

Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes

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Abstract

With declining law school enrollments, rising rates of pro se litigation, increasing competition from international lawyers and other professionals, and disparaging assessments from the Supreme Court, the legal profession is under increasing attack. Recent research suggesting that legal representation does not benefit clients has further fueled an existential anxiety in the profession. Are lawyers needed and do they matter? In this Article, we review the existing empirical research on the effect of legal representation on civil dispute outcomes. Although the pattern of results has complexities, across a wide range of substantive areas of law (housing, governmental benefits, family law, employment law, small claims, tax, bankruptcy, and torts), professional legal representation is associated with better outcomes for litigants. Only in juvenile court (and perhaps in cases involving claims to government benefits) is the benefit of representation unclear.

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I. INTRODUCTION

Edward: What makes you think I'm a lawyer?

Vivian: You have that sharp, useless look about you.¹

Every profession embraces a measure of self-loathing. Engineers mock their supposedly introverted natures, workers in the tech industry embrace managerial dysfunctions identified in Dilbert cartoons, doctors mock their egotism, and accountants ridicule their fascination with numbers. Professionals often share jokes about their abilities, foibles, and personalities. Lawyers, however, probably hold the prize for self-loathing commentary. As the vast canon of lawyer jokes reveals, there is a popular perception that the bar has failed in the pursuit of justice, existing instead as a morally bankrupt profession that obstructs justice, preys on the weak, bends to the interests of the powerful, and promotes conflict.² While other professionals mock themselves for their personality, lawyers mock their own existence.

All professions question themselves, of course. Medical journals often publish studies that suggest one treatment regimen or another has no benefit. Accountancy underwent a major self-examination after financial scandals associated with Enron and WorldCom.³ But it would be unthinkable for a medical journal to publish an article suggesting that the profession as a whole provides no overall benefit for human health, and financial scandals did not metastasize into an existential crisis for accountancy. Only lawyers seriously

1. PRETTY WOMAN (Touchstone Pictures 1991).

2. MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005).

3. See Stephen Labaton, *A Push to Fix the Fix on Wall Street*, N.Y. TIMES (Dec. 17, 2006), http://www.nytimes.com/2006/12/17/weekinreview/17labaton.html?_r=0 (discussing the aftermath of the Enron and WorldCom accounting scandals).

entertain the possibility that, taken as a whole, their profession does more harm than good. Notable legal academics and even Supreme Court justices have said as much about the profession. In *Walters v. National Ass'n of Radiation Survivors*, for example, then-Justice William Rehnquist concluded that representation by an attorney was of no benefit to veterans in disability hearings held by the Veterans Administration.⁴ Recently a professor at Harvard Law School, D. James Greiner, and his coauthor argued that representation by their own school's housing clinic actually harmed clients.⁵ As a result, they concluded that the "belief that an offer of legal representation could [not] be adverse to the client's interests" is wrong.⁶ Lawyers' quips about the futility of their profession are not merely jokes—many within the profession take the idea seriously.

Claims concerning the futility of the profession cannot be taken lightly. Market economies weed out inefficiencies, and if lawyers do not add value, their worth will likewise plummet. Although scholars have long wondered whether the profession owes its entire existence to various forms of monopolistic regulation disguised as paternalism, recent trends have exacerbated these concerns.⁷ Numerous businesses offer basic legal services in electronic formats that allow laypersons to create their own wills, contracts, leases, or other legal documents—all without the need for an attorney.⁸ Outsourcing legal research and document review services to India has also made inroads on the profession.⁹ The widespread availability of legal information on the Internet affords non-lawyers willing to do some simple research the basic tools they need to understand legal problems.¹⁰ If lawyers do

4. 473 U.S. 305, 333–34 (1985).

5. D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2118 (2012).

6. *Id.* at 2126.

7. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 40–48 (1989); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 715, 720 (1999); see also RICHARD SUSSKIND, *TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

8. See, e.g., NOLO, <http://www.nolo.com> (last visited Mar. 11, 2016) (offering pre-printed forms, computer programs for drafting legal documents, and guidance for forming business associations).

9. See, e.g., Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2189 (2007); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 765–66 (2010); see also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (permitting outsourcing).

10. See David Hall, *Google, Westlaw, LexisNexis and Open Access: How the Demand for Free Legal Research Will Change the Legal Profession*, 26 SYRACUSE SCI. & TECH. L. REP. 53, 54–57 (2012). For a discussion of no-cost alternatives to Westlaw and Lexis, see Laura K. Justiss, *A Survey of Electronic*

not add value and people can represent themselves, then the jobs in the legal profession will surely decline both in terms of quantity and quality.

Some contend that the end of the profession is not only coming, it is already here.¹¹ The Bureau of Labor Statistics reports that the number of law graduates continues to exceed the number of new positions available.¹² Graduate employment statistics are abysmal at many law schools, with more than 25% of law schools having less than half of their 2013 graduating class in full-time, permanent legal positions nine months after graduation.¹³ Applications to law schools have also plummeted in reaction to these trends, with total enrollment in 2014 at the lowest level since 1987.¹⁴ If lawyers do not add value, then these trends are both predictable and inevitable.

If the end of the profession is near, then litigation is surely the last bastion for lawyers. The complex rules that govern civil, criminal, and administrative proceedings can seem impenetrable to first-year law students and take a great deal of time and effort to master. Even if a layperson could piece together a will or negotiate a reasonable contract,¹⁵ litigation would seem to require both training and experience. When people think of lawyers, they typically envision people who practice in the civil and criminal courts. And yet, the Supreme Court in *Walters*¹⁶ and the recent study by Professor Greiner¹⁷ both question the value of lawyers in the litigation process itself. Trends suggest that pro se litigation is on the rise.¹⁸ In some areas of law, such as family law, pro se cases outnumber cases in which parties have representation.¹⁹ Without litigation,

Research Alternatives to LexisNexis and Westlaw in Law Firms, 103 LAW LIBR. J. 71, 73–74 (2011).

11. William D. Henderson, *From Big Law to Lean Law*, 38 INT'L REV. L. & ECON. (SPECIAL ISSUE) 5, 6 (2014).

12. *Occupational Outlook Handbook: Lawyers*, BUREAU LAB. STAT. (Dec. 17, 2015), <http://www.bls.gov/ooh/legal/lawyers.htm#tab-6>.

13. See *Employment Summary Report*, A.B.A., <http://employmentsummary.abaquestionnaire.org/> (last visited Feb. 10, 2016) (select “2013” as the “Class” under “Compilation”; then select “Download Complete Employment Data”; then open downloaded Excel sheet) (excluding students whose employment status was unknown).

14. *ABA Section of Legal Education Reports 2014 Law School Enrollment Data*, A.B.A. (Dec. 16, 2014, 11:18 AM), http://www.americanbar.org/news/abanews/aba-news-archives/2014/12/aba_section_of_legal.html.

15. Although many a first-year law student bemoans the amateurish drafting that inspires the complex cases they must study.

16. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985).

17. Greiner & Pattanayak, *supra* note 5, at 2118.

18. See, e.g., JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 3 (1998).

19. Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 107–12 (2001);

little or nothing remains for the legal profession.²⁰

But are lawyers really so useless? We doubt it. Even if laypeople can make plausible appearances in court, they cannot reasonably be expected to understand all of the tools available to litigators.²¹ Lawyers combine their substantive legal knowledge and understanding of legal procedure with experience as to the kinds of arguments and strategies that are likely to succeed in front of judges. They also have some personal distance from the issues, allowing them to make better judgments within the legal system.²² As the old adage goes, “a person who represents herself has a fool for a client.”²³ It seems no more plausible that a person can as ably represent herself in court as she could with an attorney as she could perform surgery on herself.

But if lawyers are truly helpful, then empirical studies of the profession should reflect their value. In this Article, we take a close look at the existing empirical research on this topic. We review the findings of studies that consider whether lawyers achieve more favorable outcomes in civil disputes across a number of substantive areas. We conclude that the evidence strongly supports the conclusion that representation benefits clients. The vast majority of the studies provide evidence that represented parties obtain more favorable outcomes than unrepresented parties, although a handful of studies suggest the opposite. With that said, the research in this area has limitations. Most cannot account for other factors that might influence case outcomes and the selection processes that result in legal representation for only some cases. Nevertheless, we conclude that in most areas, the empirical evidence indicates that lawyers benefit their clients.

In Part II of this Article, we summarize the findings of empirical research on the effect of legal representation in nine areas: juvenile cases, housing cases, administrative hearings, family law disputes, employment law litigation and arbitration, small claims cases, tax cases, bankruptcy filings, and tort claims.

Bruce D. Sales, Connie J. Beck & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 597 (1993); Carolyn D. Schwarz, Note, *Pro Se Divorce Litigants: Frustrating the Traditional Role of the Trial Court Judge and Court Personnel*, 42 FAM. CT. REV. 655, 655 (2004).

20. See GOLDSCHMIDT ET AL., *supra* note 18, 3–5.

21. Lawyers are able to access and quickly navigate through expensive legal databases, discuss strategies, anticipate problems with other seasoned lawyers, and develop efficiencies that laypersons might not be able to realize.

22. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 117–19 (1997).

23. See *Faretta v. California*, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting) (“[T]he Court by its opinion today now bestows a constitutional right on one to make a fool of himself.”).

Taking into account the research design of the studies and how they influence the interpretation of the studies' findings, we document the patterns that emerge within each substantive area. In Part III, we consider this body of research as a whole, discussing the analytic challenges that hinder research on the effect of legal representation. This Article also situates the existing research into the larger context of civil litigation, noting how existing research is disproportionately focused on particular types of civil disputes. We also discuss the questions that remain unanswered by this research. Finally, we conclude by considering the implications of this research.

II. RESEARCHING REPRESENTATION

Does having a lawyer improve a litigant's outcome? In some areas of law, representation is so nearly ubiquitous that researching this question is almost impossible. Representation is so common in serious criminal matters and complex civil litigation that a researcher could not reasonably assess whether being represented benefits clients.²⁴ But the overall scarcity of legal services in many other areas creates the kind of variation that facilitates a means of answering this question. Indeed, no shortage of studies exists on the subject of whether hiring a lawyer benefits a client.²⁵

As discussed in this Article, however, the research has produced a scholarly thicket. A wide array of studies on the issue, using a range of research methods and targeting several different areas of law, produce a

24. See Karl Monsma & Richard Lempert, *The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board*, 26 LAW & SOC'Y REV. 627, 628 (1992). Although there is a strong tradition of evaluating the effectiveness of legal counsel in the criminal context, for example James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012), the research is generally focused on the relative effectiveness of different kinds of representation. See, e.g., David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1146–51 (2007) (analyzing individual lawyers with different observable characteristics).

25. See Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About when Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 39–40 (2010) (concluding that litigants fare better when represented by lawyers and evaluating criteria for determining the appropriate distribution of legal resources); Greiner & Pattanayak, *supra* note 5, at 2175–81 (acknowledging dozens of quantitative studies on legal representation in civil disputes); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. SOC. JUST. 51, 51 (2010) (addressing how representation may affect the success of a civil justice case); see also Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 926 (2015) (presenting a meta-analysis of existing data on the effect of legal representation).

complex picture of the value of representation.²⁶ Even within the same legal setting, researchers have come to differing conclusions about lawyers' abilities to positively influence the outcomes of their clients' cases.²⁷

The range of research results is not necessarily bad news for the legal profession. As with any profession, the benefits of hiring an attorney might depend on the area being addressed and the quality of the attorney. Doctors are much more effective at treating a broken bone than Alzheimer's disease, and some doctors are more skilled than others. Scholars have noted clear variations in lawyers' effectiveness.²⁸ Judges also report that they believe that some areas of law attract higher-quality litigators than others.²⁹ Marked variation in lawyers' ability might make lawyers look ineffective in the aggregate, but such variation does not suggest that lawyers are useless.³⁰ Quite the opposite, in fact; variation in professional ability indicates that at least *some* lawyers are

26. See *infra* Tables 1–9.

27. Compare D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court (Sept. 1, 2012) [hereinafter Housing Court Study] (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880078, with D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 906–07 (2013) [hereinafter District Court Study]. Compare also Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 386–87 (1995) (finding that lawyers are associated with improved outcomes and represent tenants with valid defenses to summary eviction proceedings in New Haven, Connecticut), with John Bolton & Stephen Holtzer, *Legal Services and Landlord–Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495, 1511 (1973) (concluding that lawyers in New Haven housing court had no measurable impact on outcomes and needlessly increased case duration). Compare also Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. DISP. RESOL. 777, 819, 824 (2003) (concluding that lawyers had no effect on employment arbitration outcomes), with Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011) (finding a positive association between legal representation and case outcomes in employment arbitrations).

28. See, e.g., Abrams & Yoon, *supra* note 24, at 1150, 1165–67 (documenting variation in lawyers' effectiveness by experience and ethnicity); Leandra Lederman & Warren B. Hrungr, *Do Attorneys Do Their Clients Justice? An Empirical Study of Lawyers' Effects on Tax Court Litigation Outcomes*, 41 WAKE FOREST L. REV. 1235, 1239 (2006) (finding that the effect of legal representation varied with level of experience); Banks Miller, Linda Camp Keith & Jennifer S. Holmes, *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC'Y REV. 209, 210–12 (2015) (assessing the impact of varying lawyer skills on immigration proceedings); Jennifer Bennett Shinall, Note, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267, 291–96 (2010) (documenting variation in assessments of attorney skill and finding that for prosecutors, attorney skill is associated with case outcomes).

29. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 340–48 (2011).

30. See *supra* note 24 and accompanying text.

effective. To the extent some areas of law attract lower-quality representation, however, those areas might not show marked benefits of representation.³¹

Choice of research methods might also produce variation in results. This Article disentangles some of this methodological quagmire. At the outset, however, it is important to note that the primary impediment to studying the benefits of representation is endogeneity.³² Endogeneity in research refers to the relationship between a variable of interest (in this case, whether a client is represented by an attorney) and an unobserved source of variation in the primary outcome variable (in this case, success for a client). That is, it is difficult to separate the relationship between representation and case outcome and the relationship between other variables and case outcome. Notably, litigants with more plausible claims might be more likely to obtain representation, either because the parties are more inclined to pay for attorneys in cases in which they might succeed or because attorneys might be more likely to take more promising cases. If so, then observing a correlation between representation and litigants' outcome will not necessarily mean that representation improves outcomes.

In most studies of attorneys' value in litigation, researchers observe who is represented, who is not, and how they fare. We refer to these studies as *observational*. The potential for endogeneity makes the results of observational studies difficult to interpret. Researchers can try to address endogeneity by including factors that might affect case quality into their analyses, but some factors that influence both case quality and the decision to use an attorney are apt to be unobservable. A few studies remedy this by randomly offering an attorney to some litigants.³³ We term these *randomized* studies. Such studies are unusual, but because randomization avoids endogeneity, these studies are especially valuable.

31. See Abrams & Yoon, *supra* note 24, at 1146–51.

32. Other scholars have demonstrated that endogeneity plays a role in other areas of research, including cost-benefit analyses of public sector decision making and lawmaking and enforcement. See, e.g., Gregory Scott Crespi, *The Endogeneity Problem in Cost-Benefit Analysis*, 8 GEO. J.L. & PUB. POL'Y 91, 92, 96 (2010) (arguing there is an endogeneity problem in cost-benefit analyses because the analyses “do not confront the difficulties involved in valuing policies under those circumstances when one of their consequences is a significant alteration of the preferences of a substantial number of people, or even an alteration of the fundamental genetic identities of the members of distant future generations”); Valerie Jenness & Michael Smyth, *Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL'Y REV. 489, 493–94 (2011) (arguing that the “endogeneity of law directs analytic attention to the process whereby law is ‘generated within the social realm that it seeks to regulate’” and would be useful in criminal justice reform).

33. District Court Study, *supra* note 27, at 906.

The existing research on the value of attorneys to litigants focuses almost entirely on outcomes. This is appropriate, of course, because understanding whether lawyers actually improve the outcomes of their clients in litigation is the issue of most critical import. That emphasis, however, excludes consideration of process values. That is, even if representation would not alter a case's outcome, a litigant might feel much differently about the legal system if he or she is represented.³⁴ People value process in legal systems.³⁵ A lawyer can explain the legal system, provide reasons for the outcome, and give greater assurance that the court hears the client's story. Those who feel they have had their voices heard by courts come to believe the legal system is more fair compared to those who do not.³⁶ In turn, people who feel they have been heard are more likely to obey the law in the future.³⁷ The effect of representation on perceived fairness in the civil justice system is important, but the research on representation does not directly address these questions. Thus, we do not address them further in our own review.

In this Part, we summarize the results of empirical studies that evaluate the relationship between legal representation and civil dispute outcomes in several areas of law. In so doing, we attempt to disentangle the thorny set of results. We find that representation provides clear value in some areas, while the benefit of legal representation is less clear in others.

A. Juvenile Cases

We begin with the bad news for the legal profession. Research on juvenile justice provides a markedly unflattering evaluation of lawyers' effectiveness, as shown in Table 1 below.³⁸ Most studies of juvenile court find that representation is not associated with more favorable outcomes for juveniles.³⁹

34. See Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 495–96 (2010).

35. See, e.g., Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 171–72 (2005).

36. JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 52–54 (1984); Tom R. Tyler, *What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 103–04 (1988).

37. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 62–63 (1990).

38. See *infra* Table 1.

39. E.g., Barry C. Feld & Shelly Schaefer, *The Right to Counsel in Juvenile Court: The Conundrum of Attorneys as an Aggravating Factor at Disposition*, 27 JUST. Q. 713 (2010); see *infra* Table 1.

Not only do these studies provide scant evidence that representation benefits clients, but numerous studies have found that juveniles with legal representation are *more likely to experience worse outcomes*. Scholars have even dubbed legal representation an “aggravating factor” in determining the disposition of a juvenile offender.⁴⁰ Most of the studies are observational, which makes them prone to a pernicious endogeneity problem. Juveniles who face more serious charges are more likely to obtain representation than those who do not.⁴¹ Hence, even if lawyers benefit their clients, represented juveniles are apt to do worse in the aggregate than unrepresented juveniles. Even accounting for this bias among the observational studies, however, our review suggests that representation is unhelpful at best, and perhaps harmful.

Table 1. Studies Evaluating Legal Representation in Juvenile Cases.

Study	Design	Sample	Effect of Representation
Lemert (1967)	Observational ⁴²	1,760 cases	Mixed: more cases dismissed, but also more detention
Duffee & Siegel (1967)	Observational	218 cases	Negative: more frequent incarceration, less frequent dismissal
Platt et al. (1968)	Observational	345 cases; 8,575 dispositions	Negative: more cases dismissed, but also more probation and institutionalization
Stapleton & Teitelbaum (1972)	Randomized ⁴³	633 cases	No effect
Ferster & Courtless (1972)	Observational	110 cases; 64 hearings	Positive: institutionalization less common

40. See, e.g., Feld & Schaefer, *supra* note 39, at 714 (“Unfortunately, the presence of counsel consistently appears to be an aggravating factor when judges sentence delinquents.”).

41. See Edwin M. Lemert, *Legislating Change in the Juvenile Court*, 1967 WIS. L. REV. 421, 422 (1967).

42. Researchers compared the average outcomes between represented and unrepresented litigants in observed cases.

43. Researchers randomized offers of representation and compared average outcomes between those who received the offer of representation and those who did not.

Hayeslip (1979)	Observational	742 cases	Positive: institutionalization less common
Clarke & Koch (1980)	Observational/Regression ⁴⁴	1,435 cases	Mixed: no effect on dismissal, less likely to be institutionalized
Walter & Ostrander (1982)	Observational	522 cases	No effect
Bortner (1982)	Observational/Regression	250 cases	No effect
Aday (1986)	Regression	496 cases	Negative: more severe dispositions
Feld (1988, 1993)	Observational	126,545 cases	Negative: more severe sentences
Feld (1989)	Observational	17,195 cases	Negative: more severe sentences
Burruss & Kempf-Leonard (2002)	Observational/Regression	591 cases	Negative: more out-of-home placements
Guevara et al. (2004, 2008)	Observational/Regression	2,435 cases	Negative: more out-of-home placement
Feld & Schaeffer (2010)	Observational/Regression	69,639 cases	Negative: more out-of-home placement
<i>Juvenile Protection Proceedings</i>			
Kelly & Ramsey (1982–1983)	Observational/Regression	210 cases	No effect

44. Researchers used regression techniques to control for endogeneity in observed cases to isolate the effect of representation.

Research on the effect of representation in juvenile cases began in the 1960s as an effort to study the impact of juvenile justice reforms.⁴⁵ Until the 1960s, most juvenile justice courts emphasized a non-adversarial, therapeutic approach with rehabilitation as the primary goal.⁴⁶ The United States Supreme Court case *In re Gault*,⁴⁷ however, marked a turning point. In *In re Gault*, the Court noted that in the juvenile system “[t]he child was to be ‘treated’ and ‘rehabilitated’ and the procedures, from apprehension through institutionalization, were to be ‘clinical’ rather than punitive.”⁴⁸ Hence, procedures could be thought of as non-adversarial in nature, with the state acting as *parens patriae*.⁴⁹ The Court acknowledged the different focus of the juvenile system but insisted that due process protections—including a need for representation—applied.⁵⁰ Implicit in the ruling is the concept that the addition of lawyers to the system would protect juvenile defendants from excessive or unjust incarceration.

The earliest studies of this transformation of juvenile justice, however, showed a mixed effect of representation. Undertaken after the adoption of procedural reforms for the juvenile justice system in California but before *In re Gault*,⁵¹ one study found that in Sacramento County in 1962–1963, dismissals were more frequent where juveniles were represented.⁵² The study noted, however, that the majority of those cases involved allegations of neglect.⁵³ When the researchers excluded those cases, they found that “attorneys [had] little influence on decisions to detain youth and on the length of their detention stays.”⁵⁴

45. See, e.g., Norman Lefstein, Vaughan Stapleton & Lee Teitelbaum, *In Search of Juvenile Justice: Gault and Its Implementation*, 3 LAW & SOC’Y REV. 491, 493 (1969) (assessing compliance with constitutional mandates in three urban juvenile courts); Anthony Platt & Ruth Friedman, *The Limits of Advocacy: Occupational Hazards in Juvenile Court*, 116 U. PA. L. REV. 1156, 1156–59 (1968) (providing qualitative analysis of the role of counsel in juvenile cases in Chicago after the implementation of procedural reforms in Illinois); Charles E. Reasons, *Gault: Procedural Change and Substantive Effect*, 16 CRIME & DELINQ. 163, 168–70 (1970) (documenting rates of legal representation before and after the procedural reform of the juvenile system).

46. George W. Burruss, Jr. & Kimberly Kempf-Leonard, *The Questionable Advantage of Defense Counsel in Juvenile Court*, 19 JUST. Q. 37, 38 (2002).

47. 387 U.S. 1 (1967).

48. *Id.* at 15–16.

49. *Id.* at 16.

50. *Id.* at 17–22, 24.

51. See *supra* note 48 and accompanying text.

52. Lemert, *supra* note 41, at 442.

53. *Id.* at 429.

54. *Id.* at 443.

Worse yet, a subsequent study in a large, Midwestern city in 1967⁵⁵ showed that although dismissals were more frequent in cases where a public defender was involved, probation and institutionalization were also more frequent.⁵⁶ The study, however, arose from a survey of files in the public defender's office, and thus, the authors could not identify cases in which private attorneys represented juveniles.⁵⁷

Another study reported that juvenile cases in "a populous northeastern New York county" from 1967–1968⁵⁸ resulted in 35% of juveniles with lawyers (private or otherwise) being sentenced to out-of-home placements compared to just 5% of those youths who appeared without counsel.⁵⁹ Although such a result might be attributable to a tendency to obtain representation when a juvenile faced more serious charges, the result persisted even when the researchers accounted for the seriousness of the offense.⁶⁰ At least at the outset of the due process revolution in juvenile justice, it does not appear that the inclusion of attorneys did much to benefit juvenile offenders.

As the juvenile system progressed, however, one might have hoped that lawyers came to learn how to represent juveniles effectively. A series of studies in the 1970s and early 1980s, however, only deepened the concern that representation might adversely affect juveniles' outcomes. Focused on a "moderately sized mid-western county," a 1979 study found that 22.6% of juvenile cases resulted in institutional placements when there was no attorney involved, but in 37.5% of cases where the youth had a lawyer.⁶¹ Again, the authors found that institutional placements were more common among represented juveniles, even when they accounted for case characteristics—including severity of the offense.⁶² A 1980 study of two North Carolina juvenile courts found that among those cases where the juvenile was adjudicated delinquent, the rate at which the juvenile was removed from home

55. Anthony Platt, Howard Schecter & Phyllis Tiffany, *In Defense of Youth: A Case Study of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 623 (1968). The authors do not identify the twelve-month period used for their data collection, but the article suggests that it was 1967.

56. *Id.* at 640 tbl.3.

57. *Id.*

58. David Duffee & Larry Siegel, *The Organization Man: Legal Counsel in the Juvenile Court*, 7 CRIM. L. BULL. 544, 549 (1971).

59. *Id.* at 550 tbl.1.

60. *Id.* at 551 tbls.2 & 3.

61. David W. Hayeslip, Jr., *The Impact of Defense Attorney Presence on Juvenile Court Dispositions*, 30 JUV. & FAM. CT. J. 9, 11 (1979).

62. *Id.* at 12, 13 tbl.2.

was *higher* when the juvenile had a lawyer.⁶³ After applying a risk index comprised of a number of relevant case and juvenile characteristics, however, the authors found no reliable difference in the rate at which cases with and without legal representation were dismissed.⁶⁴

Similarly, a 1982 study relying on court observations in a “large north central city”⁶⁵ concluded that the relationship between legal representation and juvenile case outcome was “negligible.”⁶⁶ This study showed that 21% of cases involving legal representation resulted in out-of-home placements, compared to 16% of cases where the juvenile was unrepresented.⁶⁷ Even when the sample was restricted to cases involving violent offenses, the rate of removal remained higher among cases where the juvenile was represented.⁶⁸

A 1982 study of a Midwestern juvenile court that serves “the largest and most affluent county in the state”⁶⁹ showed that when the juvenile was represented, the case was more likely to be dismissed but also more likely to receive the most severe dispositions.⁷⁰

The results identified in the above studies are not limited to cases in which juveniles are accused of crimes. Research focused specifically on juvenile neglect and abuse cases follow a similar pattern. One study concerning the effectiveness of legal representation by guardians *ad litem* appointed in child protection proceedings in 1977–1978 in North Carolina “found . . . no overall effects that would be considered beneficial.”⁷¹ The researchers found that participation by the guardian *ad litem* failed to show reliable effects on the

63. Stevens H. Clarke & Gary G. Koch, *Juvenile Court: Therapy or Crime Control, and Do Lawyers Make a Difference?*, 14 LAW & SOC’Y REV. 263, 301–02 (1980).

64. *Id.* at 298, 300.

65. James D. Walter & Susan A. Ostrander, *An Observational Study of a Juvenile Court*, 33 JUV. & FAM. CT. J. 53, 55 (1982).

66. *Id.* at 60.

67. *Id.* at 61 tbl.8.

68. *Id.* at 61 tbl.9 (reporting removal rate of 40% for represented juveniles compared to 0% among unrepresented youth).

69. M. A. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 22 (1982).

70. *Id.* at 140–41.

71. Robert Kelly & Sarah Ramsey, *Do Attorneys for Children in Protection Proceedings Make a Difference?—A Study of the Impact of Representation Under Conditions of High Judicial Intervention*, 21 J. FAM. L. 405, 451 (1982) [hereinafter Kelly & Ramsey 1982] (clarifying that they consider a decrease in rates of removal to be a benefit in the context of the highly interventionist court system on which the study is based); see also Robert F. Kelly & Sarah H. Ramsey, *Legal Representation for Parents and Children in Child Protection Proceedings: Two Empirical Models of Acquisitorial Processes and a Proposal for Reform*, 89 DICK. L. REV. 605, 628–34 (1985) (discussing further the significance of the empirical results).

likelihood that a child would be removed from home,⁷² or if the child was removed, the likelihood of the child's return home.⁷³ Moreover, for those children who were returned home, they estimate that the presence of a court-appointed guardian increased the length of time to return by an average of 35%.⁷⁴ In contrast, the researchers found that representation for the child's parents was associated with an increase in the likelihood that a child who was removed would be returned home⁷⁵ and a decrease in the time until the child's return.⁷⁶

Even studies that show some evidence of a positive effect nevertheless portray representation in a dismal light. A 1972 study located in one of the most affluent counties in the United States, for example, showed some benefit of representation.⁷⁷ These authors found that probation and dismissal were more frequent dispositions in cases where counsel was present.⁷⁸ The authors nevertheless reported that in two-thirds of the hearings they observed, the lawyers "did absolutely nothing."⁷⁹

The results of these studies could arise from endogeneity. Judicial appointment of counsel is more likely in more serious cases.⁸⁰ Moreover, parents whose children face serious outcomes might be more motivated to obtain representation for their children than those parents whose children face less serious charges. The fact that several of the studies show a narrowing of the disparity in outcomes between represented and unrepresented children when the researchers control for case severity suggests that endogeneity explains this pattern of results. Even controlling simply for case characteristics might fail to capture all of the endogeneity. For example, juveniles who face more damning

72. Kelly & Ramsey 1982, *supra* note 71, at 440–41.

73. *Id.* at 441, 446 tbl.4.

74. *Id.* at 447.

75. *Id.* at 446 tbl.4.

76. *Id.* at 450. An early study focused on legal representation of respondents (parents) in 167 child-neglect cases filed in Kings County, New York in 1966 found that there was a finding of neglect in nearly 80% of the hearings in which the respondent was unrepresented but in only 63% of cases where the respondent was fully represented. Note, *Representation in Child-Neglect Cases: Are Parents Neglected?*, 4 COLUM. J.L. & SOC. PROBS. 230, 241 (1968).

77. Elyce Zenoff Ferster & Thomas F. Courtless, *Pre-Dispositional Data, Role of Counsel and Decisions in a Juvenile Court*, 7 LAW & SOC'Y REV. 195, 207 tbl.2 (1972).

78. *Id.* at 206 tbl.1; see also Elyce Zenoff Ferster, Thomas F. Courtless & Edith Nash Sneathan, *The Juvenile Justice System: In Search of the Role of Counsel*, 39 FORDHAM L. REV. 375, 402 tbl.B (1971) (reporting that dismissals and probation were more common when counsel was present).

79. Ferster & Courtless, *supra* note 77, at 207.

80. Barry C. Feld, *Right to Counsel in Juvenile Court: An Empirical Study of when Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1223 (1989).

evidence might be more apt to be represented than those who do not—a factor that none of the studies quantify adequately.⁸¹ Furthermore, larger sample sizes might be necessary to get a clearer portrait of the benefits of representation.

More recent studies that rely on large data sets and more complex statistical techniques, however, provide little reassurance that the previous results are all methodological artifacts. A study regarding juvenile felony defendants in three Missouri counties using multivariate regression techniques to control for case characteristics showed juveniles who were represented by private attorneys were three times as likely to be removed from their homes as unrepresented juveniles.⁸² Those represented by public defenders were five times as likely to be removed.⁸³ Findings from two studies in Midwestern counties that also used multivariate logistic regression to predict case disposition showed that representation had a mixed effect at best.⁸⁴ These studies found that relative to unrepresented youths, juveniles who appeared with lawyers were more likely to receive an out-of-home placement than to have their cases dismissed.⁸⁵ The researchers also found, however, the effect of legal representation varied for private and public lawyers⁸⁶ and by the juvenile's race.⁸⁷ By showing that private attorneys fared better than public defenders, these studies suggest that lawyer quality might matter.

Large-scale studies using statewide data have also provided evidence of worse outcomes among represented juveniles. A study of Minnesota juvenile cases found that 28.1% of juveniles with counsel received out-of-home placements, compared to only 10.3% of unrepresented juveniles, and that 17.6% of represented youth were sentenced to secure confinement, compared to only 5.2% of unrepresented youth.⁸⁸ Even when the comparison is made between cases involving similar offenses and prior records, a larger proportion

81. *See id.* at 1281.

82. Burruss & Kempf-Leonard, *supra* note 46, at 56.

83. *Id.*

84. Lori Guevara, Denise Herz & Cassia Spohn, *Race, Gender, and Legal Counsel: Differential Outcomes in Two Juvenile Courts*, 6 YOUTH VIOLENCE & JUV. JUST. 83, 89 (2008) [hereinafter Guevara et al. 2008]; Lori Guevara, Cassia Spohn & Denise Herz, *Race, Legal Representation, and Juvenile Justice: Issues and Concerns*, 50 CRIME & DELINQ. 344, 359 (2004) [hereinafter Guevara et al. 2004].

85. Guevara et al. 2008, *supra* note 84, at 95 (estimating a negative association between legal representation by public or private counsel and likelihood of case dismissal relative to out-of-home placement); Guevara et al. 2004, *supra* note 84, at 358 (estimating a negative association between legal representation by public or private counsel and the likelihood of case dismissal relative to secure confinement).

86. Guevara et al. 2004, *supra* note 84, at 358.

87. *Id.* at 361.

88. Feld, *supra* note 80, at 1236–37.

of represented juveniles receive the most severe sentences.⁸⁹

Finally, a multi-state⁹⁰ study of juvenile cases found that, on average, represented juveniles received more severe sentences in each of six offense categories in three states, in all but one offense category in one state, and in all but two offense categories in the final state.⁹¹ Juveniles with representation had worse outcomes on average than unrepresented youth with the same offense type and pre-hearing detention status⁹² or with the same offense type and number of prior offenses.⁹³

Even studies that use alternative research designs suggest representation is of no benefit in juvenile settings. An analysis of Minnesota juvenile cases took advantage of legislative reforms to compare the outcomes of juvenile cases before and after legislative reforms that expanded mandatory representation for juvenile felony cases and reclassified certain misdemeanors as status offenses.⁹⁴ These researchers found that—after adjusting for offense type, number of prior offenses, geography, and offender demographics—juveniles who appeared with a lawyer in 1994 were 2.9 times more likely to receive out-of-home placements than less severe sentences compared to unrepresented youth.⁹⁵ In 1999, after reforms expanded representation, represented defendants were 3.8 times more likely to receive out-of-home placements.⁹⁶ Although other long-term trends could have accounted for the result and the study's design does not perfectly control for endogeneity, the result suggests that expanding representation produces worse outcomes for juvenile offenders.

Another study used a comparison of multiple courts to assess the value of representation. The researcher reasoned that the continued reliance on more therapeutic approaches in juvenile court may mean that legal representation would benefit juveniles only in more formal settings.⁹⁷ Unfortunately, the

89. *Id.* at 1250–51.

90. Barry C. Feld, In re Gault Revisited: A Cross-State Comparison of the Right to Counsel in Juvenile Court, 34 CRIME & DELINQ. 393, 396 (1988) [hereinafter Feld 1988] (study included California, Minnesota, New York, Nebraska, North Dakota, and Pennsylvania); see also BARRY C. FELD, JUSTICE FOR CHILDREN: THE RIGHT TO COUNSEL AND THE JUVENILE COURTS 40 (1993) [hereinafter FELD 1993].

91. Feld 1988, *supra* note 90, at 405.

92. *Id.* at 414 tbl.8.

93. *Id.* at 417 tbl.11.

94. See Feld & Schaefer, *supra* note 39, at 714.

95. *Id.* at 733 tbl.6.

96. *Id.*

97. David P. Aday, Jr., Court Structure, Defense Attorney Use, and Juvenile Court Decisions, 27 SOC. Q. 107, 109–11 (1986).

study showed the opposite.⁹⁸ The author found that represented juveniles were worse off *only* in those courts that emphasized due process protection and formality.⁹⁹ In the more informal setting, representation had no significant influence on outcomes.¹⁰⁰ Thus, lawyers were useless at best and were possibly harmful precisely in the courts in which they were supposed to be most helpful.¹⁰¹

The best way to avoid endogeneity is to make representation randomly available to some juveniles but not others. Even this approach, however, only hints at modest benefits of representation.¹⁰² In a study undertaken by the National Council of Juvenile Court Judges in the late 1960s, juvenile males in two large, northern cities were randomly offered legal assistance provided by lawyers hired by the project.¹⁰³ The study was designed to maximize the potential effect of representation, so the researchers provided special training to the lawyers involved, limited their caseloads, and required them to adopt an aggressive strategy in defending their clients in an attempt to maximize their effectiveness.¹⁰⁴ At the same time, they recruited them straight from law school, raising questions about the value of lawyers' experience.¹⁰⁵

In one city, the researchers found no difference in outcomes between the cases that were offered representation and those where no offer was made.¹⁰⁶ In fact, once background characteristics were taken into account, youth who were offered representation sometimes fared worse.¹⁰⁷ In the other city, however, cases in which juveniles were offered representation more frequently ended in dismissals¹⁰⁸ or continuances¹⁰⁹ and less frequently resulted in probation or commitment.¹¹⁰ After acknowledging the additional complexity inherent in estimating the effect of *actual use* of representation,¹¹¹ the authors

98. *Id.* at 112.

99. *Id.* at 114.

100. *Id.* at 112 (finding that the correlation between attorney use and detention is only -.065).

101. *Id.*

102. W. VAUGHAN STAPLETON & LEE E. TEITELBAUM, IN DEFENSE OF YOUTH: A STUDY OF THE ROLE OF COUNSEL IN AMERICAN JUVENILE COURTS 3 (1972).

103. *Id.* at 58–59.

104. *Id.*

105. *Id.* at 60.

106. *Id.* at 72.

107. *Id.* at 79.

108. *Id.* at 66 (49.8% for represented versus 40.0% for unrepresented youth).

109. *Id.* (9.9% for represented versus 3.9% for unrepresented youth).

110. *Id.* (31.6% for represented versus 43.9% for unrepresented youth).

111. *Id.* at 70–78.

compared the outcomes in cases where representation was actually *used* (as opposed to just offered). As with the randomized offers, they found that the distribution of outcomes for unrepresented and represented was very similar in one city, but those with representation obtained more favorable outcomes in the other.¹¹² Thus, even a randomized experiment failed to offer consistent evidence of a benefit of legal representation in juvenile cases.

On the whole, research focused on juvenile cases offers a worrying assessment of the effectiveness of legal representation. Research documenting the inadequacy of representation provided to children provides further cause for concern.¹¹³ Numerous studies find that cases where juveniles have legal representation end in more severe sentences.¹¹⁴ While other studies find that cases involving representation are more likely to result in dismissal,¹¹⁵ the results as a whole are far from a straightforward endorsement for lawyers.

These results are hard to explain. Many scholars emphasize that the association between representation and bad outcomes for juveniles might actually reflect greater rates of representation among more serious cases, a possibility that is particularly probable given judges' role in appointing counsel.¹¹⁶ Even where the law requires the mandatory appointment of legal counsel—which should alleviate some of these selection concerns—scholars find significant judicial non-compliance and large variation in rates of representation.¹¹⁷ This possibility is difficult to rule out in studies that do not address endogeneity at all¹¹⁸ or those that are able to take into account case characteristics in isolation.¹¹⁹ Some observational studies are able to compare

112. *Id.* at 69 tbl.III.3, 73 tbl.III.5.

113. See JANE KNITZER & MERRIL SOBIE, LAW GUARDIANS IN NEW YORK STATE: A STUDY OF THE LEGAL REPRESENTATION OF CHILDREN 8 (1984) (reporting the poor quality of legal representation provided to children in New York state); Ferster & Courtless, *supra* note 77, at 207 (recounting the ineffectual representation offered by lawyers in court hearings they observed).

114. See, e.g., Feld, *supra* note 80, at 1237–38.

115. See, e.g., Platt et al., *supra* note 55, at 640 tbl.3.

116. See BORTNER, *supra* note 69, at 140; STAPLETON & TEITELBAUM, *supra* note 102, 82–83.

117. Feld & Schaefer, *supra* note 39, at 729–30.

118. See, e.g., Ferster & Courtless, *supra* note 77, at 195–96; Lemert, *supra* note 41, at 423; Platt et al., *supra* note 55, at 619; Walter & Ostrander, *supra* note 65, at 55.

119. See Duffee & Siegel, *supra* note 58, at 552–53; Feld 1988, *supra* note 90, at 393, 396–98; Hayeslip, *supra* note 61, 10–12. Other studies may also involve analytic limitations. See, e.g., Aday, *supra* note 97, at 108–09 (using a three-category ordinal variable representing disposition as the dependent variable in an ordinary least squares regression analysis, which may indicate that the assumptions of the regression model are violated); Burruss & Kempf-Leonard, *supra* note 46, at 45–46 (stating that the dependent variable was invariant with regard to legal representation but estimating a logistic regression model predicting the likelihood of an out-of-home placement including a term for legal representation).

outcomes involving similar offenses, however, and a few are able to account for other factors at the same time as well.¹²⁰ Moreover, even the results of the randomized study, which should be free of these concerns, are mixed.¹²¹ Indeed, these studies support the proposition that the effect of legal representation varies not only by case, but also by court.¹²²

B. Housing

We turn next to housing. Concerns about the value of representation in housing court inspired much of the current concern with the value of lawyers. A recent randomized experiment on summary eviction cases heard primarily in a Massachusetts Housing Court found no evidence that litigants benefit from an offer of full representation.¹²³ The researchers—led by Professor James Greiner of Harvard University—randomly offered full legal representation to a portion of study participants while the remaining individuals were eligible for day-of legal representation in settlement negotiations or mediation if their case proceeded to a hearing.¹²⁴ The study found no statistically significant differences in any of the outcomes considered: the likelihood that “notice-to-quit cases” reached litigation;¹²⁵ the likelihood that tenants retained possession of the housing unit;¹²⁶ the average number of months’ worth of rent the tenant was ordered to pay relative to the amount requested by the landlord;¹²⁷ the time allotted to vacate the premises for those tenants who lost possession;¹²⁸ and the procedural actions taken in the case.¹²⁹

Professor Greiner’s study is thorough and its reliance on random assignment makes it an important piece of evidence regarding the effect of legal representation. The conclusions of this study, however, are problematic. Because of the design, which randomized offers of different levels of legal

120. See BORTNER, *supra* note 69, at 22–23; Burruss & Kempf-Leonard, *supra* note 46, at 45–46; Clarke & Koch, *supra* note 63, at 269–71; Guevara et al. 2008, *supra* note 84, at 83; Guevara et al. 2004, *supra* note 84, at 344; *supra* note 119 and accompanying text.

121. See STAPLETON & TEITELBAUM, *supra* note 102, at 79.

122. See *id.* at 81.

123. Housing Court Study, *supra* note 27, at 10 (indicating that “about 90% of the litigated cases” in the study were in Housing Court).

124. *Id.* at 2.

125. *Id.* at 24.

126. *Id.* at 25.

127. *Id.* at 28.

128. *Id.* at 34.

129. *Id.* at 36–37.

representation (full versus limited), one would expect the difference in average outcomes between the two groups to be smaller than if it compared represented and unrepresented litigants. Moreover, there was crossover between the treatment and control groups in terms of *use* of representation.¹³⁰ Only 75% of the treatment group actually received full representation, and 7% of the control group also received representation.¹³¹ Within the control group, only 56% of those who were eligible—those whose cases went to a hearing—used the offered limited legal representation.¹³² This, combined with the limited sample size, makes it less surprising that the study fails to find evidence of a difference in average outcomes between the treatment and control groups. Given that the authors provide no estimate of the effect of the *use* of legal representation, it is hard to view this study as convincing evidence that lawyers fail to benefit their clients.

The study's findings also stand in sharp contrast to every other study conducted in this area of law, as Table 2 shows.¹³³ Two other studies have used random assignment to study the value of representation in this context.¹³⁴ In one, the same Harvard researchers analyzed the effect of randomized offers of full representation in eviction cases heard in a Massachusetts District Court.¹³⁵ In this study, some participants received limited legal assistance by attending an informational clinic,¹³⁶ while other tenants in a random subset of cases were offered full legal representation.¹³⁷ They found that tenants who were offered full legal representation were less likely to lose possession,¹³⁸ less likely to have a judgment or writ of execution entered against them,¹³⁹ and required to pay less, on average, than those in the limited-assistance control group.¹⁴⁰ While

130. *Id.* at 2.

131. *Id.* at 21.

132. *Id.*

133. *See infra* Table 2.

134. *See* District Court Study, *supra* note 27, at 921; *see also* Carroll Seron, Martin Frankel, Gregg Van Ryzin & Jean Kovath, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 420 (2001).

135. District Court Study, *supra* note 27, at 910.

136. *Id.* at 908, 918.

137. *Id.* at 918.

138. *Id.* at 927 (finding rate of loss of possession for the treated group was .34 relative to .62 for the control group).

139. *Id.* (finding that judgments were entered for the evictor in 17% of treated cases relative to 75% of cases in the control group).

140. *Id.* at 929–30 (estimating that for cases alleging nonpayment of rent or “serious monetary counterclaims” the evictors in the treatment cases received an average of 9.4 months’ rent less than they requested compared to 1.9 months’ rent less for those in the control group).

this study also reported crossover between treatment and control groups—the researchers noted that 97% of those in the treatment group accepted the offer of full representation and 11% of the control group also obtained full legal representation from another source¹⁴¹—the authors do not estimate the effect of actual *use* of legal representation.

In another study, researchers randomly offered legal representation to low-income tenants in New York City Housing Court.¹⁴² In that study, tenants who received an offer of representation were less likely to default, less likely to have a judgment entered against them, less likely to have a warrant of eviction issued against them, and more likely to have a stipulation requiring rent abatement or repairs entered in their cases.¹⁴³ For each outcome, the difference in the means was large and statistically significant.¹⁴⁴ There was, however, crossover between treatment and control groups—44% of the “treated” cases did not involve legal representation while 4% of the control cases did¹⁴⁵—which makes the fact that they found an effect for the randomized *offers* of legal assistance more striking. The authors also estimated the effect of actual *use* of representation and generated results that were similar to those based on the offer of representation.¹⁴⁶ Those with representation had more favorable outcomes on average than those who were unrepresented.¹⁴⁷ Moreover, the magnitude of their estimated effects is notable, especially in light of the moderate sample size.¹⁴⁸

141. *Id.* at 908, 925.

142. Seron et al., *supra* note 134, at 420–21.

143. *Id.* at 426.

144. *Id.*

145. *Id.* at 425 tbl.1. The crossover between treatment and control groups was as follows: in 4% of the cases assigned to control the tenants sought representation from another source and in 44% of treatment cases there was no representation provided. *Id.*

146. *Id.* at 425.

147. *Id.* at 428.

148. *Id.*

Table 2. Studies Evaluating Legal Representation in Housing Cases.

Study	Design	Sample Size	Effect of Representation on tenants
Bolton & Holtzer (1973)	Observational	352 cases	Mixed/Unclear
Mosier & Soble (1973)	Observational	4,102 cases; 797 hearings	Positive: fewer judgments for landlord; more dismissals; longer occupancy
Fusco et al. (1979)	Observational	1,061 cases	Positive: more likely to maintain possession
Hall (1991)	Observational	Unreported	Positive
Daines (1991)	Observational	Unreported	Mixed/Unclear
Monsma & Lempert (1992)	Observational/ Regression	911 cases	Positive: reduced probability of eviction in some types of cases
Gunn (1995)	Observational	246 cases	Positive: lower eviction rates; longer occupancy
Lawyers' Committee for Better Housing (1996)	Observational	Unreported	Positive
Seron et al. (2001)	Randomized	268 cases	Positive
Eldridge (2002)	Observational/ Regression	153 cases	Positive
Lawyers' Committee for Better Housing (2003)	Observational	736 cases	Mildly positive
Charn (2006)	Observational	61 cases	Unclear
Linn (2010)	Regression	3,300 cases	More settlements
Steinberg (2011)	Observational	431 cases	Positive in multiple respects

Greiner et al. (2012)	Randomized	184 cases	No effect
Greiner et al. (2013)	Randomized	129 cases	Positive: more likely to retain possession
<i>Housing, Family, Small Claims</i>			
Hannaford- Agor & Mott (2003)	Observational	51,842 cases	Positive: dismissal rates lower among represented cases

Observational studies of the effect of representation on housing also largely demonstrate benefits arising from legal representation. The most striking results come from a study of Philadelphia's Housing Court.¹⁴⁹ This study estimates that tenants with legal representation were *nineteen times* more likely to win than tenants without legal representation.¹⁵⁰

Several other studies also conclude that representation benefits tenants. Chicago legal aid organizations have assessed the city's housing court multiple times.¹⁵¹ The earliest study found that although legal representation was rare for tenants in the study's sample of contested eviction cases decided between 1976 and 1978, legal representation resulted in "markedly different" outcomes.¹⁵² While unrepresented tenants won possession in only 6% of cases, the same was true of 13% of represented tenants.¹⁵³ Represented tenants were more likely to have the case dismissed¹⁵⁴ or continued¹⁵⁵ and less likely to have an award of summary possession entered for the landlord.¹⁵⁶ Moreover, the authors reported that unrepresented tenants more frequently experienced

149. David L. Eldridge, *The Construction of a Courtroom: The Judicial System and Autopoiesis*, 38 J. APPLIED BEHAV. SCI. 298, 309 (2002).

150. *Id.*

151. See *Mission and History*, LAW. COMMITTEE FOR BETTER HOUSING, <http://lcbh.org/about-us/mission-and-history> (last visited Feb. 16, 2016).

152. Anthony J. Fusco, Jr., Nancy B. Collins & Julian R. Birnbaum, *Chicago's Eviction Court: A Tenant's Court of No Resort*, 17 URB. L. ANN. 93, 114 (1979) (reporting on the results of the Judgment Landlord study).

153. *Id.* at 115.

154. *Id.* (reporting that 17.3% of represented tenants' cases won involuntary dismissal of the landlord's claims compared to 7.8% among unrepresented tenants).

155. *Id.* (finding that only 2.9% of unrepresented tenants had their cases continued compared to 34.7% of represented tenants).

156. *Id.* (reporting that summary possession for the landlord was entered in 84.2% of cases where the tenant was unrepresented but only 38.7% of cases where the tenant was represented).

improper rulings and coercion by the court.¹⁵⁷ In contrast, the study found that legal representation for landlords—who were victorious in the majority of cases—appeared to have had no effect on case outcomes.¹⁵⁸

The second study of Chicago’s housing court, completed in 1996, also offered evidence of a benefit of legal representation for tenants, finding that represented tenants were “six times more likely to prevail” than unrepresented tenants.¹⁵⁹ The results of the most recent study, in 2002, were more mixed.¹⁶⁰ Based on observations of 763 eviction cases, the researchers found that cases involving legal representation were more likely to be continued, but ultimately, cases involving representation were not more likely to avoid eviction.¹⁶¹

Studies of the New Haven, Connecticut housing court eviction cases also support the view that representation benefits tenants. After comparing lawyers’ case files from 188 closed eviction cases where the tenant was represented by a legal aid lawyer¹⁶² with court files for fifty-eight eviction cases where the tenant was unrepresented, one study found that the represented tenants avoided eviction three times as often as unrepresented tenants.¹⁶³ Among those tenants who lost possession, the study reported that none of the represented tenants were forced to move immediately compared to the 20% of unrepresented tenants who faced immediate eviction.¹⁶⁴ Finally, among cases that settled, the study found that represented tenants achieved settlement agreements with more favorable terms.¹⁶⁵

A second study in New Haven analyzed the prevalence of settlements in all summary eviction cases filed in 2008 and found that cases with legal representation for tenants is associated with changes in the likelihood that cases will settle.¹⁶⁶ The author concluded that in contrast with the large proportion of

157. *Id.*

158. *Id.* at 116.

159. LISA PARSONS CHADHA, LAW. COMMITTEE FOR BETTER HOUSING, TIME TO MOVE: THE DENIAL OF TENANTS’ RIGHTS IN CHICAGO’S EVICTION COURT 9 (1996) [hereinafter TIME TO MOVE].

160. See LAW. COMMITTEE FOR BETTER HOUSING, NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 4–5 (2003) [hereinafter NO TIME FOR JUSTICE].

161. *Id.* at 4, 18.

162. The legal aid lawyers were from the New Haven Legal Assistance Association and the Yale Law School’s Jerome N. Frank Legal Services Organization. Gunn, *supra* note 27, at 391–92.

163. *Id.* at 413.

164. *Id.*

165. *Id.* (finding represented tenants’ settlement agreements included longer stays of execution and required landlords to make repairs more frequently).

166. Jeffrey Lin, Deal or No Deal: An Empirical Analysis of the Settlement Dynamics of Landlord–Tenant Disputes 44 (Dec. 16, 2010) (unpublished manuscript) (on file with Yale Law School Legal Scholarship Repository) (finding that, among all cases, the odds of settlement are more than three times

unrepresented tenants who default, tenants with representation are more likely to appear and contest the eviction and, when they do, are less likely than unrepresented tenants to settle.¹⁶⁷

In California, a 1991 study of Berkeley eviction cases found that tenants with lawyers were ten times more likely to win than unrepresented tenants.¹⁶⁸ Another California study analyzed the effect of both full and limited legal representation provided by the Legal Aid Society of San Mateo County for indigent tenants facing eviction.¹⁶⁹ The study found little difference in the percentage of tenants who retained possession of their home for those receiving limited legal assistance (18%) and those who were unrepresented (14%) but found that those tenants who received full representation fared significantly better, with 55% retaining possession.¹⁷⁰ Represented tenants who nevertheless lost possession obtained more time to move out¹⁷¹ and paid their landlord less than unrepresented tenants.¹⁷² The study also showed some benefits of limited (rather than full) representation, although these were less clear.¹⁷³

An early study from Detroit found similar results after reviewing the case files from 4,116 contested summary eviction proceedings and observing 797 in-court proceedings.¹⁷⁴ The case files indicated that cases ended with a complete

higher where the tenant is represented but that among contested cases, the odds of settlement where the tenant is represented are only .71 times those of unrepresented tenants).

167. *Id.* at 45. Without knowing the content of the settlement agreements, however, it is difficult to assess the nature of the benefit provided by legal representation.

168. Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 477 (2003) (citing REBECCA HALL, EVICTION PREVENTION AS HOMELESSNESS PREVENTION: THE NEED FOR ACCESS TO LEGAL REPRESENTATION FOR LOW INCOME TENANTS (1991)).

169. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL'Y 453, 457 (2011).

170. *Id.* at 483.

171. *Id.* at 484–85 (finding that those with full representation were given an average of 97 days compared to an average of 54 days for those with limited representation and 47 days for those tenants who were unrepresented).

172. *Id.* at 485 (finding that none of the tenants with full representation were required to make payments to the landlord and received payments from the landlord more often, while those with limited or no representation were required to make payments more frequently and received payments from the landlord less frequently). Steinberg also found that the majority of tenants who received limited or no legal representation and were required to make a payment to the landlord made payments that exceeded the maximum liability due under relevant law given the allegations contained in the complaint. *Id.* at 487.

173. *Id.* at 496. The author also did not find evidence of a difference in outcomes for those receiving limited legal assistance in document preparation alone compared to those who also received negotiation assistance. *Id.* at 488.

174. Marilyn Miller Mosier & Richard A. Soble, *Modern Legislation, Metropolitan Court, Miniscule Results: A Study of Detroit's Landlord–Tenant Court*, 7 U. MICH. J.L. REFORM 8, 24–25 (1973).

judgment for the landlord almost twice as often (46.2% versus 87.7%) when the homeowner was unrepresented versus when the homeowner had a lawyer.¹⁷⁵ Tenants with representation also had their cases dismissed, had their cases settled, or had a judgment entered in their favor at a higher rate.¹⁷⁶ In contrast, outcomes for landlords with representation did not differ greatly from those without.¹⁷⁷ In fact, there is even some suggestion that landlords with lawyers fared worse, possibly because they were more likely to settle or because judges were more likely to review compliance with notice requirements when landlords had representation.¹⁷⁸

Focused not on general eviction cases, but on hearings before a public housing eviction board in Hawaii, one study analyzed the effect of legal representation at the hearing and appeal stages in a sample of cases brought between 1969 and 1985.¹⁷⁹ The authors found that after adjusting for a number of case and tenant characteristics and modeling selection into legal representation, legal representation was associated with a decrease in the likelihood that the tenant would be evicted at the hearing stage.¹⁸⁰ The researchers found, however, that the effect of legal representation varied over time and across case type.¹⁸¹ They estimated that the probability of eviction in nonpayment and falsification cases was consistently lower when the tenant was represented, but the probability of eviction in behavioral cases was reduced for represented cases only in later periods.¹⁸²

Finally, a multi-jurisdictional study by the National Center for State Courts found that in all the jurisdictions studied, cases where the parties were not represented were more likely to be dismissed.¹⁸³ The study also found that the represented party—either tenant or landlord—was more likely to achieve a favorable outcome.¹⁸⁴

175. *Id.* at 35.

176. *Id.* at 37.

177. *Id.* at 35.

178. *Id.* at 37.

179. Monsma & Lempert, *supra* note 24, at 633.

180. *Id.* at 645, 647.

181. *Id.* at 647.

182. *Id.*

183. Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 171 (2003) (reporting higher rates of dismissal for cases where parties were not represented in Lake County, IL; Ventura County, CA; and Cook County, IL).

184. *Id.* (reporting more favorable outcomes for represented parties in Lake County, IL and Cook County, IL).

Only one observational study suggests that representation is unhelpful in housing court.¹⁸⁵ In a study of the New Haven housing court, researchers concluded that a judgment of possession was entered for the landlord in cases where the tenant is represented about as often as it is in cases where the tenant was unrepresented.¹⁸⁶ Lawyers were able to negotiate more settlements for their clients than unrepresented parties, but their clients were also more likely to default on those settlements than were unrepresented tenants.¹⁸⁷

Some housing studies take a limited perspective towards assessing the value of representation by analyzing only represented tenants' outcomes. Two such studies reached mixed conclusions.¹⁸⁸ First, in one study in New Haven, researchers evaluated the effect of representation by the New Haven Legal Assistance Association¹⁸⁹ in 1971¹⁹⁰ and found that where the tenant was represented, cases took 2.7 times as long to be disposed¹⁹¹ but resulted in favorable judgments for the tenants in only 2% of cases.¹⁹² They concluded that the ultimate effect of legal aid representation for tenants harmed landlords financially and, as a result, may eventually "decrease the long-run supply of housing available to the poor."¹⁹³ In reaching these conclusions, however, the authors assumed that all cases that were withdrawn or that resulted in settlement agreements were victories for the landlord.¹⁹⁴ If those cases were instead assumed to be tenant victories, the rate of success was actually 46%.

Second, using a similar approach, researchers described the outcomes achieved by Harvard Law School's WilmerHale Legal Services Center in foreclosure cases.¹⁹⁵ They report that in the clinic's first sixty-one cases in this area, only four ended in unfavorable outcomes.¹⁹⁶ In forty of the remaining cases, homeowners retained their homes, while in sixteen others lawyers were

185. See Gunn, *supra* note 27, at 386.

186. *Id.* at 388–89 (discussing Robert Daines, Landlord–Tenant Litigation and the Impact of Free Legal Services (1991) (unpublished manuscript)).

187. *Id.*

188. See Bolton & Holtzer, *supra* note 27; Jeanne Charn & Jeffrey Selbin, *The Clinic Lab Office*, 2013 WIS. L. REV. 145, 168–69 (2013).

189. Bolton & Holtzer, *supra* note 27, at 1495.

190. *Id.* at 1496.

191. *Id.* at 1497.

192. *Id.* at 1498 n.14.

193. *Id.* at 1502.

194. *Id.* at 1498 n.14.

195. Charn & Selbin, *supra* note 188, at 165–66 (describing results from Jeanne Charn, Preventing Foreclosure: Thinking Locally, Investing in Enforcement, Playing for Outcomes (2006) (unpublished manuscript)).

196. *Id.* at 165.

able to assist in successful home sales.¹⁹⁷ Whatever the merits of studies that fail to make direct comparisons between represented and unrepresented parties, these studies reached opposite conclusions.

Apart from Professor Greiner's widely reported study, research on representation in housing court thus presents a mirror image of juvenile proceedings. In juvenile cases, an array of observational studies suggests representation is of only limited benefit at best and may be harmful at worst, even though a randomized study suggests that representation might be beneficial. Observational studies of housing court, in contrast, almost uniformly show benefits of representation, and other than Professor Greiner's study, randomized studies support the same conclusion.¹⁹⁸

Although endogeneity might play a role in observational studies in housing court, its implications are less clear. It is possible that tenants with stronger claims are more likely to obtain representation.¹⁹⁹ Perhaps tenants with weak claims recognize that they have little chance and might not make an effort to obtain an attorney or, if they make an effort to retain representation, are less likely to actually receive assistance.²⁰⁰ Most researchers are unable to account for case or litigant characteristics in their analyses,²⁰¹ and many researchers have struggled to develop samples that are unbiased²⁰² and large enough to generate reliable results.²⁰³ Thus, observational studies might simply reflect

197. *Id.* at 165–66.

198. *See, e.g.,* Eldridge, *supra* note 149, at 298–300; Fusco et al., *supra* note 152, at 94–95; Greiner & Pattanayak, *supra* note 5, at 2118; Hartman & Robinson, *supra* note 168, at 461; Mosier & Soble, *supra* note 174, at 21–25; Seron et al., *supra* note 134, at 420.

199. *See, e.g.,* Monsma & Lempert, *supra* note 24, at 629–30.

200. *Id.*

201. *See, e.g.,* TIME TO MOVE, *supra* note 159, at 6–10 (providing non-statistical mean comparisons); NO TIME FOR JUSTICE, *supra* note 160, at 9–10 (providing non-statistical mean comparisons); Cham & Selbin, *supra* note 188, at 165–66 (offering a preliminary description of the results achieved by the law school clinic without reference to the results in the population); Fusco et al., *supra* note 152, at 128–32 (presenting non-statistical mean comparisons); Hannaford-Agor & Mott, *supra* note 183, at 168–69 (relying on non-statistical mean comparisons); Steinberg, *supra* note 169, 456–58 (providing statistical comparisons of means with some attention to claims raised); Lin, *supra* note 166, 40–50 (distinguishing cases on only a few dimensions in a regression analysis).

202. *See, e.g.,* Gunn, *supra* note 27, at 386–87 (comparing data drawn from court records for a random sample of unrepresented cases to data drawn from closed case files for a sample of cases in which legal aid was provided by two sources, which potentially created biased results because of the variation in the quality of the data and the fact that selection into legal representation was not random).

203. *See, e.g.,* NO TIME FOR JUSTICE, *supra* note 160, at 10 (“The number of cases monitored in which the tenant was represented by an attorney is so small that it is very difficult to discern what effect legal representation has on tenant success in eviction court.”); *see also* Eldridge, *supra* note 149, at 308 (relying on a sample size of 153 cases and “hundreds of variables”). *But see* Lin, *supra* note 166, at 56–60 (evaluating all eviction cases completed during a one-year period, but lacking access to the terms of

this selection effect.

Although that account cannot be ruled out,²⁰⁴ limited evidence for this kind of endogeneity, directly or indirectly, is available. A study of New Haven housing cases documents that most of the tenants who were represented had valid defenses to their evictions,²⁰⁵ but because the analysis does not extend to unrepresented tenants, it is not clear that the represented tenants' cases were substantively different. More illuminating is the analysis of legal representation in public housing evictions, where the authors find that tenants are more likely to be represented when there is more at stake²⁰⁶ but that lawyers, "[r]ather than take cases that are likely to generate a record of success, . . . tend to take the tougher cases, although they turn down cases they think are hopeless."²⁰⁷ Thus, while endogeneity remains problematic for studies in this area, it is not clear what influence it had on the results of these studies.

C. Administrative Hearings/Government Benefits

Researchers have also considered the role of lawyers in a variety of administrative settings, mostly dealing with individual benefits such as welfare claims, unemployment claims, and the like.²⁰⁸ Administrative procedures are commonly informal.²⁰⁹ They are not always adversarial and lawyers are not always heavily involved.²¹⁰ Nevertheless, as Table 3 shows, a number of studies identify more favorable outcomes for those claimants with legal representation.

Welfare benefits hearings, much like juvenile court hearings, represent a special area of interest due to the strong pronouncement that the Supreme Court

settlement agreements).

204. Many of the researchers acknowledge the limitations of their studies. See, e.g., Steinberg, *supra* note 169, at 457 ("The purpose of the study was not to reach incontrovertible or generalizable conclusions about the provision of . . . legal services, but instead to use the resources available, and an ethically-feasible methodological design given the jurisdiction in which the author was located, to make a preliminary assessment of the efficacy of *one iteration* of the unbundled model . . .").

205. Gunn, *supra* note 27, at 408.

206. Monsma & Lempert, *supra* note 24, at 644.

207. *Id.* at 645.

208. We do not consider the research described in *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985), here. Although the statistics used in the case related to administrative hearings (veteran's benefits), the statistics were not part of a published study, but were raw statistics cited during the lawsuit. *Id.* at 309.

209. See *id.* at 323.

210. See *id.*

made on the subject in *Goldberg v Kelly*.²¹¹ In *Goldberg*, Justice Brennan famously insisted that due process protection, including representation, was essential for welfare recipients, who might otherwise suffer severe deprivations if they were erroneously deprived of benefits.²¹² Nevertheless, just as in juvenile cases, the evidence that representation actually benefits recipients is weak.

Table 3. Studies Evaluating Legal Representation in Administrative or Government Benefits Hearings.

Study	Design	Sample Size	Effect on applicants
<i>Welfare Benefits</i>			
Handler (1969)	Observational	568 hearings	No effect
Hammer & Hartley (1978)	Observational	2,000 hearings	Positive: more likely to go to hearing; higher rate of success
Cooper (1980)	Observational	349 hearings	Positive
Hagen (1983)	Observational	98 hearings	Positive: higher success rate but not significant
<i>Unemployment Insurance</i>			
Rubin (1980)	Observational	10,972 hearings	Positive: higher success rate
Kubuli (1995)	Observational	Unreported	Positive: higher success rate
Greiner & Pattanayak (2012)	Randomized	207 cases	No effect/Negative: no effect on outcomes, but delay occurred
<i>Immigration</i>			
Schoenholtz & Jacobs (2002)	Observational	18,134 cases	Positive: higher success rate
Kuck (2004)	Observational	Unreported	Positive: higher success rate

211. 397 U.S. 254, 255 (1970).

212. See Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 796–97 (1991) (describing Justice Brennan’s reasoning in *Goldberg v. Kelly*).

Board of Immigration Appeals (2004)	Observational	5,143 cases	Positive: higher success rate
Ramji-Nogales et al. (2007)	Regression	192,443 cases	Positive: higher success rate
Executive Office of Immigration Review (2014) <i>Disability Benefits</i>	Observational	56,587 cases	Positive: higher success rate
Popkin (1977)	Observational	3,746 cases	Positive: more likely to succeed

A study of Wisconsin welfare program appeals²¹³ from 1945–1955 and 1957–1965 found that the success rate for those with representation “was about the same as for those who appeared without attorneys.”²¹⁴ Another study of welfare hearings in Wisconsin between 1965 and 1976 documented higher rates of success for petitioners with representation,²¹⁵ but the researchers found the differences to be “surprisingly small.”²¹⁶ They also noted that the difference in success rates varied depending on the issue at stake.²¹⁷

A study of Aid to Families with Dependent Children (AFDC) benefits appeals filed in Minnesota in 1977 concluded that “welfare recipients represented by attorneys generally did not do any better than recipients without attorneys,”²¹⁸ although the relative success rates for represented and unrepresented claimants differed by the kind of issue at stake.²¹⁹ Cases involving lawyers had a lower win rate for some types of cases, but the overall

213. Joel F. Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC: The Wisconsin Experience*, 43 SOC. SERV. REV. 12, 24 (1969) (comparing the appeals rate of aid to families with dependent programs with “other categorical public assistance programs: old age assistance, aid to the disabled, and aid to the blind”).

214. *Id.* at 30 n.24.

215. Ronald P. Hammer & Joseph M. Hartley, *Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin*, 1978 WIS. L. REV. 145, 206–07 (1978).

216. *Id.* at 206.

217. *Id.* at 208.

218. Laura Cooper, Goldberg’s *Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits when the Only Issue Raised Is a Question of Law?*, 64 MINN. L. REV. 1107, 1170 (1980).

219. *Id.* at 1170 n.244.

win rate for litigants with lawyers was higher (64.5%) than that of unrepresented litigants (58.4%) and non-lawyer-represented petitioners (62.5%).²²⁰

A more recent study of Minnesota state-level welfare hearings also found that petitioners with counsel had a higher success rate (30%) than those without representation (13%).²²¹ This trend, however, was not statistically reliable.²²² The study uncovered some reliable effects, such as petitioners with lawyers more frequently cross-examined witnesses, presented arguments at the hearing, and submitted written evidence.²²³

Other related administrative areas provide better evidence that representation matters in administrative hearings. Two studies involving unemployment claims rely on national and state-level data to reveal differences in outcomes between cases with representation and those without.²²⁴ Reporting the results of a national survey from 1979, the National Commission on Unemployment Compensation found that 30.8% of all claimants were successful at unemployment hearings but that represented claimants were successful in 45.4% of hearings where both parties appeared.²²⁵ For employers, the overall success rate (69.2%) was also higher than the success rate of employers who were represented (54.1%).²²⁶ Data on unemployment insurance appeals in Ohio revealed similar findings, with court officials reporting that in 1994, 45% of represented claimants succeeded in their appeals compared to a success rate of only 34% among unrepresented claimants.²²⁷ Employers' success rate in this study, however, remained the same regardless of representation.²²⁸

Other research has focused on the effect of legal representation in claims

220. *Id.* at 1171 tbl.III.

221. Jan L. Hagen, *Justice for the Welfare Recipient: Another Look at Welfare Fair Hearings*, 57 SOC. SERV. REV. 177, 189 (1983) (noting that the same fair hearing procedure is followed for all of the hearings, despite the fact the underlying substance may deal with one a number of federal aid programs).

222. *Id.*

223. *Id.* at 184.

224. See Murray Rubin, *The Appeals System*, in 3 UNEMPLOYMENT COMPENSATION: STUDIES AND RESEARCH 625, 628 (Nat'l Comm'n on Unemployment Comp. ed., 1980); Maurice Emsellem & Monica Halas, *Representation of Claimants at Unemployment Compensation Proceedings: Identifying Models and Proposed Solutions*, 29 U. MICH. J.L. REFORM 289, 292 (1995) (citing Memorandum from David F. Kabuli, Chief Administrative Hearing Officer of Ohio Unemployment Compensation Board of Review to National Employment Law Project (Feb. 7, 1995)).

225. Rubin, *supra* note 224, at 628.

226. *Id.*

227. Emsellem & Halas, *supra* note 224, at 292.

228. *Id.*; Kabuli, *supra* note 224.

for disability benefits, analyzing the effect of representation at multiple stages in claims for Federal Employees' Compensation Act (FECA) and Social Security disability benefits.²²⁹ The study finds a statistically reliable difference in the proportion of wins for cases where the claimant was represented in FECA hearings and administrative reviews and in Social Security hearings, but not in Social Security reconsiderations.²³⁰ In addition, claimants with representation were more likely to have requested hearings²³¹ and to have presented new evidence.²³²

A number of studies offer a favorable evaluation of the effect of legal representation in the immigration context.²³³ One study finds that asylum-seekers with representation were granted asylum at a higher rate (45.6%) than those without representation (16.3%) by immigration courts.²³⁴ The study also estimates a positive association in a multivariate regression analysis adjusting for case and court characteristics,²³⁵ however, they are unable to distinguish between representation by a lawyer or "other accredited representative."²³⁶ The researchers also present descriptive evidence suggesting that unrepresented asylum-seekers fare worse before the Board of Immigration Appeals (BIA), particularly after procedural reforms were mandated in 2002.²³⁷

Another study relying on different data also presented evidence of a higher rate of success for those asylum-seekers who are represented before immigration courts.²³⁸ Moreover, these researchers argued that given the high rate of dismissal among unrepresented applicants, the results were a conservative description of legal counsel's effect.²³⁹ A government study on

229. William D. Popkin, *The Effect of Representation in Nonadversary Proceedings—a Study of Three Disability Programs*, 62 CORNELL L. REV. 989, 1016–19 (1977). Although the study also considers the effect of representation in claims for veterans' disability benefits, we exclude that aspect of the study because it involves non-lawyer representatives. *Id.* at 1023.

230. *Id.* at 1024.

231. *Id.* at 1028.

232. *Id.* at 1029.

233. One recent study suggests that the magnitude of this benefit varies greatly depending on the lawyer's overall success rate as well as their rate of success in past cases before the same judge. Miller et al., *supra* note 28, at 228–30.

234. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007).

235. *Id.*

236. *Id.* at 399.

237. *Id.* at 360.

238. Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 743, 766 (2002).

239. *Id.* at 744.

Expedited Removal hearings also found variation in success rates for those seeking asylum with and without representation.²⁴⁰ While 25% of those asylum seekers “found to have a credible fear, who were subsequently represented by counsel,” were successful in avoiding deportation, only 2% of those who were unrepresented were successful.²⁴¹

Two evaluations of the BIA’s Pro Bono Program also offered evidence of a positive association between representation and case outcome. Between 2002 and 2011, unrepresented respondents appealing adverse determinations in immigration court were successful in only 9.5% of cases compared to a success rate of approximately 31% for those represented through the Pro Bono Program.²⁴² Where respondents were appealing decisions by the Department for Homeland Security, only 28% of unrepresented respondents were successful compared to 35% of represented respondents;²⁴³ among those who were detained, the rates of success were 24% and 36% for unrepresented and represented respondents, respectively.²⁴⁴ An evaluation of cases from 2001–2004 was less confident in the underlying data but also reported more favorable outcomes for detained individuals appealing to the BIA, with a success rate of only 7% for unrepresented litigants versus 22% for those represented through the Pro Bono Program.²⁴⁵ Among the limited sample of cases where the Department of Homeland Security initiated the appeal, however, win rates were similar for unrepresented and represented litigants.²⁴⁶

In addition to these observational studies, Professor Greiner conducted a randomized experiment of Harvard Legal Aid Bureau’s (HLAB) offer of legal representation to employees appearing before the Massachusetts Division of Unemployment Assistance for a first-level appeal of a benefits

240. CHARLES H. KUCK, LEGAL ASSISTANCE FOR ASYLUM SEEKERS IN EXPEDITED REMOVAL: A SURVEY OF ALTERNATIVE PRACTICES IN STUDY ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 239 (2004), http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/legalAssist.pdf; see also U.S. COMM’N ON INT’L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 59 (2005), <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.

241. KUCK, *supra* note 240, at 239.

242. EXEC. OFFICE FOR IMMIGRATION REVIEW, A TEN-YEAR REVIEW OF THE BIA PRO BONO PROJECT: 2002–2011 11 (2014) [hereinafter EXEC. OFFICE], http://www.justice.gov/sites/default/files/eoir/legacy/2014/02/27/BIA_PBP_Eval_2012-2-20-14-FINAL.pdf.

243. *Id.* at 12 (defining success as a remand or dismissal).

244. *Id.* at 13.

245. BD. OF IMMIGRATION APPEALS, THE BIA PRO BONO PROJECT IS SUCCESSFUL 12 (2004), <http://www.justice.gov/sites/default/files/eoir/legacy/2005/02/01/BIAProBonoProjectEvaluation.pdf>.

246. *Id.*

determination.²⁴⁷ The study found that those who received an offer of legal representation were not statistically significantly more likely to win than those who had not received an offer of legal representation.²⁴⁸ The researchers used multiple statistical techniques to confirm the result.²⁴⁹ An offer of legal representation, however, increased case duration from an average of 37.3 days to be disposed where representation was not offered to an average of 53.1 days to be disposed.²⁵⁰ This delay did not alter the amount of benefits received by clients who were successful, but the authors pointed out that additional delay in receiving benefits could have been detrimental.²⁵¹ Thus, they conclude that an offer of legal representation, on average, led to a worse outcome.²⁵²

Professor Greiner and his coauthor performed additional analyses estimating the effect of *actual use* of legal representation from any source.²⁵³ Taking into account variation in the likelihood that the employees in the treatment group would have obtained legal representation had they not been offered assistance from HLAB, the authors estimated that legal representation increased the average case duration.²⁵⁴ They attempted a similar analysis on case outcomes and estimated that the benefit of actual representation was indeterminate.²⁵⁵ The authors nevertheless expressed a “suspicion that actual use of [legal] representation produces no large increase in the win rate for the set of claimants who contact the HLAB.”²⁵⁶

This study has generated significant debate.²⁵⁷ While some commentators have highlighted the potential ramifications for publicly funded legal aid,²⁵⁸

247. Greiner & Pattanayak, *supra* note 5, at 2124–25.

248. *Id.* at 2149.

249. *Id.* at 2149–53.

250. *Id.* at 2153–54.

251. *Id.* at 2139.

252. *Id.* at 2158.

253. *See id.* at 2166–70.

254. *Id.* at 2167–68.

255. *Id.* at 2168–70.

256. *Id.* at 2170.

257. *See id.* at 2121 n.3; *see also* Jeffrey Selbin, Jeanne Cham, Anthony Alfieri & Stephen Wizner, *Service Delivery, Resource Allocation, and Access to Justice: Greiner and Pattanayak and the Research Imperative*, 122 YALE L.J. ONLINE 45, 48–53 (2012) (summarizing the critiques of the study); Ian Ayers, *Iatrogenic Legal Assistance?*, FREAKONOMICS (Dec. 28, 2010, 1:30 PM), <http://freakonomics.com/2010/12/28/iatrogenic-legal-assistance/>; David Hoffman, *What Difference Representation: Coda*, CONCURRING OPINIONS (Mar. 29, 2011), <http://concurringopinions.com/archives/2011/03/what-difference-representation-coda.html> (including twenty-two contributions discussing the article).

258. *See, e.g.*, Bob Sable, *What Difference Representation—a Response*, CONCURRING OPINIONS

others have embraced the study as a first step toward greater accountability and improved research on the effectiveness of legal aid.²⁵⁹ More relevant for our purposes are those critiques that focus on the analytic limitations of the study.

Some have questioned whether the study—with a small sample size and a high rate of success for both treatment and control groups—actually had the necessary statistical power to capture the effect of representation.²⁶⁰ This has led at least one empirical scholar to conclude that the study results are inconclusive, but that they still “support the positive effect of an offer [of representation].”²⁶¹

The crossover between treatment (representation offered) and control groups (no representation offered) in the study might also partly account for the finding that an offer of legal representation did not improve outcomes.²⁶² Professors Greiner and Pattanayak report that while a “small percentage” of the treatment group chose to forego the offered legal representation,²⁶³ “probably around 39%” of those who were in the control group obtained alternate legal representation.²⁶⁴ Moreover, another scholar has suggested that the lawyers providing representation to those in the control group may have been more experienced than the law students providing representation to the treatment group under the auspices of HLAB and, thus, may have been more likely to alter their clients’ outcomes.²⁶⁵ Given this, it is much less surprising that the authors found no statistically reliable difference in the average outcome between the treatment and control groups.²⁶⁶

(Mar. 28, 2011), <http://concurringopinions.com/archives/2011/03/what-difference-representation-a-response.html>; David Udell, *What Difference Presentation?*, CONCURRING OPINIONS (Mar. 28, 2011), <http://concurringopinions.com/archives/2011/03/what-difference-presentation.html>.

259. Jeanne Charn, *Celebrating the “Null” Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 YALE L.J. 2206, 2232–34 (2013); Steven Eppler-Epstein, *Passion, Caution, and Evolution: The Legal Aid Movement and Empirical Studies of Legal Assistance*, 126 HARV. L. REV. F. 102, 108 (2013).

260. Andrew Martin, *What Difference Representation: Randomization, Power, and Replication*, CONCURRING OPINIONS (Mar. 28, 2011), <http://concurringopinions.com/archives/2011/03/what-difference-representation-randomization-power-and-replication.html>; see also Udell, *supra* note 258.

261. Ted Eisenberg, *What Difference Representation: Inconclusive Evidence*, CONCURRING OPINIONS (Mar. 28, 2011), <http://concurringopinions.com/archives/2011/03/what-difference-representation-inconclusive-evidence.html>.

262. See Greiner & Pattanayak, *supra* note 5, at 2122, 2127–28.

263. *Id.* at 2128.

264. *Id.* In fact, the authors acknowledge that, while unlikely, up to 60% may have been represented. *Id.* at 2166 n.135.

265. See Udell, *supra* note 258.

266. *Id.* (“To prevent readers from being misled about what was studied, the authors should simply modify the abstract to make clear that: ‘the HLAB law student service provider’s offer of representation

Overall, observational studies provide solid support for the conclusion that individuals appearing before administrative agencies allocating various benefits fare better when they are represented. Could a finding that is so widespread be attributable to endogeneity? Unemployment claims, disability claims, and welfare benefit claims might be similar to housing disputes in that those with strong claims might be more apt to seek representation.²⁶⁷ In fact, that is part of the conclusion drawn by the authors of the randomized study that failed to find a benefit of legal representation in administrative appeals.²⁶⁸ They concluded that while they randomized offers of representation among those in their sample, the sample as whole was not representative of the population.²⁶⁹ Rather, those individuals who sought out legal representation differed—either in terms of their case or some personal characteristic—that made their cases more likely to be successful.²⁷⁰

In asylum cases, the situation may differ. Given the enormously high stakes, one might expect that claimants would do everything they can to remain in the country. The ability of these individuals to seek legal counsel, however, may vary greatly depending on their detention status and whether they are seeking asylum affirmatively or in defense to a proposed removal.²⁷¹ Consequently, any endogeneity might arise from lawyers' decisions to take on particular cases.

Given the tremendous shortfall in representation in asylum cases,²⁷² it seems unlikely that lawyers would select those cases that have little chance of success. For example, in an evaluation of the BIA Pro Bono Project that “increase[ed] the prevalence and quality of appellate briefs before the [BIA],” the authors described the extensive screening process that determined which cases will receive representation.²⁷³ Thus, if there is a trend toward lawyers representing “better” cases, then the finding that lawyers achieve more favorable outcomes in administrative hearings might be driven in part by this screening process.

to a claimant had no statistically significant effect on the claimant's probability of a victory *when compared to a control group in which 49% of the members received representation from other service providers and in which the remainder of the members may have received other forms of assistance.*”).

267. See, e.g., Rubin, *supra* note 224, at 629.

268. Greiner & Pattanayak, *supra* note 5, at 2173.

269. *Id.*

270. *Id.*

271. See EXEC. OFFICE, *supra* note 242, at 6.

272. See Rubin, *supra* note 224, at 628–29.

273. See EXEC. OFFICE, *supra* note 242, at 2, 6.

D. *Employment Law*

Employment cases are difficult for employees. Scholars have argued that the system of employment discrimination is stacked badly against employees.²⁷⁴ Numerous studies document chronically low success rates by employees in employment discrimination cases.²⁷⁵ Even when employees succeed, they lose far more often on appeal than employers or other kinds of individual plaintiffs.²⁷⁶ Attorneys invariably represent employers, whereas employees often are not represented.²⁷⁷ Does legal representation improve the outlook for employee plaintiffs?

Studies of the effect of legal representation in federal employment discrimination suggest employees fare better when represented, as seen in Table 4. One study analyzed a sample of dispositive pre-trial motions in federal district court cases of alleged racial discrimination and concluded that unrepresented plaintiffs were nearly half as likely as represented plaintiffs to win.²⁷⁸ The study relied on published opinions, which the author acknowledged are not a “perfect reflection of similar claims or case filings.”²⁷⁹ A companion review of a smaller sample of case filings also documents less favorable outcomes for unrepresented plaintiffs who were less likely to obtain a settlement, more likely to have their cases dismissed, and more likely to lose at

274. See, e.g., Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547, 547 (2003) (“Employment-discrimination plaintiffs swim against the tide[,] [c]ompared to the typical plaintiff”); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 891 (2006) (noting “plaintiff’s slim chances of winning an employment discrimination suit”).

275. See, e.g., Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 905 n.117 (2007) (noting that it is common for courts to dispose of employment discrimination cases through summary judgment); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL’Y REV. 103, 103 (2009) (finding that employment discrimination plaintiffs “win a lower proportion of cases during pretrial and at trial”); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 441–46 (2004) [hereinafter Clermont & Schwab 2004] (“The most significant observation about the deciding of cases, then, is the long-run lack of success at trial for employment discrimination plaintiffs, relative to other plaintiffs.”); Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1583–84 (1989) (reporting that employment discrimination plaintiffs win less frequently than civil rights plaintiffs).

276. Clermont & Schwab 2004, *supra* note 275, at 449–50.

277. See *id.* at 457.

278. Parker, *supra* note 274, at 915, 947 tbl.A2 (estimating the odds of winning are 45.2% lower for unrepresented plaintiffs compared to represented plaintiffs).

279. *Id.* at 903.

the pre-trial stage.²⁸⁰

Table 4. Studies Evaluating Legal Representation in Employment Cases.

Study	Design	Sample Size	Effect of Representation
Parker (2006)	Observational/ Regression	659 cases	Positive: plaintiffs more likely to win
Nielsen et al. (2010)	Observational	1,672 cases	Positive: plaintiffs less likely to have case dismissed; more likely to settle early
Hill (2003)	Observational	200 arbitrations	Positive: plaintiffs win slightly more frequently
Colvin (2011)	Regression	3,940 arbitrations	Positive trend: plaintiffs have higher success rates and higher average award amounts (but not statistically significant)
Colvin & Gough (2015)	Observational/ Regression	12,123 disputes	Positive trend: parties more likely to settle; plaintiffs win more often and receive higher awards (but not statistically significant)
Horton & Chandrasekher (2016)	Observational/ Regression	5,883 arbitrations	Positive: plaintiffs more likely to succeed, especially with experienced lawyers

A second study found evidence of a positive association between legal representation and case outcomes in employment litigation; however, this study conceptualizes outcomes differently.²⁸¹ Rather than focus on win rates or damage awards, the study assessed procedural milestones as a series of

280. *Id.* at 915 n.120.

281. Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 175 (2010).

sequential outcomes.²⁸² The study is also notable for including measures of case strength and attorney effort.²⁸³ Analyzing a broad sample of employment discrimination cases filed in federal court, these researchers found that the cases of unrepresented plaintiffs are more likely to be dismissed, less likely to be settled early, and more likely to lose on motions for summary judgment than the cases of plaintiffs who are represented during the litigation.²⁸⁴

Does representation beyond discrimination suits benefit employees? One study of American Arbitration Association (AAA) employment dispute arbitrations found that 50% of represented employees won compared to 48% of unrepresented employees.²⁸⁵ The fact that the win rate for represented employees was only two percentage points higher led the author to conclude “employees who proceeded pro se performed as well as those that proceeded with counsel.”²⁸⁶

Three more recent studies, however, have uncovered disparities in outcomes between cases involving representation and those without. The first study conducted an analysis of a large, national sample of mandatory employment arbitrations and found that the odds of settlement were 62.5% lower for unrepresented employees than for those with representation²⁸⁷ and that the odds of winning were 45.6% lower.²⁸⁸ The study also found that, on average, unrepresented employees received damage awards that were 47% lower than those of represented employees.²⁸⁹ A second study also found a statistically significantly lower win rate²⁹⁰ and mean damage award²⁹¹ for unrepresented employees relative to employees with legal representation. A third study of all AAA filings between 2009 and 2014 that related to employment disputes showed that unrepresented employees won only 7% of

282. *Id.* The estimates for cases where the plaintiff filed pro se but later obtained counsel show the same pattern relative to cases involving full representation, although the magnitude of the effects is smaller and achieves statistical significance only for early settlement. *Id.* at 188.

283. *Id.* at 189.

284. *Id.* at 188.

285. Hill, *supra* note 27, at 817.

286. *Id.* at 821.

287. Alexander J.S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 INDUS. & LAB. REL. REV. J. WORK & POL’Y 1019, 1031 (2015).

288. *Id.* at 1034.

289. *Id.*

290. Colvin, *supra* note 27, at 16 (reporting a win rate of 18.3% for unrepresented employees versus 22.9% for represented employees).

291. *Id.* at 16–17 (comparing mean damage award of \$12,228 for unrepresented employees to \$28,993 for represented employees).

their cases, compared to 19% and 28% success rates for parties represented by inexperienced and experienced attorneys respectively.²⁹²

Two of these studies also documented an important potential benefit of representation for employees. As is the case with many areas of law, one side, the employer, is repeatedly involved in litigation while the opposing party, the employee, is not.²⁹³ As a result of this structural imbalance, the employer is likely to enjoy a number of advantages, including access to specialized counsel²⁹⁴ and relationships with “institutional incumbents.”²⁹⁵ In arbitration, one such incumbent is the arbitrator.²⁹⁶ Both of these studies found that employers fare better when they appear repeatedly before the same arbitrator, but this “repeat pairing bias” is reduced when the employees are represented.²⁹⁷

Although researchers have not conducted randomized studies of representation in employment cases, the weight of evidence in this area suggests that employees’ representation counteracts some of the advantages employers have in such cases.

E. Family Law

Both large scale studies of court records and smaller survey analyses have found evidence that legal representation matters in divorces, custody issues, and domestic violence cases.²⁹⁸ Table 5 shows a clear pattern in family law cases—representation matters. A project analyzing a random sample of 10% of all divorce and custody cases filed in Maryland in 1999 supports the value of legal representation.²⁹⁹ This study found that legal representation for a plaintiff was associated with an increase in the odds of an award of alimony or

292. David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution* (Apr. 6, 2015) (unpublished manuscript) (on file with author).

293. Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 97, 105–06 (1974).

294. *Id.* at 114–16.

295. *Id.* at 99.

296. *See* Colvin, *supra* note 27, at 1.

297. Colvin & Gough, *supra* note 287, at 1040 tbl.A.1 (finding that the negative association between self-representation and both the propensity to settle and win rates is greater where there is a repeat employer/arbitrator pairing); Colvin, *supra* note 27, at 17 & tbl.6. (finding a statistically significant lower win rate for unrepresented employees when there is a “[r]epeat employer-arbitrator pair” rather than a “[n]onrepeat pairing”).

298. *See, e.g.*, Engler, *supra* note 25, at 53–55.

299. WOMEN’S LAW CTR. OF MD., INC., CUSTODY AND FINANCIAL DISTRIBUTION IN MARYLAND: AN EMPIRICAL STUDY OF CUSTODY AND DIVORCE CASES FILED IN MARYLAND DURING FISCAL YEAR 1999 11, 29–31 (2004) [hereinafter MD. DIVORCE STUDY].

support.³⁰⁰ The study found that representation for a defendant was *also* associated with an increase in the likelihood of an award,³⁰¹ but that association becomes negative and fails to achieve statistical significance once other case factors are taken into account.³⁰² This suggests that representation might be more common in cases that are likely to include such awards. The study also found that legal representation for the defendant was associated with a lower average spousal support or alimony award, although representation for the plaintiff did not have a statistically significant relationship with the award amount.³⁰³

A follow-up project based on a review of more than 2,500 Maryland custody and divorce cases filed in 2003 found that in divorce cases, legal representation was associated with an increase in the odds that alimony would be awarded.³⁰⁴ The authors estimated that the odds of receiving alimony were 2.6 times higher for husbands who were represented compared to those without legal counsel, even when other case factors are taken into account.³⁰⁵ Legal representation for wives was also associated with an increase in the likelihood of receiving alimony, but the result failed to achieve statistical significance once other case factors were included in the model.³⁰⁶ In custody cases, they found that representation was associated with an increase in the probability that the represented parent would be awarded sole custody.³⁰⁷

Table 5. Studies Evaluating Legal Representation in Family Law Cases.

Study	Design	Sample Size	Effect of Representation
Ellis (1990)	Observational	317 cases	Positive: higher rate of adoption of divorce decree terms

300. *Id.* at 29.

301. *Id.* at 26, 29.

302. *Id.* at 30–31.

303. *Id.* at 32.

304. WOMEN'S LAW CTR. OF MD., INC., FAMILIES IN TRANSITION: A FOLLOW-UP STUDY EXPLORING FAMILY LAW ISSUES IN MARYLAND 29 (2006) [hereinafter FAMILIES IN TRANSITION].

305. *Id.*

306. *Id.*

307. *Id.* at 47–48.

Sales et al. (1992)	Survey	273 survey participants	Positive: better tax advice and better decision making by litigants
Maccoby & Mnookin (1992)	Observational	1,100 cases	Positive: more likely to request joint custody and obtain physical custody
Murphy (2003)	Survey	142 survey participants	Positive: more likely to obtain protective order
Farmer & Tiefenthaler (2003)	Survey	1,863 survey participants	Positive: less domestic violence for women in counties with legal assistance programs to help battered women
Women's Law Center of Maryland, Inc. (2004)	Observational/ Regression	1,867 cases	Positive: increase in the likelihood and amount of an award of spousal support
Women's Law Center of Maryland, Inc. (2006)	Observational/ Regression	2,533 cases	Positive: increase in the likelihood of an award of spousal support and an increase in the likelihood of an award of sole custody
Elwart et al. (2006)	Observational	Unreported	Positive: more likely to obtain protective order

Another large study—focused on 1,100 families with children in which the parents filed for divorce in San Mateo County or Santa Clara County, California from 1984–1985—found that those parents with legal representation were more likely to request joint custody.³⁰⁸ The study also found that a represented parent is more likely to obtain physical custody than a parent without legal representation.³⁰⁹ These authors caution explicitly about endogeneity in their results, noting that parents who are willing to fight for

308. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 109 (1992) (noting the prevalence of joint custody appears to result from legal representation because, in interviews, parents desired sole custody).

309. *Id.* at 109–14.

custody might be both more likely to retain counsel to help them and more likely to obtain custody.³¹⁰

A smaller study of King County, Washington custody plans filed in divorces completed in 1988 found that custody terms differed depending on the presence of lawyers for one or both litigating parties.³¹¹ Specifically, the authors found that where one or more lawyers were involved, the parents more frequently opted for mediation and less frequently included additional provisions regarding decision making in the terms of the custody plan.³¹² Cases involving lawyers for both parents also more frequently required shared decision making³¹³ and included higher numbers of daytime and nighttime visits.³¹⁴

Taking a slightly different approach, a 1991 survey of divorce litigants from Maricopa County (Phoenix), Arizona found that represented litigants were more likely to report receiving tax advice regarding divorce³¹⁵ and changing their opinion regarding child support, child visitation, division of real estate, and division of personal property.³¹⁶ The researcher did not ascertain whether these inquiries altered the case outcomes, but the study documented how representation in family court at least provides helpful advice.³¹⁷

Studies focused on domestic violence have also documented a positive link between legal representation and client outcomes. An analysis of domestic violence cases in Dane County, Wisconsin found that represented petitioners obtained temporary restraining orders in 69% of cases, compared to a success rate of only 55% for unrepresented petitioners.³¹⁸ Similarly, a survey of women seeking assistance in confronting domestic violence found that 83% of the women who were represented in seeking a protective order were successful, compared to a success rate of 32% among unrepresented women.³¹⁹

310. *Id.*

311. Jill W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 124–32 (1990).

312. *Id.* at 131.

313. *Id.* at 132.

314. *Id.*

315. Bruce D. Sales, Connie J. Beck & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 573 (1993).

316. *Id.* at 574 & n.94.

317. *Id.* at 574.

318. LIZ ELWART ET AL., INCREASING ACCESS TO RESTRAINING ORDERS FOR LOW-INCOME VICTIMS OF DOMESTIC VIOLENCE: A COST-BENEFIT ANALYSIS OF THE PROPOSED DOMESTIC ABUSE GRANT PROGRAM 2 (2006).

319. Jane C. Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges to*

Finally, a macro-level analysis of the incidence of domestic violence using the Department of Justice's National Crime Victimization Survey attributed a recent decline in the prevalence of domestic violence in part to the provision of legal services.³²⁰ The presence of programs that provide legal services to domestic abuse victims in the county where a woman resides is negatively associated with the likelihood that she will report experiencing domestic violence.³²¹

Notwithstanding the low esteem in which state court judges seem to hold lawyers who practice in family law,³²² studies indicate that representation helps litigants; parties in divorce appear to fare better when they are represented and women seeking protection might be enormously better off.³²³ Endogeneity might well influence the results of child custody dispute studies,³²⁴ but it is less clear how selection might create the large disparities in outcomes between represented and unrepresented women seeking protective orders. As the research in family law shows, experienced lawyers can direct their clients to seek advice and consider matters that they might otherwise have ignored. In family law, representation matters.

F. Small Claims

Small claims court might be an unlikely venue for lawyers to display any advantage. The setting is supposed to be informal. If Judge Judy is to be believed, small claims court is the place for common sense, not legal jargon.³²⁵ Small claims court has received a tremendous amount of scholarly attention, much of it in the 1960s and 1970s,³²⁶ although only some of this research has

Protect Battered Women, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 512, 521 (2003).

320. Amy Farmer & Jill Tiefenthaler, *Explaining the Recent Decline in Domestic Violence*, 21 CONTEMP. ECON. POL'Y 158, 167 (2003).

321. *Id.* at 164.

322. Posner & Yoon, *supra* note 29, at 331–32.

323. See MACCOBY & MNOOKIN, *supra* note 308, at 108–09.

324. See *id.* at 108–14; FAMILIES IN TRANSITION, *supra* note 304, at 46 (noting that any association between legal representation and case outcome “should be interpreted as a descriptive, not a statistical, relationship”).

325. See generally Lawrence M. Friedman, *Judge Judy's Justice*, 1 BERKELEY J. ENT. & SPORTS L. 125, 125–27 (2012) (noting that Judge Judy's court is “a kind of small claims court” and that her procedures are “simple, common sense, and informal”).

326. For reviews of the early literature, see Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 434–52 (1990), and Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 235–36, 242–43, 246–48, 250–56 (1975).

focused specifically on the role of legal counsel. Most of the studies that have considered legal representation have concluded that legal representation is beneficial³²⁷ and that representation is most helpful when the opposing party is unrepresented.³²⁸ A study of Manhattan small claims litigants, for example, found that plaintiffs were more likely to report a higher rate of recovery when they were represented and the opposing party was unrepresented and more likely to report the lowest rate of recovery when they were unrepresented and the opposing party did have legal counsel.³²⁹ The study also offered evidence of lawyers' involvement in out-of-court settlements, finding that plaintiffs with representation who failed to appear were more likely to report having reached a settlement than those without legal counsel,³³⁰ although they were most likely to report having reached a settlement when they were represented but their opponents were not.³³¹

Research also suggests that the role of legal counsel might vary by party. A study of New Mexico small claims cases found that representation was associated with more favorable monetary outcomes for claimants but with less favorable outcomes for respondents in adjudicated cases.³³² Among mediated cases, the authors found the same results, but the estimated coefficients from their multivariate regression analysis failed to achieve statistical significance.³³³ A study combining small claims cases from multiple jurisdictions, however, found evidence of a stronger positive relationship between representation and case outcome for defendants than for plaintiffs.³³⁴ The authors of that study

327. See Elwell & Carlson, *supra* note 326, at 448–49; Yngvesson & Hennessey, *supra* note 326, at 250–51.

328. See Yngvesson & Hennessey, *supra* note 326, at 250 (describing the work of J.P. Jones, Practical Results of Court Reforms: The Politics of Small Claims Court 19 (1974) (unpublished manuscript)). Another study of small claims cases in Ohio found that the default rate among defendants is higher when business claimants are represented, leading the authors to suggest that “[t]he presence of counsel may act as a factor discouraging the defendant from appearing at trial.” Robert J. Hollingsworth, William B. Feldman & David C. Clark, Note, *The Ohio Small Claims Court: An Empirical Study*, 42 U. CIN. L. REV. 469, 482 (1973).

329. Austin Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC’Y REV. 341, 367 (1976).

330. *Id.* at 349.

331. *Id.* at 350.

332. Gary LaFree & Christine Rack, *The Effects of Participants’ Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC’Y REV. 767, 779 tbl.3 (1996) (estimating that legal representation was associated with an increase in the ratio of monetary award received of .280 for claimants and a decrease of .131 for respondents).

333. See *id.*

334. JOHN C. RUHNKA & STEVEN WELLER, *SMALL CLAIMS COURTS: A NATIONAL EXAMINATION* 70 (1978).

surmised that this result may reflect the availability of court assistance for plaintiffs in filing a claim and preparing for trial, while unrepresented defendants were unlikely to come to court until trial.³³⁵

Table 6. Studies Evaluating Legal Representation in Small Claims Court.

Study	Design	Sample Size	Effect of Representation
Jones (1974)	Observational	788 cases	Positive: plaintiffs more successful
Ruhnka & Weller (1978)	Observational	500 cases	Positive: plaintiffs and defendants more successful
Sarat (1979)	Survey	663 survey respondents	Positive: plaintiffs more frequently report settlement and more favorable outcomes
LaFree & Rack (1996)	Observational/ Regression	466 cases	Positive: more favorable outcomes in adjudicated cases

G. Tax

Scholars also offer evidence demonstrating a benefit of legal representation in tax cases brought before the United States Tax Court,³³⁶ the small-claims process of the tax court,³³⁷ and state appellate-level tax court.³³⁸ Analyzing tax deficiency cases that went to trial in the United States Tax Court, researchers found that the percentage of the amount at stake that the taxpayer had to pay was an average of thirty-five percentage points lower for litigants with legal representation,³³⁹ although there was no evidence of a difference in outcomes

335. *Id.*

336. Lederman & Hrung, *supra* note 28, at 1239.

337. William C. Whitford, *The Small-Case Procedure of the United States Tax Court: A Small Claims Court that Works*, 1984 AM. B. FOUND. RES. J. 797, 817–18 (1984).

338. HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 79–109 (1998).

339. Lederman & Hrung, *supra* note 28, at 1259.

due to legal representation in cases that settled.³⁴⁰ That combination of results suggests that many cases are clear and easy to settle. In such cases, representation does not benefit taxpayers, but that lawyers also know when to take more aggressive positions with the IRS and how to succeed.

Among cases disposed in the Milwaukee and Chicago districts through the Tax Court's small-case procedure between 1979 and 1982, researchers found that represented taxpayers went to trial less frequently than unrepresented litigants and more frequently settled their cases at either the district or appellate level.³⁴¹ They also found that the government's recovery rate (the percent of the alleged deficiency awarded to the government) was lower among represented litigants (58%) than unrepresented taxpayers (68%); however, the difference was not statistically significant.³⁴² Moreover, the overall recovery rate among represented litigants was actually higher (58%) than it was for those who appeared without representation (53%), although the difference was also not statistically significant.³⁴³

Table 7. Studies Evaluating Legal Representation in Tax Cases.

Study	Design	Sample Size	Effect of Representation
Whitford (1984)	Observational	1,119 cases	Positive: government's recovery rate is lower (not statistically significant)
Kritzer (1998)	Observational	170 cases	Positive: success rate higher for individuals with in state tax appeals
Lederman & Hrungr (2006)	Observational/ Regression	189 cases	Positive: government's recovery rate is lower

Finally, research on taxpayer appeals that were heard before the Wisconsin Tax Appeals Commission evaluated the relative effectiveness of lawyer and

340. *Id.* at 1263; see also Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 338, 357–58 (1999) (finding that the relationship between representation and the likelihood that tax court cases will settle was not statistically significant). Because the authors do not evaluate the settlement awards, it is not clear whether a positive association between representation and likelihood to settle would represent a benefit to the taxpayer.

341. Whitford, *supra* note 337, at 813.

342. *Id.* at 818.

343. *Id.*

non-lawyer tax specialist representatives³⁴⁴ and found that although 36% of taxpayers with lawyers won their cases, only 15% of those with non-lawyer representatives were successful—a pattern that remains stable when the comparison controls for the presence of small-claims cases.³⁴⁵

While the studies' discussions of context provide important insight into how variation in setting may influence lawyers' effectiveness,³⁴⁶ the studies are less able to evaluate the relative influence of a number of other factors that might be influencing the analyses. Only the Tax Court study provides multivariate regression analyses, with a limited number of independent variables;³⁴⁷ the other two studies rely on mean comparisons that may be biased by the influence of other factors.³⁴⁸

H. Bankruptcy

In the bankruptcy arena, commentators have long been concerned that the need for legal representation has made the bankruptcy process unavailable to those most in need of assistance.³⁴⁹ The passage of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA),³⁵⁰ which increased the administrative requirements imposed on debtors, has exacerbated those concerns, and serves as the motivation for two studies considering the effect of legal representation in bankruptcy cases.

344. KRITZER, *supra* note 338, at 79–80.

345. *Id.* at 83.

346. *See, e.g.*, Lederman & Hsung, *supra* note 28, at 1252–66.

347. *See id.* at 1283–94.

348. *See* KRITZER, *supra* note 338, at 79–84; Whitford, *supra* note 337, at 818 (noting, for example, that differences in recovery rates may be reduced by taxpayers' increased likelihood to seek legal representation when the government's case is stronger).

349. *See, e.g.*, Ronald J. Mann & Katherine Porter, *Saving up for Bankruptcy*, 98 GEO. L.J. 289, 338 (2009).

350. Pub. L. No. 109-8, 119 Stat. 23 (2005).

Table 8. Studies Evaluating Legal Representation in Bankruptcy Cases.

Study	Design	Sample Size	Effect of Representation
Pardo (2009)	Observational	85,623 cases	Positive: cases less frequently dismissed
Littwin (2011)	Observational/ Regression	899 cases	Positive: more likely to have debts discharged and avoid dismissal for technical deficiencies

A national study of Chapter 7 bankruptcy filings analyzed the role of legal representation in cases filed in 2001 and 2007, thereby providing information on the outcomes for unrepresented debtors before and after the recent bankruptcy reforms.³⁵¹ The study found that among the sample of 2001 filings, all unrepresented debtors in the sample obtained a discharge from debt, thereby suggesting that representation was of no real benefit.³⁵² In 2007 (after the 2005 reforms), however, the study estimated the odds of receiving a discharge were 9.5 times higher for those debtors with legal representation compared to unrepresented debtors—after adjusting for debtor and case characteristics.³⁵³ The author found that this disparity is the result of unrepresented litigants' disproportionate rate of dismissal on technical grounds.³⁵⁴ This suggests that lawyers' knowledge of the procedural requirements provides a benefit to clients in bankruptcy, particularly under the new filing requirements.

A study of Chapter 7 bankruptcy filings in the Western District of Washington reached similar conclusions, offering evidence of a higher rate of dismissal among unrepresented debtors³⁵⁵ and finding that this dismissal rate

351. Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Greatest Weakness May Account for Its Surprising Success*, 52 WM. & MARY L. REV. 1933, 1963–65 (2011). See generally Thomas Bak, John Golmant & James Woods, *A Comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation on Bankruptcy Filing Rates*, 25 EMORY BANKR. DEV. J. 11, 14–17, 23–29 (2008); Brendan A. Cappiello, *The Price of Inequality and the 2005 Bankruptcy Abuse Prevention and Consumer Prevention Act*, 17 N.C. BANKING INST. 401, 421–27 (2013).

352. Littwin, *supra* note 351, at 1971. However, she notes that there is some question whether unrepresented filers may have received assistance from paid non-lawyer petition preparers. *Id.*

353. *Id.* at 1972. Independent variables included in the model were debtor “education, race and ethnicity, income, age, homeownership, prior bankruptcy,” presence of unencumbered assets, and completeness of the petition. *Id.*

354. *Id.* at 1976–77.

355. Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors*, 26

increased after the passage of BAPCPA.³⁵⁶ In comparing the reasons for the dismissal of a subset of cases, the author found that unrepresented debtors were more likely to have their cases dismissed for a failure to file information and that the odds of this occurring increased after the passage of BAPCPA.³⁵⁷

Thus, while researchers acknowledge the potential for endogeneity,³⁵⁸ they also offered evidence of a mechanism through which lawyers benefit their clients in bankruptcy cases: lawyers avoid procedural mistakes that can result in dismissal.³⁵⁹

I. Torts

Research on legal representation in disputes resulting from personal injuries also concludes that legal representation is associated with more favorable outcomes. A large survey of individuals who had experienced a personal injury found that those who had legal representation were more likely to have received a payment.³⁶⁰ Another study, focused on automobile insurance claims, found that representation is one of the strongest predictors of recovery amounts.³⁶¹ Finally, studies drawing on a multi-state database of closed automobile insurance claims estimated that claimants with representation had a higher probability of receiving payment for general damages as well as a higher average payment³⁶² and found that the increase in payment was sufficient to offset attorneys' fees.³⁶³

EMORY BANKR. DEV. J. 5, 22–23 (2009).

356. *Id.* at 24.

357. *Id.* at 30.

358. Littwin, *supra* note 351, at 1976.

359. *See id.* at 1976–77 (finding technical difficulties experienced by pro se taxpayers account for the variation in outcomes and removal of the cases involving technical difficulties resulted in slightly better outcomes for pro se filers than represented parties).

360. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 137 (1991).

361. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 69–70, 73 (2d ed. 1980).

362. 2 JAMES K. HAMMITT, AUTOMOBILE ACCIDENT COMPENSATION 34 (1985), <http://www.rand.org/pubs/reports/R3051.html>.

363. *Id.* at 37; *see also* 1 JOHN E. ROLPH ET AL., AUTOMOBILE ACCIDENT COMPENSATION 24–26 (1985), <http://www.rand.org/pubs/reports/R3050.html>.

Table 9. Studies Evaluating Legal Representation in Torts Disputes.

Study	Design	Sample Size	Effect of Representation
Ross (1980)	Observational	2,216 claims	Positive: actual and proportionate recovery was higher
Hammitt (1985)	Regression	40,784 claims	Positive: higher probability of receiving payment and higher estimated average payment
Hensler et al. (1991)	Survey	674 survey respondents	Positive: higher rate of payment among accident victims

These studies have the benefit of large samples, which facilitate some aspects of their statistical analyses.³⁶⁴ They lack the detail necessary to fully account for endogeneity, however, which may account for a portion of the observed benefit of representation.³⁶⁵

III. DISCUSSION

Although the research on legal representation presents interpretive challenges, the overall theme of the research supports the conclusion that representation is valuable. Outside the context of juvenile cases, government benefits cases, and the recent research by Professor Greiner and his collaborators, every area of law on which research has been conducted includes numerous studies in which represented litigants fare better—sometimes much better—than unrepresented litigants.³⁶⁶

Important caveats accompany this conclusion. Notably, most of the research consists of observational studies that are likely influenced by endogeneity. In those studies in which the gap between represented and unrepresented parties narrows when researchers employ complex regression

364. See ROSS, *supra* note 361, at 69–70, 73; 2 HAMMITT, *supra* note 362, at 34, 37; 1 ROLPH ET AL., *supra* note 363, at 24.

365. See, e.g., 1 ROLPH ET AL., *supra* note 363, at 26 (noting that “the contingent fee arrangement encourages an attorney to select claims that will justify his investment of time in pursuing them” and that their “statistical models allow [them] to control for some characteristics of accidents and victims . . . [but] there is still a possibility, indeed a probability, of substantial selection effects”).

366. See *supra* Part II.C–I.

techniques, endogeneity is the likely explanation. That is, litigants with certain kinds of cases are more likely to obtain representation, and thus, when researchers account for case type, the effect of representation shrinks. That said, our review suggests that the benefit of representation is likely to be real in many areas of law.

Endogeneity is unlikely to account for the observed benefits of representation across the many different areas of law.³⁶⁷ In some cases, endogeneity might be the best explanation for the observed effect of representation. In family law, parties who actively want custody of their children are apt to both be more likely to present as better parents and to seek attorneys to defend what they view as a critical interest.³⁶⁸ Likewise, in torts cases, parties with more at stake are more apt to be able to obtain attorneys.³⁶⁹ And as we noted above, endogeneity can make attorneys look like they are doing harm in juvenile cases because children who face more serious charges are more apt to be represented.

It is not clear, however, why litigants in small claims court and those who are seeking government benefits (where the stakes are all small) do better with attorneys. Nor is it quite as obvious why asylum-seekers—who all have a great deal at stake—are better off if represented (although in this area, attorneys might be selecting cases more carefully).³⁷⁰ Endogeneity also cannot easily account for the finding that parties obtain a greater percentage of their debt discharged in bankruptcy or that parties appearing before the IRS obtain a greater percentage of taxes reduced.

Second, several of the studies look beyond outcomes to identify what lawyers actually do for litigants. Except for two juvenile courts studies,³⁷¹ all of the studies that observe attorneys show them to raise more arguments and ask more questions than unrepresented parties. Lawyers offer more than just in-court advocacy; lawyers also prepare pleadings, ensure compliance with procedural requirements,³⁷² and offer advice that helps their clients better

367. See also Sandefur, *supra* note 25, at 59–74 (finding evidence of a benefit of representation even under varying assumptions regarding selection).

368. See *supra* Part II.E.

369. See *supra* Part II.I.

370. Cf. Banks Miller, Linda Camp Keith & Jennifer S. Holmes, *Leveling the Odds: The Effect of Quality Legal Representation in Cases of Asymmetrical Capability*, 49 LAW & SOC'Y REV. 209, 210 (2015).

371. KNITZER & SOBIE, *supra* note 113, at 8; Ferster & Courtless, *supra* note 77, at 207.

372. See, e.g., Littwin, *supra* note 351, at 1976; see also Sandefur, *supra* note 25, at 78.

understand the matter at hand.³⁷³

Although representation seems to matter, several other themes emerge from this body of research concerning how best to interpret results of research on representation: the difficulty of analyzing the effect of legal representation, the importance of context in understanding the work of lawyers, and the ways that our understanding of the effect of lawyers can be distorted by the everyday realities of empirical research. Several research questions also linger. We discuss each of these topics in turn below.

A. Analytic Challenges in the Assessment of Lawyers' Effectiveness

This research makes clear that determining whether, and to what extent, lawyers affect dispute outcomes is a tricky business. The publication of the articles by Professor Greiner and his coauthors, with their critique of earlier research and controversial findings and methodology,³⁷⁴ has brought attention to many of these challenges. Combined with a growing interest in causal inference among empirical legal scholars³⁷⁵ and the social sciences more generally,³⁷⁶ it is not surprising that studies making causal claims about the effect of legal representation have been subject to scrutiny.

The concern that scholars may be unable to estimate the effect of legal representation accurately is serious. Knowing that there are many influences on dispute outcomes, can researchers isolate the effect of legal representation? In attempting to do so, are scholars able to assess the relative strength of cases, especially given the theory predicting that it is the close cases that are most likely to be litigated?³⁷⁷ Since litigants have to mobilize to get a lawyer and lawyers pick their cases, are empirical analyses able to account for the selection processes that may undermine their findings?³⁷⁸ And finally, given that the

373. See, e.g., Sales et al., *supra* note 315, at 573.

374. Greiner & Pattanayak, *supra* note 5, at 2118.

375. See, e.g., D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 534 (2008); Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. L. & SOC. SCI. 17, 19 (2011).

376. See, e.g., JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION* 3 (2009); GUIDO W. IMBENS & DONALD B. RUBIN, *CAUSAL INFERENCE FOR STATISTICS, SOCIAL, AND BIOMEDICAL SCIENCES: AN INTRODUCTION* 1 (2015); STEPHEN L. MORGAN & CHRISTOPHER WINSHIP, *COUNTERFACTUALS AND CAUSAL INFERENCE: METHODS AND PRINCIPLES FOR SOCIAL RESEARCH* 6 (2d ed. 2014); Judea Pearl, *The Foundations of Causal Inference*, 40 SOC. METH. 75, 75 (2010).

377. See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 3–6 (1984).

378. See Greiner & Pattanayak, *supra* note 5, at 2188–95 (discussing various permutations of

representation offered by different lawyers may not be equal,³⁷⁹ is the average effect of legal representation a good summary of the benefit provided by most lawyers?

Some research designs and analytical strategies are better suited to address these challenges than others, and some research is more directly focused on attempting to estimate the effect of legal counsel.³⁸⁰ Studies that rely on comparisons of win rates—described as the “slipperiest of all judicial data”—are particularly problematic.³⁸¹ When comparisons of the win rates for cases with and without legal representation are made without any statistical analysis, it is impossible to know whether an observed difference in the average outcome is due to chance. Even if statistical analysis confirms the presence of a statistically significant difference, because no other factors have been taken into account, it is possible that the influence of some factor other than legal representation is responsible.

Among more recent studies, regression analysis has largely replaced mean comparisons.³⁸² By including other predictors of case outcomes in their analyses, scholars hope to be able to isolate the effect of legal representation. Researchers’ ability to control for confounding factors, however, is limited. Even when scholars take these concerns seriously, their ability to address them is often limited by the data available, particularly when relying on court documents. While court filings and docket sheets have the benefit of being public and accessible, they often lack important relevant information and are

selection effects).

379. See, e.g., Abrams & Yoon, *supra* note 24, at 1145 (documenting variation in lawyers’ effectiveness by experience and ethnicity); Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 627–28, 644 (2005) (finding that lawyers’ career motivations influenced the trajectories of their cases); Jerry Kang, Nilanjana Dasgupta, Kumar Yogeeswaran & Gary Blasi, *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886, 908–12, 908 tbls.4 & 5 (2010) (finding that litigator race influenced evaluations of litigator competence, likeability, and hireability); Lederman & Hrung, *supra* note 28, at 1235 (finding that the effect of legal representation varied with level of experience); Posner & Yoon, *supra* note 29, at 318 (reporting variation in judges’ assessments of lawyers’ competence).

380. It is also important to emphasize that we have included in this review any empirical research that makes claims about the relationship between legal representation and the outcomes of civil disputes, regardless of whether this relationship was the primary focus of the article or a secondary finding. Not surprisingly, studies designed specifically to address this topic have often provided a more thorough analysis.

381. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998).

382. See, e.g., Lederman & Hrung, *supra* note 28, at 1283–94.

not immune from problems of missing and inaccurate data.³⁸³ Although surveys and interviews have been used to supplement court records,³⁸⁴ it is often difficult to follow litigants after the completion of their cases.³⁸⁵

Randomized designs remedy many of these issues but bring their own challenges. Most notably, random assignment has the benefit of avoiding endogeneity, thereby alleviating the need for additional data about party and case characteristics.³⁸⁶ Randomized designs, however, are rare. They require the approval of institutional review boards, consent from participants, and the cooperation of legal service providers and other parties.³⁸⁷ These impediments also generally limit the sample size that researchers can obtain and, thereby, limit the statistical power of these studies. Professor Greiner's studies, in fact, might well have uncovered real benefits of representation had he been able to collect more data. His studies include only a few hundred observations, whereas observational studies often include thousands.³⁸⁸ Furthermore, randomized designs are apt to be limited to extremely narrow contexts in which the researchers can control the offer of representation.

If lawyers vary in terms of their abilities, then the results of any one study likely only reflect the talents of a particular office for a particular type of case, rather than the profession as a whole.³⁸⁹ Indeed, the best predictor of whether a research study on representation shows no benefit to a litigant (apart from the juvenile context) is whether it involved a legal aid clinic at Harvard. Finally, studies of civil disputes have been unable to randomize the *use* of legal counsel.³⁹⁰ Thus, they fail to use randomization to answer the question of

383. See Housing Court Study, *supra* note 27, at 19 n.18 (discussing inaccuracies in court records regarding legal representation); see also Hannaford-Agor & Mott, *supra* note 183, at 177–78 (discussing the challenges resulting from variation in coding practices in cross-jurisdictional data collection).

384. See, e.g., Littwin, *supra* note 351, at 1957, 1964; District Court Study, *supra* note 27, at 911.

385. See, e.g., Steinberg, *supra* note 169, at 481 n.127 (detailing her failed attempt to capture missing data from tenants involved in eviction proceedings).

386. See John Antonakis et al., *Causality and Endogeneity: Problems and Solutions*, in THE OXFORD HANDBOOK OF LEADERSHIP AND ORGANIZATIONS 93, 93 (David Day ed., 2014) (noting that in the “randomized experiment . . . endogeneity is eliminated by experimental design”).

387. See, e.g., Seron et al., *supra* note 134, at 419 (describing the numerous parties whose assistance was necessary for their study, including judges, clerks, bar associations, and legal aid clinics).

388. Compare Greiner & Pattanayak, *supra* note 5, at 2118 (207 cases), with Feld, *supra* note 80, at 1211–12 (17,195 cases).

389. See, e.g., Miller et al., *supra* note 370, at 218.

390. See, e.g., STAPLETON & TEITELBAUM, *supra* note 102, at 51 (“In a perfect experiment of this type, there would be no ‘attrition’—that is, in all experimental cases the [individuals] would be represented by a [study-provided] lawyer, and no attorney would be retained or appointed in any control case. For obvious reasons, however, we could not force [an individual] who did not want a lawyer to accept our representation, nor could we effectuate denial of other counsel to [individuals] in the control

greatest interest to scholars and the profession.³⁹¹

B. *The Importance of Context*

A second point made apparent by this research is the importance of context in assessing the effect of legal representation. Despite the shortcomings of the studies, their varying conclusions about the magnitude of the influence of counsel as well as their consideration of the mechanisms through which lawyers are able to affect outcomes suggest that the effect of legal representation likely varies. This is not surprising given the tremendous variation in the work of the legal profession. The characteristics of the clients who lawyers serve and the opposing parties they face, as well as the features of the substantive law they engage with and the forums in which they appear, all vary substantially by practice area and setting.³⁹² Moreover, even within the same substantive area and similar settings, research suggests that the social connections that court actors develop might influence the role they are able to play.³⁹³

Research on the effect of legal representation offers a glimpse into the structural factors that may make it more likely that lawyers will be able to positively influence outcomes.³⁹⁴ For example, in the juvenile context, researchers document the effect the court's philosophy has on lawyers' ability to advocate on behalf of their clients.³⁹⁵ In employment discrimination

group who desired legal assistance.”); William D. Popkin, *Effect of Representation on a Claimant's Success Rate—Three Study Designs*, 31 ADMIN. L. REV. 449, 459 (1979) (arguing that a true randomized experiment “is impossible . . . because claimants cannot be forbidden representation”).

391. See, e.g., Rebecca Sandefur, *What Was the Question? Or, Scholarly Conventions and How They Matter*, CONCURRING OPINIONS (Mar. 28, 2011), <http://concurringopinions.com/archives/2011/03/what-was-the-question-or-scholarly-conventions-and-how-they-matter.html>.

392. See, e.g., JOHN P. HEINZ ET AL., URBAN LAWYERS 1 (2005); Galanter, *supra* note 293, at 95; Lynn Mather, *What Do Clients Want? What Do Lawyers Do?*, 52 EMORY L.J. 1065, 1065 (2003); Stanton Wheeler, Bliss Cartwright, Robert A. Kagan & Lawrence M. Friedman, *Do the “Haves” Come out Ahead? Winning and Losing in State Supreme Courts, 1870–1970*, 21 LAW & SOC'Y REV. 403, 403–06 (1987) (considering the relative influence of legal representation and repeat player status).

393. See JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 11–12, 60–61 (1977); see also STAPLETON & TEITELBAUM, *supra* note 102, at 57 (concluding that the variation in process and philosophy in two juvenile courts “that each court can justifiably be treated as a separate social system”); Colvin, *supra* note 27, at 1 (suggesting that legal representation for employees curbs arbitrators' pro-repeat-player bias).

394. See Jennifer Bennett Shinall, *Slipping away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267, 293 (2010) (finding that defendants represented by public defenders and those represented by private attorneys fared equally in court).

395. See, e.g., STAPLETON & TEITELBAUM, *supra* note 102, at 79–81; Guevara et al. 2004, *supra* note 84, at 362–64.

litigation, there is evidence that lawyers play an important role in facilitating settlements,³⁹⁶ while research suggests that in other areas lawyers are most able to benefit their clients through the use of the formal legal process.³⁹⁷ Lawyers' ability to affect case outcomes is thus influenced by the realities they confront.³⁹⁸ Understanding this, there is value in exploring the effect lawyers actually have on the outcomes of cases in which they are involved, but there is also a danger in attributing lawyers' "failures" only to them.

Another reason for caution in overstating our knowledge of the effect of legal representation results from a point we raised at the outset of this Article. Namely, that to analyze the effect of legal representation, there must be variation in the use of legal counsel.³⁹⁹ If everyone has a lawyer—as is the case in nearly all high-stakes civil trials—there is no way to observe what happens when litigants are unrepresented.⁴⁰⁰ If we assume that variation in rates of representation reflects the potential benefit to be derived from representation,⁴⁰¹ then by focusing on areas where a large proportion of litigants are unrepresented, the existing empirical research is disproportionately concentrated on areas where lawyers are less likely to exert a strong influence on case outcome.

In fora designed explicitly for use by unrepresented litigants, the perceived benefit of representation is often lower and the subsequent variation in the use of legal counsel is greater.⁴⁰² There may be disagreement about the degree to which these forums provide unrepresented litigants with an equal chance of success. To the extent that the literature on the effect of legal representation is focused on informal, non-adversary, or pro-se-friendly proceedings, however, the studies as a whole will underestimate the benefit of representation.

396. See Nielsen et al., *supra* note 281, at 175.

397. See KRITZER, *supra* note 338, at 108 ("I observed nonlawyer representatives with extensive substantive expertise. The problem is a lack of procedural expertise."); District Court Study, *supra* note 27, at 903; Lederman & Hrung, *supra* note 28, at 1264.

398. See, e.g., Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1973 (2009) (discovering a surprising anti-plaintiff effect in federal appellate courts).

399. See Monsma & Lempert, *supra* note 24, at 628.

400. See *id.*

401. We do not disagree that individuals may desire, but be unable to obtain, legal representation; however, research suggests that structural variation is a more powerful predictor of rates of representation than individual characteristics. See, e.g., Herbert M. Kritzer, *To Lawyer or Not to Lawyer: Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875, 877 (2008).

402. See Monsma & Lempert, *supra* note 24, at 628.

C. *Unanswered Questions*

Although this review documents the breadth of the existing empirical literature on the effect of legal representation in civil cases, it also indicates the need for additional study. There is clearly a need for additional empirical research that focuses on the effect of legal representation that offers thorough quantitative analysis and is realistic about the inferences that may be drawn from the results. The existing research, however, also points to areas where auxiliary research is needed in order to better understand the effect of legal representation.⁴⁰³

For example, research on individuals' legal needs indicates that seeking representation is socially patterned,⁴⁰⁴ but we have a limited understanding of how individuals decide whether to retain legal counsel.⁴⁰⁵ Similarly, we know that not all individuals are equally likely to encounter different kinds of civil disputes⁴⁰⁶ but know less about how this influences the estimates of the effect of legal counsel. Moreover, we may determine that lawyers are likely to achieve more favorable outcomes in a given situation but not understand why. Thus, there is a need not only for more research, but also different research.

Neither does any of the research we identified address the important question of how attorneys screen cases. Often the best advice a lawyer can give is to tell a client not to bring a case or to pursue some remedy other than litigation. "[A]bout half the practice of a decent lawyer consists of telling would-be clients that they are damned fools and should stop."⁴⁰⁷ Our survey is

403. See Sandefur, *supra* note 25, at 84–85.

404. See, e.g., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994); BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 1 (1977); HAZEL G. GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 10 (1999); Herbert M. Kritzer, W.A. Bogart & Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 499–500 (1991); Leon Mayhew & Albert J. Reiss, Jr., *The Social Organization of Legal Contacts*, 34 AM. SOC. REV. 309, 317 (1969); Masayuki Murayama, *Experiences of Problems and Disputing Behaviour in Japan*, 14 MEIJI L.J. 1, 16 (2007).

405. But see, e.g., MEDICAL MISHAPS: PIECES OF THE PUZZLE (Marilynn M. Rosenthal, Linda Mulcahy & Sally Lloyd-Bostock eds., 1999); William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC'Y REV. 631, 631, 649–654 (1980); Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105, 105–06 (1990); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 525 (1980).

406. See, e.g., Pascoe Pleasence, Dame Hazel Genn, Nigel J. Balmer, Alexy Buck & Aoife O'Grady, *Causes of Action: First Findings of the LSRC Periodic Survey*, 30 J.L. & SOC'Y 11, 11 (2003).

407. Lloyd B. Snyder, *Is Attorney–Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477,

also limited to the litigation context. Assessing the value of lawyers in transactional settings faces even greater methodological difficulties, which might account for the relative absence of studies in this area.⁴⁰⁸

Further analyzing the effect of legal representation could help to improve the delivery of legal services generally and has the potential to make legal aid more effective and efficient.⁴⁰⁹ Documenting the efficacy of legal representation relative to other forms of non-lawyer advice could influence the profession's claims to a monopolistic right to practice law.⁴¹⁰ And research on the ability of unrepresented individuals to achieve outcomes similar to those obtained by lawyers could have implications for the constitutional right to due process and for our assessment of adjudicatory and administrative forums. Thus, research in this area has important implications.

IV. CONCLUSION

The Supreme Court has offered widely divergent assessments of the legal profession. In regard to the right to counsel in criminal cases, the Court famously declared that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁴¹¹ Yet in *Walters v. National Ass’n of Radiation Survivors*,⁴¹² the Court rejected the claim that lawyers were necessary for litigants to be able to successfully bring appeals before the Veterans’ Administration,⁴¹³ and in *Turner v. Rogers*⁴¹⁴ the Court concluded that pro se litigants’ rights to due process could be protected without the help of a lawyer.⁴¹⁵ So which is it: are lawyers essential or worthless?

Our review of the empirical literature on the effect of legal representation on civil dispute outcomes suggests that the truth is, as it often is, somewhere in

521 (2002) (quoting 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1964)).

408. *But see, e.g.*, Michael Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 MO. L. REV. 241, 241–42 (1997).

409. *See* Monsma & Lempert, *supra* note 24, at 663.

410. *See, e.g.*, Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2611–15 (2014).

411. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

412. 473 U.S. 305, 307 (1985).

413. *See id.*; *see also* Carl M. Selinger, *What Are Lawyers Good For?: The Radiation Survivors Case, Non-Adversarial Procedures, and Lay Advocates*, 13 J. LEGAL PROF. 123, 123–24 (1988) (discussing the case and its significance for the profession).

414. 564 U.S. 431 (2011).

415. *Id.* at 448.

the middle. While there are studies that fail to find evidence of an effect of legal representation, methodological limitations suggest being cautious before accepting their findings. In contrast, the majority of studies do find evidence that legal representation is associated with more favorable outcomes, although many of those studies also struggle to overcome the analytical challenges that make identifying the effect of legal representation so difficult. On the whole, we conclude that while there may be areas where legal representation is likely to have less of an impact on case outcomes, the bulk of the evidence indicates that lawyers matter.

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