Involving Representation

[rule 4 3 dealing with unrepresented person.html](#) (“The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel...”).

⁸ *Handing Cases Involving Self-Represented Litigants*,: A National Bench Guide for Judicial Officers, 1-2 (2008) available online at: http://www.selfhelpsupport.org/library/folder.42613-Communication_Protocol (visited June 21, 2010); JOHN M. GREACEN, SELF-REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW 12 (2002), available at <http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf>; OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUSTICE INITIATIVES, SELF-REPRESENTED LITIGANTS: CHARACTERISTICS, NEEDS, SERVICES, THE RESULTS OF TWO SURVEYS 3–4 (2005), available at http://www.nycourts.gov/reports/AJJI_SelfRep06.pdf; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2046–47 (1999).

⁹ Unbundled, or limited assistance or discrete task, lawyering involves the provision of a portion of the full service package provided in the traditional lawyer-client relationship. See, *Unbundling of Legal Services/Limited-Role Representation*, Chapter III.B.1, *infra*.

¹⁰ See, e.g., Bonnie Rose Hough & Justice Laurie Zelon, *Self-Represented Litigants: Challenges and Opportunities for Access to Justice*, 47 *JUDGES JOURNAL* 30, 32 (Summer 2008).

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1. The Methodologies Employed

The reports and more formal studies that inform our understanding of the importance of representation employ an array of methodologies. The most common form involves the review of case records, typically those in the court or administrative agencies.¹¹ In these studies, the researchers search the case files, sorting the cases between those involving represented litigants and unrepresented ones and comparing the results. Separately, or in combination with the review of case files, some studies rely on observations of the proceedings¹², interviews¹³ surveys¹⁴ of the various participants and case studies in the form of narratives¹⁵ to illustrate the trends identified through other methods.¹⁶ Sandefur's research relies on meta-analysis: studying a series of reports that allows her to draw conclusions across substantive areas.¹⁷

While these studies consistently show that unrepresented parties achieve worse outcomes in many scenarios than represented ones, many are vulnerable to "selection bias": their results

¹¹ See, generally, Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010)(hereinafter "*Connecting Self-Representation to Civil Gideon*").

¹² See, e.g., David L. Eldridge, *The Making of a Courtroom: Landlord-Tenant Trials in Philadelphia's Municipal Court* 65-69, 130-42 (2001) (unpublished Ph.D. dissertation, University of Pennsylvania, on file with author) (studying 153 hearings in Philadelphia's Landlord-Tenant Court); Barbara Bezdek, *Silence in The Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

¹³ See, e.g., NY Report III, *supra* note ___, at 16-18; NY Report II, *supra* note ___, at 21-23; NY Report I, *supra* note ___, at 29-31.

¹⁴ *Id.* See, also, KIRA KRENICHYN & NICOLE SCHAEFER-MCDANIEL, RESULTS FROM THREE SURVEYS IN NEW YORK CITY HOUSING COURTS (2007), available at <https://www.policyarchive.org/bitstream/handle/10207/8683/threesurveys.pdf?sequence=1> .

¹⁵ See, e.g., NY Report I, *supra* note ___, at 29-31; BOSTON BAR ASSOCIATION, *The Importance of Representation in Eviction Cases and Homelessness Prevention*, at 24-25 (2012)(hereinafter "*The Importance of Representation in Eviction Cases and Homelessness Prevention*"), available at <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>

¹⁶ Kritzer's work illustrates one way in which the methodologies may be used in combination: "I employed a mixed research strategy that combined statistical assessment of outcomes with observation of processes". See, HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 21 (1998) (studying data from Wisconsin from the mid-1970s to the mid-1990s)

¹⁷ See, *infra*, at __ See, e.g., Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 51-52 (2011)(hereinafter *The Impact of Counsel*) ; Rebecca L. Sandefur, *Money Isn't Everything: Understanding Moderate Income Households' Use of Lawyers' Services*, in MIDDLE INCOME ACCESS TO JUSTICE, *supra* note ___, at 223; Rebecca Sandefur, *Elements of Expertise: Lawyers' Impact on Civil Trial and Hearing Outcomes* 30-32 (Mar. 26, 2008) (unpublished manuscript, under review, on file with author)) (hereinafter "The Elements of Expertise"). Albiston and Sandefur rely on a later version of this still unpublished manuscript. Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 WISC. L. REV. 101, 106, n.26 (2013).

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may be skewed because of the choices of lawyers, in selecting stronger cases, or of clients, in seeking out lawyers where their cases are stronger.¹⁸ Kritzer and Sandefur, while acknowledging the possibility of selection bias, conclude that disparities in outcomes between represented and unrepresented parties are too stark for selection bias to provide a complete explanation.¹⁹

The methodology of randomized control trials addresses the problem of selection bias. However, in large part because of the practical difficulty of conducting randomized control trials that capture real-life circumstances, few published studies are based on such trials.²⁰ Moreover, the methodology raises a different set of questions and concerns. First, the studies may not actually be able to report on the impact of representation. After potential clients are randomized into two groups, those offered representation and those not, some potential clients offered representation may decline to accept representation, while some of those not offered representation may obtain representation elsewhere. The Greiner studies therefore reported the impact of “an offer of representation” rather than “representation,” a decision that led critics to question the utility of the studies²¹ Second, the technique is criticized for placing undue burdens

¹⁸ *Id.* at 81-83.

¹⁹ KRITZER, *supra* note ____, at 33-37; Sandefur, *Elements of Expertise* at 15. Moreover, since Sandefur’s meta-analysis focuses only on cases where actual hearings took place, the role lawyers play in assisting clients in steps leading up to hearings, and in turn achieving more favorable outcomes for them, may be underestimated. *Id.* at 8.

²⁰ Two of the published studies are in the housing area, one in the area of unemployment benefits and one in the area of juvenile cases. 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, 423-26 (2001)(housing); D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Phillip Hennessey, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future* 126 HARV. L. REV. 901 (2013)(housing)(hereinafter *The Limits of Unbundled Legal Assistance*); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make*, 121 YALE L.J. 2118, 2171-2196 (2012)(unemployment); W. Vaughn Stapleton & Lee E. Teitelbaum, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS, Russell Sage Foundation (1972)(juvenile). Professor Greiner and his co-authors completed another study in the housing area that has been posted on SSRN, but not published. D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Phillip Hennessey, *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* (September 1, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078 (hereinafter *How Effective Are Limited Legal Assistance Programs?*).

²¹ See, *infra* at ____, note ____ and accompanying text.

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on those providing assistance.²² Third, a randomized control study focused on individual outcomes will shed little light on systemic impacts such as benefits from representation that might accrue to others, including the legal system more generally. The studies involving randomized control trials, therefore, make an important contribution, but do not by themselves nullify the findings of other studies using different methodologies.

2. Courts (Housing, Consumer & Domestic Relations Cases)

In eviction cases, tenants rarely are represented by counsel; the typical case pits a represented landlord against an unrepresented tenant. Regardless of whether tenants appear or default, settle or go to trial, raise defenses or do not, the result invariably is a judgment for the landlord. One variable that often can halt the swift judgment for the landlord is representation for the tenant, with the likelihood of eviction dropping precipitously. Represented tenants default less often, obtain better settlements, and win more often at trial.²³

Two published housing studies, using the randomized control study methodology to eliminate selection bias, find significant differences in case outcomes for represented tenants, in comparison to those who did not receive full representation. Comparing case outcomes for those offered representation in Manhattan Housing Court, Seron found that where a tenant was represented, a final judgment was entered against him or her in 21.5% of the cases, compared with final judgments in 50.6% of the cases involving unrepresented tenants.²⁴ The favorable results for tenants were reflected in other measures of outcomes as well, with stipulations involving represented tenants more likely to include a rent abatement for tenant (31.3%

²² See, e.g., Pastore, *supra* note ___ at 106.

²³ *Connecting Self-Representation to Civil Gideon*, *supra* note ___, at 46-51.

²⁴ Seron *et al.*, *supra* note ___, at 428. The tenants were recruited from among the tenants responding to nonpayment of rent petitions and waiting in line at the Clerk's office in Manhattan Housing Court; they were then sorted into control and treatment groups through a five-step process developed in collaboration with the Administrative Judge of the Civil Court. *Id.* at 423-24. Five variables were selected to test the effect of the program on substantive legal outcomes, and four additional variables were selected to measure the effect of the program on the efficiency of the Court. *Id.* at 426.

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compared to 2.3%) and more likely to require repairs (63.8% to 25.4%);²⁵ warrants of eviction also issued far less often for represented tenants compared to unrepresented ones (10% compared to 44.1%).²⁶ The Seron study concludes that “low income tenants with legal representation experience significantly more beneficial outcomes than their counterparts who do not have legal representation, independent of the merits of the case.”²⁷

In the Greiner study, involving Quincy District Court near Boston, lawyers from Greater Boston Legal Services screened cases to identify a subset of eviction cases meeting articulated criteria. The lawyers then provided full representation to the tenants randomly assigned to the treated group and advice, combined with assistance in the preparation of pleadings and motions, to the tenants randomly assigned to the control group.²⁸ On the key question of whether tenants retained possession of the premises, two-thirds of the treated group did as compared to one-third of the control group.²⁹ Regarding financial benefits, including rent waived and damage payments from landlords to tenants, those in the treated group again fared far better than those in the control group. While tenants in the control group received financial benefits equivalent to an average of two months’ rent, those in the treated group received almost five times as much – the equivalent of nine-and-a-half months of rent.³⁰ The benefits from full representation accrued without increasing the burden on the court.³¹

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*, at 421. The study also found that representation reduced the use of motions and increased the time to final disposition without increasing the number of court appearances. *Id.*

²⁸ *The Limits of Unbundled Legal Assistance*, *supra* note ____, at 917-919.

²⁹ *Id.*, at 908, 926-28. The Greater Boston Legal Services (GBLS) lawyers added that, for the one-third of the members of the treated group who were considered to have “lost possession,” some did so of their own volition and most did so on their own terms, often finding more suitable housing. *The Importance of Representation in Eviction Cases and Homelessness Prevention*, *supra* note ____, at 16.

³⁰ *The Limits of Unbundled Legal Assistance*, *supra* note ____, at 908, 928-931.

³¹ *Id.*, at 932-36. An unpublished companion study found no difference between the control and study group although, as with the unemployment study, many tenants in the control group received extensive assistance from lawyers. *How Effective Are Limited Legal Assistance Programs?*, *supra* note ____. Not only did the lawyers assisting litigants in the “treated” group provide a level of assistance that more closely resembled unbundled

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Steinberg's housing study is unique in that it compares the results achieved by three types of litigants: (1) unrepresented litigants, (2) those receiving partial representation by lawyers (sometimes referred to as "unbundled assistance") and (3) those receiving full representation by lawyers.³² The study, which did not involve a randomized control trial, compared the results for tenants who received no legal assistance at all and those who received full representation through Stanford's Community Law Clinic with those receiving two forms of partial assistance from a local legal services office: ghostwriting assistance through a half-day housing clinic and one-time negotiation assistance in a mandatory settlement conference.³³

Steinberg's findings offer a grim account of the effectiveness of these forms of partial assistance in the setting she studied. Both in terms of retaining possession or, where tenants had to move, the length of time before which they had to move, the partial assistance rendered had no measurable impact for tenants; they fared as poorly as those who received no assistance at all, and worse than those who received full representation.³⁴ Represented tenants also paid less money to landlords when they were ordered to pay and were awarded damages from landlords more often; tenants receiving unbundled assistance again fared as poorly as those receiving no

assistance than full representation, but a substantial portion of the "control" group received a comparable level of assistance by the same lawyers. *The Importance of Representation in Eviction Cases and Homelessness Prevention*, *supra* note ___, at 18-20. As a result, the Boston Bar Association Task Force that partnered with Greiner and his co-authors concluded that "[b]oth pilot projects prevented evictions, protected the rights of tenants, and maintained shelter in a high rate of cases"; "[t]he findings of both pilot studies confirm that extensive assistance from lawyers is essential to helping tenants preserve their housing and avoid the potential for homelessness, including all of the far-reaching tangible and intangible costs to tenants and society generally that are associated with homelessness." *Id.*, at 2-3.

³² Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 *GEO. J. POV. LAW & POL'Y* 453, 463 (2011).

³³ *Id.*, at 457, 477-78. The legal aid office was the Legal Aid Society of San Mateo County. *Id.* The study, which was limited in scope and did not involve randomized control study, was designed with the assistance of Sandefur, and involved a review of files from court, sorted by the type of assistance received. *Id.*, at 457, n.19, 480 and 496-97. With the negotiation assistance, the legal aid lawyers offered assistance to tenants who had previously received assistance at a legal aid housing clinic. *Id.*, at 478.

³⁴ *Id.*, at 483-85.

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assistance, and far worse than those receiving full representation.³⁵ Neither form of partial assistance involved in this study resulted in a different success rate.³⁶ In terms of procedural outcomes, partially assisted tenants were less likely to default and more likely to raise cognizable defenses that wholly unrepresented tenants; there was however, no improvement in outcomes.³⁷

Empirical studies of courts in other areas also suggest that representation counts. Studies involving debt collection cases consistently show that represented debtors obtain far better results than unrepresented ones, who default at a high rate and, when they appear, typically succumb to pressure from the represented creditor and the court to settle on terms less favorable than those obtained by represented debtors.³⁸ Studies in the family law area are more complicated to evaluate because it is not always clear what constitutes a favorable outcome.³⁹ Nevertheless, represented parties in these studies are more likely to obtain sole custody when the other side is without counsel, and shared custody when both are represented by counsel; represented parties also are more successful in obtaining protective orders than unrepresented ones.⁴⁰

3. Agencies (Unemployment, Immigration & Other Benefits Cases)

The methodological issues in the area of family law disappear with administrative agency decisions involving government benefits, where wins and losses present clearer instances of a favorable outcome. Kritzer's study includes extensive analysis of data involving Social Security

³⁵ *Id.*, at 485-88.

³⁶ *Id.*, at 488-90.

³⁷ *Id.*, at 490-95.

³⁸ *Connecting Self-Representation to Civil Gideon*, *supra* note ____, at 55-58. The most common methodologies include reviews of court files, observations and interviews. *Id.*, at nn. 77-86.

³⁹ Greiner & Pattanayak, *supra* note ____, at 2165-66.

⁴⁰ *Connecting Self-Representation to Civil Gideon*, *supra* note ____, at 51-55.

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disability appeals and unemployment appeals from Wisconsin.⁴¹ With Social Security disability appeals, Kritzer found that represented claimants were successful in 60-70% of their appeals, while unrepresented claimants succeeded at rates as low as 30% and as high as 55%. Although the success rates varied from year to year, the gap based on representation status ranged consistently from 15-30% each year.⁴² Kritzer also reported data regarding the success rates for claimants appearing with non-attorney representatives. For each year reported, claimants represented by non-attorneys fared far better than unrepresented ones, but slightly less well than those represented by attorneys.⁴³

Kritzer's study of unemployment compensation appeals in Wisconsin demonstrated that represented claimants fared better regardless of the nature of the claim.⁴⁴ Represented claimants won 44.2% of the cases in which they appealed, compared to 29.7% for unrepresented claimants; when broken down by the nature of the claim, a comparable gap remained for appeals involving misconduct cases, with a smaller gap for cases in which the employee allegedly quit.⁴⁵ The same did not hold true for employers. While represented employers prevailed in 58.4% of the appeals, unrepresented employers prevailed almost as often (57.3%).⁴⁶

⁴¹ Kritzer, *supra* note ____, at 111-20. As noted previously, Kritzer used a mix of statistical analysis and observation of processes. *Id.*, at 21.

⁴² *Id.* at 117 chart.

⁴³ *Id.*

⁴⁴ *Id.*, at 23-77.

⁴⁵ *Id.* at 34-39. In misconduct cases, represented claimants prevailed in 50.8% of their appeals, compared to a 37.9% success rate for unrepresented claimants. *Id.* at 37. With "Quit" cases, the overall success of the claimants dropped, but the benefits of representation remained, as 26.3% of represented claimants prevailed in these cases, while only 17.4% of claimants won on appeal. *Id.* at 38. Considering all appeals, and not simply those in which the claimant appealed, represented claimants won 50.4% of the cases, compared to unrepresented claimants who prevailed in 41.5% of the cases. *Id.* at 34.

⁴⁶ *Id.* at 34. Earlier studies also reported both a 15% gap between represented and unrepresented claimants, but no variation in success rates based on representation for employers. See, *Connecting Self-Representation to Civil Gideon*, *supra* note ____, at 61, n.100.

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Greiner and Pattanyak's initial article urging randomized controls concerned unemployment benefits cases and challenged the prior research.⁴⁷ They reported the results of a randomized control study of the impact of an offer of representation by the Harvard Legal Aid Bureau to claimants for unemployment benefits. The study not only reports no difference in outcomes between the control (no offer) and treated (offer) group, but suggests that claimants in the treated group might have been *harmed* by the offer of representation due to delays in the receipt of benefits without apparent countervailing gain.⁴⁸ The Greiner-Pattanyak study created quite a stir, particularly in the legal services community. Critics questioned the decision to study the impact of an "offer of representation" rather than "representation," noting that "nearly half of the control group were represented by counsel," many of whom were legal services lawyers. These critics maintained that the Greiner-Pattanyak paper did not shed much light on the impact of representation itself.⁴⁹ Others questioned the applicability of findings involving the impact of law-student assistance to the larger question of the impact of lawyers.⁵⁰

A pair of studies in the Immigration area, drawn from a review of government records, reveals a dramatic difference in outcomes for represented and unrepresented claimants. Kerwin reports that represented immigrants obtain relief in removal proceedings at significantly higher

⁴⁷ Greiner & Pattanyak, *supra* note ___. For their critical analysis of the existing research, see *id.*, at 2171-2196.

⁴⁸ *Id.* At ___.

⁴⁹ See Bob Sable, *What Difference Representation – A Response*, Concurring Opinions, (March 28, 2011), available at <http://www.concurringopinions.com/archives/2011/03/what-difference-representation-a-response.html#more-42104>. At the time, Sable was the Executive Director of Greater Boston Legal Services. For Professor Greiner's defense, see his *The Centrality of Abstracts? A Response to Bob Sable's and David Udell's Comments on "What Difference Representation? Offers, Actual Use, and the Need for Randomization"* Concurring Opinions, (March 28, 2011), available at <http://www.concurringopinions.com/archives/2011/03/the-centrality-of-abstracts-a-response-to-bob-sables-and-david-udells-comments-on-what-difference-representation-offers-actual-use-and-the-need-for-randomization.html#more-42420>; Greiner & Pattanyak, *supra* note ___, at 2127-32.

⁵⁰ David Udell, *What Difference Presentation?* Concurring Opinions, (March 28, 2011), available at <http://www.concurringopinions.com/archives/2011/03/what-difference-presentation.html#more-42280> (referring to the "the experience gap that exists between the HLAB students and the 'other service providers' who represented members of the control group": "[t] his experience gap may thus be expected to conceal the effectiveness of the HLAB students' performance while highlighting any delay caused by the HLAB students' performance.").

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levels than those without representation, regardless of the nature of the proceedings.⁵¹

Schoenholtz and Jacobs similarly found a dramatic difference in the success rates for represented asylum seekers as opposed to unrepresented ones: represented asylum seekers referred through the affirmative process, in which the applicant applies for asylum prior to the initiation of removal proceedings, were six times more likely to be granted asylum than unrepresented ones.⁵²

With the Greiner-Pattanayak study serving as an important exception, the unifying finding in studies involving administrative proceedings is that the success rate for represented claimants is usually 15-30% greater than for unrepresented claimants.⁵³ The level of success varies by type of benefit case involved, the grounds for appeal, the nature of the claim, and its procedural posture as well.⁵⁴

4. Meta-Analysis

In contrast to the studies that focus on a particular type of case in a particular setting, Sandefur's body of work "takes the form of meta-analysis—a quantitative research synthesis that uses the findings of extant research to produce a summary of general knowledge about a given phenomenon."⁵⁵ Sandefur focuses "on a single empirical question: how much does lawyer

⁵¹ Donald Kerwin, *Charitable Legal Programs for Immigrants: What They Do, Why They Matter and How They Can Be Expanded*, IMMIGR. BRIEFINGS, No. 04-06, June 2004 (studying data from the Executive Office of Immigration Review for Fiscal Year 2003). In asylum cases, success rates were 39% for represented, non-detained persons, compared to 14% for unrepresented, non-detained persons, dropping to 18% and 3%, respectively, where the persons were detained. In suspension of deportation cases, 62% of represented, non-detained persons received relief, compared to only 17% of unrepresented, non-detained persons, with the figures dropping to 33% and 0%, respectively, where the persons were detained. The numbers are higher in each instance for non-detained immigrant persons than for detained ones. *Id.*

⁵² Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 743 (2002) (analyzing data provided by the INS Asylum Office for fiscal years 1998 and 1999, and the first seven months of 2000). Those placed in the defensive posture, which occurs if the INS apprehends an individual before he files an affirmative application, were four times more likely to be granted asylum if they were represented. *Id.* at 743.

⁵³ *Connecting Self-Representation to Civil Gideon*, *supra* note ____, at 51-55.

⁵⁴ *Id.*

⁵⁵ *The Impact of Counsel*, *supra* note ____, at 62. For Professor Sandefur's exploration of the challenges of this methodological approach and the restrictions on the studies that can be considered, see *id.*, at 62-64.

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representation affect who wins and loses in adjudication?”⁵⁶ Sandefur concludes that when “people are represented by attorneys, they are, on average, more likely to win in adjudication than people who are unrepresented. But how much more likely varies ... widely across different kinds of civil justice problems and different studies of lawyers’ impact.”⁵⁷

Sandefur’s approach attempts to move beyond the question of where representation by lawyers affects outcomes, but also to shed light on *why* representation mattered.”⁵⁸ Sandefur concludes that “[o]ne factor that seems to shape variation in the magnitude of the lawyers’ impact is procedural complexity—the complexity of the documents and procedures necessary to pursue a justice problem as a court case appears to account for some the lawyers’ effect on case outcomes.”⁵⁹ Sandefur describes this as “relational expertise”—skill at negotiating the interpersonal environments in which professional work takes place—may be a crucial component explaining the success representatives have in assisting vulnerable litigants who otherwise might be ignored by decisionmakers.⁶⁰

Lessons from the Empirical Work

As Sandefur’s analysis reflects, the lessons from the body of empirical work regarding the importance of representation reveal that the effectiveness of representation relates to a variety of factors beyond simply whether a party is represented.

1. The Representatives

One set of variables that affects outcomes of cases is the quality of the representatives and their tactics. Consistent with Sandefur’s conclusion regarding the importance of “relational

⁵⁶ *Id.*

⁵⁷ *Id.*, at 51-52.

⁵⁸ Albiston and Sandefur, *supra* note ___ at 106, discussing many of the limitations of randomized control trials.

⁵⁹ *The Impact of Counsel*, *supra* note ___, at 52.

⁶⁰ See *The Elements of Expertise*, *supra* note ___, at 30-32.

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expertise” of the representatives, Greiner and his co-authors attribute dramatic results achieved on behalf of tenants by the legal services lawyers in Quincy District Court in part to the to their expertise, including their litigation approach.⁶¹ Greiner et al. discuss at length the outreach, screening and intake system devised, the litigation style adopted and the model of service delivery.⁶²

Kritzer’s studies of social security disability and unemployment appeals underscore the importance of expertise in a forum as a key ingredient of the advocates’ success. Kritzer ultimately concludes that formal legal training is less crucial than day-to-day experience in the unemployment cases setting, and that it is the combination of general advocacy skills, knowledge of specific hearing practices and players, and substantive knowledge of the relevant law that characterizes the most effective advocates.⁶³ Kritzer identifies the following as part of the key role: preparing the party for the hearing room situation, helping to frame the issue, bringing the evidence to make the case, and asking the questions to make the case.⁶⁴

In the social security setting, Kritzer describes the importance of a “knowledgeable, experienced” advocate and articulates the differences between the inexperienced, experienced, and “very best” advocates.⁶⁵ Kritzer identifies differences that potentially make lawyer representation effective: “the rigor with which they screen and select cases, the thoroughness of their preparation, their credibility with the administrative law judges, and how strongly they feel about winning.”⁶⁶ The “very best” or “specialist” lawyers clearly stood out in Kritzer’s observations “in terms of their confidence, their thoroughness, and their detailed knowledge of

⁶¹ *The Limits of Unbundled Legal Assistance*, *supra* note ____, at 936-948.

⁶² *Id.*, at 936-42 & 945-47.

⁶³ Kritzer, *supra* note ____, at 23-77.

⁶⁴ *Id.*, at 37-43.

⁶⁵ *Id.*, at 133-49. The difference is notable not simply because the types of cases they accept, but the greater credibility afforded by judges to the best advocates and the strengths of these advocates in presenting their cases. *Id.*

⁶⁶ *Id.*, at 139.

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the system (both in the legal sense and in the people sense).”⁶⁷ Monsma and Lempert, in their study of public housing hearings in Hawaii, suggest that the increase in the success rate over time for represented litigants was due in part to the growing expertise of the representatives.⁶⁸

Where the representation is provided by lay advocates, including law students, the effectiveness of the representation will turn on whether the representatives have received specialized training for advocacy in the particular context. Kritzer’s unemployment study found both that inexperienced law students and low-paid advocates for employers tended to be less effective than other representatives but also that skilled lay advocates can rival skilled lawyers in certain settings, since they can acquire advocacy skills and specialized knowledge of the forum, law and players without formal training in the law.⁶⁹ Authors of one study from England conclude that “specialization, rather than professional status, seems to be the best guarantee of such protection.”⁷⁰

2. The Forum – Judge or Hearing Officer, Court or Agency

A second set of variables that impacts case outcomes involves the individual decision-maker and features of the forum more generally. Kritzer’s descriptions of the hearing processes for social security and unemployment cases reflect the heavy role played by the individual judges in shaping the flow of evidence, not to mention the conclusions drawn from the evidence.⁷¹ Data from the U.S. Department of Homeland Security on immigration cases reveal dramatically the

⁶⁷ *Id.*, at 146.

⁶⁸ Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation before a Public Housing Eviction Board*, 26 LAW & SOC’Y REV. 627, 663 (1992).

⁶⁹ Kritzer, *supra* note ____, at 76.

⁷⁰ Richard Moorhead, Avrom Sherr & Alan Paterson, *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC’Y REV. 765, 799 (2003).
Id. at 788.

⁷¹ See Kritzer, *supra* note ____, at 26-32, 127-32.

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disparity in outcomes based on the identity of the judge.⁷² A study of Philadelphia’s housing court found that two of the four significant independent variables related to the judge.⁷³

Where the decisionmaker or forum tends to favor one category of litigants over another, the favored litigants would have less of a need for representation since much of the key work is being performed by the court. Thus, various studies of courts handling housing cases identify the courts’ orientation favoring the claims of landlords⁷⁴, while studies of debt collection cases observe a similar favoritism toward plaintiffs, acting as if their complaints were presumptively valid⁷⁵; representation in these settings would be more important for tenants and debtors and less important for creditors and debtors.

3. The Applicable Law

The substantive⁷⁶ and procedural⁷⁷ law at issue in a particular proceeding constitute additional variables that will impact the outcome of cases. Tenants in jurisdictions or types of housing that recognize robust affirmative defenses and counterclaims would stand a better chance of retaining possession than those in private, unregulated housing in a jurisdiction that recognizes few defenses. While represented claimants in the immigration studies fared better

⁷² See, Jaya Ramji-Nojales *et al.*, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

⁷³ Eldridge, *supra* note ___, at 130-42. Eldridge found that tenants were nineteen times more likely to win their cases when an attorney represented them. *Id.* at 135-37. He employed a multi-method design to test the significance of eight variables, four of which ultimately proved to be significant. *Id.* at 135. The strongest association was between tenant representation and hearing outcome. *Id.* at 135-37. Two other significant variables related to the judge: whether a case was heard by Judge “J” and whether a judge makes a pro-landlord argument throughout the course of the hearing. *Id.* at 135.

⁷⁴ For example, Eldridge refers to the “judges’ orientation to eviction by virtue of [the landlords’] complaint.” Eldridge, *supra* note ___, at 142. Spencer Rand describes the system as one that reflects “that it was created by landlords to work in a landlord’s favor; . . . [i]t is rare that I have found a client proceed pro se and not end up with a possession order against her.” Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work’s Empowerment*, 13 CLINICAL L. REV. 459, 496-97 (2006)

⁷⁵ Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC’Y REV. 219, 226 (1975) (observing a favoritism afforded to plaintiffs in small claims courts).

⁷⁶ See, *Connecting Self-Representation to Civil Gideon*, *supra* note ___, at 74-75.

⁷⁷ See, *id.* at 75-76.

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than unrepresented ones regardless of the nature of the proceeding, the overall success rate for represented parties varied from a low of 18% to a high of 62%, depending on the claim.⁷⁸ The success rate for represented claimants in Social Security Disability Appeals drops between the initial administrative hearing and the reconsideration stage.⁷⁹ Where the substantive law affords few remedies for litigants, the results may be equally bleak whether the litigant is represented or not; where viable claims may be raised- or unknowingly waived- representation may be essential.

Regarding procedures, Sandefur's meta-analysis concludes that it is precisely where the procedures are most complex – “the complexity of the documents and procedures” – that the lawyer's craft seems to be most needed. Studies of representation for tenants in the New York City Housing Courts, emphasize the complexity of housing laws -- an "impenetrable thicket, confusing not only to laymen but to lawyers."⁸⁰ Not surprisingly, simplification of court procedures and forms has become an important theme in Access to Justice initiatives.⁸¹ As barriers to access are lowered through reducing procedural complexity and other means, the need for representation may lessen.

4. Alternatives to Full Representation

The empirical work concerning the impact of representation tends to mask a further set of variables: for those not receiving full representation by a lawyer, what forms of assistance, if any, are they receiving in a particular context? As discussed above, not only does the operation of the courts vary from jurisdiction to jurisdiction and courtroom to courtroom, but self-help and

⁷⁸ See, Kerwin, *supra* note ___ at 6; Schoenholtz and Jacobs, *supra* note ___, at 743.

⁷⁹ See William D. Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 CORNELL L. REV. 989, 1024-27 (1977) (discussing data from the 1970s and showing a success rate of 71% for represented claimants and only 48% for unrepresented ones, but a success rate of 20% at the reconsideration stage).

⁸⁰ 89 *Christopher Inc. v. Joy*, 318 N.E.2d 776, 780 (N.Y. 1974).

⁸¹ See, Part III.C., *infra* (Lowering the Forum Barriers).

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limited assistance programs, using an array of public and private lawyers, lay advocates and court personnel, have emerged in a variety of configurations.⁸² Even if the focus narrows to a comparison between the impact of full representation versus partial or “unbundled” assistance provided by lawyers, the comparison does not bring to light the full spectrum of different interventions.⁸³ Partial assistance might involve the preparation of pleadings, telephone or in-person advice, assistance on a brief, or even a court appearance by a lawyer.

At a more basic level, it is often difficult to determine what forms of assistance various litigants have in fact received, particularly where evaluation efforts are focused on results reflected in case files; as a result, we may be classifying as “self-represented” someone who has received substantial assistance.⁸⁴ The Greiner-Pattanayak unemployment study provides a cautionary tale here: a substantial portion of the “control group” actually obtained representation, complicating the assessment of the impact of representation.⁸⁵

5. The Litigants

The characteristics of litigants also should be viewed as variables, impacting not only a prediction as to how a litigant may fare absent assistance, but also how much, and what type of, assistance a litigant may need. Unrepresented litigants typically are poor and disproportionately

⁸² See, *supra* at _____. Greiner *et al.* describe the way in which each intervention can be evaluated through the use of a randomized control trial, as part of their description of a robust research agenda for the future. *The Limits of Unbundled Legal Assistance*, *supra* note _____, at 954-59.

⁸³ See, e.g., *Unbundling of Legal Services/Limited-Role Representation*, Chapter III.B.1, *infra*.

⁸⁴ A recent study of self-represented litigants (“SRL’s”) in three Canadian provinces revealed that 53% of the SRL’s sampled had been represented by an attorney earlier in the action. Dr. Julie MacFarlane, *The National Self-Represented Litigants’ Project: Final Report: Identifying and Meeting the Needs of Self-Represented Litigants, Executive Summary*, 9 (May 2013), available at http://www.representing-yourself.com/index.php?option=com_content&view=article&id=99&Itemid=97.

⁸⁵ See, _____ *supra*. In Greiner’s unpublished “Housing Court” study, not only did the lawyers assisting litigants in the “treated” group provide a level of assistance that more closely resembled partial assistance than full representation, but a substantial portion of the “control” group received a comparable level of assistance by the same lawyers. *The Importance of Representation in Eviction Cases and Homelessness Prevention*, *supra* note _____, at 18-20. Greiner *et al.* discuss at length the levels of assistance provided to the control and treated groups. *How Effective Are Limited Assistance Programs*, *supra*, note _____, at 17-21. “[A]bout 57% of the cases that went to litigation took up this offer” and other forms of assistance were available as well. *Id.* at 20.

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are minorities.⁸⁶ A study of the effectiveness of hotlines in the United States found that clients who rated their outcomes most favorably “were significantly more likely to be white, English-speaking, [and] educated at least to the eighth grade.”⁸⁷ Language or literacy, race/ethnicity, education and other “special barriers” that included a family member with a disability or serious health problem and transportation day care problems, were among the factors that rendered hotline callers less likely to be able to achieve favorable outcomes based on the advice.⁸⁸ Bedzek study of Baltimore Rent Court cases confirms the feelings of powerlessness for those who appear in court with representation.⁸⁹

The variables identified in the preceding sections combine to underscore the crucial role of power and power imbalances in the legal system. The substantive law, procedures, decisionmaker and forum may provide power in certain ways for some types of litigants, at the expense of others. Business interests, larger landlords, and repeat players generally may wield more power than litigants who typically are poor, facing barriers such as those involving health, education and lack of child care. Unfamiliarity with the forum’s process may further disadvantage some litigants, while representation itself provides a source of power.

Implications

That the question of when representation matters is a nuanced one involving considerations that include analysis of the variables beyond representation has implications both for further empirical work and for policy decisions involving the need for counsel and the allocation of

⁸⁶ See, e.g., note ____, *supra*.

⁸⁷ *Connecting Self-Representation to Civil Gideon*, *supra* note ____, at 71.

⁸⁸ JESSICA PEARSON & LANAE DAVIS, THE HOTLINE OUTCOMES ASSESSMENT STUDY, FINAL REPORT - PHASE III: FULL-SCALE TELEPHONE SURVEY 1, 46-51 (2002), available at <http://www.nlada.org/DMS/Documents/1037903536.22/finalhlreport.pdf>.

⁸⁹ Bezdek, *supra* note ____.

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scarce resources designed to promote access to justice. For example, the importance of full representation by a lawyer in a particular forum or with a particular type of case may depend greatly on the alternatives to representation in that setting, and a study that fails to uncover that crucial information may cloud the analysis it intended to illuminate. At a more basic level, the implications underscore the need for precision in framing research questions, both to insure that the information new research yields sheds light on the questions to which we most urgently need answers and to allow meaningful comparative analysis with respect to prior works.

At the policy level, conclusions involving not only the impact of representation but the crucial role of the other variables identified in the previous section should provide important clues in designing various forms of assistance that require choices about where we should presume full representation by a lawyer is needed and where lesser forms of assistance stand a better chance of providing effective help. The greater the level of power imbalance between the parties, and the greater the barriers facing the unrepresented litigant, the greater the level of intervention that will be needed to provide meaningful assistance. For litigants with higher education and fewer barriers, navigating systems with less procedural complexity, substantive law that affords relief at least on paper, and more user-friendly and accommodating courts, more limited forms of assistance might suffice. The allocation of expert advocates, whether as direct representatives or supervisors in a particular setting, as opposed to inexperienced advocates, should be analyzed with these realities in mind as well.

These considerations should also inform conversations regarding the need for a civil right to counsel. I have articulated elsewhere a synthesis that recognizes a civil right to counsel as part of an overarching Access to Justice strategy, which includes three prongs:

(1) changes in the operation of the forum, including the expansion of the roles of the court system's key players, such as judges, court-connected mediators and clerks, to

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require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights;

(2) the use of assistance programs, rigorously evaluated to identify which most effectively protect litigants from the forfeiture of rights; and

(3) the adoption of a civil right to counsel where the expansion of the roles of the key players and the assistance programs do not provide the necessary help to vulnerable litigants.⁹⁰

The three-pronged analysis points the way to targeted representation model, which serves as a middle ground between a categorical right to counsel and a case-by-case approach.

Full representation by skilled advocates with expertise in a particular setting remains an essential component to any strategy designed to provide meaningful access. The importance of representation extends beyond the outcomes of individual cases, impacting communities, legal systems and government coffers as well. As we test new innovations and develop new research, we must accept as a starting point that, particularly where basic human needs are at stake, vulnerable litigants on the wrong end of power imbalances should be presumed to need full representation by a skilled representative. Our promise of the balanced scales of justice requires nothing less.

⁹⁰ See, e.g., Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REVIEW 196 (July-August 2006). For an explanation of the three prongs, see, *id.*, at 42-43. I have also explored how the pieces of the comprehensive strategy are in place and tremendous activity is occurring, primarily at the state level, with activities at each of the three prongs. Russell Engler, *Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*, 7 HLPR 31, 45-50 (2013)(hereinafter “*Turner v. Rogers and the Essential Role of the Courts in Delivering Access to Justice*”).