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JUSTICE FOR INTERESTS OF THE POOR: THE PROBLEM OF NAVIGATING THE SYSTEM WITHOUT COUNSEL

Deborah J. Cantrell*

INTRODUCTION

In Chapter Five of *In the Interests of Justice*, Deborah Rhode focuses on a common dilemma facing many who are in need of legal assistance. As she notes: “Americans have had too few choices about how best to meet their legal needs and too little information about the choices that are, or should be, available.”¹ Rhode eloquently discusses the misperceptions that there are too many lawyers and too much litigation at too much cost. Additionally, she highlights the more critical problem of access to legal assistance. Following her lead, I will focus on one particular group’s difficulties with access to assistance: the poor.²

The problem of too few choices and too little information is exacerbated for the poor in a legal system that primarily considers itself a for-profit venture. No money can be made from a client who struggles daily to pay for such essentials as food and housing. Further, the poor often struggle with legal problems that can be intractable, ongoing, and often irresolvable solely by recourse to the legal system. As such, lawyers looking for a good profit margin dismiss the poor as potential clients. While the poor are served by a dedicated cadre of public interest poverty lawyers, “[t]he best estimates suggest that the nation supplies about one legal aid attorney for every nine thousand poor persons, compared with one lawyer for every three hundred residents.”³ Thus, the stark fact is that the poor are more likely than others to be unrepresented in the civil legal system.⁴ As a result, they

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1. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 131 (2000) [hereinafter Rhode, *IJ*].

2. As Rhode has noted, it is not just the poor who cannot afford counsel; many in the middle class have been priced out as well. See Deborah L. Rhode, *Access to Justice*, 69 *Fordham L. Rev.* 1785, 1785 (2001) [hereinafter Rhode, *Access*].

3. Rhode, *IJ*, *supra* note 1, at 120.

4. My focus will be on civil matters rather than criminal. Nonetheless, the poor

are more likely to either unsuccessfully navigate the legal system or choose to forego the system even with a meritorious claim.

We have at least three possible ways to approach rectifying the problem. We can provide more free attorneys for the poor. We can alter the legal process so that it is less dependent on attorneys. Or we can alter a poor person's capacity to navigate the system.⁵ Certainly, the second and third approaches are interrelated as it can be the case that altering the legal process to be less dependent on lawyers means that we have also increased a person's capacity to successfully navigate the system.

I will first discuss the ways in which we might increase free attorneys for the poor and whether it is realistic to believe that through those efforts we can fully meet the needs of the poor. I conclude that it is not. I will then consider some efforts that have been taken to alter the legal process and assess whether those efforts are likely to substantially help the poor resolve their legal problems. I also conclude that they will not.

Finally, I consider efforts to educate and empower the poor to better navigate the legal system themselves and conclude that pro se assistance projects offer the best current prospect for helping the poor effectively use the system. However, most of the current pro se assistance projects have a critical design flaw in that they do not include an appropriate evaluation methodology to assess whether the type of assistance provided does, in fact, better enable its user to navigate the legal system. I then offer some detailed, applied suggestions on evaluation methodology that may be usefully incorporated into the designs of pro se assistance projects.

I. POSSIBLE SOLUTIONS

A. *More Attorneys for the Poor*

There are two possible ways to increase the number of attorneys who are available to represent the poor without charge. First, increase the number of attorneys at legal services programs throughout the country. Second, increase the amount of pro bono work by attorneys otherwise engaged in private or governmental practice. Efforts are going forward on both fronts, and while there have been some positive gains, the gains have not met the need.

are often equally underrepresented in criminal cases, given the exceptionally low funding for criminal defense for the indigent. See Rhode, *Access*, *supra* note 2, at 1788-90.

5. These approaches harken to Rhode's "second guiding principle call[ing] for equitable access to legal services and adequate choices in the services available." Rhode, *III*, *supra* note 1, at 18.

1. Increasing the Number of Legal Services Attorneys

The majority of the American public believes that the poor should have attorneys in civil matters.⁶ That same public, however, is not willing to pay for those attorneys. For example, the primary source of funding for civil legal services comes through the Legal Services Corporation (“LSC”), which receives an annual appropriation from Congress to fund local legal aid programs across the country.⁷ In 1980, LSC was funded at \$300 million, and for the next thirteen years that funding remained at a similar actual dollar level.⁸ The level increased to \$400 million in 1994-1995, but then in 1996 was dramatically cut by 30% to \$278 million.⁹ Since that time, funding has increased, but only to approximately its 1980s level of \$300 million.¹⁰ The most conservative estimate is that LSC would need to be funded at \$600 million to even come close to funding the number of legal services attorneys needed.¹¹

Other funding sources have been tapped and developed, but not to the necessary level. Legal services advocates and their supporters have successfully lobbied state legislatures for funds. Those efforts have resulted in appropriations in twenty-six states that have ranged from a high of \$10 million to lesser amounts in the \$100,000 range.¹² Bar associations have instituted lawyer fund drives, cy pres awards have been sought,¹³ donation check-off boxes have been included on bar dues notices, and private foundations have been tapped.

However, the yields of those efforts have been heavily dependent on the wealth in the particular area.¹⁴ For example, in states such as

6. Rhode, *Access*, *supra* note 2, at 1791. That same public is also badly misinformed about the poor's current access to legal service, in that many people believe that the poor are currently legally entitled to assistance and currently do not have much trouble obtaining assistance. *See id.* at 1792.

7. Legal Services Corporation Act, 42 U.S.C. § 2996 *et seq.* (1974).

8. LSC Statistics: Annual LSC Appropriations 1980-2001, http://www.lsc.gov/press/pr_aLSCa.htm [hereinafter LSC Statistics]; *see also* Christopher Stone, *Crisis in the Legal Profession: Rationing Legal Services for the Poor*, 1997 Ann. Surv. Am. L. 731, 733-34.

9. LSC Statistics, *supra* note 7.

10. *Id.*

11. Stone, *supra* note 8, at 735. That conservative estimate assumes that LSC-funded programs would continue to work under the federally mandated restrictions which prohibit programs from working on, among other things, class actions and working with undocumented immigrants. *See id.* Presumably, that figure accounts both for the need for a greater number of attorneys and for inflation.

12. ABA Standing Committee on Legal Aid and Indigent Defendants, *A Chart of Significant Fundraising Activities for Legal Services* (2001), http://www.abanet.org/legalservices/sclaid_chart.html [hereinafter *Significant Fundraising Activities*].

13. *See id.* For a more detailed discussion of cy pres awards, see Brad Seligman and Jocelyn Larkin, *Fluid Recovery and Cy Pres: A Funding Source for Legal Services*, available at <http://www.impactfund.org/CyPres2000FED.html> (last visited Jan. 28, 2002).

14. *See Significant Fundraising Activities*, *supra* note 12 (detailing state-by-state

California where there are several large private foundations, those foundations have contributed almost \$19 million in grant funds.¹⁵ In contrast, in poor states like New Mexico, foundation funding has only been \$117,000.¹⁶ Similarly, individual donors in the wealthy state of Florida gave \$1.7 million, while donors in the poorer state of West Virginia gave only \$65,000.¹⁷

Further, some of these funds come with restrictions.¹⁸ State legislatures have mirrored federal restrictions or have funded only certain substantive areas; and foundations often have a bias against litigation, and most will not fund any legislative advocacy work. Therefore, the recipient legal service program is often not able to fully meet the range of legal needs or the volume of legal problems presented by its poor clients.

By far the most extensive and fruitful effort to increase legal services funding has been the creation of interest-on-lawyers'-trust-accounts ("IOLTA") programs which have generated funds roughly equal to the amount of state and local funding combined.¹⁹ Yet even the total amount of yearly IOLTA funding, when added to current LSC funding, would bring spending on legal services up to just over its high water mark of \$400 million.²⁰ Further, IOLTA programs are under constitutional challenge in both the Fifth and Ninth Circuits on the argument that the programs amount to unconstitutional takings in violation of the fifth amendment.²¹

In the end, while legal services supporters have been creative in seeking new funding, the social and political response has been spotty. Governments seem unlikely to increase appropriations, private donations are not substantial enough, and foundation funding is limited and depends too much on geographical location. Therefore, it is unrealistic to think that the poor are likely to see their legal aid programs hiring substantial numbers of new attorneys. The focus then

yields for the various types of efforts).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Stone, *supra* note 8, at 734; see also *Significant Fundraising Activities*, *supra* note 12. Every state has an IOLTA program in which attorneys in private practice deposit client funds in special accounts on which any interest that accrues is made available for funding legal services. *Id.* Some states have voluntary programs, others are mandatory, and some have provisions for clients to opt out of the program. *Id.* Some programs also apply to certain funds related to real estate closings. See *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097 (9th Cir. 2001), *reh'g en banc granted*, 248 F.3d 1201 (2001).

20. *Significant Fundraising Activities*, *supra* note 12 (summing the IOLTA amounts listed in the chart gives a total of roughly \$116 million).

21. *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998) (now being reheard in the Fifth Circuit); *Washington Legal Found. v. Legal Found. of Washington*, 236 F.3d 1097 (9th Cir. 2001), *reh'g en banc granted*, 248 F.3d 1201 (2001).

turns to whether the private bar, through pro bono work, will fill the need. The answer, as seen below, is unfortunately no.

2. Pro Bono Efforts

Urging attorneys to represent the poor pro bono is not a new or untried response. Legal aid societies in the early 1900s relied on pro bono contributions.²² The ABA Model Rules of Professional Conduct have, since 1983, called for every attorney to perform fifty-hours of pro bono service per year.²³ Today, local bar associations have pro bono referral projects.²⁴ Most large law firms and many small law firms have formal pro bono programs.²⁵ Yet, despite the pro bono infrastructure, lawyers have not heartily responded with services. As Rhode details, the pro bono picture is bleak. Half of the country's lawyers perform no pro bono work and, for those that do, the average contribution is not even half an hour a week.²⁶ Further, while large law firms are happy to tout their pro bono programs, only a third of the 500 largest law firms are publicly willing to commit to the ABA's Pro Bono Challenge, requiring firms to dedicate three percent of total billable hours to pro bono work.²⁷

If we are to look to pro bono efforts to fill the poor's legal needs, we must grapple with the large divide between rhetoric and practice. Observers, Rhode included, have considered many different solutions. Some have called for mandatory pro bono requirements.²⁸ Others have charged that mandatory pro bono would discourage volunteerism and would be administratively impractical.²⁹ Still others

22. Martha F. Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973*, at 10-12 (1993).

23. Model Rules of Prof'l Conduct R. 6.1 (2000).

24. The ABA's Standing Committee on Pro Bono and Public Service maintains a directory of each state's pro bono programs which is available at <http://www.abanet.org/legalservices/probono/foreword.html>.

25. See Pro Bono Institute, *The Law Firm Pro Bono Resource Guide* (1999) (detailing law firm pro bono projects around the country.)

26. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415, 2415 (1999) [hereinafter Rhode, *Cultures of Commitment*].

27. Rhode, III, *supra* note 1, at 37.

28. See David Luban, *Lawyers and Justice: An Ethical Study* 277-89 (1988) (proposing a forty-hour annual pro bono contribution from every attorney and arguing a moral basis for the requirement); Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 *B.U. Pub. Int. L.J.* 215 (1993) (proposing that lawyers be required to provide twenty hours of service per year or pay a monetary equivalent in lieu of providing service). In contrast to the call for mandatory pro bono is the argument that pro bono should not be pursued at all because it distracts attorneys from the only real solution, funding more legal services lawyers. See Rob Atkinson, *A Social-Democratic Critique of Pro Bono Public Representation of the Poor: The Good as the Enemy of the Best*, 9 *Am. U. J. Gender Soc. Pol'y & L.* 129 (2001) (suggesting that the better approach is to tax lawyers and use those funds to supply more legal services lawyers).

29. See Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong*

have argued that the issue should be guided by sociological and psychological research and theories on volunteerism and help-giving behavior.³⁰ In the end, the active commentary of more than ten years about pro bono work and the clear opportunities to engage in pro bono have done nothing to spur attorney participation. The majority of attorneys are either unable or unwilling to move beyond supportive talk for pro bono.

Further, there does not appear to be any focused groundswell of general public opinion in favor of any kind of social services to the poor that would create pressure on attorneys to participate more thoroughly in pro bono. In fact, public support of the poor as a group is waning, as seen by punitive legislation like welfare reform³¹ and quality-of-life statutes criminalizing behavior such as sleeping on a public park bench.³² The public at large seems to hold the same sentiment as many attorneys—happy to talk about helping the poor so long as it requires little action and does not disrupt one's daily routine.

While one would like to be more optimistic about pro bono's role in meeting the legal needs of the poor, it is clear that pro bono in and of itself will not solve the problem. Efforts to increase pro bono must go forward, but with a realistic expectation that pro bono work will not greatly reduce the number of poor needing assistance. If we cannot expect that we will be able to meaningfully increase the number of attorneys available to represent the poor, then we must consider our next option: altering the legal process so that attorneys are less necessary.

B. *Altering the Legal Process*

Legal advocates and court personnel have both concluded that it would be helpful to those trying to get into court if the required forms and procedures were simplified.³³ Some efforts are underway, such as statutory requirements in California that the courts create simplified forms for summonses, complaints, and answers in child support cases.³⁴ The simplified form includes both the summons and

Answer to the Right Question, 49 Md. L. Rev. 78, 101 (1990) (providing a detailed history of the pro bono movement, its definitional problems, and its practical and logistical challenges). Lardent is now the president of the Pro Bono Institute, a non-profit organization dedicated to increasing pro bono work of lawyers.

30. See Rhode, *Cultures of Commitment*, *supra* note 26, at 2426-31.

31. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended at 42 U.S.C. § 601 (Supp. 1999)).

32. See generally John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts, and Community Compassion*, 44 St. Louis U. L.J. 811, 812-13 (2000) (giving an overview of quality-of-life crimes that have the effect of criminalizing poverty and homelessness).

33. See Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Court Managers* 110 (1998).

34. Cal. Family Code § 17400(d) (West Supp. 2002).

complaint in the same document and includes a notice of the proposed judgment. While the new form streamlines the court documents required in a child support action, it still requires the plaintiff to understand basic legal processes of service and notice. To a lawyer, the concept that due process includes adequate notice is second nature, as is the way in which that process is put into practice. To a non-lawyer, the concept that due process includes notice may be familiar, but the practice is often foreign and mysterious and is not made clear merely because the summons and the complaint are one form instead of two.

Another example of a simplified process can be found in probate, where almost all states have adopted the Uniform Probate Code's process for "informal" probate and for distribution of estates containing only a modest amount of personal property.³⁵ The informal probate process is supposed to encourage distribution of a decedent's estate with less judicial administration. Similarly, the personal property affidavit is supposed to allow for distribution of small estates not containing real property without any judicial supervision. The difficulty in both cases is that a lay person must already understand issues such as title to real and personal property, community property law in some states, mandatory spousal distribution shares, creditor rights, and other complicated legal topics. The simplified process does not at all help the lay person understand the law with which she must comply. In fact, it may set up a false hope that an otherwise complicated legal matter may be handled without counsel.

Simplification processes that have the effect of removing a matter entirely out of the judicial realm immediately raise the concern that less prestigious legal issues do not warrant judicial attention. There is rich and informative literature on the merits and risks of alternative dispute resolution ("ADR") that considers the various types of ADR and grapples with whether those without power and special legal knowledge are better served by particular kinds of ADR than by going forward in court.³⁶ It is beyond this article to review that literature, but it is important to note that there is no clear answer to be had. Thus, we cannot say now that ADR is the way in which the system can fill the needs of the poor without counsel.

35. See Unif. Probate Code § 3-301 (informal administration) and § 3-1201 (distribution of personal property by affidavit) (amended 1993). While probate may not often apply to the poor, it is a clear example of how good intentions of attorneys do not necessarily lead to practices and procedures that are easier for a lay person to use.

36. See Steven H. Goldberg, "Wait a Minute. This is Where I Came In." *A Trial Lawyer's Search for Alternative Dispute Resolution*, 1997 BYU L. Rev. 653 (containing a detailed bibliography on ADR).

We might also consider “delegalizing” some matters by taking them entirely out of the judicial or alternative dispute systems and having them proceed in some other fashion. For example, one could argue that uncontested divorces that do not involve property or custody issues need not involve the legal system at all and could be processed in a purely administrative fashion just like drivers’ licenses. As lawyers, our initial reaction is to think that every matter that is currently legal must remain legal, but we must consider whether that response is merely protecting our turf or whether it is based on legitimate concerns. Certainly delegalizing is not appropriate in cases requiring a neutral arbiter, where the legal system provides a method for moderating power imbalances, or where the dispute involves more complex statutory or common law rights. But delegalization will never be a realistic possibility until attorneys are willing to relinquish control over the process, or the lay public becomes sufficiently activist to envision a different system.³⁷

The efforts that have been made to move certain kinds of cases out of the courts have generally resulted in maintaining the adversarial system in an administrative setting. For example, when a poor person is denied welfare benefits, she must request a fair hearing to challenge the denial.³⁸ The hearing, although administrative and less formal than a court appearance, is adversarial and colored by rules of civil procedure and evidence: a hearing brief should be submitted, witnesses must be subpoenaed, and testimony is given under oath.³⁹ For a lay person, the administrative process is just as intimidating as if the hearing had been held in a courtroom. Thus, delegalization must be something more than moving the adversarial system from courthouse to business office.

Thus, we find ourselves in the same position as we did with funding more lawyers for the poor and encouraging more pro bono: the effort to alter the legal process is admirable and achieves some success, but not enough to cover the poor’s legal needs. We must consider our related option of taking steps to educate and empower the poor so that they are able to represent themselves adequately in the existing system.

37. There was a movement for states to convene stakeholders in the legal system to consider the future of their state’s court system and consider what the court system should look like thirty years in the future. Some of those state plans envisioned delegalizing certain matters. See, e.g., Report from the Commission on the Future of the Tennessee Judicial System, <http://tscaoc.tsc.state.tn.us/geninfo/publications/futures.pdf> (last visited Jan. 28, 2002).

38. See, e.g., Cal. Welfare & Insts. Code § 10950 (West 2001)

39. See, e.g., Western Ctr. On Law & Property, *CalWORKs: A Comprehensive Guide to Welfare and Related Medi-Cal Issues for California Families*, ch. 14, <http://www.wclp.org/advocates/library/calworks/ch14a.html> (last visited on Jan. 28, 2002).

C. *Alter the Capacity for Self-Representation*

If we increase the capacity of the poor to represent themselves in the existing system, we take an approach that, at its best, builds the skills of a person and equips the person with ways to respond to future legal problems without using a lawyer. An effective pro se assistance project empowers and builds self-confidence.⁴⁰ It gives a person experiential information about the judicial process and how to better navigate through it. All of those results should lead to a longer-term ability to fend for oneself in the judicial system.⁴¹ However, those long-term results can only happen if the pro se assistance project truly is effective in helping users to achieve better legal outcomes. Therefore, we need to be diligent about accurately evaluating the effectiveness of the projects.

Not surprisingly, poverty law programs have often been in the lead in developing new and innovative pro se assistance programs. Recognizing that their existing staffs are unable to provide direct representation to all potential clients, the programs have created various pro se assistance programs rather than turn clients away. Examples of pro se assistance programs include written self-help packets,⁴² web-based information centers,⁴³ staffed courthouse assistance centers,⁴⁴ and court house-based computerized screen touch kiosks.⁴⁵

Each of these types of pro se assistance requires some level of financial commitment by the program and is based on the assumption that the model of assistance, in fact, does assist the user. Because the demand for any kind of assistance has been strong, the emphasis has been on developing and rolling out a pro se assistance program. There has been less concern on ensuring that an appropriate evaluation plan is in place to check whether the program is meeting

40. See generally Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (1992) (arguing that lawyers must practice law in a way that empowers clients rather than dominates the client and the process).

41. That is not to say that all legal matters could ultimately be effectively handled pro se. Certainly, some legal matters will continue to be sufficiently complicated that they are not amenable to pro se assistance.

42. For examples of written self-help packets that can be downloaded, see the web site maintained by the Self-Service Center of the Superior Court of Arizona, Maricopa County, one of the oldest pro se assistance programs in the country, at http://www.superiorcourt.maricopa.gov/ssc/info/gen_info_available.asp (last visited Jan. 28, 2002).

43. Pine Tree Legal Assistance, the primary legal aid program in Maine, has been in the forefront of using technology for client assistance. See Pine Tree Legal Assistance, at <http://www.ptla.org> (last visited Jan. 28, 2002).

44. See, e.g., United Way of Central New Mexico, Participating Organizations, at <http://www.uwcnm.org/organizations/abqbarassociation.htm> (last visited Jan. 28, 2002); see also Goldschmidt et al., *supra* note 33, at 79-80 (listing examples of types of pro se assistance projects including staffed court house assistance centers).

45. See, e.g., Legal Aid Society of Orange County & Commission Legal Services, at <http://www.legal-aid.com/I-CAN/ican.html> (last visited Jan. 28, 2002).

the actual needs of its users and helping them achieve better legal outcomes.

It is critical that programs not stop at the “feel good” level of evaluation. That is to say, program personnel feel good when they can offer some option to a client other than a bare “No, we can’t take your case.” However, if that option does not truly help the client make some headway on her legal problem, then the program has done nothing more than inefficiently allocate some of its limited resources.

1. Some Background: The Rise in Pro Se Parties

Data suggests that the number of pro se litigants has been increasing in the last five years.⁴⁶ Further, poor people are more likely to represent themselves than are the non-poor.⁴⁷ In those legal areas in which the problems of the poor are common, the respective courts have become the “poor people’s courts” where, in some jurisdictions, over four-fifths of litigants are proceeding pro se.⁴⁸ Thus, the development of pro se assistance programs has predominated in areas such as family law, landlord-tenant, and small claims.⁴⁹ The development has been almost exponential as survey data suggests that few programs existed before 1995. Since that time at least forty-five states have pro se programs with about 150 pro se assistance programs in operation throughout the country.⁵⁰

While the increase in pro se assistance programs has brought with it increased reporting on the availability of the programs, there is little information publicly reported on the effectiveness of programs or on methodologies for evaluating assistance models. For example, in a 1998 national survey of pro se assistance projects, survey respondents were asked to provide general descriptive information about their particular assistance project, including whether or not an evaluation had been performed.⁵¹ The summary of the survey responses notes nothing on possible measures of efficacy of assistance other than clients’ “feel good” responses.⁵²

2. Existing Evaluation Methods

A 1996 survey of a sample of pro se assistance programs demonstrates that if a program had some form of ongoing evaluation methodology, it was exclusively a survey-based methodology that

46. American Judicature Soc’y, A National Conference on Pro Se Litigation: Report and Update 3 (2001) [hereinafter Report and Update].

47. Goldschmidt et al. *supra* note 33, at 11.

48. Rhode, *Access*, *supra* note 2, at 1804.

49. Report and Update, *supra* note 46, at 5.

50. *Id.*

51. *Id.* app. A.

52. *See id.* app. B at 10.

focused on gathering information on the volume of clients seen by the project, some client demographic information, and a general assessment from the client on whether the program's services were easy to use and were helpful.⁵³ Of the fourteen assistance programs that were reviewed in the 1996 survey, seven had no evaluation methodology in place and the remainder used a basic client satisfaction survey (sometimes combined with a similar court personnel satisfaction survey).⁵⁴ While a client satisfaction survey does provide useful information about whether a client could navigate the program and whether the client received some benefit, even if just a psychological boost, the survey information provides limited information on how the program affected the outcome of the client's legal problem. For example, satisfaction surveys are generally administered immediately after the client has received assistance and before the client has taken any further steps in her legal matter. Consequently, the client cannot report on whether she was actually able to better handle the legal matter—clearly the kind of outcome information that helps to determine program efficacy.

Another limitation of a client satisfaction survey is that it is likely skewed by a halo effect, the client counterpart to the attorney "feel good" effect. The client is relieved to have had some assistance, often the first compassionate response to the client's problem (the angel with the halo), and the client's response to the survey reveals more about the good feelings and relief she has experienced than it does about the actual impact the assistance had on the outcome of the client's legal problem.

Some reports on evaluation methodologies go beyond satisfaction surveys. One of the earliest reported studies, done well before the current rise of pro se assistance, was conducted by Rhode while a law student at Yale.⁵⁵ In that study, Rhode and her colleague used empirical methods to discern whether the practice of prohibiting the use of self-help divorce kits under the auspices of the charge of unauthorized practice of law were supported by policy arguments that a divorce required the adjudicatory experience and professional advice of a lawyer. The study's methodology included a random sampling of court dissolution files, post-dissolution questionnaire surveys to a random sampling of plaintiffs' counsel in the reviewed court files, and interviews with a sampling of the plaintiffs.

What is notable about the dissolution study is that it relied on data from multiple sources. That design permits the evaluator to independently assess the same information from multiple sources. For example, Rhode and Cavanagh asked both plaintiffs and their

53. Goldschmidt et al., *supra* note 33, at 73-104.

54. *Id.*

55. Ralph C. Cavanagh & Deborah L. Rhode, Project, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 Yale L.J. 104 (1976).

counsel what role counsel had played in negotiating property arrangements. Counsel reported negotiating property issues in about sixty percent of their cases, whereas clients reported that counsel had negotiated a property issue in only thirty-two percent of their cases.⁵⁶ Had the evaluation methodology included a survey of only counsel or clients, the evaluation would have missed an interesting finding relevant to assessing the self-help divorce kits (i.e., that clients and attorneys assess attorney involvement differently).⁵⁷

There are some other larger scale efforts underway to develop evaluation models that more actively and accurately track the efficacy of pro se assistance models. For example, in California, the state legislature appropriated approximately \$950,000 to fund joint projects between local courts and local legal service providers (called partnership projects), and the funds have been used to establish some kind of pro se assistance program.⁵⁸ As part of the grant conditions, each project is required to develop a detailed evaluation plan.⁵⁹ The plan must address certain high priority questions such as what case types are amenable to self-help assistance, whether pro se parties were more prepared after using self-help materials, and what impediments existed to a client's successful use of the self-help program.⁶⁰ Programs are requested to use measuring methodologies that include: interviews with users and non-users of the program, focus groups with users and non-users, random follow-up telephone samplings of users, client satisfaction questionnaires, analysis of a sampling of court files of users and non-users, and court observers to assess the performance and case dispositions of users and non-users.⁶¹

Notably, the suggested methodologies encourage programs to assess both users and non-users, adopting in essence a standard experimental design of creating a control group (non-users) with which to compare the experimental group (users). Using a control group design is an effective method for testing the difference that an intervention, in this case self-help assistance, can make and is an evaluation tool that should be used actively. Of course, there are still some logistical issues that come with using a control group. For example, how does one find a group of non-users who are similar enough to the users so that comparisons are fair? Or, how many

56. *Id.* at 144.

57. This disparity in self-reporting results also highlights that self-assessments may not be the most reliable method of data collection and that having a second way of tracking the same information is advisable.

58. Legal Services Trust Fund Program Equal Access Fund 2000-2001 Partnership Grants (2001) (on file with author).

59. Legal Services Trust Fund, State Bar of California, Reporting Requirements and Evaluation Methodology for Partnership Grant Recipients (June 23, 2000) (unpublished memorandum on file with author).

60. *Id.*

61. *Id.*

people need to be in each comparison group so that any gathered information can be compared in a statistically significant way (i.e., having groups of only five people in each means that comparisons are not likely to be statistically significant)?⁶²

In addition to control groups, one methodology mentioned above that has rarely been used is that of trained observers. Trained observers are commonly used in social science, but have not been reported as an evaluative tool in the legal arena.⁶³ Trained observers can be used in the pro se arena to evaluate programs such as trial preparation clinics or small claims court representation projects or other programs that focus on court appearances. The trial observer can rate self-help participants on issues such as whether the person brought the necessary documents to court, whether the participant was able to clearly tell her or his story to the court, whether the participant was respectful, and what was the substance of the court's ruling. The trial observer could also rank a representative sample of other pro se parties that had not received any self-help assistance. At least one of the California partnership projects has been using a trained observer.⁶⁴

3. Client Characteristics and Evaluation Designs

In addition to the methodological studies above, there is some demographic information about the kinds of people who are more often proceeding pro se that helps frame some of the evaluative issues that should be considered, especially for poverty lawyers. For example, in the national survey of pro se assistance projects, survey respondents indicated that eighty percent of clients were likely to

62. Statistical significance is rarely, if ever, considered when lawyers present comparison information. In contrast, in the experimental sciences, results are discounted unless statistically significant. If we are to meaningfully assess the results of pro se assistance, we need to have evaluation methodologies that include sample sizes that will permit reliable statistical analysis. We also need to understand basic statistical analysis and that the mere reporting of percentages is insufficient and possibly misleading. *See, e.g.*, Jessica Pearson & Lanae Davis, *The Hotline Outcome Assessment Study: Final Report-Phase II: Pre-Test of Follow-Up Telephone Questionnaire 27* (2000), <http://www.equaljustice.org/hotline1/hotlinepretest.pdf> (discussing the sample size needed to generate statistically significant results with a standard error rate of five percent, the most generous standard generally used in social science research).

63. One exception is legal programs designed to teach and critique attorneys on legal skills such as examining a witness, opening and closing arguments and the like. *See, e.g.*, Nat'l Institute for Trial Advocacy, *Teaching Methodology*, at <http://www.nita.org/about.htm> METHODS (last visited Jan. 28, 2002).

64. IOLTA Info. Services & Sonoma County Legal Aid, SHAC: The First Six Months (Apr. 13, 2001) (unpublished memorandum on file with author). The partnership project developed an observation protocol and then trained law student volunteers as observers. At the time of the April 13, 2001, evaluation, the observers had reviewed only nine users and nine non-users, a sample size too small to generate data generalizable to the self-help program.

have a high school diploma and that as many as one-fifth of the clients had some college education.⁶⁵ That statistic may suggest that only people with some level of education (with some corresponding confidence) even opt to pursue pro se assistance, whereas those less educated are reluctant even to venture into pro se assistance. Thus, one issue that programs, especially poverty law programs, need to evaluate even at the outset of designing a pro se assistance program is whether they invite client participation.⁶⁶

Further, pro se assistance programs that are targeted at the poor have found that while education is correlated with the ability to successfully proceed as a pro se party, there are even more basic factors that need to be considered such as the client's ability to read and speak English, whether the client has emotional or mental disabilities, and whether the client has some degree of self-motivation.⁶⁷ These issues are not unique to the delivery of pro se assistance, and poverty lawyers must deal with language, education, and disability issues in full representation cases as well. However, in full representation cases, the lawyer remains involved with the client throughout the entire process and has the ability to regularly check in and assess how the client is faring as well as take on the responsibility of managing the flow of the legal process. In pro se assistance, given the absence of an ongoing relationship with an attorney, there must be some way to evaluate the assistance model to ensure that its design does not deter participants because of education, language, or other issues.

This is another area in which looking outside of the law is useful. For example, readability experts can assess self-help materials to ensure that the materials are written at a level that is most accessible for the users of the program. In that manner, the pro se program has some assurance at the outset that a potential client will be comfortable with the materials. Then, clients can be interviewed after they receive

65. Report and Update, *supra* note 46, app. B at 3. See also Goldschmidt et al., *supra* note 33, at 12 (noting that an extensive 1990 survey done in family law court in Maricopa County, Arizona found that most pro se litigants had one to three years of college education and discussing similar findings in New York and California).

66. An interesting example is a new court-based program in California in which, by statutory mandate, all state family law courts must have a family law facilitator. Cal. Family Code § 10002 *et seq.* (West Supp. 2002). The family law facilitator is a court employee who provides, among other services, free educational materials, court forms, and assistance with filling out forms. The facilitator is the person to whom potential family law pro se parties are routinely referred by all court personnel from clerk's offices to courtrooms. See Judicial Council of California, California's Child Support Commissioner System: An Evaluation of the First Two Years of the Program 16-18 (May 2000) (on file with author). The facilitators report that over half of their participants are the very poor (and, presumably, the less educated). *Id.* at 45.

67. Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 30 Clearinghouse Rev. 1178, 1183 (1997); see also Pearson & Davis, *supra* note 62, at 28.

or use materials as a double check evaluation on the accessibility of the materials. The need for readability evaluations is made clear by a comparison of some current written self-help materials now available over the Internet.

One example comes from the self-help web site maintained by the Florida state court. In the family law section there is a document titled "General Information for Self-Represented Litigants."⁶⁸ One issue is whether a person who has not been to court before will know that the term "litigant" refers to her. The first paragraph starts in bold and tells the reader that she "should read this General Information thoroughly before taking any other steps to file [her] case or represent [herself] in court."⁶⁹ The reader then faces nine more pages of information, including five pages of legal definitions.

Compare similar self-help materials provided by Pine Tree Legal Assistance of Maine in which a person who looks up information about self-representation in a divorce case is told:

Divorce and the sharing of parental rights are serious matters. For most people, this is a difficult, stressful time. In this guide, we try to explain and simplify the court process for you. We hope that this will help you feel more confident about dealing with the legal system. You can get through this ordeal. Begin here and take one step at a time.⁷⁰

Clearly, both the readability and tenor of the two documents is dramatically different, with the Pine Tree material being more accessible and encouraging. As lawyers with a deep comfort with legal terms and processes, we should be reminded that we may not be the best assessors of how readable a document may be to a non-lawyer.⁷¹

68. General Information for Self-Represented Litigants, Family Law Forms, Commentary, and Instructions, <http://www.flcourts.org/osca/divisions/family/bin/generalinfo.pdf> (Sept. 2000).

69. *Id.*

70. Divorce and Parental Rights in Maine, <http://www.ptla.org/Divorce.htm>. Pine Tree's home page also includes information in Spanish, Arabic, Russian, and French.

71. A program's own potential clients are an excellent source of readability "experts" and a good test group for review of materials. For example, once initial materials are developed, users should be encouraged to provide feedback on the documents. The feedback then can be incorporated into the documents and the documents modified over time until a solid set of materials is created. This method has been effectively used by poverty law programs. One example comes from the pro se divorce clinic run by Legal Services of Eastern Michigan ("LSEM"). LSEM created informational packets for their divorce clinic and they actively sought client feedback on the documents and continuously modified the packet until clients were regularly reporting that the packet was easy to use. Once the final packets were in use, LSEM tracked how many clients were able to obtain a dissolution judgment and found that over a two-year period, of the approximately 800 clients who went through the clinic and used the materials, roughly eighty-five percent obtained a judgment. Telephone interview with Ed Hoort, Executive Director, Legal Services of Eastern Michigan (Aug. 29, 2001).

4. Methodological Challenges⁷²

In addition to client characteristics, pro se assistance projects present methodological challenges. Some of the difficult questions that an evaluation design must consider are discussed below.

a. *What are the ultimate service goals of the project?*

The most modest service goal of a pro se assistance project is to give the client some psychological boost that she can actually proceed as a pro se party. Most programs—and, more importantly, most funders—expect a project to have more ambitious goals, such as educating a client about the law involved in her problem, creating realistic expectations about the extent of the solution available via legal process, ensuring that the client has appropriately filled out any required court paperwork, better preparing the client for court appearances, and helping the client to get a better ruling from the court.

Each of the above goals requires specific attention in an evaluation design and may have to be measured by different methods. For example, the goal of educating a client may involve an assessment of the readability of written materials as well as an assessment of the client's increased knowledge as measured by self-reporting and by reporting of the assisting project personnel.

b. *How accessible and amenable to evaluation will the potential clients be?*

In order to assess the effectiveness of pro se assistance, a client will need to be followed over the course of her legal proceeding. Thus, the potential clients must be willing to either fill out written surveys or agree to an interview at some point, or points, after receiving assistance. This may be more difficult to do if the potential clients have housing-related legal problems or serious health problems, as those clients are more likely to be transient or have other disabilities that make follow-up challenging. Similarly, clients experiencing particularly traumatic legal problems may not be agreeable to speaking further about the problems. As one study proposal for legal hotlines details, programs may need to plan on contacting three times the number of clients in order to achieve a sample size large enough to generate statistically significant results.⁷³

72. For a good overview of methodologies for program evaluation, see Gregg G. Van Ryzin & Marianne Engelman Lado, *Evaluating Systems for Delivering Legal Services to the Poor: Conceptual and Methodological Considerations*, 67 *Fordham L. Rev.* 2553 (1999).

73. Pearson & Davis, *supra* note 62, at 24-25 (discussing the need for a large interviewee pool and the need to consider that certain people were more likely than

c. *How will the assistance project allocate its personnel so that both project services and evaluation needs are met?*

Evaluations require some commitment of personnel, both to gather data and to analyze it. Further, adequately analyzing data often requires knowledge other than the legal knowledge that is required to give assistance. Thus, project designers must plan for legal personnel and evaluation personnel. If the project design does not consider evaluation costs at the outset, then it may find itself unable to effectively evaluate its services. Evaluation costs can be expensive. For example, the study proposal for legal hotlines estimated that to complete its assessment of the effectiveness of hotlines, assuming five hotlines participating, evaluation costs would run approximately \$140,000.⁷⁴ Nonetheless, programs can help confine costs by collaborations with others, such as social science graduate programs at local universities, local law schools, and the like.

Despite the challenges of developing a solid evaluation design, it is critical that pro se assistance programs dedicate time and resources to the effort. With overall program resources limited, a program cannot afford to continue providing services that are not truly assisting the client.⁷⁵

others to have disconnected phone numbers, including those who initially contacted the hotlines with housing problems, male clients, racial minorities, and clients with the lowest incomes).

74. *See id.* at 31.

75. There is a burgeoning national dialogue between pro se assistance programs which includes, among other sources, a pro se listserve organized by the American Judicature Society, available at <http://boris.neton-line.com:8080/~prose>. The National Center for State Courts also sponsors a web site that collects pro se resource information, Nat'l Ctr. for State Courts, Pro Se Litigation at <http://www.ncsc.dni.us/KMO/Topics/ProSe/PSsummary.htm> (last modified May 9, 2001). Additionally, the Legal Services Corporation has recently allocated money for a national technology assistance project that is designed to help share local technological innovations that increase the delivery of legal services to the poor. Telephone interview with Robert Cohen, Executive Director of the Legal Aid Society of Orange County (August 7, 2001) (the Legal Aid Society of Orange County is the recipient of the technology support grant). Finally, there are some large scale evaluations ongoing that assess court processes and design to determine ways in which the judicial system itself might better respond to pro se parties and better collaborate with pro se assistance programs. *See e.g.*, Meeting the Needs of Self-Represented Litigants: A Consumer Based Approach, http://www.judgeline.org/Public_Access/proposal.html (last visited at Mar. 10, 2002) (describing a joint project between the National Center for State Courts and the Illinois Institute of Technology to use business-based process design and communication theory to redesign court processes so they are more usable to pro se parties); *see also* Richard Zorza, Designing, From the Ground Up, A Self-Help Centered Court, One in Which the Litigant Without Lawyer is the Norm (2001), available at <http://dev.cast.org/castweb/dgrogan/law/selfhelp/index.cfm?i=5> (including a discussion of the emotional, skill, and physical barriers that pro se parties encounter in a courthouse).

CONCLUSION

The lack of legal representation for the poor is a large and growing problem. If we are to pay attention to the poor's interest in justice, then we must find ways to increase the number of attorneys for the poor, make the legal system more manageable for the poor, and help the poor become better equipped to deal with the existing system. Each of those approaches could solve the poor's need for representation, but none are trouble free. To increase the number of attorneys requires either substantially more funding from government or private sources or substantially more dedication to pro bono projects by attorneys. Both hopes are unrealistic, as the best we have seen over the last several years are marginal increases in funding and pro bono work. To make the legal system more manageable for the poor requires a change in the judicial process. The efforts thus far to simplify forms and procedures have been modest and have not eliminated the need for legal advice. Further, moving matters from the judicial arena to the administrative arena while leaving the basic adversary process in place does not help the poor better understand or better navigate the process.

Thus, focusing on educating the poor so that they are better prepared and able to navigate the legal system by themselves appears the most advantageous response. It creates lasting skills that can be used for future problems. It allows a poor person to have a measure of confidence that the legal system, as it exists, is navigable without counsel.

It is promising that the number of pro se assistance programs have increased rapidly in the last years, and anecdotal information suggests they are beneficial. In order to ensure that pro se assistance develops in the most effective way, legal services programs must carefully craft an evaluation plan for their programs. Programs must be willing to look beyond self-report satisfaction surveys to more rigorously assess pro se assistance designs and efficacy. Programs would do well to look to the empirical methodologies employed in the social sciences as tools for evaluating pro se assistance.