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***GIDEON IS MY CO-PILOT: THE PROMISE OF
CIVIL RIGHT TO COUNSEL PILOT PROGRAMS***

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INTRODUCTION

In recent years, access to justice and civil right to counsel advocates have taken a strong interest in pilot programs to test the cost and effectiveness of increasing the availability of counsel to low-income civil litigants. An eighteen-month privately-funded housing counsel pilot in two Boston courts has recently concluded and a new housing pilot is about to begin in three different Massachusetts courts. Pilots are also ongoing or in late stages of development in several other states. The most ambitious pilot program to date is the multi-year, multi-county pilot project underway in California pursuant to the Sargent Shriver Civil Counsel Act of 2009.¹ A national civil right to counsel pilot project conference was held in Chicago in November 2012, and a manual on developing civil right to counsel pilot projects was created the same year by the Washington Appleseed organization in conjunction with the National Coalition for a Civil Right to Counsel.²

This article discusses the recent interest in civil right to counsel pilot programs and examines the California Sargent Shriver Civil Counsel Act pilots in detail, assessing their unique mix of court-based innovations and newly-funded counsel. It offers a look at some of the

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¹ Sargent Shriver Civil Counsel Act, Cal. Gov't Code § 68650 (West 2010).

² WASHINGTON APPLESEED, DEVELOPING CIVIL RIGHT TO COUNSEL PILOT PROJECTS (2012), *available at* http://media.wix.com/ugd//4569ed_4cb3b68ed9b6a5feae794d944ab08de5.pdf.

critical questions which designers of pilots must consider and some insights the ten Shriver pilots are already offering.

I. THE CIVIL RIGHT TO COUNSEL MOVEMENT

The past decade has been a remarkable time for advocacy aimed at increasing the availability of counsel for indigent litigants with civil cases. Sometimes referred to as the “civil *Gideon*” movement, after a phrase coined by U.S. District Judge Robert Sweet in a 1997 lecture,³ the network of advocates, judges, academics, policymakers, and others urging greater access to lawyers for the poor has sponsored conferences, scholarship, law review symposia, legislation, test cases, bar resolutions, and statewide hearings, among other measures, to bring attention to the plight of unrepresented civil litigants and the need for greater assistance for those who cannot afford counsel.⁴

Some of these initiatives, including the test cases in most states, have failed or ended inconclusively, albeit often over strong dissents.⁵ Others, notably legislative measures, have succeeded in perhaps surprising number, though generally in narrow areas of the law. For example, several states have recently passed legislation expanding or strengthening the right to counsel for parents or children in cases involving termination of parental rights, while one has created a right to counsel for immigrant children seeking special immigrant juvenile status and another has expanded its existing right to counsel in family court custody cases to reach custody cases in all courts.⁶ Additional

3 Hon. Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503 (1998).

4 I have chronicled some of these developments elsewhere, as have many others. See Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY L.A. L. REV. 1065, 1067-71 (2009). For developments since 2009 see also John Pollock, *Where We've Been, Where We're Going: A Look at the Status of the Civil Right to Counsel, and Current Efforts*, 26 MIE JOURNAL 29 (2012). See generally The National Coalition for a Civil Right to Counsel, <http://www.civilrighttocounsel.org> (updated regularly to reflect new developments in litigation, scholarship and events related to the right to counsel) (last visited February 19, 2014).

5 See *Frase v. Barnhart*, 379 Md. 100,103 (2003) (declining to reach question of right to counsel in contested custody case); *King v. King*, 162 Wash.2d 378, 394-396 (2007) (rejecting claim of right to counsel in custody case). But see *Franco-Gonzalez v. Holder*, 2013 Westlaw 3674492 (C.D. Cal 2013 (granting permanent injunction requiring “qualified representatives” to represent immigration detainees incapable of self-representation during all phases of their immigration proceedings)).

6 Laura K. Abel, *Keeping Families Together, Saving Money, and Other*

legislative measures are pending or proposed in other jurisdictions.⁷

In contrast to judicial decisions decreeing a right to counsel, which (depending on the legal theory) may be independent of analysis of financial cost or benefit,⁸ the legislative process naturally demands this sort of information. In part to support these legislative initiatives, advocates and policymakers have become increasingly interested in what pilot or experimental programs can tell us about the effectiveness and costs of various interventions.

The turn toward experimentation and measurement in the provision of services also follows a longstanding trend in other fields, particularly medicine, toward “evidence-based” practices.⁹ As others have noted, evidence-based analysis of what works in the civil justice system, particularly as to problems of access to justice, has been slower in coming.¹⁰ Although there is a substantial literature describing and

Motivations Behind New Civil Right to Counsel Laws, 42 LOY. L.A. L. REV., 1087, 1090-1110 (2009).

⁷ See Border Security, Economic Opportunity and Immigration Modernization Act of 2013 § 3502(c) (requiring appointment of counsel for certain particularly vulnerable aliens in some immigration proceedings). For the recent administrative amendment considered by the New York City Council requiring appointment of counsel for particularly vulnerable aliens in certain immigration proceedings, *see also*, “A Local Law to amend the administrative code of the city of New York, in relation to providing legal counsel for certain tenants subject to eviction, ejection or foreclosure proceedings,” *available at* <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=451623&GUID=CAD2F1A6-C518-49E1-BB75-40C8B2CC1624> (last visited February 19, 2014). *See also* Washington Rule of Court G.R. 33 (a)(C), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=gr&ruleid=gagr33 (last visited February 19, 2014) (allowing for appointment of counsel as a reasonable accommodation for litigants with disabilities).

⁸ *See, e.g.*, In re S.A.J.B., 679 N.W.2d 645 (Iowa 2004), *Zockert v. Fanning*, 800 P.2d. 773, 776 (Or. 1990); *Adoption of K.L.P.*, 763 N.E.2d 741, 753 (Ill. 2002) (all holding that where state provides counsel to indigent parents in state-initiated action to terminate parental rights, equal protection requires provision of counsel to indigent parents in privately-initiated termination proceedings). *But see Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (articulating three-part test for when additional procedural protections are needed to protect federal due process rights, and identifying fiscal and administrative burdens among interests to be weighed).

⁹ *See, e.g.*, Gordon Guyatt et. al., *Evidence-Based Medicine: A New Approach to Teaching the Practice of Medicine*, 268 (17) J. AM. MED. ASS’N. 2420-2425 (1992).

¹⁰ *See, e.g.*, Laura K. Abel, *Evidence-Based Access to Justice*, 13 U.PENN. J. L. & SOC. CHANGE 295 (2009-10); *see also* Jeffrey Selbin, Josh Rosenthal, and Jeanne Charn, Center for American Progress, *Access to Evidence: How an Evidence-Based Delivery System Can Improve Legal Aid for Low- and Moderate-Income Americans*,

attempting to measure the effect of providing legal representation to indigent civil litigants, virtually none of it until recently included randomized studies, the so-called “gold standard” of evidence-based practice.¹¹ Since 2011, however, three randomized studies of the effects of broader access to free counsel have been published by a team of Harvard statisticians and law professors, and randomization is part of the evaluation of some of the California Shriver Act pilots.¹² Experienced legal services practitioners and theorists are increasingly joining the call for empirical research into what works best in providing legal services to the poor,¹³ and research capacity is increasing.¹⁴

(June 2011), available at ssrn.com/abstract=1868626. A Westlaw search of legal journals turns up only 73 articles with the term “evidence-based” in the title. The earliest is from 2001, and none before 2004 use the phrase in a context other than evidence-based medicine.

11 See Stefan Timmermans, *THE GOLD STANDARD: THE CHALLENGE OF EVIDENCE-BASED MEDICINE* (2003); see also D. James Greiner and Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?* 121 *YALE L.J.* 2118, 2178-2196 (2012) [hereinafter “Greiner, *What Difference Representation*”] (discussing “gold standard” and citing dozens of non-randomized studies of legal aid). The “evidence-based” evaluation movement is not without its critics, however. See, e.g., Jeanne Charn and Jeffrey Selbin, *The Clinic Lab Office*, 2013 *WISC. L.REV. REV.* 145, 168 (2013) (reviewing critiques of evidence-based research, and citing W.A. Rogers, *Evidence-Based Medicine and Justice: A Framework for Looking at the Impact of EBM upon Vulnerable or Disadvantaged Groups*, 30 *J. MED. ETHICS* 141, 144 (2004), which critiques evidence-based medicine from a social justice perspective); see also Mark R. Tonelli, *The Limits of Evidence-Based Medicine*, 46 *RESPIRATORY CARE* 1435, 1438 (2001) (contesting the view that empirical evidence is always superior to clinical experience).

12 See generally Greiner et. al., *What Difference Representation*, *supra* note 11; D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: a Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 *HARV. L. REV.* 901 (2013) [hereinafter “Greiner, *District Court*”]; D. James Greiner, Cassandra Wolos Pattanayak, & Jonathan Hennessy, “How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court,” (2012), available at ssrn.com/abstract=1880078 [hereinafter Greiner, “*Housing Court*”].

13 See, e.g., Charn and Selbin, *supra* note 11; Deborah Rhode, *Access to Justice: An Agenda For Legal Education and Research*, 62 *J. LEGAL EDUC.* 531 (2013); Steven Eppler-Epstein, *Passion, Caution, and Evolution: The Legal Aid Movement and Empirical Studies of Legal Assistance*, 126 *HARV. L. REV. FORUM* 102 (2013); Steven Eppler-Epstein, *Randomized Investigation of Legal Aid Outcomes*, 46 *CLEARINGHOUSE REV.* 43 (May-June 2012).

14 See, e.g., Charn & Selbin, *supra* note 11 at 160-61 (noting American Bar Foundation and U.S. Department of Justice initiatives, new National Legal Aid and

Other factors likely contributing to the recent interest in civil right to counsel pilot programs are not themselves new, but may be receiving increased attention as a result of the economic recession. One is the perennial need for legal services programs and other providers to show “success” at what they do, both to stave off funding cuts and to garner new funds. The other is the need for data and cost estimates to combat the instinctive reaction of many policymakers and members of the public that a civil right to counsel is simply unaffordable.¹⁵

Finally, and perhaps most importantly, interest in pilot programs also coincides with the civil right to counsel movement’s increased interest in “targeted” initiatives, which are those attempting to determine and document where counsel is most urgently needed, based on the importance of the legal matter or the vulnerability of the litigant.¹⁶

This interest in targeting could be due to pessimism about the likelihood of a sweeping “*Gideon*” type of judicial ruling mandating counsel at public expense in a broad swath of civil cases. It could also be driven in part by the proliferation of measures such as self-help centers, limited and “unbundled” legal assistance and the consequent desire to determine the effectiveness of such measures compared to full representation. The desire not only to show the effectiveness of greater access to counsel but also to measure costs and savings may likewise play a role. A targeted approach to counsel, urging its provision in cases involving “basic human needs . . . such as those involving shelter, sustenance, safety, health or child custody,” was adopted in an influential 2006 ABA resolution, which was widely endorsed by state

Defender Association research entity, and National Science Foundation funding for scholarly research into civil justice).

¹⁵ See generally Ted Frank, *The case against ‘Civil Gideon’*, OVERLAWYERED (June 16, 2008), available at <http://overlawyered.com/2008/06/the-case-against-civil-gideon/> (last visited February 19, 2014); Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010) (discussing the unaffordability to counsel in civil cases); see also Maryland Access to Justice Commission, IMPLEMENTING A CIVIL RIGHT TO COUNSEL IN MARYLAND (2011), available at <http://mdcourts.gov/mdatjc/pdfs/implementingacivilrighttocounselinmd2011.pdf> (discussing an attempt at “costing out” the provision of counsel in basic human needs cases with an imbalance of representation).

¹⁶ See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37 (2010); Russell Engler, *Reflections on a Civil Right to Counsel and Drawing Lines: When Does Access to Justice Mean Full Representation by Counsel, and When Might less Assistance Suffice?* 9 SEA. J. SOC. JUST. 97 (2010).

and local bar associations, Access to Justice Commissions, and other groups.¹⁷ Pilots can assist in determining which areas or populations to target, and in evaluating the costs, benefits, and challenges of such strategies. Several of the pilots discussed here explicitly take this approach.

Whether to document the need for legal services, shore up existing legal services programs through evidence-based data, support legislative initiatives, counter skepticism about feasibility, or to evaluate the costs and benefits of innovations, therefore, pilot programs are attractive to many stakeholders. The following section describes selected recent, ongoing, and proposed pilots, particularly regarding what such pilots have yielded or may be expected to yield.¹⁸

II. RECENT CIVIL RIGHT TO COUNSEL PILOT PROGRAMS

Not surprisingly, the majority of recent pilots are in the area of housing, where the imbalance of representation between indigent defendants and landlord plaintiffs is overwhelming. Studies abound show that the proportion of represented tenants in most jurisdictions is in the low single digits, while landlords are overwhelmingly represented.¹⁹ Two recent pilots in Massachusetts and one in San Francisco offer interesting and important insight into the problem.

A. *The Massachusetts Housing Pilots*

Two important pilot programs have recently concluded in the Boston area, and a third has been authorized for two courts in other parts of the state. All have built on the long term work of the

¹⁷ ABA House of Delegates Resolution 112A (August 7, 2006), available at http://www.americanbar.org/content/dam/aba/migrated/legal/services/sclaid/atjresourcecenter/downloads/2010_CivilRighttoCounsel_ABA_Initiatives.authcheckdam.pdf.

¹⁸ As this article was being finalized, another state joined the move toward pilot programs. See H.B. 3111, Public Act 98-0351, 98th Gen. Assemb., Spec. Sess. (Ill. 2013) (creating Access to Justice Fund and encouraging state supreme court to create pilot program for court-based legal assistance).

¹⁹ See, e.g., Russell Engler, *Connecting Self-Representation*, *supra* note 16 at 48. Family law is another area where the majority of low-income litigants are unrepresented in many jurisdictions and is part of the Shriver pilots discussed *infra*. (See, e.g., Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts* 1 CALIF. L. REV. (2010) (citing data from California, Utah, New Hampshire, and nationally)).

Massachusetts Access To Justice Commission and its 2008 report, *Gideon's New Trumpet: Expanding the Civil Right to Counsel in Massachusetts*.²⁰ In the two completed pilots, the Boston Bar Association (BBA), with private funding, undertook an 18 month experiment, using a "targeted representation model," to document the effects of providing legal services to "a category of eviction cases in which, in the judgment of experienced housing judges and lawyers, counsel was most needed and nothing short of full representation would be effective."²¹

One of the pilots operated at the Quincy District Court in Lawrence, MA, and the other at the Northeast Housing Court in Lynn, MA.²² Intake began in the spring of 2009 and continued for over a year.²³ Both pilots included the random assignment of clients to either a treatment group or a control group. One extensive study and analysis of the results was produced by the BBA and another by a team of Harvard lawyers and statisticians.²⁴ In addition, the BBA Task Force "supplemented the statistical analysis with other evaluation tools, including follow-up interviews with clients, project attorneys, court clerks, judges, and homeless shelter providers. . . ."²⁵

The basics of the two studies were well described in a 2012 article:

In the [Quincy] MA District Court study, Greater Boston Legal Services (GBLS) used eviction court records to identify potential study participants and mailed individualized form letters inviting the tenants to participate in a two- to three-hour clinic for filling out court forms and learning court procedure. . . . GBLS screened all the tenants who agreed to participate in the study and selected 129 cases where it

20 GIDEON'S NEW TRUMPET: EXPANDING THE CIVIL RIGHT TO COUNSEL IN MASSACHUSETTS, (September 2008), *available at* http://www.bostonbar.org/prs/nr_0809/GideonsNewTrumpet.pdf.

21 Boston Bar Association Task Force on the Civil Right to Counsel, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES, (March 2012), *available at* <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf> [hereinafter "BBA Report"].

22 *Id.* at 1.

23 *Id.*

24 BBA Report, *supra* note 21; Greiner, *District Court*, *supra* note 12; Greiner, *Housing Court*, *supra* note 12.

25 BBA Report, *supra* note 21, at 2.

felt its assistance could make the most difference. Of these 129 cases, 76 were randomized into a “treatment group” and were offered full representation that included help in pursuing rental assistance, reasonable accommodations, and other relief outside of the direct eviction process. The remaining 53 were control group cases that were not offered any additional assistance (but the majority had already received the clinic assistance).

In the [Northeast] MA Housing Court study, Neighborhood Legal Services . . . did no individualized outreach, but rather located its study participants from the 60- to 90-minute clinics it was already running or from calls to its telephone intake system. . . . The 184 cases were randomized into 85 cases receiving an offer of full representation (which included only advocacy in court, not extrajudicial assistance like in the MA District Court study) and 99 control cases receiving an offer of limited assistance in the form of lawyer for the day (LFTD) assistance in addition to the clinic assistance previously received. The LFTD assistance involved help with negotiations and mediation, but not the filing of motions.²⁶

The results were dramatic. In the Quincy District Court study, which compared full representation to the three-hour self-help clinic, “two-thirds of the tenants who received full representation were able to stay in their homes, compared with one-third of those who lacked representation.”²⁷ In the Northeast Housing Court study, the BBA report noted that “because a robust program already made limited representation available to all parties, the study essentially compared varying levels of legal representation, rather than full representation and a lack of representation.”²⁸ the data showed “no measurable difference in outcomes between the treated and control groups” with

26 John Pollock, *Recent Studies Compare Full Representation to Limited Assistance in Eviction Cases*, 42 HOUSING LAW BULLETIN 72, 73 (2012).

27 BBA Report, *supra* note 21 at 2. See also Greiner, *District Court*, *supra* note 12 at 7.

28 BBA Report, *supra* note 21 at 2.

approximately one-third of each group maintaining possession.²⁹

The BBA's report on the pilots concluded that both programs unequivocally showed that legal assistance makes a pronounced difference in eviction outcomes, noting that even the 30% rate of retaining possession under the self-help clinic in Quincy and both models in the Northeast District Court are far above the 2% state average of tenant retention of possession.³⁰ The BBA offers an explanation for the failure of the full representation model in Northeast Housing Court to achieve better results than the lawyer for a day program, noting that the lawyer for a day program actually provided far more substantial services than its name implies, and the "full representation" services in Housing Court were significantly less "full" than might have been expected.³¹

In early 2013, pursuant to its Crisis Response and Innovation grant program for homelessness prevention initiatives, the Massachusetts Attorney General's Office awarded \$400,000 to Massachusetts Law Reform and two partner legal services agencies to provide representation to low-income tenants and landlords in certain eviction cases in Worcester Housing Court and Framingham District Court.³² The anticipated evaluation method does not include random assignment, but does include review of court records to develop a baseline understanding of outcomes prior to the experiment; review of client goals; reporting of time spent on cases by participating lawyers; monitoring of outcomes; follow-up interviews with clients served; and

29 *Id.* See also Greiner, *Housing Court*, *supra* note 12, at 35-36. (Both the BBA and the Harvard studies of the two pilots also compared other outcomes including months of rent due or waived, payments from one party to another, and time before moving out.) BBA Report, *supra* note 21, at 15-18; Greiner *Housing Court*, *supra* note 12, at 36-46, Greiner *District Court*, *supra* note 12, at 928-936.

30 BBA Report, *supra* note 21, at 32.

31 BBA Report, *supra* note 21, at 18-24. See also Pollock, *supra* note 26, at 77 ("[T]he full representation and limited assistance in the [Northeast] Housing Court would up being fairly similar to each other," with "the rate of filing motions for the full representation group...almost the same as the limited assistance group." Pollock also notes the significant differences between the full representation offered in the Quincy District Court pilot and that in the Northeast Housing pilot ("[I]n the MA District Court study, the full representation attorneys filed prejudgment motions at more than 10 times the rate used by the full representation attorneys in the MA Housing Court study. In terms of total motions, it was four times as much.").

32 See, *Program to Assist Tenants, Lawyers*, MASS. LAWYERS WEEKLY (March 7, 2013), available at <http://masslawyersweekly.com/2013/03/07/program-to-assist-tenants-landlords/> (last visited February 14, 2014).

culling of data from sources such as state agencies and shelters.³³

B. *The San Francisco “Right to Counsel City” Pilot*

In 2012, the Bar Association of San Francisco (BASF), successfully urged the Board of Supervisors to pass a resolution designating that locality as the nation’s first “Right to Counsel City.”³⁴ The resolution endorses the “basic human needs” framework adopted by the 2006 ABA resolution,³⁵ while carefully setting forth the ordinance’s aspirational, rather than mandatory or enforceable, character:

The City and County of San Francisco hereby declares itself the first “Right to Civil Counsel City” in the United States. This title is intended to represent the City and County’s firm commitment to creating a local judicial system that provides representation to all residents involved in civil proceedings that could deny them basic human needs, such as child custody, shelter, sustenance, safety or health, regardless of their income or ability to pay.

The City and County of San Francisco declares its intent to work with the Courts, the Bar Association of San Francisco, and interested persons to progress steadily toward the goal of providing counsel whenever the court, in its discretion, believes that such counsel would assist in the fair administration of justice. *This declaration is not intended to immediately establish a right to counsel in civil proceedings, but rather it is a codification of the beginning of a firm commitment to this eventual goal.*³⁶

Section 58.2 of the ordinance mandates that within six months of

³³ HOMELESSNESS PREVENTION PROGRAM GRANT APPLICATION (on file with author) at 10.

³⁴ San Francisco Ordinance No. 45-12, adding San Francisco Administrative Code Article 58, §§ 58.1 through 58.3 (March 6, 2012), *available at* <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/ordinances12/o0045-12.pdf>. The ordinance passed by a vote of 9-2. *Id.*

³⁵ *See supra* note 17 and accompanying text.

³⁶ *Id.* at § 58.1. (Emphasis added).

the measure's effective date, the Board of Supervisors "shall consider recommendations regarding the creation of a San Francisco Right to Civil Counsel Pilot Program,"³⁷ while limiting the City's fiscal commitment to the cost of a single staff person for supporting "program coordination among the City, the Superior Court, non-profit organizations and others involved in the Pilot Program."³⁸ The ordinance also specifies that "the legal services provided pursuant to the Pilot Program be provided by pro bono and legal services attorneys."³⁹ After passage of the ordinance, the Board provided a \$100,000 grant to the San Francisco Volunteer Legal Services Program (VLSP) (now the Justice and Diversity Center (JDC)) to pay for a coordinator of pro bono services for low-income parties in eviction cases as a one-year pilot program.⁴⁰ With this funding, JDC and partner organizations undertook an ambitious plan to increase dramatically the availability of pro bono counsel to low-income landlords and tenants in San Francisco's 3,700 annual eviction actions.⁴¹

Using the City's preexisting Eviction Defense Collaborative, which offers self-help and assistance answers to all (with a sliding scale for those above eligibility limits for free services), JDC and its partner organizations are using a combination of existing nonprofit service providers and expanded pro bono counsel to try to serve every tenant whose case does not settle at the mandatory settlement conference required in eviction cases in San Francisco Superior Court.⁴² However, unlike the Massachusetts and Shriver pilots described elsewhere in this article, the San Francisco pilot is not comprised primarily of an infusion of funds to expand nonprofit legal services. Instead, the program intends to dramatically increase pro bono

37 *Id.* at § 58.2.

38 *Id.* at § 58.3.

39 *Id.*

40 Telephone interview with Mairi McKeever, Managing Attorney, JDC, March 27, 2013. *See also* Mike Rosen, *Testing Civil Gideon*, CALIFORNIA LAWYER (June 2012), available at <https://www.callawyer.com/Clstory.cfm?eid=922767> (last visited February 19, 2014) (describing San Francisco efforts and funding).

41 McKeever interview, *supra* note 40. Court data provided to JDC reveals that the 3,695 eviction actions filed in San Francisco in 2012 overwhelmingly involved low-income defendants: fee waiver petitions were filed in 3,193 cases, or 86%. *Id.*

42 *See* Eviction Defense Collaborative website, www.evictiondefense.org (describing Trial Project).

involvement, especially by the large firms which have not traditionally taken on eviction matters.⁴³ The City’s grant to JDC is making possible more recruitment, training, and coordination of pro bono services, especially among those large firms.⁴⁴ Therefore, and in contrast to the other pilots described in this article, both the goal and potentially the biggest effect of the San Francisco pilot so far is its changes to the legal culture, especially the large firm culture of the city.⁴⁵

The San Francisco ordinance calls for an “independent evaluation” to be completed within six months of completion of the one-year pilot, and mandates that it include “(a) analysis of relevant data collected regarding impact of [the] Pilot Program on demand for services; (b) consider[ation of] the effectiveness and continued need for the Pilot Program as it pertains to equal access to justice, and (c) strategies and recommendations for maximizing the benefit of that representation in the future.”⁴⁶ Stanford Law School’s John and Terry Levin Center for Public Service and Public Interest Law is coordinating the evaluation, which will examine, *inter alia*, case outcomes and the qualitative experience related by clients and lawyers, and attempt to document the costs of public services for persons who are evicted.⁴⁷

III. THE SARGENT SHRIVER CIVIL COUNSEL PILOTS

The most ambitious pilot program to date is currently ongoing in California pursuant to the Sargent Shriver Civil Counsel Act, passed in 2009 and signed by Governor Arnold Schwarzenegger.⁴⁸ Remarkably,

43 McKeever interview, *supra* note 40.

44 *Id.*

45 Mairi McKeever, JDC’s managing attorney, notes that in recent years, pro bono efforts in eviction cases have come largely from smaller and solo firms, as large firms have increasingly directed their efforts toward higher profile and sometimes international matters. She notes that the Right to Counsel City project is already having a salutary effect on “refocusing attorney efforts on basic human needs” in San Francisco. *Id.*

46 Ordinance 45-12, *supra* note 34 at § 58.3. The ordinance also specifies that “if the evaluation finds that the Pilot Program is successful, the Board of Supervisors shall consider extending, expanding, or making permanent the work of the Pilot Program.” *Id.*

47 McKeever interview, *supra* note 40; Telephone interview with Diane Chin, Director, The John and Terry Levin Center for Public Service and Public Interest Law (April 17, 2013).

48 2009 Cal. Legis. Serv. Ch. 457 (A.B. 590), codified at Cal. Gov’t Code §68650 *et seq.* It was no accident that California’s pilot legislation was named for

in a time of recession and budget austerity, the statute allocates an estimated \$9-10 million per year (though not from the state treasury) for the six-year life of the pilots.⁴⁹

The Shriver Act's genesis and the strategy and politics behind its passage have been thoroughly chronicled by two insiders, the Deputy Chief Counsel to the California State Assembly Committee on the Judiciary and the Executive Director of the Legal Aid Association of California.⁵⁰ The legislative effort built on the work of California's longstanding Access to Justice Commission, which was established in 1994, and its subcommittee, the Model Statute Task Force.⁵¹ That Task Force, which I co-chaired, was charged in 2004 with drafting what its name implies, a model statute that any state could use for the implementation of a legislatively-enacted right to counsel.⁵² Much of the work of the Task Force, in particular the legislative findings of the Model Statute, eventually found its way into the Shriver Act.⁵³ Passage of the Shriver Act was also helped by its author's experience as the

Sargent Shriver, one of the fathers of the federally-funded Legal Services Program and a luminary of President Johnson's War on Poverty. At the time the Shriver Act was passed, Sargent Shriver was still alive and California's Governor Schwarzenegger was married to Shriver's daughter Maria Shriver. The state's then-Chief Justice, Ronald George, a longtime proponent of greater access to court for the poor and middle class and one of the moving forces behind the pilot legislation, described himself as "shameless" in suggesting the bill be named after Shriver to increase the chances of Schwarzenegger signing it. See Maura Dolan, *California Chief Justice Ronald George Leaves Historic Legacy*, LA TIMES, December 30, 2010.

49 See Cal. Gov. Code § 68085.1(c)(1)(E) (allocating \$10 of each of certain post-judgment fees between July 1, 2011 and June 30, 2017 to the Judicial Council "to implement and administer the civil representation pilot program. . ."). According to the Shriver Coordinator at the Administrative Office of the Courts, original estimates of the annual amount available through this mechanism were approximately \$11 million. However, recent data shows that post-judgment filings are down, resulting in less money for the Shriver projects. Current estimates are that approximately \$ 8.9 million per year is likely to be available. See Email from Bonnie Hough to Clare Pastore (September 28, 2013) (on file with author).

50 See Kevin G. Baker & Julia R. Wilson, *Stepping Across the Threshold: Assembly Bill 590 Boosts Legislative Strategies for Expanding Access to Civil Counsel*, 43 CLEARINGHOUSE REVIEW 550 (March 2010).

51 *Id.* at 552.

52 See Clare Pastore, *The California Model Statute Task Force*, 40 CLEARINGHOUSE REVIEW 176 (July 2006) (describing model statute process, goals, and product).

53 The Model Statute, formally known as the State Equal Justice Act, is available on the website of the Brennan Center for Justice at <http://www.brennancenter.org/legislation/state-basic-access-act-ca>.

former Executive Director of one of the state’s most respected legal services agencies, and by the enthusiastic support of then-Chief Justice Ronald George, a longtime and active proponent of increasing access to justice.⁵⁴

The following sections discuss the elements of the statute, the process for creation and selection of the pilots, and the pilots eventually selected.

A. *The statute*

The Shriver Act contains four central provisions: an extensive set of legislative findings; a detailed scheme for the development, selection, and operation of the pilots; a mandate for evaluation (including a listing of some required evaluation elements); and a funding mechanism. In addition, four goals are set forth: (1) providing representation for low-income persons in specified areas of the law, (2) establishing best practices in “court procedures, personnel, training, case management and administrative practices to ensure that unrepresented parties in those cases have meaningful access to justice,” (3) “gather[ing] information on the outcomes associated with providing those services,” and (4) “address[ing] the substantial inequities in timely and effective access to justice that often give rise to an undue risk of erroneous decision because of the nature and complexity of the law and the proceeding or disparities between the parties in education, sophistication, language proficiency, legal representation, access to self-help, and alternative dispute resolution services.”⁵⁵ I will discuss the Act’s first three provisions (findings, selection of pilots, and evaluation) in turn and summarize the fourth (funding).

1. The legislative findings

Section 1 of the Shriver Act, uncodified in the Government Code but available in the session law, contains fourteen remarkable paragraphs of legislative findings, comprising nearly 2,000 words.⁵⁶ These findings illustrate the Legislature’s recognition of the growing

⁵⁴ Baker & Wilson, *supra* note 50 at 552-553.

⁵⁵ CAL. GOV’T CODE § 68651(b)(1) (2009)

⁵⁶ Assemb. B. 590, ch. 457 (Cal. 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf.

size and extent of the “justice gap,”⁵⁷ and include strikingly frank declarations that the inability of many litigants to afford representation causes injustice in some cases⁵⁸ threatens courts’ ability to dispense justice in others,⁵⁹ undermines public confidence in the courts,⁶⁰

57 The “justice gap” is a term coined by the federal Legal Services Corporation in 2004 to describe the chasm between the legal needs of low-income Americans and the resources available to fill those needs. See Legal Services Corporation, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2005), available at <http://www.lsc.gov/sites/default/files/LSC/pdfs/JusticeGapReportOverview120105.pdf> (describing the 2004 creation of a “Justice Gap Committee” to study the problem). The Shriver Act refers implicitly to the justice gap throughout the findings, and explicitly to it in Section 2 immediately following the Findings (“in light of the large and ongoing justice gap between the legal needs of low-income Californians and the legal resources available to meet those needs, it is the intent of the Legislature to encourage the legal profession to . . . provid[e] pro bono legal services and financial support of nonprofit legal organizations. . .”).

58 See Assemb. B. 590, ch. 457, § 1(b) (Cal. 2009) (“In some cases, justice is not achievable if one side is unrepresented because the parties cannot afford the cost of representation”) available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0551-0600/ab_590_bill_20091011_chaptered.pdf. See also *id.* at Section 1(g) (“Many judicial leaders acknowledge that the disparity in outcomes is so great that indigent parties who lack representation regularly lose cases that they would win if they had counsel. A growing body of empirical research confirms the widespread perception that parties who attempt to represent themselves are likely to lose, regardless of the merits of their case, particularly when the opposing party has a lawyer. . . .”); *id.* at Section 1(k) (“In many cases decided in the state’s adversarial system of civil justice the parties cannot gain fair and equal access to justice unless they are advised and represented by lawyers.”).

59 *Id.* at Section 1(b) (“The effect [of the lack of representation for indigent litigants], is that critical legal decisions are made without the court having the necessary information. . . .”); *Id.* at Section 1(i) (“The absence of representation not only disadvantages parties, it has a negative effect on the functioning of the judicial system. . . causing erroneous and incomplete pleadings, inaccurate information, unproductive court appearances, improper defaults, unnecessary continuances, delays in proceedings for all court users, and other problems that can ultimately subvert the administration of justice.”)

60 *Id.* at Section 1(g):

...[C]ourt opinion surveys show that more than two-thirds of Californians believe low-income people usually receive worse outcomes in court than others. Unfairness in court procedures and outcomes, whether real or perceived, threatens to undermine public trust and confidence in the courts. The sense that court decisions are made through a process that is fair and just, both in substance and procedure, strongly affects public approval and confidence in California courts. As many legal and judicial

imposes avoidable costs on the courts and society,⁶¹ and is inconsistent with the requirements of a democracy.⁶² The findings also embrace the concept of state responsibility for addressing the imbalance in access to justice between those who can afford representation and those who cannot,⁶³ but explicitly disavow the notion that doing so requires the provision of counsel in all cases.⁶⁴

2. Pilot requirements

leaders have noted, the combined effect of widespread financial inability to afford representation coupled with the severe disadvantages of appearing in court without an attorney foster a destructive perception that money drives the judicial system. Respect for the law and the legal system is not encouraged if the public perceives, rightly or wrongly, that justice is mainly for the wealthy.

See also id. at Section 1(h) ([Equal access] “is essential to the public’s confidence in the legal system and its ability to reach a just decision.”).

61 *Id.* at Section 1(d) (“There are significant social and governmental fiscal costs of depriving unrepresented parties of vital legal rights affecting basic human needs, particularly with respect to indigent parties, including the elderly and people with disabilities, and these costs may be avoided or reduced by providing the assistance of counsel where parties have a reasonable possibility of achieving a favorable outcome.”); *id.* at Section 1(I) (“When parties lack legal counsel, courts must cope with the need to provide guidance and assistance to ensure that the matter is properly administered and the parties receive a fair trial or hearing. Those efforts, however, deplete scarce court resources and negatively affect the court’s ability to function as intended. . . .”).

62 *Id.* at Section 1(h) (“Equal access to justice without regard to income is a fundamental right in a democratic society. It is essential to the enforcement of all other rights and responsibilities in any society governed by the rule of law.”).

63 *Id.* at Section 1(j) (“Because in many civil cases lawyers are as essential as judges and courts to the proper functioning of the justice system, the state has just as great a responsibility to ensure adequate counsel is available to both parties in those cases as it does to supply judges, courthouses, and other forums for the hearing of those cases”); *Id.* at Section 1(k) (“In order for those who are unable to afford representation to exercise this essential right of participants in a democracy, to protect their rights to liberty and property, and to the pursuit of basic human needs, the state has a responsibility to provide legal counsel without cost.”).

64 *See id.* at Section 1(k) (“there are some forums in which it may be possible for most parties to have fair and equal access if they have the benefit of representation by qualified nonlawyer advocates, and other forums where the parties can represent themselves if they receive self-help assistance.”); *id.* at (l) (“the state has an interest in providing publicly funded legal representation and nonlawyer advocates or self-help advice and assistance, when the latter is sufficient, and doing so in a cost-effective manner by ensuring the level and type of service provided is the lowest cost type of service consistent with providing fair and equal access to justice.”).

Although widely misreported as a “right to counsel” statute,⁶⁵ the Shriver Act does not create any rights or guarantee counsel to anyone. Instead, it identifies six key areas of the law (housing, domestic violence and restraining orders, elder abuse, guardianship of the person, probate conservatorship, and child custody).⁶⁶ It then establishes a structure under which legal services agencies, courts, other service providers, and pro bono attorneys can partner to experiment with increased representation, innovations in court procedures, improved self-help, and other best practices to better serve indigent litigants with cases in those fields, and to measure the effects of increasing representation and providing other services. It explicitly recognizes that counsel will not be provided in all cases even within the pilot criteria and priorities.⁶⁷ In addition, perhaps mindful of the possibility that the soaring numbers of unrepresented parents seeking custody could overwhelm the pilot, the Legislature capped pilot funds for custody projects at 20% of all Shriver grants.⁶⁸

Nonetheless, providing more attorneys for low-income litigants is

65 See, e.g., Carol J. Williams, *California Gives the Poor a New Legal Right*, LA TIMES (October 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-civil-gideon17>; Brennan Center for Justice, *California Recognizes Civil Right to Counsel in Pilot Program* (October 13, 2009) available at <http://www.brennancenter.org/legislation/california-recognizes-civil-right-counsel-pilot-program>; Kapri Suanders, *Beaches, Hollywood, Disneyland, and A Right to Counsel in Civil Cases: California Has Got It All!*, JOURNAL OF GENDER, RACE & JUSTICE BLOG (November 13, 2009), available at <http://blogs.law.uiowa.edu/jgrj/?p=162>; Brian Brophy, *Note, A Civil Right to Counsel Through the States Using California’s Efficiency Project as a Model Toward A Civil Gideon*, 8 HASTINGS RACE & POV. L. J. 39, 39 (2011).

66 CAL. GOV’T CODE § 68651(b)(1) (2009).

67 See, e.g., CAL. GOV’T CODE § 68561(b)(4) (2009) (“Recognizing that not all indigent parties can be afforded representation, even when they have meritorious cases, the court partner shall, as a corollary to the services provided by the lead legal services agency, be responsible for providing procedures, personnel, training, and case management and administration practices that reflect best practices to ensure unrepresented parties meaningful access to justice and to guard against the involuntary waiver of rights, as well as to encourage fair and expeditious voluntary dispute resolution, consistent with principles of judicial neutrality.”). The statute specifies that “in light of the significant percentage of parties who are unrepresented in family law matters, proposals to provide counsel in child custody cases should be considered among the highest priorities for funding, particularly when one side is represented and the other is not.” *Id.* at §(b)(2)(A).

68 *Id.*, § 68561(b)(2)(B).

clearly the centerpiece of the statute. Indeed, Section 6 provides that the statute “shall be known, and may be cited, as the Sargent Shriver Civil Counsel Act,”⁶⁹ and the Act’s very first substantive section specifies that “Legal counsel shall be appointed to represent low-income parties in civil matters involving critical issues affecting basic human needs in those specified courts selected by the Judicial Council as provided in this section.”⁷⁰

The statute requires that each pilot be a partnership between a court, a “lead legal services agency,” which must be a qualified California IOLTA provider, and other legal services providers as appropriate.⁷¹ The use of pro bono services is also encouraged.⁷² In addition to providing representation, innovation in court procedures is required.⁷³

Interestingly, rather than leave the design of the referral process to the applicant agencies, the statute goes into detail about how the pilot partners must work together. The lead legal services agency for each project is to serve as the “hub for all referrals, and the point at which decisions are made about which referrals will be served and by whom.”⁷⁴ Referrals can emanate from the court or the other pilot partners, and must be directed to the lead legal services agency.⁷⁵

While the findings are remarkable for their frank acknowledgment of the difficulty of achieving justice in today’s courts, the heart of the Shriver Act is in its detailed requirements as to the criteria for selecting particular cases for representation. In this, the Act reflects the trend

69 CAL. GOV’T CODE § 68650 (2009).

70 CAL. GOV’T CODE § 68651(a) (2009).

71 CAL. GOV’T CODE § 68651(b)(4) (2009). IOLTA, an acronym for Interest on Lawyer Trust Accounts, is a mechanism by which funds being kept by attorneys which are too small or held for too short a period of time to generate interest in separate accounts for each client are instead pooled in a single interest-bearing account. The interest generated on the pooled funds is given to the State Bar’s Legal Services Trust Fund Commission, which distributes the funds to approximately 100 California legal services organizations annually. The State Bar of *California, Interest on Lawyers’ Trust Accounts (IOLTA)* (Jan. 1, 2008), available at <http://www.calbar.ca.gov/Attorneys/MemberServices/IOLTA.aspx>. The constitutionality of IOLTA programs was upheld against a takings challenge in *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003).

72 CAL. GOV’T CODE § 68651(b)(4) (2009).

73 CAL. GOV’T CODE § 68651(b)(1) (2009). (“Projects...shall provide representation of counsel...as well as providing court procedures, personnel, training, and case management and administration methods that reflect best practices to ensure unrepresented parties in those cases have meaningful access to justice...”).

74 CAL. GOV’T CODE § 68651(b)(7) (2009).

75 *Id.*

discussed above of targeting scarce representation resources at that subset of cases where representation is likely to make the greatest difference or avoid the most injustice.⁷⁶

The Legislature imposed three levels of targeting in the Shriver Act. The first is in the areas of law to be served, discussed above. The second is in the criteria by which pilots were to be selected for funding through the competitive grant process. In addition to an assessment of applicants' "capacity for success, innovation and efficiency,"⁷⁷ the Legislature directed that the following factors be considered in awarding grants:

- Whether in the cases proposed for service, the persons to be assisted are likely to be opposed by a party who is represented by counsel;
- The likelihood that representation in the proposed case type tends to affect whether a party prevails or otherwise obtains a significantly more favorable outcome in a matter in which they would otherwise frequently have judgment entered against them or suffer the deprivation of the basic human need at issue;
- The likelihood of reducing the risk of erroneous decision;
- The nature and severity of potential consequences for the unrepresented party regarding the basic human need at stake if representation is not provided;
- Whether the provision of legal services may eliminate or reduce the potential need for and cost of public social services regarding the basic human need at stake for the client and others in the client's household;
- The unmet need for legal services in the geographic area to be served; and
- The availability and effectiveness of other types of court services, such as self-help.⁷⁸

Finally, the third level of targeting in the statute occurs after pilot programs are funded. The Legislature mandated that in assessing

⁷⁶ See *supra* note 16 and accompanying text.

⁷⁷ CAL. GOV'T CODE § 68651(b)(5) (2009).

⁷⁸ *Id.*, §§ 68651(b)(5)(A)-(F) (2009).

whether a particular case within the Shriver Act’s six specified fields of law would be served, the lead legal services agency “shall determine the relative need for representation of the litigant, including all of the following”:

- Case complexity;
- Whether the other party is represented;
- The adversarial nature of the proceeding;
- The availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case;
- Language issues;
- Disability access issues;
- Literacy issues;
- The merits of the case;
- The nature and severity of potential consequences for the potential client if representation is not provided; and
- Whether the provision of legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the client’s household.⁷⁹

The statute also sets the financial eligibility limit at 200% of the federal poverty level (FPL).⁸⁰

3. Evaluation requirement

The Shriver Act’s evaluation requirement assigns to the Judicial Council the task of conducting a study “to demonstrate the effectiveness and continued need for the pilot program” and mandates a report of the study’s findings and recommendations to the Legislature by January 31, 2016.⁸¹ It sets forth a variety of elements to be included in the study and report:

79 CAL. GOV’T CODE § 68651(b)(7)(A)-(J) (2009).

80 CAL. GOV’T CODE § 68651(b)(1) (2009).

81 CAL. GOV’T CODE § 68651(c). The Judicial Council is the state’s policy-making arm for the courts. *See* Cal. Const. art. VI, § 6; <http://www.courts.ca.gov/policyadmin-jc.htm> (February 18, 2014).

The study shall report on the percentage of funding by case type and shall include data on the impact of counsel on equal access to justice and the effect on court administration and efficiency, and enhanced coordination between courts and other government service providers and community resources. This report shall describe the benefits of providing representation to those who were previously not represented, both for the clients and the courts, as well as strategies and recommendations for maximizing the benefit of that representation in the future. The report shall describe and include data, if available, on the impact of the pilot program on families and children. The report also shall include an assessment of the continuing unmet needs and, if available, data regarding those unmet needs.⁸²

Notably, random assignment or the use of control and treatment groups is not mandated by the statute. However, as discussed *infra*, various types of random assignment or control groups are planned for evaluation of several of the pilots. In others, however, particularly those aiming for a “saturation” model where the goal is to serve every eligible case in the relevant service area, an unserved control group is not being used.

The Request for Proposals for Evaluation of the Pilots (“RFP”) was issued January 13, 2012.⁸³ It called for an ambitious two-phase process whose objective was “an evaluation study to identify and assess the key outcomes for pilot programs in provision of legal representation in civil cases,” with a funding level of \$247,000 to \$290,000 for each term.⁸⁴ The first term (covering principally the design and implementation of data collection and design of methodology for experimental design in four pilots), covered April 1 through December 31, 2012, and the second (producing statistical reports and implementing the

82 CAL. GOV'T CODE § 68651(c).

83 Administrative Office of the Courts, Request For Proposals # FCC 10-11-LM (2012), *available at* <http://www.courts.ca.gov/documents/CFCC-10-11-LM-RFP.pdf> (hereinafter "Evaluation RFP"). *See also* Evaluation of Pilot Projects under the Sargent Shriver Civil Counsel Act (2012), <http://www.courts.ca.gov/16663.htm> (Administrative Office of the Courts announcement of RFP).

84 Evaluation RFP, *supra* note 83, at 1.

experimental design) January 1 through December 31, 2013.⁸⁵ The timeline for solicitation and consideration of proposals and awarding of contracts was an extremely compressed two and a half months.⁸⁶

Substantively, the evaluation protocol hews closely to the statute's command that a report to the Governor and Legislature be produced by January 31, 2016, addressing a range of equal justice, efficiency, impact, and cost-benefit outcomes.⁸⁷ For housing programs, the RFP notes a long list of possible "measurement items" including client characteristics, other risk factors such as disability and loss of mental health services, the representation or service received, the basis for the eviction action, whether pre-filing mediation or settlement occurred, key dates and events in the case, whether the case was settled before trial and if so, whether by negotiation, mediation, or day of trial negotiation, delays in the case and the reason for them, the terms of judgment, settlement, or move-out agreements, client feedback, and the client's living situation on follow up.⁸⁸ For the custody projects, reflecting the fact that objective measures of "success" in a custody case are less evident than in an eviction, the RFP suggests a list of outcome measures including demographics, whether early services were provided, timeliness of referrals to social services, increase in early stipulations or mediation, completion of education programs, "client/attorney assessment of reduction in acrimony," quality of safety and case planning, long term success of case plan, adherence to orders and service plans, and number of returns to court.⁸⁹ Follow-up surveys with randomly identified clients six months after the conclusion of their cases are also mandated.⁹⁰

The "second term" of the evaluation, according to the RFP, is focused primarily on designing and implementing experimental and comparative evaluation studies to be implemented by two housing and two custody pilots.⁹¹ Suggested questions for the experimental evaluation component include whether the pilot was "effective in changing the number and proportion of positive case outcomes,"⁹² the relative effectiveness of various Shriver services (e.g., full versus

85 *Id.* at 3.

86 *Id.* at 4.

87 CAL. GOV'T CODE § 68651(c).

88 Evaluation RFP, *supra* note 83, at Att.2, Exhibit C, p. 2-3.

89 Evaluation RFP, *supra* note 83 at Att. 2, Exhibit C, p. 3-4.

90 *Id.* at 5.

91 *Id.* at 5.

92 *Id.* at 6.

limited scope representation or self-help services), how effective the screening process was, and whether the pilot improved court operations.⁹³

After a competitive bidding process, the Administrative Office of the Courts (AOC) contracted with NPC Research, Inc., of Portland, Oregon, for the evaluation.⁹⁴ NPC has extensive experience in evaluation of legal and judicial innovations and programs, especially in the areas of criminal justice, drug treatment courts, and juvenile justice.⁹⁵ NPC has selected Qualtrics, a data collection and analysis software tool, as the mechanism for collecting Shriver data, and has created detailed data collection protocols for the housing and custody projects.⁹⁶

The scope of information to be collected by the pilots pursuant to NPC's direction is impressively broad, covering dozens of measures such as client demographics, case outcomes, court appearances and continuances, Shriver services provided, client goals and satisfaction with the process, judicial officers involved, and many others.⁹⁷ To the extent that this information is actually captured on all or most Shriver cases, it will provide a wealth of data for analysis. The housing and custody pilots have been instructed to begin entering data on all Shriver

⁹³ *Id.*

⁹⁴ See NPC Research website, *Sargent Shriver Civil Counsel Act Evaluation*, (2012), http://www.npcresearch.com/projects_0172.php (describing NPC's Shriver research project).

⁹⁵ See NPC Research, *Specialty Areas*, (2012), http://www.npcresearch.com/specialty_areas.php.

⁹⁶ NPC Research, Shriver Civil Right To Counsel Pilot Project Qualtrics Housing Survey Instruction Manual, at 4 (April 12, 2012), *available at* http://www.npcresearch.com/Files/Shriver%20Housing%20Instruction%20Manual_FINAL_4.12.13.pdf; NPC Research, Shriver Civil Right To Counsel Pilot Project Qualtrics Custody Survey Instruction Manual (April 12, 2013) http://www.npcresearch.com/Files/Shriver%20Custody%20Instruction%20Manual_FINAL_4.12.13.pdf; at 4. Both manuals note that Qualtrics was selected as the collection mechanism because of its SAS 70 certification and ability to meet rigorous privacy and password standards. SAS 70 Certification is "a widely recognized auditing standard developed by the American Institute of Certified Public Accountants "...[which] represents that a service organization has been through an in-depth audit of their control objectives and control activities, which often include controls over information technology and related processes." SAS 70 Overview, http://sas70.com/sas70_overview.html.

⁹⁷ Qualtrics Housing Survey Instruction Manual, *supra* note 96 at 14-52; See also Qualtrics Custody Survey Instruction Manual, *supra* note 96 at 14-55.

clients as early 2013, and requested to go back and enter pre-Shriver data from as far back as possible.⁹⁸ The custody projects were instructed to begin entering data on all parties receiving Shriver assistance as of February 1, 2013, and likewise requested to enter earlier data as possible.⁹⁹

4. Funding mechanism

The Shriver Act funds the pilot programs by directing that between July 1, 2011 and July 1, 2017, a portion of certain post-judgment and other fees shall be directed to the Judicial Council “to implement and administer the civil representation pilot program...”¹⁰⁰ At the time of passage, it was estimated that funds available for the pilot through these fees would total approximately \$11 million per year.¹⁰¹ Although the Shriver Act was passed in 2009, the funding provision was delayed for two years at the request of judicial leaders, in order to allow the courts to use the funding for general operations in the interim.¹⁰² Funded Shriver grants for the first three years total \$9.5 million annually.¹⁰³

B. Applications for and selection of the pilots

The Shriver Act directs that “[t]he participating projects shall be selected by a committee appointed by the Judicial Council with representation from key stakeholder groups including judicial officers, legal services providers, and others, as appropriate.”¹⁰⁴ Pursuant to this mandate, the Chief Justice appointed a “Shriver Implementation Committee” in 2010, consisting of sixteen individuals with long histories of involvement with access to justice, legal services, and/or civil right to counsel initiatives. The group was chaired by Justice Earl Johnson, Jr., who retired from California’s Court of Appeal in 2007, is a

98 Qualtrics Housing Survey Instruction Manual, *supra* note 96 at 4.

99 Qualtrics Custody Survey Instruction Manual *supra* note 96 at 4.

100 CAL. GOV. CODE §§ 68085.1(c)(1)(E) (2011) (directing funds to pilot); Cal. Gov. Code §§ 68085.1(l) (2011) (provision becomes void on July 1, 2017 unless extended by a later enacted statute).

101 Baker & Wilson, *supra* note 50 at 555.

102 Baker & Wilson, *supra* note 50 at 555.

103 Sargent Shriver Civil Counsel Act Implementation Committee, Report to the Judicial Council (April 7, 2011), *available at* <http://www.courts.ca.gov/documents/20110429itemp-revt.pdf>.

104 CAL. GOV’T CODE § 68651(b)(5) (2011).

founder of California's Access to Justice Commission and is the author of numerous scholarly articles on access to justice.¹⁰⁵ The group included a legislative staff member, three judges, representatives of two legal services programs and of one court's self-help center, the Attorney General's office, the State Bar Office of Legal Services, a county court's self-help center, and the Chamber of Commerce, as well as two law professors with legal services backgrounds (including this author), and two private attorneys.¹⁰⁶ The Administrative Office of the Courts staffed the Committee. Throughout the planning, selection, and implementation process, the "point person" has been the Managing Attorney of the AOC's Center for Families, Children & the Courts, Bonnie Rose Hough, another veteran of legal services, self-help, and access to justice initiatives.¹⁰⁷

The Committee met twice in person and several times by telephone during the selection process. After a required "Letter of Interest,"¹⁰⁸ applications for Shriver grants were due in early 2011.¹⁰⁹ Twenty-one applications were received, from 18 different legal service providers in 16 of California's 58 counties.¹¹⁰ Fifteen proposals dealt with housing

105 See, e.g., Earl Johnson Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee its People the Equality Before the Law the Social Contract Demands?*, 37 *Fordham Urb. L.J.* 157 (2010); *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 *DePaul L.Rev.* 393 (2009); *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 *Seattle J. For Soc. Just.* 201 (2003); *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *Fordham Int'l L.J.* S83 (2000); *Toward Equal Justice: Where the United States Stands Two Decades Later*, 5 *Md. J. Contemp. Legal Issues* 199 (1994); *The Right to Counsel in Civil Cases: An International Perspective*, 19 *Loyola of Los Angeles Law Rev.* 341 (1985).

106 Shriver Civil Counsel Act Implementation Committee (2012), available at <http://www.courts.ca.gov/documents/SrgtShriverCCAct.pdf> (listing Implementation Committee members).

107 *Id.* (listing AOC Lead Committee Staff).

108 Administrative Office of the Courts, *Request for Letters of Interest to Apply for Grant Funding to Operate a Pilot Project Under the Sargent Shriver Civil Counsel Act*, (September 23, 2010), available at <http://www.courts.ca.gov/partners/documents/Memorandum.pdf>.

109 Administrative Office of the Courts, *Questions and Answers Sargent Shriver Civil Counsel Act*, (2011), available at <http://www.courts.ca.gov/documents/shriver-pilotprojects-rfp-qna.pdf> (describing RFP process and deadlines).

110 Administrative Office of the Courts, *Report to the Judicial Council For Business Meeting on April 29, 2011*, Attachment A available at

matters, including eviction defense, foreclosure, habitability, security deposits, housing discrimination, and predatory lending.¹¹¹ Nine proposals sought funding for child custody work, often with a particular focus on families where domestic violence was present.¹¹² Eight sought funding for domestic violence and restraining orders, four for probate conservatorships, six for elder abuse, and five for guardianships.¹¹³ The total dollar amount of grants sought was roughly \$22 million, a bit more than twice the projected available funds.¹¹⁴

The Committee divided the task of analyzing each proposal in detail and reconvened after extensive study of the applications and sharing of summaries by the Committee teams assigned to each proposal. Over the course of a daylong meeting in a room whose walls were rapidly covered with butcher paper lists of projects, goals, concerns, cost estimates, and other factors, committee members considered the projects' geographical diversity, distribution among the statutory subject areas, innovativeness, capacity for achieving the statute's goals, cost, staffing levels, number of cases proposed for services, and a myriad of other factors.¹¹⁵ It was rapidly apparent that there was an embarrassment of riches— far more worthwhile proposals than could be enabled with the available funding. After intensive discussion, the list was winnowed to ten pilots proposed by seven lead legal services agencies.¹¹⁶

C. The selected pilots

On April 29, 2011, the Judicial Council approved the recommendation of the Shriver Implementation Committee that seven lead legal services agencies, proposing ten different pilots in seven counties, be funded.¹¹⁷ Funded were six housing pilots, three custody pilots (one with a focus on high-conflict cases involving domestic

<http://www.courts.ca.gov/documents/20110429itemtemp-revt.pdf>

111 *Id.* at 8.

112 *Id.* at 3.

113 Numbers total more than the number of applications because many applicants proposed to work in more than one subject area. *Id.*

114 *Id.*

115 Notes of Implementation Committee meeting of April 1, 2011 (on file with author).

116 *Id.*

117 Administrative Office of the Courts, *supra* note 110 at 2.

violence), and one probate guardianship pilot,¹¹⁸ with a projected collective budget of \$9.5 million.¹¹⁹ Individual grants ranged from \$350,000 to \$2.8 million annually for a three-year period.¹²⁰ The pilots cover a wide swath of the state, from small Yolo County north of Sacramento, down to San Diego, and including San Francisco, Sacramento, Santa Barbara, Kern, and Los Angeles Counties.¹²¹ Lead legal services agencies include some of the state's largest and most respected programs, including Legal Services of Northern California, Neighborhood Legal Services of Los Angeles, and the Legal Aid Society of San Diego.¹²² Smaller agencies are also represented, including the Volunteer Legal Services Program of the San Francisco Bar Association (now renamed the Justice and Diversity Center of the Bar Association of San Francisco), the Los Angeles Center for Law and Justice, the Legal Aid Foundation of Santa Barbara County, and Greater Bakersfield Legal Assistance.¹²³

The first installment of funds was disbursed to the projects in October 2011, although most did not begin providing services until February 2012 because of bureaucratic and other contracting formalities, some related to changes in state contracting law.¹²⁴ The Administrative Office of the Courts has continued to coordinate the projects, including hosting meetings and conference calls for the projects by subject area.¹²⁵

In all, the Shriver projects have so far funded over 50 attorneys statewide (known in most counties as "Shriver Counsel") as well as numerous paralegals, interpreters, and coordinators within the lead legal services agencies and their partner providers. Pursuant to the statutory mandate that court innovation be part of each project, Shriver has also funded court or public agency personnel in most of the pilot courts, including a dedicated clerk to handle eviction cases in Los Angeles, an environmental health investigator in Sacramento, a Probate Guardianship Facilitator in Santa Barbara, and others. In some places, the Shriver-funded court personnel have been controversial because of

118 *Id.* at 2.

119 *Id.* at 1.

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 Telephone interview with Bonnie Hough, California Administrative Office of the Courts, (Jan. 23, 2013).

125 *Id.*

drastic cuts facing the California judiciary and attendant layoffs of court personnel.

Following is a brief description of each of the pilots.¹²⁶

1. Housing pilots

a. Los Angeles

Los Angeles is home to the largest housing pilot, with a grant of \$2.8 million per year. Neighborhood Legal Services of Los Angeles County (NLSLA) serves as the lead legal services agency and coordinates a team of lawyers and advocates from the Legal Aid Foundation of Los Angeles, Public Counsel, and the Inner City Law Center. In total, 21 Shriver Counsel have been funded, including 3-4 who screen clients for eligibility, 13 who regularly represent tenants in court, and four supervisors.¹²⁷ The program operates in the Stanley Mosk Courthouse in downtown Los Angeles, where more than 17,000 eviction actions (20% of the total in California's largest county) are filed each year.¹²⁸

One of the project's central innovations is the creation of its Eviction Assistance Center (EAC) in the courthouse, which is staffed every day by at least four Shriver Counsel. In its application, NLSLA anticipated that the project would have sufficient resources to provide full representation for 2000 litigants annually, about 40% of all those eligible,¹²⁹ and limited scope services to another 3000.¹³⁰ The program reported that it had met its goal of serving 2,000 full-scope cases in approximately the project's first year of operation,¹³¹ and that as of July 31, 2013, had provided full-scope representation to 3083 litigants and

¹²⁶ Except as noted, descriptions of each project are drawn from the applications each submitted, which are on file with the author.

¹²⁷ Email from Tiela Chalmers, NLSLA Shriver Coordinator, to Clare Pastore (April 12, 2013) (on file with author).

¹²⁸ NLSLA Application (hereinafter "NLSLA App."), App. B at 1 (on file with author).

¹²⁹ To be eligible, potential clients must be parties to an eviction action at the Mosk Courthouse, within the 200% FPL income guidelines, and with a represented opponent. *Id.* at 2-3.

¹³⁰ *Id.* at 3.

¹³¹ Email from Tiela Chalmers, NLSLA Shriver Coordinator, to Clare Pastore, (May 7, 2013) (on file with author).

limited scope representation to 2033 litigants.¹³²

Every party to an eviction action at the Mosk Courthouse can potentially be evaluated for Shriver eligibility by going to the courthouse EAC. There, a two-level determination occurs. First, potential clients are screened for eligibility based solely on income threshold (200% of poverty, the Shriver statutory limit) and a represented opponent.¹³³ Those not eligible are referred to other agencies (such as other nonprofits or the self-help centers in other courthouses).¹³⁴ Parties potentially eligible for Shriver services meet with an EAC attorney the same day, who makes the determination of whether full or limited scope assistance will be provided. Limited scope assistance includes help with filing and serving an answer and filing a fee waiver request, brief advice and counsel, and referral to online video and in-person self-help defense workshops.¹³⁵ Those offered full-scope representation receive an appointment within a very short time (next day if possible) with one of the Shriver partner agencies (Public Counsel, Inner City Law Center, or Legal Aid Foundation of Los Angeles), assigned on a random basis, which then represents the client through settlement or trial.¹³⁶

NLSLA and its partner agencies have put a great deal of thought and discussion into the instrument used to determine who will be offered full-scope representation. Consistent with the statute's listing of factors to be considered in determining the need for representation,¹³⁷ the screening criteria ask the EAC attorney to determine if "merit and/or vulnerability" of the potential client is high, and to rate factors including (1) the presence of legal or technical defenses such as defective notice, (2) factual defenses such as cure, waiver, estoppel,

132 NLSLA Shriver Quarterly Report, 4 (April-July 2013) (on file with author).

133 NLSLA App., *supra* note 128, App. B at 2-3.

134 EAC Screening chart (on file with author).

135 *Id.*

136 *Id.*; See Telephone interview with Tiela Chalmers, NLSLA Shriver Coordinator, (Mar. 15, 2013); NLSA App. at App. B at 2. (Assignment to one of the participating legal services agencies is random except for clients whose immigration status makes them ineligible for federally funded legal services assistance. Those clients are referred to non-federally funded agencies.)

137 CAL. GOV'T CODE § 68651(b)(7) (setting forth factors of case complexity, representation by opponent, adversarial nature of the proceedings, availability and effectiveness of other services, language, disability, and literacy issues, the merits of the case, nature and severity of the potential consequences without representation, and the potential for reducing public social services costs).

retaliation, breach of lease term, or habitability, and (3) vulnerability issues such as whether the tenant is a long term tenant in a rent-stabilized unit,¹³⁸ has a Section 8 voucher which would be lost if the tenant is evicted, or is elderly, disabled, likely to become homeless, or has income under 50% of the area median.¹³⁹ The form also allows the screening attorney to indicate other factors including whether the eviction appears pretextual, the landlord appears to be targeting the tenant (for example, by attempting sequential evictions), the landlord appears abusive, or there is a new legal issue that would benefit from litigation, such as a requirement to pay rent online.¹⁴⁰ However, one NLSLA advocate notes that the prioritization process has been a moving target,” which has changed over time, partly as a result of different priorities or philosophies among the partner programs, and that more frank conversation among partner agencies ahead of time would have been useful to reach agreement on prioritization goals and systems.¹⁴¹

In addition to those offered full representation through Shriver Counsel, the project has created a “Shriver Corps” of pro bono attorneys (recruited, trained, supported, and mentored by attorneys in the participating legal services programs) who have been taking on full-scope representation cases.¹⁴² It is hoped that in the future, these pro bono attorneys will staff an Attorney of the Day program for litigants who were initially offered only limited Shriver representation, but this depends on the difficult task of persuading the court to make the eviction calendar available in advance.¹⁴³ Twelve of Los Angeles’ most prominent firms have signed on to the Shriver Corps.¹⁴⁴

138 Cf. CAL. CIV. CODE § 1954.52(a)(1). Under state law, even in the few jurisdictions where rent control exists, “vacancy decontrol” allows the rent to be raised to market value each time a tenant moves out. Thus, if tenancy in a rent-controlled unit is terminated, the unit will most often not remain affordable to a new tenant, and the former tenant will have little chance of finding a similarly priced unit.

139 EAC Full Scope Placement Checklist (on file with author).

140 *Id.*

141 Attachment to email from Tiela Chalmers, NLSLA Shriver Coordinator, to author (May 7, 2013) (on file with author).

142 NLSLA App., *supra* note 128 at App. B, p.4. (on file with author).

143 Attachment to email from Tiela Chalmers, *supra* note 131.

144 SHRIVER HOUSING PROJECT LA, <http://www.shriverhousingla.org> (last visited February 18, 2014). The firms include Perkins Coie, Morrison & Foerster, Bingham, Steptoe & Johnson, Latham & Watkins, Manatt, Morgan Lewis, Munger, Tolles & Olson, O’Melveny & Myers, Proskauer, Skadden, and McDermott Will &

The project has also funded a court clerk who handles all Shriver eviction cases, allowing for the rapid location and assessment of files, provision of a copy of the complaint to the tenant if necessary, and the weeding out of ineligible clients (e.g., those against whom a default has already been entered).

Like all the Shriver housing projects, the Los Angeles project also offers assistance to landlords who meet the income and represented opponent criteria.¹⁴⁵ According to the NLSLA Shriver coordinator, a handful of landlords have been served in the first year, through placement with pro bono attorneys.¹⁴⁶

The Los Angeles Shriver program also has a website geared toward volunteers and pro bono attorneys, which invites visitors to “be involved in the largest and most dramatic experiment in legal services since the 1970s” via a “groundbreaking effort to provide legal representation to low-income families and individuals facing eviction, [and] help us fight homelessness on a large scale. . . .”¹⁴⁷

Some advocates initially hoped that the Los Angeles housing pilot would do at least some randomized assignment for evaluation purposes, reasoning that turning away eligible clients for research purposes was not ethically troubling in a setting where only a fraction of all cases could be served even with the dramatic infusion of Shriver resources.¹⁴⁸ However, after extended discussion, and based in part on the strong objections of some program advocates, the program decided not to sort clients randomly into control and treatment groups, so the Los Angeles evaluation will not include randomized assignment.¹⁴⁹

b. San Diego

San Diego, the state’s third-largest county with nearly three million residents,¹⁵⁰ is home to the second-largest Shriver housing

Emery.

¹⁴⁵ E-mail from Tiela Chalmers, Coordinator, NLSLA Shriver, to Clare Pastore (Apr. 12, 2013) (on file with author).

¹⁴⁶ *Id.*

¹⁴⁷ SHRIVER HOUSING PROJECT LA, *supra* note 144.

¹⁴⁸ Interview with Tiela Chalmers, *supra* note 136.

¹⁴⁹ *Id.*

¹⁵⁰ U.S. Dep’t of Commerce, *State & County QuickFacts: San Diego County, Cal.*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/06073.html> (June 27, 2013).

project. With a grant of just under \$1.9 million per year for its housing project, the Legal Aid Society of San Diego County (LASSD) has a housing investigator and eleven Shriver attorneys, including one senior attorney and two “lead attorneys” with substantial experience and eight attorneys with one to three years of experience.¹⁵¹ The application set forth a goal of providing either full or limited-scope representation to all eligible tenants who would contact the project, with eligibility defined as those under the statutory 200% FPL income threshold and facing a represented party.¹⁵² LASSD estimated that a maximum of 4,500 cases per year, including those requiring advice only, or dispositive motions and settlements, would be served.¹⁵³ For context, San Diego County as a whole typically sees 17,000 eviction actions annually, and the Central Division (where the Shriver project operates) over 6,000.¹⁵⁴

The court innovation proposed in the San Diego eviction pilot was modest. A Shriver telephone contact number was added to the packet that all parties in unlawful detainer cases receive from the court, informing them that they may be eligible for free legal representation.¹⁵⁵ The notices are also posted on the court’s website.¹⁵⁶ In addition, the court began an early settlement conference program, in which parties are encouraged but not required to participate.¹⁵⁷ Advocates have expressed frustration at the court’s unwillingness to require participation in settlement conferences or to increase the prominence of the Shriver information in the packet sent to all parties.¹⁵⁸

151 Telephone interview with Gregory Knoll, Executive Director, LASSD (Apr. 5, 2013).

152 LASSD Application (hereinafter “LASSD App.”), App. B at 2 (on file with author); *see also* Interview with Gregory Knoll, *supra* note 151.

153 LASSD App., *supra* note 152, at App. B, p.2.

154 *Id.* at 7.

155 CAL. CIV. PROC. CODE § 1161.2 (c) (requires that between 28 and 48 hours after the filing of an eviction action, the court clerk mail a notice to each defendant which includes, *inter alia*, the name and telephone number of an IOLTA or federally-funded legal services provider in the country).

156 LASSD App., *supra* note 152, at App. B, p.7.

157 *Id.* at App. B., p. 6.

158 Telephone interview with Gregory Knoll, *supra* note 151; *cf.* Shriver Pilot Project Report, Legal Aid Society of San Diego at 1 (May 1 – July 31, 2012) (on file with author) (“[T]he process to request a mandatory settlement conference is still not in place.”); *cf. id.* at 3 (“[T]he ‘Notice that You Have Been Sued’ includes so much information that the information on the Shriver project gets lost. The notice is not

Clients connect with the Shriver project largely by calling the LASSD intake number listed on the form the court issues to all parties in eviction actions. That number leads callers to the central LASSD intake system, which then screens for Shriver eligibility.¹⁵⁹ As of December 31, 2012, 11 months after the project began, approximately 770 full representation cases had been opened, a dramatically lower number than expected,¹⁶⁰ although results in those cases are anecdotally reported to be significantly superior to those generally obtained by tenants.¹⁶¹ Between February 1, 2012, when the program began, and April 30, 2013, 1,193 cases (full and limited representation) were opened, with the housing investigator working on approximately 720.¹⁶² The investigator does habitability investigations, client welfare checks, service of discovery, document filing in court, and court testimony.¹⁶³

With regard to evaluation, in addition to the standard data collection all Shriver housing projects are doing, LASSD is using a randomized assignment component, followed by review of case outcomes through court records and follow-up interviews.¹⁶⁴ The randomization began in mid-July 2013, and LASSD reports that pursuant to that protocol, it is accepting a little more than two-thirds

translated into any foreign language.”). However, in April, 2013, advocates reported success in persuading the court to order the parties to a settlement conference in one case, after which the case did settle. E-mail from Gregory Knoll, Executive Director, LASSD, to author (May 2, 2013) (on file with author) Notably, this was achieved only after an *ex parte* request and vigorous objection by the landlord’s attorneys, a resource-intensive process which is obviously impractical on a large scale. *Id.*

159 Telephone interview with Gregory Knoll, *supra* note 151.

160 *Id.* LASSD’s Executive Director expressed the surprise and frustration many San Diego advocates feel about the low take-up rate, and noted possible reasons for it, including the court’s unwillingness to adjust its preexisting notice significantly, which means the availability of information about Shriver is not prominent. The program is exploring whether publicizing Shriver services to clients who come to the preexisting pro bono eviction defense clinic located in the courthouse might help connect Shriver-eligible clients with services. *Id.*

161 Telephone interview with Gregory Knoll, *supra* note 151 (discussing his conversations with judges and their observations of the frequency and favorability of settlements, including such aspects as extended time for tenants to move out, agreements that the landlord will not report the tenant to a credit reporting agency, forbearing rent prior to move-out, etc.).

162 E-mail from Gregory Knoll, Executive Director, LASSD, to Clare Pastore (May 6, 2013) (on file with author).

163 *Id.*

164 Telephone interview with Gregory Knoll, *supra* note 151.

of the eligible clients who contact the project.¹⁶⁵

c. Sacramento

Legal Services of Northern California (LSNC), a large program covering 23 counties ranging from just north of the San Francisco Bay area to the Oregon border and east to the Sierra Nevada mountains,¹⁶⁶ won two Shriver contracts to run housing pilot programs, one in Sacramento and one in neighboring Yolo County (described in section d. below).

The Sacramento pilot operates in Sacramento proper, the state capital and a city of nearly a half-million inhabitants. The pilot funds a supervising attorney, four staff attorneys, and an administrative support clerk.¹⁶⁷ Referrals come from a combination of pre-existing LSNC intake and court referrals through inclusion of LSNC's information on the packet sent to all parties in eviction actions.¹⁶⁸

The proposal anticipated providing representation to tenants in 720 trials and 288 dispositive motions per year, and providing self-help advocacy in 300 cases.¹⁶⁹ As of April 2013, a bit over a year after the program's inception, the program had served over 700 clients (both full and limited scope).¹⁷⁰ The program informally estimates that 90 to 95% of the cases (about the same as LSNC's pre-Shriver caseload) settle, with settlements much more favorable to tenants with representation, and that the program is winning about half of the small number of cases that do go to trial.¹⁷¹

An interesting innovation in the Sacramento housing pilot is its partnership with the Mediation Clinic of the McGeorge School of

165 Quarterly Report: Apr.– Jul. 2013, LASSD at 1 (on file with author).

166 LEGAL SERVICES OF N. CAL., <http://about.lsn.net/about-2/mission/> (last visited February 12, 2014).

167 Telephone interview with Timothy Griffiths, Supervising Attorney, LSNC (Apr. 10, 2013).

168 *Id.*

169 LSNC Sacramento Application (hereinafter "LSNC App."), App. B at 2 (on file with author).

170 Telephone interview with Timothy Griffiths, *supra* note 167. Mr. Griffiths estimates that full scope services have been provided to approximately 30% of the clients served, and attributes the somewhat lower than anticipated number of total clients in part to the fact that program had not been staffed at full capacity for much of its first year for unforeseen reasons including LSNC staff turnover.

171 *Id.*

Law in Sacramento.¹⁷² This voluntary mediation program is utilized predominantly in disputes which have not yet reached litigation. Participants are identified through robust community outreach and diversion of tenants with 30 day notices to quit but against whom lawsuits have not yet been filed.¹⁷³ The lack of mediation for filed cases was not anticipated; instead LSNC discovered after commencing the Shriver program that landlords' counsel would not agree to post-filing mediation.¹⁷⁴ The managing attorney, like advocates in other housing pilots, noted the difficulty of implementing innovations which challenge the landlord bar's predominant business model of minimizing court appearances and meetings.¹⁷⁵

An additional Shriver innovation in Sacramento County is the implementation of expanded electronic filing options.¹⁷⁶ Prior to Shriver, e-filing was unavailable to parties proceeding under a fee waiver,¹⁷⁷ including legal aid attorneys representing clients with fee waivers. Indeed, e-filing was virtually unavailable to anyone except for parties "in the know," since it was administered, at a cost, by a private company and not publicly advertised or mentioned on the court's website.¹⁷⁸ Thus, the prior system not only imposed lengthy waits in the clerk's office on those attempting to file answers or other documents, but also provided what sometimes became a significant substantive advantage to those allowed to e-file. For example, when an unlawful detainer plaintiff sought a default judgment, a tenant proceeding under a fee waiver had only until the filing window closed to appear in person and file an answer. If the tenant missed the deadline, it would often be too late by the next day the clerk's office was open, because the landlord would have e-filed a motion for default in the interim.¹⁷⁹ Now, both parties have equal access to the filing system.

Legal Services of Northern California does not anticipate using random assignment of clients to a control or treatment group as part

172 LSNC App., *supra* note 169, App. B at 2.

173 Telephone interview with Timothy Griffiths, *supra* note 167.

174 *Id.*

175 *Id.*

176 *Id.*; *see also* LSNC App., *supra* note 169, at App. B, p.9.

177 LSNC App., *supra* note 169, at App. B., p.9.

178 E-mail from Timothy Griffiths, Supervising Attorney, LSNC7, to the author (Apr. 15, 2013) (on file with author).

179 *Id.*

of the evaluation, although comparison of court records for represented and unrepresented tenants will be used.¹⁸⁰ Like advocates in other programs where the pilot aims to provide at least some level of service to all eligible clients who contact the agency, LSNC's Shriver Supervising Attorney expressed discomfort with the notion of turning away eligible, needy clients that the program had the capacity to serve, solely for purposes of evaluation.¹⁸¹

d. Yolo County

LSNC's Yolo County pilot is similar to its Sacramento counterpart, albeit less ambitious with its smaller legal services office, drastically smaller number of annual eviction actions, and lack of a partner such as the McGeorge Mediation Clinic. Yolo is a mixed urban and rural county of 200,000, which includes agricultural regions, the city of Davis, and the Sacramento bedroom community of Woodland.¹⁸² Court statistics included in LSNC's proposal reveal that in 2010, prior to Shriver, tenants were unrepresented in 88% of all Yolo County unlawful detainer cases, and landlords in 12%.¹⁸³ LSNC's sampling of 25 cases from 2010 (three percent of eviction cases for a three week period) revealed that "the landlord prevailed in every case that proceeded without LSNC's involvement."¹⁸⁴

The Shriver grant of \$336,000 was used to hire two Shriver attorneys (both newly licensed), and fund interpreter services, a part-time mediator, a part-time self-help attorney who aids both landlords and tenants, and a housing investigator.¹⁸⁵ The investigator, a registered environmental health specialist, is an interesting innovation, funded through a Shriver contract with the County Health Department's Division of Environmental Sciences.¹⁸⁶ According to the proposal, either party or the court may initiate an investigation by requesting the investigator conduct a site visit of the premises

180 Telephone interview with Timothy Griffiths, *supra* note 167.

181 *Id.*

182 LSNC Yolo Application (hereinafter "LSNC Yolo App."), App. B at 8 (on file with author).

183 *Id.* at 7.

184 *Id.*

185 LSNC Yolo App., *supra* note 182, at App. B., pp. 4-5; *see also* Telephone interview with Alysa Meyer, Managing Attorney, LSNC Yolo (Apr. 10, 2013).

186 LSNC Yolo App., *supra* note 182, at App. B, p. 5; *see also* Interview with Alysa Meyer, *supra* note 185.

involved in the unlawful detainer case....”¹⁸⁷ The managing attorney reports that this measure is quite successful, with Shriver attorneys able to request inspections and receive reports within 48 hours, and the registered health specialist making a highly credible witness at trial.¹⁸⁸

Shriver mediation services are available even before an eviction action is filed (through a pre-filing outreach program to landlords, landlord attorneys, and tenants), based on a successful program operated in another, similarly-sized LSNC county in 2009.¹⁸⁹ In that program, approximately ten percent of all eviction actions, representing nearly half of those ultimately set for trial, were resolved by mediation, garnering extremely positive reviews from judges, court personnel, and other stakeholders.¹⁹⁰ Despite the early availability of services, the managing attorney reports that most mediations occur on the day of trial and in cases where the tenant is unrepresented, apparently because landlords’ attorneys regularly decline to mediate when the tenant is represented.¹⁹¹

With regard to representation, LSNC’s application estimated that approximately 337 tenants per year would qualify for Shriver services, and that the program would provide full representation in 200 cases and limited assistance (pleadings, court forms, discovery and advice) in an additional 100.¹⁹² Informal results so far indicate that while the overall number served is consistent with the estimate, the pilot provided less direct (full) representation than anticipated and more limited scope assistance, a trend the managing attorney attributes in large part to the increased number of settlements achieved.¹⁹³

In terms of evaluation, the Yolo Shriver project’s managing attorney reports that while all evaluation protocols are not yet finalized, randomization is unlikely since the pool of clients is so small and the program does not wish to deny services to eligible

187 LSNC Yolo App., *supra* note 182, at App. B, p.5.

188 Interview with Alysa Meyer, *supra* note 185.

189 LSNC Yolo App., *supra* note 182, at App. B, p.6

190 *Id.*.

191 Telephone interview with Alysa Meyer, *supra* note 185 (apparently, only one of the five or six attorneys who regularly represent landlords in Yolo County is willing to mediate represented cases).

192 LSNC Yolo App., *supra* note 182, at App. B., p.10.

193 Interview with Alysa Meyer, *supra* note 185.

clients it has capacity to serve.¹⁹⁴ In addition to the standardized data elements all Shriver housing projects are gathering for NPC Research, the program is considering ways to gather data regarding the effect of the Shriver pilot on the community, including on the habitability conditions of local housing.¹⁹⁵

e. Kern County

Greater Bakersfield Legal Assistance (GBLA) serves Kern County, a Central Valley county with one of the state's fastest-growing populations (840,000) and extremely high poverty and unemployment rates.¹⁹⁶ In partnership with the Volunteer Attorney Program of Kern County, GBLA received \$560,000 for its Shriver housing project, which was used to hire three full-time Shriver attorneys, a bilingual paralegal, a social services worker, and interpretation costs.¹⁹⁷ In addition, Shriver funds cover an unlawful detainer advisor who is an employee of the court.¹⁹⁸ Referrals to the Shriver project come from the Assessment Attorney at the Shriver-funded Landlord-Tenant Assistance Center (LTAC) in the court's Self-Help Center who screens for eligibility and conflicts.¹⁹⁹

Priority for full-scope representation is given to cases where the opposing party is represented by counsel and the client is especially vulnerable, the case is unusually complex, or an opportunity to establish valuable precedent exists.²⁰⁰ Clients not offered full-scope representation receive assistance with answers, drafting motions,

194 *Id.*

195 *Id.*

196 GBLA Application (hereinafter "GBLA App."), App. B at 9-10 (on file with author).

197 Telephone interview with Estela Casas, Executive Director, GBLA (Mar. 27, 2013).

198 *Id.*

199 *Id.*

200 GBLA App., *supra* note 196, App. B at 3. The specific criteria for representation listed in the application are a represented opponent and one or more of the following factors: "the client lacks the ability for self-representation due to disability, infirmity, cultural or linguistic barriers, the opposing party's conduct poses a significant threat to the well-being of the client or to similarly situated persons, the claim or defense requires particular trial skills or legal argument; the client is at significant risk of homelessness, loss of public housing or other government benefit, or other onerous consequences; [or] an opportunity exists to establish legal precedent that would inure to the benefit of the client and other low-income residents." *Id.*

general information about the process, and mediation through the existing program.²⁰¹

GBLA's proposal also included a potential law reform component described as, "evaluation of legislation, rules, and procedures for the purpose of identifying impediments to equal access to justice and speedy, affordable resolution of housing-related problems."²⁰²

As with several other Shriver housing projects, GBLA's proposal included a mediation component intended to get the parties into settlement discussions much earlier than the traditional day of trial discussions customarily seen in eviction cases.²⁰³

In addition to the legal representation and expanded self-help services, the Kern County Shriver project also includes a Social Service coordinator who links clients to services intended to help support tenants in remaining in their homes, such as job placement assistance, health and mental health services, substance abuse treatment or counseling, money management, conflict resolution, etc.²⁰⁴ Every income-eligible client who reaches the LTAC is referred either to "advanced self-help" with the unlawful detainer advisor or to a Shriver attorney for representation, with the presence of an attorney on the other side being the principal factor determining which form of assistance is offered.²⁰⁵ As of the end of the first year, approximately 900 clients had received advanced self-help and 183 direct representation.²⁰⁶

f. Santa Barbara County

The Legal Aid Foundation of Santa Barbara County (LAF)

201 Casas interview, *supra* note 197.

202 GBLA App., *supra* note 196, App. B at 1.

203 *Id.* at 4 (noting pre-existing Kern County Superior Court contract with Better Business Bureau for unlawful detainer mediation with non-attorney mediators "outside the courtroom immediately before trial," and describing goal of bringing parties to mediation much earlier). The proposal also noted that most plaintiffs' attorneys in eviction cases choose not to participate in that existing mediation program, leaving defendants to negotiate directly with plaintiffs' attorneys who "know[] how to negotiate a settlement that satisfies the plaintiff's objectives, while the unrepresented defendant is often unaware that a mere word or two added to a stipulated settlement might prevent an adverse judgment with lifelong repercussions." *Id.* at 6.

204 GBLA App., *supra* note 196, App. B at 14.

205 Interview with Estela Casas, *supra* note 197.

206 *Id.*

received \$465,000 in Shriver funds for its housing project, the smallest of the housing grants. Santa Barbara County is a southern coastal county whose population of 423,000 includes some of the wealthiest census tracts in California (in Santa Barbara proper and certain adjoining areas) as well as some very poor and rural sections, most in North County.²⁰⁷ The Shriver grant has funded a total of three attorneys who each handle both probate guardianships (discussed below) and housing cases,²⁰⁸ as well as translators for the Santa Maria (North County) office, where many clients are monolingual Spanish speakers.²⁰⁹ The principal court innovation of the Santa Barbara housing pilot is the implementation of mandatory settlement conferences at least forty-eight hours prior to trial, conducted by a Shriver-funded settlement master in two North County courthouses (Lompoc and Santa Maria).²¹⁰

All Shriver intake (housing, guardianship, and conservatorship) is handled by the Shriver Intake Paralegal who completes the intake (screening for income eligibility, disability, language and literacy) and conflicts checks.²¹¹ Eligible clients then consult a Shriver attorney by telephone to allow the attorney to evaluate the case's complexity, merits, and the nature and severity of the consequences if representation is not provided.²¹²

2. Custody projects

The statute permits the use of Shriver funds in cases where a parent seeks "sole legal or physical custody,"²¹³ a relatively narrow slice of all family law matters, since state law favors joint custody.²¹⁴

207 U.S. Census Bureau, "State and County QuickFacts: Santa Barbara County," *available at* <http://quickfacts.census.gov/qfd/states/06/06083.html> (last visited February 19, 2014).

208 Interview with Yvonne Cudney, LAF Managing Attorney (Mar. 22, 2013).

209 *Id.*

210 Interview with Yvonne Cudney, *supra* note 208; LAF Application (hereinafter "LAF App."), App. B at 4. According to LAF Shriver coordinator Yvonne Cudney, this is an especially important development because prior to Shriver, voluntary settlement conferences were in place, but were conducted by a group of volunteer attorneys who were mostly drawn from the landlord bar.

211 LAF, "Sargent Shriver Intake Procedure" (on file with author).

212 LAF Proposal, App. B at 4, Interview with Yvonne Cudney, *supra* note 208.

213 CAL. GOV'T CODE §68651(b)(1).

214 CAL. FAMILY CODE §3040(a).

This tends to mean that such cases involve unusual factors such as domestic violence, mental or physical disability of one or both of the parents, or very high conflict between the parents. Three Shriver custody projects have been funded.

a. San Francisco

The Bar Association of San Francisco Volunteer Lawyers Program (VLSP), now known as the Justice & Diversity Center (JDC), received an annual \$350,000 Shriver grant, making it the smallest of the three custody projects, with an anticipated representation caseload of approximately 100 clients per year, and approximately another 150 self-represented litigants receiving legal information.²¹⁵ The stated goal of the project was to “create a system whereby every single low-income person in San Francisco seeking or responding to a request for sole physical or legal custody where the other party is represented by counsel, will receive legal representation.”²¹⁶ One attorney handles cases where Shriver represents, and Shriver dollars are also funding another attorney at the courthouse self-help center to identify clients and a part-time coordinator of the project.²¹⁷ The court provides office space and computers for the project.

Referrals come from the court’s Family Law Self-Help Center (where all pro per litigants must go before filing custody motions under local rules), from project staff speaking with potentially eligible litigants appearing for the readiness calendar (where mediation and hearing dates are set), the private bar, and other legal services organizations including JDC’s own family law intake staff.²¹⁸ The Shriver attorney located at the court engages in a “preage” (a JDC coinage referring to a very early form of triage) process to identify pro per clients at the self-help center who are within the Shriver eligibility criteria (income-eligible and facing a represented opponent), and makes contact that day or the next to determine whether full scope or limited scope assistance will be offered.²¹⁹

215 VLSP Application (hereinafter “VLSP App.”), App. B at 9.

216 *Id.* at 3.

217 Telephone interview with Mairi McKeever, Director of Pro Bono Legal Services, JDC (Mar. 27, 2013).

218 VLSP App., *supra* note 215, App. B at 7.

219 *Id.*

Complex cases are referred to JDC pro bono attorneys.²²⁰

Anecdotally, JDC reports that cases are increasingly resolving by means of settlements rather than hearings or judgments, a very desirable result from the standpoint of judicial and attorney resources.²²¹ In JDC's most recent quarterly report to California's Administrative Office of the Courts ("AOC"), the program reported that the number of stipulations and partial stipulations remained at a higher level than initially predicted.²²² Additionally, JDC reported that comments from some bench officers indicate that they believe it might be worthwhile for the project "to refocus its attention from 'Adversarial Advocacy' towards counseling in a more holistic approach" and assisting with non-legal services such as housing, therapy, job training, etc.²²³

The San Francisco custody pilot is using a control group of sorts as part of its evaluation. For the first three months before Shriver representation began, Shriver staff identified cases where they would otherwise have offered representation, and flagged those cases to track and compare to future cases in which Shriver services will be provided. Approximately twenty-five cases were flagged, and the unrepresented party interviewed after the custody hearing. Additional follow-up is planned, but the supervising attorney noted that even he, an advocate with a dozen years of family law experience, was surprised at just how difficult it was for an unrepresented litigant to navigate the system. He noted that of the twenty-five cases flagged, only one had settled (with the aid of the court's facilitator).²²⁴

b. San Diego

The San Diego custody project is run by the San Diego Volunteer Lawyer Program (SDVLP), although the Legal Aid Society of San Diego is the lead legal services agency under the grant.²²⁵ SDVLP received approximately \$450,000 of the \$700,000 custody grant (with

²²⁰ *Id.*

²²¹ Interview with Mairi McKeever, *supra* note 217.

²²² JDC Quarterly Report (Apr. –Jul. 2013) at 1 (on file with author).

²²³ *Id.* JDC notes that the program does make such referrals but does not have the resources to follow up on behalf of every client who cannot or do not do so themselves. *Id.*

²²⁴ Telephone interview with Javier Bastidas, JDC Supervising Attorney (May 9, 2013).

²²⁵ LASSD Application (hereinafter "LASSD App."), App B at 2.

the rest going to cover court personnel and the Legal Aid Society's intake system), which covers SDVLP's three Shriver attorneys as well as part of a supervisor's time.²²⁶ The core innovation of San Diego's pilot is the attempt to get early case resolution in custody cases through a "fast track" process under which Shriver counsel could stipulate to an early neutral evaluation (ENE) by a bench officer within thirty days of the request for sole custody, "an expedited Family Court Services (FCS) counseling session within two weeks of the ENE, and an expedited . . . hearing to determine the custody issues within two weeks of the FCS session."²²⁷ Thus, the entire custody determination process could ideally be resolved within approximately sixty days of filing, compared to the four seven month process common in pre-Shriver cases.²²⁸ Additional staffing at the court, funded by Shriver, was to make these early sessions possible.

SDVLP's pilot application anticipated (based on SDVLP's experience in family law practice) that 120 to 180 cases per year, or ten to fifteen new cases per month per attorney, would be served, and that pro bono representation would be provided to an additional number of clients.²²⁹ However, program staff reports that while mediations with a settlement judge have been extremely effective, the number of eligible clients has been dramatically smaller than expected, though not because the need for services is less acute than projected.

In SDVLP's experience thus far, imbalance of representation in custody cases is significantly less common than anticipated.²³⁰ In addition, the pilot's Shriver plan was to assist those whose cases did not settle through the court's pre-existing "workshop" process (whereby both parents meet with a family court mediator). But program protocols ruled out high conflict cases because those cases generally contain issues such as domestic violence or Child Protective Services involvement which are beyond the capacity of the mediators to handle.²³¹ SDVLP staff also mentioned that the statutory requirement that the lead legal services agency (in this case the Legal

226 Interview with Greg Knoll, *supra* note 151; email and telephone message from Amy Fitzpatrick, Executive Director, SDVLP (May 6, 2013).

227 LASSD App., *supra* note 225, App. B at 2.

228 *Id.* at 4.

229 *Id.* at 16.

230 Telephone interview with Kris Jacobs, Managing Attorney, SDVLP, and Amy Fitzpatrick, Executive Director, SDVLP (Apr. 8, 2013).

231 *Id.*

Aid Society of San Diego) perform all screening²³² is a bit cumbersome, since it means that cases are being screened by LASSD's heavily used, non-Shriver specific pre-existing system, rather than by SDVLP's specialists.²³³ Finally, some clients have rejected Shriver offers once they learned that the Shriver project will not handle the entire family law case, but only the custody issues.²³⁴

Because of the difference between the expectations and the experience in the first year, SDVLP has worked with the San Diego Superior Court to make changes to the pilot in order to serve more clients, including establishing a clinic inside the courthouse three mornings each week where staff and pro bono attorneys assist clients even where it is not yet known if the other side is represented.²³⁵ Like all of the custody pilot staff interviewed, SDVLP staff mentioned the "fluidity" of representation in family law and the frequency with which representation status can change (as previously unrepresented parties secure counsel for certain but not all aspects of the case, for example) and the consequent difficulty in making determinations as to whether a case meets the Shriver criterion of representation on the other side.²³⁶

In its latest quarterly report to the AOC, SDVLP reports that a "second phase" of its project (assisting more self-represented litigants or SRLs) has begun, and that the program anticipates training and supervising certified law students to provide legal advice and counsel to SRLs prior to and on the day of their settlement conferences.²³⁷ Before the program to provide this advice was initiated, the court had ceased offering settlement conferences prior to mediation because the judge found them counter-productive "because the SRLs had no one there to educate them regarding the process and the applicable laws."²³⁸ Because the number of assisted clients remains below capacity, SDVLP plans to expand its provision of direct representation to a second courthouse in the eastern part of the County.²³⁹ So far, eighty-three clients have been provided direct representation in the first phase, and eighty-eight cases of direct legal

232 CAL. GOV'T CODE § 68651(b)(7).

233 Interview with Kris Jacobs and Amy Fitzpatrick, *supra* note 230.

234 *Id.*

235 *Id.*

236 *Id.*

237 SDVLP Quarterly Report, Apr.-Jul. 2013 at 1 (on file with author).

238 *Id.*

239 *Id.*

assistance in the second phase of the project.²⁴⁰ Of the fifty-eight direct representation clients with settlement conferences between January 1, 2012 and August 16, 2013, twenty-five cases were fully settled by stipulation, fifteen reached partial stipulation, two were “put in a more positive position for future settlement” and sixteen cases reached no agreement.²⁴¹

Whether randomized assignment will be used in the San Diego assessment has not yet been determined, and SDVLP attorneys, like those whose projects are targeted at small populations elsewhere, expressed concern about the ethics of turning away eligible clients in order to create a control group.²⁴²

c. Los Angeles

The Los Angeles Center for Law and Justice (LACLJ) received a Shriver grant of \$850,000 to provide “representation, specialized mediation, and support services to a total of 450 self-represented litigants annually involving domestic violence at the Stanley Mosk Courthouse in downtown Los Angeles.”²⁴³ As of approximately the end of the first year, the pilot had received about 230 referrals, reflecting in part the same difficulty the other custody projects have identified with unbundling only certain aspects from complex family law disputes, and in part the exceedingly lengthy and complex nature of high-conflict cases where domestic violence is also present.²⁴⁴ Asymmetrical representation in such cases is common, in part because the alleged perpetrator is often facing criminal charges and so prioritizes the need for an attorney even for the family law matter.²⁴⁵ The goal of representation or assistance in each case is to get the case to judgment, something the project attorney interviewed stressed could differ among the Shriver family law projects – some prioritize stabilizing interim or temporary orders, for example.²⁴⁶ Because of this focus, the time that cases remain open is lengthy.

LACLJ has partnered with a private Los Angeles law firm with a

²⁴⁰ *Id.* at 3.

²⁴¹ *Id.* at 4.

²⁴² Interview with Kris Jacobs and Amy Fitzpatrick, *supra* note 230.

²⁴³ LACLJ Application (hereinafter “LACLJ App.”), App. B at 1.

²⁴⁴ Telephone interview with Brandi Davis, Managing Attorney, LACLJ (Mar. 26, 2013).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

long-established sliding scale business model geared at low-income litigants.²⁴⁷ The project also includes specially developed parenting classes focusing on high-conflict custody disputes, developed by the Center for Divorce Education.²⁴⁸ While the proposal anticipated a case management component to the pilot as well, this has been discontinued due to low client take-up, a result one project attorney attributes to the inability of low-income parents in these crisis situations to prioritize such services “in the hierarchy of their urgent needs.”²⁴⁹

Three Shriver attorneys are at work on the project. Referrals were intended to come from judicial officers, but after concerns about judicial neutrality were aired, a slightly altered system has been put in place, under which referrals come from family court mediators and evaluators, the court’s self-help center staff attorneys, and the county bar’s court-based domestic violence assistance program.²⁵⁰ Court cutbacks have also impacted the project, eliminating the planned specialized calendar for this subset of custody cases.²⁵¹

Like each of the custody projects, LACLJ has struggled in tandem with the contracted evaluator to conceptualize and agree upon a workable evaluation system. A randomized control group is not planned.²⁵²

3. Probate guardianship pilot

The sole Shriver pilot in the guardianship field is in Santa Barbara County, coordinated by the Legal Aid Foundation of Santa Barbara and funded at \$483,000 annually. The project primarily assists unrepresented litigants, often monolingual Spanish speakers from

247 LACLJ App., *supra* note 243, App. B at 1. *See also* www.leavittquinn.org (“the mission of Levitt Quinn Family Law Center is to provide affordable legal representation in family law matters to low-income families of Los Angeles County...”).

248 LACLJ App., *supra* note 243, App. B at 4. While the LA Superior Court has long mandated that divorcing parents participate in a parent education class, the course tailored specifically for families where domestic violence has occurred is new. The court had actually developed it prior to Shriver, but never allocated funds for its implementation. *Id*; *see also* Davis Interview, *supra* note 244.

249 Telephone interview with Brandi Davis, *supra* note 244.

250 *Id*.

251 LACLJ App., *supra* note 243, App. B at 6; Interview with Brandi Davis, *supra* note 244.

252 Interview with Brandi Davis , *supra* note 244.

rural parts of the county, in securing guardianships over children in their care.²⁵³ The typical case is a grandparent caring for grandchildren when parents are incarcerated, addicted to drugs, or absent, and who need the guardianship in order to secure medical care for the children, enroll them in school, etc.²⁵⁴

In contrast to most of the pilots which are explicitly aimed at leveling the playing field between litigants with attorneys and those without, and to some degree at changing the culture of courts, the LAF probate pilot's coordinator has described it as more of a "pure access project," stemming not from an imbalance in representation but from the sheer difficulty many unsophisticated and/or non-English speaking litigants have in obtaining basic services from the court, even when unopposed.²⁵⁵ LAF's review of court files prior to the beginning of the Shriver project revealed ample need for such assistance. For example, the court's Legal Resource Centers had 146 visits from self-represented litigants seeking guardianships in 2009, with 22 of those litigants visiting between two and nine times each.²⁵⁶ "Court data confirmed that [unrepresented litigants] required between one (1) and thirteen (13) continuances each. In conservatorships of the person and estate, as many as twenty (20) continuances have been required."²⁵⁷ Reasons for the pro pers' inability to secure guardianships often included the difficulty of understanding service requirements or which forms to file, as well as the inability of pro per litigants to know how to check the online tentative rulings and file corrected pleadings in response.²⁵⁸

Shriver funds were used to hire three attorneys at LAF (who divide their time between housing and probate matters), and a Probate Facilitator, employed by the court, who assists pro per litigants in negotiating the process.²⁵⁹ The concept is that persons whose guardianship petitions are complex or contested, or those who are non-English speakers, can get representation by LAF; others can

253 LAF Application (hereinafter "LAF App."), App. B at 7 (on file with author).

254 *Id.*; Telephone interview with Yvonne Cudney, *supra* note 208.

255 *Id.*

256 Email of April 30, 2013 from Yvonne Cudney to author.

257 *Id.*

258 *Id.*

259 Telephone interview with Yvonne Cudney, *supra* note 208. Part of Ms. Cudney's time is also funded by Shriver.

access the process through the court-based facilitator.²⁶⁰ In its most recent quarterly report, LAF notes that one probate judge reports anecdotally that the Shriver project has reduced the number of unrepresented guardianship litigants by half.²⁶¹ The report also notes that the program is considering whether one Shriver office, which has up to now represented all eligible persons seeking guardianships and conservatorships, should instead begin screening more closely for suitability of proposed guardians to avoid denials of guardianships after working up a petition.²⁶² Between November 1, 2011 and June 2013, the program served 138 persons seeking guardianships or conservatorships.²⁶³

D. Early lessons and observations from the Shriver Pilots

Though it is far too early for formal Shriver data or conclusions to be available, informal observations abound. Some relate to the nature of the enterprise of conducting a pilot. For example, without exception, each advocate interviewed (at least one in each Shriver lead legal services agency) mentioned the difficulty of beginning a project without full clarity as to the evaluation methodology or precisely what data would be collected. One program noted that entering the required data into the Qualtrix database takes nearly an hour per client and cuts into the time allocated for representation. Several observed that a greater level of service program coordination with the evaluation designers and evaluators themselves would have made the process smoother. In addition to the data collection mandated by the NPC evaluation protocol, some programs are doing additional data collection on their own. For example, the Legal Aid Foundation of Santa Barbara, the only Shriver guardianship project, is keeping a narrative-style record of results achieved through the securing of guardianships, such as noting that the guardianship secured over a severely ill child allows the grandparents to seek medical care outside the local area and also to get the child a passport

²⁶⁰ *Id.*

²⁶¹ LAF Quarterly Report, Apr.-Jul. 2013 at 3 (on file with author).

²⁶² *Id.* at 1.

²⁶³ *Id.* at 5. The Quarterly Report indicates that 56 clients received advice, 29 received limited services, 2 negotiated settlements with litigation, and 4 received “extensive services.” There were 15 uncontested court decisions, and 5 contested court decisions.

so that he can potentially have a travel wish fulfilled through the Make a Wish Foundation.²⁶⁴ Several advocates mentioned regret at the lack of “before” data, even if anecdotal, about how the courts functioned prior to Shriver.

Whether to randomize assignment of clients (that is, to provide services to some and not to others on a random basis in order to compare outcomes) has been controversial. While some researchers, as noted above, are convinced that randomization is the “gold standard” of evaluation, many advocates have doubts about the ethics of denying services in the name of research, especially in projects (like some of the Shriver pilots) which have the capacity to serve all or most comers. Even where a program cannot come close to filling the need, many advocates balk at turning away clients who have already been screened for need and eligibility, or for whom the advocate can readily discern a strong legal argument. Others acknowledge that the only difference between such a process and normal intake limits is that the clients have made their way into the system and are therefore present in a way that those who cannot get through the phone system are not.²⁶⁵

Several family law advocates reported attorney and client frustration with the perception that the Shriver statute’s specification that family law representation is limited to cases where sole custody is at issue²⁶⁶ means that assistance can be provided only with the custody issues themselves and not other issues in the family law case, such as property division or divorce. However, while the statute clearly limits Shriver family law services to cases where sole custody is at issue, it nowhere explicitly states that Shriver funds cannot be used to resolve the client’s entire matter once this criterion is met. Although the limitation is not compelled by the words of the statute or the AOC’s interpretation,²⁶⁷ it seems to have influenced project design in several Shiver projects, and accordingly some pilots have limited services to custody matters alone, which can result in the

264 Telephone interview with Yvonne Cudney, *supra* note 208; “Guardianship Outcomes Chart,” provided by LAF (on file with author). Other such results in the LAF outcomes archive include several cases where dependency proceedings were averted when grandmothers secured a guardianship over grandchildren, and another where guardianship permitted a maternal aunt to live in public housing with the children in her care, preserving stability for the children.

265 Telephone interview with Tiela Chalmers, *supra* note 136.

266 Cal. Gov’t Code § 68651(b)(1).

267 Telephone interview with Bonnie Hough, *supra* note 124.

client shuttling back and forth between a legal provider and the self-help center, depending on which aspect of the case is at issue. One advocate reported frustration with the lack of legal information or brief advice available to alleged batterers at restraining order hearings, because the results of those proceedings can bear so heavily on the eventual custody decision.²⁶⁸ But the advocate also noted the difficulty in obtaining funding for those services and the potential political difficulties with representation of alleged perpetrators in an area where most programs, if they tread at all, serve survivors, not perpetrators, of domestic violence.²⁶⁹

Likewise, the understanding that Shriver funds can only be used to provide representation where the client faces a represented opponent has sometimes been problematic in the family law context. (By contrast, one advocate noted that this criterion is helpful in avoiding conflicts in the housing context.²⁷⁰) While providing representation only where it would “even up” the matter is certainly consistent with some of the goals that underlie the Shriver pilot, with the statute’s expressed concern for these cases,²⁷¹ and certainly seems a wise use of resources in most instances, it is not clear that assisting one party against an unrepresented opponent is actually prohibited by the statute in all cases. In fact, no language in the statute explicitly bars representation against an unrepresented opponent, and one section appears to contemplate it.²⁷² This might make sense where, for example, the opponent was initially represented but dismisses his or her attorney somewhere along the way.

One of the family law pilots expressed surprise at the number of noncustodial parents who sought Shriver services, contrary to

268 Telephone interview with Javier Bastidas, *supra* note 224.

269 *Id.*

270 Attachment to email from Tiela Chalmers, *supra* note 141.

271 See CAL. GOV’T CODE 68651(b)(5) (requiring that “[p]rojects shall be selected on the basis of whether, in the cases proposed for service, the persons to be assisted are likely to be opposed by a party who is represented by counsel.”); 68651(b)(7) (specifying “[w]hether the other party is represented” as one of ten factors for consideration in lead legal services agency’s determination of the “relative need for representation”).

272 See CAL. GOV’T CODE § 68651(b)(2) (explaining that “[i]n light of the significant percentage of parties who are unrepresented in family law matters, proposals to provide counsel in child custody cases should be considered among the highest priorities for funding, *particularly when one side is represented and the other is not.*”) (emphasis added).

expectations.²⁷³ In addition, the custody projects also raised serious concerns with the evaluator regarding data collection, out of concern that information regarding mental health, substance abuse, or domestic violence issues could find its way into databases that might be available in discovery to opponents over the lengthy course of litigation in family law cases.²⁷⁴

All of the housing pilots in which settlement conferences before trial (or before the trial date) are voluntary, not mandatory, reported frustration with the reluctance of the landlord bar to participate, noting that the “business model” of much of the landlord bar depends on reducing the amount of time spent on each case and consequently the number of court visits.²⁷⁵ (One advocate noted wryly that the court’s apparent concern for the business model of the landlord bar is not matched by any similar concern for the practices of the tenant bar).²⁷⁶ Conversely, it appears that most private family law practitioners bill hourly, so there is no built-in impediment (and perhaps even an incentive) to participate in voluntary activities such as early settlement conferences.²⁷⁷

The projects located at courthouses report that that model seems quite successful,²⁷⁸ while at least one housing pilot reports that the location of legal services several miles from the courthouse is a significant disadvantage, with some clients simply disappearing between their initial (often telephonic) contact with the legal services program and their scheduled visit to the

Shriver office.²⁷⁹ Other replicable court innovations which seem to be paying off even at this early stage include the dedicated court

273 Telephone interview with Brandi Davis, *supra* note 244.

274 Telephone interview with Mairi McKeever, *supra* note 40. After consultation with outside ethics counsel by several of the custody projects, the matter was resolved with some changes to the data collection protocol.

275 Telephone interview with Gregory Knoll, *supra* note 151; telephone interview with Timothy Griffiths, *supra* note 167; telephone interview with Estela Casas, *supra* note 197; telephone interview with Tiela Chalmers, *supra* note 136.

276 Attachment to Chalmers email, *supra* note 141.

277 Telephone interview with Kris Jacobs and Amy Fitzpatrick, *supra* note 230.

278 Telephone interview with Tiela Chalmers, *supra* note 136; telephone interview with Estela Casas, *supra* note 197; GBLA Quarterly Report, April-July 2013 at 1 (on file with author) (noting benefits of having moved courthouse Landlord-Tenant Assistance Center from down the hall to directly next to civil department.)

279 Telephone interview with Timothy Griffiths, *supra* note 167.

clerk for unlawful detainer actions in Los Angeles,²⁸⁰ the Environmental Health Specialist in Yolo (actually a county health department employee rather than a court employee),²⁸¹ the Unlawful Detainer Advisor in Kern,²⁸² expansion of electronic filing options in Sacramento,²⁸³ and the Probate Facilitator in Santa Barbara.²⁸⁴ While not a court innovation per se, the expanded availability of landlord/tenant clinics to help pro per litigants has helped reduce lines and delays at the clerk's office filing window in Yolo County, benefiting all litigants.²⁸⁵ Reports from Sacramento, Yolo, and San Diego to the AOC also indicate the courts' perceptions that the Shriver housing projects are helping reduce technical problems with pleadings, reduce delays, and relieve pressure on court resources.²⁸⁶

Staffing issues have been significant for some pilots. Legal Services of Northern California's Sacramento housing pilot experienced significant staff turnover in its first year, which the supervising attorney attributes at least in part to the program beginning, not with attorneys recruited specifically for Shriver work, but with some otherwise facing layoffs as the legal services program experienced funding cuts, and whose first choice was not the Shriver work.²⁸⁷ The Los Angeles coordinator also notes the challenge of staffing a high-volume, repetitive practice over the long term.²⁸⁸ In San Diego, by contrast, the LASSD Executive Director spoke enthusiastically about the skills, energy, and commitment of the newly-licensed attorneys hired specifically for the Shriver housing project.²⁸⁹

Directors and advocates with some of the pilots report encouraging culture change. Several cited the readiness, even eagerness, of Shriver Counsel to go to trial as a valuable incentive for settlement. Los Angeles Shriver attorneys also report a palpably different "feel" in the master calendar courtroom where eviction

280 Telephone interview with Tiela Chalmers, *supra* note 136.

281 Telephone interview with Alysa Meyer, *supra* note 185.

282 Telephone interview with Estela Casas, *supra* note 197.

283 Telephone interview with Timothy Griffiths, *supra* note 167.

284 Telephone interview with Yvonne Cudney, *supra* note 208.

285 "Shriver Housing Program Narrative Reports through December 2012" at 13.

286 *Id.* at 14.

287 Telephone interview with Timothy Griffiths, *supra* note 167.

288 Attachment to email from Tiela Chalmers, *supra* note 141.

289 Telephone interview with Gregory Knoll, *supra* note 151.

matters are handled. Long a sort of insider's club for the repeat-player landlord lawyers, the courtroom dynamic has changed with Shriver lawyers now also in court daily, familiar to the judges and clerks, and literally sitting inside the bar.²⁹⁰ All of the housing projects (and some judges) report a trend of settlements more favorable to represented tenants than to pro pers.²⁹¹

Another interesting type of culture change reported by several advocates occurred among the nonprofit service providers themselves. The housing projects contracted with OneJustice, a statewide consulting and support organization for nonprofits, to coordinate a series of conference calls and trainings for Shriver housing lawyers.²⁹² The executive director of OneJustice commented not only on the many opportunities this provided to think through common issues such as negotiation timing and techniques, when to request jury trials, discovery practice, triage of clients, etc., but also on how it has created a true "esprit de corps" among the Shriver attorneys themselves, something she described as "almost like a practice group would be in a firm."²⁹³ She also noted that she believes the Shriver pilots have changed the culture of the legal services community by forcing more reflection on "how we understand the choices we are making" in terms of who is served, and who should be served.²⁹⁴

At least one program reports that its law reform goals are being furthered by the Shriver project. Greater Bakersfield Legal Assistance included in its Shriver application "identifying impediments to equal access to justice and speedy, affordable resolution of housing-related problems" among its pilot goals,²⁹⁵ and GBLA advocates report that at least one such problem has been identified and, with Shriver resources, will likely be resolved through negotiation or litigation.²⁹⁶

290 Telephone interview with Tiela Chalmers, *supra* note 136.

291 Telephone interview with Gregory Knoll, *supra* note 151; telephone interview with Timothy Griffiths, *supra* note 167; telephone interview with Estela Casas, *supra* note 197; telephone interview with Tiela Chalmers, *supra* note 136; telephone interview with Alysya Meyer, *supra* note 185.

292 Interview with Julia Wilson, Executive Dir., OneJustice (Jan. 30, 2013).

293 *Id.*

294 *Id.*

295 GBLA App., *supra* note 196, App. B at 1.

296 Telephone interview with GBLA Executive Director Estela Casas and Shriver advocates Janie Chang, Lily Marshall-Bass, and Xochitl Garcia (April 22,

Others report more mixed experiences. In San Diego, for example, LASSD's Executive Director is disappointed that the court declined to make early settlement conferences mandatory or to make the "You May Be Eligible For Free Assistance" information more prominent in the packet of information received by litigants.²⁹⁷ He confirms that the landlord bar has been unwilling to take advantage of early settlement opportunities.²⁹⁸ On the other hand, the San Diego program (like the other housing pilots) reports that both the Shriver attorneys' experience and that of the judges is that settlements in Shriver-represented cases are much more favorable to tenants than previously, in such areas as time to move, foregoing adverse credit reporting, rent forbearance prior to an agreed-upon move-out date, etc.²⁹⁹

Several housing programs commented on the desirability of making a mediation or settlement conference mandatory, noting that without such a process being court-ordered, many landlord attorneys refuse to participate.³⁰⁰ Greater Bakersfield Legal Assistance notes that reluctance to mediate is not limited to landlords, but tends to show up on the part of "whichever party did not make contact with the Shriver project."³⁰¹ In its most recent quarterly report, GBLA notes that "the project still struggles with mediation participation," but reports some progress in increasing the number of mediations.³⁰²

2013) (discussing the issue of the local Housing Authority's propensity for beginning housing subsidy termination proceedings as soon as a three-day notice to pay rent or quit has been issued, beginning the eviction process, rather than following a judgment, as advocates believe is required to comply with the public housing rules' requirement that termination be based on "repeated or serious" violations).

297 Telephone interview with Gregory Knoll, *supra* note 151.

298 *Id.*

299 *Id.* LASSD's proposal noted that historically, over 75% of unlawful detainer cases regularly settle, and almost without exception do so on the day of trial, "based upon each side's evaluation of the resources that the other brings to bear on the day of trial." LASSD App., *supra* note 225, App. B at 8. Shriver's increase in these resources has likely been the major factor prompting the more favorable settlements, even without the added pressure or incentive of earlier settlement discussions.

300 Telephone interview with Timothy Griffiths, *supra* note 167; interview with Estela Casas, Janie Chang, Lily Marshall-Bass, and Xochitl Garcia, *supra* note 296; telephone interview with Gregory Knoll, *supra* note 151. *See also* LSNC Yolo Quarterly Report (Apr.-Jul. 2013) at 4 (stating that many of the represented landlords refuse to mediate cases against unrepresented tenants) Yolo reports that sixteen cases to date have been mediated through the Shriver project. *Id.*

301 Telephone interview with Estela Casas *supra* note 197.

302 GBLA Quarterly Report (April-July 2013) at 2 (on file with author).

This has occurred after GBLA and the court partners worked to “streamline” the referrals, in part by having the mediator make contact with both parties within forty-eight hours after one has requested mediation and by having the mediators spend time at the Landlord-Tenant Assistance Center “explaining and encouraging mediation.”³⁰³ The Yolo County housing project also reports that mediation “remains underutilized,” though it has increased over the most recent reporting period.³⁰⁴

One interesting result reported by several housing projects is the very small number of cases going to trial. In San Diego, for example, LASSD reports no jury trials at all in the first year, and only a handful of trials overall.³⁰⁵ Kern reports only five trials.³⁰⁶ In terms of conserving scarce court resources, these results, like the reduction in court appearances for guardianship or conservatorship-seekers in Santa Barbara County, certainly seem encouraging.

Finally, although a survey of the attitudes of opposing counsel is not part of any formal Shriver evaluation, a series of telephone interviews conducted by University of Southern California Law student Allison Fisher with landlords’ attorneys in Los Angeles County in August 2013 revealed interesting, if not entirely unexpected, attitudes. Of the six landlord attorneys interviewed, “none of the attorneys had anything positive to say about the program regarding its effects on landlords. Many attorneys acknowledged that the [Shriver] Program had good intentions or that [it] was good for tenants, but felt that it was terrible for landlords and not good for the courts in general.”³⁰⁷ The attorneys interviewed complained of increased costs of evictions (because of increased litigation as well as settlements more favorable to tenants) and several contended that providing counsel to tenants made cases unbalanced because represented tenants who do not pay their attorneys have little incentive to settle, while landlords must consider the costs of counsel as well as of the settlements themselves.³⁰⁸ Somewhat paradoxically, the landlord attorneys complained both that the Shriver attorneys

303 *Id.*

304 LSNC Yolo Quarterly Report (Apr.-Jul. 2013) at 1 (on file with author).

305 Telephone interview with Gregory Knoll, *supra* note 151.

306 Interview with Estela Casas, Janie Chang, Lily Marshall-Bass, and Xochitl Garcia, *supra* note 296.

307 Memorandum from Allison Fisher, USC Law Student, to author (Aug. 31, 2013) (on file with author).

308 *Id.* at 4.

“only care about winning, and not what is best for the tenants,” and that tenants “are getting settlements that include waiving back rent and allowing for more time to leave the apartment while still not paying rent.”³⁰⁹ Although the Los Angeles Shriver project reports that only a handful of cases have gone to trial, several of the landlord attorneys noted that the increase in jury demands has driven up the costs of prosecuting an eviction.³¹⁰ Only one of the six interviewed landlord attorneys answered in the affirmative to the question “Are there any positive effects of the Shriver law in your view?”³¹¹

CONCLUSION

In one sense, the turn toward legislation and pilot programs as a way to expand access to counsel in civil cases could be regarded as the failure or abandonment of the quest for a “civil *Gideon*” across all or most civil cases. In another sense however, it may be the vanguard rather than the last gasp of a broader goal. Both the Boston pilots and the Shriver pilots have yielded and are yielding novel, solid, and methodologically defensible conclusions about what works and does not work in terms of poor peoples’ access to the courts, and providing solid proof of the detrimental impact on justice of severe power or resource imbalances. Surely this evidence cannot be ignored in perpetuity.

309 *Id.* at 3.

310 *Id.* at 2-10.

311 *Id.* at 1-10; *see also* Addendum to Memorandum from Allison Fisher to author at 4 (Sept. 7, 2013) (on file with author). The landlord attorneys almost uniformly responded that the Shriver law, while good for tenants, was bad for landlords. *Id.* The one with a more slightly positive answer noted that it is easier to settle cases and that litigation ran more smoothly with counsel on the tenants’ side.