Self-Help, Reimagined

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

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I. INTRODUCTION

By any measure, the overwhelming majority of human beings (as opposed to corporations, labor unions, or other incorporeal entities) who face legal problems in the United States do so without a traditional attorney-client relationship and indeed, without any form of professional legal assistance.[1] In an important sense, the majority of legal scholarship in the United States is focused on elite (particularly wealthy) individuals and, more the point, on corporations, labor unions, partnerships, and the other incorporeal entities that consume legal services in quantity. This Article, in contrast, is about how human beings in the United States who choose to attempt to address[2] their legal problems actually do so, or

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

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

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

Currently the dominant form of assistance received by low-income individuals seeking help with legal matters is the provision of self-help materials, sometimes coupled with limited advice from a legal professional.[3] Self-help or *pro se* legal materials are actively distributed by courts, legal aid organizations, public libraries, bar associations, neighborhood advocacy centers, internet-based networks, law schools, pro bono groups, and even for-profit companies, among others.[4]

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

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

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

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

[4] RICHARD ZORZA, THE SUSTAINABLE 21ST CENTURY LAW LIBRARY: VISION, DEPLOYMENT, AND ASSESSMENT FOR ACCESS TO JUSTICE, *available at* www.zorza.net/LawLibrary.pdf (last visited Mar. 2, 2015); Larry Upshaw, Divorce Forms Could Endanger Property Rights, Says Texas Family Law Council, BUSINESS WIRE, http://eon.businesswire.com/news/eon/20121119006521/en/pro-bono-lawyers/legal-services/probono (last visited Mar. 2, 2015); COURT FORMS, STATE OF MAINE JUDICIAL BRANCH, www.courts.maine.gov/fees_forms/forms/ (last visited Mar. 2, 2015); Small Claims Actions: Maine Court Forms, PINE TREE LEGAL ASSISTANCE, www.ptla.org/small-claims-action-maine-court-forms (last visited Mar. 2, 2015); PRO BONO FORMS, NORTHERN DISTRICT OF NEW YORK FEDERAL COURT BAR ASSOCIATION, www.ndnyfcba.org/probonoforms/#dp (last visited Mar. 2, 2015); *Know Your Rights: Defending Creditor Lawsuits*, NEW ECONOMY PROJECT, www.neweconomynyc.org/resource/lawsuits/www.neweconomynyc.org/resource/lawsuits/ (last visited Mar. 2, 2015); *Helpful Legal Information for the Public*, DELAWARE COUNTY BAR ASSOCIATION, www.delcobar.org/?page=publiclegalinfo (last visited Mar. 2, 2015); *About ProBono.net*, PROBONO.NET, www.probono.net/about/ (last visited Mar. 2, 2015); RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, accesstojustice.net (last visited Mar. 2, 2015); LEGALZOOM, www.legalzoom.com (last visited Mar. 2, 2015). This form of unbundling of legal services aims to help the unrepresented litigant navigate the morass of procedures required to have their side heard in court.

relationship, or any kind of professional legal assistance (limited, unbundled, or otherwise), to meet the United States' well-documented civil justice gap.[5] Lawyers are expensive. It is unlikely there will be sufficient public and private funding to provide free or low-cost civil legal services to the poor via the traditional method of an individual attorney-client relationship.[6] Other market-based solutions, such as Limited License Legal Technicians[7] (or, more generally, non-lawyer assistance) and unbundled legal services,[8] are an important part of a comprehensive solution to the civil justice gap. Adjudicatory system reform is similarly essential.[9] But markets are accessible only to those with income and

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[5] LSC Unmet Needs, *supra* note 1; AM. BAR ASS'N, CONSORTIUM ON LEGAL SERV. AND THE PUB., LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), *available at* http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf (last visited Mar. 1, 2015). Numerous studies have been conducted within individual states documenting the shortage of available legal assistance relative to demand or need. The following is a sample of reports released since 2000: ALA. ACCESS TO JUSTICE COMM., THE LEGAL NEEDS OF LOW-INCOME ALABAMIANS: A NEEDS ASSESSMENT & ANALYSIS (2009), *available at* http://alabamaatj.org/wp-content/uploads/2013/08/Access-to-Justice-Needs-Final.pdf (last visited Mar. 1, 2015); A.L. BURRUSS INST. OF PUB. SERV. & RES.—KENNESAW STATE UNIV. WITH D. MICHAEL DALE, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA: A REPORT DRAWN FROM THE 2007/2008 GEORGIA LEGAL NEEDS STUDY (June 2009), *available at* http://www.kennesaw.edu/burruss_inst/docs/LegalNeeds_Report%20FINAL%20SECURED.pdf (last visited Mar. 1, 2015); IND. LEGAL SERV., INC., IND. BAR FOUND. & IND. STATE BAR ASS'N., UNEQUAL ACCESS TO JUSTICE: A COMPREHENSIVE STUDY OF THE CIVIL LEGAL NEEDS OF THE POOR IN INDIANA (2008), *available at* http://www.indianalegalservices.org/files/ilsi-unequal-access-2008-full.pdf (last visited Mar. 1, 2015); LEGAL SERV. OF N.J. POVERTY RES. INST., UNEQUAL ACCESS TO JUSTICE: MANY LEGAL NEEDS, TOO LITTLE LEGAL ASSISTANCE, THE CONTINUING CIVIL JUSTICE GAP FOR LOWER-INCOME NEW JERSEYANS (Sep. 2009), *available at* www.lsnj.org/PDFs/PovertyResearchInstitute/LegalNeeds2009.pdf (last visited Mar. 1, 2015); S.C. ACCESS TO JUSTICE COMM., 2008 PUBLIC HEARINGS OF THE SOUTH CAROLINA ACCESS TO JUSTICE COMMISSION—EXECUTIVE SUMMARY (April 2009), *available at* http://www.scatj.org/assets/Executive%20Summary%20April2009.pdf (last visited Mar. 1, 2015). For a more general discussion, *see* Henry J. Scudder, *Hearings Shed Light on Unmet Needs*, N.Y. L.J. (Jan. 24, 2011), *available at* http://www.nycourts.gov/courts/ad4/clerk/Notice-PR/PJ-hearing.pdf; Rhode, *supra* note 1, at 869.

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

[7] Washington State has recently authorized non-lawyer representation in litigation, *see* In the Matter of the Adoption of New APR 28--Limited Practice Rule for Limited License Legal Technicians, 12-13-063 Wash. Reg. 298141 (NS) (June 15, 2012), available at http://www.courts.wa.gov/content/publicUpload/PressReleases/25700-A-1005.pdf (order was not included in the Washington Register due to page count limitations); Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 Miss. L.J. 75 (2013). Administrative agencies have long allowed non-lawyer practice. *See* U.S. Department of Justice, Executive Office for Immigration Review, Form EOIR-31 (form required for a non-lawyer representative in immigration cases).

[8] For a review of the literature and use of unbundling in representation, *see* Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825 (2012).

[9] Richard Zorza, *Some First Thoughts on Court Simplification: The Key to Civil Access And Justice Transformation*, 61 DRAKE L. REV. 845 (2013) (discussing simplification of procedural rules); Paula Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 39 CT. L. REV. 8, 11–12 (2003) ("A

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

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

Self-help materials cannot be successful unless two conditions are met: (i) when the lay would-be user can find materials in a timely manner (are self-help materials *accessible*?), and once found, (ii) when the lay would-be user can successfully use the materials to advance his or her cause (are the self-help materials *deployable*?).[10]

Until now, the primary focus of the bench, the bar, and the academy has been on access. Currently, many types of self-help materials are readily available to those who seek them. Practically every state court system and legal aid organization has websites providing forms or other information to unrepresented litigants.[11] Efforts have also been made to write these materials in "plain language."[12] These are all laudable, but they share a common shortcoming: none that we have found

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large proportion of cases . . . seem to languish indefinitely because litigants do not know how to move to the next stage of the litigation process after they have filed the initial pleadings.); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36 (2002) (arguing that court staff and judges should provide basic legal information to pro se litigants and that judges should make greater use of pretrial conferences); Margaret M. Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879 (1999) (arguing that clinics' success depends upon how willing courts are to modify the system to make it more user-friendly).

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

[11] NAT'L CTR. FOR STATE COURTS, COURT FORMS - SELF-REPRESENTATION STATE LINKS, http://www.ncsc.org/Topics/Access-and-Fairness/Self-Representation/State-Links.aspx?cat=Court%20Forms (last visited Feb 9, 2015).

[12] *See, e.g.*, Richard Zorza, *Court Leadership and Self-Represented Litigation: Solutions for Access*, Effectiveness, and Efficiency/Module 6: Forms and Plain Language 4 (2008), http://www.ncsc.org/microsites/access-to-justice/home/Topics/~/media/Microsites/Files/access/06-Plain%20Language-Con.ashx. *See* also PlainLanguage.gov, http://www.plainlanguage.gov/whatisPL (last visited Feb. 11, 2015); Ruth Sullivan, *The Promise of Plain Language Drafting*, 47 MCGILL L. J. 97 (2001); Joseph Kimble, *Answering the Critics of Plain Language*, 5 SCRIBES J. OF LEGAL WRITING 51 (1994).

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

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

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

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

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[13] *See* JOHN M. GREACEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS, A FIFTY-STATE REVIEW OF THE "STATE OF THE ART" (2011), *available at* http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2012/05/national_meetingofstateaccesstojusticechairs/ls_sclaid_atj_court_access.pdf (last visited Feb 11, 2015) (no mention of these issues).

[14] Steinberg *supra* 745.

[15] *See infra* Part III.

[16] "Instead, after negotiating in the hallway with the landlord's lawyer, she [] agreed to pay outstanding rent and to vacate the apartment within three months." Erica L. Fox, *Alone in the Hallway: Challenges to Effective Self-Representation in Negotiation*, 1 HARV. NEGOT. L. REV. 85, 85 (1996).

[17] *Id.*

[18] We borrow Fox's terminology here; in this context, self-agency means the ability of an individual to act as her own agent, to represent her best interest in the negotiation. *Id.* at 86.

[19] *Accord* Steinberg, *supra* note 6, at 755 (describing the maze of rules and procedures a self-represented litigant must overcome and concluding that it is not surprising "that unrepresented litigants feel nervous, bewildered, and emotionally overwhelmed in charting their course through the court system.").

in plan-making and plan-implementation.[20] After a review of available lay legal materials, we further posit that the way information is currently presented to self-represented individuals—without visual imagery, with unnecessary details, and without attention to layout and organization—can thwart its effective deployment.[21] Thus, our aim in this Article is twofold: (i) to identify the barriers that low- and moderate-income/asset ("LMI") individuals face in attempting to navigate legal and quasi-legal spheres without professional assistance; and (ii) to propose ways in which self-help materials might be re-imagined to address these barriers.

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

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[20] Sandefur, *supra* note 2.

[21] For example, in a study examining information presented to medical patients, the researchers found that illustrated booklets were more effective in communicating concepts than those without illustrations. *See* J. M. Moll, *Doctor-Patient Communication in Rheumatology: Studies of Visual and Verbal Perception Using Educational Booklets and Other Graphic Material*, 45 ANNALS OF RHEUMATIC DISEASES 198, 206-207 (1986). *See also* Peter S. Houts, et. al., *The Role of Pictures in Improving Health Communication: A Review of Research on Attention, Comprehension, Recall and Adherence*, 61 PATIENT EDUC. & COUNSELING 173, 175-187 (2006) (reviewing studies that found that the inclusion of pictures to written and spoken language increases patients' "attention, comprehension, recall and adherence"). . In a study examining information presented to medical patients, the researchers found that illustrated booklets were more effective in communicating concepts than those without illustrations. *See* J. M. Moll, *Doctor-Patient Communication in Rheumatology: Studies of Visual and Verbal Perception Using Educational Booklets and Other Graphic Material*, 45 ANNALS OF RHEUMATIC DISEASES 198, 206-207 (1986).

II. BARRIERS TO EFFECTIVE DEPLOYMENT

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

We draw on and quote from cognitive semi-structured interviews with LMI individuals in financial distress in courts in Maine, Massachusetts, and Connecticut. We asked test subjects to read self-help materials in front of a research team member and encouraged readers to "think out loud," in order to describe thought processes as they read.[22] At opportune times, the research member asked open-ended follow up questions, such as, "What do you think of this phrase/illustration?" Our team interviewed individuals in severe financial distress, as evidenced by a pending debt collection lawsuit, but we hypothesize that our findings on deployment barriers are applicable to a wide range of legal and quasi-legal situations.[23]

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

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

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

Interview by Peter Lacy with anonymous debt collection defendant, in Portland, Me. (Feb. 14, 2013).

> There were about thirty-three credit card debt collection cases on the docket. Of those, only about five people showed up to court. The debt collection cases had the same attorney. He carried a small briefcase with him to court. If challenged, it is likely that he wouldn't have had all the required

This Part proceeds in two steps. In Section I.A, we discuss barriers to action. In Section I.B, we discuss barriers to understanding. In Part III, we discuss overcoming these barriers.

A. Barriers to Action

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

1. Overtaxed Bandwidth

Recent research on scarcity—of time, or money, for example—reveals scarcity's far-reaching implications for the poor.[24] Sendhil Mullainathan and Eldar Shafir's study of this issue exposes how the poor spend an inordinate amount of energy,

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documentation to prevail on the debt. However, the court granted him about twenty-eight default judgments because defendants failed to appear in the court.

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

The literature on small claims courts and in other court systems reinforces the student observations. *See, e.g.*, D. James Greiner & Andrea Matthews, The Problem of Default, Part I (Feb. 17, 2015) (unpublished manuscript) (on file with authors). On small claims courts, *see* Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1989); Archibald S. Alexander, *Small Claims Courts in Montana: A Statistical Study*, 44 MONT. L. REV. 227 (1983); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981); Richard M. Alderman, *Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York*, 24 SYRACUSE L. REV. 1217 (1973); Barkley Clark, *Default, Repossession, Foreclosure, and Deficiency: A Journey to the Underworld and a Proposed Salvation*, 51 OR. L. REV. 302 (1971); Beatrice A. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969). *But see* William C. Whitford, *The Small-Case Procedure of the United States Tax Court: A Small Claims Court That Works*, 9 LAW & SOC. INQUIRY 797–828 (1984). On default in courts outside the small claims court system, *See, e.g.*, Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990); Nanette K. Laughrey, *Default Judgments in Missouri*, 50 MO. L. REV. 841 (1985); Michael A. Pohl & David Hittner, *Judgments by Default in Texas*, 37 SW. L.J. 421 (1983); Stephen L. Dreyfuss, *Due Process Denied: Consumer Default Judgments in New York City*, 10 COLUM. J.L. & SOC. PROBS. 370 (1973); Norman E. Risjord & June M. Austin, *Problems of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 88 (1955).

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

[24] *See generally* SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH (2013).

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

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

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

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

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[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] MULLAINATHAN & SHAFIR, *supra* note 24, at 157.
[29] *Id. See also* Kathleen D. Vohs & Todd F. Heatherton, *Self-Regulatory Failure: A Resource-Depletion Approach*, 11 PSYCHOL. SCI. 249 (2000).
[30] Low bandwidth "means that you have fewer mental resources to assert self-control." MULLAINATHAN & SHAFIR, *supra* note 24, at 158. Psychologists have shown that self-control resembles a muscle, noting that "the resource needed for self-control is a limited, consumable strength, much like a muscle's ability to work." Mark Muraven & Roy F. Baumeister, *Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?*, 126 PSYCHOL. BULL. 247, 248, 256 (2000).

2. Anxiety and Feelings of Threat

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

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

> Q: How did you feel when you were first notified of the lawsuit in the summons and complaint?
>
> A: Awful. [Speaking about when she was served …] I was at work and I had to go outside the building to talk to the sheriff. It was embarrassing. [32]

In answering a similar question, another debt collection defendant puts it this way: "I felt nervous because this is my first time. It feels like you are being scolded. I'm pretty sure if we had money, we wouldn't be here."[33]

Anxiety, as well as feelings of threat and impending disaster, are commonly cited in many of our interviews.[34] We hypothesize that these emotions were more paralyzing among defendants who failed to appear.[35]

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

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[31] As we explain below, the delivery of such a summons is the starting point for enrollment of study subjects in our Study.

[32] Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Dec. 12, 2013) (using Bad Evidence *Pro Se* Packet).

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

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

> Q: How did you feel when you were first notified of the lawsuit in the summons and complaint?
> A: Nervous.
> Q: How do you think others feel who are less smart or knowledgeable than you?
> A: More scared.

Q: How did you feel when you came to court this morning?
A: Anxious … I wanted to get this done and get out of here.
Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Oct. 31, 2014) (using Statute of Limitation *Pro Se* Packet). *See also* Sandefur, *supra* note 2.

[35] *See* Sandefur, supra note 2; Mary Spector, *Debts, Defaults, and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts*, 6 VA. L. & BUS. REV. 257.

to providing legal information. For self-help materials to be mobilizing and deployable, they must address individuals' performance-minimizing and solution-inhibiting mental states.[36]

3. Unfamiliarity with Legal Details

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

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

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[36] *See, e.g.*, Michael Browning et al., *Anxious Individuals Have Difficulty Learning the Causal Statistics of Aversive Environments*, 18 NATURE NEUROSCIENCE 590-96 (2015), http://www.nature.com/neuro/journal/v18/n4/full/nn.3961.html.

[37] Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change* 9 LAW & SOC'Y REV. 95 (1974);*Introduction* to IN LITIGATION, DO THE 'HAVES' STILL COME OUT AHEAD? 1–6 (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

[38] *See, e.g.*, Steinberg, *supra* note 6, at 756 (discussing the expressive challenges self-represented litigants encounter in court and citing a study that concludes that "judges and other court players routinely disregard the narrative-style testimony of unrepresented litigants").

B. Barriers to Understanding: The Self-Help Materials Themselves

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

1. Excessive Focus on Conceptual Understanding

We begin with a distinction fundamental to artificial intelligence, cognitive psychology, and education scholars, between *procedural* knowledge and *conceptual* knowledge.[39] Students have *procedural* knowledge when they know how to follow a set of sequential steps but do not necessarily know the reasons for the steps or how to apply those steps to markedly new situations; procedural understanding is the knowledge of algorithm.

In contrast, *conceptual* understanding occurs when students know what to do, why to do it, and how to do it (or something like it) in a markedly new situation. Conceptual understanding is a webbed framework that links and supplies relationships across pieces of information. One finds this distinction in many strands of the education literature.[40]

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

[40] James Hiebert & Patricia Lefevre, *Conceptual and Procedural Knowledge in Mathematics: An Introductory Analysis*, *in* CONCEPTUAL AND PROCEDURAL KNOWLEDGE: THE CASE OF MATHEMATICS (James Hiebert ed., 1986); RICHARD SKEMP, THE PSYCHOLOGY OF LEARNING MATHEMATICS 152–63 (1987); Karen C. Fuson, *Conceptual Structures for Multiunit Numbers: Implications for Learning and Teaching Multidigit Addition, Subtraction, and Place Value*, 7 COGNITION & INSTRUCTION 343 (1990); Stellan Ohlsson & Ernest Rees, *The Function of Conceptual Understanding in the Learning of Arithmetic Procedures*, 8 COGNITION & INSTRUCTION 103 (1991); James Hiebert & Diana Wearne, *Instruction, Understanding, and Skill in Multidigit Addition and Instruction*, 14 COGNITION & INSTRUCTION 251 (1996); Bethany Rittle-Johnson & Martha Wagner Alibali, *Conceptual and Procedural Knowledge of Mathematics: Does One Lead to the Other?*, 91 J. EDUC. PSYCHOL. 175 (1999); Bethany Rittle-Johnson & Robert S. Siegler, *The Relation Between Conceptual and Procedural Knowledge in Learning Mathematics: A Review*, *in* THE DEVELOPMENT OF MATHEMATICAL SKILLS 75-110 (Chris Donlan ed., 1998); Bethany Rittle-Johnson et al., *Developing Conceptual Understanding and Procedural Skill in Mathematics: An Iterative Process*, 93 J. EDUC. PSYCHOL. 346 (2001); Jon R. Star, *Reconceptualizing Procedural Knowledge*, J. RES. MATHEMATICS EDUC. 404 (2005); Jon R. Star, *Foregrounding Procedural Knowledge*, 38 J. RES. MATHEMATICS EDUC. 132 (2007); Arthur J. Baroody et al., *An Alternative Reconceptualization of Procedural and Conceptual Knowledge*, 38 J. RES. MATHEMATICS EDUC. 115 (2007).

In cognitive psychology and artificial intelligence, an analogous distinction (one fundamental to several different classes of proposed cognitive architectures) exists between *declarative knowledge* and (alas) *procedural knowledge*. *See* Anderson, *supra* note 39, THE ARCHITECTURE OF COGNITION (1983); JOHN R.

The importance of this distinction lies in the realization that procedural knowledge can be easier to teach and learn. If the aim of the instruction is to allow a student to produce correct responses on a narrowly defined range of problems, then procedural knowledge is probably sufficient. As one mathematics educator has explained, "if what is wanted is a page of right answers, [procedural knowledge] can provide this more quickly and easily."[41]

Undoubtedly, some complex justiciable problems can only be addressed through deployment of conceptual knowledge.[42] The ability to apply abstract principles to new fact patterns is the hallmark of the traditional professional,[43] and it is this skill that legal educators attempt to engender in their students.[44] We hypothesize, however, that not every aspect of every legal problem requires that the lay individual understand the context, background and nuances of potential defenses. In some cases, we hypothesize that lay individuals can, or can be induced to, deploy professional legal knowledge by following a set of step-by-step instructions, such as that provided in a script or a check-the-box form. Fundamentally, we believe that many aspects of law can be usefully commoditized, a theme to which we return.

Our hypothesis is apparently contrary to the prevailing wisdom among those who produce lay legal education materials today.[45] These materials typically begin by

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ANDERSON, RULES OF THE MIND (1993); JOHN R. ANDERSON, COGNITIVE PSYCHOLOGY AND ITS IMPLICATIONS (1995); Hui-Qing Chong et al., *Integrated Cognitive Architectures: A Survey*, 28 ARTIFICIAL INTELLIGENCE REV. 103 (2007) (using different terminology); David J. Jilk et al., *SAL: An Explicitly Pluralistic Cognitive Architecture*, 20 J. EXPERIMENTAL & THEORETICAL ARTIFICIAL INTELLIGENCE 197 (2008); John E. Laird, *Extending the SOAR Cognitive Architecture*, *in* ARTIFICIAL GENERAL INTELLIGENCE: PROCEEDINGS OF THE FIRST AGI CONFERENCE (Pei Wang et al. eds., 2008); Paul S. Rosenbloom, *Combining Procedural and Declarative Knowledge in a Graphical Architecture*, *in* PROCEEDINGS OF THE 10TH INTERNATIONAL CONFERENCE ON COGNITIVE MODELING (Dario D. Salvucci & Glenn F. Gunzelmann, eds., 2010). For the cognitive psychologist, declarative knowledge refers to dominance of a basic set of facts or a set of rote sequential steps to reach a given goal; this knowledge is easier to learn. For the cognitive psychologist, procedural knowledge refers to a deeper internalization of how and why to do things. ANDERSON, ARCHITECTURE, *supra* note 39. To avoid confusion, we stick to the education literature's usage of terms.

[41] Skemp, *supra* note 40.

[42] Indeed, some literature suggests it can be helpful to provide simple but clear explanations of why instructional materials suggest some courses of action and avoidance of others. Borje Holmberg, *Guided Didactic Conversation in Distance Education*, *in* DISTANCE EDUCATION: INTERNATIONAL PERSPECTIVES 117 (D. Sewart, D. Keegan & Borje Holmberg eds. 1983).

[43] Talcott Parsons, *The Professions and Social Structure*, *in* 17 SOC. FORCES 457–467 (1939).

[44] Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, *in* J. LEGAL EDUC. 313 (1995); BARRY FRIEDMAN AND JOHN C.P. GOLDBERG, OPEN BOOK: SUCCEEDING ON EXAMS FROM THE FIRST DAY OF LAW SCHOOL (2011).

[45] We reviewed a vast amount of lay legal educational and self-help materials in preparation for the development of our materials. *See, e.g.*, Neighborhood Economy Project, *The Basics of Defending Creditor Lawsuits*, http://www.neweconomynyc.org/the-basics-of-defending-creditor-lawsuits/ [http://perma.cc/7WFC-8NL2].

defining legal vocabulary, and subsequently explain abstract legal concepts.[46] The expectation appears to be that a lay individual must learn a great deal about the law relating to her case in order to represent herself effectively.[47] Legal process and procedure are eventually explained, but generally in a way that requires the lay individual to have previously grasped the legal concepts and, worse yet, the jargon. The result is self-help materials that impose what may be unnecessary burdens on the user. The lawyer/author instinct to educate, as opposed to direct, interferes with the lay person's effective deployment of information.[48]

2. Lack of Analogies and Visual Images

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

With respect to analogies, for those areas in which conceptual (as opposed to procedural) understanding is needed, analogy can be a powerful tool. One of the lessons of the scholarship on expertise and professional knowledge generally is that many hard concepts are best taught not by direct, abstract statements but rather by analogy,[49] preferably by multiple analogies.[50] But analogies are rarely, if ever, found in civil legal materials for lay individuals.[51]

Moreover, despite the overwhelming consensus among education scholars that visual depictions improve learning, we did not find a single instance[52] of the use

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[46] *See, e.g.*, Ventura Courts Self-Help Legal Access Center, *Part 2a - Legal Reasons Why I Should Not Have to Pay the Money*, DEFENDING LAWSUITS FOR BREACH OF CONT. OR COLLECTION OF MONEY (COMMON COUNT) 8, http://www.courts.ca.gov/partners/documents/kanspart2a.pdf (citing specific statutes that individuals can look up for more information).

[47] RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT 61 (2002), http://www.zorza.net/Res_ProSe_SelfHelpCtPub.pdf (last visited Feb. 2, 2015) ("For example, an eviction defense template would first detail all the possible defenses and counterclaims (which presumably have been explored first in an answer template, in any event), and then for each of the defenses, lay out the elements of the defense and some of the ways that these facts could be shown.").

[48] Part IV discusses how some sorts of legal information might be commoditized into check-lists and scripts.

[49] Blasi, *supra* note 44, at 355-361.

[50] Mary L. Gick & Keith J. Holyoak, *Analogical Problem Solving*, 12 COGNITIVE PSYCHOL. 306 (1980); Mary L. Gick & Keith J. Holyoak, *Schema Induction and Analogical Transfer*, 15 COGNITIVE PSYCHOL. 1 (1983).

[51] For one of the few examples we found, see the interactive self-help forms at *Hawaii Self-Help Interactive Forms*, LAWHELP.ORG/HI, http://www.lawhelp.org/hi/resource/hawaii-self-help-interactive-forms [http://perma.cc/VRM9-XW6Q.]

[52] Actually, we did find one. *See How to Start a Contested Case*, ALASKA COURT SYSTEM, Sept. 2011, http://www.courts.alaska.gov/shc/shc-181n.pdf. We leave it to readers to evaluate whether our statement above constitutes an exaggeration in any relevant sense.

of illustrations or images (other than occasional clip art) to communicate civil legal concepts to LMI individuals.[53] This absence is striking given the many studies showing that images can serve multiple purposes, including easing anxiety, entertaining so as to motivate, facilitating understanding, and serving as mnemonic devices (*e.g.*, a drawing of an ear to aid in the memory of "hearsay").[54]

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

3. Language, Presentation Style, and Organization

In our review of existing self-help materials, we were struck by how often the sequence and arrangement of information was inconsistent with the research on how to best communicate written information. Legibility and format affect reading speed, comprehension, and recall of information.[55] The psychology, marketing, education, and health fields address these issues at the level of the page, the sentence, and the word.

For example, research shows that "[t]he use of all capital letters in a heading actually dramatically decreases speed of reading."[56] In multiple studies, "the average reader took about 12-13% more time to read all caps[;] 38 words per

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[53] *See, e.g.*, John E. Readence & David W. Moore, *A Meta-Analytic Review of the Effect of Adjunct Pictures on Reading Comprehension*, 18 PSYCHOL. IN THE SCH. 218 (1981); W. Howard Levie & Richard Lentz, *Effects of Text Illustrations: A Review of Research*, 30 EDUC. TECH. RES. & DEV. 195 (1986); Moll, supra note 21; Chris Delp & Jeffrey Jones, Communicating Information To Patients: The Use of Cartoon Illustrations to Improve Comprehension of Instructions, 3 ACAD. EMERGENCY MED. 264 (1996); Prabu David, *News Concreteness and Visual-Verbal Association: Do News Pictures Narrow the Recall Gap Between Concrete and Abstract News?*, 25 HUM. COMM. RES. 180 (1998); Russell N. Carney & Joel R. Levin, *Pictorial Illustrations Still Improve Students' Learning from Text*, 14 EDUC. PSYCHOL. REV. 5 (2002); Russell N. Carney & Joel R. Levin, *Promoting Higher-Order Learning Benefits by Building Lower-Order Mnemonic Connections*, 17 APPLIED COGNITIVE PSYCHOL. 563 (2003); Houts et al., *supra* note 21; Chua Yan Piaw, *Using Content-Based Humorous Cartoons in Learning Materials to Improve Students' Reading Rate, Comprehension and Motivation: It is a Wrong Technique?*, 64 PROCEDIA - SOC. & BEHAV. SCI. 352 (2012); Eunmo Sung & Richard E. Mayer, *When Graphics Improve Liking but Not Learning from Online Lessons*, 28 COMPUTERS IN HUM. BEHAV. 1618 (2012); Erlijn Van Genuchten et al., *Examining Learning from Text and Pictures for Different Task Types: Does the Multimedia Effect Differ for Conceptual, Causal, and Procedural Tasks?*, 28 COMPUTERS IN HUM. BEHAV. 2209 (2012).

[54] Joel R. Levin, *On Functions of Pictures in Prose*, *in* NEUROPHYSIOLOGICAL & COGNITIVE PROCESSES IN READING 203-28 (Francis J. Pirozzolo & Merlin C. Wittrock, eds., 1981); Joel R. Levin et al., *On Empirically Validating Functions of Pictures in Prose*, *in* THE PSYCHOLOGY OF ILLUSTRATION 51-85 (Dale M. Willows & Harvey A. Houghton, eds., 1987); Russell N. Carney & Joel R. Levin, *Promoting Higher-Order Learning Benefits by Building Lower-Order Mnemonic Connections*, 17 APPLIED COGNITIVE PSYCHOL. 563 (2003).

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

[56] Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic Layout and Design into the Text of Legal Writing Documents*, 2 J. ASSN. LEGAL WRITING DIRECTORS 108, 115 (2004).

minute slower than using sentence case."[57] Many readers are likely to skip all-caps sentences.[58] Nonetheless, many court forms and materials designed for self-represented litigants include important messages entirely in uppercase.[59]

Unsurprisingly, sentence structure and length, the amount of jargon, paragraph complexity, the use of passive voice, and other familiar writing concepts all matter.[60] The education literature recommends the use of short sentences. Very short. Perhaps so short that they lack subjects and verbs. Some that are not grammatically correct. Write the way the intended user speaks and thinks. Write as though you are competing for the time and attention of busy and stressed individuals. Because you are.

III. RE-CONCEPTUALIZING SELF-HELP MATERIALS AND FORMS

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

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

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[57] *Id.* at 115 n.23 (citing the seminal article, Miles A. Tinker & Donald G. Paterson, *Influence of Type Form on Speed of Reading*, 12 J. APPLIED PSYCHOL. 359 (1928)).
[58] *Id.* at 116.
[59] *See, e.g.*, Vt. Super. Ct. Civ. Div., *Information and Instructions for the Defendant* 5, https://www.vermontjudiciary.org/eforms/Form%20257.pdf (last visited Feb. 16, 2015) ("IF YOU FAIL TO ANSWER THE SUMMONS AND COMPLAINT WITHIN THIRTY (30) DAYS OF THE DATE THAT IT WAS MAILED TO YOU, THE PLAINTIFF MAY PROCEED TO HAVE YOU PERSONALLY SERVED BY A SHERIFF OR CONSTABLE.").
[60] Access to justice commissions, legal aid organizations, and others seeking to help unrepresented individuals have rightly urged a focus on using "plain language" so that clients and other lay readers can better understand the content of the documents. Mark Adler, *Bamboozling the Public*, 9 SCRIBES J. LEGAL WRITING 167, 167-85 (2004); Kimble, *supra* note 12; Sullivan, *supra* note 12. *See supra* note 12. *But see, e.g.*, Ventura Courts Self-Help Legal Access Center, *supra* note 46 ("Every lawsuit must be brought within a certain time frame that the law provides depending on the cause of action, or legal theory being sued upon. For example, lawsuits for breach of a written contract must be brought within 4 years from the date of the breach. Lawsuits for breach of an oral contract must be brought within 2 years from the date of the breach.").

problems. In parallel projects, we are testing the effectiveness of self-help materials constructed with our hypotheses in mind.[61] The examples we provide in this Part come from materials we have developed for individuals in financial distress. We have tested many of these materials through cognitive interviews with a financially distressed population and we describe some of what we have learned in this preliminary testing below.[62] But further work is needed.

A. Overcoming Situational Barriers

1. Motivating and Engaging Through Illustrations and Cartoons

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

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

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

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[61] *See, e.g.*, *supra* note 23; Jiménez et al., *supra* note 22.
[62] *See supra* note 23; *See supra* note 32; *See supra* note 33; *See supra* note 34.
[63] *See supra* note 53. *See also* LARRY GONICK, THE CARTOON GUIDE TO ALGEBRA (2015).
[64] Moll, *supra* note 21; Delp & Jones, *supra* note 53.
[65] Moll, *supra* note 21, at 207.
[66] Peter C. Whalley & Richard W. Fleming, *An Experiment With a Simple Recorder of Reading Behavior*, 12 PROGRAMMED LEARNING & EDUC. TECH. 120 (1975); Richard E. Mayer & Roxana Moreno, *Aids to Computer-Based Multimedia Learning*, 12 LEARNING & INSTRUCTION 107 (2002);

should precede that text.[67] Learners also perform better when they do not have to split their attention between text and diagram, so to the extent possible, textual explanations should be incorporated into diagrams and pictures.[68] These explanations must be concise, or they risk increasing cognitive load.[69]

A few more lessons from the literature: graphics that are merely decorative are distracting and should not be used.[70] Neither should images that depict actions one does not want an individual to take (such as a graphic of a pregnant woman smoking in a health pamphlet).[71]

We posit, therefore, that simply drawn cartoons placed next to or before relevant text can serve both as learning aids and motivational tools.[72] As an example, we have duplicated an image we call "Blob" on the right.[73] We have tested materials using Blob and other simply drawn cartoons in the debt collection context via semi-structured cognitive interviews with debt collection defendants in small claims courts in Maine, Connecticut, and Massachusetts. Responses have been positive, with only a small minority of the over 50 defendants we have interviewed expressing a negative reaction.[74]

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

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[67] Wolfgang Schnotz, *An Integrated Model of Text and Picture Comprehension*, *in* THE CAMBRIDGE HANDBOOK OF MULTIMEDIA LEARNING 98 (Richard E. Mayer ed., 2005). *See also* Roxana Moreno & Richard E. Mayer, *A Learner-Centered Approach to Multimedia Explanations: Deriving Instructional Design Principles from Cognitive Theory*, INTERACTIVE MULTIMEDIA ELECTRONIC J. COMPUTER-ENHANCED LEARNING (Feb. 5, 2000), http://imej.wfu.edu/articles/2000/2/05/index.asp (last visited Feb. 22, 2015) (finding that learning outcomes increase when text and graphics "are physically integrated rather than separated" and when they are "temporally synchronized rather than separated in time"). *Accord* Houts et al., *supra* note 21, at 188.

[68] Rohani A. Tarmizi & John Sweller, *Guidance During Mathematical Problem Solving*, 80 J. EDUC. PSYCHOL. 424 (1988).

[69] Mayor & Moreno, *supra* note 67.

[70] Susan B. Bastable, *Literacy in the Adult Population*, *in* NURSE AS EDUCATOR: PRINCIPLES OF TEACHING AND LEARNING FOR NURSING PRACTICE 220 (Susan B. Bastable ed., 2d ed. 2003).

[71] *Id.*

[72] *See* Houts et al., *supra* note 21, at 188 (recommending using the simplest drawings possible).

[73] For an extended discussion of Blob's origins, see Greiner & Matthews, *supra* note 23.

[74] Interview by Hilary Higgins with anonymous debt collection defendant, in Boston, Ma. (Mar. 10, 2014) (using Bad Evidence Script 3) ("They helped me understand, but I don't like cartoons . . . . I'm not a cartoon person."); Interview by Alvin Lin with anonymous debt collection defendant, in Boston, Ma. (Mar. 20, 2014) (using Court Action, What Happens Script) ("She personally did not like the cartoons, but she thought that it was a good way to get less smart people to follow along.").

cartoons help."[75] Another interviewee noted that a cartoon helped her understand the text and noted that it served as ". . . a good memory tool and [is] less intimidating than just text. I'd rather read a long picture book than a short book with no pictures."[76]

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

Most individual debt collection defendants fail to appear in court and thus default.[77] If this failure to engage were addressed, it is possible that a sizeable number of cases filed against these defendants would be dismissed.[78] The slightest objection or defense raised may reveal a lack of proof of essential aspects of each allegedly delinquent account, including the amount of principal owed, the applicable interest rate, permissible charges and fees, dates of delinquency, and the proper state law governing the original debt contract.[79] How might we increase the engagement level of debt collection defendants in order to improve the function and fairness of the adjudicatory process?

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

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[75] Interview by Rachel Deschuytner with anonymous debt collection defendant, in Portland, Me. (Mar. 27, 2014).

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

Various literatures include other lessons. For example, graphics that are merely decorative are distracting and should not be used, nor should illustrations which depict *un*desired behavior (such as a pregnant woman smoking). Bastable, *supra* note 70. And experiments in the deployment of medical information have found that the use of pictures and illustrations differs by age groups. *See, e.g.*, Roger W. Morrell et al., *Effects of Labeling Techniques on Memory and Comprehension of Prescription Information in Young and Old Adults*, 45 J. GERONTOLOGY 166 (1990) (studying prescription drug labels); Beverly J. Dretzke, *Effects of Pictorial Mnemonic Strategy Usage on Prose Recall of Young, Middle-Aged and Older Adults*, 19 EDUC. GERONTOLOGY 489 (1993) (focusing on mnemonic images); *see also* Chiung-ju Liu et al., *The Use of Illustration to Improve Older Adults' Comprehension of Health-Related Information: Is it Helpful?*, 76 PATIENT EDUC. & COUNSELING 283 (2009); Julia C.M. van Weert et. al., *Tailored Information for Cancer Patients on the Internet: Effects of Visual Cues and Language Complexity on Information Recall and Satisfaction*, 84 PATIENT EDUC. & COUNSELING 368 (2011).

[77] Estimates vary, but according to some sources, at least 80% of the consumers sued fail to appear in court and consequently have default judgments entered against them. Judgments in hand, debt buyers' attorneys then obtain payment through compulsory collection processes enforced by overburdened courts, such as wage garnishment, bank account seizure, and even arrest (to compel debtors' court appearances). D. James Greiner & Andrea Matthews, *supra* note 23. Rebecca L. Sandefur, *The Importance of Doing Nothing: Everyday Problems and Responses of Inaction*, TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 123 (Pascoe Pleasence, Alexy Buck, Nigel Balmer, eds., 2007).

[78] *See* Pine Tree Lawyer for the Day Statistics.

[79] *See* Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 50 HARVARD J. ON LEGIS. 41 (2015); *See* Greiner & Matthews, *supra* note 23.

theory posits that individuals are "motivated to sustain 'self-integrity,' or perceptions that they are moral, consistent, and dependable."[80] When encountering a message that threatens their self-integrity, individuals may "denigrate the message" as a way to restore their self-image.[81] For example, studies have shown that among smokers, those at the highest risk for negative health outcomes "are the least likely to accept or respond" to a message about the negative health consequences of smoking.[82] "The implication is that any health message that is perceived as threatening to the individual will be unsuccessful in changing behavior unless this type of defensive processing can be overcome."[83] Self-affirmation exercises aim to shortcut this type of defensive processing by reminding individuals of positive values about themselves before they encounter the threatening information.[84]

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

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

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[80] William M. P. Klein & Peter R. Harris, *Self-Affirmation Enhances Attentional Bias Toward Threatening Components of a Persuasive Message*, 20 PSYCHOL. SCI. 1463, 1463 (2009).
[81] *Id.*
[82] Christopher J. Armitage et al., *Self-Affirmation Increases Acceptance of Health-Risk Information Among UK Adult Smokers with Low Socioeconomic Status*, 22 PSYCHOL. ADDICTIVE BEHAV. 88, 88 (2008).
[83] *Id.*
[84] *See, e.g.*, Peter R. Harris, Kathryn Mayle, Lucy Mabbott, & Lucy Napper, *Self-Affirmation Reduces Smokers' Defensiveness to Graphic On-Pack Cigarette Warning Labels*, 26 HEALTH PSYCHOL. 437 (2007).
[85] *See* Zachary Hill & D. James Greiner, *The Possibilities of Self-Affirmation Theory in Civil Justice*, CLEARINGHOUSE REV. (Nov.-Dec. 2014).
[86] Christine Logel & Geoffrey L. Cohen, *The Role of the Self in Physical Health, Testing the Effect of a Values-Affirmation Intervention on Weight Loss*, 23 PSYCHOL. SCI. 53 (2012), *available at* http://pss.sagepub.com/content/23/1/53.
[87] *See id.* at 53.

Considerable research in non-legal contexts supports our hypothesis.[88] Public health researchers have used written self-affirmation exercises to spur individuals to take action on diet, exercise, or cleanliness.[89] Many of these studies are randomized control trials, the gold standard in evaluating interventions.[90] One study, examining the effect of self-affirmation theory on alcohol consumption, tested whether a self-affirmation exercise enabled processing of the "threatening message" to reduce drinking.[91] The research concluded that self-affirmation was effective in reducing alcohol intake "by facilitating the processing of health risk information."[92] Similar studies in the context of education found that identity-based threats to performance among racial minorities and women/girls in STEM (science, technology, engineering and math) subjects were blunted by the subjects' engagement in self-affirmation exercises.[93]

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

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[88] Christopher J. Armitage et al., *Evidence that Self-Affirmation Reduces Alcohol Consumption: Randomized Exploratory Trial With a New, Brief Means of Self-Affirming*, 30 HEALTH PSYCHOL. 633 (2011) [hereinafter Armitage et al., *Self-Affirmation Reduces Alcohol Consumption*]; David A. K. Sherman et. al., *Do Messages About Health Risks Threaten the Self? Increasing the Acceptance of Threatening Health Messages via Self-Affirmation*, 26 PERSONALITY & SOC. PSYCHOL. BULL.1046 (2009); Amy McQueen & William M. P. Klein, *Experimental Manipulations of Self-Affirmation: A Systematic Review*, 5 SELF & IDENTITY 289 (2006); Lucy Napper et. al., *Developing and Testing a Self-Affirmation Manipulation*, 8 SELF & IDENTITY 42 (2009); Andy Martens et. al., *Combating Stereotype Threat: The Effect of Self-Affirmation on Women's Intellectual Performance*, 42 J. EXPERIMENTAL SOC. PSYCHOL. 236 (2006); Rachel B. Fry & Steven Prentice-Dunn, *Effects of Coping Information and Value Affirmation on Responses to a Perceived Health Threat*, 17 HEALTH COMM. 133 (2005).

[89] Self-affirmation theory is credited to Claude M. Steele. *See* in particular, CLAUDE M. STEELE, *Chapter 6: The Psychology of Self-Affirmation: Sustaining the Integrity of the Self, in* 21 ADVANCES IN EXPERIMENTAL PSYCHOLOGY 261–302 (1988). For a review of positive affect theory, see ALICE M. ISEN, *Chapter 48: A role for neuropsychology in understanding the facilitating influence of positive affect on social behavior and cognitive processes, in* THE OXFORD HANDBOOK OF POSITIVE PSYCHOLOGY 503-518 (2d ed. 2009).

[90] *See, e.g.*, Armitage et al., *Self-Affirmation Reduces Alcohol Consumption*, *supra* note 88; Mary E. Charlson et. al., *Randomized Controlled Trials of Positive Affect and Self-Affirmation to Facilitate Healthy Behaviours in Patients with Cardiopulmonary Diseases: Rationale, Trial Design, and Methods*, in 28 CONTEMPORARY CLINICAL TRIAL 748 (2007); *See* also 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, 2121 (2011).

[91] Christopher J. Armitage et al., *supra* note 82.

[92] Logel & Cohen, *supra* note 86.

[93] These threats were measured by tests at a variety of ages, across a variety of specific classroom subjects, and across a variety of group identities. Steven J. Spencer et al., *Stereotype Threat and Women's Math Performance*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 28 (1999); Joshua Aronson & Michael Inzlicht, *The Ups and Downs of Attributional Ambiguity: Stereotype Vulnerability and the Academic Self-Knowledge of African-American Students*, 15 PSYCHOL. SCI. 829 (2004); Toni Schmader et al., *The Costs of Accepting Gender Differences: The Role of Stereotype Endorsement in Women's Experience in the Math Domain*, 50 SEX ROLES 835 (2004); Geoffrey L. Cohen et al., *Reducing the Racial Achievement Gap: A Social-Psychological Intervention*." 313 SCI. 1307 (2006); Geoffrey L. Cohen at al., *Recursive Processes in Self-Affirmation: Intervening to Close the Minority Achievement Gap*, 324 SCI. 400 (2009); Sian L. Beilock et al., *Stereotype Threat and Working Memory: Mechanisms, Alleviation, and Spillover*, 136 J. EXPERIMENTAL PSYCHOL. 256 (2007); Akira Miyake et al., *Reducing the Gender Achievement Gap in College Science: A Classroom Study of Values Affirmation*, 330 SCI. 1234 (2010).

who were not similarly treated.[94] The researchers concluded that "affirming people's values helps them maintain self-control in difficult situations or buffers them against life stressors."[95] They further noted that self-affirmations "interrupted a feedback loop in which failure to achieve health goals worse[ned] psychological functioning, which in turn increase[d] the risk of further failure in a repeating cycle."[96] Other studies have confirmed that self-affirmation exercises can reduce stress,[97] help individuals cope with layoffs,[98] reduce students' tendency to self-handicap before a test,[99] boost self-control after self-control has been depleted,[100] and help buffer self-esteem in victims of domestic violence.[101]

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

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

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

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

[97] J. David Creswell, William T. Welch, Shelley E. Taylor, David K. Sherman, Tara L. Gruenewald and Traci Mann, *Affirmation of Personal Values Buffers Neuroendocrine and Psychological Stress Responses*, 16 PSYCHOL. SCI. 846 (2005); David K. Sherman and Debra P. Bunyan, J. David Creswell, Lisa M. Jaremka, *Psychological Vulnerability and Stress: The Effects of Self-Affirmation on Sympathetic Nervous System Responses to Naturalistic Stressors*, 28 HEALTH PSYCHOL. 554 (2009).

[98] Batia Wiesenfeld, Joel Brockner, Barbara Petzall, Richard Wolf & James Bailer, *Stress and Coping Among Layoff Survivors: A Self-Affirmation Analysis*, 14 ANXIETY, STRESS & COPING 15 (2001); Barbara J. Petzall, Gerald E. Parker, Philipp A. Stoeberl, *Another Side to Downsizing: Survivors' Behavior and Self-Affirmation*, 14 J. BUS. & PSYCHOL. 593 (2000); Batia Wiesenfeld, Joel Brockner, *A Self-Affirmation Analysis of Survivors' Reactions to Unfair Organizational Downsizings*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 441 (1999).

[99] Charles E. Kimble , Emily A. Kimble & Nan A. Croy, *Development of Self-Handicapping Tendencies*, 138 J. SOC. PSYCHOL. 524 (1998).

[100] Brandon J. Schmeichel and Kathleen Vohs, *Self-Affirmation and Self-Control: Affirming Core Values Counteracts Ego Depletion*, 96 J. PERSONALITY & SOC. PSYCHOL. 770 (2009).

[101] Shannon M. Lynch and Sandra A. Graham-Bermann, *Woman Abuse and Self-Affirmation: Influences on Women's Self-Esteem*, 6 VIOLENCE AGAINST WOMEN 178 (2000).

Remember, you're a good person!

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

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

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

Or think of your own words that describe you:

- ☐ _____
- ☐ _____

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

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

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

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

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

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

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

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

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[102] Fox, *supra* note 16, at 94 (defining self-agency as comprising those three elements).
[103] *Id.*
[104] Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 777 (2001).
[105] Nicole Loorbach et al., *Adding Motivational Elements to an Instruction Manual for Seniors: Effects on Usability and Motivation*, 54 TECHNICAL COMM. 343 (2007).
[106] Many courts have found as much. Miller v. Javitch, Block & Rathbone, 561 F.3d 588 (6th Cir. 2009).
[107] Royal Financial Group v. Perkins, 414 S.W.3d 501 (Mo. Ct. App. 2013); Consent Order, *In re* JPMorgan Chase Bank, N.A., No. AA-EC-13-76 (Comptroller of the Currency, U.S. Dep't of the Treasury 2013).
[108] In-person conversation with Mnookin in Boston, Ma. (2013).

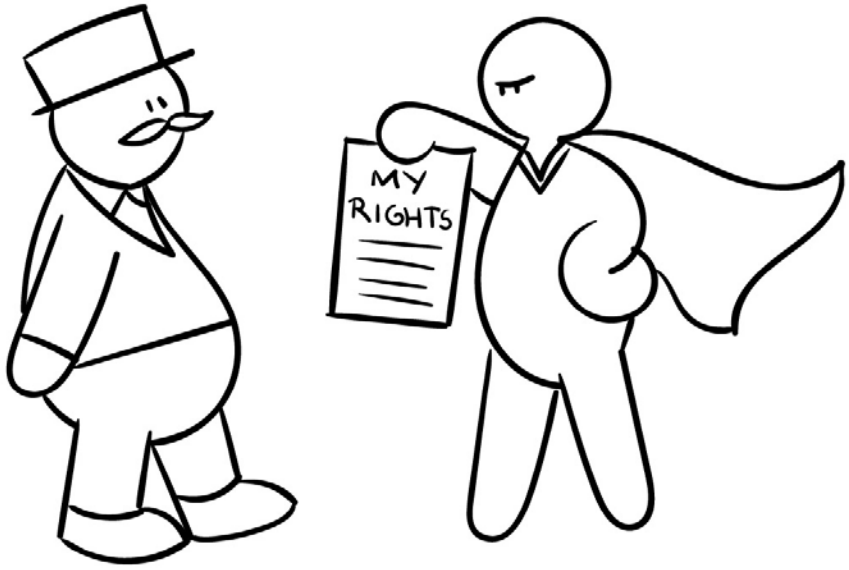
practicing a negotiation (with a friend or in front of a mirror). That someone else might be a fictional lawyer from a television program, a relative, a historical figure, or anyone the study subject thinks of as strong, confident, and unafraid.[109]

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

> Don't know how to talk to bullies?
>
> Think of someone who does. Someone confident.
>
> They can be someone you know, someone on TV, or someone in a movie.
>
> 
>
> Write that person's name here: _____.

[109] In-person conversation with Robert Bordone, in Cambridge, Ma. (2013).

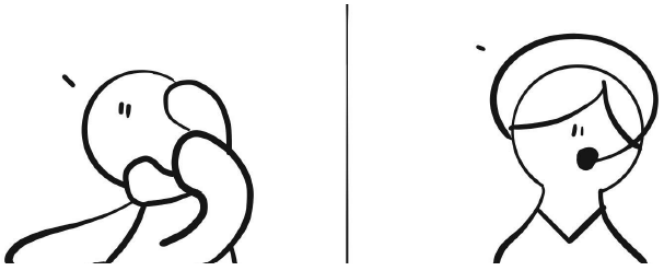
Now think about how that person would act around a bully.



Now think about how that person would talk to a bully.

Finally, we hypothesize that visualization techniques in preparation for a negotiation might also increase the individual's capability. This may involve presenting potential setbacks individuals may encounter when trying to represent themselves, and requesting that they visualize what they will do in response. The

example below prepares individuals to "stick to their guns" when they do not immediately encounter a helpful person on the phone.

> The loan company representative or debt collector might not be very nice. They might tell you that you can't have certain options. They might tell you there's nothing they can do for you. Practice how you will respond. For example, you might say this:
>
> "What you are asking me to pay is impossible.
> I want to speak to your supervisor."
>
> 

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

4. Demystifying Legal Mundanity

Earlier, we posited that a lack of knowledge of legal mundanity hinders lay individuals' self-confidence and trust in self-help materials. To counter this, civil legal materials could include what would appear to a lawyer to be trivial logistical information about the legal process: where an individual should go, what she will see when she arrives in court, when to raise her hand to show that she is present. As suggested earlier, the purpose of providing this information is two-fold: (i) to inform lay individuals regarding what they actually need to know to deploy professional legal knowledge effectively, and (ii) to instill confidence in the other parts of the materials, the parts that contain what for lawyers is "substantive" information.

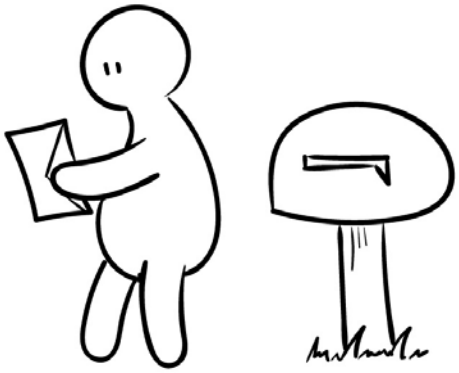
The next few pages show selections from a packet our students and we have created on how respond to a debt collection lawsuit.[110] Its target audience is debt collection defendants in Maine, where one of our studies is taking place.

When do I go to court?

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

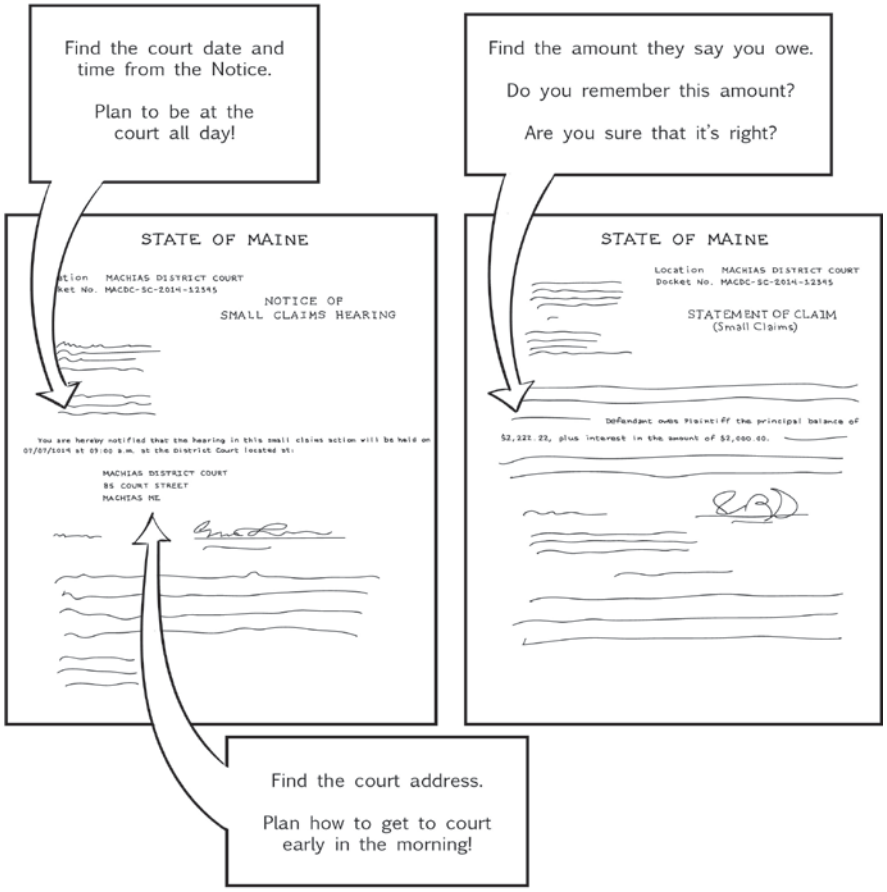
So, watch for a letter from the court.

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



[110] Court Action, What Happens (May 2014) (unpublished interview script) (on file with authors).

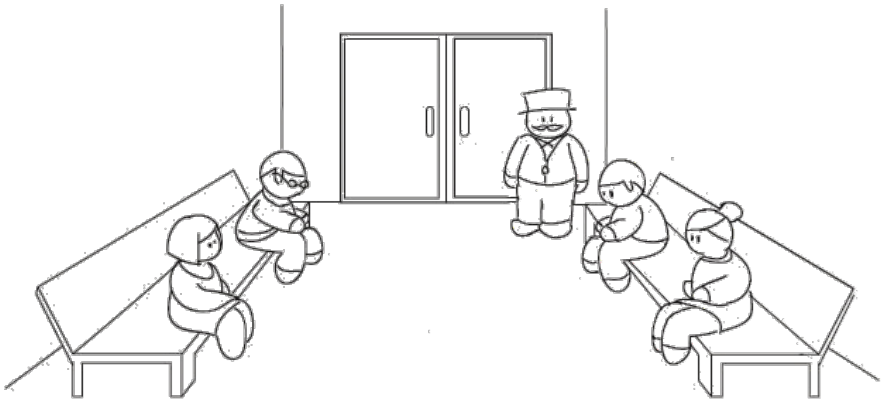
When you get the paper that says "Notice of Small Claims Hearing":



The images above address what the individual will see before coming to court. What about court itself? Court is an unfamiliar and intimidating place. In fact, courts are designed to be intimidating; they may have to be intimidating to induce litigant compliance with their rulings. But, as we have suggested, most people cannot fight feelings of intimidation and perform unfamiliar and complex tasks well at the same time. Thus, we created the following images from our self-help packet. Note the level of detail, which is designed to inform and to instill trust.

What To Expect When You First Get to Court

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



It might be crowded. Don't worry! Go find your courtroom. If none of the papers you have tells you which courtroom, ask a security guard where **small claims court** is.

We hypothesize that self-help materials should discuss as much as possible of the process as the individual is likely to encounter. For example, if most defendants in a particular type of case are sent to mediation, the materials should explain this, and provide details about what to expect during the mediation process. We hypothesize that providing this detail will increase the individual's confidence and comfort in an unfamiliar situation.

5. Aiding with Plan-Making and Implementation Strategies

Lay individuals addressing justiciable problems need to plan and to execute a number of complex tasks. These might involve responding to a lawsuit within a short time period, keeping track of notices to know when to come to court, or arranging transportation or leave from work to attend a court hearing. The behavioral economics, psychology, and public health literatures have insights that could aid LMI individuals in plan making and plan execution.[111]

[111] For a review of implementation intentions that work, *see* Todd Rogers et al., *Making the Best Laid Plans Better: How Plan-Making Prompts Increase Follow-Through*, 1 BEHAV. SCI. & POL'Y (forthcoming 2015), available at http://scholar.harvard.edu/files/todd_rogers/files/making_0.pdf (last visited Feb. 28, 2015).

Research from these fields on how people can achieve their goals tells us first that if the goals are specific,[112] proximate,[113] and characterized as learning exercises rather than as performance, they are most likely to be met.[114] The framing of the goals also matters; goal attainment is more likely if the goal is framed positively (losing weight will give me more energy) rather than negatively (being obese will lead to heart disease).[115]

Similarly, simple prompts increase follow-through on achieving goals.[116] In the public health context, something as simple as the inclusion of a sticky note with the language: "Don't forget! Colonoscopy appointment with: ____ on: _____," attached to a reminder to undergo a colonoscopy significantly increased patient compliance.[117] The sticky-note worked by addressing three different barriers to intention implementation: (i) cognitive, by associating a future cue (the date) with a plan of action (the appointment), (ii) logistical, by providing a solution to the practical challenge of remembering the date and time of the appointment, and (iii) material, by offering a visual reminder of the appointment.[118] Political scientists have used similar measures to promote voting.[119]

Research from these fields also suggests that implementation intentions can aid the follow through on achievement of goals.[120] Implementation intentions, structured as "when situation X happens, I will perform response Y," facilitate a commitment to responding to a specific circumstance in a particular way.[121] When an individual identifies a potential situation or circumstance and pre-identifies an action in response, that action becomes mentally accessible and easier to act on.[122] The pre-planned response requires less conscious intent. The implementation intention places the achievement of a goal under the direct control

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[112] EDWIN A. LOCKE ET. AL., A THEORY OF GOAL SETTING AND TASK PERFORMANCE (1990).
[113] Albert Bandura & Dale H. Schunk, *Cultivating Confidence, Self-Efficacy, and Intrinsic Interest Through Proximal Self-Motivation*, 41 J. PERSONALITY & SOC. PSYCHOL. 586 (1981).
[114] Carol S. Dweck, *Implicit Theories as Organizers of Goals and Behavior*, *in* THE PSYCHOLOGY OF ACTION: LINKING COGNITION AND MOTIVATION TO ACTION 69 (Peter M. Gollwitzer & John A Bargh eds., 1996).
[115] Peter M. Gollwitzer, *Implementation Intentions: Strong Effects of Simple Plans*, 54 AM. PSYCHOL. 493, 494 (1999).
[116] Katherine L. Milkman et al., *Following Through on Good Intentions: The Power of Planning Prompts* (Nat'l Bureau of Econ. Research, Working Paper No. 17995, 2012), *available at* http://nrs.harvard.edu/urn-3:HUL.InstRepos:8830778 (last visited Feb. 28, 2014).
[117] Milkman, *supra* note 116, at 2.
[118] *Id.* at 3-4.
[119] David W. Nickerson & Todd Rogers, *Do You Have a Voting Plan?: Implementation Intentions, Voter Turnout, and Organic Plan Making*, 21 PSYCHOL. SCI. 194 (2010).
[120] "I want to achieve Y" is how a goal intention is phrased. *Id.* at 494.
[121] *Id.* at 494-95.
[122] *Id.*

of "situational cues," partially removing the action from "conscious and effortful control."[123]

We can apply these lessons to the legal context, then test to see if they work. For example, a self-help assistance packet or a notice can include sticky notes to be placed on refrigerators or wall calendars.[124] Legal materials can include blank lines for recipients to write down the dates, times, and locations of court hearings.[125] If information is to be delivered electronically—via an app or the web, for example—the individual can be prompted to sign up for reminders either through e-mail or text.

B. Overcoming Barriers to Understanding

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

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

Studies from other fields have found that roadmaps or summaries help readers understand relationships among concepts.[126] The education literature identifies two specific strategies to do this: content overviews and advance organizers. The literature is mixed on which of these approaches are most effective, and the answer likely depends on the purpose of the material. Both tools may be helpful if included in civil legal materials for the lay individual.

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[123] *Id.* at 495.
[124] J. Beshears et al., A Nudge to Help Employees Follow-Through on Their Best-Laid Plans: The Potency of Implementation Intentions Reminders (unpublished manuscript) (on file with authors).
[125] Katherine L. Milkman et al., *Using Implementation Intentions Prompts to Enhance Influenza Vaccination Rates* (Nat'l Bureau of Econ. Res., Working Paper No. 17183, 2011).
[126] "Both signals and advance organizers help provide the reader with the hierarchical structure of the materials. Ultimately, this contributes to better recall because the reader better understands the relationship among subtopics." Robbins, *supra* note 56, at 124 (citing Robert F. Lorch et. al., *Effects of Signaling Topic Structure on Text Recall*, 85 J. EDUC. PSYCHOL. 281, 287 (1993)). "Advance organizers such as roadmaps or summaries create a learning base that the reader can call upon as pre-learned material when later introduced to the material in more depth." *Id.* at 124-26.

Content overviews consist of concise outlines that provide the reader with a map of the content in the text.[127] They help prepare the learner for the task ahead and are especially helpful when the learners have lower ability levels and when students must learn facts or concepts, two conditions that are likely to be in the context of legal self-help materials.[128] Overviews are useful when material can be broken up into different units and can be structured either in prose or outline form. They are only successful to the extent they are simple and precise.[129] Research suggests that having each new section contain a small content overview before it begins is superior to producing a single, large overview at the beginning of the material.[130]

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

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

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

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[127] Percy W. Marland & Ronald E. Store, *Some Instruction Strategies for Improved Learning from Distance Teaching Materials*, *in* DISTANCE EDUCATION: NEW PERSPECTIVES 145 (Magnus John & Desmond Keegan eds., 1993).

[128] GARY R. MORRISON ET AL., DESIGNING EFFECTIVE INSTRUCTION (6th ed. 2011); James Hartley & Ivor K. Davies, *Pre-Instruction Strategies: The Role of Pretests, Behavioral Objectives, Overviews and Advance Organizers*, 46 REV. EDUC. RES. 239, 246 (1976) (noting that content overviews "prepare" and advance organizers "clarify"). Content overviews are also helpful for "holist" learners, individuals who prefer a subject overview before filling in the details. John J. Sparkes, *Matching Teaching Methods to Educational Aims in Distance Education*, *in* THEORETICAL PRINCIPLES OF DISTANCE EDUCATION 135 (Desmond Keegan ed., 1993).

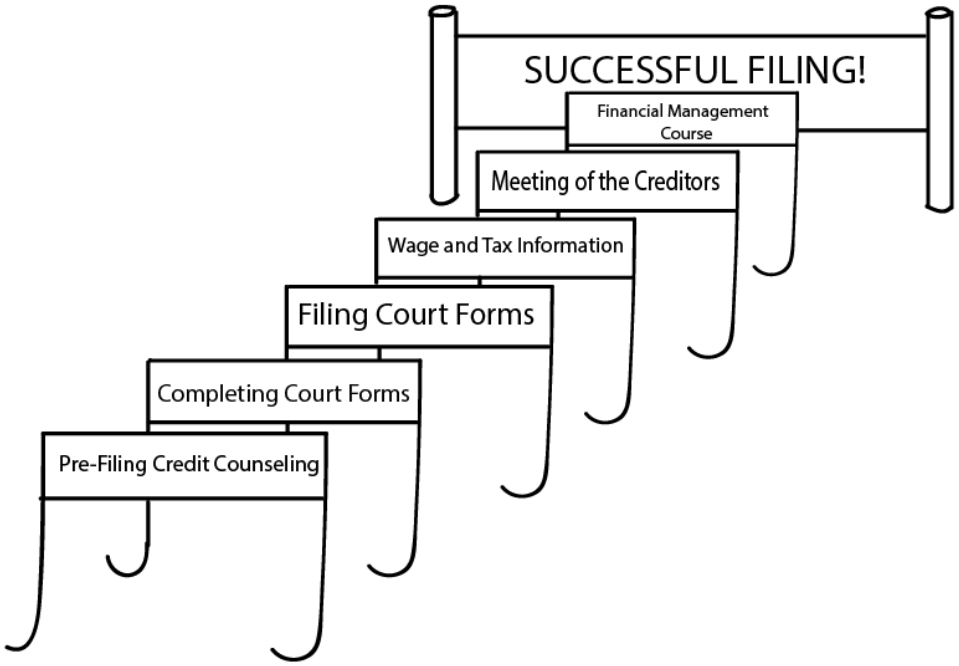
[129] Hartley & Davies, *supra* note 128, at 244.

[130] *Id.*

[131] Note that this passage is written at the 1.8 grade level in the Flesch-Kinkaid scale. *See* READIBILITYSCORE.COM, www.readability-score.com (last visited July 28, 2015).

organizers are most useful when the material works hierarchically, from more inclusive to less inclusive.[133] For example, to help an individual defend herself in a lawsuit, an organizer might make a general statement about how required tasks in litigation fit together. For example, "Any legal proceeding in court can be broken down into a number of smaller parts. With each task that is performed successfully, you move closer to winning the case." This statement could be accompanied by a flowchart showing the sequence of steps subjects are likely to encounter in the courtroom.

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



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

[133] Marland & Store, *supra* note 127.

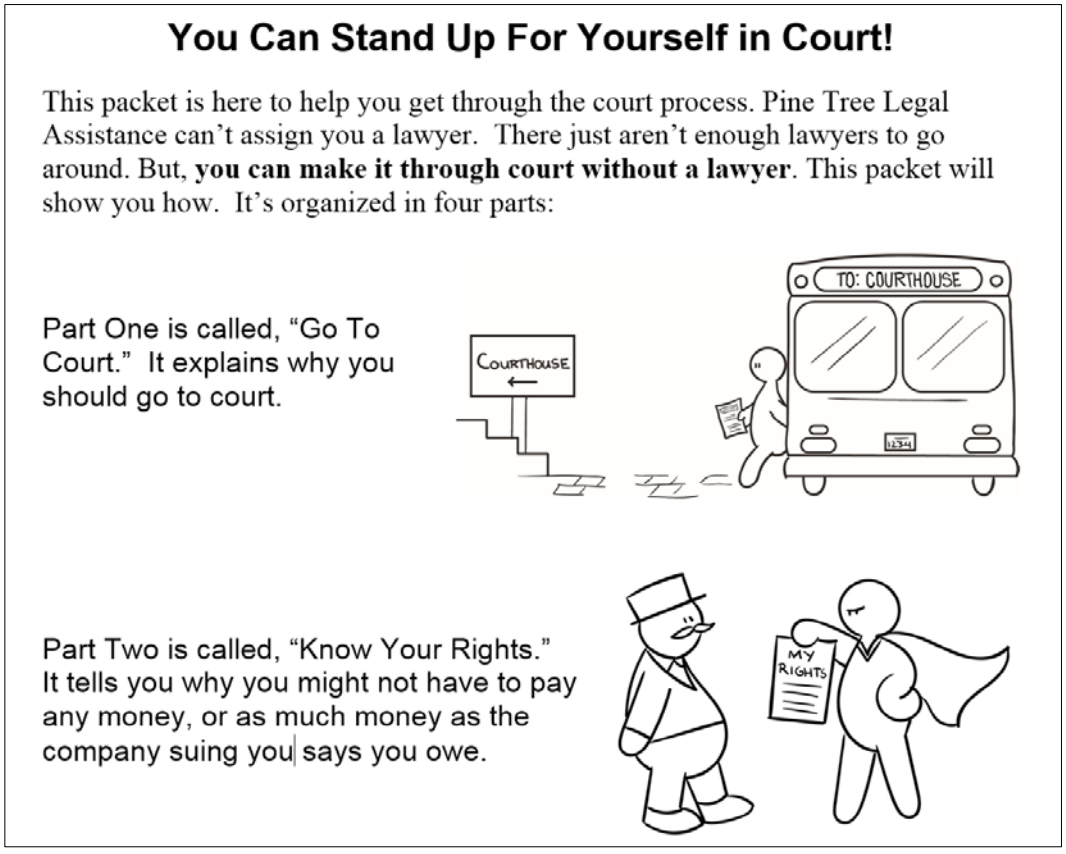
Some researchers have found that advanced organizers that highlighted the ease of use of the material, and that noted that no prior knowledge was necessary to perform the tasks, increased study subjects' confidence in their abilities and reduced anxiety.[134] Subjects who received materials with these types of organizers demonstrated better learning outcomes and were less likely to be discouraged and walk away from a task.[135]

2. Organizing and Structuring Content

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

Providing an outline at the beginning of the text can help readers see the structure of the text and enables them to read the text nonlinearly if they choose.[136] Below is an example of the first page of a packet designed to help an unrepresented individual defend herself in court:

[134] Loorbach, *supra* note 105, at 345, 350.
[135] *Id.* at 350.
[136] James Hartley, *Designing Instructional and Informational Text*, *in* HANDBOOK OF RESEARCH ON EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY 925 (David H. Jonassen ed., 2004) [hereinafter Hartley 2004].



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

[137] Lorch, *supra* note 126, at 269.
[138] *Id.* at 264, 268, 270. Jukka Hyona & Robert F. Lorch, *Effects of Topic Headings on Text Processing: Evidence from Adult Readers' Eye Fixation Patterns*, 14 LEARNING & INSTRUCTION 131, 133 (2004). Headings also produce a slight decrease in recall of familiar topics, Lorch, *supra* note 126, at 268, but this is unlikely to be an issue in the case of legal materials for a lay audience. When undergraduate readers are presented information without headings, they rely on length as a cue for determining what is important and what is not; when they are presented with headings, however, they do not rely on length as a cue. *Id.* at 273. If choosing not to use headings in parts of self-help materials, designers should be mindful of the fact that the length of the presentation of the topics might influence the level of importance readers assign to the topics.
[139] Hyona, *supra* note 138, at 133.

context of the text structure.[140] Topic headings reduce the burden of these transitions.

Research also suggests the best order in which to present information. For example, information ordinarily should be presented chronologically, as this will make it easier for readers to follow.[141] When possible, threatening information should be presented first, followed by subject-specific information that will help the individual cope with the threat.[142] Studies have found that this order of presentation energizes the reader, whereas the reverse leaves them feeling alarmed and overwhelmed.[143] Based on this research, self-help materials might present the consequences of, for example, not coming to court first, followed by an explanation that the information packet contains information that will help the individual avoid those consequences.

At the paragraph level, a prominent education scholar recommends the use of signal words to develop the conceptual structure of the passage. Some words ("in contrast") signal comparisons; others ("first," "second," "reasons for this are") signal the structure of the argument; still others ("therefore," "as a result") signal causal relationships.[144] This recommendation is not universal,[145] but it may help older readers the most.[146] One way to reconcile the disagreement in the studies is

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[140] *Id.*

[141] Hartley 2004, *supra* note 136, at 929.

[142] Steven Prentice-Dunn et. al., *Effects of Persuasive Message Order on Coping with Breast Cancer Information*, 16 HEALTH EDUC. RES. 81, 84 (2001). It should be noted, however, that this study only measured initial attitudes, not later behavior in response to the information.

[143] *Id.*

[144] Hartley 2004, *supra* note136, at 927.

[145] *See, e.g.*, Barstable, *supra* note 70, at 218 (recommending that one limit the use of transition phrases because they lengthen sentences and make them harder to read).

[146] James Hartley, *What Does It Say? Text Design, Medical Information and Older Readers*, *in* PROCESSING OF MEDICAL INFORMATION IN AGING PATIENTS 239 (Denise C. Park, Roger W. Morrell, & Kim Shifrin eds., 1999). We note that there is considerable evidence that age influences the processing of information. Experiments in the deployment of medical information have found that the use of pictures and illustrations differs by age groups. *See, e.g.*, Roger W. Morrell et al., *Effects of Labeling Techniques on Memory and Comprehension of Prescription Information in Young and Old Adults*, 45 J. GERONTOLOGY 166 (1990) (studying prescription drug labels); Beverly J. Dretzke, *Effects of Pictorial Mnemonic Strategy Usage on Prose Recall of Young, Middle-Aged and Older Adults*, 19 EDUC. GERONTOLOGY 489 (1993) (focusing on mnemonic images); *see also* Chiung-ju Liu et al., *The Use of Illustration to Improve Older Adults' Comprehension of Health-Related Information: Is it Helpful?*, 76 PATIENT EDUC. & COUNSELING 283 (2009); van Weert et al., *supra* note 76. A note of caution, therefore, seems appropriate. Individuals above the age of 60 may process professional legal information differently from younger individuals. Materials may need to address different populations differently. *See also* Morrow et al., *Designing Medical Instructions for Older Adults, in* PROCESSING OF MEDICAL INFORMATION IN AGING PATIENTS (Denise C. Park et al. eds., 1999); Morrow et al., *supra* note 148; Morrow et al., *The Influence of List Format and Category Headers on Age Differences in Understanding Medication Instructions*, 24 EXPERIMENTAL AGING RES. 231 (1998); James Hartley et al., *The Effects of Line-Length and Paragraph Denotation on the Retrieval of Information From Prose Text*, 12 VISIBLE LANGUAGE 183 (1978); Prentice-Dunn et al., *supra* note 142; MAKING YOUR WEBSITE SENIOR FRIENDLY: A CHECKLIST, NAT'L INST. ON AGING & NAT'L LIBRARY OF MED., *available at* http://www.nlm.nih.gov/pubs/checklist.pdf; Pamela W. Henderson et al., *Impression Management Using*

to note that it signaling words seem to be particularly helpful in the absence of headings.[147]

At the sentence level, thematic grouping of items in lists may be helpful when there are a large number of instructions.[148] Such groupings can help provide structure and organization. In a list, the most important information can be placed first and last, as this is where readers are most likely to look.[149] Finally, lists should be separated from the main text using bullets or numbers and listed vertically instead of within a paragraph.[150]

3. Commoditizing the Process: Maximizing Procedural Knowledge

Prior research has established that many legal issues faced by higher-income and educated individuals can be addressed by legal professionals with routinized responses. Some law can be commoditized.[151] Moreover, commoditized legal offerings can be faster, cheaper, and potentially less prone to error for many clients. Building on the distinction between conceptual and procedural knowledge discussed previously, we hypothesize that the same is true for the justiciable problems faced by LMI individuals.

Commoditized law is everywhere. Courts and LSPs use check-the-box and fill-in-the-blanks complaint and answer forms.[152] Document assembly computer programs exist on the web.[153] We propose even more simplistic forms than those currently available, with some tailored to an individual's situation. Printed below is a portion of an answer form for a lay individual responding to a debt collection

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Typeface Design, 68 J. MARKETING 60 (2004); Lonsdale et al., *supra* note 55; Marieke Kools et al., *The Effect of Graphic Organizers on Subjective and Objective Comprehension of a Health Education Text*, 33 HEALTH EDUC. & BEHAV. 760 (2006); Larson, *supra* note **Error! Bookmark not defined.**.

[147] Jan H. Spyridakis, Signaling Effects: Increased Content Retention and New Answers—Part 2, 19 J. TECH. WRITING & COMM. 395, 408 (1989).

[148] Morrow et al., *List Formats Improve Medication Instructions for Older Adults*, 21 EDUC. GERONTOLOGY 151 (1995).

[149] Bastable, *supra* note 70, at 267. Psychologists term this the "serial position effect." *See* Saul McLeod, *Serial Position Effect*, SIMPLYPSYCHOLOGY (2008), http://www.simplypsychology.org/primacy-recency.html (last visited July 3, 2015).

[150] *Id.* at 926.

[151] Jerry Van Hoy, *Selling and Processing Law: Legal Work at Franchise Law Firms*, 29 LAW & SOC'Y REV. 703, 715-22 (1995); Kritzer, *supra* note 3.

[152] *See, e.g.*, STATE OF MICHIGAN JUDICIAL CIRCUIT FAMILY COUNTY DIVISION, PETITION FOR DIRECT PLACEMENT ADOPTION (June 2013), *available at* http://courts.mi.gov/Administration/SCAO/Forms/courtforms/adoptions/pca301a.pdf [http://perma.cc/B8CN-WPVJ] (last visited Feb. 28, 2015).

[153] *See, e.g.*, Legal Paperwork Assistance, TURBO COURT, https://turbocourt.com/go.jsp?act=actShowState&tmstp=1426554638745&id=29465829 (last visited July 29, 2015) (New Hampshire small claims court initiation process).

lawsuit. Following the plain English explanation, in italics, is language that expresses the legal implications of the preceding sentence. The non-italics text is written at a fourth-grade level.[154] The language in italics, in contrast, is at a ninth-grade level.[155] The answer form invites the reader to pay no attention to the latter.

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

ANSWER

I believe I have the following defenses that support my argument that I am not legally responsible to pay the Plaintiff:

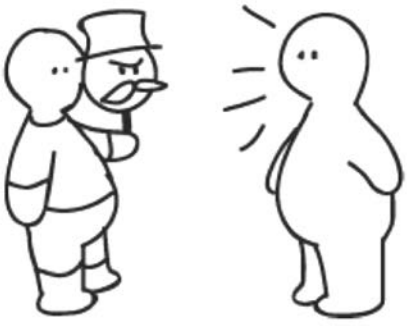
Check <u>each</u> box that applies to you!
Don't worry about the italics. They're for the judge.

☐ I do not know the company suing me. I do not remember ever doing any business with this company. *Therefore, I deny that I owe this company any money.*

☐ Even if I did owe some money, I do not know if this amount is right. I do not know how they came up with this amount. *Therefore, I deny that I owe it.*

☐ I am not the person named in the papers I received about this lawsuit. *Therefore, I deny that I owe this company any money.*

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



Practice with a friend.

[154] Tested using www.readability-score.com, *see supra* note 131; 3.7 in Flesch-Kincaid scale.
[155] Tested using www.readability-score.com, *id*.; 8.5 in Flesch-Kincaid scale.

Finally, we hypothesize that visualizing what could happen in court whenmay even enable the lay individual speaks up will also help instill confidence.

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

When it's your turn to talk, you can read this to the judge!

Your Honor, there are three problems here:

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

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

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

Also, Your Honor, if the lawyer is not an **"original creditor"**:

Please check that the lawyer's company has proved they've got the rights to my particular account. The lawyer has to produce a contract, with my account number on it, that shows that they bought my account. Otherwise, it's not enough. And again, please make sure that someone with "personal knowledge" signed any papers the lawyer has. Without "personal knowledge" about my particular account, with my account number, I don't know that this lawyer has the rights to my specific account.

4. Teaching Concepts by Analogy where Conceptual Knowledge is Needed

Legal professionals are trained as decision-makers and problem-solvers.[156] Effective decision-making and problem solving grow out of a professional's ability to organize a vast body of knowledge and recognize patterns in factual circumstances and possible solutions.[157] According to researchers, professionals acquire this ability by induction (either through drawing on experiences in similar context or through repeated experiences with the topic in question) or by analogical reasoning.[158]

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

In such circumstances, the literature suggests that teaching by use of analogy, preferably multiple analogies, can be more effective than abstract instruction.[159]

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

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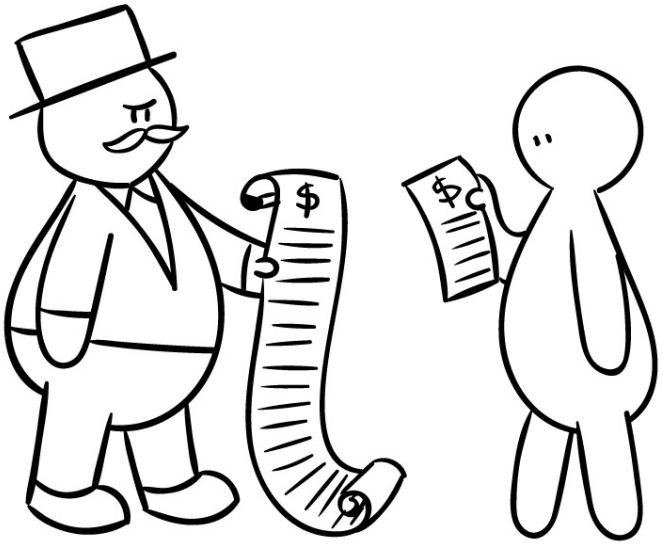
[156] Gary Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995).
[157] *Id.*
[158] *Id.* at 356.
[159] Anderson, *supra* note 39; Blasi, *supra* note 44, at 359; Mary L. Gick & Keith J. Holyoak, *Schema Induction and Analogical Transfer*, 15 COGNITIVE PSYCHOL. 1, 32 (1983).

Don't Pay if it's the Wrong Amount!



Don't give away your money!

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

It's the same way in court!

Some lawyer has said that you owe their company an amount of money. Do you remember that amount? Is that amount exactly how much you remember owing? If not, ask for the proof!

IV. TESTING NEW MATERIALS: AN ITERATIVE PROCESS

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

This section suggests ways to test proposed self-help materials. It also describes some of what we have learned while testing our financial distress materials.

A. What We Know About Testing

Research highlights the need to test distinct parts of materials, such as individual illustrations, as well as the whole.[160] Computer-based tests can be a good first step to ensuring the readability of instructional materials;[161] they are easy-to-use and helpful.[162] However instructional texts should always undergo multiple kinds of testing, and some research suggests that computer readability scores can be suspect in the legal context.[163]

What can we learn from other fields about testing the effectiveness of legal texts on human subjects? To test comprehension of the material, cognitive psychologists suggest asking open-ended questions.[164] Specifically, scholars have developed four categories of comprehension questions that can be asked about a text: "text base macro, text base micro, situation model macro, and situation model micro questions."[165]

Text base questions are ones whose answers are "stated literally in the text," either on the macro (global, or heading-level) or micro (local, or sentence-level) levels.[166] Answering these questions correctly means that the reader is able to recall portions of a text literally; that is, they have at least a superficial understanding of it.[167] For example, a text base macro question about a set of materials on student loan repayment options might ask: what are the two repayment options available to federal student loan borrowers? A text base micro question might ask: "what kinds of questions should you ask a student loan counselor about your loan?"

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[160] Houts et al., *supra* note 21, at 189.
[161] Bastable, *supra* 70. These tests may be useful but should be used with caution. First, different types of word processing software—even different versions of the same software—encode the same readability measure in slightly different ways; thus one must use the same software version to process different texts. Hartley 2004, *supra* note 136, at 932.
[162] Computer-based formulas tend to reward short, choppy sentences; but if overdone, these can be difficult to read. *Id.* Formulas also disregard the order of words and sentences, something that can be critical to a person's understanding. *Id.*
[163] Charrow & Charrow, *supra* note **Error! Bookmark not defined.**, at 1341.
[164] Kools et al., *supra* note 146. Designers should limit the use of multiple choice questions, as these do not tell us what the person does not understand *Id.* at 770.
[165] Kools et al., *supra* note 146, at 4. *See also* Rikj Hofman and Herre van Oostendorp, *Cognitive Effects of a Structural Overview in a Hypertext*, 30 BRIT. J. EDUC. TECH. 129 (1999).
[166] *Id.* at 3.
[167] *Id*.

Situational model questions are designed to elicit whether the tester has acquired a deeper knowledge of the material and can generalize the knowledge she has acquired from the material to new situations.[168] As such, situational model questions might be useful in contexts in which conceptual, as opposed to just procedural, knowledge is essential. Answering situational model questions requires that the reader make inferences on the global and local levels.[169] For example, a situational model macro question for a set of materials that discussed "debts" generally might ask, "if a defense to a credit card collection action is that the debt is too old to collect, would that defense be available to you if a hospital was suing you to collect a debt?" A situational micro question on the same materials might be, "what other defenses might be available to you when a creditor is suing you on a medical debt?"

The task for the researcher is three-fold: for each set of materials to be tested, create questions at these four levels, identify the correct answers, and construct a scoring system.[170] Researchers can then test different variations of potential materials with the aim of improving the scores thus obtained.

Other fields suggest other methods. Writing for a legal audience, James Stratman, a communication theorist, suggests the use of protocol analysis. In particular, he suggests tape-recording real-world subjects thinking out loud while they read the material being tested—termed a "concurrent protocol."[171] Stratman notes that the point here is "to find out what helps or hinders the readers in their effort to comprehend and use the text."[172] Although the purpose of this method is "not necessarily to have the readers criticize or evaluate what they read, [] they may do so spontaneously at times."[173] The researcher does not interrupt in these cases; the tester goes through all of the material while speaking aloud. "Researchers later analyze her transcription to see what information she used or perhaps failed to use in the problem-solving process."[174]

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

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[168] *Id.* at 3.
[169] *Id.*
[170] *Id.* at 7.
[171] James F. Stratman, *Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols. Legal Writing*, 1 J. LEGAL WRITING INST. 35, 42 (1991).
[172] *Id.* at 42-43.
[173] *Id.*
[174] *Id.* at 42.

trouble understanding the material elicits more honest feedback.[175] This question should be asked not just about the material as a whole, but also about specific words and sentences.[176] The intuition is that test subjects are more forthcoming when answering a question about someone else instead of themselves.[177]

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

B. Our Experiences

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

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

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

the rare position of being able to understand the legal problem (by virtue of their legal training) while encountering it as new and unfamiliar.

We close with a few specific "lessons learned" from testing our reconceptualized materials. Our testing process has demonstrated that sometimes what we (as attorneys, legal academics, and law students) find obvious, clear, and intuitively appealing is not always what individuals in severe financial distress find helpful.[183] One example that one of us continues to have difficulty accepting appears below.

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

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

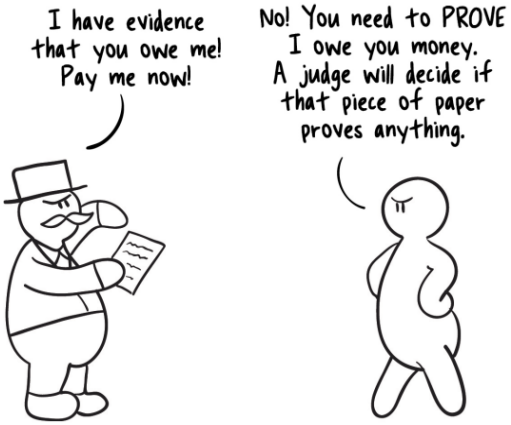
> One thing that stood out to me was captioning: "Your debt may be too old to collect!" I am always hesitant about the use of exclamation points. Perhaps I watched too many "Hogan's Heroes" episodes in my youth, but they always seem to convey authority: "Achtung!" I would also think that poor people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

Interview by Brenda Thibault with anonymous debt collection defendant, in Dorchester, Ma. (Apr. 25, 2013).

Version #1

Version # 2

Version # 3



We initially thought that both Version #1 and Version # 2 provided clear, simple illustrations of the idea that the evidence produced by the plaintiff in a debt

collection case must meet admissibility standards. Interviewees did not have the same reaction.

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

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

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

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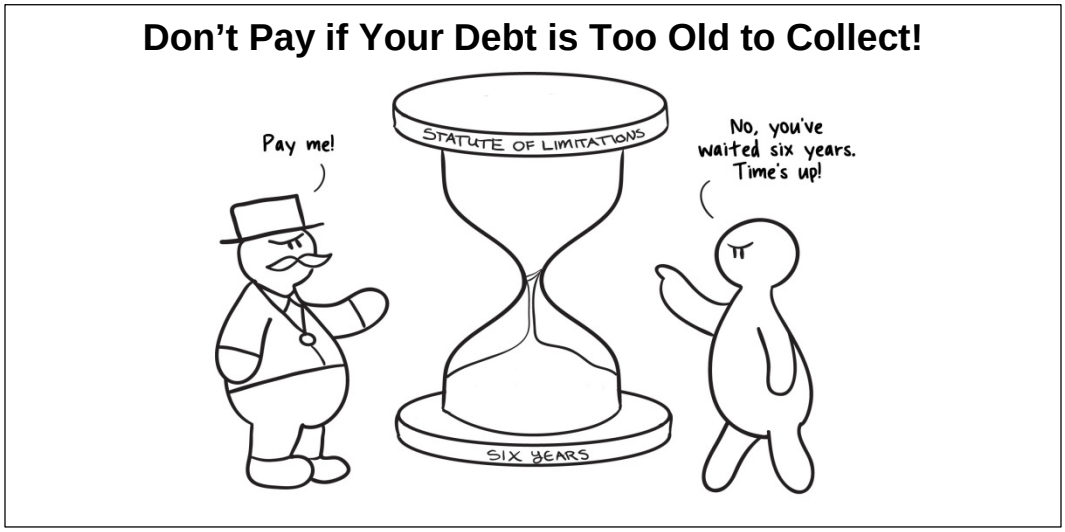
[184] Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Oct. 31, 2013)
[185] Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Nov. 14, 2013); Interview by Sarah Hodges with anonymous debt collection defendant, in Portland, Me. (Dec.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



V. CONCLUSIONS AND NEXT STEPS

We close by emphasizing three points.

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

Second, in case there is some doubt on the issue, we do not contend that the ideas articulated here are the complete answer to the United States' access to justice problems. Our view is that adjudicatory system reform, unbundling, non-lawyer assistance, alternative legal business models, increased use of technology, and the elimination of state-level border restrictions on the practice of law, to name a few, all deserve careful study and the attention of those in power. Our point is that the volume of litigants who interact with the formal legal system without any form of professional assistance means that effective self-help materials must be part of any reasonable access to justice strategy.

Finally, we highlight the thought process that allowed us to articulate the hypotheses above. In essence: (i) identify a problem characterized as legal (*e.g.*, defending a small claims court debt collection case); (ii) break the problem into constituent cognitive, psychological, and mental processing parts (*e.g.*, overcoming fear and hopeless, making and committing to a plan to appear in court, gathering and understanding information about what will happen, preparing mentally for what will happen, rehearsing legal arguments, and following through on all that has been committed to and rehearsed); (iii) recognize that most of these cognitive challenges have little to do with formal law; (iv) look for well-designed research from fields other than law that addresses the same or cognitively similar problems; and (v) apply the lessons of that research to the current setting.

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

We call this overall thought process "thinking like a non-lawyer." We suspect that it is disruptive of the existing United States legal order, which continues to justify itself on the idea (perhaps the fiction) that addressing legal problems requires professional judgment and, as such, the process cannot be reduced to addressing "mere details"[191] no matter how vast in quantity. Under this view, lawyers, as professionals, make irreducibly complex judgments to address their clients' legal problems; automation and routinization of law is impossible.[192]

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

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[191] William J. Goode, *The Librarian: From Occupation to Profession?*, 31 LIBR. Q. 306 (1961).

[192] Sociologists have long recognized that the claim of an exclusive ability to make irreducibly complex judgments, a kind of problem-solving that resists automation and routinization, is one of the hallmarks of a profession. *See, e.g.*, Harold L. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137 (1964).

the table by following written instructions on cookbooks, on the backs of cans and boxes, or by following habits. Our future work explores the nature and implications of thinking like a non-lawyer.