

PASSION, CAUTION, AND EVOLUTION:
THE LEGAL AID MOVEMENT AND EMPIRICAL STUDIES OF
LEGAL ASSISTANCE

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When *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, the first randomized study of legal aid by Greiner and Pattanayak¹ began to circulate through the world of legal aid, a muted groan went up. I must admit that, as the executive director of a large legal aid program facing a budget crisis, I was one of those groaning. “Here we go,” the feeling went in the legal aid community, “ivory tower researchers who don’t understand what we do have conducted a narrow study that oversimplifies our work, and now every opponent of free legal aid to the poor will wave it about and shout, ‘Look! Incontrovertible scientific proof that government funding for legal aid is a waste of money!’” The study, of outcomes for plaintiffs with unemployment cases offered help by the Harvard Legal Aid Bureau (HLAB), suggested that those offered help by HLAB did not fare any better than those denied help (and in fact those who obtained unemployment compensation received it later, on average).²

When the current study — *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*³ — began to circulate, another noise arose: a cheer that was perhaps even more muted than the earlier groan. The news for legal aid providers was better this time: the randomized study of eviction defendants showed that those offered help by lawyers at Greater Boston Legal Services (GBLS) fared far, far better than those not offered help.⁴

Overall, while the reaction from the legal aid community to these studies has ranged from fascination to outright hostility, the predomi-

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¹ 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 (2012).

² *Id.* at 2124–25.

³ D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013).

⁴ *See id.* at 908–09.

nant response has been in the realm of mild interest, or even a sense that the studies don't matter much. As one on the "fascinated" side of the spectrum, I want to explore both why the legal aid community is largely uninterested, and why I believe we will become more interested over time.

These questions are important because, in our fourth decade, the legal aid movement remains remarkably cohesive despite years of evolution and individuation. Legal aid programs are almost all led by lawyers who have devoted their entire career to legal help for the poor. And even beyond leadership, legal aid staffing is largely comprised of lawyers, secretaries, and paralegals who have dedicated their careers to serving poor clients in crisis. Working with high levels of staff empowerment (sometimes but not always formalized as staff unions), the executives of legal aid programs tend to be leaders in service to their programs, rather than autocrats. In short, like the lightbulb in the old joke, it only takes one person to change a legal aid program, but the program has to want to change.

There should be no doubt that the randomized studies of legal aid undertaken by Greiner, Pattanayak, and Hennessey are about change. They ask: When do legal aid programs really help their clients? When do they not make a difference, and could they even cause harm? By comparing different service approaches, can one identify areas of law, and practices in assisting clients, that result in the greatest impact for low-income people (given scarce resources)? Well-planned research resulting in well-founded results on these questions must, inevitably, lead to change.

Given this, the first question I asked was: why is the legal aid community largely uninterested in the studies thus far?

Before the War on Poverty, legal assistance programs were local charities, often started by particular social groups to assist others of that group. (The Legal Aid Society of New York was founded in 1876 by a German-American philanthropic group to assist German immigrants.⁵) The national legal aid movement started with funding from the Ford Foundation and the federal government in the 1960s, as part of the War on Poverty; some of the earlier charitable programs evolved into broader service programs, and new legal aid programs were started. The federal Legal Services Corporation (LSC) was established and ensured legal aid funding in every state.⁶

⁵ *The History of the Legal Aid Society*, LEGAL AID SOC'Y, <http://www.legal-aid.org/en/las/aboutus/ourhistory.aspx> (last visited Feb. 11, 2013).

⁶ See generally *History of Civil Legal Aid*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/About/About_HistoryCivil (last visited Feb. 11, 2013).

In the early years of the national legal aid movement, legal aid programs often faced severe hostility from the private bar.⁷ (At her installation as President of the New Haven County Bar Association (NHCBA), Patricia Kaplan, the former director of the New Haven Legal Assistance Association (NHLAA), remarked on the change in the private bar attitude that had occurred since the first director of NHLAA was physically removed from an NHCBA meeting he tried to attend.)

Since that time, legal aid programs across the country have faced funding dangers that every few years threaten to dismantle the entire legal aid network. In the 1980s, President Ronald Reagan led an effort to completely eliminate federal Legal Services Corporation funding,⁸ and did succeed in reducing that funding by one quarter.⁹ In the 1990s, the newly created interest on lawyer trust account (IOLTA) funding programs faced a round of cuts as interest rates dropped.¹⁰ Around the same time, in another attempt to shackle legal aid programs, harsh rules and restrictions (many of which were later declared illegal) were established by act of Congress as a negotiated alternative to slashed funding.¹¹ More recently, the IOLTA funding program was declared unconstitutional by a district court and then a court of appeals, and that key source of funding appeared about to disappear until the U.S. Supreme Court overruled the earlier decisions.¹²

Now, legal aid programs face simultaneous assaults on both IOLTA and LSC funding. The LSC challenge again comes from a Congress that includes members who have advocated for the elimination of federal legal aid funding, and who have so far achieved a fourteen percent cut in funding.¹³ The IOLTA challenge comes from the American economy, as personified by the Federal Reserve Board of Governors, which (for some good reasons) is holding interest rates at (approximately) zero. In Connecticut, IOLTA revenues have dropped from over \$20.7 million in 2007 to a projected \$1.7 million in 2013. Connecticut Legal Services, the program I direct, lost two-thirds of its

⁷ See, e.g., ALAN W. HOUSEMAN & LINDA E. PERLE, CTR. FOR LAW & SOC. POLICY, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 24-25, 31 (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf>.

⁸ See, e.g., Stuart Taylor Jr., *Reagan Is Moving to End Program That Pays for Legal Aid to the Poor*, N.Y. TIMES, Mar. 6, 1981, at A1.

⁹ See HOUSEMAN & PERLE, *supra* note 7, at 29-30.

¹⁰ See, e.g., Abby Goodnough, *Governor's Budget Vetoes Imperil Legal Aid Programs*, N.Y. TIMES, May 11, 1998, at B4 (citing 1993 drop in interest rates' leaving "not . . . nearly enough money for legal services").

¹¹ See HOUSEMAN & PERLE, *supra* note 7, at 39-40.

¹² *Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998).

¹³ See, e.g., *House-Senate Agreement Cuts LSC Funding*, LEGAL SERVS. CORP. (Nov. 15, 2011), <http://www.lsc.gov/media/press-releases/house-senate-agreement-cuts-lsc-funding>.

funding as a result. We avoided collapse and have been able to continue providing services across the state, because we (and the many supporters of access to justice in our state) successfully convinced Connecticut's governor and legislature to identify enough funding to make up about ninety percent of the IOLTA loss. Few other states are as fortunate.

The national challenges described above are just a piece of the funding struggle; on a local basis, legal aid programs have to prove their worth over and over again to every United Way, to charitable foundations, even to donors. In some places, there are additional state or local attacks on funding that mirror the national debate, resulting in further sharp funding and service cuts.

These enormous environmental challenges have real-world consequences for legal aid programs. Staff constantly wonder if they are about to get laid off. Lawyers, paralegals, and secretaries who have devoted their careers to serving the poor wonder if they will have any money to retire on. It is simply heroic that so much high-quality work gets done under these circumstances — that people whose jobs are on the line and whose work is being attacked on the political stage manage, in case after case after case, working with a very stressed client population, to focus on their mission. It is not surprising that legal aid programs don't have much energy for investigation of methods, or for comparisons between randomized studies and other outcome measurements. It is not surprising that this service-minded community doesn't spend much time thinking about whether and in what ways one study is valid and another not, or what the implications of studies are for the future direction of the work. Legal aid programs have been focused on the enormous needs of our clients during a terrible recession, and on figuring out how to build community support and funding to maintain desperately-needed services. As a result, our evaluation of research tends to be seen through the lens of advocacy for our work. We tend to ask: "If this study says we accomplish good results, how can we tell people about it? If this study says we don't accomplish important results, how can we discredit it?"

So why do I think interest in randomized studies of legal aid's impact will (and should) pick up in our community? First, because the people who populate legal aid programs are highly educated and passionate about the needs of low-income people. Over time legal aid staff and leaders will recognize the opportunity offered by careful study to learn how better to focus scarce resources, to identify the most effective advocacy strategies, to understand for which low-income clients we can make the greatest difference.

There will also be broader uptake of randomized studies when the results start to be less ambiguous. So far these early randomized studies¹⁴ offer, rather than a clear answer as to how legal aid programs should direct resources or practice law, merely a set of hints as to what the next set of studies should be.

For example, in the study of HLAB unemployment representation, in which those offered representation fared no better than those turned away, Greiner suspects that the representation offered was of high quality, even though the “attorneys” were students working on cases part-time in a school clinic. But this could be studied; HLAB or others could conduct a randomized evaluation to compare the impact of students with the impact of full-time attorneys assisting randomly assigned applicants for representation in unemployment cases. Similarly, one might wonder whether the HLAB findings result from problems with the outreach and screening system; it seems certain that there is *some* group of unemployment plaintiffs who could not obtain equal results without at least a law student’s assistance. A study could be built that uses outreach to bring less-educated and non-English-speaking plaintiffs to HLAB, and then randomizes to learn if law student representation has a greater impact for that group.

As for the study of GBLs housing cases in *The Limits of Unbundled Legal Assistance*, Greiner suspects that the GBLs attorneys’ “confrontational litigation style,” which features an aggressive motions practice and frequent requests for a jury trial, contributed to the difference in outcome between the treated and control groups.¹⁵ Certainly, a future randomized study could explore whether practice style creates different results among represented clients (this study compared only representation and nonrepresentation). But those of us who know some of the exceptional lawyers involved in the study also wonder whether the lawyers’ experience and skill level, rather than practice style, impacted the study results; a future study might compare impacts achieved for clients represented by lawyers at differing experience levels, holding the practice style constant.

Despite the stresses faced by legal aid programs, and the lack of clear answers thus far from randomized study, there is already some interest in the legal aid community, and that interest is spreading. *Clearinghouse Review*, the preeminent periodical on legal aid practice (published by the Sargent Shriver National Center on Poverty Law)

¹⁴ As to the question, “Why *randomized* studies as opposed to many other forms of measurement?” see Greiner & Pattanayak, *supra* note 1, at 2121 n.4, 2209, where the authors discuss the benefits of randomized trials, and Greiner, Pattanayak & Hennessy, *supra* note 3, at 906 n.7.

¹⁵ Greiner, Pattanayak & Hennessy, *supra* note 3, at 919.

has published a discussion of Greiner's studies of legal aid.¹⁶ Another article, written by the coordinator of the National Coalition for a Civil Right To Counsel, has been published in the *Housing Law Bulletin*, a publication of the National Housing Law Project.¹⁷ And a session at a recent conference of the National Legal Aid and Defender Association was well attended and well received.

At this point, a few studies have been conducted, and each study raises more questions than it answers. This is a good beginning. As Greiner has noted, "the medical community has largely embraced the idea that to produce information and knowledge required to address the needs of its client base, it must make extensive use of the randomized trial."¹⁸ The legal community is in the infancy of careful study of best practices for legal help to poor people; the medical community benefits from decades of studies upon studies, with parallel studies and follow-up studies to drill down into a deep understanding. The longer we work at research, the more we will learn about how to target scarce resources toward maximum impact.

Is the effort worth it? There is no doubt that the effort carries costs. First, there is the time required to set up a study, time taken up by meetings, proposals, counterproposals, and negotiations regarding study design. In a world of too-scarce resources, every hour of time not spent serving clients must be justifiable. Second, since the point of the studies is to identify both more- and less-successful legal aid efforts, there is the danger that opponents of legal aid funding will take reports of less-successful efforts out of context and use them against legal aid. History suggests that these costs are real.¹⁹

But the long-term effort to use randomized study to hone the effectiveness of legal aid is, in fact, worthwhile because — perhaps for the first time in the short history of the legal aid movement — it appears clear that legal aid is around to stay. Despite the challenges referred to above, there are key institutional players across the country who are invested in the support and development of legal aid as a key element of "justice for all" in our country. Almost every state has followed the

¹⁶ Steven Eppler-Epstein, *The Greiner Studies: Randomized Investigation of Legal Aid Outcomes*, 46 CLEARINGHOUSE REV. 43 (2012).

¹⁷ John Pollock, *Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*, 42 HOUSING L. BULL. 72 (2012).

¹⁸ Greiner & Pattanayak, *supra* note 1, at 2209.

¹⁹ For example, a brief before the U.S. Supreme Court in support of the respondents in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), took Greiner and Pattanayak's point that "we currently have astonishingly little credible, objective information about the effect of representation," Brief for Law Professors Benjamin Barton and Darryl Brown as Amici Curiae in Support of Respondents at 7, *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (No. 10-10) (quoting Greiner & Pattanayak, *supra* note 1, at 70), to argue more broadly that representation does not provide enough demonstrable value to litigants to make the investment in court-appointed attorneys worthwhile. *Id.* at 6–8.

encouragement of the American Bar Association and established an Access to Justice Commission. These commissions have as one of their goals access to civil justice for poor people through the legal aid delivery system.²⁰ State court judges and local bar leaders, whose predecessors forty years ago might have opposed legal aid, now are staunch supporters. And as the legal aid movement matures, increasing numbers of former legal aid lawyers and staff are now judges and legislators.

In this context, in which legal aid has become not only accepted but essential in local justice systems, long-term investment is worthwhile. The handful of programs investing in serious study of best practices is increasing, and as the results of follow-up studies give us clearer and better direction, more interest will follow. In the long run, legal aid programs' investment in randomized study will not only improve services and help direct scarce resources, but will also build public support, because the willingness of the legal aid movement to question itself and change in response will demonstrate to the wider world that our work is, in the end, focused on doing the best we can to help very poor people, in often-desperate circumstances, to improve their lives.

²⁰ See *Definition of Access to Justice Commission*, AM. BAR ASS'N (July 2011), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_scl_aid_atj_definition_of_a_commission.pdf.