Evidence-Based Practices and Access to Justice

Handouts

Erika Rickard & Chris Griffin
NACM Mid-Year Conference
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About the Access to Justice Lab

The Access to Justice Lab was founded in July 2016 thanks to the generous support of the Laura and John Arnold Foundation. The Arnold Foundation’s core objective “is to address our nation’s most pressing and persistent challenges using evidence-based, multi-disciplinary approaches.”

The Lab is housed within the Center on the Legal Profession (CLP) at Harvard Law School, which seeks to make a substantial contribution to the modern practice of law by increasing understanding of the structures, norms and dynamics of the global legal profession.

Our Mission

The Access to Justice Lab is dedicated to transforming adjudicatory administration and engagement with the courts into evidence-based fields.

In no field is resistance to evidence-based thinking more ferocious than in United States legal practice. For more than a century, U. S. practice and judging have reflected an ethos of professionalism in which individual lawyers and judges purport to make irreducibly complex judgments about each client’s or litigant’s legal needs and the merits of their claims. Only a lawyer knows what is best for a client, and the only person a lawyer should listen to about her client’s legal needs is another lawyer. As a result, law currently recognizes only two sources of truth about what works and what doesn’t: (i) the pronouncements of legal elites, and (ii) each individual lawyer’s or judge’s own personal experience.

Almost a century ago, U.S. medicine was the same. In the 1920s and 1930s, doctors thought that they alone, as professionals, knew what was best for patients, and that no non-physician could say anything useful to improve professional medical judgments. In this time period, medicine recognized only two sources of truth about what worked: (i) the pronouncements of medical elites, and (ii) each physician’s own personal experiences with “his” particular patients.

Medicine transformed itself from an art into (more of) a science. Starting more than 100 years ago, medicine began to recognize a role for ideas from non-medical fields. And in the first half of the Twentieth Century, medicine began accepting the randomized control trials (“RCTs”), as a critical tool in deciding what works. U.S. legal practice, another other quintessential U. S. profession, underwent no transformational change.

The Access to Justice Lab will work to produce transformational change in U.S. legal practice. We will produce rigorous evidence of what works, by incorporating evidence-based thinking and learning from other fields, and by implementing creative interventions and randomized control trial field studies.
Examples of Our Work: Collaboration with Courts

Pre-trial release
The Laura and John Arnold Foundation (the “LJAF”) developed the Public Safety Assessment (the “PSA”) to provide an accurate tool to distinguish criminal defendants according to the risk that they will engage in future misconduct. Jurisdictions across the United States have begun to implement the PSA at the initial release/detention hearing at the start of a criminal case. We are conducting a randomized control trial to assess whether providing the PSA to judicial officials making initial release/detention decisions leads to reductions in the following outcomes:

- failures to appear at future hearings;
- new criminal activity;
- new violent criminal activity; and
- the number of days defendants spend incarcerated pretrial.

Mediation in federal court
The A2J Lab has partnered with a federal district court to conduct a randomized control trial evaluating the effect of a formal mediation session with inmates in federal prison with civil rights complaints. This study is the first of any kind to evaluate an alternative dispute resolution (ADR) program rigorously on multiple dimensions, including court and party expenditure of resources, litigant opinions of the judicial process and the result, and nature of the parties’ post-litigation relationship.

Default in debt collection cases
We know that 95% or more of debt collection defendants lose their cases because they do not show up to court, even when they have a strong chance of winning their cases. Our debt collection studies address the question: How can legal services providers and courts persuade individuals to participate in legal processes?

Our pilot study, Problems of default, part I, demonstrates that a well-constructed letter sent to debt collection defendants at the start of their case can more than triple the rate of defendants coming to court to contest their cases. This randomized control trial was a collaborative effort of the Access to Justice Lab, a legal aid organization, and a local court. We are currently expanding the study to test the effectiveness of images and translation as elements of a well-constructed letter.

Self-help tools in guardianship cases
Court-based self-help centers and volunteer attorney programs that assist litigants in guardianship proceedings report a major obstacle: serving documents on interested parties. In this randomized control trial, the A2J Lab will partner with a court system and a legal aid provider to develop self-help materials and then conduct a randomized study to address the following question: can well-designed informational packets improve the current system by increasing the rate at which petitioners effectuate service?
The Public Safety Assessment (PSA)

Following a person’s arrest, a judge must decide whether that person should:

- be released to await trial.
- be detained in jail to await trial.

A judge considers many factors in making this decision. One tool that judges may use to help make this decision is the PSA.

The PSA produces a score that represents the likelihood that a defendant who is released before trial will commit a new crime or will fail to appear for a future court appearance.

The PSA also flags the small number of defendants who pose an elevated risk of committing a crime of violence if released before trial.

The PSA score is calculated based on nine factors.

The PSA does NOT look at any of the following factors:

- race
- gender
- income
- education
- home address
- drug use history
- family status
- marital status
- national origin
- employment
- religion
- age at current arrest
- current violent offense
- pending charge at the time of the offense
- prior misdemeanor conviction
- prior felony conviction
- prior violent conviction
- prior failure to appear pretrial in past 2 years
- prior failure to appear pretrial older than 2 years
- prior sentence to incarceration
- prior failure to appear pretrial in past 2 years
- prior sentence to incarceration
- prior failure to appear pretrial older than 2 years
- prior sentence to incarceration

The PSA score is not the only information that a judge considers, and the final decision will always be made by a judge.

The PSA was developed from research using data from across the United States.

For more information about the PSA, please visit www.arnoldfoundation.org.
PUBLIC SAFETY ASSESSMENT:
RISK FACTORS AND FORMULA

The pretrial phase of the criminal justice process should aim to protect public safety and assure defendants’ appearance in court, while honoring individuals’ constitutional rights, including the presumption of innocence and the right to bail that is not excessive. Yet research shows that low-risk, nonviolent defendants who can’t afford to pay often spend extended time behind bars, while high-risk individuals are frequently released from jail. This system causes significant harm to too many individuals and is a threat to our communities.

A growing number of jurisdictions are now reforming their pretrial systems to change the way they make pretrial release and detention decisions. These communities are shifting away from decision making based primarily on a defendant’s charge to decision making that prioritizes the individual’s level of risk—both the risk that he will commit a new crime and the risk that he will fail to return to court if released before trial. This risk-based approach can help to ensure that the relatively small number of defendants who need to be in jail remain locked up—and the significant majority of individuals who can be safely released are returned to the community to await trial.

PUBLIC SAFETY ASSESSMENT: AN EVIDENCE-BASED TOOL TO EVALUATE RISK

In partnership with leading criminal justice researchers, the Laura and John Arnold Foundation (LJAF) developed the Public Safety Assessment™ (PSA) to help judges gauge the risk that a defendant poses. This pretrial risk assessment tool uses evidence-based, neutral information to predict the likelihood that an individual will commit a new crime if released before trial, and to predict the likelihood that he will fail to return for a future court hearing. In addition, it flags those defendants who present an elevated risk of committing a violent crime.
DEVELOPMENT

LJAF created the PSA using the largest, most diverse set of pretrial records ever assembled—1.5 million cases from approximately 300 jurisdictions across the United States. Researchers analyzed the data and identified the nine factors that best predict whether a defendant will commit new criminal activity (NCA), commit new violent criminal activity (NVCA), or fail to appear (FTA) in court if released before trial.

RISK FACTORS

The table below outlines the nine factors and illustrates which factors are related to each of the pretrial outcomes—that is, which factors are used to predict NCA, NVCA, and FTA.

RELATIONSHIP BETWEEN RISK FACTORS AND PRETRIAL OUTCOMES

<table>
<thead>
<tr>
<th>Risk Factor</th>
<th>FTA</th>
<th>NCA</th>
<th>NVCA</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Age at current arrest</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>2. Current violent offense</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Current violent offense &amp; 20 years old or younger</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Pending charge at the time of the offense</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>4. Prior misdemeanor conviction</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>5. Prior felony conviction</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Prior conviction (misdemeanor or felony)</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>6. Prior violent conviction</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>7. Prior failure to appear in the past two years</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>8. Prior failure to appear older than two years</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>9. Prior sentence to incarceration</td>
<td></td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

Note: Boxes where an “X” occurs indicate that the presence of a risk factor increases the likelihood of that outcome for a given defendant.

The PSA relies solely on the above nine variables. It does not rely on factors such as race, ethnicity, or geography.
FACTOR WEIGHTING
Each of these factors is weighted—or, assigned points—according to the strength of the relationship between the factor and the specific pretrial outcome. The PSA calculates a raw score for each of the outcomes. Scores for NCA and FTA are converted to separate scales of one to six, with higher scores indicating a greater level of risk. The raw score for NVCA is used to determine whether the defendant should be flagged as posing an elevated risk of violence.

HOW RISK SCORES ARE CONVERTED TO THE SIX-POINT SCALES AND NVCA FLAG

<table>
<thead>
<tr>
<th>Risk Factor</th>
<th>Weights</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Failure to Appear (maximum total weight = 7 points)</strong></td>
<td></td>
</tr>
<tr>
<td>Pending charge at the time of the offense</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Prior conviction</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Prior failure to appear pretrial in past 2 years</td>
<td>0 = 0; 1 = 2; 2 or more = 4</td>
</tr>
<tr>
<td>Prior failure to appear pretrial older than 2 years</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td><strong>New Criminal Activity (maximum total weight = 13 points)</strong></td>
<td></td>
</tr>
<tr>
<td>Age at current arrest</td>
<td>23 or older = 0; 22 or younger = 2</td>
</tr>
<tr>
<td>Pending charge at the time of the offense</td>
<td>No = 0; Yes = 3</td>
</tr>
<tr>
<td>Prior misdemeanor conviction</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Prior felony conviction</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Prior violent conviction</td>
<td>0 = 0; 1 or 2 = 1; 3 or more = 2</td>
</tr>
<tr>
<td>Prior failure to appear pretrial in past 2 years</td>
<td>0 = 0; 1 = 1; 2 or more = 2</td>
</tr>
<tr>
<td>Prior sentence to incarceration</td>
<td>No = 0; Yes = 2</td>
</tr>
<tr>
<td><strong>New Violent Criminal Activity (maximum total weight = 7 points)</strong></td>
<td></td>
</tr>
<tr>
<td>Current violent offense</td>
<td>No = 0; Yes = 2</td>
</tr>
<tr>
<td>Current violent offense &amp; 20 years old or younger</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Pending charge at the time of the offense</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Prior conviction</td>
<td>No = 0; Yes = 1</td>
</tr>
<tr>
<td>Prior violent conviction</td>
<td>0 = 0; 1 or 2 = 1; 3 or more = 2</td>
</tr>
</tbody>
</table>
JUDICIAL DISCRETION
The PSA is a decision-making tool for judges. It is not intended to, nor does it functionally, replace judicial discretion. Judges continue to be the stewards of our judicial system and the ultimate arbiters of the conditions that should apply to each defendant.

NONPROFIT IMPLEMENTATION AND OWNERSHIP
LJAF provides the PSA at no cost to jurisdictions that adopt it and funds technical support to help localities integrate the tool into their operations. The PSA cannot be implemented by a jurisdiction, incorporated into software, or otherwise used or reproduced without LJAF’s express, prior written consent.

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Self-Help Materials: Examples & Articles
Turner v. Rogers: Improving Due Process for the Self-Represented
by Richard Zorza
The U.S. Supreme Court’s decision in Turner v. Rogers (2011) stresses the due-process rights of self-represented litigants. Courts should see this decision as an opportunity to improve their services and programs for such litigants.

On June 20, 2011, the United States Supreme Court, in its first trip to the self-represented courtroom in 25 years, issued a groundbreaking opinion in Turner v. Rogers (2011) about the due-process rights of the self-represented and what courts must do to ensure that they are given true access to justice. The decision challenges judges and court administrators to build consensus around innovations and improvements. This article briefly summarizes the core holding of Turner, including its broader due-process elements, suggests the approaches that courts and access-to-justice institutions might consider to deal with the broad implications of the decision, and offers concrete resources to assist in that process. The good news is that many of the needed access innovations are already being deployed and have now been effectively endorsed by the Supreme Court in this decision.

The Turner Decision

Significantly, the case as it came to the Supreme Court was in a posture that did little to suggest the ultimate broad reach of its holding—one very different from that sought by either of the parties. In the South Carolina Supreme Court, a child support obligor sought reversal of his civil-contempt-incarceration order on the grounds that he had lacked counsel. (The party seeking the incarceration order was not the state and also did not have counsel.) After South Carolina had rejected the claim, certiorari was granted. During briefing of the case, the solicitor general, representing the United States, urged rejection of both the self-represented litigant’s right-to-counsel claim and the respondent’s urging of affirmance. The solicitor general urged that although there was no categorical right to counsel in such cases, the failure of the trial court to follow available alternative procedures that would have protected the litigant’s due-process rights required reversal.

The Supreme Court agreed:

And we consequently determine the “specific dictates of due process” by examining the “distinct factors” that this Court has previously found useful in deciding what specific safeguards the Constitution’s Due Process Clause requires in order to make a civil proceeding fundamentally fair. Mathews v. Eldridge, 424 U. S. 319, 335 (1976) (considering fairness of an administrative proceeding). As relevant here those factors include (1) the nature of “the private interest that will be affected,” (2) the comparative “risk” of an “erroneous deprivation” of that interest with and without “additional or substitute procedural safeguards,” and (3) the nature and magnitude of any countervailing interest in not providing “additional or substitute procedural requirement[s].” . . .

[A]s the Solicitor General points out, there is available a set of “substitute procedural safeguards,” Mathews, 424 U. S., at 335, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. . . . The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. . . . The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances
Turner's incarceration violated the Due Process Clause (Turner v. Rogers, 2011: slip opinion at 11, 14, 16).

There are a number of important points about the opinion as a whole that should be emphasized:

- While the decision itself focuses on incarceration (and, indeed, states the importance of the private interest at stake in such situations), it relies on the due-process clause, which is implicated in every case dealing with the potential deprivation by a court of a constitutionally protected interest—which means almost every nontrivial self-represented-litigant case.

- Moreover, since the case discusses the needs of the party seeking the deprivation, the decision supports the idea that due process applies to the person seeking the deprivation as well as the party potentially subject to it (Turner v. Rogers, 2011: slip opinion at 13-14).

- The Supreme Court explicitly approved—indeed in some cases required—the use of forms in self-represented-litigant cases, thereby putting to final rest any claim of their inappropriateness (Turner v. Rogers, 2011: slip opinion, 14-16).

- The Supreme Court similarly approved, and in some situations required, engaged judicial questioning, also shutting off any objection that such neutral questioning is forbidden (Turner v. Rogers, 2011: slip opinion at 14-15)—thus potentially raising that key question in every self-represented litigant case.

- The Court reached out to endorse the concept of neutral court staff providing assistance to litigants, even though the facts did not include such staffing (Turner v. Rogers, 2011: slip opinion, 14-15).

- The Court made clear that, notwithstanding its decision in Turner, there might well be situations in which there was a right to counsel. The court gave as possible examples situations similar to Turner, but in which the other side had counsel, or was the state itself (Turner v. Rogers, 2011: slip opinion, 15).

- Moreover, in what may be of greater immediate day-to-day significance for trial courts, the Court acknowledged that there might well be particular factual situations in which appointment of counsel is required to ensure fairness and accuracy (Turner v. Rogers, 2011: slip opinion, 16).

Some state court systems might respond to the decision by a cursory review of their procedures and conclude that since a) they do not use civil-contempt incarceration in child support cases, b) they provide counsel in such cases, or c) provide the notice, forms, questioning, and fact finding required in Turner in such cases, they do not need to pay attention to the case.

In the opinion of this writer, such an approach would be seriously flawed. It would fail to recognize the broad legal import of the decision, particularly its groundbreaking application of the due-process clause to the rights of the self-represented, and would fail to embrace the opportunity for expanding the already launched systemic access-to-justice improvements upon which the decision implicitly relies. Moreover, the Supreme Court’s effective endorsement of innovations that are already being broadly deployed—such as greater judicial engagement and user-friendly forms—should reassure the states that their access-innovation efforts will find support at the highest judicial levels.

**Implications for Judges and for Judicial Education**

The decision, and its endorsement of an engaged role for judges in self-represented cases, provides clear permission for judges to continue on their current path of experimenting with ways to make sure that the self-represented are fully heard. Those who have felt inhibited in doing so for fear of being perceived as non-neutral should be reassured that they have received both Department of Justice (DOJ) and Supreme Court imprimatur for such engagement, provided, of course, that it is neutral and consistent with ethical rules. Those who have believed that their lack of engagement is required by the Constitution would be advised to reconsider their position.

It may be that part of the reason that DOJ felt able to support, and the Supreme Court endorsed, such judicial questioning is that there are now extensive research-based protocols for such neutral engagement. In any event, these protocols
Future Trends in State Courts 2012

judges deal with those challenges. Such an initiative might, building on model resources already available, include developing state-specific bench books on the topic, presenting customized judicial educational programs, making videos about best practices, performing educational role playing of problems and best-practice solutions, and establishing judicial support networks for further discussion of these issues.

Implications for the Management of Cases in the Courthouse

While Turner identifies as “available” only two specific nonjudicial procedures that were desirable but absent in the facts of that case—notice of the key issue and forms—the analysis is clear that the totality of the procedures are to be considered in the due-process fairness-and-accuracy analysis.

Thus, the good news for court administrators is that there is already available and tested a wide range of effective innovations that can enhance fairness and accuracy. Many of these can be implemented at low or zero cost. Turner provides an opportunity to analyze court operations and to assess whether such innovations could enhance accuracy and fairness of outcomes in accordance with the requirements of the decision. Specifically:

- The deployment of plain-language forms, including easy-to-use, interactive online versions of those forms, can help ensure that needed information is provided to the court. This is far cheaper, both to deploy and maintain, if forms are standardized statewide. (In a time of financial crisis, statewide nonuniformity of such forms should be among the first casualties.)
- The provision or expansion of neutral, court-based, informational self-help services, already provided in some form in most states, can give litigants the kind of information and forms-completion assistance envisioned by Turner as helping ensure access and fairness. Such systems are most cost-effective when provided statewide through phone hotlines supplemented by online tools, as in Minnesota and Alaska.
- Courtroom-based services, integrated with the flow of the case, can help litigants focus on what is needed to move the case forward and provide the additional information needed by the court. Such assistance is now routine in states such as California and New Hampshire.
• The provision of unbundled or discrete task representation can be facilitated by the courts, in cooperation with the bar, through rules changes, training programs, and general promotion. The effect is low-cost representation for those cases in which it is most critical, responding to the concern of *Turner* that there may be cases in which attorney assistance is needed. Such programs cost the court nothing. Such programs are routine in Massachusetts and Maine, among many other states. New York is one state that has been effective in facilitating pro bono representation using this model.

Many of these innovations could easily be built into the reengineering programs that many courts are now starting. Indeed, they would help ensure that these reengineering efforts improve access as well as efficiency. (See the “Resources” section.)

**Implications for Justice System Coordination and Innovation**

The process of review and innovation envisioned by this article will not occur without leadership. For states with access-to-justice commissions, the choice of who should lead the process may be simple. The commissions have the credibility of being creatures of the court system, but also the leverage that comes from having members from a wide variety of constituencies. Moreover, they may be found to be more appropriate review vehicles than the state supreme court, given that the Court might ultimately be asked to rule on the sufficiency of the state’s procedures under *Turner* due-process standards.

In such states, indeed, the state supreme court might find it appropriate to formally ask the access-to-justice commission to work with the state administrative office of the courts to conduct such a comprehensive *Turner* review of key case types for the self-represented, with a particular focus on those in which the stake for the litigants is greatest, such as loss of home or family integrity. In states without a commission, the court might find it appropriate to create a special body, one which might indeed evolve into a commission.

**Conclusion**

*Turner v. Rogers* may turn out to be a highly significant decision for the day-to-day operations of the courts, one that plays a major role in fulfilling the core promise of courts as institutions that offer access to justice for all. Court leaders and staff at all levels have the opportunity to participate in giving life and meaning to this vision and these values.
RESOURCES


Justice Eileen C. Moore was charged with finding artwork for the new 4th District Court of Appeal building in Santa Ana, California, on a shoestring budget. She contacted the school superintendent and then the probation department got involved. Students read court cases and depicted them in murals. This year’s Trends cover was created by a 17-year-old at Juvenile Hall. The case involved gang violations and disfiguring a public place and the young artist had also been charged with graffiti crimes. The resulting mural hangs in the courthouse, along with more than a dozen other paintings depicting Orange County, California cases.
YOUR COURT CASE
If you start a court case, you are the PLAINTIFF. The PLAINTIFF must follow the court rules for notifying the person on the other side about the case.
If you are responding to a court case, you are the DEFENDANT. You may write an answer to the case. You may also make a claim against the PLAINTIFF, called a counterclaim.
Whether you are the PLAINTIFF or the DEFENDANT, every time you file a document with the court you must give a copy to the other side. Both sides must follow all court rules.
You must come to your court hearing. If you do not, the court may rule for the other side.
If it is an EMERGENCY and you need an emergency court order, COME TO COURT and tell the court what you need.

DISABILITY ACCESS
Every courthouse has someone to help with accessibility. If you have a disability and need help at the court, ask staff for the ADA Coordinator. The court also has forms to use for requesting accommodations. For forms and a list of ADA Coordinators by court, go to: mass.gov/courts/ada

FEES
If you are indigent and cannot afford court fees, you may ask the court to waive the fees through an affidavit of indigency.
Learn more about waiving fees: http://www.mass.gov/courts/forms/indigency-forms-gen.html

AGREEMENTS
You may be able to reach an agreement without going to trial, but you do not have to. Make sure you understand all parts of any agreement before signing it, and do not sign anything you do not understand. Some courts have MEDIATION PROGRAMS to help you reach an agreement. Ask your court for more information.

COURT RESOURCES
Court staff can give you information, but they cannot give you legal advice.
Some courthouses have Court Service Centers where you can get help with court forms.
Trial Court Law Libraries give free legal information. You can contact a law library by text at 617-674-1455; online at www.lawlib.state.ma.us, or in person at your local law library.
The court website also has self-help information.
- Contact information for your court: www.mass.gov/courts/court-info/courthouses
- Court forms: www.mass.gov/courts/forms
- Abuse and harassment: www.mass.gov/courts/selfhelp/abuse-harassment
- Family, children, and divorce: www.mass.gov/courts/selfhelp/family
- Housing: www.mass.gov/courts/selfhelp/housing
- Small claims: www.mass.gov/courts/selfhelp/small-claims
- Traffic tickets: www.mass.gov/courts/selfhelp/tickets
- More information: www.mass.gov/courts/selfhelp

LEGAL ASSISTANCE
The statewide legal aid program provides legal information in multiple languages: www.masslegalhelp.org
For help finding a lawyer, use the Legal Resource Finder: www.masslegalservices.org/findlegalaid
The Massachusetts Bar Association (MBA) has a Lawyer Referral Service hotline to connect people with lawyers: 617-338-0500.
The MBA also has a Dial-A-Lawyer program for free basic legal advice over the phone on the first Wednesday of each month from 5:30-7:30pm: 617-338-0610.
Some courts have Lawyer-For-A-Day programs, which provide free legal assistance to eligible people. Ask your court for more information. Some courts allow people to hire a lawyer to help with a piece of the case, rather than the whole case. This is called limited assistance representation (LAR).
Information about LAR: www.mass.gov/courts/programs/legal-assistance/lar-gen.html
YOUR COURT CASE
If you start a non-criminal court case, you are the plaintiff. The plaintiff must follow the court rules for notifying the person on the other side about the case.
If you are responding to a court case, you are the defendant. In many cases, you must file a written answer to the case. If you do not answer, the court file will only include one side of the case. You may also make a claim against the plaintiff, called a counterclaim.

Whether you are the plaintiff or the defendant, every time you file a document with the court you must make sure the other side gets a copy. Keep a copy for yourself.


You must come to your court hearing. If you do not, the judge may rule for the other side.

EMERGENCY ORDERS
If you have an emergency and you need an order from the court quickly, tell your court. The court staff will tell you what to do next.

COURT FEES
If you cannot afford court fees, you may ask the court to waive the fees, which means that you will not have to pay them.

Learn more about waiving court fees: mass.gov/courts/forms/indigency-forms-gen.html

AGREEMENTS
You may be able to reach an agreement to settle your case without going to trial. Make sure you understand all parts of any agreement before signing it, and do not sign anything you do not understand. Only sign an agreement if you agree to everything it says. Some courts have mediation programs or other programs to help you reach an agreement. Ask your court for more information, or visit: mass.gov/courts/programs/adr

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Court staff can give you information, but they cannot give you legal advice.

Some courthouses have Court Service Centers to help you fill out forms. Learn more about Court Service Centers: mass.gov/courts/court-service-centers

Trial Court Law Libraries give free legal information. You can contact a law library by text at 617-674-1455 Monday-Friday; by online chat at mass.gov/lawlib; or in person at your local law library.
The court website also has self-help information. Go to mass.gov/courts/selfhelp for self-help information about:

- Contact information for your court
- Court forms
- Abuse and harassment (restraining orders and harassment orders)
- Family, children, and divorce
- Housing
- Small claims
- Traffic tickets
- and more.
LEGAL HELP
The statewide legal aid program provides legal information in multiple languages: masslegalhelp.org

For help finding a lawyer, use the Legal Resource Finder: massLRF.org

The Bar Association in your area may have a Lawyer Referral Service to connect people with lawyers: masslegalservices.org/lawyer-referral-services

The Massachusetts Bar Association provides free basic legal advice over the phone on the first Wednesday of each month from 5:30-7:30pm: 617-338-0610.

Some courts have Lawyer-For-A-Day programs, which provide free legal assistance to eligible people: mass.gov/courts/programs/legal-assistance/

Some courts allow people to hire a lawyer to help with a piece of the case, rather than the whole case. This is called limited assistance representation (LAR). LAR attorneys can draft documents or represent you in court at one or more hearings.

Information about LAR: mass.gov/courts/programs/legal-assistance/lar-gen.html

DISABILITY ACCESS
Every courthouse has someone to help with accessibility. If you have a disability and need help at the court, ask staff for the ADA Coordinator. The court also has forms to use for requesting accommodations. For forms and a list of ADA Coordinators by court, go to: mass.gov/courts/ada

LANGUAGE ACCESS
This is an official court notice; if you have difficulty reading English, obtain a translation. If you have difficulty speaking English, you have a right to an interpreter, free of charge, for all court events. If you require an interpreter, please let the court staff know.

Esta es una notificación oficial del tribunal que debe mandar a traducir si no entiende inglés. Usted tiene derecho a un(a) intérprete gratis en todos los procedimientos judiciales. Si necesita un(a) intérprete, avísele al personal del tribunal.

Esta é uma notificação judicial. Se não conseguir entender, peça uma tradução. O direito a intérprete gratuito em qualquer audiência judicial é garantido por lei. Se precisar de intérprete, avise na secretaria do fórum.

Se avi ofisyèl tribinal la; si’w gen difikilte pou'w li Anglè, fè yon moun tradwi’l pou ou. Si’w gen difikilte pou'w pale Anglè, ou gen dwa pou’w genyen yon entèprèt gratis, pou tout sa wap regle nan tribinal la. Si’w bezwen yon entèprèt, tanpri fè yon moun kap travay nan tribinal la konnen.

Đây là một thông báo chính thức của tòa án; nếu bạn gặp khó khăn khi đọc tiếng Anh, nên yêu cầu phiên dịch lại. Nếu bạn gặp khó khăn khi nói tiếng Anh, bạn có quyền có thông dịch viên miễn phí, cho tất cả các sự kiện ở tòa. Nếu bạn cần một thông dịch viên, xin vui lòng cho nhân viên tòa án biết.

www.mass.gov/courts/language-access
ADMINISTRATIVE APPEALS FLOWCHART

Note: this chart demonstrates a typical administrative appeal. Not all appeals will follow this exact process.
We will never have enough lawyers to serve the civil legal needs of all low- and moderate-income (LMI) individuals who must navigate civil legal problems. A significant part of the access to justice toolkit must include self-help materials. That much is not new; indeed, access to justice commissions across the country have been actively developing *pro se* guides and forms for decades. But the community has hamstrung its creations in two major ways. First, by focusing these materials on educating LMI individuals about formal law, and second, by considering the task complete once the materials have been made available to self-represented individuals. In particular, modern self-help materials fail to address many psychological and cognitive barriers that prevent LMI individuals from successfully deploying their contents. This Article makes two contributions. First, we develop a theory of the obstacles LMI individuals face when attempting to *deploy* professional legal knowledge. Second, we apply learning from fields as varied as psychology, public health, education, artificial intelligence, and marketing to develop a framework for how courts, legal aid organizations, law school clinics, and others might re-conceptualize the design and delivery of civil legal materials for unrepresented individuals. We illustrate our framework with examples of reimagined civil legal materials.

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I. INTRODUCTION

By any measure, the overwhelming majority of human beings (as opposed to corporations, labor unions, or other incorporeal entities) who face legal problems in the United States do so without a traditional attorney-client relationship and indeed, without any form of professional legal assistance.1 In an important sense, the majority of legal scholarship in the United States is focused on elite (particularly wealthy) individuals and, more the point, on corporations, labor unions, partnerships, and the other incorporeal entities that consume legal services in quantity. This Article, in contrast, is about how human beings in the United States who choose to attempt to address2 their legal problems actually do so, or

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1 ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERV., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS: A WHITE PAPER 4 (2009), available at www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/prose_white_paper.authcheckdam.pdf (last visited Mar. 2, 2015) (noting that “When going to state court, most people proceed pro se most of the time” and that “state courts, including traffic, housing and small claims, are dominated by pro se litigants”). Studies generally find that approximately 80 percent of the civil legal needs of low-income people go unmet. For major studies covering the nation as a whole, see, e.g., LEGAL SERV. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION (2009), available at http://www.lafla.org/pdf/justice_Gap09.pdf (last visited Mar. 2, 2015) (hereinafter LSC UNMET NEEDS) (“[F]or every person helped by LSC-funded legal aid programs, another is turned away. That was the primary finding in 2005 and LSC’s collection of data from LSC-funded programs across the country in 2009 reaffirms that finding.”); Deborah L. Rhode, Whatever Happened to Access to Justice?, 42 LOY. LA. L. REV. 869, 869 (2008) (noting that “a majority of the [civil legal] needs of middle-income Americans[] remain unmet”). See also Jessica K. Steinberg, Demand Side Reform in the Poor People’s Court, 47 CONN. L. REV. 741, 764-74 (2015) (noting that “In landlord-tenant matters, for instance, it is typical for ninety percent of tenants to appear pro se while ninety percent of landlords appear with counsel.”). The vast scholarship devoted to the practice and structure of law in the United States is about elite (particularly wealthy) individuals and, more the point, about corporations, labor unions, partnerships, and the other incorporeal entities that consume legal services in quantity.

2 Many individuals do not attempt to address legal problems, even problems they recognize that they have and that they recognize as legal. REBECCA L. SANDEFUR, The Importance of Doing Nothing: Everyday Problems and the Importance of Inaction, in TRANSFORMING LIVES: LAW AND SOCIAL PROCESS (Pascoe

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could be empowered to do so. More specifically, it is about assisted self-help, and how to think about the “assisted” part.

Currently the dominant form of assistance received by low-income individuals seeking help with legal matters is the provision of self-help materials, sometimes coupled with limited advice from a legal professional. Self-help or *pro se* legal materials are actively distributed by courts, legal aid organizations, public libraries, bar associations, neighborhood advocacy centers, internet-based networks, law schools, pro bono groups, and even for-profit companies, among others.

Given the prominent, perhaps even dominant, role that self-help materials play in the United States’ response to the justice gap, and their long history in the United States, one might expect that those interested in access to civil justice would have developed theories of what works, and why, in guided self-help. One might also expect that those theories would have been tested in at least some of the dizzying variety of legal settings in which litigants currently proceed without lawyers, including as eviction proceedings, government benefits, and family law contests. Such is not the case. Indeed, it appears that there has been little analysis of, and no rigorous testing of, self-help materials in the legal context.

In this Article, we begin the construction of a dialogue about assisted self-help. In choosing to study this topic, we make the following assumption: there will never be sufficient funding or in-kind donations to provide an attorney-client

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Pleasence et al. eds., 2006) (reviewing the reasons that many individuals do nothing in response to legal problems).

3 Steinberg, supra note 6; Herbert M. Kritzer, *The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World, 33 LAW & SOC’Y REV. 713 (1999).


This form of unbundling of legal services aims to help the unrepresented litigant navigate the morass of procedures required to have their side heard in court.
relationship, or any kind of professional legal assistance (limited, unbundled, or otherwise), to meet the United States’ well-documented civil justice gap. Lawyers are expensive. It is unlikely there will be sufficient public and private funding to provide free or low-cost civil legal services to the poor via the traditional method of an individual attorney-client relationship. Other market-based solutions, such as Limited License Legal Technicians (or, more generally, non-lawyer assistance) and unbundled legal services, are an important part of a comprehensive solution to the civil justice gap. Adjudicatory system reform is similarly essential. But markets are accessible only to those with income and


6 Steinberg, supra note 1, at 764-74 (describing the practical impediments to providing legal services to the poor in the most extreme civil cases); Gillian K. Hadfield, The Cost of Law: Promoting Access to Justice Through the (Un)corporate Practice of Law, 38 INT’L REV. L. & ECON. 43, 46 (2014) (“If every American lawyer in the country did an additional 100 h[ours] per year, that would be enough to secure less than 30 min[utes] per dispute-related problem per household.”).


assets sufficient to pay for the services offered, and adjudicatory system reform depends on the idea that lay individuals will find and be able to use the information needed to navigate reformed, but still alien and probably alienating, tribunals.

Studying self-help is critical in two senses. First, self-help must be a central component of any serious discussion about addressing the justice gap in the United States. And second, self-help must occupy a central role in any serious description of the way in which legal institutions directly affect the lives of corporeal persons.

Self-help materials cannot be successful unless two conditions are met: (i) when the lay would-be user can find materials in a timely manner (are self-help materials accessible?), and once found, (ii) when the lay would-be user can successfully use the materials to advance his or her cause (are the self-help materials deployable?).

Until now, the primary focus of the bench, the bar, and the academy has been on access. Currently, many types of self-help materials are readily available to those who seek them. Practically every state court system and legal aid organization has websites providing forms or other information to unrepresented litigants. Efforts have also been made to write these materials in “plain language.” These are all laudable, but they share a common shortcoming: none that we have found

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10 We discuss these concepts further in another article, D. James Greiner, Dalie Jimenez & Lois Lupica, Thinking Like a Non-Lawyer (July 30, 2015) (unpublished draft) (on file with authors).
Self-Help, Reimagined

seriously considers whether and how lay recipients can deploy the professional legal knowledge they provide.13

While scholarship teaches us that “[f]inding information and knowing how to use it are two different things,”14 attention to lay deployment of professional legal knowledge has been sparse. Anecdotes from the field however, suggest that lay deployment challenges in law-related contexts are serious.15 An example from almost two decades ago provides a telling illustration. A pro se tenant, as a result of fully accessible self-help legal materials and limited advice, came to her eviction hearing armed with damning photographic evidence of her apartment’s uninhabitability as well as knowledge of favorable law. But at a mediation in her case, she failed to produce the evidence she had in hand or to raise legal defenses.16 The tenant’s explanation: “It didn’t come up.”17 Access to professional legal knowledge was not a problem for this tenant. The problem was deployment, particularly a lack of self-agency,18 a lack of knowledge of how to negotiate, and (we hypothesize) a struggle against debilitating emotions such as fear, shame, guilt, or hopelessness.19

This Article explores the impediments to lay deployment of the professional legal knowledge in self-help materials. Based in part on our observations of small claims courts and semi-structured cognitive interviews with small claims defendants, we identify a series of obstacles that we posit are preventing individuals subject to compulsory legal process from deploying professional knowledge.

In brief, we hypothesize that lay deployment problems stem from a variety of cognitive, emotional, and behavioral challenges, ranging from immobilizing feelings of shame, guilt, or hopelessness to lack of self-agency as well as failures

14 Steinberg supra 745.
15 See infra Part III.
16 “Instead, after negotiating in the hallway with the landlord’s lawyer, she [] agreed to pay outstanding rent and to vacate the apartment within three months.” Erica L. Fox, Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation, 1 HARV. NEGOT. L. REV. 85, 85 (1996).
17 Id.
18 We borrow Fox’s terminology here; in this context, self-agency means the ability of an individual to act as her own agent, to represent her best interest in the negotiation. Id. at 86.
19 Accord Steinberg, supra note 6, at 755 (describing the maze of rules and procedures a self-represented litigant must overcome and concluding that it is not surprising “that unrepresented litigants feel nervous, bewildered, and emotionally overwhelmed in charting their course through the court system.”).
in plan-making and plan-implementation. After a review of available lay legal materials, we further posit that the way information is currently presented to self-represented individuals—without visual imagery, with unnecessary details, and without attention to layout and organization—can thwart its effective deployment. Thus, our aim in this Article is twofold: (i) to identify the barriers that low- and moderate-income/asset ("LMI") individuals face in attempting to navigate legal and quasi-legal spheres without professional assistance; and (ii) to propose ways in which self-help materials might be re-imagined to address these barriers.

Part II builds a theory of barriers to effective deployment by joining together a variety of literatures—particularly public health, education, and cognitive psychology—that speak to analogous problems in other contexts. We also rely on findings from semi-structured interviews with individuals in financial distress. In Part III, we draw from these literatures to reimagine self-help materials that address the hurdles faced by lay individuals attempting to navigate the legal system without full representation. We provide examples from materials we have been developing for a research study on consumers in financial distress. We contend, however, that we cannot simply arbitrage the findings of other literatures to the legal context, even if those other literatures include theory-driven hypotheses evaluated by strong research designs. The legal context may not be as different as legal professionals would have the world believe, but it is different. New self-help materials need to be subjected to the testing so stunningly absent in the context of old self-help materials. Part IV surveys the literature on testing of educational materials and discusses our experiences in testing. Part V concludes by discussing next steps.

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20 Sandefur, supra note 2.
21 For example, in a study examining information presented to medical patients, the researchers found that illustrated booklets were more effective in communicating concepts than those without illustrations. See J. M. Moll, Doctor-Patient Communication in Rheumatology: Studies of Visual and Verbal Perception Using Educational Booklets and Other Graphic Material, 45 Annals of Rheumatic Diseases 198, 206-207 (1986). See also Peter S. Houts, et. al., The Role of Pictures in Improving Health Communication: A Review of Research on Attention, Comprehension, Recall and Adherence, 61 Patient Educ. & Counseling 173, 175-187 (2006) (reviewing studies that found that the inclusion of pictures to written and spoken language increases patients' “attention, comprehension, recall and adherence”). In a study examining information presented to medical patients, the researchers found that illustrated booklets were more effective in communicating concepts than those without illustrations. See J. M. Moll, Doctor-Patient Communication in Rheumatology: Studies of Visual and Verbal Perception Using Educational Booklets and Other Graphic Material, 45 Annals of Rheumatic Diseases 198, 206-207 (1986).
II. BARRIERS TO EFFECTIVE DEPLOYMENT

In this Part, we analyze obstacles that, we hypothesize, thwart the ability of a lay person to deploy professional legal knowledge contained in already-accessed self-help materials. We divide these impediments into two categories: barriers to action and barriers to understanding. We restrict our analysis to situations in which there are easily found self-help legal assistance materials tailored to the particular legal problem the individual faces.

We draw on and quote from cognitive semi-structured interviews with LMI individuals in financial distress in courts in Maine, Massachusetts, and Connecticut. We asked test subjects to read self-help materials in front of a research team member and encouraged readers to “think out loud,” in order to describe thought processes as they read. At opportune times, the research member asked open-ended follow up questions, such as, “What do you think of this phrase/illustration?” Our team interviewed individuals in severe financial distress, as evidenced by a pending debt collection lawsuit, but we hypothesize that our findings on deployment barriers are applicable to a wide range of legal and quasi-legal situations.

22 We conducted these interviews as part of the Financial Distress Research Project, a randomized control trial testing the effectiveness of interventions that might help individuals in financial distress. We first described this study in an article in 2013 which focused on the randomized control trial aspect of the project. See Dalié Jiménez et al., Improving the Lives of Individuals in Financial Distress Using a Randomized Control Trial: A Research and Clinical Approach, 20 GEO. J. ON POVERTY L. & POL’Y 449 (2013). As part of this project, we have spent the past two years, developing and testing the effectiveness of self-help legal materials to help rehabilitate individuals in financial distress. The materials span a variety of circumstances: (1) responding to and challenging a debt collection lawsuit in small claims court, (2) negotiating with creditors outside of that lawsuit (with specific modules targeted at medical, utility, and student loan debt), (3) obtaining and correcting the individual’s credit report, and (4) filing a no-asset Chapter 7 bankruptcy, if appropriate. Over sixty law students from Maine, Harvard, and UConn law schools have participated in the creation of these materials.

23 Nationally, a high fraction of individuals who have been sued fail to respond to the summons, to file answers, or to appear at court hearings. This is particularly true in debt collection cases. Default is yet another instance of inaction in the face of a justiciable problem, and it was prevalent in the courts from which we recruited our interview subjects. Two student reports are telling. As one student interviewer put it:

I have now been to three separate small claims dockets in two different Maine courts . . . . Quick observations are as follows: The biggest barrier to justice in small claims when it comes to these credit card cases is the default judgment. I watched one session where the attorney for the collection company stood up right before the judge came out and called out a dozen names to see if any of the defendants were there. No one responded, and he walked away with a dozen default judgments. I know we’ve talked about encouraging pro se defendants to show up, but it was interesting to see how truly prevalent the practice was.

Interview by Peter Lacy with anonymous debt collection defendant, in Portland, Me. (Feb. 14, 2013).
This Part proceeds in two steps. In Section I.A, we discuss barriers to action. In Section I.B, we discuss barriers to understanding. In Part III, we discuss overcoming these barriers.

A. Barriers to Action

Solving justiciable problems typically requires action. The needed action may be responding to a lawsuit, coming to court on a hearing date, or, when in court, advocating for oneself. We hypothesize that failures to take action are in part a function of the psychological and mental state a lay individual finds herself in when faced with a justiciable problem: overtaxed, anxious, unfamiliar with legal mundanity.

1. Overtaxed Bandwidth

Recent research on scarcity—of time, or money, for example—reveals scarcity’s far-reaching implications for the poor.24 Sendhil Mullainathan and Eldar Shafir’s study of this issue exposes how the poor spend an inordinate amount of energy, documentation to prevail on the debt. However, the court granted him about twenty-eight default judgments because defendants failed to appear in the court.

Interview by Rachel Deschuyter with anonymous debt collection defendant, in Portland, Me. (Apr. 11, 2013).


The upshot of all this is that when we observed deployment barriers even among those litigants who DID find the gumption to attend court to contest their debt collection lawsuits, we were probably observing the tip of a sizeable iceberg. While hypotheses vary about why debt collection defendants default, see Greiner & Mathews, supra note 23, our guess is that our interview subjects were an unrepresentative sample of all debt collection defendants in that they were more likely to have resisted, partially, the debilitating psychological states associated with pro se litigants.

attention, and mental bandwidth dealing with their impoverished state.\textsuperscript{25} The need to focus on navigating the attendant issues of poverty—finding and keeping food, shelter, and employment—requires an intense use of mental capacity. This focus on the scarcity—referred to as tunneling—leaves limited room for consideration and attention to other issues.\textsuperscript{26} Decision making quality suffers, making coping with poverty ever harder.\textsuperscript{27}

Drawing on this research, we hypothesize that LMI individuals, like the poor in Mullainathan and Shafir’s study, “are not just short on cash. They are also short on [available] bandwidth.”\textsuperscript{28} More specifically, “an overtaxed bandwidth means a greater propensity to forget . . . things that fall under what psychologists call prospective memory—memory for things that you had planned to remember, like calling the doctor or paying a bill by the due date.”\textsuperscript{29}

We hypothesize that successfully addressing a justiciable problem requires a heavy investment of prospective memory. Many of the legal and quasi-legal tasks required of lay individuals who engage with the legal system involve goal identification, goal pursuit, persistence, plan-making, plan-implementation strategies and self-control.\textsuperscript{30} In the case of debt collection defendants, for example, these tasks include preparing a response to the lawsuit; re-arranging one’s schedule and securing transportation to court; and collecting evidence, such as receipts, documents or photographs. If the individual reaches an agreement outside of court, she may need to follow-up, perhaps multiple times, with the other party to receive evidence of the agreement, and perhaps later of payment, in writing.

Thus, overtaxed bandwidth and little excess prospective memory challenge an individual’s ability to deploy even the best and most accessible self-help materials, unless perhaps those materials include appropriate antidotes.

\textsuperscript{25} Id.

\textsuperscript{26} Id.

\textsuperscript{27} Id.

\textsuperscript{28} MULLAINATHAN & SHAHIR, supra note 24, at 157.

\textsuperscript{29} Id. See also Kathleen D. Vohs & Todd F. Heatherton, Self-Regulatory Failure: A Resource-Depletion Approach, 11 PSYCHOL. SCI. 249 (2000).

\textsuperscript{30} Low bandwidth “means that you have fewer mental resources to assert self-control.” MULLAINATHAN & SHAHIR, supra note 24, at 158. Psychologists have shown that self-control resembles a muscle, noting that “the resource needed for self-control is a limited, consumable strength, much like a muscle’s ability to work.” Mark Muraven & Roy F. Baumeister, Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?, 126 PSYCHOL. BULL. 247, 248, 256 (2000).
2. Anxiety and Feelings of Threat

Consider the mental state of a lay person in severe financial distress who is stopped by a sheriff and given a summons to appear in small claims court to respond to a debt collection lawsuit.\(^\text{31}\) We posit that most of us would find this situation both scary and threatening.

Cognitive interviews of persons sued in debt collection actions confirm our intuition:

Q: How did you feel when you were first notified of the lawsuit in the summons and complaint?

A: Awful. [Speaking about when she was served …] I was at work and I had to go outside the building to talk to the sheriff. It was embarrassing.\(^\text{32}\)

In answering a similar question, another debt collection defendant puts it this way: “I felt nervous because this is my first time. It feels like you are being scolded. I’m pretty sure if we had money, we wouldn’t be here.”\(^\text{33}\)

Anxiety, as well as feelings of threat and impending disaster, are commonly cited in many of our interviews.\(^\text{34}\) We hypothesize that these emotions were more paralyzing among defendants who failed to appear.\(^\text{35}\)

Thus, we hypothesize that materials designed to help a LMI debt collection defendant, or any lay LMI individual facing a justiciable problem, must address the broad range of negative emotions experienced by these individuals, in addition

\(^{31}\) As we explain below, the delivery of such a summons is the starting point for enrollment of study subjects in our Study.

\(^{32}\) Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Dec. 12, 2013) (using Bad Evidence Pro Se Packet).

\(^{33}\) Interview by Hilary Higgins with anonymous debt collection defendant, in Boston, Ma. (Mar. 10, 2014) (using Bad Evidence Script 3 Pro Se Packet).

\(^{34}\) More than one subject we interviewed thought that upon receiving the summons, she would be incarcerated. Interview by D. James Greiner with anonymous debt collection defendant, in Boston, Ma. (Feb. 14, 2013) (using State of Limitations Script). Another cognitive interview revealed the following:

Q: How did you feel when you were first notified of the lawsuit in the summons and complaint?

A: Nervous.

Q: How do you think others feel who are less smart or knowledgeable than you?

A: More scared.

Q: How did you feel when you came to court this morning?

A: Anxious … I wanted to get this done and get out of here.


\(^{35}\) See Sandefur, supra note 2; Mary Spector, Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts, 6 VA. L. & BUS. REV. 257.
to providing legal information. For self-help materials to be mobilizing and deployable, they must address individuals’ performance-minimizing and solution-inhibiting mental states.36

3. Unfamiliarity with Legal Details

An individual overcoming these barriers and, say, attending her first court hearing will face another challenge: the emotional effect of not knowing the details of how the formal legal system works. In a small claims court debt collection hearing for example, such details might include the mechanics of the initial calendar call, the negotiation/mediation process, or the small claims court trial. To clarify, we speak here not of the rules of evidence and procedure; nor of the inner workings of the court system and the habits of its human personnel, secrets with which repeat players become familiar;37 nor of the danger that judges, mediators, or other court personnel may react differently to the same argument depending on whether it appears in legal trappings.38 Rather, we refer to legal mundanity, details such as where to sit, who will speak when, and what will occur next. And we hypothesize that the lay litigant’s problem is not so much (say) sitting in the wrong seat, a mistake that can be remedied by a polite tap on the shoulder and a point in the right direction. Rather, the problem is the embarrassment and confidence-shattering effect such a tap and point might have, coupled with the increased cognitive load as she attempts to concentrate simultaneously on finding the right seat and on remembering how to deploy unfamiliar legal arguments. We have found few lay legal materials that address legal mundanity, and none that integrate the mundane with substantive legal knowledge.

In focusing on the emotional state of the individual who lacks repeat-player knowledge of the debt collection tribunal’s unwritten rules, consider the individual’s trust in a self-help legal pamphlet she might have access to that fails to tell her (say) where to sit. Such an individual might reason, “If the pamphlet failed me on the small things, such as where to sit, why should I trust it on the big things, such as what to say to the lawyer in a negotiation?”

38 See, e.g., Steinberg, supra note 6, at 756 (discussing the expressive challenges self-represented litigants encounter in court and citing a study that concludes that “judges and other court players routinely disregard the narrative-style testimony of unrepresented litigants”).
B. Barriers to Understanding: The Self-Help Materials Themselves

We next turn to the question of how the design and presentation of many types of self-help materials fails to facilitate understanding and internalization of the professional legal knowledge lay individuals require. We draw principally from the education literature, supplemented by insights from cognitive psychology and artificial intelligence.

1. Excessive Focus on Conceptual Understanding

We begin with a distinction fundamental to artificial intelligence, cognitive psychology, and education scholars, between procedural knowledge and conceptual knowledge. Students have procedural knowledge when they know how to follow a set of sequential steps but do not necessarily know the reasons for the steps or how to apply those steps to markedly new situations; procedural understanding is the knowledge of algorithm.

In contrast, conceptual understanding occurs when students know what to do, why to do it, and how to do it (or something like it) in a markedly new situation. Conceptual understanding is a webbed framework that links and supplies relationships across pieces of information. One finds this distinction in many strands of the education literature.

39 These concepts were pioneered by Allen Newell and Herbert Simon in the artificial intelligence literature. ALLEN NEWELL & HERBERT A. SIMON, HUMAN PROBLEM SOLVING (1972). The language has been adopted more broadly in the cognitive psychology field. See, e.g., JOHN R. ANDERSON, THE ARCHITECTURE OF COGNITION (1983) [hereinafter ANDERSON, ARCHITECTURE].

The importance of this distinction lies in the realization that procedural knowledge can be easier to teach and learn. If the aim of the instruction is to allow a student to produce correct responses on a narrowly defined range of problems, then procedural knowledge is probably sufficient. As one mathematics educator has explained, “if what is wanted is a page of right answers, [procedural knowledge] can provide this more quickly and easily.”

Undoubtedly, some complex justiciable problems can only be addressed through deployment of conceptual knowledge. The ability to apply abstract principles to new fact patterns is the hallmark of the traditional professional, and it is this skill that legal educators attempt to engender in their students. We hypothesize, however, that not every aspect of every legal problem requires that the lay individual understand the context, background and nuances of potential defenses. In some cases, we hypothesize that lay individuals can, or can be induced to, deploy professional legal knowledge by following a set of step-by-step instructions, such as that provided in a script or a check-the-box form. Fundamentally, we believe that many aspects of law can be usefully commoditized, a theme to which we return.

Our hypothesis is apparently contrary to the prevailing wisdom among those who produce lay legal education materials today. These materials typically begin by

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Anderson, Rules of the Mind (1993); John R. Anderson, Cognitive Psychology and its Implications (1995); Hui-Qing Chong et al., Integrated Cognitive Architectures: A Survey, 28 Artificial Intelligence Rev. 103 (2007) (using different terminology); David J. Jilk et al., SAL: An Explicitly Pluralistic Cognitive Architecture, 20 J. Experimental & Theoretical Artificial Intelligence 197 (2008); John E. Laird, Extending the SOAR Cognitive Architecture, in Artificial General Intelligence: Proceedings of the First AGI Conference (Pei Wang et al. eds., 2008); Paul S. Rosenbloom, Combining Procedural and Declarative Knowledge in a Graphical Architecture, in Proceedings of the 10th International Conference on Cognitive Modeling (Dario D. Salvucci & Glenn F. Gunzelmann, eds., 2010). For the cognitive psychologist, declarative knowledge refers to dominance of a basic set of facts or a set of rote sequential steps to reach a given goal; this knowledge is easier to learn. For the cognitive psychologist, procedural knowledge refers to a deeper internalization of how and why to do things. Anderson, Architecture, supra note 39. To avoid confusion, we stick to the education literature’s usage of terms.

41 Skemp, supra note 40.
42 Indeed, some literature suggests it can be helpful to provide simple but clear explanations of why instructional materials suggest some courses of action and avoidance of others. Borje Holmberg, Guided Didactic Conversation in Distance Education, in Distance Education: International Perspectives 117 (D. Sewart, D. Keegan & Borje Holmberg eds. 1983).
defining legal vocabulary, and subsequently explain abstract legal concepts. The expectation appears to be that a lay individual must learn a great deal about the law relating to her case in order to represent herself effectively. Legal process and procedure are eventually explained, but generally in a way that requires the lay individual to have previously grasped the legal concepts and, worse yet, the jargon. The result is self-help materials that impose what may be unnecessary burdens on the user. The lawyer/author instinct to educate, as opposed to direct, interferes with the lay person’s effective deployment of information.

2. Lack of Analogies and Visual Images

The education and psychology literatures have many lessons on how to induce internalization of whatever a lay individual does need to learn, be it procedural or conceptual. Authors of legal assistance materials have, apparently, learned few of these lessons. For illustrative purposes, we focus on two examples here: analogy and visual images.

With respect to analogies, for those areas in which conceptual (as opposed to procedural) understanding is needed, analogy can be a powerful tool. One of the lessons of the scholarship on expertise and professional knowledge generally is that many hard concepts are best taught not by direct, abstract statements but rather by analogy, preferably by multiple analogies. But analogies are rarely, if ever, found in civil legal materials for lay individuals.

Moreover, despite the overwhelming consensus among education scholars that visual depictions improve learning, we did not find a single instance of the use

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46 See, e.g., Ventura Courts Self-Help Legal Access Center, Part 2a - Legal Reasons Why I Should Not Have to Pay the Money, DEFENDING LAWSUITS FOR BREACH OF CONT. OR COLLECTION OF MONEY (COMMON COUNT) 8, http://www.courts.ca.gov/partners/documents/kanspart2a.pdf (citing specific statutes that individuals can look up for more information).
47 RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT 61 (2002), http://www.zorza.net/Res_ProSe_SelfHelpCtPub.pdf (last visited Feb. 2, 2015) (“For example, an eviction defense template would first detail all the possible defenses and counterclaims (which presumably have been explored first in an answer template, in any event), and then for each of the defenses, lay out the elements of the defense and some of the ways that these facts could be shown.”).
48 Part IV discusses how some sorts of legal information might be commoditized into check-lists and scripts.
49 Blasi, supra note 44, at 355-361.
52 Actually, we did find one. See How to Start a Contested Case, ALASKA COURT SYSTEM, Sept. 2011, http://www.courts.alaska.gov/shc/shc-181n.pdf. We leave it to readers to evaluate whether our statement above constitutes an exaggeration in any relevant sense.
of illustrations or images (other than occasional clip art) to communicate civil legal concepts to LMI individuals. This absence is striking given the many studies showing that images can serve multiple purposes, including easing anxiety, entertaining so as to motivate, facilitating understanding, and serving as mnemonic devices (e.g., a drawing of an ear to aid in the memory of “hearsay”).

The absence of analogies and illustrations serves to hinder deployment of such materials. In Part III we discuss how these two tools, among others, might be adapted to self-help materials.

3. Language, Presentation Style, and Organization

In our review of existing self-help materials, we were struck by how often the sequence and arrangement of information was inconsistent with the research on how to best communicate written information. Legibility and format affect reading speed, comprehension, and recall of information. The psychology, marketing, education, and health fields address these issues at the level of the page, the sentence, and the word.

For example, research shows that “[t]he use of all capital letters in a heading actually dramatically decreases speed of reading.” In multiple studies, “the average reader took about 12-13% more time to read all caps[;] 38 words per

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55 Maria do Santos Lonsdale et. al., Reading in Examination-Type Situations: The Effects of Text Layout on Performance, 29 J. RES. READING 433, 433 (2006). The authors tested subjects’ speed and accuracy in a testing setting, cautioning the possibility that the “results of this study are specific to the reading task of searching for particular information in the text under time pressure.”

minute slower than using sentence case.”

Many readers are likely to skip all-caps sentences. Nonetheless, many court forms and materials designed for self-represented litigants include important messages entirely in uppercase. 

Unsurprisingly, sentence structure and length, the amount of jargon, paragraph complexity, the use of passive voice, and other familiar writing concepts all matter. The education literature recommends the use of short sentences. Very short. Perhaps so short that they lack subjects and verbs. Some that are not grammatically correct. Write the way the intended user speaks and thinks. Write as though you are competing for the time and attention of busy and stressed individuals. Because you are.

III. RE-CONCEPTUALIZING SELF-HELP MATERIALS AND FORMS

We have developed a catalog of suggestions for how courts, legal services providers, law school clinics, and anyone else creating civil legal materials for lay individuals might reimagine those materials in ways that address the barriers hypothesized in Part II. The approaches we describe are low-cost. Many of the suggestions we have borrowed from other literatures are based on helping low-literacy individuals learn health or other information. We have chosen to use these suggestions not because LMI individuals necessarily have low literacy skills, but because we hypothesize that low mental bandwidth and tunneling affect an individual’s ability to focus on complex language and concepts.

To be clear, we do not yet know whether any of our proposals in fact improve the deployability of legal self-help materials, or if they do, whether greater deployability leads to more favorable adjudicatory outputs or solved legal

57 Id. at 115 n.23 (citing the seminal article, Miles A. Tinker & Donald G. Paterson, Influence of Type Form on Speed of Reading, 12 J. Applied Psychol. 359 (1928)).
58 Id. at 116.
60 Access to justice commissions, legal aid organizations, and others seeking to help unrepresented individuals have rightly urged a focus on using “plain language” so that clients and other lay readers can better understand the content of the documents. Mark Adler, Bamboozling the Public, 9 Scribes J. Legal Writing 167, 167-85 (2004); Kimble, supra note 12; Sullivan, supra note 12. See supra note 12. But see, e.g., Ventura Courts Self-Help Legal Access Center, supra note 46 (“Every lawsuit must be brought within a certain time frame that the law provides depending on the cause of action, or legal theory being sued upon. For example, lawsuits for breach of a written contract must be brought within 4 years from the date of the breach. Lawsuits for breach of an oral contract must be brought within 2 years from the date of the breach.”).
problems. In parallel projects, we are testing the effectiveness of self-help materials constructed with our hypotheses in mind.61 The examples we provide in this Part come from materials we have developed for individuals in financial distress. We have tested many of these materials through cognitive interviews with a financially distressed population and we describe some of what we have learned in this preliminary testing below.62 But further work is needed.

A. Overcoming Situational Barriers

1. Motivating and Engaging Through Illustrations and Cartoons

In Part II, we identified emotional, behavioral, and cognitive barriers that may inhibit LMI individuals from taking action. We hypothesized that some of these obstacles stemmed from the compulsory nature of the process; others from LMI individuals’ limited cognitive bandwidth. To address these barriers, we propose that self-help materials include illustrations, more specifically, cartoons and stick figures.

As noted above, the education, psychology, and public health literatures suggest that graphics and illustrations can motivate, engage, and improve learning outcomes.63 These literatures also rank types of illustrations according to their effectiveness: stick figure drawings and cartoons are superior to photographs or highly detailed drawings.64 Why? Learners generally lack the ability to distinguish important features in photographs (or highly detailed drawings) from irrelevant details, and the resulting distractions and higher cognitive loads prevent effective interaction. The solution is to remove the irrelevant details and include only the important features, something cartoons and stick figure drawings facilitate. Cartoons facilitate learning via other mechanisms as well. In the medical context, for example, scholars have posited that cartoons might help by “assuaging anxiety,” at the slight risk of “trivializing” the subject being considered.65

Other literature advises that an image’s placement (on the page) can be as important as its content.66 Cognitive theory, verified by experiments, suggests that if an illustration cannot be placed immediately beside the text it accompanies, it

61 See, e.g., supra note 23; Jiménez et al., supra note 22.
62 See supra note 23; See supra note 32; See supra note 33; See supra note 34.
63 See supra note 53. See also LARRY GONICK, THE CARTOON GUIDE TO ALGEBRA (2015).
64 Moll, supra note 21; Delp & Jones, supra note 53.
65 Moll, supra note 21, at 207.
66 Peter C. Whalley & Richard W. Fleming, An Experiment With a Simple Recorder of Reading Behavior, 12 PROGRAMMED LEARNING & EDUC. TECH. 120 (1975); Richard E. Mayer & Roxana Moreno, Aids to Computer-Based Multimedia Learning, 12 LEARNING & INSTRUCTION 107 (2002);
should precede that text. Learners also perform better when they do not have to split their attention between text and diagram, so to the extent possible, textual explanations should be incorporated into diagrams and pictures. These explanations must be concise, or they risk increasing cognitive load.

A few more lessons from the literature: graphics that are merely decorative are distracting and should not be used. Neither should images that depict actions one does not want an individual to take (such as a graphic of a pregnant woman smoking in a health pamphlet).

We posit, therefore, that simply drawn cartoons placed next to or before relevant text can serve both as learning aids and motivational tools. As an example, we have duplicated an image we call “Blob” on the right. We have tested materials using Blob and other simply drawn cartoons in the debt collection context via semi-structured cognitive interviews with debt collection defendants in small claims courts in Maine, Connecticut, and Massachusetts. Responses have been positive, with only a small minority of the over 50 defendants we have interviewed expressing a negative reaction.

For example, when asked whether the respondent thought the cartoon was distracting, one interviewee stated, “I like the cartoon. It’s cute and it makes words at the end seem less scary. I don’t understand the official wording so the

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69 Mayor & Moreno, supra note 67.


71 Id. See Houts et al., supra note 21, at 188 (recommending using the simplest drawings possible).

72 For an extended discussion of Blob’s origins, see Greiner & Matthews, supra note 23.

73 Interview by Hilary Higgins with anonymous debt collection defendant, in Boston, Ma. (Mar. 10, 2014) (using Bad Evidence Script 3) (“They helped me understand, but I don’t like cartoons . . . . I’m not a cartoon person.”); Interview by Alvin Lin with anonymous debt collection defendant, in Boston, Ma. (Mar. 20, 2014) (using Court Action, What Happens Script) (“She personally did not like the cartoons, but she thought that it was a good way to get less smart people to follow along.”).
Another interviewee noted that a cartoon helped her understand the text and noted that it served as “. . . a good memory tool and [is] less intimidating than just text. I’d rather read a long picture book than a short book with no pictures.”

2. Reducing Emotional and Cognitive Challenges with Self-Affirmation and Positive Affect Theories

Most individual debt collection defendants fail to appear in court and thus default. If this failure to engage were addressed, it is possible that a sizeable number of cases filed against these defendants would be dismissed. The slightest objection or defense raised may reveal a lack of proof of essential aspects of each allegedly delinquent account, including the amount of principal owed, the applicable interest rate, permissible charges and fees, dates of delinquency, and the proper state law governing the original debt contract. How might we increase the engagement level of debt collection defendants in order to improve the function and fairness of the adjudicatory process?

Self-affirmation theory from cognitive psychology might provide an explanation—and potential solution—to engaging consumers. Self-affirmation

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75 Interview by Rachel Deschuytner with anonymous debt collection defendant, in Portland, Me. (Mar. 27, 2014).
76 Interview by Hanne Olsen with anonymous debt collection defendant, in Boston, Ma. (Apr. 17, 2014) (using Court Action Interest and Fees Script). Another interviewee “liked the cartoon and didn’t think it was too childlike because the blobs seemed ageless (almost like ghosts) so it didn’t seem like a kids cartoon.” Interview by Kavya Naini with anonymous debt collection defendant, in Boston, Ma. (Mar. 27, 2014).

Various literatures include other lessons. For example, graphics that are merely decorative are distracting and should not be used, nor should illustrations which depict undesired behavior (such as a pregnant woman smoking). Bastable, supra note 70. And experiments in the deployment of medical information have found that the use of pictures and illustrations differs by age groups. See, e.g., Roger W. Morrell et al., Effects of Labeling Techniques on Memory and Comprehension of Prescription Information in Young and Old Adults, 45 J. GERONTOLOGY 166 (1990) (studying prescription drug labels); Beverly J. Dretzke, Effects of Pictorial Mnemonic Strategy Usage on Prose Recall of Young, Middle-Aged and Older Adults, 19 EDUC. GERONTOLOGY 489 (1993) (focusing on mnemonic images); see also Chiung-ju Liu et al., The Use of Illustration to Improve Older Adults’ Comprehension of Health-Related Information: Is it Helpful?, 76 PATIENT EDUC. & COUNSELING 283 (2009); Julia C.M. van Weert et. al., Tailored Information for Cancer Patients on the Internet: Effects of Visual Cues and Language Complexity on Information Recall and Satisfaction, 84 PATIENT EDUC. & COUNSELING 368 (2011).
77 Estimates vary, but according to some sources, at least 80% of the consumers sued fail to appear in court and consequently have default judgments entered against them. Judgments in hand, debt buyers’ attorneys then obtain payment through compulsory collection processes enforced by overburdened courts, such as wage garnishment, bank account seizure, and even arrest (to compel debtors’ court appearances). D. James Greiner & Andrea Matthews, supra note 23. Rebeca L. Sandefur, The Importance of Doing Nothing: Everyday Problems and Responses of Inaction, TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 123 (Pascoe Pleasence, Alexy Buck, Nigel Balmer, eds., 2007).
78 See Pine Tree Lawyer for the Day Statistics.
79 See Dalíe Jiménez, Dirty Debts Sold Dirt Cheap, 50 HARVARD J. ON LEGIS. 41 (2015); See Greiner & Matthews, supra note 23.
theory posits that individuals are “motivated to sustain ‘self-integrity,’ or perceptions that they are moral, consistent, and dependable.”\textsuperscript{80} When encountering a message that threatens their self-integrity, individuals may “denigrate the message” as a way to restore their self-image.\textsuperscript{81} For example, studies have shown that among smokers, those at the highest risk for negative health outcomes “are the least likely to accept or respond” to a message about the negative health consequences of smoking.\textsuperscript{82} “The implication is that any health message that is perceived as threatening to the individual will be unsuccessful in changing behavior unless this type of defensive processing can be overcome.”\textsuperscript{83} Self-affirmation exercises aim to shortcut this type of defensive processing by reminding individuals of positive values about themselves before they encounter the threatening information.\textsuperscript{84}

Self-affirmation theory posits that when people affirmatively acknowledge their self-worth (such as, for example, by recalling past acts of kindness), the need to respond defensively to threatening messages is reduced.\textsuperscript{85} Once an individual lowers her natural defensiveness, she can process a message of behavioral change and may be more able to conform behavior accordingly.

In the legal context, we hypothesize that exercises affirming the positive aspects of the individual’s world as well as her sense of self can help address the debilitating and paralyzing mental states of the self-represented LMI individual.\textsuperscript{86} For example, completing a self-affirming exercise may make people less likely to discredit a difficult message (the need to face a lawsuit) and more likely to take steps to respond (show up to court).\textsuperscript{87}

\textsuperscript{81} Id.
\textsuperscript{82} Christopher J. Armitage et al., \textit{Self-Affirmation Increases Acceptance of Health-Risk Information Among UK Adult Smokers with Low Socioeconomic Status}, 22 PSYCHOL. ADDICTIVE BEHAV. 88, 88 (2008).
\textsuperscript{83} Id.
\textsuperscript{84} See, e.g., Peter R. Harris, Kathryn Mayle, Lucy Mabbott, & Lucy Napper, \textit{Self-Affirmation Reduces Smokers’ Defensiveness to Graphic On-Pack Cigarette Warning Labels}, 26 HEALTH PSYCHOL. 437 (2007).
\textsuperscript{87} See id. at 53.
Considerable research in non-legal contexts supports our hypothesis.\textsuperscript{88} Public health researchers have used written self-affirmation exercises to spur individuals to take action on diet, exercise, or cleanliness.\textsuperscript{89} Many of these studies are randomized control trials, the gold standard in evaluating interventions.\textsuperscript{90} One study, examining the effect of self-affirmation theory on alcohol consumption, tested whether a self-affirmation exercise enabled processing of the “threatening message” to reduce drinking.\textsuperscript{91} The research concluded that self-affirmation was effective in reducing alcohol intake “by facilitating the processing of health risk information.”\textsuperscript{92} Similar studies in the context of education found that identity-based threats to performance among racial minorities and women/girls in STEM (science, technology, engineering and math) subjects were blunted by the subjects’ engagement in self-affirmation exercises.\textsuperscript{93}

Similarly, a weight-loss study found that those who completed a values affirmation exercise were more successful than a comparable group of subjects

\begin{itemize}
\item \textsuperscript{89} Self-affirmation theory is credited to Claude M. Steele. \textit{See} in particular, Claude M. Steele, \textit{Chapter 6: The Psychology of Self-Affirmation: Sustaining the Integrity of the Self}, in 21 \textit{Advances in Experimental Psychology} 261–302 (1988). For a review of positive affect theory, see Alice M. Isen, \textit{Chapter 48: A role for neuropsychology in understanding the facilitating influence of positive affect on social behavior and cognitive processes}, in \textit{The Oxford Handbook of Positive Psychology} 503-518 (2d ed. 2009).
\item \textsuperscript{90} \textit{See}, e.g., Armitage et al., \textit{Self-Affirmation Reduces Alcohol Consumption}, supra note 88; Mary E. Charlson et al., \textit{Randomized Controlled Trials of Positive Affect and Self-Affirmation to Facilitate Healthy Behaviours in Patients with Cardiopulmonary Diseases: Rationale, Trial Design, and Methods}, in 28 \textit{Contemporary Clinical Trial} 748 (2007); \textit{See also} D. James Greiner & Cassandra Wolos Pattanayak, \textit{Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make}, 121 \textit{Yale L. J.} 2118, 2121 (2011).
\item \textsuperscript{91} Christopher J. Armitage et al., \textit{ supra note 82.}
\item \textsuperscript{92} Logel & Cohen, \textit{ supra note 86.}
\end{itemize}
who were not similarly treated.\textsuperscript{94} The researchers concluded that “affirming people’s values helps them maintain self-control in difficult situations or buffers them against life stressors.”\textsuperscript{95} They further noted that self-affirmations “interrupted a feedback loop in which failure to achieve health goals worsened psychological functioning, which in turn increased the risk of further failure in a repeating cycle.”\textsuperscript{96} Other studies have confirmed that self-affirmation exercises can reduce stress,\textsuperscript{97} help individuals cope with layoffs,\textsuperscript{98} reduce students’ tendency to self-handicap before a test,\textsuperscript{99} boost self-control after self-control has been depleted,\textsuperscript{100} and help buffer self-esteem in victims of domestic violence.\textsuperscript{101}

We can apply these lessons to the legal context. Self-help legal materials can include self-affirming exercises before the presentation of particularly challenging information or tasks. The image that follows is a snapshot from a self-help packet designed for individuals preparing to go to court on a debt collection matter. The page following the self-affirmation exercise provides advice on how to talk to the debt collector’s attorney.

\textsuperscript{94} All of these study subjects reported dissatisfaction with their weight. Because “maintaining a healthy body mass index (BMI) requires two things: the ability to cope with stress, which increases calorie consumption....and the ability to maintain self-control.” Logel & Cohen, \textit{supra} note 86, at 53.

\textsuperscript{95} The researchers hypothesized that overweight individuals may react negatively to information on the benefits of exercise because of the implicit message that being targeted to receive such information implies that they are overweight (with all of the accompanying social stigma and subtext). Following the study, the researchers found that “brief interventions can have long-term effects” because “brief interventions can interrupt recursive cycles that would otherwise produce cumulative costs.” \textit{Id.} at 54.

\textsuperscript{96} \textit{Id.} at 54-55. The literature on these points is extensive. See, \textit{e.g.}, Mary E. Charlson et al., \textit{Randomized Controlled Trials of Positive Affect and Self-Affirmation to Facilitate Healthy Behaviours in Patients with Cardiopulmonary Diseases: Rationale, Trial Design, and Methods}, 28 \textit{CONTEMP. CLINICAL TRIALS} 748 (2007); Tracy Epton & Peter R. Harris, \textit{Self-Affirmation Promotes Health Behavior Change}, 27 \textit{HEALTH PSYCHOL.} 746 (2008); Christopher J. Armitage et al., \textit{Self-Affirmation Increases Acceptance of Health-Risk Information Among UK Adult Smokers with Low Socioeconomic Status}, 22 \textit{PSYCHOL. ADDICTIVE BEHAV.} 88 (2008); Janey Peterson et al., \textit{Randomized Control Trial of Positive Affect Induction to Promote Physical Activity After Percutaneous Coronary Intervention}, 172 \textit{ARCHIVES INTERNAL MED.} 329; Logel & Cohen, \textit{supra} note 86.


Increasing Self-Agency Through Information, Role-Playing, and Visualization

Part of a professional’s role in representing an individual is to act as the client’s spokesperson, to assert the client’s position, to persuade, push or cajole others in the client’s interests. Attorneys acting on behalf of clients represent that they use specialized knowledge in their advocacy, and they may do so. But, certainly, a major element of what attorneys do is relieve the client of the need to speak, to assert, to persuade, push, or cajole, for herself.

In contrast, the pro se individual must act as her own agent. To do so successfully—to have what Erica Fox has termed “self-agency”—she must (1) internalize that her interests are legitimate; (2) believe that it is legitimate to pursue those interests; and (3) have the capacity (the self-confidence and the

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**Remember, you’re a good person!**

You got sued. A lawyer says you owe money. That doesn’t make you a bad person. The lawyer might try to make you feel guilty. The lawyer might try to make you feel like a bad person. Don’t let them do that to you.

Pick some words that describe you. Maybe some of these:

- Kind
- Giving
- Fair
- Honest
- Hard-working

Or think of your own words that describe you:

- ___________
- ___________
assertiveness) to pursue them.102 “Ineffective self-representation in negotiation can result from a deficiency in any one of these three elements.”103

Consider the unrepresented litigant who is asked by the clerk or judge to “step into the hallway” to try to negotiate an agreement with her adversary, or, rather, an attorney representing her adversary. It turns out that “many [individuals] are better at standing up for the interests of others than they are for their own interests.”104 We hypothesize that self-help materials that ignore this problem are less likely to succeed.

We propose that low-cost interventions may be able to address all three elements of self-agency. To help the individual recognize that her interests are legitimate, self-help materials should instill hope and confidence while explaining the individual her rights.105 In the debt collection context, our self-help materials might point out that courts have found that debt collection plaintiffs sometimes have no intention of continuing with lawsuits when they meet determined opposition.106 Such materials might also disclose that courts and regulators have found that debt collection plaintiffs frequently do not know whether they are suing the right person, on the right debt or credit card, or for the correct dollar amount.107

The message is that fighting a lawsuit is not breaking a promise or reneging on an obligation. To the contrary, fighting a lawsuit could be a way of refusing to pay a debt not actually owed, or to pay the wrong amount to the wrong person. The theory is that lay people will contest lawsuits better, or at all, when they feel good about doing so. More generally, how one feels about deploying specialized knowledge affects whether and how one deploys such knowledge.108

We further hypothesize that role-playing exercises can help the unrepresented individual with Fox’s third element, having the capacity to pursue her interests. For example, we have adapted a technique regularly used by the Harvard Program on Negotiation: asking a study subject to pretend to be someone else while

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102 Fox, supra note 16, at 94 (defining self-agency as comprising those three elements).
103 Id.
106 Many courts have found as much. Miller v. Javitch, Block & Rathbone, 561 F.3d 588 (6th Cir. 2009).
108 In-person conversation with Mnookin in Boston, Ma. (2013).
practicing a negotiation (with a friend or in front of a mirror). That someone else might be a fictional lawyer from a television program, a relative, a historical figure, or anyone the study subject thinks of as strong, confident, and unafraid.\textsuperscript{109}

Below is an illustration of how this negotiation preparation technique might be used in self-help materials to empower a consumer in an upcoming negotiation.

Don’t know how to talk to bullies?

Think of someone who does. Someone confident.

They can be someone you know, someone on TV, or someone in a movie.

Write that person’s name here: ____________________________.

\textsuperscript{109} In-person conversation with Robert Bordone, in Cambridge, Ma. (2013).
Finally, we hypothesize that visualization techniques in preparation for a negotiation might also increase the individual’s capability. This may involve presenting potential setbacks individuals may encounter when trying to represent themselves, and requesting that they visualize what they will do in response. The
example below prepares individuals to “stick to their guns” when they do not immediately encounter a helpful person on the phone.

The loan company representative or debt collector might not be very nice. They might tell you that you can’t have certain options. They might tell you there’s nothing they can do for you. Practice how you will respond. For example, you might say this:

“What you are asking me to pay is impossible. I want to speak to your supervisor.”

The visualization exercises may also suggest that the individual practice stepping back (literally or figuratively) from a situation when they feel they are losing control of it.

4. Demystifying Legal Mundanity

Earlier, we posited that a lack of knowledge of legal mundanity hinders lay individuals’ self-confidence and trust in self-help materials. To counter this, civil legal materials could include what would appear to a lawyer to be trivial logistical information about the legal process: where an individual should go, what she will see when she arrives in court, when to raise her hand to show that she is present. As suggested earlier, the purpose of providing this information is two-fold: (i) to inform lay individuals regarding what they actually need to know to deploy professional legal knowledge effectively, and (ii) to instill confidence in the other parts of the materials, the parts that contain what for lawyers is “substantive” information.
The next few pages show selections from a packet our students and we have created on how respond to a debt collection lawsuit. Its target audience is debt collection defendants in Maine, where one of our studies is taking place.

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**When do I go to court?**

The court will mail you a letter telling you when to go.

So, watch for a letter from the court.

The letter will say “Notice of Small Claims Hearing” at the top.

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110 Court Action, What Happens (May 2014) (unpublished interview script) (on file with authors).
The images above address what the individual will see before coming to court. What about court itself? Court is an unfamiliar and intimidating place. In fact, courts are designed to be intimidating; they may have to be intimidating to induce litigant compliance with their rulings. But, as we have suggested, most people cannot fight feelings of intimidation and perform unfamiliar and complex tasks well at the same time. Thus, we created the following images from our self-help packet. Note the level of detail, which is designed to inform and to instill trust.
We hypothesize that self-help materials should discuss as much as possible of the process as the individual is likely to encounter. For example, if most defendants in a particular type of case are sent to mediation, the materials should explain this, and provide details about what to expect during the mediation process. We hypothesize that providing this detail will increase the individual’s confidence and comfort in an unfamiliar situation.

5. Aiding with Plan-Making and Implementation Strategies

Lay individuals addressing justiciable problems need to plan and to execute a number of complex tasks. These might involve responding to a lawsuit within a short time period, keeping track of notices to know when to come to court, or arranging transportation or leave from work to attend a court hearing. The behavioral economics, psychology, and public health literatures have insights that could aid LMI individuals in plan making and plan execution.\footnote{For a review of implementation intentions that work, see Todd Rogers et al., \textit{Making the Best Laid Plans Better: How Plan-Making Prompts Increase Follow-Through}, 1 BEHAV. SCI. & POL’y (forthcoming 2015), available at http://scholar.harvard.edu/files/todd_rogers/files/making_0.pdf (last visited Feb. 28, 2015).}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{courtroom.png}
\caption{What To Expect When You First Get to Court}
\end{figure}

When you get inside the court, it may look like this:

It might be crowded. Don’t worry! Go find your courtroom. If none of the papers you have tells you which courtroom, ask a security guard where small claims court is.
Research from these fields on how people can achieve their goals tells us first that if the goals are specific, proximate, and characterized as learning exercises rather than as performance, they are most likely to be met. The framing of the goals also matters; goal attainment is more likely if the goal is framed positively (losing weight will give me more energy) rather than negatively (being obese will lead to heart disease).

Similarly, simple prompts increase follow-through on achieving goals. In the public health context, something as simple as the inclusion of a sticky note with the language: “Don’t forget! Colonoscopy appointment with: _____ on: _____,” attached to a reminder to undergo a colonoscopy significantly increased patient compliance. The sticky-note worked by addressing three different barriers to intention implementation: (i) cognitive, by associating a future cue (the date) with a plan of action (the appointment), (ii) logistical, by providing a solution to the practical challenge of remembering the date and time of the appointment, and (iii) material, by offering a visual reminder of the appointment. Political scientists have used similar measures to promote voting.

Research from these fields also suggests that implementation intentions can aid the follow through on achievement of goals. Implementation intentions, structured as “when situation X happens, I will perform response Y,” facilitate a commitment to responding to a specific circumstance in a particular way. When an individual identifies a potential situation or circumstance and pre-identifies an action in response, that action becomes mentally accessible and easier to act on. The pre-planned response requires less conscious intent. The implementation intention places the achievement of a goal under the direct control

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117 Milkman, supra note 116, at 2.
118 Id. at 3-4.
119 David W. Nickerson & Todd Rogers, Do You Have a Voting Plan?: Implementation Intentions, Voter Turnout, and Organic Plan Making, 21 PSYCHOL. SCI. 194 (2010).
120 “I want to achieve Y” is how a goal intention is phrased. Id. at 494.
121 Id. at 494-95.
122 Id.
of “situational cues,” partially removing the action from “conscious and effortful control.”  

We can apply these lessons to the legal context, then test to see if they work. For example, a self-help assistance packet or a notice can include sticky notes to be placed on refrigerators or wall calendars. Legal materials can include blank lines for recipients to write down the dates, times, and locations of court hearings. If information is to be delivered electronically—via an app or the web, for example—the individual can be prompted to sign up for reminders either through e-mail or text.

B. Overcoming Barriers to Understanding

The legal system is complex, replete with process- and substantive decision-trees that professionals, after formal training and practice, gain facility in navigating. Reducing this complexity in effective self-help materials is not easy. Research in the fields of education and psychology, however, offers some insights and suggest tools that we posit can be effective in addressing barriers to effective deployment. In this section, we arbitrage these insights.

1. Previewing Content and Context: Content Overviews and Advanced Organizers

Studies from other fields have found that roadmaps or summaries help readers understand relationships among concepts. The education literature identifies two specific strategies to do this: content overviews and advance organizers. The literature is mixed on which of these approaches are most effective, and the answer likely depends on the purpose of the material. Both tools may be helpful if included in civil legal materials for the lay individual.

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123 Id. at 495.
124 J. Beshears et al., A Nudge to Help Employees Follow-Through on Their Best-Laid Plans: The Potency of Implementation Intentions Reminders (unpublished manuscript) (on file with authors).
126 “Both signals and advance organizers help provide the reader with the hierarchical structure of the materials. Ultimately, this contributes to better recall because the reader better understands the relationship among subtopics.” Robbins, supra note 56, at 124 (citing Robert F. Lorch et. al., Effects of Signaling Topic Structure on Text Recall, 85 J. EDUC. PSYCHOL. 281, 287 (1993)). “Advance organizers such as roadmaps or summaries create a learning base that the reader can call upon as pre-learned material when later introduced to the material in more depth.” Id. at 124-26.
Content overviews consist of concise outlines that provide the reader with a map of the content in the text.\textsuperscript{127} They help prepare the learner for the task ahead and are especially helpful when the learners have lower ability levels and when students must learn facts or concepts, two conditions that are likely to be in the context of legal self-help materials.\textsuperscript{128} Overviews are useful when material can be broken up into different units and can be structured either in prose or outline form. They are only successful to the extent they are simple and precise.\textsuperscript{129} Research suggests that having each new section contain a small content overview before it begins is superior to producing a single, large overview at the beginning of the material.\textsuperscript{130}

Below is an example of a brief content overview used in a packet of materials aimed at the unrepresented litigant defending herself in a debt collection lawsuit:\textsuperscript{131}

\begin{center}
\begin{tabular}{|p{\textwidth}|}
\hline
\textbf{Part Two: Know Your Rights}\\
You now know that you should go to court. There are good reasons why you might not have to pay anything. And there are good reasons why you might not have to pay as much as the company says. You have rights. Here, you will learn more about your rights. You will learn more about the good reasons you might not have to pay. That way, you can stand up for yourself when you get to court.\\
You don’t need to write any of this down. This will be easy to understand. We’ll tell you what to say in court later. For now, just read this to understand your rights.\\
\hline
\end{tabular}
\end{center}

Advanced organizers provide context (instead of content) for the lesson and relate the topic to what the learner already knows.\textsuperscript{132} Research suggests that advance

\begin{footnotesize}
\begin{enumerate}
\item Percy W. Marland & Ronald E. Store, \textit{Some Instruction Strategies for Improved Learning from Distance Teaching Materials, in DISTANCE EDUCATION: NEW PERSPECTIVES} 145 (Magnus John & Desmond Keegan eds., 1993).
\item Gary R. Morrison et al., \textit{Designing Effective Instruction} (6th ed. 2011); James Hartley & Ivor K. Davies, \textit{Pre-Instruction Strategies: The Role of Pretests, Behavioral Objectives, Overviews and Advance Organizers}, 46 REV. EDUC. RES. 239, 246 (1976) (noting that content overviews “prepare” and advance organizers “clarify”). Content overviews are also helpful for “holist” learners, individuals who prefer a subject overview before filling in the details. John J. Sparkes, \textit{Matching Teaching Methods to Educational Aims in Distance Education, in THEORETICAL PRINCIPLES OF DISTANCE EDUCATION} 135 (Desmond Keegan ed., 1993).
\item Hartley & Davies, supra note 128, at 244.
\item \textit{Id.}
\item Note that this passage is written at the 1.8 grade level in the Flesch-Kinkaid scale. \textit{See} \textit{READIBILITYSCORE.COM, www.readability-score.com} (last visited July 28, 2015).
\end{enumerate}
\end{footnotesize}
organizers are most useful when the material works hierarchically, from more inclusive to less inclusive. For example, to help an individual defend herself in a lawsuit, an organizer might make a general statement about how required tasks in litigation fit together. For example, “Any legal proceeding in court can be broken down into a number of smaller parts. With each task that is performed successfully, you move closer to winning the case.” This statement could be accompanied by a flowchart showing the sequence of steps subjects are likely to encounter in the courtroom.

In our materials helping individuals file their own Chapter 7 bankruptcies, we use the following advanced organizer in the beginning of the materials. The “hurdles” repeat throughout the materials.

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132 Hartley & Davies, supra note 128, at 244-45. David Ausubel is credited with being the first to introduce the concept of the advance organizer. See generally David P. Ausubel, The Psychology of Meaningful Verbal Learning (1963). According to Ausubel, students are able to learn new material only if they can subsume that material within relevant existing concepts or knowledge. Therefore, when students encounter advance organizers, they should be able to learn and recall new information with less difficulty. The organizer allows the learner to hierarchically organize the new information as a subset or subconcept of existing information. David P. Ausubel, The Use of Advance Organizers in the Learning and Retention of Meaningful Verbal Learning, 51 J. Educ. Psychol. 267 (1960). The literature on the effectiveness of advance organizers is mixed, but most studies point to an improvement in learner performance. Hartley & Davies, supra note 128, at 255.

133 Marland & Store, supra note 127.
Some researchers have found that advanced organizers that highlighted the ease of use of the material, and that noted that no prior knowledge was necessary to perform the tasks, increased study subjects’ confidence in their abilities and reduced anxiety. Subjects who received materials with these types of organizers demonstrated better learning outcomes and were less likely to be discouraged and walk away from a task.

2. Organizing and Structuring Content

Content and context cues like overviews and organizers are helpful only to the extent individuals can identify the structure they provide. The education literature discusses several strategies that can improve students’ understanding of the structure of new instructional material. Moving from the more general to the specific, these include providing an outline of the material, using headings, and properly grouping and sequencing different types of information.

Providing an outline at the beginning of the text can help readers see the structure of the text and enables them to read the text nonlinearly if they choose. Below is an example of the first page of a packet designed to help an unrepresented individual defend herself in court:

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134 Loorbach, supra note 105, at 345, 350.
135 Id. at 350.
You Can Stand Up For Yourself in Court!

This packet is here to help you get through the court process. Pine Tree Legal Assistance can’t assign you a lawyer. There just aren’t enough lawyers to go around. But, you can make it through court without a lawyer. This packet will show you how. It’s organized in four parts:

Part One is called, “Go To Court.” It explains why you should go to court.

Part Two is called, “Know Your Rights.” It tells you why you might not have to pay any money, or as much money as the company suing you says you owe.

The literature suggests that the use of headings is helpful when introducing the reader to a new topic.\textsuperscript{137} This is unsurprising, but we found few examples of a thoughtful use of headings in existing self-help materials. Research suggests that the use of headings increases the recall of ideas by signaling that the topic is distinct and by providing the reader with context and a structure to follow.\textsuperscript{138} The premise is that transitions between sections place a heavy processing demand on readers.\textsuperscript{139} Readers must suppress the topic of the section that has just finished and must then identify the new topic of the next subsection and fit it within the

\textsuperscript{137} Lorch, supra note 126, at 269.

\textsuperscript{138} Id. at 264, 268, 270. Jukka Hyona & Robert F. Lorch, Effects of Topic Headings on Text Processing: Evidence from Adult Readers’ Eye Fixation Patterns, 14 LEARNING & INSTRUCTION 131, 133 (2004). Headings also produce a slight decrease in recall of familiar topics, Lorch, supra note 126, at 268, but this is unlikely to be an issue in the case of legal materials for a lay audience. When undergraduate readers are presented information without headings, they rely on length as a cue for determining what is important and what is not; when they are presented with headings, however, they do not rely on length as a cue. Id. at 273. If choosing not to use headings in parts of self-help materials, designers should be mindful of the fact that the length of the presentation of the topics might influence the level of importance readers assign to the topics.

\textsuperscript{139} Hyona, supra note 138, at 133.
context of the text structure. Topic headings reduce the burden of these transitions.

Research also suggests the best order in which to present information. For example, information ordinarily should be presented chronologically, as this will make it easier for readers to follow. When possible, threatening information should be presented first, followed by subject-specific information that will help the individual cope with the threat. Studies have found that this order of presentation energizes the reader, whereas the reverse leaves them feeling alarmed and overwhelmed. Based on this research, self-help materials might present the consequences of, for example, not coming to court first, followed by an explanation that the information packet contains information that will help the individual avoid those consequences.

At the paragraph level, a prominent education scholar recommends the use of signal words to develop the conceptual structure of the passage. Some words (“in contrast”) signal comparisons; others (“first,” “second,” “reasons for this are”) signal the structure of the argument; still others (“therefore,” “as a result”) signal causal relationships. This recommendation is not universal, but it may help older readers the most. One way to reconcile the disagreement in the studies is

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140 Id.
141 Hartley 2004, supra note 136, at 929.
142 Steven Prentice-Dunn et. al., Effects of Persuasive Message Order on Coping with Breast Cancer Information, 16 HEALTH EDUC. RES. 81, 84 (2001). It should be noted, however, that this study only measured initial attitudes, not later behavior in response to the information.
143 Id.
144 Hartley 2004, supra note136, at 927.
145 See, e.g., Barstable, supra note 70, at 218 (recommending that one limit the use of transition phrases because they lengthen sentences and make them harder to read).
146 James Hartley, What Does It Say? Text Design, Medical Information and Older Readers, in PROCESSING OF MEDICAL INFORMATION IN AGING PATIENTS 239 (Denise C. Park, Roger W. Morrell, & Kim Shifrin eds., 1999). We note that there is considerable evidence that age influences the processing of information. Experiments in the deployment of medical information have found that the use of pictures and illustrations differs by age groups. See, e.g., Roger W. Morrell et al., Effects of Labeling Techniques on Memory and Comprehension of Prescription Information in Young and Old Adults, 45 J. GERONTOLOGY 166 (1990) (studying prescription drug labels); Beverly J. Dretzke, Effects of Pictorial Mnemonic Strategy Usage on Prose Recall of Young, Middle-Aged and Older Adults, 19 EDUC. GERONTOLOGY 489 (1993) (focusing on mnemon images); see also Ching-ju Liu et al., The Use of Illustration to Improve Older Adults’ Comprehension of Health-Related Information: Is it Helpful?, 76 PATIENT EDUC. & COUNSELING 283 (2009); van Weert et al., supra note 76. A note of caution, therefore, seems appropriate. Individuals above the age of 60 may process professional legal information differently from younger individuals. Materials may need to address different populations differently. See also Morrow et al., Designing Medical Instructions for Older Adults, in PROCESSING OF MEDICAL INFORMATION IN AGING PATIENTS (Denise C. Park et al. eds., 1999); Morrow et al., supra note 148; Morrow et al., The Influence of List Format and Category Headers on Age Differences in Understanding Medication Instructions, 24 EXPERIMENTAL AGING RES. 231 (1998); James Hartley et al., The Effects of Line-Length and Paragraph Denotation on the Retrieval of Information From Prose Text, 12 VISIBLE LANGUAGE 183 (1978); Prentice-Dunn et al., supra note 142; MAKING YOUR WEBSITE SENIOR FRIENDLY: A CHECKLIST, NAT’L INST. ON AGING & NAT’L LIBRARY OF MED., available at http://www.nlm.nih.gov/pubs/checklist.pdf; Pamela W. Henderson et al., Impression Management Using
to note that it signaling words seem to be particularly helpful in the absence of headings.  

At the sentence level, thematic grouping of items in lists may be helpful when there are a large number of instructions. Such groupings can help provide structure and organization. In a list, the most important information can be placed first and last, as this is where readers are most likely to look. Finally, lists should be separated from the main text using bullets or numbers and listed vertically instead of within a paragraph.

3. Commoditizing the Process: Maximizing Procedural Knowledge

Prior research has established that many legal issues faced by higher-income and educated individuals can be addressed by legal professionals with routinized responses. Some law can be commoditized. Moreover, commoditized legal offerings can be faster, cheaper, and potentially less prone to error for many clients. Building on the distinction between conceptual and procedural knowledge discussed previously, we hypothesize that the same is true for the justiciable problems faced by LMI individuals.

Commoditized law is everywhere. Courts and LSPs use check-the-box and fill-in-the-blanks complaint and answer forms. Document assembly computer programs exist on the web. We propose even more simplistic forms than those currently available, with some tailored to an individual’s situation. Printed below is a portion of an answer form for a lay individual responding to a debt collection.
lawsuit. Following the plain English explanation, in italics, is language that expresses the legal implications of the preceding sentence. The non-italics text is written at a fourth-grade level. The language in italics, in contrast, is at a ninth-grade level. The answer form invites the reader to pay no attention to the latter.

Figure 1 – Example of an answer that uses procedural instead of conceptual knowledge.

<table>
<thead>
<tr>
<th>ANSWER</th>
</tr>
</thead>
<tbody>
<tr>
<td>I believe I have the following defenses that support my argument that I am not legally responsible to pay the Plaintiff:</td>
</tr>
<tr>
<td>Check each box that applies to you! Don’t worry about the italics. They’re for the judge.</td>
</tr>
<tr>
<td>☐ I do not know the company suing me. I do not remember ever doing any business with this company. Therefore, I deny that I owe this company any money.</td>
</tr>
<tr>
<td>☐ Even if I did owe some money, I do not know if this amount is right. I do not know how they came up with this amount. Therefore, I deny that I owe it.</td>
</tr>
<tr>
<td>☐ I am not the person named in the papers I received about this lawsuit. Therefore, I deny that I owe this company any money.</td>
</tr>
</tbody>
</table>

Scripts might also be a way to help the lay individual “say the right words” when in court. We hypothesize that having a simple script may instill confidence in the individual and make it more likely that she will speak up in court. In addition, reminding the self-represented litigant to practice the script in front of a mirror, or with a friend, as shown in the two cartoons below can also help to prepare her for what she might face.

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154 Tested using www.readability-score.com, see supra note 131; 3.7 in Flesch-Kincaid scale.
155 Tested using www.readability-score.com, id.; 8.5 in Flesch-Kincaid scale.
Finally, we hypothesize that visualizing what could happen in court may even enable the lay individual to speak up will also help instill confidence.

An example of a script follows. The lay individual need not have a conceptual understanding of the rules of evidence or the law regarding chain of title to a debt. Rather, the individual need only say the right words (namely, these words) to the judge at the right time. This script is at a sixth grade reading level on the Flesch-Kincaid scale.
When it’s your turn to talk,
you can read this to the judge!

Your Honor, there are three problems here:

First, the proof from the other side has to come from someone who knows what they are talking about. It doesn’t matter if that proof comes from paper records or from something else. The person still has to know what they are talking about. Otherwise, those papers could just be made up! They need “personal knowledge.”

Second, no one can talk about things someone else told them. For example, no one from the company can say, “John told me this person owes me $1000, so I know it’s true.” They can only talk about things they’ve seen or done themselves. They can’t use “hearsay.”

Third, the company has to prove the amount I owe. It has to show you papers or records showing why the amount it has in its paper is right. They have to “prove damages” and “produce business records.” Now I know, Your Honor, that the rules of evidence don’t apply 100% here. But you should still consider what I just said. Where’s the real proof?

Also, Your Honor, if the lawyer is not an “original creditor”:

Please check that the lawyer’s company has proved they’ve got the rights to my particular account. The lawyer has to produce a contract, with my account number on it, that shows that they bought my account. Otherwise, it’s not enough. And again, please make sure that someone with “personal knowledge” signed any papers the lawyer has. Without “personal knowledge” about my particular account, with my account number, I don’t know that this lawyer has the rights to my specific account.
4. Teaching Concepts by Analogy where Conceptual Knowledge is Needed

Legal professionals are trained as decision-makers and problem-solvers. Effective decision-making and problem solving grow out of a professional’s ability to organize a vast body of knowledge and recognize patterns in factual circumstances and possible solutions. According to researchers, professionals acquire this ability by induction (either through drawing on experiences in similar context or through repeated experiences with the topic in question) or by analogical reasoning.

A layperson has no experiences to draw on, nor the knowledge base from which to organize information and recognize patterns. The absence of this foundation is a barrier to an individual understanding conceptual legal information when such an understanding is necessary to understand and thus address a problem. Conceptual knowledge may be needed, for example, when a lay person has to respond to a query outside the scope of a script.

In such circumstances, the literature suggests that teaching by use of analogy, preferably multiple analogies, can be more effective than abstract instruction.

Below is an example of using multiple analogies, one visual and the other textual. Visually, the wrong amount is analogized to a piece of paper that is too long. Textually, the wrong amount in a debt collection context is analogized to the wrong amount in a grocery store.

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157 Id.
158 Id. at 356.
IV. TESTING NEW MATERIALS: AN ITERATIVE PROCESS

Researchers in the education, psychology, public health, and other fields agree that testing is imperative. But how does one test? Interviewing individuals from the population likely to use the materials is a first step, but we in law can learn much more from other fields about how to test our materials more methodically.

Don’t Pay if it’s the Wrong Amount!

Don’t give away your money!

Suppose you pick out $100 worth of food at the grocery store. But when you get to checkout, the cashier says “You owe us $180.” You wouldn’t just pay $180. You would say “Why the extra $80? Where did that come from?” Maybe that $80 extra charge isn’t right. And if the cashier can’t tell you where the $80 came from, you’d say, “I won’t pay that. Not until you prove to me that I owe it.”

It’s the same way in court!

Some lawyer has said that you owe their company an amount of money. Do you remember that amount? Is that amount exactly how much you remember owing? If not, ask for the proof!
This section suggests ways to test proposed self-help materials. It also describes some of what we have learned while testing our financial distress materials.

A. What We Know About Testing

Research highlights the need to test distinct parts of materials, such as individual illustrations, as well as the whole. Computer-based tests can be a good first step to ensuring the readability of instructional materials; they are easy-to-use and helpful. However instructional texts should always undergo multiple kinds of testing, and some research suggests that computer readability scores can be suspect in the legal context.

What can we learn from other fields about testing the effectiveness of legal texts on human subjects? To test comprehension of the material, cognitive psychologists suggest asking open-ended questions. Specifically, scholars have developed four categories of comprehension questions that can be asked about a text: “text base macro, text base micro, situation model macro, and situation model micro questions.”

Text base questions are ones whose answers are “stated literally in the text,” either on the macro (global, or heading-level) or micro (local, or sentence-level) levels. Answering these questions correctly means that the reader is able to recall portions of a text literally; that is, they have at least a superficial understanding of it. For example, a text base macro question about a set of materials on student loan repayment options might ask: what are the two repayment options available to federal student loan borrowers? A text base micro question might ask: “what kinds of questions should you ask a student loan counselor about your loan?”

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160 Houts et al., supra note 21, at 189.
161 Bastable, supra 70. These tests may be useful but should be used with caution. First, different types of word processing software—even different versions of the same software—encode the same readability measure in slightly different ways; thus one must use the same software version to process different texts. Hartley 2004, supra note 136, at 932.
162 Computer-based formulas tend to reward short, choppy sentences; but if overdone, these can be difficult to read. Id. Formulas also disregard the order of words and sentences, something that can be critical to a person’s understanding. Id.
163 Charrow & Charrow, supra note Error! Bookmark not defined., at 1341.
164 Kools et al., supra note 146. Designers should limit the use of multiple choice questions, as these do not tell us what the person does not understand Id. at 770.
165 Kools et al., supra note 146, at 4. See also Rik Hofman and Herre van Oostendorp, Cognitive Effects of a Structural Overview in a Hypertext, 30 BRIT. J. EDUC. TECH. 129 (1999).
166 Id. at 3.
167 Id.
Situational model questions are designed to elicit whether the tester has acquired a deeper knowledge of the material and can generalize the knowledge she has acquired from the material to new situations. As such, situational model questions might be useful in contexts in which conceptual, as opposed to just procedural, knowledge is essential. Answering situational model questions requires that the reader make inferences on the global and local levels. For example, a situational model macro question for a set of materials that discussed “debts” generally might ask, “if a defense to a credit card collection action is that the debt is too old to collect, would that defense be available to you if a hospital was suing you to collect a debt?” A situational micro question on the same materials might be, “what other defenses might be available to you when a creditor is suing you on a medical debt?”

The task for the researcher is three-fold: for each set of materials to be tested, create questions at these four levels, identify the correct answers, and construct a scoring system. Researchers can then test different variations of potential materials with the aim of improving the scores thus obtained.

Other fields suggest other methods. Writing for a legal audience, James Stratman, a communication theorist, suggests the use of protocol analysis. In particular, he suggests tape-recording real-world subjects thinking out loud while they read the material being tested—termed a “concurrent protocol.” Stratman notes that the point here is “to find out what helps or hinders the readers in their effort to comprehend and use the text.” Although the purpose of this method is “not necessarily to have the readers criticize or evaluate what they read, [] they may do so spontaneously at times.” The researcher does not interrupt in these cases; the tester goes through all of the material while speaking aloud. “Researchers later analyze her transcription to see what information she used or perhaps failed to use in the problem-solving process.”

Testers sometimes find it difficult to tell researchers that something is not clear about materials the researcher created. One technique that we have used is asking testers whether they think that someone else of lower intelligence would have

168 Id. at 3.
169 Id.
170 Id. at 7.
172 Id. at 42-43.
173 Id.
174 Id. at 42.
trouble understanding the material elicits more honest feedback.\textsuperscript{175} This question should be asked not just about the material as a whole, but also about specific words and sentences.\textsuperscript{176} The intuition is that test subjects are more forthcoming when answering a question about someone else instead of themselves.\textsuperscript{177}

Another researcher suggests using a “cloze test”: presenting a passage to readers with every nth word missing and asking readers to fill in the missing words.\textsuperscript{178} the higher the performance on the “cloze test,” the more comprehensible the material.\textsuperscript{179} Still another way to test the material is to have readers circle sections, sentences and words that they think would cause trouble for other readers of lesser ability.\textsuperscript{180} Readers can also be asked to rate on a 1-10 scale different layouts of text; in this scenario, researchers should provide one text as a baseline so that it is possible to make sense of what their ratings mean.\textsuperscript{181}

\textbf{B. Our Experiences}

For the past three years, we have been iteratively developing and testing self-help materials for individuals in financial distress using some of the techniques just described. We have done so by visiting small claims courts in Massachusetts, Maine, and Connecticut on days in which debt collection cases are calendared. Part of our testing has been asking people about their understanding of different images used in our self-help materials to communicate legal concepts.

As mentioned previously, we have used semi-structured cognitive interviews to evaluate our materials. The primary creators and testers of our materials have been students at our three law schools.\textsuperscript{182} We began relying on law students for practical reasons, but we have since become convinced that law students should be involved in the creation of self-help materials wherever possible. Law students have an absolutely critical asset that most practitioners and law professors lack: inexperience. Law students encountering legal concepts for the first time are in

\begin{footnotes}
\item[175] Hartley 2004, supra note 136.
\item[176] Hartley 2004, supra note 136.
\item[177] Id.
\item[178] Hartley 2004, supra note 136.
\item[179] Id.
\item[180] Id. at 931.
\item[181] Id. at 932.
\item[182] Organized in teams by subject matter, students have collaborated on creating all of our materials. We supervised of course, but this has been predominantly a student-led effort. The students have also tested the bulk of materials. After some training and shadowing, the students visited small claims courts on days in which debt collection matters were calendared. They brought current copies of materials as well as $10 Dunkin Donuts gift cards to offer testers. We did not request personal information about the testers, other than to inquire whether they were visiting court for a debt collection matter.
\end{footnotes}
the rare position of being able to understand the legal problem (by virtue of their legal training) while encountering it as new and unfamiliar.

We close with a few specific “lessons learned” from testing our reconceptualized materials. Our testing process has demonstrated that sometimes what we (as attorneys, legal academics, and law students) find obvious, clear, and intuitively appealing is not always what individuals in severe financial distress find helpful. One example that one of us continues to have difficulty accepting appears below.

The goal in the following example was to communicate the idea that a debt buyer may lack the evidence needed to prove ownership of the sued-upon debt. We tested three versions of cartoons designed to illustrate this idea—a concept we referred to as “bad evidence.”

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183 The reverse may also be true. As observed by a UConn Law School student during a cognitive interview of a pro se debt collection action defendant:

One thing that stood out to me was captioning: “Your debt may be too old to collect!” I am always hesitant about the use of exclamation points. Perhaps I watched too many “Hogan’s Heroes” episodes in my youth, but they always seem to convey authority: “Achtung!” I would also think that poor people might find them condescending. In order to get your attention, the powers-that-be use exclamation points. None of my interviewees, however, had a problem with the captioning.

Indeed, exclamation points seemed to rivet their attention on the subject matter of the form.

Interview by Brenda Thibault with anonymous debt collection defendant, in Dorchester, Ma. (Apr. 25, 2013).
We initially thought that both Version #1 and Version #2 provided clear, simple illustrations of the idea that the evidence produced by the plaintiff in a debt
collection case must meet admissibility standards. Interviewees did not have the same reaction.

In testing Version # 1, one interview subject read the illustration as saying, “the evidence is stacked against you.”184 Similarly, one interview subject thought the message in Version # 2 was “threatening” and “harassing”185 or simply confusing.186 After much testing of these three versions, we ultimately determined that Version #3 was most helpful and least confusing.187 It successfully communicated the simple message that the plaintiff in a debt collection suit has to “prove you owe them money.”188

We have also explored using different analogies to explain the concept of out of statute debt. We first thought about drawing an egg timer with time running out, or asking study subjects to consider whether they would drink milk that is well past its expiration date. Neither of these concepts proved sufficient. The statute of limitations concept is not one that lay people understand easily.189 In particular, the concept that there are magic words (e.g., “this debt is past the statute of limitations”) that they could utter that would destroy an opposing attorney’s case, is contrary to some lay individuals’ conception of the law.190

After testing, we settled on the image below to represent the expiration of the statute of limitations:

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184 Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Oct. 31, 2013)
185 Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Nov. 14, 2013); Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Dec. 13, 2013) (this interview subject also thought the image in version #2 was “threatening / harassing”).
186 Interview by Rachel Deschuytner with anonymous debt collection defendant, in Portland, Me. (Feb. 12, 2014).
187 Interview by Rachel Deschuytner with anonymous debt collection defendant, in Portland, Me. (Feb. 27, 2014) (“Q: Suppose the cartoon is the only thing you looked at: what do you think it means? A: Like the monopoly man is going to push you around and make you give him money.” “Q: Could you tell me in your own words what you think the lesson of the cartoon and the words around it is? A: They have to prove I owe the debt. I can make them prove it.”) (on file with authors). See also Interview by Hilary Higgins with anonymous debt collection defendant, in Boston, Ma. (Mar. 10, 2014) (interview 1.1) (“Here the defendant is giving a good statement, and the other person is attacking.”). Interview by Hilary Higgins with anonymous debt collection defendant, in Boston, Ma. (Mar. 10, 2014) (interview 1.2).
188 See Interview by Rachel Deschuytner with anonymous debt collection defendant, in Portland, Me. (Mar. 27, 2014).
189 “The gentleman I spoke to was a service member (Army), who had come to court in his full dress uniform to challenge the credit card complaint. The form he was given was the statute of limitations form. His initial reaction was surprise, since he did not know anything about there being a statute of limitations when it came to the claim against him and mentioned that that fact might actually help him in his case.” Interview by Peter Lacy with anonymous debt collection defendant, in Portland, Me. (Mar. 25, 2013)
190 On the statute of limitations issue, courts who have considered the issue as well as the Federal Trade Commission agree that lay individuals are unlikely to understand that the statute of limitations is a defense to a debt collection lawsuit. See Jiménez, supra note 22, at 139-41.
V. CONCLUSIONS AND NEXT STEPS

We close by emphasizing three points.

First, the ideas identified above require testing. In this Article, we have arbitrated research from other fields, research that seems to us to address problems structurally or cognitively analogous to problems in access to justice. But there are differences in getting to a polling location on election day, getting to a medical facility for a colonoscopy, and getting to court for a court hearing. Voting is, or can be, a social act, done with friends and family; voting can also be expressive. Colonoscopies are physically invasive. Attending a court hearing ordinarily bears none of these characteristics. In terms of the effectiveness of interventions designed to promote any of these activities, these distinctions may matter. Without testing, we will not know.

Second, in case there is some doubt on the issue, we do not contend that the ideas articulated here are the complete answer to the United States’ access to justice problems. Our view is that adjudicatory system reform, unbundling, non-lawyer assistance, alternative legal business models, increased use of technology, and the elimination of state-level border restrictions on the practice of law, to name a few, all deserve careful study and the attention of those in power. Our point is that the volume of litigants who interact with the formal legal system without any form of professional assistance means that effective self-help materials must be part of any reasonable access to justice strategy.
Finally, we highlight the thought process that allowed us to articulate the hypotheses above. In essence: (i) identify a problem characterized as legal (e.g., defending a small claims court debt collection case); (ii) break the problem into constituent cognitive, psychological, and mental processing parts (e.g., overcoming fear and hopeless, making and committing to a plan to appear in court, gathering and understanding information about what will happen, preparing mentally for what will happen, rehearsing legal arguments, and following through on all that has been committed to and rehearsed); (iii) recognize that most of these cognitive challenges have little to do with formal law; (iv) look for well-designed research from fields other than law that addresses the same or cognitively similar problems; and (v) apply the lessons of that research to the current setting.

For us, the key step in this process is the recognition that the relevant tasks have little to do with formal law. In fact, in the specific context of small claims court debt collection lawsuits, we hypothesize that many defendants may prevail despite knowing no law at all, so long as they have the faith and the gumption to read pre-written scripts with magic phrases the defendants need not understand, phrases like “burden of proof,” “best evidence rule,” “hearsay,” and “lack of proof of ownership over the debt.”

We call this overall thought process “thinking like a non-lawyer.” We suspect that it is disruptive of the existing United States legal order, which continues to justify itself on the idea (perhaps the fiction) that addressing legal problems requires professional judgment and, as such, the process cannot be reduced to addressing “mere details” no matter how vast in quantity. Under this view, lawyers, as professionals, make irreducibly complex judgments to address their clients’ legal problems; automation and routinization of law is impossible.

In contrast, one premise of “thinking like a non-lawyer” is that the set of legal problems experienced by human beings (as opposed to incorporeal entities) requiring irreducibly complex judgments is small. A second premise is that the recipe for solving the legal problems of human beings has five parts mundanity and four parts psychology for every one part formal law. A third premise is that even that one part formal law can, in many settings involving human beings, be commoditized. The use of the word “recipe” immediately above is deliberately evocative. Gourmet cooks serve the rich and famous. The rest of us put dinner on

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192 Sociologists have long recognized that the claim of an exclusive ability to make irreducibly complex judgments, a kind of problem-solving that resists automation and routinization, is one of the hallmarks of a profession. See, e.g., Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964).
the table by following written instructions on cookbooks, on the backs of cans and boxes, or by following habits. Our future work explores the nature and implications of thinking like a non-lawyer.
Ethics of Randomization
Equipoise and the ethics of randomization

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\textbf{INTRODUCTION}

It is widely accepted that randomized controlled clinical trials yield the most reliable evidence about the effects of clinical care\(^1\). In this article we discuss the ethical importance of 'equipoise'—the condition which applies when there is no preference between the treatment options to be compared. We ask whether equipoise is an essential prerequisite for an ethical trial: are trials ethical only if there is no preference between treatments? If so, who must have no preference—clinical experts, individual clinicians and/or the potential participants (patients)? Does it make any difference whether there is open access to contending treatments or whether one (or more) of them are 'new' and less available. Lastly, if equipoise is an essential prerequisite for an ethical trial, what are the implications for clinical science? Clinical trials may examine a number of competing treatments simultaneously but, for ease of description, we consider the case of two treatments; A and B.

\textbf{INDIVIDUAL AND SOCIAL OBLIGATIONS}

Clinicians and ethics committees are concerned with two sorts of obligations: the obligation to safeguard the rights of individual trial participants and the obligation to society to facilitate research aimed at improving medical treatment—let us call these 'individual obligations' and 'social obligations'.

Does randomization, as such, create a tension between these two obligations? The individual obligation requires that each patient is offered one or more treatments deemed to be appropriate for that particular person. Under randomization, treatment is assigned according to the imperatives of the experimental design.

However, since the whole point of holding a trial is to find out which treatment is more appropriate, participants, even if they were acting from a purely egoistic point of view, would have no reason to object to randomization as such. Being randomized does not disadvantage them (for reasons given below it may even advantage them) and does advantage society. Ethics committees and clinical researchers then should have no difficulty reconciling individual and social obligations on account of randomization: any trial worth carrying out is a reasonable bet for individual participants\(^2\).

Of course, matters are not so simple. The underlying simplistic assumption here is that if we do not yet know which treatment is better we are not defaulting on our obligation to give the most appropriate treatment by assigning treatment at random. Where we do not know which treatment is better we may all the same, in advance of proposed trials, have our (more or less rational) preferences. Believing and disbelieving come in degrees: the results of previous trials (perhaps too small to place the issue beyond reasonable doubt), observational studies, the history of medicine's past mistakes and the biological plausibility of a treatment all legitimately influence the degree of our prior belief\(^3\).

\textbf{EQUIPOISE}

Equipoise is the point where there is no preference between treatments, i.e. it is thought equally likely that treatment A or B will turn out to be superior\(^4\). At this point we may be said to be 'agnostic' or 'resting' on the fulcrum of a decision: we would take odds of 1:1 in a bet. Equipoise is different from simply not 'knowing' or being 'uncertain', because it implies that we have no (rational) preference whatever. We could have a mild preference for treatment A and still not 'know' which treatment was best: we would be uncertain but not in equipoise.

Individual equipoise (referred to by Freedman as theoretical equipoise\(^5\)) applies to individual clinicians whilst collective equipoise (also known as clinical equipoise) refers to the profession as a whole (or at least those sections of the profession who are perceived to be 'expert' in the subject—we return later to the question of who is 'expert'). Individual equipoise demands an opinion from the individual that the evidence is equally split, i.e. it is perceived to favour neither treatment A nor B or to favour them equally.

\textbf{IS COLLECTIVE EQUIPOISE NECESSARY?}

It could be argued that an adequate procedure for obtaining consent would suffice to screen out trials which are unethical in principle. Who, after all, would agree to participate if,
having been given all relevant information, participation appeared contrary to their own best interests?

All the same, we do need to separate the questions of principle from the procedural questions. No matter how sophisticated the procedural rules are that we adopt, they do not ensure that consent is genuine. The getting of genuine (informed and voluntary) consent is notoriously tricky—9. Hence we cannot rely entirely on procedural safeguards (important as such safeguards are—a point to which we shall return). The very existence of ethics committees engenders a certain level of dependency, because a potential participant may assume that the trial has been seen as reasonable by a separate, informed and authoritative panel charged with safeguarding the interests of participants. Furthermore, some trials address questions, where it is impossible or impractical to get consent.

Thus, members of ethics committees should proceed on the basis that the question to be investigated has not already been answered. In some cases, the evidence may be compelling and the ‘experts’ (however defined) may all be in agreement as to which treatment is best. Under these circumstances the trial would be unethical. Alternatively, the data may be confused and contradictory, and the ‘experts’ divided equally amongst themselves (less plausibly the experts might be all individually equipoised). Under these circumstances the ethics committee could find the trial ethically acceptable. Assuming that an ethics committee perceives the experts as all well qualified to comment, then patients would seem to have nothing to gain or lose from trial entry. In reality, however, most cases coming before a committee probably lie somewhere between these two extremes—collective equipoise would be incomplete in such instances.

Johnson and colleagues carried out a survey among members of the public and found that, while most accepted the practice of randomization when expert opinion was evenly split, less than 3% considered trials to be acceptable if opinion was split 80:20. (Greater deviations from an equal split in opinion were tolerated when the treatment could be repeated, i.e. when it was not a putative life saving intervention and, therefore, where participants in the ‘inferior’ arm of the study would be only temporarily disadvantaged.)

Ethics committees, it would seem, do not need to satisfy themselves that collective equipoise is exactly evenly balanced. This is fortunate because there is a practical problem over how ethics committees can assess collective equipoise. This might be: informal information (e.g., opinions of local clinicians); semi formal (e.g., evidence of different practice by doctor/locality/ or different opinions in the literature); or formal by specific measurement of expert belief. Just whose views are worthy of respect (and thus who may be considered ‘expert’) may be a matter of some controversy. And even supposing that the ‘experts’ can be identified, it cannot be assumed that their strength of belief will always correspond to the strength of the evidence. Many trials (e.g., those of treatments for AIDS) are the subject of public attention and ethics committees may wish to include patients’ representatives among the ‘experts’. The ethics committee may decide to examine existing evidence itself—in that case it becomes the relevant body of ‘experts’ who need to be in some agreement—to have reasonable collective equipoise. It is not straightforward to guage the extent of collective equipoise but it remains the underlying principle which makes a trial ethical from the perspective of an ethics committee. Of course, that does not make it ethical—individual professionals and potential participants must also judge it to be so—and this takes us to our main argument.

EQUIPOISE AND THE CLINICIAN: PATIENT RELATIONSHIP

Once a trial has been approved by an ethics committee, it is the individual clinician who must make or withhold the offer of entry in a trial and who must decide what to tell the patient in obtaining consent. Clinicians are in a strong position over inviting people to participate in trials where there is collective equipoise and when they themselves are equipoised (as in the trial of cervical cerclage to prevent recurrent miscarriage). The entry criterion for this trial was that the individual doctor could not decide, in a particular case, whether cerclage would prevent or promote fetal loss.

What though if, as is often the case, collective equipoise applies but the clinician is not in a state of individual equipoise? If such clinicians are to follow the familiar principle, ‘do as you would be done by’ (hence disclosing their lack of equipoise or not offering trial entry in these circumstances), then we might have to accept low recruitment for many important trials needed for the advance of science (and hence for the benefit of mankind—a point to which we return later). For example, a small but well conducted trial, suggesting that A was more effective than B, with a P value of 0.2, might lead a previously equipoised clinician to conclude that it was more likely than not that A was more effective than B. Could this clinician then act as though having no opinion about the relative effectiveness of these two therapies?

A crucial contribution to this debate has come from Freedman who appears to offer a way out. Freedman argues that doctors are not bound by the principle, ‘do as you would be done by’. Rather, they are bound by the consensus of expert opinion, by collective equipoise. In justifying this opinion, Freedman points out that the criteria for entry into a specialty and for censure in negligence cases are based on
adherence to collective norms. Thus, Freedman argues, offering trial entry is ethically acceptable provided that the profession as a whole (or at least ‘domain experts’) are divided on the issue, i.e. provided there is no collective agreement as to which treatment is better. If the profession as a whole is equipoised between A and B, then, according to Freedman, a clinician who prefers A can still ethically offer a patient entry in the trial.

We are concerned that this argument may not give sufficient weight to the requirement not to violate trust. It could be argued that ignoring a lack of personal equipoise violates the trust between patient and doctor and thus one of medicine’s core values. James Spence (1960) wrote that:

the essential unit of medical practice is the occasion when, in the intimacy of the consulting room, a person who is ill, or believes himself to be ill, seeks the advice of a doctor whom he trusts. This is a consultation, and all else in medicine derives from it.

Confidence is thus at the heart of the clinician/patient relationship, which must be ‘a real human relationship based on love, caring and sharing’. At issue here is whether the clinician is justified in behaving as though having no preference, when this is not the case. Most patients might expect their clinician either to withhold the offer of trial entry or declare any preference and would feel that Spence’s principle had been overruled if this was not done. If this is so and if the importance of maintaining trust between clinician and patient is paramount, then the presence or absence of individual equipoise should affect how a clinician behaves.

We are not the first people to point out the conflict between private and public duties which a lack of equipoise can unmask. Freedman, as we mentioned, suggested a way out of this potential difficulty by distinguishing between collective and personal equipoise and claiming the primacy of the former. Others have suggested randomization in unequal ratios, but this can only maximize group, not individual, expected utility. It does not help an individual patient to know that her chance of drawing the less preferred treatment is, say, one in four, rather than one in two. Yet others have suggested randomizing patients to clinicians whose lack of equipoise lies in different directions, but this might not go down well with many patients especially if a relationship has already been formed with a participating clinician.

OBLIGATIONS OF DOCTORS/EXPERTS TO INFORM THEIR BELIEFS

The above argument does not entitle clinicians to deviate from equipoise for frivolous reasons. A sincere attempt to understand the issue must be made by clinicians who have a personal preference in the face of collective equipoise. Doctors and patients’ representatives need to be advised of history’s lessons and they have an obligation to keep as up to date as possible, to be sceptical of unsubstantiated claims and reluctant to form a view in the absence of in-depth knowledge. The ethically difficult cases are those where the clinician is party to evidence which is contradictory and/or weaker than that associated with conventional levels of statistical significance. It is in these cases that different people, equally well informed, intelligent and sincere, will form different opinions about the likely effects of treatment. This article considers how we should behave when this happens.

EXCEPTIONS TO THE REQUIREMENT FOR INDIVIDUAL EQUIPOISE

Are there circumstances under which it is acceptable (desirable) for clinicians to ignore lack of personal equipoise? We argue that the importance of personal equipoise is greatly diminished under conditions where access to the preferred treatment is limited, irrespective of whether or not a trial is taking place.

First, randomization against a lack of personal equipoise is permissible, indeed desirable, when access to treatment is in any case limited as a result of inadequate resources. Here, randomization also serves as an egalitarian method to allocate scarce resources. Lockwood and Anscombe cite the example of doctors in India, who were not able to obtain sufficient anti-pseudomonas vaccine for burn patients, and allocated this treatment on the basis of randomization.

Secondly, open access to the preferred treatment may be limited, not because of financial constraints, but because a central authority (e.g., third party payer or health department), has decided that the treatment requires better evaluation in the public interest. This applies particularly to new technology, where the individual clinician’s belief may not be widely shared (i.e. there is collective equipoise) or where there is doubt as to whether putative benefits are sufficient to outweigh the costs of the new treatment. A good example of the latter, is the randomized trial of extracorporeal membrane oxygenation, currently taking place in the UK. Thus, it is possible for a third party payer to be acting in an ethically acceptable way in restricting access to new treatments (to people in trials), while an individual clinician might be acting in an ethically acceptable way in recruiting patients to the same new treatment despite having a personal preference for the new therapy. This is because the third party payer is responsible to people in general while the clinician is responsible to an individual whose best hope, in these circumstances of restricted access, can be realized by trial entry. We also make the observation that, as a general rule, an ethical obligation to maximize perceived utility for individuals, if it applies, is likely to restrict trials which are desirable for society as a whole. This, therefore,
is an argument for restricting access to new technology to people in trials. Put another way, it may be inappropriate to ask clinicians and their patients to be the principal gatekeepers of developments in practice—a point to which we shall return.

THE PSYCHOLOGICAL EFFECTS OF TRIAL ENTRY

Participants in trials may find the experience of randomization disturbing\textsuperscript{19-20}. On the other hand, they may be privileged patients. So far we have simply assumed that participants in trials who turn out to have been in the inferior arm of treatment have been disadvantaged. To be sure they are worse off than those who receive the superior treatment, but are they worse off than if they had not participated? While patients who decline to participate in trials are not deliberately neglected, trial protocol may necessitate close and extensive monitoring of participants so that, in effect, participants might regard themselves as beneficiaries\textsuperscript{21}. If that is true, it may be that even those participants in trials who turn out to have ended up in the inferior arm of the trial, have not overall been disadvantaged. This may incline an outside observer to favour trials in general. It may convince an ethics committee to sanction a trial despite some misgivings, say about potential psychological risks or the degree of departure from collective equipoise. However, it hardly excuses an individual clinician in ignoring equipoise. In so far as patients may do better overall in clinical trials, this must be because of some treatment variable—perhaps rigour in following protocols or the psychological boost from extra attention. At the point where the offer of trial entry is made, the intention is to compare two treatments, not to give better overall care. A clinician cannot argue that equipoise was ignored because he or she would compensate by giving better care. Thus, the argument that participants may be beneficiaries cannot be used to gainsay the importance of equipoise. Put another way, a patient who was offered entry in a clinical trial, and who then learned that her doctor had failed to disclose a personal preference, would not feel any less aggrieved on hearing that this was because the doctor anticipated giving a higher standard of care on account of his/her participation in the trial.

EQUINOISE AND PATIENT VALUES: THE TRADE-OFF BETWEEN BENEFIT AND SIDE EFFECTS

Thus far in the discussion we have rather naively assumed that treatments are simply better or worse, e.g., an increase or decrease in the risk of death at no differential cost—the situation referred to in decision analysis as one of probabilistic dominance. However, we must consider the more usual case where treatments are not simply better or worse. Most treatments have more than one effect and these effects may move in opposite directions. Here, perceptions of patients must come into the picture since the best treatment is not defined simply by probabilities of outcomes, but also by how these outcomes are valued\textsuperscript{22}. Thus, where a treatment has well known side effects, the point of equipoise is not ‘no effect’ but an effect big enough to compensate for its perceived disadvantage: the point defined by decision analysis as that where the expected utilities of both treatment options are the same\textsuperscript{23-25}. We call uncertainty around the point of no treatment effect ‘absolute’ equipoise, and uncertainty around the point where the patient has no preference ‘effective’ equipoise (Figure 1). (This could be called the patient’s equipoise, but it is in reality the point where the patient’s trade-off value corresponds with the clinician’s expectation of the most likely treatment effect.) To give an example, let us consider trials comparing conservative with radical surgery for early breast cancer. Clearly, the second of these treatments has a known side-effect—namely, greater mutilation. Thus, the point of ‘effective’ equipoise is not ‘no difference’ between treatments, but a difference which compensates, but only just compensates, for the mutilation of extensive surgery. Thus, if a woman would sacrifice 2% of her chance of surviving for 5 years in order to avoid mutilation, then her point of effective equipoise is a 2% gain in 5 year survival. (This crude trade-off is given for pedagogic purposes. A more refined method would consider the different probabilities of death and disability in each year following treatment, along with the probabilities of moving from one

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Figure 1 Effective equipoise occurs when the most likely results (of a proposed trial) are thought to be an improvement sufficient, but only just sufficient, to compensate for the disadvantage of the treatment with the greatest ‘costs’. Those ‘costs’ are side-effects when viewed from the point of view of the individual patient, or the combination of those side-effects and monetary costs when viewed from the perspective of society. In this example treatment B has greater ‘costs’ than treatment A, such that an improvement in mortality of about 20% would be sufficient to compensate for them. Put another way, an improvement in mortality of less than 20% may not be sufficient to offset the ‘costs’.
state to another—Markov chain analysis.) This has implications for study design, since, if this were a typical response, the study should be sufficiently large to measure a treatment effect of this magnitude. The point of effective equipoise would be 2\% if:

1 this was the trade-off which a patient would be prepared to make, and
2 this was also the treatment effect which her doctor thought most likely in advance of the trial.

Standard (so called frequentist) analysis of clinical trials requires a starting hypothesis, typically that there is no difference in outcome across treatments—the ‘null hypothesis’. According to our analysis, prior belief in a null hypothesis (absolute equipoise) is an unsound basis for clinical trials where there is a perceived trade-off between putative benefits and side-effects. Here, if the trial were ethically carried out, the starting hypothesis should be an effect corresponding to mean effective equipoise.

Thus, in circumstances of a trade-off (where one of the treatments has a perceived side-effect) the point of individual ‘effective’ equipoise is based not only on the clinician’s beliefs about likely treatment effects, but also the patient’s preferences.

The ‘preference’ trial takes these considerations seriously—here a potential participant can choose treatment A, treatment B or randomization. The latter is appropriate if the patient’s values and the doctor’s best guess of likely treatment effect coincide. In some cases a patient, perhaps a specialist in the subject concerned, may not wish to abrogate the judgement of the most likely treatment effect to her care giver and may form her own opinion on this point. However, this does not change the essential point that she is not likely to accept randomization unless the probability estimate and trade-off value coincide. It has been suggested that effective equipoise is less likely to occur when trade-offs are forced by comparisons of treatments with dissimilar side effects, i.e. where effective rather than absolute equipoise is required. There are many examples of trials carried out in the face of large trade-offs and these frequently involve surgical procedures. Examples include, medical versus surgical therapy for menorrhagia, lithotripter versus surgery for ureteric stones, chorion villus sampling versus amniocentesis for prenatal diagnosis and Caesarean childbirth versus trial of vaginal delivery for the mature breech presentation. In all of these cases it must be the minority of patients who, in the face of all current information, will be in effective equipoise and hence who will agree to be randomized—in all of these cases a high recruitment rate must call into question the comprehensiveness of counselling. New treatments have potential unknown side-effects, the probability of which will be perceived to vary according to the nature of the treatment. This probability is one of the negative effects that a patient must consider in deciding whether or not she is in effective equipoise. Of course, the perceptions of good or harm may change with time, with consequent changes in recruitment—however, sincere decisions can only be made on the basis of information available in prospect.

Figure 2 The line marked ‘prior’ is the probability distribution of the expected results of a proposed trial showing that, the greater the deviation from the expected result (20\% improvement) the less likely it is to happen. This could be based on the opinion of one person (individual ‘prior’) or many people (collective ‘prior’).

Figure 3 People may not be able to think of probabilities as a continuum, but rather in categories. If this is true, then there is a range of effects that have equally the greatest probability of occurring—a zone of equivalence in which randomization is ethical. It could be argued that complete equipoise does not exist: that the fact that doctors can 'come off the fence' confirms that they must always have a degree of preference, however slight. However, if a decision must be made, then it will be made, even if the decision maker was previously in 'perfect' equipoise. Here, we make the point that there is likely to be a zone of potential treatment effects to which the mind assigns the same probabilities.
THE EQUINOX CURVE

Effective equipoise occurs when the clinician's 'best bet' about the most likely treatment effect corresponds to the patient's trade-off requirement. As a general rule, as a potential result deviates further from the point of effective equipoise, so the clinician is likely to perceive it as being increasingly unlikely to happen—a curve could be drawn around the point of effective equipoise to represent the distribution of these 'prior' perceptions (Figure 2). It may be wrong to represent these subjective probabilities on a curve, (in reality the mind might perceive zones of equal probability) in which case there is a range of equally likely potential results corresponding to a zone of effective equipoise—a zone of equivalence (Figure 3). Some of the mathematicians, with whom we have discussed our analysis, have become side-tracked with the semantics of the word equipoise, wondering whether it can describe a range of potential outcomes with an equal chance of occurring (as shown in Figure 3) or whether it must be a point and if so, whether one can ever be so agnostic as to be truly 'resting on a fulcrum'. The important point from an ethical perspective is that the clinician has only acted unethically if he or she feels that the principles of trust laid down above have been violated. The Papworth principle (do as you would to a cherished member of your family) is the determining factor. Presumably, clinicians would not wish to see members of their family randomized if, having been previously equipoised, they now had evidence just short of statistical significance. Equally, they may be very happy to offer randomization to a family member over a range of potential effects which they think have an equal probability of occurring (as in Figure 3).

In some cases, the probability envelope may be asymmetrical (Figure 4). In these circumstances, the patient’s interests are not served by trial entry, even in the zone of equivalence. This applies when, according to 'prior' perceptions, a treatment may decrease the risk of a bad outcome but almost certainly will not increase it. An example might be the recently completed Medical Research Council trial of folic acid to prevent neural tube defects: given prior information there was little or no expectation that this treatment might actually increase the risk of this outcome. An interesting situation may arise when patients with terminal illness are offered potentially life prolonging therapy. A non-suicidal patient with an expected survival of, say, 2 months may be rationally equipoised when the effect perceived most likely is increased mortality since the 'new' treatment may buy more time if it is beneficial than it stands to deprive the patient of if it is indeed harmful. To give a simple example, if there is a 25% chance that a trial will show an improvement in survival with a new therapy distributed symmetrically around a mean of 12 months versus a 75% chance that it will show a reduced life expectancy distributed around 1 month, then the new therapy may be the best bet, offering an expected net gain of 1.75 months.

IMPLICATIONS FOR BAYESIAN TRIAL DESIGN

The accepted technique for the design and interpretation of clinical trials is based on hypothesis testing—the Popperian notion of a null hypothesis underlies much clinical thinking. There is a movement to use an alternative method which seeks simply to describe the probabilities that treatments differ from each other by different amounts. The method is described in detail in statistical texts. Bayesian interpretation of trial results is not dependent on a starting hypothesis, but rather on 'prior' expectations of treatment effects, i.e. on the equipoise 'curve'. Thus, Bayesian approaches incorporate beliefs resulting from evidence external to the trial in a formal way.

If analysis of the results of a trial is to be restricted to this method, then the trial may be 'open', i.e. the results may be made available during the course of the study. This means that equipoise is likely to shift in response to accumulating data, especially if the interval between randomization and outcome is short. At first sight, this suggests that many trials would have to stop at the equivalent of large P values in order not to violate the principle of individual equipoise. On the other hand, some clinicians (and their patients) may move into individual effective equipoise as others are moving out. The ethical basis of open trials would then be that different clinical opinions and patient values would, at different times, result in different clinician/patient combinations in effective equipoise. Seen in this light,
different beliefs in the light of the same evidence would not be a problem for scientific medicine, but a benefit. They would allow trials to be done which were ethically acceptable by providing cohorts of doctors/patients who were in equipoise in the face of the same (inconclusive) evidence.

**IMPLICATIONS FOR SCIENCE**

Our conclusion, that collective and individual equipoise are important principles, is not the best conclusion in a utilitarian sense—at least not in the medium term. This is because utility (the greatest good for the greatest number) would seem to depend on getting precise answers to clinical questions, and this can only happen when ‘recruitment’ is high. Recruitment may be threatened when importance is attached to equipoise.

As a general rule, many more people stand to benefit from clinical practice which has been improved by strong evidence, than stand to lose by receiving the somewhat less favoured treatment in a clinical trial. Given a ‘prior’ equipoise curve and an estimate of the number of people who will be treated before a treatment is superseded, it is possible to calculate the thresholds at which more people stand to lose than gain by conducting (or extending) a trial\(^{31}\). As a general rule, such calculations favour large trials (i.e. conducted to a high level of precision), because of the huge imbalance that normally exists between the number of people receiving treatment in and outside of clinical trials. If clinicians put individual obligations before their social obligations, then science must pay a price, since equipoise is likely to be disturbed at much lower levels of evidence than would constitute the traditional threshold of scientific ‘proof’. In other words, evidence short of the traditional threshold for statistical significance will affect individual equipoise.

Some people may consider it ethically acceptable to make a trade-off between these obligations (social and individual), but we have presented at least one argument against doing this in claiming the primacy of the doctor-patient relationship. Furthermore, it is not clear to us that utility is served by accepting an argument favouring the social obligation over the individual obligation. In the last analysis, the public might become suspicious and resentful if clinicians fail to disclose personal preferences in the interest of science or of convincing other clinicians. If this happened, future patients might withdraw from trials altogether.

Acceptance of our argument might not have as large an effect on trial participation as would at first seem likely. First, we have argued that policy makers are free from the individual obligation and can, with more justification, adopt a consequentialist stance. Furthermore, a reasonable degree of collective equipoise is most likely early in the life of a new treatment. Thus, new treatments can justifiably be restricted, as a matter of public policy, to people in trials.

Secondly, trials where one treatment can be substituted for another at a later date are unlikely to be greatly affected by our analysis. Less collective equipoise would seem necessary and patients are less likely to be put off by any personal clinical view favouring one treatment. This is because they can always come back to the alternative method later. Thirdly, doctors who offer trial entry to patients may not be expert in the topic of concern. They may thus be individually equipoised and happy to rely on collective equipoise among those who are regarded as expert. Fourthly, some trials involve randomization of units other than individual participants—wards, clinicians, time periods, general practices and hospital departments can all be randomized in the public interest (of getting precise and accurate information to guide treatment and policy) without violating the trust inherent in the relationship between patients and their doctors. Lastly, ‘preference’ trials, in which people are invited to choose treatment A, treatment B or a randomized comparison of both treatments, provide an opportunity for all patients to maximize their personal expected utilities while the trial continues to recruit those who are in effective equipoise.

**CONCLUSION**

Patients are entitled to the most appropriate treatment available. The point of clinical trials is to find out just what is the most appropriate treatment, and would therefore appear not to deny that right. However, in advance of a trial, clinicians will often have rational but different preferences, i.e. they may not be in equipoise.

A degree of collective equipoise among experts is a legitimate requirement for Ethics Committees. However, individual clinicians may have preferences in cases where the evidence is not clear cut. Unless access to the relevant treatment is restricted, we suggest that, the trust between clinician and patient is violated if trial entry is offered in these circumstances (or offered without divulging any clear personal preference). We further suggest that, when treatments have different side effects, the point of individual equipoise is not ‘no difference’, but ‘an effect sufficient to compensate for the treatment with the worst side effect’. Thus, decision analysis defines the treatment of greatest expected utility and trials of life saving, but freely available, treatments are ethical when the treatments under comparison have the same expected utilities.

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